IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant/Cross-Appellee,

v.

THOMAS JACOB TOMLIN,
Appellee/Cross-Appellant.

No. 2 CA-CR 2014-0170
Filed February 4, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Graham County
No. CR201300062
The Honorable R. Douglas Holt, Judge

AFFIRMED IN PART AND REMANDED IN PART

COUNSEL

Kenny Angle, Graham County Attorney
By Jeff A. Hall, Deputy County Attorney, Safford
Counsel for Appellant/Cross-Appellee

Harriette P. Levitt, Tucson
Counsel for Appellee/Cross-Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Following a bench trial, Thomas Tomlin was convicted of aggravated driving with a drug in his body while his driver's license was suspended, possession of drug paraphernalia, and possession of marijuana. After the trial court sentenced Tomlin, it granted his motion to vacate the judgment and for a new trial. In this appeal, the state challenges those rulings. Tomlin argues in a cross-appeal that the court erred in implicitly denying his motion for a judgment of acquittal. For the following reasons, we affirm the court's denial of Tomlin's motion for a judgment of acquittal but remand for further proceedings.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining Tomlin's convictions and resolve all reasonable inferences against him. *See State v. Snider*, 233 Ariz. 243, ¶ 2, 311 P.3d 656, 658 (App. 2013). In August 2010, a Safford police officer arrested Tomlin after learning he had a local arrest warrant and was driving on a suspended license. Tomlin admitted he had smoked marijuana that day, and he provided a urine sample. The test showed that Tomlin's urine contained Carboxy-THC,[1] a metabolite of marijuana, as well as amphetamine and methamphetamine. Tomlin was charged with one count each of aggravated driving with a drug in his body while his driver's license was suspended, possession of drug paraphernalia, and possession of marijuana.

¶3 Tomlin filed a motion to suppress the results of the urine test. At a hearing, the trial court denied the motion, and the

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[1]Carboxy-tetrahydrocannabinol.

parties stipulated to submit the case to the court. Tomlin's counsel asked the court to "make findings as to each count based on submitted evidence . . . in lieu of testimony at trial." The court asked Tomlin personally whether that was his "understanding," and Tomlin responded, "I believe so, yes."

¶4 The trial court then informed Tomlin that by submitting the matter to the court he was waiving the right to testify on his own behalf, the right to cross-examine witnesses, the right to remain silent, and the right to a jury trial. But it did not ask Tomlin if he understood those rights and if he nonetheless wished to waive his right to a jury trial. The court stated it would rule on the stipulated evidence and the testimony it had heard during the suppression hearing. Subsequently, it found Tomlin guilty of each charge.

¶5 During the sentencing hearing approximately seven months later, Tomlin stated that his waiver of a jury trial during the suppression hearing was "somewhat insufficient," so he had "signed an actual waiver . . . to formalize that." In his written waiver of trial by jury, which Tomlin signed on the same day as the sentencing hearing, he acknowledged he was "entitled to a trial by jury on these charges and if applicable, on fact[s] used to aggravate any sentence." He also indicated he understood "that once [he has] made the decision to give up [his] right to a jury trial, [he] may change [his] mind only with the permission of the court, and may not change it at all once the trial has actually begun." Tomlin checked boxes indicating he waived his right to "trial by jury on guilt or innocence" and "trial by jury on facts used to aggravate any sentence."

¶6 At the same hearing, Tomlin's counsel stated Tomlin "[did] want to proceed, waiving . . . his trial rights." His counsel asked him if that was correct, and Tomlin responded in the affirmative. The trial court then asked Tomlin whether he "agree[d] with all that," was "affirmatively waiving the trial by jury in case we did something inadequate previously," and wanted to proceed with sentencing, and Tomlin responded in the affirmative to each question.

¶7 The trial court suspended the imposition of sentence as to all counts and placed Tomlin on concurrent terms of supervised probation totaling five years. As a condition of probation on count one, the court sentenced him to four months' imprisonment with credit for time served. In its minute entry, the court stated that Tomlin "knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross-examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights."

¶8 On the same day as Tomlin's sentencing hearing, our supreme court decided *State ex rel. Montgomery v. Harris*, in which it concluded that "[d]rivers cannot be convicted of [driving under the influence of a drug or its metabolite] based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana," and "Carboxy-THC . . . does not cause impairment." 234 Ariz. 343, ¶¶ 24, 25, 322 P.3d 160, 164 (2014). Tomlin filed alternative motions for a judgment of acquittal after the verdict, to vacate the judgment, or for a new trial. He pointed out there had been "deficiencies in the record" with respect to his waiver, but stated those deficiencies "were corrected with the defendant's consent through submission of a signed Waiver of Jury Trial and a further record made on April 22, 2014, wherein [Tomlin] verified on the record his agreement to the court considering all evidence presented at the [suppression hearing], including his testimony." Tomlin contended that "no evidence was presented . . . to establish the impairing nature of any metabolite found in [Tomlin's] urine." He stated that, had he been aware of the issue addressed in *Harris*, "he would not have waived his right to a jury trial and thus his waiver was not knowingly or intelligently given."

