IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AGUSTIN SOTO RIVERA,
Appellant.

No. 2 CA-CR 2014-0087
Filed February 2, 2016

Appeal from the Superior Court in Pima County
No. CR20121143002
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Appellant Agustin Soto Rivera was convicted on multiple charges arising from a home invasion. He contends the trial court committed error by allowing him to be tried *in absentia* and, in the alternative, that his absence from trial was involuntary. We find no error, and affirm Rivera's convictions.

Factual and Procedural Background

¶2 Rivera and co-defendant Rosario Soto Jr. were indicted on three counts of armed robbery, three counts of aggravated assault, three counts of aggravated robbery, three counts of kidnapping, one count of first-degree burglary, one count of possession of marijuana, one count of fleeing from a law enforcement vehicle, and one count of possession of a deadly weapon by a prohibited possessor. At his arraignment, the court advised Rivera that if he failed to attend any scheduled hearing, including his trial, the court could proceed in his absence.

¶3 In June 2012, the court set trial for March 2013, and again admonished Rivera that trial could take place in his absence should he fail to appear. Rivera acknowledged that he understood the admonition.

¶4 In February 2013, Rivera moved for a trial continuance, which the court granted. In April 2013, the court set trial for September 10, 2013, and admonished the defendants as follows:

> [THE COURT:] Both Mr. Soto and Mr. Rivera, you understand that your trial is the 10th of September? You guys need to be here for that. Otherwise, we could do it

> without you and a warrant could issue for your arrest.
>
> Do you both understand?
>
> DEFENDANT SOTO: Yes, sir.
>
> DEFENDANT RIVERA: Yes, sir.

¶5 Rivera and Soto failed to appear for trial on September 10, 2013. The trial court found Rivera had been told of his new trial date and warned of the consequences of failing to appear. As a result, the court found Rivera's absence voluntary and proceeded with trial *in absentia*. After a three-day trial, Rivera was convicted of two counts of armed robbery, one count of attempted armed robbery, three counts of aggravated assault with a deadly weapon or dangerous instrument, two counts of aggravated robbery, one count of attempted aggravated robbery, one count of burglary in the first degree, one count of possession of marijuana, and one count of fleeing from a law enforcement vehicle. Following the verdicts, the court issued a warrant for Rivera's arrest.

¶6 Rivera was eventually apprehended and appeared in-custody in November 2013. The trial court ultimately sentenced him to concurrent and consecutive terms totaling 31.5 years' imprisonment. Rivera appealed and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

¶7 Rivera presents two arguments on appeal: (1) trying him *in absentia* denied him his constitutional right to be present at his trial; and (2) the trial court erred in finding his absence voluntary under Rule 9.1, Ariz. R. Crim. P.[1]

[1]We apply the version of Rule 9.1 in effect prior to January 1, 2016, although application of the 2016 version would not change our analysis. *See* Ariz. Sup. Ct. Order R-15-0017 (Aug. 27, 2015).

Standard of Review

¶8 Ordinarily, we review a determination of voluntary absence under Rule 9.1 for abuse of discretion. *State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984) ("We will not upset a trial court's finding of voluntary absence . . . absent an abuse of discretion."); *see also State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996). However, we review constitutional issues *de novo*. *State v. Guarino*, ___ Ariz. ___, ¶ 5, 362 P.3d 484, 486 (2015).

Discussion

¶9 A defendant's "right to be present at trial is protected both by the Sixth Amendment to the federal constitution as incorporated and applied to the states through the Fourteenth Amendment, and by article II, section 24 of the Arizona Constitution." *State v. Levato*, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996). When a defendant's right to confront witnesses or evidence against him is not implicated, "the right to presence is nevertheless protected by the due process clauses of the Fifth and Fourteenth Amendments." *Id.* A defendant waives his right to be present, however, if he voluntarily absents himself. Ariz. R. Crim. P. 9.1; *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (1983); *see also Diaz v. United States*, 223 U.S. 442, 455 (1912).

¶10 Rule 9.1 provides that "a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it" and that a "court may infer that an absence 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." The defendant bears the burden of establishing that his absence was involuntary. *State v. Reed*, 196 Ariz. 37, ¶ 3, 992 P.2d 1132, 1134 (App. 1999).

