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IN THE COURT OF APPEALS OF INDIANA

JUSTIN WOODHOUSE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 12A02-1012-CR-1322
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-1003-FB-47

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Justin Woodhouse appeals his convictions for Class B felony dealing in methamphetamine,[1] Class D felony possession of a chemical reagent or precursor with intent to manufacture a controlled substance,[2] Class D felony maintaining a common nuisance,[3] Class A misdemeanor resisting law enforcement,[4] Class B misdemeanor disorderly conduct,[5] and four counts of Class C misdemeanor purchasing more than three grams of a precursor.[6] He raises the following issues for our review:

1. Whether the trial court abused its discretion by trying Woodhouse *in absentia*;

2. Whether the trial court abused its discretion when it admitted records of Woodhouse's purchases of pseudoephedrine; and

3. Whether Woodhouse's convictions of Class B dealing in methamphetamine and Class D felony possession of a chemical reagent or precursor with intent to manufacture a controlled substance impermissibly subjected him to double jeopardy.

We affirm and remand.

FACTS AND PROCEDURAL HISTORY

On March 1, 2010, the property manager of the apartment complex where Woodhouse and his wife lived called the police because she smelled "a cross between lighter fluid [and] ether," (Tr. at 48), coming from Woodhouse's apartment. The police arrived, found Woodhouse in the mailroom, and a struggle ensued. The police subdued Woodhouse and then, based on a previously-obtained search warrant, searched Woodhouse's apartment.

[1] Ind. Code § 35-48-4-1.1.
[2] Ind. Code § 35-48-4-14.5(e).
[3] Ind. Code § 35-48-4-13(b)(2).
[4] Ind. Code § 35-44-3-3(a)(1).
[5] Ind. Code § 35-45-1-3(a)(1).
[6] Ind. Code § 35-48-4-14.7(d).

In Woodhouse's apartment, police found two bags of stripped lithium batteries that tested positive for anhydrous ammonia; a plastic bottle that tested positive for sulfuric acid and was identified as an "HCL generator"; a clear plastic bottle that tested positive for anhydrous ammonia; one box of rock salt; one container of drain cleaner; and plungers from syringes. (App. at 15.) The police later discovered Woodhouse and his wife had made several purchases of pseudoephedrine exceeding the legal limit when combined.

The State charged Woodhouse with Class B felony dealing in methamphetamine, Class D felony possession of a chemical reagent or precursor with intent to manufacture a controlled substance, Class D felony maintaining a common nuisance, Class A misdemeanor resisting law enforcement, Class B misdemeanor disorderly conduct, and four counts of Class C misdemeanor purchase of more than three grams of a precursor.

On multiple occasions, the court advised Woodhouse that his trial date was June 22, 2010. Nevertheless, when that day arrived, Woodhouse failed to appear for his trial. In his absence, a jury found him guilty on all counts, and the trial court entered judgment on the verdicts.

Woodhouse did appear for his sentencing hearing and apologized for missing his trial. At his sentencing hearing, the trial court merged counts I and II, which were Class B felony dealing in methamphetamine and Class D felony possession of a chemical reagent or precursor with intent to manufacture a controlled substance, and sentenced Woodhouse to an aggregate sentence of seventeen years, with three years suspended.

DISCUSSION AND DECISION

1. Conviction *In Absentia*

The Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution give a criminal defendant the right to be present during his trial. 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." *Holtz v. State*, 858 N.E.2d 1059, 1061 (Ind. Ct. App. 2006), *trans. denied*. When a defendant fails to appear in court and fails to notify the trial court or provide an explanation for his absence, the trial court "may conclude that 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*. at 1062.

When a defendant later appears in court, the trial court must afford him an opportunity to present evidence that his absence from the trial court was not voluntary; however, the trial court is not required to make a *sua sponte* inquiry. *Id*. at 1062-63. On appeal, we examine the entire record to determine if the defendant's absence was voluntarily, knowingly, and intelligently made. *Id*. at 1062.