¶9 The trial court held a hearing on the motion and subsequently granted Tomlin's motion to vacate the judgment and for a new trial. The court found that Tomlin's "stipulation to the factual basis was not knowingly, voluntarily and intelligently obtained" and that he "may not have properly waived his right to a jury trial." The court also found that the decision in *Harris* "may

impact . . . the factual and legal issues in this case." This appeal and cross-appeal followed.

Waiver of Right to Jury Trial

¶10 The state argues "[t]he trial court should not have granted [Tomlin's] Motion to Vacate Judgment because there is nothing in the record that suggests that there was a violation of [Tomlin's] rights under the Arizona or United States constitutions" as Tomlin "knowingly and voluntarily waived his rights." "A defendant's waiver of his or her right to a jury must be given knowingly, voluntarily and intelligently." *State v. Innes*, 227 Ariz. 545, ¶ 5, 260 P.3d 1110, 1111 (App. 2011). The defendant must be "aware of the right and manifest[] an intentional relinquishment or abandonment." *Id.* "The pivotal consideration in determining the validity of a jury trial waiver is the requirement that the defendant understand that the facts of the case will be determined by a judge and not a jury." *State v. Conroy*, 168 Ariz. 373, 376, 814 P.2d 330, 333 (1991).

¶11 Although our supreme court has not set forth the standard of review for waivers of the right to a jury trial, in other waiver contexts, the court has stated that de novo review applies to whether a defendant knowingly and voluntarily waived a similar right to be present at trial. *See State v. Lehr*, 227 Ariz. 140, ¶ 8, 254 P.3d 379, 384 (2011). Therefore, we review de novo whether Tomlin knowingly, voluntarily, and intelligently waived his right to a jury trial, but we defer to the trial court's factual findings. *See State v. Winegar*, 147 Ariz. 440, 445, 711 P.2d 579, 584 (1985) ("[T]he trial judge 'has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and . . . can better assess the impact of what occurs before him.'"), *quoting State v. Chapple*, 135 Ariz. 281, n.18, 660 P.2d 1208, 1224 n.18 (1983) (alteration in *Winegar*).[2]

[2]Tomlin did not argue below that the trial court neglected to personally address him and advise him of the right to a jury trial; instead he stated only that he had failed to respond to the court's description of his rights. Tomlin's statement was included as part of

¶12 Rule 18.1(b)(1), Ariz. R. Crim. P., provides that, before accepting a waiver of the right to a jury trial, "the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." The waiver must be "made in writing or in open court on the record." Ariz. R. Crim. P. 18.1(b)(2); *see also State v. Butrick*, 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976) ("Although the defendant's waiver may be either written or oral, . . . the court must always address the defendant personally . . . to ascertain 'that the waiver is knowing, voluntary and intelligent.'").

¶13 Tomlin twice appeared, with counsel, and told the trial court he wished to proceed with a bench trial. The court personally addressed him at the suppression hearing and informed him of the rights he was giving up by waiving his right to a jury trial. After he had been found guilty, Tomlin signed a written waiver of jury trial. *Cf. United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985) (written waiver creates presumption that waiver of right to jury trial is voluntary, knowing, and intelligent). The court again personally addressed him at sentencing, confirming that Tomlin was "affirmatively waiving the trial by jury in case we did something inadequate previously." Tomlin made multiple efforts to waive his right to a jury trial, thereby "manifest[ing] an intentional relinquishment or abandonment." *Innes*, 227 Ariz. 545, ¶ 5, 260 P.3d at 1111.

¶14 Tomlin argues the *Harris* decision "substantially impacted the voluntariness of [his] waiver, because he would not, in all likelihood, have waived his right to a jury trial and submitted the case for the court's review had he known that he could not be

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the chronology leading up to his assertion that any deficiencies in his initial waiver were corrected with the subsequent colloquy and written waiver. Despite Tomlin's assertion, the court found Tomlin "may not have properly waived his right to a jury trial." Because the court concluded sua sponte that the waiver may have been unconstitutional, we do not review for fundamental error; instead, we review de novo whether Tomlin properly waived his right to a jury trial.

convicted based upon a finding of carboxy-THC in his urine." Tomlin cites no authority for the proposition that a subsequent change in case law has any bearing on whether a defendant's waiver of the right to a jury trial was knowing, voluntary, and intelligent, and we have found none. Accordingly, we reject his argument.[3] On this record, we conclude Tomlin's waiver of his right to a jury trial was knowing, voluntary, and intelligent. Accordingly, the trial court erred in vacating the judgment and ordering a new trial on that basis. However, for the reasons stated below, we remand for further proceedings.

