

Christopher M. Lee appeals after a jury trial from his conviction and sentence for Burglary,¹ a class B felony, and Theft,² a class D felony. In his appeal, Lee presents the following issues:

- I. Did the trial court commit various errors when sentencing Lee?
- II. Did the trial court err by trying Lee *in absentia*?

We affirm in part and reverse and remand in part.

The facts most favorable to the jury's verdict reflect that on October 30, 2004, Lee and his girlfriend, Megan Harmon, were at Megan's mother's home with Megan's minor sister, Amanda. The three left the house to meet another friend, Josiah Huelsman, and the four then walked to another friend's house to ask if they could borrow a car. That friend, Samantha Pomante, was home alone while her parents were camping. At first, Samantha searched for the keys to the car, but could not find them. Samantha ultimately changed her mind thinking that it was a bad idea to loan out the car.

After spending approximately an hour at Samantha's house, Samantha, Amanda, and Megan left to ask some other friends if they could borrow a car while Lee and Huelsman remained at Samantha's house. The girls walked through the Lake in the Woods subdivision where Samatha's aunt and uncle, Kim and Chris Fledderman, lived. They stopped and entered the Fleddermans' house to use the restroom. The Fleddermans were gone camping with Samantha's parents. Samantha, who did not have a key to the Fleddermans' home,

¹ Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2009 1st Regular Sess.).

² I. C. § 35-43-4-2 (West, PREMISE through 2009 1st Regular Sess.).

gained entry to the residence through the garage and locked the door when the girls left.

While the girls were gone, Lee went to Samantha's parents' bedroom and took a lock box which he hid by a creek near Samantha's house. When the girls returned, Lee and Huelsman were sitting on the stairs where they had been sitting when the girls left. Samantha's cousins arrived, and Amanda, Megan, Huelsman, and Lee left. Samantha left to stay the night at her grandmother's house.

Lee, Megan, and Amanda returned to the Fledderman home and entered it. Once inside, Lee and Megan looked around and found alcohol, rings, a necklace, and a camera bag, which Lee and Megan took from the residence. After about fifteen to thirty minutes there, Lee, Megan, and Amanda returned to the home of Megan and Amanda's mother, Lisa Austing, and took the stolen items downstairs into the basement.

Lee and Megan asked Megan's brother, Justin, for a ride and he drove them into the Lake in the Woods subdivision. Megan and Lee exited the vehicle and walked in different directions toward separate driveways. When they returned, Lee was carrying a safe, which he pried open once inside Justin's car. The safe, containing papers, jewelry, and old coins, came from the home of Samantha's parents, Daphne and Bart Pomante.

When Austing arrived home later that day, she discovered the stolen property, including alcohol, jewelry, and coins, in her basement. Austing confronted Lee about what she had discovered and called the police. Lee told Austing that he could not believe that she had called the police and then he fled. The police responded and Austing allowed the officers to collect the items she had discovered in her basement. Although Austing had told

Lee, Amanda, and Megan to remain in her home, they all left except for Justin, who remained until the police arrived. Megan ultimately returned to her home, and the police found Amanda one week later.

The Pomantes gave no one permission to remove their property from their home, some of which was still missing at the time of trial. Samantha, who had originally allowed Lee and Megan into her parents' home and her aunt and uncle's home, gave no one permission to remove property from either home. Samantha's aunt, Kim Fledderman, gave no one permission to enter her home or remove her property from it. Her missing property included a camera, jewelry consisting of a wedding band and engagement ring, and liquor from her liquor cabinet.

Officer Stanley Holt of the Batesville Police Department was the lead investigator for these crimes. Officer Holt interviewed suspects and witnesses. Lee's confession and those statements taken by Officer Holt were admitted into evidence at Lee's trial without objection. Officer Jeffrey Davis of the Batesville Police Department was the first officer to respond to Austing's call to the police and collected the stolen property from Austing's basement. While Officer Davis was there, Megan returned home and showed Officer Davis where she and Lee had dumped the safe. Davis then recovered the stolen safe. The State charged Lee with burglary of the Fledderman home and the State later amended the information to add the charge of theft from the Pomantes. Lee was tried *in absentia*, and the jury found Lee guilty as charged. The trial court sentenced Lee to an aggregate sentence of twenty and one half years, with sixteen years executed and four and one half years suspended to probation. The

trial court ordered restitution of \$1,000.00 for the theft from the Pomantes and \$2,864.40 for the burglary of the Fledderman home. Lee now appeals.

I.

Lee claims that the trial court erred by crediting him with only ninety-two days for confinement already served. The State concedes that a credit of only ninety-two days, as reflected by the abstract of judgment, appears to be inaccurate and suggests remand to the trial court for a clarification and determination of the appropriate credit time. Our review of the record leads us to the conclusion that a remand is warranted here for a determination of the appropriate credit time earned by Lee.

Lee next claims that the trial court's restitution order is not supported by the evidence, claiming that the State did not produce evidence of the monetary value of the loss incurred by the victims. The State argues that Lee has waived appellate review of the restitution issue by failing to object at the earliest opportunity, or, in the alternative, that the issue of restitution should be remanded to the trial court for clarification, as the record is unhelpful in establishing how the trial court arrived at the amounts of restitution ordered.

