NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
AUG 26 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2007-0243
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
COREY LAMONT HOLLEMAN,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064587

Honorable John S. Leonardo, Judge
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner — Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Corey Holleman was convicted of possession of a narcotic drug for sale and sentenced to an enhanced, presumptive prison term of 15.75 years. On appeal, Holleman argues the trial court erred by (1) proceeding with jury selection in his absence; (2) instructing the jury he could be convicted on an accomplice liability theory when no such allegation was made in the indictment; (3) giving jury instructions that misstated the law; and, (4) finding he had historical prior felony convictions by a preponderance of the evidence rather than by clear and convincing evidence. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In late 2006, officers of the Tucson Police Department investigated a suspected drug house in midtown Tucson occupied by Holleman and several others, culminating in a search of the residence pursuant to a warrant. In the master bedroom used by Holleman, they found two small digital scales, several small packages of powder cocaine, and a locked safe containing more than eighty-seven grams of crack cocaine, approximately one thousand dollars in cash, and several documents bearing Holleman's name, including a vehicle title, a notebook containing records of financial transactions, and an invoice for the purchase of the safe. Based on the items found, Holleman was charged with a single count of possession of a narcotic drug for sale.

¶3 Testimony at trial established that the safe had been used by Holleman and a business partner who had a key. There was conflicting evidence about whether the safe had also been accessible to the other occupants of the house; although Holleman's partner testified he kept the key next to the safe, the police did not find it during their search. Over Holleman's objection, the court instructed the jury on accomplice liability, and during closing argument, the state referred to this instruction, telling the jury that "even if you believe that [Holleman] never touched these drugs . . . and that he was letting people use the safe, then he's guilty." The jury found Holleman guilty of the charged offense and found for sentencing purposes that the amount of cocaine base he had possessed was 750 milligrams or more, pursuant to A.R.S. §§ 13-3401(36)(C) and 13-3408(D). After finding Holleman had four prior felony convictions and was on probation at the time of the offense, the court sentenced him to an enhanced, presumptive prison term of 15.75 years. This appeal followed; we have jurisdiction under A.R.S. § 13-4033(A).

Discussion

Right to be present at jury selection

¶4 Holleman first argues he was denied his constitutional right to be present at jury selection. A defendant's right to be present at trial is protected by the Fifth, Sixth, and Fourteenth Amendments of the federal constitution, as well as article II, § 24 of the Arizona Constitution. *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998). "This encompasses the defendant's presence at jury selection." *Id.* However, a defendant

may voluntarily relinquish this right. *Id.* ¶ 9; *see State v. Bible*, 175 Ariz. 549, 571, 858 P.2d 1152, 1174 (1993) (defendant waived right to be present at voir dire when he voluntarily left after the court "told him he had a right to remain and that the proceedings would continue if he left"). A trial court's determination that a defendant has waived the right to be present is a question of fact, which we will not reverse absent an abuse of discretion. *State v. Holm*, 195 Ariz. 42, ¶ 2, 985 P.2d 527, 528 (App. 1998), *disapproved in part on other grounds by State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001).

¶5 Here, Holleman assented to jury selection proceeding in his absence because of a delay in obtaining civilian clothes for him. But he relies on *Garcia-Contreras* to argue that his waiver of the right to be present was not voluntary. In that case, the defendant requested that jury selection be delayed while he obtained civilian clothes. 191 Ariz. 144, ¶ 1, 953 P.2d at 537. The trial court denied the request, instead stating he could either appear in his jail clothes or "waive" his presence. *Id.* Because a defendant has the right not to be compelled to appear before the jury in prison clothes, our supreme court found that Garcia-Contreras "was without meaningful alternatives, [and thus] his decision not to attend jury selection must be considered involuntary." *Id.* ¶¶ 8, 11.

¶6 Holleman had a similar problem in obtaining civilian clothes. However, half an hour after jury selection had been scheduled to start the trial court told Holleman that it "want[ed] to inquire whether we can start picking the jury without you being here and that's up to you and your attorney to decide." After Holleman confirmed he had "had an

adequate chance to talk to [his] attorney about this," he agreed to allow jury selection to proceed in his absence. Although our dissenting colleague correctly notes there is no record of the duration of Holleman's discussion with his attorney, nothing in the record suggests the trial court in any way pressured or impeded that discussion. The trial court was in the best position to judge Holleman's demeanor and response, and we should not second-guess the court's determination that his waiver was voluntary absent a clear abuse of discretion. *See Holm*, 195 Ariz. 42, ¶ 2, 985 P.2d at 528.

