State v. Trent

2007 | Cited 0 times | Court of Appeals of Arizona | October 12, 2007

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of the Supreme Court

¶1 After a jury trial, appellant Dallas Sean Trent was convicted of four charges related to driving under the influence of an intoxicant (DUI) and one felony child abuse charge. On appeal, he argues that he was denied his constitutional right to be present at a pretrial suppression hearing and that he was convicted of crimes not charged in the indictment against him. Finding no merit in these arguments, we affirm Trent's convictions. He also argues, however, the trial court erred in placing him on a five-year term of probation for the child abuse conviction, a class five felony. We agree and, therefore, modify the probationary term on that conviction to conform to the statutory maximum of three years.

Background

¶2 "We view the facts in the light most favorable to sustaining the convictions, with all reasonable inferences resolved against the defendant." State v. Riley, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In June 2005, Pima County Sheriff's Deputy Loza stopped a vehicle Trent was driving after it crossed two lanes of traffic without signaling to exit the freeway. Loza testified that Trent's vehicle did not have a rear license plate and that Loza "couldn't see anything inside the [vehicle's] window that would show it [had] a temporary tag."

¶3 When Loza approached the vehicle, he noted five other people inside, including two children in the back seat. He smelled an odor of alcohol coming from the vehicle, and Trent admitted having "been drinking earlier in the day." Loza then called a second deputy to investigate Trent for DUI. That deputy noticed a "moderate odor of intoxicants" as Trent stepped out of the car and saw that his eyes "were red, watery and bloodshot." Trent also swayed slightly as he stood and "appeared kind of sleepy."

¶4 After undergoing field sobriety tests and failing a horizontal gaze nystagmus (HGN) test, Trent was arrested. He admitted having had two beers and having taken Vicodin for a foot injury. A blood test showed Trent had an alcohol concentration (AC) of .087 and an inactive marijuana metabolite in his blood, but no sign of Vicodin was found.

¶5 Because Trent's driver's license was suspended at the time of his arrest, the state charged him with "aggravated [DUI] while license is suspended" and "aggravated driving with an alcohol concentration of 0.08 or more while license is suspended" under A.R.S. § 28-1383. Because there were children in the vehicle, the state also charged one count of felony child abuse and two counts of aggravated DUI with a minor present.[1] After a jury trial, Trent was convicted as charged. The trial court suspended imposition of sentence, placing Trent on five years' probation on all counts. This appeal followed.

Discussion

I. Absence from Suppression Hearing

¶6 Trent first argues the trial court committed "structural, constitutional error requiring the reversal of his convictions" by holding in his absence a pretrial hearing on his motion to suppress evidence.[2] Trent filed that motion in December 2005, and a hearing was set for January 9, 2006. Trent, who was out of custody, did not appear at that hearing. Defense counsel informed the court that he had "had sporadic contact with [Trent]," but that Trent had called that morning and left a message that "his son was in the emergency room and he wouldn't be able to make it." Counsel requested a continuance, saying he "need[ed Trent] to testify." The state did not object, and the hearing was continued to January 30.

¶7 Trent again failed to appear at the January 30 hearing. His counsel did not explain Trent's absence, merely stating he had "brought . . . up last time [that Trent was] crucial to th[e suppression] issue and . . . need[ed] . . . to testify." The trial court responded: "As you pointed out, you brought this up last time, he's still not here so we will go ahead and proceed." Neither the court nor defense counsel made any further record about Trent's absence or the reasons therefor. And, although Trent was present on the first day of trial on February 7, neither the court nor Trent addressed the issue then.[3]

¶8 As the state points out, at no point below did Trent ever argue that his absence from the January 30 hearing was involuntary or object to the court's proceeding in his absence based on a right to be present. Thus, we review only for fundamental error. State v. Henderson, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" Id., quoting State v. Hunter, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To 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.

