MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jose Alfredo Brena,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 27, 2023

Court of Appeals Case No. 23A-CR-910

Appeal from the Elkhart Superior Court

The Honorable Gretchen S. Lund, Judge

Trial Court Cause No. 20D04-1910-F6-1391

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Jose A. Brena appeals his convictions of Operating While Intoxicated Endangering a Person with a Passenger less than 18 years of age, as a Level 6 felony;[1] Resisting Law Enforcement, as a Level 6 felony;[2] Possession of Marijuana, as a Class B misdemeanor;[3] and Operating a Motor Vehicle Without Ever Receiving a License, as a Class C misdemeanor.[4]

[2] We affirm.

Issues

[3] Brena raises two issues, which we restate as follows:

I. Whether the trial court erred when it held Brena's trial in his absence without subsequently conducting an evidentiary hearing regarding the reason for his absence.

II. Whether the trial court abused its discretion when it admitted hearsay evidence pursuant to the excited utterance exception.

Facts and Procedural History

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[1] Ind. Code § 9-30-5-1; I.C. § 9-30-5-3(a)(2).

[2] I.C. § 35-44.1-3-1(a)(3) & (c)(1)(A).

[3] I.C. § 35-48-4-11(a)(1).

[4] I.C. § 9-24-18-1(a).

[4] On the evening of October 9, 2019, Brena was driving a vehicle in Elkhart with his two sons, N.B. and D.B. N.B., who was twelve years old, was in the front passenger seat, and D.B., who was fifteen years old, was in the back seat. An undercover officer ("UC14"[5]) with the Elkhart City Police Department, who was also a member of the Elkhart County Interdiction and Covert Enforcement unit, was on patrol that evening and saw that Brena's vehicle was activating its brake lights in an intersection when the light was green. In UC14's experience, that behavior "shows a lot of poor depth perception, which is consistent with subjects that are impaired." Tr. at 62. As UC14 followed the vehicle, he observed it "sideswipe the curb" to the right. *Id*. at 63. UC14 then activated his vehicle's lights, at which point Brena's vehicle "accelerated and continued traveling" for approximately one minute—ten "city blocks"—before coming to a stop in a parking lot. *Id*. at 64. By that point, UC14 had activated his vehicle's siren in addition to its lights.

[5] Because Brena's vehicle did not stop immediately when UC14's lights were activated, the traffic stop became a "felony traffic stop." *Id*. at 65. During such a stop, for purposes of officer safety, the driver is ordered to "put the keys outside of the vehicle" while the officer waits for additional officers to arrive to assist. *Id*. Then, "once it is safe to do so, [the officers] call one subject out [of the vehicle] at a time, at gunpoint." *Id*. Brena complied with UC14's

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[5] Due to his undercover work, the officer was identified at trial and in the briefs only as "UC14."

commands, laid on the ground, and was handcuffed. As UC14 was escorting Brena to a squad car, he felt Brena's arm "tensing up," and Brena then "lunged backwards and kicked" another officer. *Id*. at 73. During this time, UC14 noticed that Brena was emitting the "odor of alcoholic beverages" and had slurred speech and "red, watery, bloodshot eyes." *Id*. at 85. Brena later failed three field sobriety tests and refused to take a certified chemical test. Subsequent investigation also disclosed that Brena did not have, and had never had, a driver's license.

[6] By the time Brena was being handcuffed, multiple officers had arrived with their squad car lights and sirens activated, and they had approached the vehicle with their guns drawn because it was a felony traffic stop. N.B. and D.B. were also ordered at gunpoint to exit the vehicle, and they were then handcuffed. N.B. exited the vehicle and was "noticeably stressed out," *id*. at 77, and "[l]ooking around frantically," *id*. at 75. When N.B. then spoke with UC14, N.B. "talked really softly and his voice cracked." *Id*. at 77. When N.B. had exited the vehicle, UC14 noticed marijuana on the back of N.B.'s pants. N.B. told UC14 that Brena had thrown a baggie of marijuana into the front passenger seat and told N.B. to "get rid of it or hide it." *Id*. at 107. Officers detected the odor of raw marijuana emanating from the vehicle and proceeded to search it. The officers "found marijuana basically scattered throughout the front passenger seat and to the left side of the front passenger seat." *Id*. at 80.