¶7 Furthermore, we disagree with the dissent's characterization of the court's words as "ambiguous." Here, the court merely inquired whether, given the delay that had already occurred, Holleman would agree to the process going forward in his absence until his civilian clothing arrived. Unlike *Garcia-Contreras*, Holleman did not ask to delay jury selection, nor did the trial court give Holleman an ultimatum to either attend wearing prison garb or waive his attendance. The dissent's contention that the court intended to proceed with jury selection under any circumstances is thus pure speculation.[1] On the contrary, there

[1]Similarly, we find nothing in the record to support the dissent's assertions that Holleman's counsel "was utterly unaware of Holleman's right to insist on the arrival of civilian clothes before jury selection commenced," or that Holleman's absence from jury selection "encouraged the jury to infer that he did not consider his trial important enough to attend." And, if counsel's performance in advising Holleman was indeed as deficient as the dissent suggests, Holleman must make such an argument in a proceeding for post-conviction relief. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32[, Ariz. R. Crim. P.,] proceedings."); *State v. Jones*, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996).

is nothing in the record to suggest that Holleman's waiver of his right to be present was anything but voluntary.

¶8 Nor are we persuaded by Holleman's related contention that any apparent waiver was invalid because he "was never informed by the trial court of his right to be present for the selection of his jury, or of the constitutional importance of his presence." The only authorities he cites in support of this position concern either a defendant's guilty plea pursuant to Rule 17, Ariz. R. Crim. P., or a waiver of the right to a jury trial pursuant to Rule 18.1, Ariz. R. Crim. P. Both these rules include specific requirements for trial judges to undertake a personal colloquy to inform defendants of their rights. *See, e.g.*, *State v. Baker*, 217 Ariz. 118, ¶ 8, 170 P.3d 727, 729 (App. 2007); *State v. Carter*, 216 Ariz. 286, ¶ 13, 165 P.3d 687, 690 (App. 2007). However, Rules 9.1 and 19.2, Ariz. R. Crim. P., which pertain to a defendant's right to be present during jury empanelment, contain no such requirement. *See* Ariz. R. Crim. P. 19.2 cmt. Rather, a warning added to a defendant's release order containing the conditions for pretrial release is sufficient to comply with the notice requirement of this rule. *See* Ariz. R. Crim P. 9.1 2007 cmt.; *State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977). In the present case, not only did the trial court clearly tell Holleman it was his decision whether jury selection should proceed in his absence, but the form providing the conditions for Holleman's release expressly stated his "right to be present at . . . trial and other proceedings" in the case. And there is no authority to support the dissent's contention that Holleman had a further "right to delay" the proceedings. Thus,

the trial court was not obligated to inform him of such a right or to establish he was aware of it. The court therefore did not err in accepting Holleman's waiver and proceeding with jury selection in his absence.

Accomplice liability

¶9 Holleman next contends the court erred in instructing the jury that he could be convicted on the theory of accomplice liability. At trial, he objected to the accomplice liability jury instruction on the ground that no evidence supported it. On appeal, he has apparently abandoned that argument[2] and instead renews an argument he first raised in a pro se motion below,[3] that the state's use of a theory of accomplice liability "altered the charges" and resulted in "th[e] erroneous submission of more than one offense to the jury." He thus argues he did not receive adequate notice of the charges against him because the indictment did not include any reference to accomplice liability.

¶10 Holleman confuses notice of the specific charges against him with "notice of how his responsibility for those offenses was to be proved." *State v. Tison*, 129 Ariz. 526, 538, 633 P.2d 335, 347 (1981). And although he correctly asserts a right to the former, *see State v. Johnson*, 198 Ariz. 245, ¶ 8, 8 P.3d 1159, 1162 (App. 2000), the state's use of an

---

[2]Although Holleman's statement of the issues asserts that he was "denied his right to due process when the trial court gave an accomplice liability instruction without ruling on [his] objection to the instruction that the evidence did not support the instruction," he fails to develop this argument. We therefore do not consider it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

[3]The court denied this motion, which it interpreted as a motion for a new trial pursuant to Rule 24, Ariz. R. Crim. P.