“[W]e will not reverse a restitution order unless the trial court abuses its discretion.” *Kimbrough v. State*, 911 N.E.2d 621, 639 (Ind. Ct. App. 2009). An abuse of discretion occurs when the trial court misinterprets or misapplies the law. *Kimbrough v. State*, 911 N.E.2d 621. The amount of restitution that is ordered must reflect the actual loss incurred by the victim. *Id.* “The amount of actual loss is a factual matter which can be determined only

upon the presentation of evidence.” *Kellett v. State*, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999).

Having reviewed the record, it is unclear to us how the trial court arrived at the amount of restitution, that is, the actual loss suffered by the victims of Lee’s crimes. We also note that Lee did not object to the trial court’s restitution order at the sentencing hearing. We have addressed restitution issues, despite the lack of any objection, on the grounds of fundamental error. *See Lohmiller v. State*, 884 N.E.2d 903 (Ind. Ct. App. 2008) (trend in recent caselaw to review restitution orders on grounds of fundamental error where trial court exceeds statutory authority in its order). “The vast weight of the recent caselaw in this state indicates that appellate courts will review a trial court’s restitution order even where the defendant did not object based on the rationale that ‘a restitution order is part of the sentence and it is the duty of the appellate courts to bring illegal sentences into compliance.’” *Kimbrough v. State*, 911 N.E.2d 621 at 639 n.9 (Ind. Ct. App. 2009) (quoting *Cherry v. State*, 772 N.E.2d 433, 440 (Ind. Ct. App. 2002)). Here, it is unclear what evidence the trial court considered in arriving at the specific amounts ordered. Without a remand for clarification, there is no way to determine if there is sufficient evidence to support the trial court’s order. We remand the trial court’s restitution order for clarification.

Lee next challenges the adequacy of the trial court’s sentencing statement. Lee alleges that the trial court failed to specify the aggravating and mitigating circumstances after finding that both aggravating and mitigating circumstances existed. The State argues that the trial court’s statement is adequate because the trial court’s comments during the sentencing

hearing indicate that the trial court adopted the reasons offered by the State for the sentence imposed.

Sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* at 490.

Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482. The statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant aggravating and mitigating circumstances and explain why each circumstance has been determined mitigating or aggravating. *Id.* A trial court must set forth the reason it imposed a sentence only when it deviates from the presumptive sentence. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006). “The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court.” *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (citing *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002)).

Here, the trial court's written sentencing statement makes no reference to aggravating or mitigating circumstances, and the oral sentencing statement announces that aggravating and mitigating circumstances exist, but does not indicate specifically which of the State's proffered aggravating circumstances or Lee's proffered mitigating circumstances it intended to find. As a result, we find that the trial court abused its discretion in sentencing Lee and must remand to the trial court for a clarification or new sentencing determination which shall include reasonably detailed reasons or circumstances for the sentence imposed. *See Ramos v. State*, 869 N.E.2d 1262 (Ind. Ct. App. 2007) (remand to trial court for clarification or new sentencing where there is irregularity in sentencing decision).

Lee also argues that his sentence is inappropriate in light of the nature of the offense and his character. We do not reach this issue as we have determined above that the trial court's sentencing statement is inadequate for meaningful appellate review.

II.

Lee contends that the trial court erred by allowing him to be tried *in absentia*. The State argues that the trial court did not abuse its discretion by concluding that Lee waived the right to be present at his trial. The State also notes that Lee failed to raise a post-trial challenge to the trial court's determination that his waiver was knowingly, intelligently, and voluntarily made.

"A criminal defendant has a right to be present during his trial under the Sixth Amendment of the U.S. Constitution and under [article 1, 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.” *Ellis v. State*, 525 N.E.2d 610, 611 (Ind. Ct. App. 1987). “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.” *Id.* “The best evidence of this knowledge is the defendant’s presence in court on the day the matter is set for trial.” *Fennell v. State*, 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.” *Diaz v. State*, 775 N.E.2d 1212, 1216-17 (Ind. Ct. App. 2002). “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.” *Diaz v. State*, 775 N.E.2d at 1217. 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 v. State*, 492 N.E.2d 297.

In the present case, the trial court acknowledged that because of the age of the case and the fact that the trial date had been reset numerous times, the best evidence of Lee’s waiver of his right to be present at trial did not exist. The trial court then asked Lee’s trial counsel if he had informed Lee of his trial date. Lee’s counsel indicated that he had sent two letters to Lee about his trial and had met with Lee the week prior to trial in preparation for it.

Lee's counsel stated that he believed Lee knew the date of his trial. Lee's counsel further stated that he had attempted to no avail to reach Lee by phone the morning of trial at Lee's place of employment in Ohio, and that Lee had not called to explain his absence. The State indicated that witnesses for the State told the deputy prosecutor they believed Lee would skip trial, and that one witness declined an offer from Lee for money to forego testifying against him at trial. Based on this information, the trial court found that Lee had waived his right to be present for trial, and granted, over defense counsel's objection, the State's motion to try Lee *in absentia*.