[7] Brena was charged with multiple crimes as a result of his intoxicated and unlicensed driving, resisting the traffic stop, and possessing marijuana. A bond

order signed about two days after Brena's arrest indicated that he had "very recently [been] released from incarceration for [Class] A felony Dealing in Cocaine or Narcotic Drug." App. at 29. Brena posted bond and appeared at his initial hearing on October 18, 2019, as well as multiple status conferences. At a status conference on February 17, 2021, at which Brena was present, the trial court scheduled a final status conference for May 12, 2021, and a jury trial for June 22, 2021.

[8] When the court scheduled those dates at the February 2021 status conference, it had the following colloquy with Brena:

> [Court]: I'm going to give you two important dates.… Your first one is going to be your jury trial. I am scheduling you for a jury trial on June 22nd, 2021[,] at 8:30 in the morning.
>
> [Brena]: All right.
>
> [Court]: I am scheduling you for [a] status conference on May 12th, 2021[,] at 1:15 in the afternoon.
>
> [Brena]: All right, so–
>
> [Court]: So, let's talk about this. The status conference on May 12th at 1:15, you should anticipate that you will appear virtually, just like you are today. Okay?
>
> [Brena]: Okay.

> [Court]: Your jury trial, obviously, will be in person. You'll be expected to be here in person on June 22nd at 8:30. Do you understand that?
>
> [Brena]: Yes, Your Honor.
>
> [Court]: Okay. So, Mr. Brena, do you acknowledge that you have a jury trial scheduled on June 22nd, 2021[,] beginning at 8:30 in the morning?
>
> [Brena]: Yes.
>
> [Court]: Do you acknowledge that you'll be here for your jury trial?
>
> [Brena]: Yes, Your Honor.
>
> [Court]: Do you further acknowledge that if you fail to appear for your trial, your trial could be held in your absence?
>
> [Brena]: Yes, Your Honor.

Tr. at 22-23.

[9] Brena failed to appear at the May 12 status conference or a subsequently scheduled status conference on May 26. At the latter, Brena's counsel informed the trial court that he had not had contact with Brena: "No, I called yesterday and left him a voicemail on the new number that we just got from him on May the 8th, but I have not heard anything from him. He didn't call me back so that's all I can say." *Id*. at 24. After recounting the timeline of dates and prior

scheduling orders, the trial court found that Brena had notice of the jury trial date and issued a warrant for his arrest.

[10] Prior to trial, the State filed a motion requesting permission to introduce the statements of N.B. through UC14, under the excited utterance exception to the hearsay rule. Brena's counsel objected to the motion, arguing that the excited utterance from N.B. was not related to the cause of the excitement, so the hearsay exception did not apply. Moreover, Brena's counsel noted that, under the best evidence rule, N.B. should be called to testify so that Brena had the opportunity to cross-examine N.B. The trial court took the matter under advisement and later granted the request and admitted the evidence during the trial.

[11] Brena's trial was held as scheduled on June 22, but Brena did not appear. Brena's counsel informed the court that he had not had any contact from Brena "since prior to the last (2) court dates he failed to appear at." *Id*. at 26. The trial court found that Brena had notice of the jury trial date, and the State moved to try him in absentia. Brena's counsel was asked if he had any objection, and he responded, "No, I don't believe I can object. He was advised on the record." *Id*. at 26-27. The trial proceeded to voir dire and opening statements. Then the trial court again asked Brena's counsel about any "update on [Brena's] status or whereabouts," to which Brena's counsel replied, "No, I have no updates. I have not heard from him, and it's been a long time since I've been able to reach him." *Id*. at 53. The trial was held in Brena's absence but with his counsel representing him.