¶9 "The Sixth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, and article II, § 24, of the Arizona Constitution, establish and protect a

defendant's right to be present at his trial." State v. Reed, 196 Ariz. 37, ¶ 3, 992 P.2d 1132, 1133 (App. 1999). So, too, does Rule 19.2, Ariz. R. Crim. P. The state does not dispute that a suppression hearing is a critical stage of criminal proceedings to which that right attaches. See Clark v. Stinson, 214 F.3d 315, 322 (2d Cir. 2000); United States v. Hurse, 477 F.2d 31, 33 (8th Cir. 1973); State v. Robertson, 755 A.2d 1249, 1254 (N.J. Super. Ct. App. Div. 2000) ("[A]lmost every court that has examined the issue has concluded that the defendant's constitutional right to confront witnesses . . . guarantees defendant the right to be present at the hearing on the motion to suppress evidence."); cf. State v. Levato, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996) ("[A] defendant has the right to be present at every stage of the trial 'whenever . . . presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'"), quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964). But, "'[a] defendant may voluntarily relinquish the right to attend trial.'" Reed, 196 Ariz. 37, ¶ 3, 992 P.2d at 1133, quoting State v. Garcia-Contreras, 191 Ariz. 144, ¶ 9, 953 P.2d 536, 539 (1998).

¶10 Under Rule 9.1, Ariz. R. Crim. P., "[t]he 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." See also State v. Armenta, 112 Ariz. 352, 353, 541 P.2d 1154, 1155 (1975). And, "[w]hen the record demonstrates that such notice has been provided, the trial court may presume the absence is voluntary and the burden is on the defendant to demonstrate otherwise." State v. Fristoe, 135 Ariz. 25, 34, 658 P.2d 825, 834 (App. 1982).

¶11 Here, however, the record does not demonstrate that Trent received the notice required for the Rule 9.1 presumption to apply. Although he was advised that "if [he] fail[ed] to appear at court the court case and any trial c[ould] continue in [his] absence," nothing in the record shows that he was notified personally of the date and time of the suppression hearing.[4] And, unlike the situation in Reed, 196 Ariz. 37, ¶ 4, 992 P.2d at 1134, in which Reed was absent for the second day of trial, we cannot say "the trial court was entitled to initially rely on the inference that Rule 9.1 permits and to proceed." Although a defendant will normally have notice of the second day of trial when he or she has appeared on the first day, that is not necessarily so for a suppression hearing that was scheduled in Trent's absence and that did not directly relate to any other proceeding of which he was or should have been aware.

¶12 Likewise, contrary to the state's apparent argument, we cannot say this is a situation in which Trent's "failure to know of the . . . [hearing] dates . . . is directly attributable to his failure to keep in contact with the court and his attorney." Brewer v. Raines, 670 F.2d 117, 119 (9th Cir. 1982). It is true that "[a] defendant cannot be allowed to keep himself deliberately ignorant and then complain about his lack of knowledge." Id. But the record shows that Trent did maintain at least "sporadic contact" with his attorney and the court.[5] And the record is silent on whether Trent contacted, or attempted to contact, his attorney between January 9, when the suppression hearing was continued, and January 30, when the hearing was held. Absent such a record, the state did not make "a prima facie showing

of a voluntary waiver of the right to be present." State v. Rice, 116 Ariz. 182, 185, 568 P.2d 1080, 1083 (App. 1977). And the court should not have found, albeit implicitly, that the state did so.