accomplice liability theory does not generally implicate this right because "[u]nder Arizona law, an accused is a principal regardless of whether he directly commits the illegal act or aids or abets in its commission." *State v. McInelly*, 146 Ariz. 161, 162-63, 704 P.2d 291, 292-93 (App. 1985). In *McInelly*, a police officer found drugs in a car in which the defendant and two others had been traveling. *Id.* at 162, 704 P.2d at 292. As in the present case, the indictment neither alleged that the defendant had committed the charged offenses as an accomplice, nor had it cited the accomplice liability statutes. *Id.* The trial court nevertheless instructed the jury on accomplice liability. *Id.* Division One of this court affirmed the defendant's convictions for transportation of marijuana for sale and other charges, finding the indictment provided adequate notice of the charges and that the defendant "was not entitled to notice of the precise method of proving those charges." *Id.* at 163, 704 P.2d at 293. And, directly contrary to Holleman's argument, the court stated, "There is no requirement that the indictment charge appellant as an accomplice in order to permit a jury instruction to that effect." *Id.* at 162, 704 P.2d at 292.

¶11 Holleman's reliance on *State v. Martin*, 139 Ariz. 466, 679 P.2d 489 (1984), is equally misplaced. There, our supreme court's reversal of the defendant's convictions was based not on the state's use of an accomplice liability theory per se, but on the fact that the use of such a theory in that case permitted the defendant to be convicted for selling drugs to his co-conspirator, an offense "not . . . in the contemplation of the indictment." *Id.* at 471, 679 P.2d at 494. In that case, "[t]o fit the state's theory . . . the indictment [would

have to have been] interpreted as reading that on May 28th, Martin and Phelps sold cocaine to Phelps." *Id.* at 471-72, 679 P.2d at 494-95. Here, Holleman was both charged and convicted of possession of a narcotic drug for sale, and regardless of whether the conviction was based on Holleman's own possession or his aiding others to possess by permitting them to use his safe for that purpose, the offense was clearly contemplated by the indictment. Thus, *Martin* is distinguishable, and there is no basis for Holleman's assertion that the accomplice liability instruction represented an alteration of the charges against him. The trial court therefore did not err in giving this instruction.

Burden of proof and jury instructions

¶12 Next, Holleman argues the court gave jury instructions that "caused the burden of proof to be shifted to the defense." We review jury instructions de novo to determine whether they properly stated the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). Because Holleman did not object to the instructions at trial, we review for fundamental error.[4] *See State v. Simpson*, 217 Ariz. 326, ¶ 12, 173 P.2d 1027, 1029 (App. 2007). "But, before we engage in fundamental error analysis, we must first find error." *State v. Herrera*, 203 Ariz. 131, ¶ 22, 51 P.3d 353, 359 (App. 2002). And we will not find

[4]Holleman suggests that the instructions were erroneous and the resulting error was structural, mandating reversal, because they constituted "[a] misleading instruction of reasonable doubt." *See State v. Torres*, 208 Ariz. 340, ¶ 11, 93 P.3d 1056, 1060 (2004) (noting United States Supreme Court has only found structural error in jury instructions where the reasonable doubt instruction was defective). We disagree. As we discuss below, the instructions at issue were entirely separate from the court's reasonable doubt instruction, which Holleman does not contest.

reversible error unless "a jury would be misled by the instructions when taken as a whole." *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

¶13 Here, a written instruction added the word "alone" to an oral instruction given by the trial court so that it read: "The number of witnesses testifying on one side or the other is not alone the test of a witness[']s c[r]edibility or of the weight of the evidence." In addition, the court instructed the jury that "the 'credibility of a witness' means the truthfulness of the witness." Holleman asserts that, taken together, these instructions shifted the burden of proof. First, he contends the inconsistent written instruction permitted the jury to consider the number of witnesses offered by each side, including his exercise of the right not to testify in his own defense, and thus "diluted the presumption of innocence." And second, he suggests the instruction on credibility was "confusing" and thus created "a real danger that the presumption of innocence m[ight] be prejudiced."

¶14 However, even if these instructions were, in themselves, "an incorrect statement of the law" as Holleman claims, we accept neither his contention that they shifted the burden of proof, nor his implication that they compromised the jury instructions as a whole. *See id.* The instructions at issue here addressed how the jury should evaluate the evidence, not the burden of proof. And, the jurors were also instructed that "if warranted by the evidence, [they might] believe one witness against a number of witnesses testifying differently" and in assessing witness credibility they should consider "how truthful is a witness, and how convincing is his/her evidence, and which witness and which evidence

appears to you to be most accurate and otherwise trustworthy in light of all the evidence and circumstances shown."

