MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

R. Patrick Magrath
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jesse R. Drum
Assistant Section Chief
Criminal Appeals
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael H. Wesseling,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 13, 2022

Court of Appeals Case No. 21A-CR-2856

Appeal from the Dearborn Superior Court

The Honorable Jonathan N. Cleary, Judge

Trial Court Cause No. 15D01-0910-FD-204

Najam, Judge.

Statement of the Case

[1] Michael H. Wesseling appeals his conviction for intimidation, as a Class D felony, and his corresponding sentence. Wesseling raises two issues for our review:

1. Whether the trial court erred when it tried him *in absentia*.

2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] Wesseling was in a romantic relationship with K.L. from 1998 to 2001. During the relationship, K.L. gave birth to a child. K.L., who had sole legal custody of the child, obtained a court order for Wesseling to pay child support. "In the beginning," Wesseling complied with the child-support order. Tr. at 45. However, his payments became "very sporadic." *Id*. As a result, on October 10, 2008, the court held Wesseling in contempt. *See* Ex. at 6. The court then continued the matter to December 19. *See id*.

[4] Shortly after 2:00 a.m. on December 17, Wesseling called K.L. and "threaten[ed]" her. Tr. at 47. In particular, Wesseling left K.L. a voicemail message in which he told her to "drop the child support by Friday or you're all dead." *Id*. He also said that he "would cook [her] kids in front of [her] f**king face and eat them." *Id*. K.L. reported the message to Dearborn County

Sheriff's Deputy Jacob Bunner. The State then charged Wesseling with intimidation, as a Class D felony.

[5] On October 18, 2010, the trial court held a jury trial.[1] Wesseling did not appear, so the court began the trial *in absentia*. At the conclusion of jury selection, Wesseling called the court and stated that he had been in "an accident." *Id*. at 28. Wesseling advised the court that he was not in the hospital and that he would "be [t]here." *Id*. The court then noted for the record that it had previously advised Wesseling of the date and time of the trial at two prior hearings. *See id*. The trial proceeded, but Wesseling never appeared.

[6] K.L. testified that Wesseling's voicemail caused her to feel "scared" for her and her kids' lives. *Id*. at 51. She further testified that this was not the first time Wesseling had threatened her. In particular, she testified that he previously "threatened to cut off [her] head," "pulled a knife" on her, and "slashed" her parents' tires and wrote threats on the hood of their truck. *Id*. at 52. Deputy Bunner then testified that Wesseling's phone records confirmed that he had called K.L. at 2:24 a.m. on December 17, 2008. At the conclusion of the trial, the jury found Wesseling guilty as charged.

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[1] A few months before his scheduled trial date, Wesseling filed a "waiver of counsel and demand to proceed *pro se,*" which the court approved. Appellant's App. Vol. 2 at 25, 28.

[7] On October 25, Wesseling filed a letter with the court in which he "request[ed]" a new trial. Appellant's App. Vol. 2 at 123. In his letter, Wesseling stated that he had been "badly injured" about thirty-two hours before his trial and that it "was against [his] physical welfare to go to court on [his] trial date." *Id*. The court did not take any action on that letter.

[8] On November 22, 2021, the court held a sentencing hearing.[2] At the beginning of the hearing, Wesseling testified that he had "slipped" and hit his eye the night before his trial. Tr. at 91. He further testified that he and his father "decided that it wasn't in [their] best interest[s] to bring [him] out here." *Id*. Wesseling also testified that, in addition to calling the court, he had faxed the court a copy of the hospital records showing that he had sustained a "laceration" and received stitches. *Id*. at 95. The court responded that it did not have "those medical records," so it did not "have any proof" that Wesseling had been injured. *Id*. at 96.

[9] The court then sentenced Wesseling. Wesseling admitted that he had shot a man in Ohio after he was convicted of the instant offense. *See id*. at 92. The court identified as aggravators the "heinous nature" of the offense and Wesseling's subsequent felony conviction in Ohio. *Id*. at 100. The court then acknowledged Wesseling's "mental health diagnosis" and substance-abuse

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[2] On March 30, 2011, Wesseling was convicted of felonious assault and aggravated battery in Ohio and, as a result, served eleven years in the Ohio Department of Correction. That conviction and sentence caused the delay in sentencing in the present case.

issues but noted that Wesseling had not sought treatment for either problem. *Id*. at 102-03. "[B]ased upon the aggravating factors," the court sentenced Wesseling to three years, with two years executed and one year suspended to probation.[3] *Id*. at 103. This appeal ensued.

Discussion and Decision

Issue One: Trial In Absentia

[10] Wesseling first asserts that the court violated his due process rights when it held his trial *in absentia*. As this Court has previously stated:

> "A criminal defendant has a right to be present during his trial under the Sixth Amendment of the U.S. Constitution and under [Article I, Section 13] of the Indiana Constitution." *Fennell v. State*, 492 N.E.2d 297, 299 (Ind. 1986). "A defendant in a non-capital case may waive his right to be present at trial, but the waiver must be voluntarily, knowingly and intelligently made. The trial court may presume a defendant voluntarily, knowingly and intelligently waived his right to be present and try the defendant *in absentia* upon a showing that the defendant knew the scheduled trial date but failed to appear." *Ellis v. State*, 525 N.E.2d 610, 611-12 (Ind. Ct. App. 1987) (citation omitted). "The best evidence of this knowledge is the defendant's presence in court on the day the matter is set for trial." *Fennell*, 492 N.E.2d at 299. "A defendant who has been [tried in absentia], however, must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver." *Ellis*, 525

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[3] In its written judgment of conviction and sentencing order, the court placed an "x" next to a pre-printed statement that Wesseling had "entered a plea of guilty to the Court with sentencing at the Court's sole discretion." Appellant's App. Vol. 2 at 177. However, it is clear that Wesseling did not enter into a guilty plea but, rather, was convicted following a jury trial. Neither party discusses this clerical error in their briefs on appeal.