¶13 In sum, Trent arguably has met the first component of fundamental error review by showing that error of a fundamental nature occurred. See Henderson, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; cf. State v. Jones, 197 Ariz. 290, ¶ 50, 4 P.3d 345, 363 (2000) ("The right to be present at all critical stages of a criminal trial is a fundamental right."); State v. Mann, 188 Ariz. 220, 230, 934 P.2d 784, 794 (1997) (no reversible error when defendant's absence "was not [from] an evidentiary type proceeding where [he] could respond to witnesses" or could have "communicate[d] with the attorney about testimony given there"). He has not, however, met his burden to show resulting prejudice. See Henderson, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶14 "Fundamental error review involves a fact-intensive inquiry, and the showing required to establish prejudice therefore differs from case to case." Id. ¶ 26. Here, Trent must show that the result of the suppression hearing probably would have been different had he been present. Cf. State v. Morales, 215 Ariz. 59, ¶ 11, 157 P.3d 479, 482 (2007) (no prejudice and no need to reverse for violation of Rule 17.6, Ariz. R. Crim. P., absent "showing that the defendant would not have admitted the fact of the prior conviction had the [Rule 17.6] colloquy been given"); State v. Ruggiero, 211 Ariz. 262, ¶ 27, 120 P.3d 690, 696 (App. 2005) (when fundamental, sentencing error alleged, defendant "'must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result [in finding an aggravator] than did the trial judge'"), quoting Henderson, 210 Ariz. 561, ¶ 27, 115 P.3d at 609.

¶15 Trent argues that, had he been present at the suppression hearing, "[h]e could have testified . . . that his lane change was safe and that his temporary license tag was . . . visibly displayed." But, as he acknowledges, Deputy Loza testified on cross-examination at the hearing that Trent's lane change "didn't affect any other traffic" and that "[t]here was a temporary tag inside the window." And Trent's arguments that, had he been present, he could have "assisted in cross-examination" or helped "establish[] a strategy to impeach Loza" are overly general and entirely speculative. He does not specify what those tactics or strategies would have been or how his assistance would have helped, let alone changed the result. Nor did he establish below, by affidavit or otherwise, what he would have testified to had he attended the hearing.

¶16 In sum, "[n]othing of evidentiary value in this record shows that error . . . deprived [Trent] of a fair trial." State v. Bible, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993). Thus, Trent has not demonstrated that he was actually prejudiced by any error here. See State v. Gomez, 211 Ariz. 494, ¶ 21, 123 P.3d 1131, 1136 (2005). Absent such a showing, he cannot prevail under a fundamental error standard of review. See Henderson, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; cf. State v. Dann, 205 Ariz. 557, ¶ 73, 74 P.3d 231, 249 (2003) (no error when defendant "failed to show how his presence at any of the procedural hearings would have affected his ability to defend against the charges or how he was prejudiced by the absences").

II. Notice of Charges

¶17 Trent next argues reversal is required because two of his convictions "could have been for offenses for which the grand jury did not indict him" and the remaining convictions were "tainted" by "unconstitutional evidence." Specifically, he contends "he had no notice of a formal charge that he had driven with [marijuana] metabolites in his system." If Trent was convicted of crimes different from those charged in the indictment, the trial court lacked jurisdiction to enter those convictions, and they must be vacated. See State v. Mikels, 119 Ariz. 561, 563, 582 P.2d 651, 653 (App. 1978); cf. State v. Johnson, 198 Ariz. 245, 8 P.3d 1159 (App. 2000).

¶18 When the state presented its case to the grand jury, the results of Trent's blood test were still pending. But the state presented the grand jury with evidence that Trent had admitted drinking and using Vicodin before driving and that a "preliminary breath test" had shown an AC of .083. As noted earlier, the grand jury indicted Trent on five counts, including two counts of "aggravated driving while under the influence of intoxicating liquor or drugs while a minor is present," "in violation of A.R.S. § 28-1383(A)(3)(a)(b), (F), (J) and (L) [and §] 28-1381."

¶19 At trial, when the prosecutor mentioned in opening statement that Trent had "had the metabolites of drugs in his system" while driving, Trent objected. He argued "[h]e wasn't charged with a metabolite in his system, and the grand jury wasn't presented any evidence on the metabolite in his system." He contended that introducing evidence of a marijuana metabolite instead of the Vicodin mentioned before the grand jury was effectively "amending the indictment." The trial court overruled his objection and allowed the state to introduce evidence that Trent had had a marijuana metabolite in his blood while driving.

