

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NERY ABRAHAM ARMENTA-ESTRELLA,
Appellant.

No. 2 CA-CR 2015-0249
Filed June 9, 2016

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NOT FOR PUBLICATION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 Pima County
No. CR20073229
The Honorable Howard Hantman, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, and
Abraham J. Hamadeh, Pursuant to Arizona
Supreme Court Rule 38(d), Tucson
Counsel for Appellee

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Appellant

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MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 After a jury trial held in his absence in 2008, Nery Armenta-Estrella was convicted of conspiracy to commit importation or possession of a narcotic drug for sale and two counts of sale of a narcotic drug. Following his arrest in 2013, he was sentenced to concurrent, five-year prison terms for each offense. On appeal, Armenta-Estrella argues the trial court erred in concluding he was voluntarily absent from trial. Finding no error, we affirm.

¶2 At his August 2007 initial appearance, Armenta-Estrella was advised of his next court date and admonished that “the trial or proceedings will be held without [him]” should he fail to appear. He was similarly advised at his September arraignment and at two November pretrial conferences. Despite being advised of the date, he did not attend a December 10, 2007, status conference—his counsel waived his presence—at which his trial was set for March 11, 2008. On December 19, 2007, Armenta-Estrella paid a cash bond of \$5,000. He did not attend any further hearings in his case; his trial was ultimately set for July 22, 2008.

¶3 On July 7, 2008, the trial court issued an arrest warrant for Armenta-Estrella when he failed to appear for a July 2008 hearing at which defense counsel informed the court that her client “had been inadvertently released from custody.” Shortly thereafter, defense counsel filed a motion seeking to “preclude” the trial from proceeding in Armenta-Estrella’s absence, stating he “did not voluntarily absent himself from the State of Arizona but, rather was deported, apparently, back to his native Mexico.”

¶4 At the hearing on the motion to preclude, defense counsel and the prosecutor informed the trial court that Armenta-

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Estrella had been released to federal custody and removed to Mexico the following day pursuant to a 2005 exclusion order.¹ That order, effective for twenty years, prohibited Armenta-Estrella from entering the United States unless he obtained permission from the United States Attorney General. Armenta-Estrella did not contest his removal. The court, noting Armenta-Estrella apparently had made no effort to contact his attorney after his deportation, determined he had “actual and constructive” notice of future hearings and “[i]t [wa]s his choice not to be here.” Thus, the court concluded, his absence was voluntary and trial would proceed. He was then convicted and sentenced as described above. This appeal followed.²

¶5 On appeal, Armenta-Estrella argues the trial court erred in finding his absence voluntary because he had no “personal notice of the time of trial, and he had no meaningful alternative to being deported.” A defendant may voluntarily relinquish the right to be present at trial. *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 9, 953 P.2d 536, 539 (1998). We review a trial court’s decision to proceed in absentia based on a defendant’s voluntary absence for an abuse of discretion. *See State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996).

¶6 Generally, a court may infer a defendant’s absence is voluntary if the “defendant had 1) personal notice of the time of the proceeding, 2) his right to be present at it, and 3) a warning that the

¹At the hearing concerning whether trial would proceed in Armenta-Estrella’s absence, the state identified documents related to his removal. Those documents, however, were not admitted into evidence and are not part of the record on appeal. Although Armenta-Estrella attached to his opening brief a purported copy of those documents, we will not consider on appeal that attachment or any arguments based on it. *See State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (“[W]e generally do not consider materials that are outside the record on appeal.”).

²Armenta-Estrella sought and was granted relief pursuant to Rule 32.1(f), Ariz. R. Crim. P., in order to file a delayed notice of appeal.

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proceeding would go forward in his absence.” *State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981); *see also* Ariz. R. Crim. P. 9.1. However, actual notice of the time of the next hearing is not required; a trial court may also infer a defendant is voluntarily absent “if the record indicates criminal proceedings commenced in his presence, that he absconded knowing of his right to attend future proceedings, and that his disappearance has made it impossible to contact him with reference to these proceedings.” *State ex rel. Romley v. Sup. Ct.*, 183 Ariz. 139, 144, 901 P.2d 1169, 1174 (App. 1995), *quoting State v. Cook*, 115 Ariz. 146, 149, 564 P.2d 97, 100 (App. 1977), *overruled on other grounds by State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983). And, “[a]n out-of-custody defendant has the responsibility to remain in contact with his attorney and the court.” *State v. Bishop*, 139 Ariz. 567, 571, 679 P.2d 1054, 1058 (1984).

¶7 Although it appears Armenta-Estrella was unaware of his exact trial date, that did not preclude the court from finding his absence voluntary. *See Romley*, 183 Ariz. at 144, 901 P.2d at 1174. He was advised his trial could proceed without him but did not maintain contact with the court or with his counsel. *See Bishop*, 139 Ariz. at 571, 679 P.2d at 1058 (out-of-custody defendant required to maintain contact with court or counsel); *Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354 (although defendant did not have actual notice of trial dates, absence voluntary when court admonished defendant of the consequence of absence, defendant failed to appear at the pretrial conference, and defendant failed to keep in contact with counsel).

¶8 And we disagree with Armenta-Estrella that his removal renders his absence involuntary. The fact a defendant acquiesced to removal does not establish that his or her absence is involuntary. *See State ex rel. Thomas v. Blakey*, 211 Ariz. 124, ¶¶ 10-14, 118 P.3d 639, 641-42 (App. 2005). In *Blakey*, a defendant was released on bond to federal immigration custody and requested voluntary release to Mexico in lieu of contesting removal. *Id.* ¶ 11. We determined the trial court had erred in finding that his resulting absence from trial was involuntary, reasoning he did not resist removal such as by requesting asylum or a hearing, and did not remain in contact with counsel. *Id.* ¶¶ 11-12.

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¶9 Similarly, Armenta-Estrella did not contest his removal and did not remain in contact with his attorney. Although he suggests his ability to resist deportation was more limited than that of the defendant in *Blakey*, he has not identified any supporting evidence in the record. And, even if he had only limited means to contest his removal, there is no evidence he sought to employ those means. And nothing in the record suggests he requested reentry into the United States from the Attorney General, or otherwise sought to attend his trial or remain in contact with the court or his counsel.

¶10 We find unavailing Armenta-Estrella's reliance on *United States v. Arrous*, 320 F.3d 355 (2d Cir. 2003), because that case is distinguishable. Although the court there suggested a deported defendant's absence "was at least partially involuntary," it noted the record did not show whether the defendant had been advised of the option to seek "parole[] back into the United States for the new sentencing hearing" and, indeed, that it was "not clear whether [the defendant] knew anything at all about the resentencing proceedings." *Id.* at 360-61. Here, even if we assume Armenta-Estrella was unaware he could seek re-entry into the United States via application to the Attorney General, he clearly was aware of the continuing legal proceeding against him but did not maintain contact with counsel or make any apparent effort to attend his trial.

¶11 The trial court did not abuse its discretion in finding Armenta-Estrella voluntarily absent from trial.³ Accordingly, we affirm his convictions and sentences.

³And in view of this resolution, we need not address the state's argument that Armenta-Estrella "waived" this issue because he "eschewed the opportunity to prove," after his 2013 arrest, that his absence from trial was involuntary.