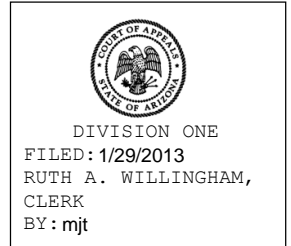


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 09-0561
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT BRUCE CRAIG,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1990-007998

The Honorable Paul A. Katz, Judge (Retired)
The Honorable Helene F. Abrams, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Tucson
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Laura P. Chiasson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Robert Bruce Craig appeals from his convictions and sentences for child molestation and sexual conduct with a minor.

Craig argues that his convictions and sentences must be reversed due to the unavailability of the trial transcript. Because Craig has failed to make any credible allegation of reversible error, we conclude he is not entitled to appellate relief and therefore affirm.

PROCEDURAL BACKGROUND

¶12 On July 19, 1990, Craig was indicted on three counts of child molestation and three counts of sexual conduct with a minor, each a class 2 felony and dangerous crime against children. Following arraignment, Craig was released to third-party custody pending trial. A month before his January 28, 1991, trial date, Craig disappeared and a bench warrant was issued for his arrest. When Craig failed to appear for trial, he was tried in absentia. At the conclusion of the trial, the jury returned guilty verdicts on all counts as charged. Defense counsel filed a notice of appeal on behalf of Craig from the guilty verdicts, but that appeal was dismissed as premature because judgment and sentence had not been pronounced.

¶13 After remaining a fugitive for nearly eighteen years, Craig was taken into custody on the bench warrant and extradited to Arizona in October 2008. On July 1, 2009, the trial court entered judgment and sentenced Craig to mitigated, consecutive terms of imprisonment totaling eighty-one years. Craig timely appealed.

¶14 During preparation of the record on appeal, it was discovered that the court reporters for the five days of trial proceedings were no longer employed by Maricopa County and the trial court was unable to contact them. Pursuant to Rule 31.8(h), Arizona Rules of Criminal Procedure, this court stayed the appeal and revested jurisdiction in the trial court for purposes of permitting the trial court and the parties to attempt to locate the court reporters for preparation of the transcript or to reconstruct the proceedings necessary for inclusion in the record on appeal.

¶15 In response to our order, the parties submitted a stipulation that was accepted by the trial court stating the transcript of the trial proceedings could not be prepared because one of two court reporters who covered the trial could not be located and the notes of the other had been destroyed. The parties additionally agreed that it was not possible to reconstruct the trial proceedings because the trial judge has no bench notes or recollection of the trial, the prosecutor has no recollection of the case and reviewing her trial file would not refresh her memory, the lead defense attorney has passed away, and the second chair attorney has only a general recollection of the trial and reviewing her trial file would not refresh her memory. Craig thereafter filed a brief on appeal raising only

one issue: whether reversal for a new trial is required due to the absence of the transcript of the trial proceedings.

DISCUSSION

¶6 Craig argues that the absence of the trial transcript violates his constitutional rights to appeal, due process, and counsel. Citing to other portions of the record on appeal, Craig notes that issues arose at trial regarding the amendment of the indictment, the admissibility of other act evidence, a motion for mistrial, and the jury instructions. Craig contends his appellate counsel is unable to raise any claims of error regarding these and other matters without the trial transcript and claims his right to appeal is rendered meaningless absent the transcript. Thus, Craig reasons, his convictions and sentences must be reversed and a new trial granted.

¶7 In Arizona, a criminal defendant has a constitutional right to an appeal. Ariz. Const. art. 2, § 24; *Wilson v. Ellis*, 176 Ariz. 121, 123, 859 P.2d 744, 746 (1993). Although the right to appeal includes the right to a complete trial record on appeal, the absence of a verbatim record of all of the proceedings does not per se require reversal. *In re Jorge D.*, 202 Ariz. 277, 282, ¶ 26, 43 P.3d 605, 610 (App. 2002); see also *Norvell v. Illinois*, 373 U.S. 420, 424 (1963) (holding failure of state to provide transcripts does not automatically entitle a defendant to a new trial). Rather, a defendant must demonstrate

specific prejudice before a reviewing court will contemplate reversal. *Jorge D.*, 202 Ariz. at 282, ¶ 26, 43 P.3d at 610. In addressing the effect of a missing trial transcript, our supreme court has stated:

We are not prepared to say that in every case involving a lost or unavailable reporter's transcript the defendant is entitled to a new trial. Absent a showing of reversible error, or at least a credible and unmet allegation of reversible error, we are inclined to hold that the remaining record will suffice to support an affirmation of a verdict and judgment by the trial court. Where, however, through no fault of the defendant the reporter's transcript is unavailable and the defendant has shown prima facie fundamental error, we feel that a new trial should be granted.

