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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/15/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0130
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
TERRY ALAN KELLY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-105803-001 DT

The Honorable James R. Rummage, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Terry Alan Kelly appeals his conviction and sentence for one count of forgery. Counsel for Kelly filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and

State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, he was unable to find any arguable grounds for reversal. Kelly was granted the opportunity to file a supplemental brief *in propria persona*, but he has not done so. However, he has raised four issues through counsel.

¶12 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Kelly. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

¶13 Kelly was indicted on one count of forgery, a class 4 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-2002(A)(2), (3)¹ (Supp. 2011).² The following evidence was presented at trial.

¶14 On January 30, 2010, Kelly was a passenger in a vehicle that was stopped by Officers Stryczek and Sanchez. When

¹ The statute provides: "A person commits forgery if, with intent to defraud, the person . . . [k]nowingly possesses a forged instrument; or [o]ffers or presents, whether accepted or not, a forged instrument or one that contains false information."

² Absent material change since the date of the offense, we cite to the statute's current version.

Stryczek asked for Kelly's identification, Kelly presented an Arizona driver license with the name Kenneth Cockerel. Stryczek immediately noticed that the identification "wasn't consistent with what an actual Arizona Driver's License looks like." Using the "mobile computer" in his patrol vehicle, Stryczek attempted to obtain information on the license from the department of motor vehicles, but there was no record of it. As Stryczek placed Kelly into "investigative detention," Kelly gave him his true identity. The officer then placed Kelly under arrest.

¶15 The jury found Kelly guilty as charged. Prior to sentencing, the State proved that he had two prior felony convictions. The trial court then sentenced Kelly to a super-mitigated term of six years imprisonment, with credit for 133 days of presentence incarceration credit. This timely appeal followed.

¶16 Kelly first argues that the trial court erred by not instructing the jury on the definition of "intent to defraud." We review the superior court's denial of a proposed jury instruction for abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). However, Kelly did not submit a proposed written instruction for the court's consideration in accordance with Arizona Rule of Criminal Procedure 21.2. Kelly's counsel merely suggested to the court that it should examine the relevant case law and "come up with a

definition." Moreover, because "intent to defraud" is not defined by statute, it is "a term of ordinary significance[,]" which the court is not required to define. See *State v. deBoucher*, 135 Ariz. 220, 226, 660 P.2d 471, 477 (App. 1982). Thus, the trial court did not err in failing to *sua sponte* give the jury an instruction defining "intent to defraud."

¶17 Second, Kelly asserts that he did not have notice of the trial date. Kelly appeared at a hearing on July 26, 2010 in which the court granted a defense motion to continue the trial date and reset it to August 23, 2010. Additionally, the minute entry relating to the comprehensive pretrial conference held on May 20, 2010 explains that any failure to appear could result in a warrant being issued for Kelly's arrest and the "trial . . . may be conducted in [Kelly's] absence." Based on our review of the record, Kelly had adequate notice of the trial date and the consequences of his failure to appear. See *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996) ("The trial court may infer that a defendant's absence is voluntary if the defendant had personal knowledge of the time of the proceeding, his right to be present, and the warning that the proceeding would take place in his absence if he failed to appear.").

¶18 Third, Kelly argues that his plea offer should have been "further extended." Deciding whether to extend or further

extend a plea offer is "a core prosecutorial power." *State v. Donald*, 198 Ariz. 406, 417, ¶ 39, 10 P.3d 1193, 1204 (App. 2000). A defendant has "no constitutional right to a plea agreement[,] and the state is not required to offer one." *State v. Jackson*, 170 Ariz. 89, 91, 821 P.2d 1374, 1376 (App. 1991). Therefore, the State had no obligation to extend the deadline for Kelly to respond to its plea offer.

¶9 Finally, Kelly argues that a forgery conviction is probation-eligible. Although the presentence report writer did indicate that Kelly would be a good candidate for probation if he were eligible, Kelly was not eligible because the State proved he had two prior felony convictions. See A.R.S. § 13-703(C) (Supp. 2011) (providing a person must be sentenced as a class 3 repetitive offender if he or she "stands convicted of a felony and has two or more historical prior felony convictions").

¶10 We have searched the entire record for reversible error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Although Kelly voluntarily absented himself from the trial, he was represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Kelly's conviction and sentence.

¶11 Upon the filing of this decision, counsel shall inform Kelly of the status of the appeal and his options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Kelly shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

JON W. THOMPSON, Judge