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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STATE OF ARIZONA, Appellee, v. NICARWIA JOSEPHINE HUDSON, Appellant.	2 CA-CR 2012-0159 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112923001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Amy Pignatella Cain
Tucson
Attorneys for Appellee

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By Michael J. Miller
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E C K E R S T R O M, Judge.

¶1 Following a jury trial in 2012, appellant Nicarwia Hudson was convicted of aggravated assault on a police officer. The trial court suspended the imposition of sentence and placed Hudson on probation for eighteen months.[1] On appeal, Hudson argues she was denied her constitutional right to be present during the jury selection process. She asks that we reverse her conviction and remand for a new trial. For the reasons set forth below, we affirm.

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Hudson's conviction arose from an incident involving an altercation with police officers during a traffic stop in August 2011. On several occasions before trial, the trial court had informed Hudson of the consequences "should she fail to appear" at any hearing or at trial, and she confirmed by signature that she understood that if she failed "to appear at court[,] the court case and any trial c[ould] continue in [her] absence." The trial originally was scheduled to begin in Judge Christopher Browning's courtroom at 1:30 p.m. on March 13, 2012. Due to a reassignment of judges in the week before trial, it was rescheduled to begin on the same date, but at 10:30 a.m. in Judge Deborah Bernini's courtroom.

[1]Hudson states in her opening brief that she was found guilty of assaulting Officer A. and not guilty of assaulting Officer S., and that she was placed on probation for eight months. However, the record shows she was found guilty of assaulting Officer S. and was placed on probation for eighteen months. She was acquitted of assault against Officer A.

¶3 When Hudson failed to appear at the newly scheduled time and location, her attorney explained that he had not informed her personally of the new courtroom and starting time, but he had informed "her mother who answered the phone at the house [where] she is staying," that "this is the time change, she needs to show up in Judge Bernini's courtroom on that date. So hopefully she got the message." The trial court stated, "I'd like to proceed with the jury selection without her. I can tell the jurors that the trial was accelerated and we're expecting her after the lunch hour or something along those lines. Any objection?" Defense counsel responded, "That would be fine, Judge."

¶4 The jury then was brought into the courtroom. The trial court read the names of the potential jurors, explained the jury selection process, introduced the attorneys and defense counsel's legal assistant, and asked if any of the jurors recognized them or the names of any of the potential witnesses, including Hudson. The court then told the jury:

> Let me explain something, Ms. Hudson has not yet joined us in the courtroom. Ladies and gentlemen, this case was reassigned to me from another judge yesterday, and I'm a morning start and a lot of our criminal judges don't start until the afternoon. We're going to start jury selection now and then we'll proceed with the trial. So she had been notified the trial was at 1:30 and we're hoping she'll be here this afternoon.
>
> If not, I'll explain to you how that will work, but we're going to start in her absence. I wait for no man. We start this trial on time and we move forward at quite a fast and rapid pace.

One potential juror, who worked for the Tucson Fire Department, told the court that although he did not recognize the names of the officers or victims, he might

"[p]otentially" know them once he saw them. The judge admonished the jurors to notify the court at any point during the trial if they recognized a witness as someone they knew. Hudson then arrived, and the court told the jury: "Ms. Hudson got the message that we moved the trial up on her by about three hours. Ms. Hudson, would you be nice enough to stand, everybody had to do that when they were introduced, to see if anyone recognizes you? This is Ms. Hudson." The voir dire process then continued.

¶5 On appeal, Hudson argues her absence during the beginning portion of the jury selection process deprived her of meaningful "interaction" with the jurors and may have suggested to the jury she is irresponsible. Asserting her attorney should not have been allowed to waive her presence, Hudson maintains the trial court should have permitted counsel "to attempt to contact her" before proceeding in her absence.[2] She further suggests she may have been late because "she had trouble finding the new courtroom" or because of "[t]raffic and parking" or "construction" issues. Hudson also asserts the court abused its discretion "by denying [a] short continuance," thereby depriving her of her constitutional right to be present at trial. But, because counsel did not request a "short continuance," none was denied.

¶6 Moreover, once Hudson did arrive, counsel did not offer any further explanation for her tardiness or object to the trial court having proceeded in her absence. Although our supreme court has held that exclusion from the entire jury selection process is structural error, exclusion from a minor portion can be harmless. *State v. Garcia-*

[2]The record does not show that counsel asked for permission to contact Hudson before waiving her presence.