State v. Masters, 108 Ariz. 189, 192, 494 P.2d 1319, 1322 (1972).

¶8 Unlike in *Masters*, Craig makes no "credible and unmet allegation of reversible error." 108 Ariz. at 192, 494 P.2d at 1322. Craig's argument is limited to claiming his counsel is unable to make any claim of error in the absence of the trial transcript. However, the remaining record, including the minute entries of the trial, indicates the trial was properly conducted in accordance with the law and the Rules of Criminal Procedure. Absent some showing to the contrary, we will presume the missing portions of the record support the trial court's rulings on any issues raised during trial. *State v. Zuck*, 134 Ariz. 509, 513,

658 P.2d 162, 166 (1982); see also *Bute v. Illinois*, 333 U.S. 640, 671 (1948) ("Doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State's attorney."); *State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996) ("Even if a trial record is incomplete, we must assume that it supports the judgment unless there is 'at least a credible and unmet allegation of reversible error.'") (quoting *Masters*, 108 Ariz. at 192, 494 P.2d at 1322). No specific claim of error having been raised on appeal, we hold that Craig has failed to make the requisite showing for the granting of a new trial.

¶19 *State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993), cited by Craig, does not dictate a different result. In *Schackart*, the defendant was sentenced to death on his conviction for first degree murder. *Id.* at 497, 858 P.2d at 642. On appeal, he argued that he was entitled to a new trial because problems with the transcript made it "unavailable" for all practical purposes. *Id.* at 498, 858 P.2d at 643. Our supreme court rejected the claim with respect to the trial proceedings, and affirmed the conviction on all charges. *Id.* at 503, 858 P.2d at 648. The court, however, vacated the death sentence and ordered a new sentencing hearing based on a finding that the sentencing transcript was inadequate given the broad scope of the court's obligation to independently review death

sentences. *Id.* at 499, 858 P.2d at 644. In this non-capital case, we have no analogous obligation to independently review any of the trial court proceedings in the instant appeal. See 1995 Ariz. Sess. Laws, ch. 198, § 1 (repealing former A.R.S. § 13-4035 (1989), which required review of entire record for fundamental error in criminal appeals); *State v. Lacy*, 187 Ariz. 340, 354-55, 929 P.2d 1288, 1302-03 (1996) (recognizing repeal).

¶10 Furthermore, this is not a situation where the missing portion of the record is unavailable "through no fault of the defendant." *Masters*, 108 Ariz. at 192, 494 P.2d at 1322; *Cf. State v. Hart*, 110 Ariz. 55, 57, 514 P.2d 1243, 1245 (1973) (remanding for a new trial where appellant could not make first appeal without transcripts which were unavailable by no fault of the appellant). The extended period of time between Craig's trial and appeal leading to the unavailability of the trial transcript and the inability to reconstruct the proceedings is the direct result of Craig's actions in unlawfully absconding and remaining a fugitive from justice. Craig's behavior is distinguishable from the defendant in *Hart* who tried to appeal while imprisoned only a few years after conviction. *Hart*, 110 Ariz. at 56, 514 P.2d at 1244.

¶11 Other jurisdictions addressing similar situations involving an absconding defendant have concluded a defendant should not be permitted to benefit from such voluntary unlawful

conduct. See *People v. Iacopelli*, 367 N.W.2d 837, 838 (Mich. Ct. App. 1985) (holding defendant not entitled to new trial where trial transcripts were lost and could not be reconstructed because he was fugitive for nine years); *Bellows v. State*, 871 P.2d 340, 343 (Nev. 1994) ("Because appellant's absence led to the loss of his trial transcripts, he may not benefit from his attempt to elude the law."); *State v. Brown*, 866 P.2d 1172, 1174 (N.M. Ct. App. 1993) (upholding denial of new trial where defendant not blameless for lack of transcript when he was fugitive for thirteen years); *Commonwealth v. Johnson*, 764 A.2d 1094, 1099 (Pa. Super. Ct. 2000) (holding defendant not entitled to new trial due to transcript's absence because the law does not allow a fugitive to take advantage of his own wrong); *State v. Verikokides*, 925 P.2d 1255, 1256-58 (Utah 1996) (defendant not entitled to new trial where seven-year absence as fugitive resulted in loss of transcript, trial evidence and exhibits). We agree with the rationale behind these decisions that granting a new trial under these facts would wrongly reward the act of absconding and tend to encourage similar unlawful conduct by other defendants.

CONCLUSION

¶12 For the foregoing reasons, we conclude that Craig is not entitled to appellate relief based on the unavailability of

the trial transcript. Accordingly, Craig's convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge