IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL DEVAUGHN JOHNSON,
Appellant.

No. 2 CA-CR 2020-0003
Filed April 22, 2021

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201800448
The Honorable Patrick K. Gard, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Czop Law Firm PLLC, Higley
By Steven Czop
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Espinosa authored the decision of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

E S P I N O S A, Presiding Judge:

¶1 Michael Johnson appeals from his conviction and sentence for promoting prison contraband, arguing the jury verdict was improperly rendered in his absence and the trial court erroneously denied his request to have an investigator photograph his prison cell. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdict. *See State v. Mangum*, 214 Ariz. 165, ¶ 3 (App. 2007). In May 2017, while Johnson was incarcerated in an Arizona correctional facility, a corrections officer found a cell phone inside an open bag of chips on top of a cabinet in Johnson's cell. The officer believed the cabinet was Johnson's because his cellmate's belongings were in the other cabinet. Investigators extracted data from the phone and found photographs of Johnson along with text messages and call records to his wife. Johnson was charged with promoting prison contraband under A.R.S. § 13-2505(A)(3).

¶3 During the state's case-in-chief, Johnson represented himself with the help of advisory counsel. After the state rested, however, Johnson asked advisory counsel to take over for the remainder of the trial. Johnson then testified his cellmate had possessed the phone and Johnson's wife had been communicating with the cellmate, believing him to be Johnson, including during an eleven-minute long phone call.

¶4 On the final day of trial, the jury reached a verdict in about an hour and a half. Johnson, who had been in custody for the duration of the trial, was not present when the verdict was to be read. Johnson's counsel waived his presence, and the jury's guilty verdict was announced. Johnson arrived in the courtroom a few minutes later, and a sentencing date was set. He was subsequently sentenced to a five-year term of imprisonment, to be

served at the completion of his existing term. We have jurisdiction over Johnson's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Waiver of Presence at Sentencing

¶5 Johnson argues the trial court violated his right to be present at all stages of trial because the jury returned its verdict in his absence. Because Johnson failed to raise this issue below, we review only for fundamental error.[1] *See State v. Rose*, 231 Ariz. 500, ¶ 7 (2013); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-21 (2005). Under that standard of review, Johnson has the burden of first establishing that error exists and then establishing it is fundamental "by showing that (1) the error went to the foundation of the case, (2) the error took from [him] a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If he establishes fundamental error under prongs one or two, "he must make a separate showing of prejudice." *Id.*

¶6 A defendant is entitled to be present at all phases of a trial, including the return of the verdict. Ariz. R. Crim. P. 19.2. The defendant also has a right to be present at all critical stages of trial under the Sixth Amendment to the United States Constitution and Article 2, Section 24 of the Arizona Constitution. *State v. Schackart*, 190 Ariz. 238, 255 (1997). This right applies to "those proceedings where 'his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Id.* (quoting *State v. Christensen*, 129 Ariz. 32, 38 (1981)). And in situations not implicating a defendant's right to confront witnesses or evidence, the defendant's right to be present is protected by the due process clauses of the Fifth and Fourteenth Amendments. *State v. Levato*, 186 Ariz.

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[1]Although presence errors may be structural in some circumstances, not all such errors necessarily are. *State v. Forte*, 222 Ariz. 389, ¶ 15 (App. 2009); *see also State v. Garcia-Contreras*, 191 Ariz. 144, ¶¶ 17, 20 (1998) (defendant's involuntary exclusion from jury selection structural error). Johnson has not alleged structural error here, but instead, citing *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990), contends we should apply harmless-error review. *Larson*, however, does not address which standard to apply in the situation here, when the defendant failed to raise the issue in the trial court. *Id.* *State v. Rose*, on the other hand, explicitly applies fundamental-error review to a defendant's claim of presence error when the defendant failed to object below. 231 Ariz. 500, ¶ 7 (2013).

441, 443 (1996). Thus, "criminal defendants, under all but exceptional circumstances, are entitled as a matter of constitutional right to be physically present for the return of jury verdicts." *Id.* at 443-44.

¶7 Johnson argues his counsel's waiver of his right to be present was invalid because, absent exceptional circumstances, such waiver had to be made by him personally. The state responds, citing *Rose*, 231 Ariz. 500, ¶¶ 9-10, and *United States v. Gagnon*, 470 U.S. 522, 526-28 (1985), that neither the United States Supreme Court nor Arizona courts have required personal waiver. Neither of those cases, however, is directly on point. In *Rose*, our supreme court acknowledged that a trial court may rely on counsel's waiver of a defendant's right to be present in certain circumstances without personal waiver by the defendant and found no fundamental error in the defendant's absence from three days of jury selection. 231 Ariz. 500, ¶¶ 9-10. And in *Gagnon*, the United States Supreme Court determined an on-the-record waiver was not required where the defendants had voluntarily absented themselves from an *in camera* conference by not asserting their right to be present.[2] 470 U.S. at 526-28.