¶15 Furthermore, the contested instructions were given after the trial court had concluded its discussion of reasonable doubt, during which it clearly stated that "[t]he State has the burden [of] proving the defendant guilty beyond a reasonable doubt." The court had also instructed the jury to "consider all of the instructions," to "start with the presumption that the defendant is innocent," and not to "conclude that the defendant is likely to be guilty because of his choices" in testifying or calling witnesses. Viewed in their entirety, therefore, the jury instructions adequately reflected the law and made it clear that the state was required to prove Holleman guilty beyond a reasonable doubt. And, we presume the jurors followed these instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). We thus find no error, much less fundamental error.[5] *See Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268; *Herrera*, 203 Ariz. 131, ¶ 24, 51 P.3d at 360.

Proof of prior convictions

¶16 Finally, Holleman argues the trial court erred in applying a preponderance of the evidence standard in finding he had four prior convictions for purposes of sentence

[5]Holleman also suggests that the instructions constituted a comment on the evidence in violation of article VI, § 27 of the Arizona Constitution. However, because he cites no other authority in support of his cursory argument, we do not consider it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

enhancement.[6] Because he did not object below, we review for fundamental error.[7] Fundamental error is that which "goes to the foundation of [a defendant's] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005). And "[t]o 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.

¶17 "[P]rior convictions for sentence enhancement purposes must be established by clear and convincing evidence." *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). And in *Henderson*, 210 Ariz. 561, ¶ 25, 115 P.3d at 608, our supreme court found fundamental error where a trial court used a standard of review below the constitutionally required standard to find facts that were used to enhance a defendant's

---

[6]Holleman also argues he was entitled to have a jury determine the allegation that he had prior convictions. He concedes we have "declined prior invitations to require a jury trial on prior convictions without explicit guidance from the Arizona Supreme Court," *see State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005). Nevertheless, he relies on Justice Thomas's concurrence in *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring), for the proposition that a majority of the United States Supreme Court now recognizes that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which underpins the exemption of prior convictions from the general requirement that sentence-enhancing facts be found by a jury, "was wrongly decided." For the same reasons stated in *Keith*, we similarly decline Holleman's invitation. *See Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d at 230 (court of appeals will not anticipate how the Supreme Court may rule in the future).

[7]We disagree with Holleman's unsupported assertion that the court's actions constituted structural error. *See State v. Henderson*, 210 Ariz. 561, ¶ 17, 115 P.3d 601, 607 (2005) (failure to find sentence-enhancing factors by proper standard of proof and fact finder not structural error).

sentence. Here, the trial court found the state had proven Holleman's prior convictions "by a preponderance of the evidence." We therefore must conclude that fundamental error occurred.

¶18 Holleman, however, has failed to establish resulting prejudice. "The proper procedure for establishing a prior conviction is for the state to submit a certified copy of the conviction and establish that the defendant is the person to whom the document refers." *Cons*, 208 Ariz. 409, ¶ 16, 94 P.3d at 615. And in this case, Holleman's probation officer identified him in court, stated she was supervising him pursuant to two prior felony convictions in CR-64000 and CR-20031170, and confirmed that his full name, date of birth, and social security number matched those on the sentencing minute entries for two other felony convictions in CR-63059 and CR-63903. The state also introduced, without objection, copies of the convictions in all four cases.[8] Although Holleman contends on appeal that the state failed to prove the prior convictions, "neither party challenges the authenticity of these copies, and thus evidence conclusively proving his prior convictions is . . . in the record." *State v. Morales*, 215 Ariz. 59, ¶ 13, 157 P.3d 479, 482 (2007). Therefore, Holleman has not shown that a reasonable judge, applying the appropriate standard of proof, "could have reached a different result." *See Henderson*, 210 Ariz. 561,

[8]We note the copy of the conviction in CR-63059 was uncertified and apparently not formally admitted, but a trial court may take judicial notice of its own files, *State v. Richards*, 166 Ariz. 576, 579, 804 P.2d 109, 112 (App. 1990), and the court did so here.

¶ 27, 115 P.3d at 609. Because he has failed to make such a showing, we find no reversible error.