¶11 Rivera cites *Crosby v. United States*, 506 U.S. 255 (1993), for the proposition that a court is constitutionally prohibited from proceeding *in absentia* when a defendant fails to appear at the start of trial. He notes the Court in *Crosby* made a distinction between

pretrial and midtrial flight, and further urges that use of Rule 9.1 to authorize trial *in absentia* offends the "common law principles and social interests set forth in *Crosby*."

¶12 In *Crosby*, the defendant failed to appear before the beginning of his trial in federal court. 506 U.S. at 256. The trial court found he had been given adequate notice of his trial date, his absence had been deliberate, and he had voluntarily waived his constitutional right to be present at trial. *Id.* at 257. Trial proceeded in his absence and a jury found him guilty. *Id.*

¶13 Based on the explicit text of Rule 43, Fed. R. Crim. P., the Court reversed Crosby's convictions. *Id.* at 262. The version of Rule 43 in effect at the time provided, "'The defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule.'" 506 U.S. at 258, *quoting* Fed. R. Crim. P. 43(a). Nowhere did the rule authorize a trial *in absentia* when a defendant was not present at the beginning of his trial. *See Crosby*, 506 U.S. at 258. The rule provided, however, that "'the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present*, . . . is voluntarily absent after the trial has commenced. . . .'" *Id.*, *quoting* Fed. R. Crim. P. 43(b) (emphasis added). "[T]he distinction between pretrial and midtrial flight [was not] so farfetched as to convince [the Court] that Rule 43 [could not] mean what it says." *Id.* at 261.

¶14 But, notably, the Court expressed no opinion concerning whether the right to be present at the start of trial may be waived, only that "the defendant's initial presence serves to assure that any waiver is indeed knowing." *Id.* Moreover, because the Court found the text of Rule 43 dispositive, it did not consider Crosby's claim that commencing the trial of a voluntarily absent defendant was also constitutionally prohibited. 506 U.S. at 262.

¶15 Nothing in *Crosby* prevents a trial court from commencing the trial of a voluntarily absent defendant pursuant to Rule 9.1. Nor is such a practice constitutionally prohibited; a defendant may waive his right to presence at his trial by his voluntary absence, *Taylor v. United States*, 414 U.S. 17, 19 (1973) ("[T]he prevailing rule has been, that if, after the trial has begun in

his presence, he voluntarily absents himself, this . . . operates as a waiver of his right to be present . . . ."), *quoting Diaz v. United States*, 223 U.S. 442, 455 (1912), or even at times by his misconduct, *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding "a defendant can lose his right to be present" if, after a judge warns him that he could "be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"). Waiver is performed by an "intelligent" and "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). The intelligence of any waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* Thus, regardless of whether a defendant chooses to absent himself before or during trial, the critical question remains the same: Did the defendant voluntarily, knowingly, and intelligently waive his right to be present?

¶16 Rule 9.1 does not deprive a defendant of his constitutional right to be present. Pursuant to the rule, a court may only proceed *in absentia* if the defendant knew when the proceeding would occur, that he had a right to be present at it, and that by failing to appear he would lose that right—in other words, the trial would proceed without him. The rule, in effect, ensures that a court establishes that any relinquishment of the right to be present is made knowingly and intelligently before finding any absence voluntary. In this way, Rule 9.1 "comports with the requirements of a waiver of the defendant's constitutional rights provided that the defendant is afforded a hearing to determine whether his absence was, in fact, voluntary." *Brewer v. Raines*, 670 F.2d 117, 120 (9th Cir. 1982).

¶17 Rivera asks us to distinguish between pre-trial and mid-trial absence, but such a distinction would be anomalous. The validity of a waiver depends not upon when it is made, but whether

it was made knowingly, voluntarily, and intelligently.[2] Thus, a defendant may waive his or her right to be present at any time before or after the commencement of trial. "The defendant, and not . . . the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide" whether or not he will attend his trial and when. *See Faretta v. California*, 422 U.S. 806, 834 (1975).

