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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WILLIAM BERNARD HIPP, Appellant.	2 CA-CR 2010-0416 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093171001

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Law Office of Jacob Amaru
By Jacob Amaru
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B R A M M E R, Judge.

¶1 A jury found William Hipp guilty of aggravated driving under the influence of an intoxicant and aggravated driving with an illegal drug or its metabolite in his body, both while having a suspended or revoked driver license; possession of a dangerous drug

(diazepam); and possession of drug paraphernalia. The trial court imposed concurrent, presumptive 2.5-year prison sentences for the first three counts, and a concurrent, presumptive one-year prison sentence for possession of drug paraphernalia. Hipp filed a timely notice of appeal, and counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting that, after reviewing the record for potential appellate issues, he had found none that were "meritorious" and asking this court to review the record for error.

¶2 At the beginning of the second day of trial, before Hipp was brought to the courtroom and, while the jury was not present, the trial court informed the state and Hipp's counsel that, after the first day of trial had concluded, several jurors had been in the hallway outside the courtroom when sheriff's deputies accompanied Hipp through the hallway. Although the deputies and the bailiff had informed the court that the jurors were facing away from Hipp and had not seen him, the court asked counsel whether they wished him to ask the jurors if any had seen Hipp. Hipp's counsel agreed the court should query the jury.

¶3 When Hipp was brought to the courtroom, the trial court discussed with him an issue involving his medication. Hipp was having difficulty staying conscious and had slurred speech, apparently because he had been given incorrect medication and had not been given any food. The court determined that it could not proceed with trial without Hipp being "medically cleared," noting that Hipp could not "assist his counsel if he's [o]n the verge of passing out."

¶4 After Hipp was taken for medical treatment, the jury was brought to the courtroom and the trial court informed the jurors that Hipp had to be evaluated for a medical condition and that the trial possibly would proceed later that day. The court also asked the jurors if any had seen Hipp in the hallway the previous day, but none had. Trial resumed that afternoon.

¶5 We ordered the parties to file supplemental memoranda addressing whether Hipp was involuntarily absent for a critical stage of the proceedings and, if so, whether that absence constituted fundamental, prejudicial error. "A defendant has a constitutional right to be present in the courtroom at every critical stage of the proceedings against him." *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983). A critical stage, in general, is any proceeding where the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934); *see also State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (citing *Snyder*). Thus, the right to be present generally does not extend to proceedings "'characterized as relating only to the resolution of questions of law.'" *State v. Dann*, 205 Ariz. 557, ¶ 53, 74 P.3d 231, 245 (2003), *quoting* 5 Wayne R. LeFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* § 24.2(a) (2d ed. 1999). A defendant, of course, may waive his or her right to be present expressly or by his or her conduct. *See State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977); *see also* Ariz. R. Crim. P. 9.1. Because no objection to Hipp's absence was raised below, normally we would review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶6 Despite the state's contrary argument, there is little question Hipp was involuntarily absent. Although Hipp did not object to being medically evaluated, he did not consent to trial proceeding in his absence.[1] And we question the state's conclusion that the trial court's brief colloquy with the jury was not a critical stage of the proceedings because it was merely "procedural." *See Morehart v. Barton*, 226 Ariz. 510, ¶ 14, 250 P.3d 1139, 1143 (2011) (constitutional right to be present does not extend to "purely procedural hearings"). Although the proceeding had only a limited relation to the charges against Hipp, he may have had personal knowledge whether any jurors had seen him in the hallway the previous evening. His involuntary absence deprived him of the opportunity to present that information.

¶7 But we need not decide that question because, even assuming the trial court's colloquy with the jury constituted a critical stage of the proceedings, Hipp cannot show prejudice. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. And we disagree with Hipp that his absence so undermined the integrity of the trial process such that structural error occurred. *See State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 16, 953 P.2d 536, 540 (1998) ("[P]resence error may 'so undermine the integrity of the trial process that [it] will necessarily fall within that category of cases requiring automatic reversal.'"), *quoting Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995). "Criminal proceedings conducted in violation of a defendant's right to be present may be reviewed

[1]Notably, Hipp's counsel waived his presence and a defendant may, in some circumstances, be bound by his or her attorney's waiver of that defendant's right to be present. *See State v. Levato*, 186 Ariz. 441, 444, 924 P.2d 445, 448 (1996). Nothing in the record suggests a strategic basis for waiver here.

for harmless error." *State v. Sainz*, 186 Ariz. 470, 474, 924 P.2d 474, 478 (App. 1996); *see also Garcia-Contreras*, 191 Ariz. 144, ¶ 16, 953 P.2d at 540 (constitutional violation based on involuntary absence "may be subject to harmless error review"). Even had jurors seen Hipp in custody in the hallway, he would be entitled to relief only upon a showing of prejudice. *See State v. Speer*, 221 Ariz. 449, ¶ 74, 212 P.3d 787, 800-01 (2009) (inadvertent exposure of handcuffed defendant to jury outside courtroom not inherently prejudicial; defendant must show resulting prejudice). Considering the overwhelming evidence of Hipp's guilt, there is no basis to find prejudice.[2] *See State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice where "[o]verwhelming evidence in the record support[ed] the jury's verdict").

¶8 After being stopped by a sheriff's deputy for driving more than twenty miles per hour under the posted speed limit and crossing the center line, Hipp exhibited signs of confusion and "very slow speech," and failed both field sobriety tests administered. An officer trained in drug recognition, after evaluating Hipp, opined that he was under the influence of a central nervous system (CNS) depressant. *See* A.R.S. §§ 28-1381(A)(1), 28-1383(A)(1). An officer found several pills of diazepam—a CNS depressant—in a coin purse in Hipp's vehicle. *See* A.R.S. §§ 13-3401(6)(c)(xvi), 13-3407(A)(1), 13-3415(A). Analysis of Hipp's blood revealed it contained diazepam. *See* §§ 28-1381(A)(3), 28-1383(A)(1), 13-3401(6)(c)(xvi). And the custodian of records for the Department of Motor Vehicles testified Hipp's license had been suspended and

[2]For the same reason, we reject Hipp's argument he was prejudiced by the jury having to wait until the afternoon for trial to resume.

revoked and that the department had provided him notice of that suspension. *See* § 28-1383(A)(1).

¶9 Pursuant to our obligation under *Anders*, we have reviewed the record for fundamental, reversible error and found none. As we noted above, the evidence of Hipp's guilt was overwhelming. And Hipp's sentences were within the prescribed stautory range and were imposed lawfully. *See former* A.R.S. § 13-701(C)[3]; *see also* §§ 28-1383(L)(1), 13-3407(B)(1), 13-3415(A). We therefore affirm Hipp's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

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

[3]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1–120, effective "from and after December 31, 2008," *id.* § 120. We refer in this decision to the sentencing statute in force at the time of Hipp's offenses. *See* 1993 Ariz. Sess. Laws, ch. 255, § 10 (§ 13-701(C)).