> N.E.2d at 612. "This does not require a *sua sponte* inquiry; rather the defendant cannot be prevented from explaining." *Hudson v. State*, 462 N.E.2d 1077, 1081 (Ind. Ct. App. 1984). As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial. *See Reel v. State*, 567 N.E.2d 845, 846 (Ind. Ct. App. 1991) (employing "voluntarily and knowingly" standard). 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. *Fennell*, 492 N.E.2d at 299.

Diaz v. State, 775 N.E.2d 1212, 1216-17 (Ind. Ct. App. 2002) (footnotes omitted).

[11] Here, there is no dispute that Wesseling knew of his trial date but did not appear for his trial. It is therefore presumed that he waived his right to be tried in person. *See id*. Still, Wesseling contends that he "rebutted that presumption" when he "notified the court of his injury and his inability to attend trial." Appellant's Br. at 11-12. We cannot agree.

[12] The record demonstrates that Wesseling's trial was scheduled to begin at 8:30 a.m. on October 18, 2010. But it was not until over an hour later, at approximately 9:40 a.m., that Wesseling called the court to notify it of his alleged injury. During that phone call, Wesseling acknowledged that he was not in the hospital and stated that he would he "would be [t]here." Tr. at 28. Despite that assurance, Wesseling never appeared. Then, in his letter to the court requesting a new trial, Wesseling informed the court that he had been injured "about 32 hours" before the trial and that it was "against [his] physical

welfare to go to court" on his trial date. Appellant's App. Vol. 2 at 123. And, at sentencing, Wesseling said that he and his father "decided that it wasn't in [their] best interest to bring [him] out there." Tr. at 91.

[13] Even if we assume for the sake of argument that Wesseling had sustained an injury the night before his trial,[4] when he first called the court on the day of his trial, he did not indicate that his injury made it impossible for him to appear. To the contrary, he told the court that he would be there. However, he never appeared. And, other than his vague statements that it was against his "physical welfare" and not in his "best interest" to go to trial, his later communications to the court did not offer any explanation to demonstrate that his injury prevented his attendance at his trial. From our review of the record, we conclude that the evidence supports a reasonable inference that Wesseling was able to attend his trial but made a conscious decision not to. As such, we cannot say that the court erred when in concluded that Wesseling had knowingly and voluntarily waived his right to be present at his trial. The court did not err when it conducted Wesseling's trial *in absentia*.

Issue Two: Sentencing

[14] Wesseling next contends that his sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that

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[4] While Wesseling claims that he faxed the court his medical records, the court stated that it did not have "those medical records," so there was not "any proof" that he had been injured. Tr. at 96.

"[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This Court has recently held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has recently explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[15] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless

overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[16] The sentencing range for Wesseling's Class D felony is six months to three years, with an advisory sentence of one and one-half years. Ind. Code § 35-50-2-7(a) (2008). Here, the court identified as aggravators the "heinous nature" of the offense and Wesseling's subsequent felony conviction in Ohio. Tr. at 102. And, while the court did not explicitly identify them as mitigating factors, the court acknowledged Wesseling's "mental health diagnosis" and substance-abuse issues. *Id*. Then, "based upon the aggravating factors," the court sentenced Wesseling to an enhanced term of three years, with two years executed and one year suspended to probation. *Id*. at 103.

[17] On appeal, Wesseling asserts that his sentence is inappropriate in light of the nature of the offense because, while "upsetting," his conduct was not "particularly heinous." Appellant's Br. at 14. He maintains that nothing about the offense "went beyond the scope of exactly the conduct proscribed by the legislature." *Id*. And Wesseling maintains that his sentence is inappropriate in light of his character because he has "significant family support," he planned to "seek gainful employment," and his family "had seen a lot of growth" in him. *Id*.

[18] However, Wesseling has not met his burden on appeal to demonstrate that his sentence is inappropriate. With respect to the nature of the offense, Wesseling threatened to kill K.L. and her children, and he threatened to cook K.L.'s children and eat them in front of her simply because she sought to enforce a child-support order. Nothing about those threats shows any restraint, regard, or lack of brutality. Wesseling has not presented compelling evidence portraying the nature of the offense in a positive light. *See Stephenson v. State*, 29 N.E.3d 111, 122.

[19] As for his character, Wesseling has a criminal history that dates back to 1997, spans two states, and includes five misdemeanors prior to the instant felony conviction. Further, as Wesseling acknowledged, after he had committed the instant offense, he was convicted in Ohio of felonious assault and aggravated battery. In addition, leading up to the instant offense, Wesseling had threatened to kill K.L., had held a knife to her, and had slashed her parents' tires. And, as the court noted, Wesseling has a history of drug use for which he has not sought treatment, which reflects poorly on his character. We cannot say that Wesseling's sentence is inappropriate in light of his character. We therefore affirm Wesseling's sentence.

Conclusion

[20] In sum, the trial court did not err when it tried Wesseling *in absentia*. And Wesseling's sentence is not inappropriate in light of the nature of the offense and his character. We affirm his conviction and sentence.

[21] Affirmed.

Bradford, C.J., and Bailey, J., concur.