

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA,  
*Appellee,*

v.

JUSTIN RAY KARDELL,  
*Appellant.*

No. 1 CA-CR 19-0564

FILED 11-17-2020

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Appeal from the Superior Court in Maricopa County  
No. CR2018-137707-001  
The Honorable Stephen M. Hopkins, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Michael O'Toole  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Joel M. Glynn  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Paul J. McMurdie joined.

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**M O R S E**, Judge:

¶1 Justin Ray Kardell appeals his convictions and sentences for theft of means of transportation, a class 3 felony, and possession of burglary tools (manipulation key), a class 6 felony. After searching the record and finding no arguable, non-frivolous question of law, Kardell's counsel filed a brief asking this court to search the record for fundamental error. *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297 (1969). Kardell was granted an opportunity to file a supplemental brief in propria persona but did not do so. After reviewing the entire record, we find no reversible error and affirm Kardell's convictions and sentences.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 We view the facts in the light most favorable to sustaining the judgment and resolve all reasonable inferences against Kardell. *See State v. Fontes*, 195 Ariz. 229, 230, ¶ 2 (App. 1998).

¶3 On July 30, 2018, the victim's car was stolen from a business parking lot. On July 31, 2018, Phoenix police officers conducted a traffic stop of the stolen car. Kardell was driving the car, the car's steering column and ignition were "ripped out," and wires were exposed under the steering column. There was a small key in the car's ignition that did not go with the car. Personal property that did not belong to the victim, including mail addressed to Kardell, was in the car. The victim did not know Kardell and did not give Kardell permission to use the car.

¶4 Kardell told officers that he got the car from a friend named Johnny, but he did not know Johnny's last name or address. Kardell also admitted he initially thought the car was stolen because of the damage to the steering column but changed his mind after Johnny used the key to start the car.

¶5 Kardell was arrested on July 31, 2018. That day, he received and signed a release order containing the following warnings:

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You must appear at all court proceedings in this case or your release conditions can be revoked, a warrant will be issued and proceedings may go forward in your absence. You must maintain contact with your attorney.

¶6 Kardell was subsequently indicted and arraigned on August 30, 2018. At the arraignment, a commissioner issued a minute entry with the following: "NOTICE TO DEFENDANTS: [. . .] The defendant may be tried in his/her absence if he/she fails to appear for trial." A similar warning was issued when Kardell was present for the initial pretrial conference on October 15, 2018. On November 19, 2018, Kardell was present in court when the court rescheduled a pretrial conference for November 28, 2018. Kardell failed to appear on November 28, and the trial judge issued a bench warrant for his arrest.

¶7 Kardell failed to appear at subsequent hearings. At a trial management conference on February 20, 2019, defense counsel told the court that he had tried to reach Kardell by telephone without success and had not had contact with him since November 11th. Defense counsel also told the court he had spoken with Kardell's mother who said she did not know Kardell's whereabouts.

¶8 The State elected to proceed in absentia and trial was ultimately held on May 20, 2019. The jury found Kardell guilty as charged. On June 24, 2019, officers arrested Kardell on the bench warrant. On October 4, 2019, the court sentenced Kardell to 10 years in prison for theft of means of transportation, and three years in prison for possession of burglary tools. Kardell timely appealed, and we have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

### DISCUSSION

¶9 We review the entire record for fundamental error. *State v. Flores*, 227 Ariz. 509, 512, ¶ 12 (App. 2011). We have conducted an independent review of the record, *see Leon*, 104 Ariz. at 300, and find no fundamental error.

¶10 A criminal defendant has a right to be present at all stages of the proceedings, including trial, but may waive that right through a voluntary absence. *State v. Reed*, 196 Ariz. 37, 38-39, ¶ 3 (App. 1999). A trial court "may infer that a defendant's absence is voluntary if the defendant had actual notice of the date and time of the proceeding, notice of the right to be present, and notice that the proceeding would go forward in the

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defendant's absence." Ariz. R. Crim. P. 9.1. The defendant has the burden to rebut this inference by showing that his absence was involuntary. *Reed*, 196 Ariz. at 39, ¶ 3; *State v. Sainz*, 186 Ariz. 470, 473 n.2 (App. 1996).

¶11 The record reflects that Kardell was provided adequate notice. At the beginning of the proceedings on July 31, 2018, Kardell received and signed a release order requiring him to appear at all proceedings in the case and warning him that proceedings could go forward in his absence if he failed to appear. This warning was reiterated at his arraignment on August 30, 2018. Later, Kardell was present in court on November 19, 2018, when the superior court scheduled the November 28 conference at which Kardell failed to appear. After Kardell was ultimately arrested on the bench warrant, neither Kardell nor counsel asserted that his absence had been involuntary nor offered a justification for his failure to communicate with counsel during the six months until trial eventually began. *See State v. Muniz-Caudillo*, 185 Ariz. 261, 262 (App. 1996) (finding that a defendant's failure "to appear at any subsequent proceedings or keep in contact with trial counsel to ascertain his trial date," supported inference that absence was voluntary). The superior court did not err in proceeding with trial in absentia. *See Reed*, 196 Ariz. at 39, ¶ 3.

¶12 The proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. As noted above, Kardell was permissibly tried in absentia after he failed to appear. The record reveals that counsel represented Kardell at all stages of the proceedings. There was sufficient evidence from which the jury could determine, beyond a reasonable doubt, that Kardell is guilty of the charged offenses. The jury was properly comprised of 8 members. *See* A.R.S. § 21-102(B). The trial court properly instructed the jury on the presumption of innocence, the burden of proof, and the elements of the charged offenses.

¶13 Kardell was present at sentencing but the superior court did not fully apprise Kardell of the consequences of his admission to the allegation of his prior felony convictions. This was error. *See State v. Morales*, 215 Ariz. 59, 61, ¶¶ 8-9 (2007) (noting that Ariz. R. Crim. P. 17.6 applies to both a defendant's admission and a defense counsel's stipulation "to the existence of a prior conviction"). However, the presentence investigation report showed Kardell's prior convictions, and Kardell cannot establish prejudice nor fundamental error. *Id.* at 62, ¶¶ 11-13 (holding that an inadequate colloquy does not require resentencing where documentary proof was sufficient to prove the prior convictions); *see also State v. Gonzales*, 233 Ariz. 455, 458, ¶ 11 (App. 2013) ("[A]n unobjected-to presentence report

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showing a prior conviction to which the defendant stipulated without the benefit of a Rule 17.6 colloquy conclusively precludes prejudice . . .").

¶14 The remainder of the sentencing proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Kardell was given an opportunity to speak, the court explained the basis for imposing the sentence, and the sentences imposed were within the statutory limits. See Ariz. R. Crim. P. 26.9, 26.10.

CONCLUSION

¶15 For the foregoing reasons, we affirm.

¶16 Upon the filing of this decision, defense counsel shall inform Kardell of the status of the appeal and of his future options. 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 (1984). Kardell shall have thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review.



AMY M. WOOD • Clerk of the Court  
FILED: AA