Submission of Case on the Record

¶15 Our supreme court has set forth warnings that a trial court must give a defendant before he or she submits his or her case to the court for decision on a stipulated record. *See State v. Avila*, 127 Ariz. 21, 24-25, 617 P.2d 1137, 1140-41 (1980). Although Tomlin did not argue below or on appeal that he was not given each of the warnings required by *Avila*, we will not ignore fundamental error when we find it. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). Failure to give each of the *Avila* warnings is fundamental error. *See State v. Bunting*, 226 Ariz. 572, ¶ 11, 250 P.3d 1201, 1205-06 (App. 2011).

¶16 Before a defendant submits his or her case to the court on a stipulated record, he or she must be informed of the following rights:

> 1. The right to a trial by jury where he may have representation of counsel;
>
> 2. The right to have the issue of guilt or innocence decided by the judge based solely upon the record submitted;

[3]To the extent Tomlin argues there was insufficient evidence to support his conviction, we address those arguments in our discussion of his cross-appeal from the trial court's denial of his motion for a judgment of acquittal.

> 3. The right to testify in his own behalf;
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> 4. The right to be confronted with the witnesses against him;
>
> 5. The right to compulsory process for obtaining witnesses in his favor;
>
> 6. The right to know the range of sentence and special conditions of sentencing.

Avila, 127 Ariz. at 24-25, 617 P.2d at 1140-41. It "must appear from the record that the waiver was knowingly, intelligently and voluntarily made," and waiver "will not be presumed from a silent record." *Id.* at 25, 617 P.2d at 1141.

¶17 In *Bunting*, the defendant submitted her case to the trial court on the record, consisting solely of police reports. 226 Ariz. 572, ¶ 3, 250 P.3d at 1203. She also executed a waiver of her right to trial by jury. *Id.* The trial court questioned Bunting on the record and found that her jury waiver was knowing, intelligent, and voluntary. *Id.* On appeal, Bunting argued the trial court erred in failing to advise her of the rights set forth in *Avila*. *Id.* ¶ 5. The state argued that "a colloquy was not required because the trial court properly advised Bunting of her right to a jury trial and this was sufficient to accomplish the 'intentional waiver of a known right.'" *Id.* ¶ 8. We rejected the state's argument, stating, "[a]lthough the record reflects that Bunting voluntarily and intelligently waived her right to a jury trial, this recital does not satisfy the need for a valid waiver on this issue of a submitted record." *Id.*, *citing Butrick*, 113 Ariz. at 566, 558 P.2d at 911 (recognizing distinction between "just a waiver of a jury" and "the waiver of a jury and submission of the entire question of guilt or innocence to the court"). We concluded that "the trial court in this case was obligated to follow *Avila*, which requires that six warnings be provided to a submitting defendant prior to a determination of the defendant's guilt or innocence." *Id.* ¶ 10.

¶18 Here, the trial court advised Tomlin only of his right to testify on his own behalf, to cross-examine witnesses, to remain silent, and to a jury trial. It did not advise Tomlin of his other rights

as required by *Avila* – to be confronted with the witnesses against him, to compulsory process for obtaining witnesses in his favor, or to know the range of sentence and special conditions of sentencing. Therefore, the court's warnings to Tomlin did not comport with *Avila*.[4]

¶19 Accordingly, we remand for the trial court to determine whether Tomlin was prejudiced by insufficient warnings, that is, whether he "would not have agreed to submit [his] case on the record had the proper colloquy been given." *Bunting*, 226 Ariz. 572, ¶ 11, 250 P.3d at 1206. If the court finds Tomlin would not have agreed to submit his case had he been given each of the *Avila* warnings, the court is instructed to vacate the conviction and grant him a new trial. *See id.* ¶ 12. In the alternative, if the court determines that Tomlin would have agreed to submit his case if a proper colloquy had been conducted, Tomlin's convictions and probationary terms are affirmed. *See id.*

Motion for Judgment of Acquittal

¶20 In his cross-appeal, Tomlin argues the trial court erred in denying his motion for a judgment of acquittal. We review the court's denial of Tomlin's motion for an abuse of discretion. *See State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). Rule 20, Ariz. R. Crim. P., provides, "the court shall enter a judgment of acquittal . . . if there is no substantial evidence to warrant a conviction." "'Substantial evidence' . . . 'is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). We will reverse Tomlin's convictions based on insufficient evidence

[4]The state suggests that Tomlin's waiver was knowing, voluntary, and intelligent because he "was present in the court room and represented by counsel when his counsel agreed to the stipulated facts, and no objection was made, but we rejected the same argument in *State v. Baker*. 217 Ariz. 118, ¶¶ 10-11, 170 P.3d 727, 729 (App. 2007).