¶20 Section 28-1383(A)(3), provides: "A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if . . . [,] [w]hile a person under fifteen years of age is in the vehicle, [he or she] commits a violation of either [A.R.S. §§ 28-1381 or 28-1382]." Under § 28-1381(A), "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle in this state" when the person (1) is "under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree"; (2) "has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle"; or (3) has "any drug defined in [A.R.S.] § 13-3401 or its metabolite in the person's body." Both marijuana, referred to in the statute as cannabis, § 13-3401(20)(w), and Vicodin, which contains hydrocodone, § 13-3401(21)(n), are included among the drugs defined in § 13-3401.

¶21 Thus, as the state argues, "because the indictment[] express[ly] cit[ed] to §§ 28-1381 and -1383(A)(3)(a), . . . [it] provided [Trent] sufficient notice on the two charged counts of aggravated DUI with a minor present." Indeed, the crime of driving with any drug or its metabolite in one's body in the presence of a minor was expressly alleged in the indictment when § 28-1381 was cited in its

entirety as the basis for Trent's violation of § 28-1383.

¶22 Trent, however, argues that "[t]he three different ways of committing DUI [under § 28-1381] are predicated on different acts and constitute separate crimes" and that "the State [should] properly charge[] such offenses in separate counts of an indictment." But the two counts of aggravated DUI with a minor present, as charged, were for violation of § 28-1383, not § 28-1381. Therefore, we must consider not whether the various subsections of § 28-1381 are separate offenses that should be separately charged but, rather, whether § 28-1383 sets forth multiple offenses or simply different means of committing the same offense.

¶23 As noted above, under § 28-1383(A)(3)(a), "[a] person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if" he or she violates § 28-1381 "[w]hile a person under fifteen years of age is in the vehicle." The four subsections of § 28-1381(A) are not listed separately in § 28-1383(A), but rather are included collectively in one subsection citing § 28-1381 in its entirety. § 28-1383(A)(3)(a). A second subsection, § 28-1383(A)(3)(b), provides that one also commits aggravated DUI by violating § 28-1382 while a person under fifteen is in the vehicle. Thus, the structure of § 28-1383(A) suggests that the subsections of § 28-1381(A) merely serve as different means of committing a single crime-aggravated driving while under the influence of intoxicating liquor or drugs. See State v. Rivera, 207 Ariz. 69, ¶ 10, 83 P.3d 69, 72 (App. 2004) ("We find it instructive that driving and actual physical control appear together in the same sentence rather than in separately numbered subsections."); cf. State v. Ramsey, 211 Ariz. 529, ¶ 19, 124 P.3d 756, 763 (App. 2005) (three or more acts specified in A.R.S. §§ 13-1405, 13-1406, or 13-1410, as required in § 13-1417, do not "constitute elements of the offense" but, rather, "are merely the means by or the manner in which one commits the crime of continuous sexual abuse of a child").

¶24 The state's analogy to the first-degree murder statute further supports this conclusion. Under A.R.S. § 13-1105, one commits first-degree murder either by intentionally causing death with premeditation or by causing death in the course and furtherance of certain enumerated felonies. In addressing that statute in a case where the prosecution first argued a new predicate felony in closing argument, our supreme court stated: "In order to avoid injustice and to ensure that proper notice has been given in a felony murder case, we believe the state should include the predicate felony in the original or an amended indictment." State v. Blakley, 204 Ariz. 429, ¶ 56, 65 P.3d 77, 88 (2003). But when the defendant has been given an adequate opportunity to defend, or when the question is whether the state will proceed on a premeditated- or felony-murder theory, the court has repeatedly found that "[t]here is no requirement that the defendant receive notice of how the State will prove his responsibility for the alleged offense." State v. Arnett, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988); see also Gerlaugh v. Lewis, 898 F. Supp. 1388, 1407 (D. Ariz. 1995) ("In Arizona premeditated murder and felony murder lead to one crime-first degree murder."); State v. Eastlack, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994); State v. West, 176 Ariz. 432, 443, 862 P.2d 192, 203 (1993), overruled on other grounds by State v. Rodriguez, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998).

