FILED BY CLERK
APR 11 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS ANTONIO GONZALEZ, Appellant.	2 CA-CR 2010-0361 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092778001

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin
Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 Jesus Gonzalez was convicted after a jury trial of aggravated assault with a deadly weapon or dangerous instrument. The trial court sentenced him to a mitigated, five-year prison term. Gonzalez argues on appeal that the jury was not properly instructed on the state's burden of proof nor given the definition of reasonable doubt as required by our supreme court in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). We affirm.

¶2 After the close of evidence, the trial court gave the jury its final instructions. Gonzalez waived the presence of a court reporter for the reading of those instructions, and the majority of the instructions were instead digitally recorded, although the court reporter did record some of them. On appeal, Gonzalez notes that the court reporter did not record jury instructions pertaining to reasonable doubt—specifically, an instruction that the state has the burden to prove the defendant's guilt beyond a reasonable doubt and an instruction defining the term "reasonable doubt." And, as Gonzalez observes, no written copy of the instructions was filed, nor was the digital recording. Thus, he argues "based on this appellate record" and absent proof those instructions were given as part of the final jury instructions, the trial court committed structural error in failing to properly instruct the jury.

¶3 We declined Gonzalez's invitation to decide this appeal without the complete record and therefore ordered the court reporter to provide a transcript of the digitally recorded portion of the trial court's reading of the jury instructions. *See* Ariz. R. Crim. P. 31.8(h); *State v. Diaz*, 223 Ariz. 358, n.4, 224 P.3d 174, 178 n.4 (2010) (noting appellate court may order supplemental record to correct omission in appellate record).

That transcript shows the court properly instructed the jury as to the state's burden of proof and the definition of reasonable doubt required by *Portillo*. Because Gonzalez's argument has no factual support, we reject it.

¶4 Gonzalez asserts, however, in his reply brief that he "has no obligation to base an appeal on extra-record sources," and thus had no reason to obtain a copy of the digital recording. We disagree. "It is within the defendant's control as to what the record on appeal will contain, and it is the defendant's duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal." *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). Moreover, the right to have proceedings recorded by a court reporter may be waived, *State v. Moore*, 108 Ariz. 532, 534, 502 P.2d 1351, 1353 (1972), and the trial court expressly found that Gonzalez had waived that right here.

¶5 After this court ordered the transcript, Gonzalez requested, and this court granted, permission to file a supplemental brief. In that brief, Gonzalez argues that we should not consider the transcript "as part of the appellate record." He relies on A.R.S. § 12-223, which requires the presence of a court reporter "during the hearing of all matters" and that the reporter "make stenographic notes of all oral proceedings before the court . . . [and] certify that [any] transcript [of those proceedings] is a correct and complete statement of such proceedings." But, as we noted above, the right to a court reporter's presence may be waived, as the trial court found in this case. *See Moore*, 108 Ariz. at 534, 502 P.2d at 1353. And, in light of that finding, Gonzalez identifies no authority, and we find none, that prohibits the digital recording of court proceedings or

precludes such recordings from being transcribed and included in the record on appeal pursuant to Rule 31.8, Ariz. R. Crim. P. Indeed, A.R.S. § 38-424 expressly permits the use of "tape recorders or other recording devices in lieu of reporters or stenographers" unless "the matter to be recorded arises out of court proceedings and either party requests that a court reporter or stenographer be used."

¶6 Gonzalez further asserts that his waiver was ineffective because it was made through counsel instead of personally, was not reflected in the transcripts, and was "gained by the promise that the written jury instructions would be in the appellate record, which is not the case." He also asserts the trial court did not properly notify him "before proceeding in reliance on the recording device."

¶7 Gonzalez has waived these arguments on appeal because he did not raise them in his opening brief. *State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998). Gonzalez opted to forgo the opportunity to promptly and squarely raise whatever valid arguments may exist regarding the electronic recording of the jury instructions. He instead chose to ignore the extant recording and ask this court to decide his appeal as if it did not exist.

¶8 And, in any event, we presume any items missing from the record support the trial court's finding that Gonzalez validly waived his right to have a court reporter present. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). Again, Gonzalez did not meet his obligation to provide this court with a sufficient appellate record. *See Moore*, 108 Ariz. at 534, 502 P.2d at 1353. And, to the extent he believes the transcribed record is not sufficient to show whether he waived his right to a

court reporter, he could have, but did not, ask to correct or modify the record pursuant to Rule 31.8(h), Ariz. R. Crim. P. For these reasons, we do not address these arguments further.[1] And, for the same reasons, we do not address his claim that reversal is warranted because of "flaws in the supplemental transcript [that] demonstrate the dangers of permitting trial courts to rely on unapproved and unregulated recording devices."

¶9 Gonzalez's conviction and sentence are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[1]Moreover, as the state correctly points out, Gonzalez raised none of these claims in the trial court and therefore we would review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Gonzalez has waived any such claims on appeal because he does not argue any error related to the inclusion of the supplemental transcript in the record on appeal constitutes fundamental and prejudicial error, and we find nothing that could be so characterized. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).