In addition, at Lee's sentencing hearing, the trial court inquired about the length of time that had elapsed between Lee's conviction and sentencing. Lee's trial commenced on May 14, 2007, and Lee's sentencing hearing was held on April 22, 2009. Defense counsel reminded the court that Lee had been absent for trial. Lee did not offer an explanation for his absence from trial, nor did he claim that he was unaware of the trial date. The pre-sentence investigation report indicated that Lee was on parole and probation at the time the offenses at issue were committed. Prior to the trial court's pronouncement of sentence, the trial court inquired again of defense counsel, while Lee was present, if Lee "was aware and knew of" the date of his trial. *Sentencing Transcript* at 7. Defense counsel responded in the affirmative and stated that defense counsel had not determined in the interim where Lee was at the time of trial. After Lee's conviction here, Lee was arrested in Kentucky and subsequently returned to Indiana.

Our review of the record leads us to the conclusion that while direct evidence of Lee's knowledge of the actual date of his trial is lacking, the information before the trial court leads to the conclusion that Lee's absence was knowing and voluntary. Furthermore, Lee had the opportunity to present an explanation for his absence or claim a lack of knowledge of the trial date, but Lee did neither. Amanda Harmon testified at trial that Lee offered her \$5,000.00 to forego testifying against him at trial and she declined. Lee has failed to establish error in the trial court's decision to allow Lee to be tried *in absentia*.

Lee's final argument is that the trial court erred by denying defense counsel's request for a mistrial based upon "negative inferences the prosecutor drew from Lee's absence." *Appellant's Brief* at 16. Lee correctly notes the State has failed to address this issue in its brief. "An appellee's failure to respond to an issue raised by an appellant is akin to failure to file a brief." *Atchley v. State*, 730 N.E.2d 758, 766 (Ind. Ct. App. 2000). "[W]e are obliged to decide the law as applied to the facts in the record in order to determine whether reversal is required." *Id.* Lee will demonstrate reversible error if he establishes prima facie error. *See Newman v. State*, 719 N.E.2d 832 (Ind. Ct. App. 1999). Prima facie error is error that is evident at first sight, on first appearance, or on the face of it. *Id.*

Lee argues that the prosecutor "tainted the jury during voir dire by making negative inferences from Lee's absence and failure to testify." *Appellant's Brief* at 16. In particular, during voir dire the deputy prosecutor noted that Lee was not present, asked if the jurors also had noticed that Lee was not present and questioned each prospective juror about any problems they might have serving as a juror in a trial where the defendant did not appear.

This led to questions from prospective jurors about Lee's whereabouts, whether he would be held in contempt, and why the trial was not continued due to Lee's absence. The deputy prosecutor responded that "we can't just wait until he feels like showing up. I mean, you know, it's already 2007. Are we gonna wait until 2012 and keep bringing jury pools in and wasting your time?" *Transcript* at 42. The deputy prosecutor later stated that the jury was missing work, was spending time away from their families, and that the police officer was there, but Lee did not show up for trial. The deputy prosecutor noted that the jurors would only be hearing from one of four people who committed the crimes, and asked the jurors if they had a problem not hearing from Huelsman "although he probably knows stuff. He just simply won't be here today, much like the Defendant." *Id.* at 51. He went on to say, "out of the four [people accused], the Defendant's not here, Huelsman is in Florida, Megan still has the same charges pending, and the right to remain silent." *Id.* at 52.

At the conclusion of voir dire, Lee's counsel moved for a mistrial because of the prosecutor's comments on Lee's absence from trial and argued that the comments equated to a comment on Lee's failure to testify. *Transcript* at 119. The trial court agreed that he was surprised by the deputy prosecutor's comments, but denied Lee's motion for a mistrial. Lee did not renew his motion for mistrial at the end of the State's case, nor did he seek other curative measures.

First, we note that Lee's counsel did not object to any of the complained-of comments by the deputy prosecutor during voir dire. A contemporaneous objection to the prosecutor's comment in the first instance would have alerted the trial court to the potential impact of

those comments on the jurors. Instead, Lee waited to make his motion for mistrial after the jury had been impaneled. Accordingly, the State cannot be charged with the entire responsibility for any harm from the staccato effect of those comments.

Assuming that the prosecutor's comments were improper, and not just made for the purpose of ensuring that the absent defendant received a fair trial, we are left to determine what harm if any resulted from those comments. Lee claims that he was placed in a position of grave peril because the jury was tainted by those comments. We note, however, that the evidence against Lee was not marginal. The State introduced Lee's confession without objection and elicited testimony of Amanda Harmon, a co-perpetrator in the crimes, who clearly implicated Lee. Further, the trial court gave Final Instruction Number 14, which instructed the jury not to consider Lee's absence from trial in determining Lee's guilt or innocence of the charges. *Appellant's Appendix* at 141. We cannot say that Lee has established prima facie error requiring reversal, as we find that Lee has not shown harm resulting from the prosecutor's comments.

Judgment affirmed in part and reversed and remanded in part.

NAJAM, J., and BRADFORD, J., concur.