¶25 Likewise, the offense set forth in § 28-1383 is a single crime that may be committed in several different ways. And a conviction under § 28-1383(A)(3) depends on the predicate violation of either § 28-1381 or § 28-1382. Thus, although it might be preferable for the state to include the specific predicate violation in the indictment, we cannot say that its failure to do so deprived the trial court of jurisdiction over the two charges in question, particularly when Trent was given adequate notice of the metabolite evidence before trial.

¶26 Additionally, we find distinguishable the various crimes Trent argues are analogous. Driving under the influence and driving with an AC of .08 or more, listed separately in subsections (1) and (2) of § 28-1381(A), are separate crimes. As our supreme court explained under the former DUI statute:

It is possible to have less than 0.10 blood alcohol content and still be under the influence of intoxicating liquor. Such a person would then be guilty of violating paragraph (A) and not paragraph (B). On the other hand, a person may have over 0.10 per cent blood alcohol content and still not have his driving abilities significantly impaired to come within the provisions of [former] A.R.S. § 28-692(A), driving under the influence of intoxicating liquor.

Anderjeski v. City Court, 135 Ariz. 549, 550-51, 663 P.2d 233, 234-35 (1983); see also State v. Thompson, 138 Ariz. 341, 346, 674 P.2d 895, 900 (App. 1984). In contrast, whichever subsection of § 28-1381(A) a defendant violated, he or she would still be guilty of violating only one subsection of § 28-1383(A) and, thus, only one act of aggravated DUI. Likewise, assault committed by a "[k]nowing[] touching" and assault committed by placing the victim "in reasonable apprehension of imminent physical injury" are separate crimes, listed in separate subsections and consisting of entirely different acts and elements. A.R.S. § 13-1203(A)(1)(2); see also State v. Sanders, 205 Ariz. 208, ¶¶ 31-33, 68 P.3d 434, 442-43 (App. 2003).

¶27 Trent's reliance on the various forms of sexual-conduct-with-a-minor offenses and State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (App. 1985), is similarly unavailing. That case dealt with separate acts, including masturbation and anal sex. Id. at 590, 716 P.2d at 47. The victim in that case testified at trial that he had performed some of those acts on Cummings, but evidence before the grand jury had indicated Cummings had performed the acts on the victim. Id. In addition, the victim did not testify at all about other charged acts. Id. In short, in Cummings, the acts alleged in the indictment and those established at trial were not only different acts but in some instances were performed by a different actor than the indictment alleged. And some of the charges were completely unsupported by evidence at trial.

¶28 Here, in contrast, the only crime charged and the only act at issue was aggravated DUI. Trent committed that crime by violating any provision of § 28-1381 while driving with a child under fifteen in the vehicle. The fact that he possibly could have violated § 28-1381 in several different ways does not change the fact that the resulting charge against him was only one offense-aggravated DUI.

¶29 In sum, although "[d]ue process requires that a defendant be given '"notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge,"'" "[t]he indictment itself need not inform the defendant of the theory by which the state intends to prove that charge so long as the defendant receives sufficient notice to reasonably rebut the allegation." Rivera, 207 Ariz. 69, ¶ 12, 83 P.3d at 73, quoting Blakley, 204 Ariz. 429, ¶ 47, 65 P.3d at 87, quoting Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517 (1948). The indictment here properly notified Trent of the specific charge-that he had committed aggravated DUI by violating § 28-1381 while driving with a minor under fifteen in the vehicle. And, even assuming he did not actually know what drugs he had recently used, the state timely disclosed before trial the blood test results that showed the presence of a marijuana metabolite. Thus, Trent received "sufficient notice to reasonably rebut the allegation" at trial. Rivera, 207 Ariz. 69, ¶ 12, 83 P.3d at 73. We find no reversible error in the trial court's admitting evidence regarding the marijuana metabolites found in Trent's blood sample or in its instructing the jury about that in connection with the two aggravated DUI charges against Trent.