¶8 Assuming, without deciding, that the trial court erred by accepting counsel's waiver of Johnson's right to be present, Johnson's claim nevertheless fails because he has not demonstrated the alleged error was prejudicial. *See Escalante*, 245 Ariz. 135, ¶ 21 (if error takes from defendant right essential to defense, prejudice must be shown). Johnson first contends

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[2]We reject the state's additional argument that Johnson personally waived his right to be present by voluntarily absenting himself from the rendering of the verdict. *See* Ariz. R. Crim. P. 9.1. Although we cannot say an in-custody defendant can never voluntarily absent himself from trial, we are not persuaded this is one of those "rare" occasions and will not presume so as the state suggests. *See, e.g.*, *United States v. Velazquez*, 772 F.3d 788, 799-800 (7th Cir. 2014) (in-custody defendant voluntarily absent given "long-standing and well-documented aversion to appearing voluntarily in court" and statements to correctional staff that he was refusing to appear). Johnson took an active role in his defense, representing himself for portions of the trial and requesting transportation from the correctional facility to the court for every stage of his case. He was only six minutes late to the courtroom after the recess ended, and there is nothing in the record to suggest Johnson caused that tardiness. *See State v. Sainz*, 186 Ariz. 470, 473-74 (App. 1996) ("Had the trial court considered defendant's confinement, the only conclusion that could have been reached was that defendant's absence was involuntary.").

he was prejudiced because counsel did not poll the jury, depriving him of "the benefit of observing the court ask and confirm with each juror his or her vote for guilty, and that the verdict was unanimous."

¶9 Although the trial court must poll the jury at the request of any party, *see* Ariz. R. Crim. P. 23.3(a), there is little authority supporting the view that a defendant suffers any concrete harm from being absent when the jury returns, *see Rice v. Wood*, 77 F.3d 1138, 1143 (9th Cir. 1996) ("In two centuries of state and federal case law, remarkably few opinions even mention the possibility that defendant's presence may cause jurors to have second thoughts when they return the verdict. Experience, too, shows that jurors seldom have a change of heart when polled, and there is absolutely no evidence for the proposition that, when this does occur, it is influenced by defendant's presence."). Notably, Johnson has not pointed to any evidence or indication that jurors might have changed their verdict had he been present. And in the absence of such, his argument that polling the jury could have revealed error is speculative at best and not enough to demonstrate fundamental error. *See State v. Dickinson*, 233 Ariz. 527, ¶ 13 (App. 2013) (to prove prejudice in fundamental error review, defendant "may not rely upon 'speculation' to carry [the] burden" (quoting *State v. Munninger*, 213 Ariz. 393, ¶ 14 (App. 2006))).

¶10 Johnson also claims his absence "affected his ability to ask questions and make a record related to the verdict." We disagree. After Johnson's counsel declined to have the jury polled, Johnson, who had represented himself for the first part of the trial, had the opportunity to ask questions and make a record following his return to the courtroom, but he did not do so. Nor did he raise the issue in his motion for new trial or before the trial court at sentencing. Under the specific circumstances of this case, Johnson has failed to demonstrate he was prejudiced by his absence at the rendering of the verdict. Accordingly, he has not established fundamental error.

Denial of Request for Investigator to Take Photographs

¶11 Johnson also contends the trial court abused its discretion by denying his request for his appointed investigator to enter the prison and photograph his cell. Upon a defendant's motion, a trial court may order any person to make available material not otherwise required by the disclosure rules if the court finds the defendant has a substantial need for the material or information to prepare his case and cannot obtain the substantial equivalent by other means without undue hardship. Ariz. R. Crim. P. 15.1(g). Whether a defendant is entitled to discovery of certain

evidence is within the trial court's discretion. *State v. Tyler*, 149 Ariz. 312, 314 (App. 1986). Accordingly, we will not disturb a ruling on a discovery request absent an abuse of that discretion. *State v. Fields*, 196 Ariz. 580, ¶ 4 (App. 1999).

¶12 In denying Johnson's request, the trial court reasoned,

> I cannot give direction to the Department of Corrections to allow your investigator to go into DOC. I can ask if there is any assistance with them getting photographs that have previously been acquired, but I can't send him in. That is DOC'[s] protocol. I don't have any control over DOC.

Setting aside the question of whether the trial court had the authority to order the investigator's entry into the DOC facility to take photographs,[3] Johnson did not demonstrate a substantial need for the photographs, as required by Rule 15.1(g). Indeed, his request below contained no argument or other showing that he had a "substantial need" for the photographs to prepare his case.[4] *See State v. Bernini*, 222 Ariz. 607, ¶ 8 (App. 2009) (sufficiency of showing of substantial need may vary from case-to-case and trial court in best position to rule on discovery request).

¶13 Johnson now claims such photographs were essential to his defense because they "would have depicted the scene of the crime, established the location of the cabinets in the cell, and helped to establish where exactly the officer found the bag containing the phone." As the state points out, however, a diagram or witness testimony could readily have

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[3]Without citing any authority, Johnson asserts "the court had the power to allow an investigator in the prison to take photos" and he alternatively suggests the court should have inquired and received "a position from the department of corrections on how to accommodate Johnson's request."

[4]Although representing himself at the time he filed his motion, the court had advised Johnson he would be held to the same standards as an attorney. *See State v. Mott*, 162 Ariz. 452, 455-56 (App. 1989). And, "[a]n accused's right to self-representation does not mean that a defendant has an unlimited right to books, witnesses, and investigators that he may feel necessary to adequately represent himself." *State v. Rigsby*, 160 Ariz. 178, 182 (1989).

established the same things. *See State v. Connor*, 215 Ariz. 553, ¶ 24 (App. 2007) (no substantial need to examine victim's medical records when same evidence could be presented through witness testimony). And, in fact, the corrections officer who found the cell phone gave a detailed description of the layout of Johnson's prison cell and where the phone was discovered. Johnson too testified about details regarding his cell and the cabinet where the phone was found. Although, in some cases, verbal testimony and diagrams describing the *locus in quo* could be insufficient to provide the same evidentiary clarity of photographs, Johnson has failed to provide any persuasive argument why that is the case here. Accordingly, Johnson has demonstrated no abuse of discretion in the trial court's denial of his request. *See Fields*, 196 Ariz. 580, ¶ 4.

Disposition

¶14 For the reasons stated above, Johnson's conviction and sentence are affirmed.