DIVISION ONE
FILED: 04-13-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0152
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GRACIANO BRAVO CERVANTES,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
_____	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2003-032138-002 SE

The Honorable Mark F. Aceto, Judge
The Honorable Helene F. Abrams, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
By Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

Graciano Bravo Cervantes — Safford
Appellant *In Propria Persona*

B R O W N, Judge

¶1 Graciano Bravo Cervantes ("Defendant") appeals his conviction and sentence for one count of transportation of marijuana for sale. Counsel for Defendant 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). Finding no arguable issues to raise, counsel requests that this court search the record for fundamental error. Defendant was granted the opportunity to file a supplemental brief *in propria persona*, and has done so.

¶2 Our obligation in this appeal 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 Defendant. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

¶3 In March 2003, a grand jury indicted Defendant for one count of transportation of marijuana for sale, having a weight of less than two pounds, a class 3 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-3405 (2010),[1] and one count of transportation of marijuana for sale, with a weight

[1] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

of more than two pounds, a class 2 felony, also in violation of A.R.S. § 13-3405.[2] The following evidence was presented at trial.

¶4 In May 2001, T.M., an undercover narcotics officer, was working with a confidential informant and agreed to meet with Rafael Cervantes,[3] an alleged drug dealer, to purchase a large quantity of marijuana. T.M., the informant, and Rafael arrived at the appointed meeting location where Rafael told them he could have the marijuana delivered shortly. Rafael placed a call, and soon thereafter a taxi cab arrived, being driven by Defendant and carrying one passenger. Rafael accompanied T.M. to the trunk of the taxi, where T.M. was shown several large bundles of marijuana. Once T.M. saw the marijuana, he signaled the awaiting police officers, and all of the suspects at the scene were arrested. The police seized over one hundred pounds of marijuana.

¶5 Tempe police detective Dobson testified that after being informed of his *Miranda*[4] rights, Defendant told the police

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[2] The State dismissed count one of the indictment prior to trial.

[3] Rafael Cervantes is Defendant's brother and the co-defendant in this case. He also failed to appear for trial and a bench warrant was issued for his arrest. In 2009, Rafael pled guilty to solicitation to commit sale or transportation of marijuana. He is not a party to this appeal.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

he did not know there was marijuana in the trunk of the taxi. Defendant claimed he had been flagged down by a passenger,[5] stopped to pick him up, and the passenger told him that he had "stuff" to put in the trunk. Defendant told the detective that he walked into a store to get something to drink while the passenger loaded his belongings into the trunk of the taxi cab. When he returned the trunk was closed and the passenger was waiting inside the taxi. Defendant claimed that he asked the passenger what he had put in the trunk and was told "some old clothes and stuff." Defendant admitted there was a "crazy" smell in the taxi, but said he was unaware that it was marijuana. He also told the detective that it was "weird" that his brother was present at the drop-off location.

¶6 Defendant failed to appear for the final trial management conference and a bench warrant was issued for his arrest. When he failed to appear for trial, the court proceeded in absentia. The jury found Defendant guilty of transportation of marijuana for sale, with a weight in excess of two pounds. In January 2009, Defendant was pulled over for a traffic violation and arrested on the outstanding warrant. At sentencing, the court imposed a four-year mitigated prison term

[5] In his supplemental brief, Defendant asserts that his brother called him on his cell phone and told him to pick up the passenger.

and credited Defendant with 47 days of presentence incarceration credit. Defendant then filed a timely notice of appeal.

¶7 Defendant raises the following issues in his supplemental brief: (1) ineffective assistance of counsel;[6] (2) denial of the right to be present at trial; (3) the trial court erred by failing to inquire as to his absence during trial; and (4) insufficient evidence to sustain the conviction.

¶8 We consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citations omitted). "Fundamental error review, in contrast, applies when a defendant fails to object to alleged trial error." *Id*. at ¶ 19 (citing *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id*. at ¶ 19 (citations omitted). None of the arguments in Defendant's

[6] This court will not consider an appellant's claims of ineffective assistance of counsel raised in a direct appeal regardless of merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Defendant's claim must be presented first to the superior court in a petition for post-conviction relief. *Id*.

supplemental brief were raised in the trial court therefore we review only for fundamental error.