¶30 In a related argument, Trent maintains his other convictions must also be reversed because they were "tainted" by the marijuana-metabolite evidence. First, to the extent Trent argues this evidence was improper other-act evidence, he did not object on that basis below. See Ariz. R. Evid. 103(a)(1) (party must "stat[e] the specific ground of objection"). Therefore, the argument is waived. See State v. Moody, 208 Ariz. 424, ¶ 163, 94 P.3d 1119, 1157 (2004).

¶31 In any event, the trial court properly instructed the jurors on the other charges against Trent, stating the elements they had to find proven beyond a reasonable doubt in order to find Trent guilty. Trent does not argue otherwise. And none of those instructions mentioned the presence of drug metabolites. We presume jurors follow the instructions they are given. State v. Ramirez, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994) ("[A]bsent some evidence to the contrary, we presume that the jury read and followed the relevant instruction."). Thus, we cannot say the evidence, even if erroneously admitted, affected the other verdicts.

III. Probation Term

¶32 Finally, Trent maintains the trial court erred in imposing five years' probation on his conviction for class five felony child abuse. As the state points out, Trent did not object to that below. Therefore, we review his claim for fundamental error. See Henderson, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶33 As Trent argues and the state concedes, under A.R.S. § 13-902(A)(4), probation for a class five or class six felony, other than a violation of §§ 28-1381 to 1383, may only continue for three years. Thus, the five-year probationary term the trial court imposed on the child abuse count exceeded the statutory maximum and was illegal. See State v. Cox, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002). An illegal sentence constitutes fundamental error. Id. We agree with the state that "the prejudice in serving a probation term that exceeds the statutory maximum is obvious." See Henderson, 210 Ariz.

561, ¶ 20, 115 P.3d at 607. In keeping with our statutory authority to correct an illegal sentence, A.R.S. § 13-4037(A), we grant Trent's request "to reduce his probation term for [the child abuse] count . . . to three years."

Disposition

¶34 We affirm Trent's convictions and the terms of probation imposed, except for the five-year term on the child abuse conviction, which is reduced to a three-year term.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge

1. At the state's request, the trial court dismissed a second felony child abuse count with prejudice before trial.

2. We note at the outset that Trent's reply brief contains a citation to and copy of a memorandum decision this court issued in another case. Trent claims he "does not cite this case as precedent but simply wishes to alert the Court to [its] recent ruling." But we see no distinction. See Black's Law Dictionary 1214 (8th ed. 2004) (defining precedent as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues"). Rule 31.24, Ariz. R. Crim. P., clearly states memorandum decisions may be cited for only two reasons: (1) to establish res judicata or similar defenses; and (2) to inform the court of such a decision so that it "can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review." Trent does not cite the memorandum decision for either of those reasons and, therefore, plainly violates our supreme court's rule. Unless or until that rule is changed, we caution counsel to comply with it.

3. Trent was also absent on the second day of trial. He called defense counsel and reported that he had been involved in an automobile accident and had been taken to the hospital. Counsel was not able to confirm Trent's presence at the hospital, however, and no police report of the incident was made. The trial then proceeded in Trent's absence. He does not argue that proceeding in his absence on the second day of trial violated his rights.

4. The record does contain a form entitled "conditions of release and order," on which the state relies to show that Trent had been advised of his right to be present. That form states: "I understand I have the right to be present at my trial and other proceedings in my case, and if I fail to appear, the trial or proceedings will be held without me." But the line provided for Trent's signature on that form is blank and, therefore, nothing shows that he ever saw, read, or received a copy of the form.

5. The state argues the trial court told Trent that he had to stay in contact with his attorney. Indeed, the minute entry for

the November 14, 2005, pretrial conference, to which the state refers in its brief, does say Trent was "admonished to remain in contact with his attorney." The transcript of that conference, however, shows the trial court gave no such warning. In any event, we need not address that discrepancy because such a warning was not required under Rule 9.1, Ariz. R. Crim. P., and the possibility that the trial court gave it does not change our analysis of this point.