[12] Following the presentation of evidence, the jury found Brena guilty of Operating While Intoxicated Endangering a Person with a Passenger under eighteen (18) years of age, Resisting Law Enforcement, Possession of Marijuana, and Operating a Vehicle Without Ever Having a Driver's License. A warrant for Brena's arrest was served on March 2, 2023, and a hearing on Brena's failure to appear was held on March 6. At the hearing, the trial court twice asked Brena why he had failed to appear at his trial. Brena responded that he "caught COVID" at some point "during that time." *Id*. at 153. When questioned further, Brena stated that he did not remember exactly when he had COVID, but "it was during the time [he] had to go to Court." *Id*. Brena then asked about his right to appeal and indicated his intent to hire his own counsel. Brena did not request a hearing to present further evidence regarding his reason for being absent at his jury trial. When the court asked him at the end of the hearing whether he had any more questions for the court, Brena said no.

[13] At Brena's subsequent sentencing hearing, the trial court sentenced him to an aggregate executed sentence of two years of incarceration. This appeal ensued.

Discussion and Decision

Waiver of Presence at Trial

[14] Brena appeals the trial court's decision to conduct his trial in his absence. Generally, criminal defendants have a constitutional right to be present at all stages of their trials. *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007).

However, that right may be waived if it is done so knowingly and voluntarily. *Id*.

> When a defendant fails to appear for trial and fails to notify the trial court or provide it with an explanation of his absence, the trial court may conclude the defendant's absence is knowing and voluntary and proceed with trial when there is evidence that the defendant knew of his scheduled trial date.

Id. "The best evidence that a defendant knowingly and voluntarily waived his or her right to be present at trial is the defendant's presence in court on the date the matter is set for trial." *Id*. (quoting *Lampkins v. State*, 682 N.E.2d 1268, 1273 (Ind. 1997), *modified on reh'g*, 685 N.E.2d 698 (Ind. 1997)).

[15] A defendant who has been tried in absentia must be afforded an opportunity "'to explain his absence and thereby rebut the initial presumption of waiver.'" *Lusinger v. State*, 153 N.E.3d 1162, 1166 (Ind. Ct. App. 2020) (quoting *Brown v. State*, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005), *trans. denied*). However, "[t]his does not require a sua sponte inquiry; rather, the defendant cannot be prevented from offering an explanation." *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied*. On review, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial. *Id*. "A defendant's explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him in absentia." *Id*. (citing *Fennell v. State*, 492 N.E.2d 297, 299 (Ind. 1986)).

[16] Brena does not dispute that he was not present in court on February 17, 2021, when the court set his trial for June 22, 2021. Thus, Brena does not dispute the fact—which is well-supported by the record—that Brena had actual knowledge of the date, time, and place of his jury trial. Nor does Brena dispute the facts that, on March 6, the trial court provided him with an opportunity to provide an explanation for his absence from the trial, and he did so. Brena's only contention on appeal is that the trial court erred by not setting an evidentiary hearing on the reasons for Brena's absence. Brena acknowledges that he did not ask for such a hearing and that the trial court had no duty to set one sua sponte. Appellant's Br. at 12.

[17] Nevertheless, Brena maintains that the trial court erred when it failed to take the "more appropriate action" of "scheduling a hearing to permit [him] the opportunity to present evidence to corroborate his reason for missing his trial date." *Id*. However, Brena cites no supporting authority for that contention, and we find none. Rather, the controlling authority provides only that the court cannot prevent a defendant from offering an explanation for his absence. *E.g., Soliz*, 832 N.E.2d at 1029. Brena does not contend—nor could he—that the court prevented him from offering an explanation, as he clearly did so at the May 6 hearing. No more was required—or even requested. *See id*.

[18] The trial court did not err when it held Brena's trial in his absence and did not hold a post-trial evidentiary hearing regarding the reasons for the absence.