¶18 Thus, when a defendant voluntarily absents himself before the start of his trial, a court may proceed in his absence provided it finds his absence knowing, intelligent, and voluntary. "To hold otherwise, 'would allow an accused at large upon bail to immobilize the commencement of a criminal trial and frustrate an already overtaxed judicial system until the trial date meets, if ever, with his pleasure and convenience.'" *United States v. Houtchens*, 926 F.2d 824, 827 (9th Cir. 1991), *quoting Gov't of V.I. v. Brown*, 507 F.2d 186, 189 (3d Cir. 1975); *see also Diaz*, 223 U.S. at 458 (law will not "'allow a person to take advantage of his own wrong[,]'" but would

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[2]The touchstone of a valid waiver is whether the holder of the right relinquished it knowingly, voluntarily, and intelligently. *Zerbst*, 304 U.S. at 464. Indeed, of the many procedural rights guaranteed to criminal defendants by the Constitution, the United States Supreme Court has consistently analyzed any waiver according to the standard enunciated in *Zerbst*, without regard to the timing of that waiver. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 529 (1972) (waiver of right to speedy trial); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (waiver of right to privilege against compulsory self-incrimination); *Brookhart v. Janis*, 384 U.S. 1, 5 (1966) (waiver of right to confrontation); *Green v. United States*, 355 U.S. 184, 191–92 (1957) (waiver of the right to be free from double jeopardy); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (waiver of right to trial by jury). While the timing of a waiver may serve a purpose in determining whether the waiver was knowing, voluntary, or intelligent, it is not, by itself, a part of the waiver analysis. *Cf. Miranda*, 384 U.S. at 444 (interrogated defendant not deemed to have waived right to privilege against compulsory self-incrimination until after he is fully informed of his right of silence).

do so "'if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield'"), *quoting Falk v. United States*, 15 App. D.C. 446, 460-61 (D.C. Cir. 1899). "A defendant has a right to his day in court, but he does not have the right unilaterally to select the date and hour." *Brown*, 507 F.2d at 190.

¶19 For the first time on appeal, Rivera also claims the trial court erred in determining his absence was voluntary.[3] Speaking about his visits with his attorney, Rivera asserted at sentencing, "I have only seen him once in jail. When he came to see me, his only advice was, if you could afford to bond out, bond out and talk to your travel agent. I did exactly as he said, you know." These statements, according to Rivera, demonstrate that his attorney-client relationship had "deteriorated beyond repair," leaving him "without a true freedom of choice or meaningful alternative," and making his absence involuntary—a situation analogous to that found in *State v. Garcia-Contreras*, 191 Ariz. 144, 953 P.2d 536 (1998).

¶20 Because Rivera failed to make this argument below, "we . . . review solely for fundamental, prejudicial error." *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 16, 185 P.3d 135, 140 (App. 2008). It is Rivera's burden to establish that any error was fundamental and it prejudiced him. *See id.* Because he does not argue the alleged error was fundamental, the argument is waived. *See id.* ¶ 17.

¶21 In any event, this case does not involve the lack of meaningful alternatives contemplated in *Garcia-Contreras*. In *Garcia-Contreras*, on the opening day of trial, defense counsel requested a delay in proceeding because the defendant's civilian clothes had not arrived. 191 Ariz. 144, ¶ 1, 953 P.2d at 537. The trial court denied the request and gave the defendant the option of either appearing in his prison garb, or waiving his presence during jury selection. *Id.* Our Supreme Court reversed, holding that the trial court's proffered options did not present the defendant with a meaningful alternative

[3]Rivera did not object to the trial court's determination below and only relies, now, on his statements made at sentencing to argue that the trial court should have ruled his absence involuntary.

and, thus, "his decision not to attend jury selection must be considered involuntary." *Id.* ¶ 11. The court stressed that "a voluntary waiver of the right to be present requires true freedom of choice," which "presupposes meaningful alternatives." *Id.*

¶22 Rivera claims his only choices were to abscond before trial or go to trial represented by counsel with whom he had a conflict. But Rivera's options were not so limited. As the state points out, he could have moved for the appointment of new counsel rather than absconding. Instead, he chose to abscond, and in his absence the trial court correctly found a knowing waiver of his right to be present. Accordingly, we find no error.

Disposition

¶23 For the foregoing reasons, we affirm Rivera's convictions.