¶9 Defendant argues he was denied the right to be present at his trial when the trial commenced in absentia. A defendant has a right under the United States and Arizona Constitutions "to appear and defend in person in all criminal proceedings." *State v. Cook,* 115 Ariz. 146, 148, 564 P.2d 97, 99 (App. 1977), *overruled in part on other grounds by State v. Fettis,* 136 Ariz. 58, 664 P.2d 208 (1983); *see also* U.S. Const. amends. VI, XIV; Ariz. Const. art. 2, § 24. However, a defendant's right to be present is not absolute and he can waive this right by his voluntary absence from the proceedings. *State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977). Additionally, a court can infer that the "absence [of a defendant] is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear." Ariz. R. Crim. P. 9.1.

¶10 The minute entry for a pretrial conference held on May 28, 2003, indicates Defendant was present and the court informed him of the date and time of the trial, the right to be present at trial, and a warning that the proceeding could go forward in

his absence.[7] Additionally, in his supplemental brief Defendant admits that the warning was on the minute entry, but claims that the court failed to verbally advise him, and if the court did, he did not verbally acknowledge it. As we do not have a transcript of the pretrial conference, we presume the minute entry accurately reflects what occurred at that proceeding. *Cf*. ARCAP 11(b); *State v. Berge*, 130 Ariz. 135, 136, 634 P.2d 947, 948 (1981) (stating that it is the responsibility of the objecting party to ensure the record contains necessary material and any failure to provide relevant portions of the record can result in presumption that the missing material supports conclusion of the trial court). Furthermore, on the first day of trial, the court stated it had "specifically told the defendant that he had a right to be present at trial and that if he was not present, the trial would proceed in his absence." Thus, nothing in the record before us indicates that Defendant was denied the right to be present at trial.

¶11 We also reject Defendant's argument that the sentencing court should have made additional findings before deciding his absence was voluntary. The evidence before the sentencing court suggested he was voluntarily absent.

[7] Defendant was also present for the hearing on July 17, 2003, when the trial management conference and trial dates were reset.

Therefore, the court did not abuse its discretion when proceeding with sentencing.

¶12 Defendant next argues there was insufficient evidence to sustain his conviction. In determining whether sufficient evidence exists to support a conviction we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008). We review the sufficiency of the evidence presented at trial only to determine if "substantial evidence" exists to support the verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005) (citation omitted). Evidence is sufficient when it is "more than a [mere] scintilla and is such proof" as could convince reasonable persons of a defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981) (citation omitted). The substantial evidence required to warrant a conviction may be either circumstantial or direct. *State v. Mosley*, 119 Ariz. 393, 402, 581 P.2d 238, 247 (1978).

¶13 To convict Defendant of transportation of marijuana for sale pursuant to A.R.S. § 13-3405, the State was required to prove that (1) he transported a usable amount of marijuana; (2) he was aware or believed that the substance he was transporting was marijuana; and (3) his transportation was for purposes of sale. At trial, the parties stipulated that the drug discovered

in the trunk of the taxi cab Defendant was driving was in fact a usable amount of marijuana. Defendant does not argue the evidence is insufficient to establish the transportation was for purposes of sale. Rather, he argues there was insufficient evidence to show he was aware of or believed he was transporting marijuana. We disagree.

¶14 Defendant was driving the taxi that contained one hundred nine pounds of marijuana in the trunk. The taxi arrived at the meeting location shortly after Rafael, Cervantes' brother, placed a call to someone requesting that the marijuana be delivered there. The trunk of the taxi was opened as Rafael and T.M. approached it to view the marijuana. Defendant argues the police report does not indicate there was a noticeable odor emanating from the trunk that would have alerted the driver that he was transporting marijuana; however, Defendant admitted to the police that there was a "crazy" smell in the cab. Additionally, T.M. testified the smell of marijuana was emanating from the vehicle and the marijuana smell was pervasive from a few feet away from the vehicle. A reasonable jury could conclude that Defendant was aware of the marijuana in his taxi.

¶15 We have read and considered counsel's and Defendant's briefs, and we have reviewed the entire record for fundamental error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in accordance with

the Arizona Rules of Criminal Procedure. As far as the record reveals, Defendant was represented by counsel at all stages of the proceedings. Defendant was given the opportunity to speak before sentencing, and the sentence imposed was within statutory limits.

¶16 Upon filing this decision, counsel shall inform Defendant 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). Defendant 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.

¶17 Accordingly, we affirm Defendant's conviction and sentence.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
LAWRENCE F. WINTRHOP, Judge