Contreras, 191 Ariz. 144, ¶¶ 17, 22, 953 P.2d 536, 540-41 (1998). Because Hudson was not excluded from the entire jury selection process and because she did not object below, we review only for fundamental error.[3] *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). 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.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶7 A criminal defendant generally has a constitutional right to be present at all trial proceedings. *Morehart v. Barton*, 226 Ariz. 510, ¶ 13, 250 P.3d 1139, 1142 (2011). This due process right includes the right to be present during the jury selection process. *Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d at 538; *see* Ariz. R. Crim. P. 19.2 (defendant has right to be present at every stage of trial, including impaneling of jury); *see also State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981). But the right to be present, which is not absolute, "'applies only to those proceedings in open court whenever [a defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *State v. Dann*, 205 Ariz. 557, ¶ 53, 74 P.3d 231, 245 (2003), *quoting State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586

[3]Hudson suggests in her opening brief that we review for fundamental error if we "believe[] that the issue was not adequately preserved," and she subsequently asserts in her reply brief that "[t]he error was fundamental."

(1981) (alteration in *Dann*). And, as with other constitutional rights, an accused "may voluntarily relinquish the right to attend trial" proceedings. *Garcia-Contreras*, 191 Ariz. 144, ¶ 9, 953 P.2d at 539; *see also* Ariz. R. Crim. P. 9.1 (defendant may waive right to be present at proceeding and court may infer voluntary absence if defendant had personal notice of time of proceeding, right to be present, and warning proceeding would go forward in defendant's absence).

¶8 Hudson asserts that counsel lacked the authority to waive her presence. However, a defendant's personal waiver is required for relatively few constitutional rights, such as the right to counsel, the right to jury trial, and the right to a twelve-person jury. *See State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007). "And 'a trial court may rely on counsel's waiver of a defendant's right to be present' in certain circumstances; 'personal waiver by the defendant is not required.'" *State v. Rose*, 231 Ariz. 500, ¶ 9, 297 P.3d 906, 910 (2013), *quoting State v. Canion*, 199 Ariz. 227, ¶ 26, 16 P.3d 788, 795 (App. 2000). "Unless the circumstances are exceptional, a defendant is bound by his counsel's waiver of his constitutional rights." *State v. Collins*, 133 Ariz. 20, 23, 648 P.2d 135, 138 (App. 1982), *citing Henry v. Mississippi*, 379 U.S. 443 (1965). Here, Hudson has not presented any exceptional circumstances that would render invalid her attorney's waiver, nor does it appear the record would support such a finding.

¶9 However, even assuming without deciding that Hudson's attorney was not authorized to waive her presence, arguably constituting fundamental error, she has not demonstrated that she was prejudiced. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. "Fundamental error review involves a fact-intensive inquiry, and the showing

required to establish prejudice therefore differs from case to case." *Id.* ¶ 26. Hudson argues that she could have "monitor[ed]" her attorney's performance during the interaction with the sole juror who spoke in her absence to see if there was "evidence of . . . bias" and that "[h]er absence, even though short, . . . impacted the jury's evaluation of her and . . . her attorney's ability to evaluate prospective jurors, which could well have affected the verdict." The record, however, does not support her assertions.

¶10 Hudson was absent for only a brief portion of the jury selection process, during which, other than the negligible interaction with a single juror, the court did nothing more than read the names of the potential jurors, introduce counsel, and provide the jurors with general information. As previously noted, our supreme court has held that "exclusion from the entire jury selection process is structural error, but in so holding [the court] noted that exclusion from a 'minor portion' of jury selection proceedings may be harmless error." *State v. Morris*, 215 Ariz. 324, ¶ 44, 160 P.3d 203, 214 (2007), *quoting Garcia-Contreras*, 191 Ariz. 144, ¶ 17, 953 P.2d at 540; *see also State v. Ayers*, 133 Ariz. 570, 571, 653 P.2d 27, 28 (App. 1982) ("harmless error has generally been found only where the accused's absence has been from some minor portion of the [jury] selection process," rather than the whole thing). Here, the brief portion of the jury selection process Hudson missed did not involve questioning the jurors about the facts or legal issues of the case. *Cf. Rose*, 231 Ariz. 500, ¶ 10, 297 P.3d at 910 (absent waiver, and assuming defendant entitled to attend prescreening process concerning jurors' availability, no fundamental error arose from defendant's absence from three days of process); *Morris*, 215 Ariz. 324, ¶¶ 44-45, 160 P.3d at 214 (any error in defendant's

exclusion from jury "prescreening process," where no prospective juror was questioned about facts or legal issues of case, was harmless).

¶11 In sum, "[n]othing of evidentiary value in this record shows that error . . . deprived [Hudson] of a fair trial," *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), or that her "absence deprived [her] of a substantial right to defend [herself] and resulted in actual prejudice." *Dann*, 205 Ariz. 557, ¶ 56, 74 P.3d at 246. Absent such a showing, she cannot prevail under a fundamental error standard of review. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶12 Hudson's conviction and term of probation are affirmed.

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

CONCURRING:

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

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