Excited Utterance Hearsay Exception

[19] Brena also appeals the trial court's decision to allow UC14 to testify as to what N.B. told him at the time of the felony traffic stop, over Brena's hearsay objection. Specifically, Brena challenges the admission of N.B.'s statements that Brena had possession of the marijuana in the vehicle, threw it at N.B., and told N.B. to hide it.[6]

[20] A trial court has broad discretion in ruling on the admissibility of evidence, and we will not disturb its ruling unless the challenger shows that the court abused its discretion. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

[21] Hearsay is a statement made by an out-of-court declarant that is offered to prove the truth of the matter asserted. Ind. Evidence Rule 801. Hearsay is inadmissible, with specific exceptions. Evid. R. 802. One such exception is the "Excited Utterance," which the rules define as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Evid. R. 803(2).

> To meet the excited utterance exception, three elements must be present: (1) a "startling event or condition" has occurred; (2) the declarant made a statement while "under the stress or excitement caused by the event or condition;" and (3) the statement was

[6] We note that the challenged statements relate only to the possession of marijuana conviction.

> "related to the event or condition." *Lawrence v. State*, 959 N.E.2d 385, 389 (Ind. Ct. App. 2012), *trans. denied*. …
>
> This test is not "mechanical" and admissibility turns "on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications." *Sandefur v. State*, 945 N.E.2d 785, 788 (Ind. Ct. App. 2011). …
>
> "The heart of the [excited utterance] inquiry is whether the declarant was incapable of thoughtful reflection." *Teague* [*v. State*], 978 N.E.2d [1183,] 1187 [(Ind. Ct. App. 2012)]…. The rationale behind admitting excited utterances is that startling events and absence of opportunity for reflection vest the statements with reliability and reduce the likelihood of falsification. *See* 13 Robert Lowell Miller Jr., Indiana Practice: Indiana Evidence § 803.102 at 307-09 (4th ed. 2018).

Ramsey v. State, 122 N.E.3d 1023, 1032 (Ind. Ct. App. 2019) (internal citation omitted), *trans. denied*.

[22] The record here reveals that N.B. spoke with UC14 shortly after Brena's vehicle was stopped. At that time, twelve-year-old N.B. was "noticeably stressed out" after very recently (1) having been a passenger in a car that was fleeing police, (2) having Brena throw marijuana at him and order him to hide it, and (3) having police, with guns drawn, order him, his father, and his brother to exit the vehicle and place them in handcuffs. Tr. at 77. Upon exiting the vehicle, N.B. was "looking around frantically," *id*. at 75, and spoke to UC14 "really softly," with his voice "crack[ing]," *id*. at 77. Thus, as Brena concedes, N.B.'s

statements were made while he was still under the stress caused by a startling event. *See* Appellant's Br. at 15.

[23] But Brena argues that the only startling event was having the police order N.B., at gunpoint, to exit the vehicle and place him in handcuffs. And he asserts that N.B.'s challenged statements did not encompass that startling event; rather, he contends that the statements concerned only the events that occurred prior to the stop. Brena appears to suggest that being a passenger in a fleeing vehicle and having marijuana thrown at him and being ordered to hide the marijuana from the police during the flight of that vehicle, were not "startling events" to twelve-year-old N.B. We disagree. The trial court was well within its discretion to find that those were startling events, that N.B.'s statements related to those events, and that N.B.'s statements were made while he was still under the stress of those startling events.

Conclusion

[24] The trial court did not err when it held Brena's trial in his absence, as Brena knowingly and voluntarily waived his right to be present and was not prevented from providing an explanation for his absence. Nor did the trial court err when it did not hold a post-trial evidentiary hearing on the reasons for Brena's absence from trial. And, the trial court did not abuse its discretion when it admitted UC14's testimony about what N.B. told him under the excited utterance exception to the rule against hearsay.

[25] Affirmed.

Tavitas, J., and Kenworthy, J., concur.