Disposition

¶19 For the reasons stated above, we affirm Holleman's conviction and sentence.

_____

GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____

PHILIP G. ESPINOSA, Judge

E C K E R S T R O M, Presiding Judge, dissenting.

¶20 As the majority opinion acknowledges, an accused has an undisputed due process right, protected variously by the Fifth, Sixth, and Fourteenth Amendments, to be present at all stages of his trial, and a concomitant right arising from the fair trial guarantee of the Sixth Amendment to appear before the jury in civilian, rather than jail, attire. *See State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998). In the absence of any evidence that the defendant has attempted to "'frustrate the process of justice'" by intentionally delaying the arrival of civilian clothes, the defendant has an implicit right to

have commencement of the trial await their arrival. *Id.* ¶¶ 12-14, *quoting Estelle v. Williams*, 425 U.S. 501, 505 n.2 (1976). Those rights, however, may be waived. *Id.* ¶ 9.

¶21 The United States Supreme Court has defined waiver as "'an intentional relinquishment or abandonment of a known right or privilege.'" *Barker v. Wingo*, 407 U.S. 514, 525 (1972) (reaffirming standard set forth in *Johnson* for waiver of constitutional rights), *quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 541 U.S. 477 (1981). And, both our federal and state supreme courts have applied related standards from *Johnson* in evaluating whether defendants have waived the specific rights at issue here. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970) (applying *Johnson* presumption against waiver in evaluating right to presence at trial); *see also Garcia-Contreras*, 191 Ariz. 144, ¶ 14, 953 P.2d at 539-40 (noting application of *Johnson* presumption in *Allen* and applying that standard in assessing waiver of right to presence in the context of delayed arrival of civilian attire); *State v. Jeffers*, 135 Ariz. 404, 416, 661 P.2d 1105, 1117 (1983) (finding defendant's decision to refuse street clothing for trial "an intentional relinquishment of a known right"). Nor may we presume from a silent or ambiguous record that an accused has intentionally foregone a known right. Rather, we must be "[m]indful . . . [to] 'indulge every reasonable presumption against the loss of constitutional rights.'" *Garcia-Contreras*, 191 Ariz. 144, ¶ 14, 953 P.2d at 540, *quoting Allen*, 397 U.S. at 343.

¶22 I part ways with the majority's well-reasoned decision because I can find nothing in the record that shows Holleman knew he had a right to insist that commencement of the trial await the arrival of his civilian clothes. Before beginning jury selection, the court inquired of Holleman as follows:

> Mr. Holleman, we are about to start the jury selection process but obviously there's a problem with your clothes and we are still trying to work that out so you can get civilian clothes so you can appear in Court with those. But we want to inquire whether we can start picking the jury without you being here and that's up to you and your attorney to decide.

Although the court expressly asked Holleman whether it could start jury selection in his absence, it did not clarify how jury selection would have proceeded in his presence. Nor would the context of the court's inquiry have reassured Holleman that the court would wait for the arrival of his clothes if he elected to be present for jury selection. To the contrary, the court made a record that it had already delayed the trial for thirty minutes to await the arrival of Holleman's clothes—and its subsequent appearance on the bench with the prefatory remark that "we are about to start the jury selection process" suggested it intended to wait no longer.

¶23 Thus, Holleman and his counsel reasonably could have construed the court's inquiry as offering two choices: proceed in the presence of the jury in jail attire or allow the trial to proceed in Holleman's absence. Nor would any of the court's subsequent comments

have contradicted that impression.[9] And, assuming arguendo that the court's comments are subject to more than one reasonable interpretation, courts may not presume the waiver of a constitutional right from an ambiguous record. *See Allen*, 397 U.S. at 343; *Garcia-Contreras*, 191 Ariz. 144, ¶ 14.

¶24 In short, Holleman's agreement to allow the trial to proceed in his absence cannot be construed as a waiver of his right to insist that the trial be briefly delayed to await civilian attire because nothing in the record demonstrates that he was aware he possessed such a right or that the court was somehow acknowledging the existence of that right in its comments. Rather the record suggests, albeit circumstantially, that the court intended to proceed with jury selection under any circumstances.