"'only if there is a complete absence of probative facts'" to support the court's conclusion. *See State v. Lopez*, 230 Ariz. 15, ¶ 3, 279 P.3d 640, 642 (App. 2012), *quoting State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000).

¶21 With respect to his conviction for aggravated driving while under the influence, Tomlin argues "[t]he only evidence of drug use in this case was that [he] admitted he had smoked marijuana earlier in the day," "there was carboxy-THC in his urine," and the officer "testified he saw a green tint on [Tomlin's] tongue." But the record belies this assertion. One of the exhibits before the trial court was the result of Tomlin's urine test, which showed the presence of methamphetamine and amphetamine, in addition to Carboxy-THC.

¶22 A person commits aggravated driving while under the influence of a dangerous drug if he or she drives "[w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body," A.R.S. § 28-1381(A)(3), and while "the person's driver license or privilege to drive is suspended, canceled, revoked or refused," A.R.S. § 28-1383(A)(1). Both amphetamine and methamphetamine are listed in § 13-3401, and Tomlin testified that he knew his driver's license was suspended on the night he was arrested. Although the trial court did not mention the presence of methamphetamine and amphetamine in Tomlin's urine when it found him guilty of aggravated driving under the influence, there nevertheless was substantial evidence that Tomlin had been driving while a dangerous drug was in his body, and we will affirm a conviction supported by substantial evidence. *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994).[5]

[5]Tomlin asserts "[t]he presence of a drug or its metabolite in the urine does not correlate with the presence of that drug or its metabolite in the human body" because "whatever is in the suspect's urine is no longer in his system." However, that assertion defies logic. If a drug is present in a person's urine, which is expelled from the body, then it necessarily was present in his body. Furthermore, Tomlin cites no persuasive authority for the

¶23 Tomlin argues that, "[p]ursuant to [*Harris*], the evidence was insufficient to support a conviction because the only evidence of [his] marijuana use was his statement that he had smoked marijuana earlier in the day," and his "urine specimen revealed the presence of carboxy-THC, which is not indicative of driving impairment." Although the court in *Harris* concluded Carboxy-THC is a non-impairing metabolite of marijuana and therefore cannot in itself support a conviction for aggravated DUI, 234 Ariz. 343, ¶¶ 24, 25, 322 P.3d at 164-65, the court's decision did not affect the prohibition against driving with "any drug defined in § 13-3401 . . . in the person's body," § 28-1381(A)(3). As noted above, both methamphetamine and amphetamine are listed in § 13-3401. Thus, the decision in *Harris* does not resolve the question of whether Tomlin had been driving with a prohibited drug in his body.

¶24 Tomlin also argues his conviction for possession of drug paraphernalia (count two) must be reversed because the state failed to produce any evidence that the pipe was tested for marijuana or other drug residue, and his conviction for possession of marijuana (count three) must be reversed because the state failed to produce any evidence confirming that the substance seized was marijuana. He claims "[i]t is apparent that the [trial] court convicted [him] on Counts 2 and 3 solely based upon [his] statement to Officer Cluff" that he had smoked marijuana earlier. But again, the record does not support this contention. In addition to Tomlin's admission he had smoked marijuana earlier in the day, the evidence showed Tomlin had admitted to the arresting officer that he had "a pipe used for smoking marijuana and a small amount of marijuana in his front pocket," and the officer had found in Tomlin's pocket a substance and a pipe that "looked and . . . smelled and were consistent with marijuana." *See State v. Ampey*, 125 Ariz. 281, 282, 609 P.2d 96, 97 (App. 1980) (evidence sufficient to convict defendant of possession of marijuana where "defendant himself admitted the substance was marijuana"); A.R.S. § 13-3415(E)(1) (in determining whether an object is drug paraphernalia, the court considers

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suggestion that a urine test is insufficient to prove the presence of a drug in the body.

"[s]tatements by an owner or by anyone in control of the object concerning its use"). We conclude substantial evidence supported Tomlin's convictions. Therefore, the trial court did not err in denying Tomlin's motion for a judgment of acquittal.

Disposition

¶25 For the foregoing reasons, we affirm the trial court's denial of Tomlin's motion for a judgment of acquittal and remand for further proceedings consistent with this decision.