¶25 The majority correctly observes that the court provided Holleman an opportunity to consult with counsel about the decision. But the record does not provide us with the length or content of that discussion. And, assuming Holleman's counsel understood the court's actions and comments as expressing an intent to proceed under any circumstances, that discussion may have been no broader than that conducted between counsel and the defendant in *Garcia-Contreras*. In that case, our supreme court found the defendant had not waived his constitutional right to be present for jury selection in civilian clothes—even though the defendant there discussed the issue with his counsel, and even

[9]The court asked Holleman, "Do you understand what we're saying is just that you won't be present because you don't have the right clothes yet until we select a jury[?]"

though the defendant apparently failed to expressly assert any constitutional right to delay the trial for appropriate clothing.[10] *Garcia-Contreras*, 191 Ariz. 144, ¶¶ 6, 14, 953 P.2d at 538, 539-40.

¶26 Finally, I am skeptical that Holleman's counsel was aware of his client's right to delay the trial because, under the specific circumstances here, I can conceive of no strategic or tactical reason for Holleman to have agreed to allow jury selection to proceed in his absence. Properly advised, Holleman essentially had three choices. First, he could have attended jury selection wearing jail attire—and suffer the inculpatory visual contradiction to the presumption of innocence created by such attire. *See Estelle*, 425 U.S. at 504-05 (observing impairment of presumption of innocence caused by jail attire and acknowledging that the "reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment"). Second, he could allow jury selection to proceed in his absence, as he did. That absence not only prevented him from assisting in jury selection, it also encouraged the jury to infer that he did not consider his trial important enough to attend in its entirety—and that the identity of his jury and its avowals of impartiality were matters that failed to capture his interest. *See Garcia-Contreras*, 191 Ariz. 144, ¶¶ 18-20, 953 P.2d at 541 (noting defendant's potential role in the effective

[10]Garcia-Contreras's counsel had moved to continue the trial for the arrival of appropriate clothing, but nothing in the court's recital of the facts suggests he asserted any constitutional right of his client to have that motion granted. *Garcia-Contreras*, 191 Ariz. 144, ¶¶ 1, 6, 953 P.2d at 537, 538.

exercise of peremptory challenges and that "[d]efendant's absence [from jury selection] may . . . damage[] him in the eyes of the jury—some may . . . th[ink] he ha[s] irresponsibly failed to show up for the first day of his trial").[11]

¶27 Third, he could have insisted that the court delay jury selection until the arrival of his civilian attire and thereby avoid any damaging inferences at all. Because no properly advised defendant, aware of the latter option, would choose to allow the trial to proceed in his absence, I believe Holleman's acquiescence itself strongly suggests that his counsel was utterly unaware of Holleman's right to insist on the arrival of civilian clothes before jury selection commenced.[12] *See Johnson*, 304 U.S. at 464 (determination of whether there has been an intentional waiver of a constitutional right "must depend, in each case, upon the particular facts and circumstances surrounding that case").

¶28 Indulging every presumption against the waiver of constitutional rights, as controlling jurisprudence suggests we must, I do not agree the record before this court

---

[11]Moreover, respected scholarship in the area of trial advocacy suggests that a jury's first impression, once formed, is difficult to alter over the course of a trial. *See, e.g.*, Thomas A. Mauet, *Trial Techniques* § 4.1 (6th ed. 2002) (noting in trial advocacy context that "[a]s in life generally, the psychological phenomenon of primacy applies, and initial impressions become lasting impressions"); Natasha K. Lakamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. Rev. 845, 866 n.82 (1998) (noting how "primacy effect" can alter the way jurors perceive and process information).

[12]The Supreme Court has acknowledged that, notwithstanding the apparent impairment in the presumption of innocence, some defendants might prefer to stand trial in jail clothes and therefore the decision to do so conceivably could be viewed as a tactical decision to secure a jury's sympathy. *Estelle*, 425 U.S. at 508. But, Holleman did not choose that option here and the state has not suggested any conceivable tactical basis for allowing jury selection to occur in his absence.

supports a finding that Holleman knowingly waived his right to attend jury selection in civilian clothes. Although I would otherwise be inclined to find the constitutional violation here harmless based on the weight of the evidence presented against Holleman, our supreme court has characterized such error as structural. *See Garcia-Contreras*, 191 Ariz. 144, ¶ 20, 953 P.2d at 541 (finding defendant's unwaived absence from jury selection to be structural error "not amenable to harmless error review"). I would therefore reverse Holleman's conviction and remand the case for a new trial. I concur with the majority in all other respects.

_____

PETER J. ECKERSTROM, Presiding Judge