Woodhouse argues he "did not ever affirmatively indicate a knowing and intelligent waiver" of his right to be present during his trial. (Br. of Appellant at 14.) We disagree. Woodhouse received notice of his trial date through multiple channels of communication. At Woodhouse's initial hearing on March 2, 2010, the trial court informed Woodhouse that he had to appear for trial on June 22, 2010. On March 9, Woodhouse filed a motion for a

speedy trial, and the trial court granted that motion. On March 31, in its order appointing pauper counsel and granting Woodhouse's motion for reduction of bond, the trial court again stated Woodhouse's trial was scheduled for June 22, and he would be required to attend. On May 25, Woodhouse signed a pre-trial order confirming the June 22 trial date, and he received additional notice of the trial date on May 26 as well. On June 10, the trial court again issued a pre-trial order indicating a trial date of June 22.

When Woodhouse failed to appear at his jury trial, the State reported its investigator had called "jails in surrounding counties . . . to confirm the defendant was not under arrest and in custody of another jail." (Tr. at 13-14.) In addition, the State had contacted multiple hospitals, but Woodhouse had not been admitted to any of them. When he appeared at his sentencing hearing, Woodhouse stated, "I just wanted to say that I'm – I – I'm sorry for, you know, missing my – my court date[.]" (*Id*. at 306.) Woodhouse did not provide any explanation with his apology, nor has he directed us to any other place in the record where he provided an explanation for his absence.

In light of the numerous times the court provided notice of the trial date and Woodhouse's failure to provide an explanation when apologizing for his absence, we cannot say his waiver of his right to be present during his trial was involuntary, unknowing, or unintelligent. We therefore hold the trial court did not abuse its discretion in holding his trial and convicting Woodhouse *in absentia*. *See Holtz*, 858 N.E.2d at 1062 (trial court did not err in convicting Holtz *in absentia* when he had been informed of his trial date twice prior, did not notify the court he would be absent, and did not provide an explanation for his absence).

2. Admission of Pharmacy Records

We afford trial courts great deference in their decisions to admit or exclude evidence. *Marshall v. State*, 893 N.E.2d 1170, 1174 (Ind. Ct. App. 2008). We review specific decisions for an abuse of discretion, which occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented to the court. *Id*. We reverse only when a "manifest" abuse of discretion denied the defendant a fair trial. *Id*.

On appeal, Woodhouse asserts the pharmacy records were inadmissible because they were hearsay that did not qualify as a public record or report pursuant to Evid. R. 803(8) and because they were not properly authenticated pursuant to Evid. R. 901. However, Woodhouse objected at trial based on the business records exception to hearsay. A party cannot assert on appeal an objection not raised at trial. *See Craig v. State*, 883 N.E.2d 218, 220 (Ind. Ct. App. 2008) (a party may not assert an argument for the first time on appeal). Thus, his argument regarding the admission of the pharmacy records is waived.

3. Double Jeopardy

Article 1, Section 14 of the Indiana Constitution provides, in relevant part, "No person shall be put in jeopardy twice for the same offense." Our Indiana Supreme Court has held:

> Two or more offenses are the 'same offense' in violation of Article 1, Section 14 of the Indiana Constitution if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original).

Woodhouse argues that his convictions for Class B felony dealing in methamphetamine and Class D felony possession of chemical reagents or precursors with intent to manufacture a controlled substance subjected him to double jeopardy based on the "actual evidence" test. Under this test,

> the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53. The actual evidence test is satisfied only if the evidence establishing all of the elements of one offense also establishes all of the elements of a second offense. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002).

During his sentencing hearing, Woodhouse argued his convictions for Class B felony dealing in methamphetamine and Class D felony possession of chemical reagents or precursors with intent to manufacture a controlled substance subjected him to double jeopardy. The trial court agreed, saying, "Count II [possession of precursors] is merging into Count I [dealing in methamphetamine]." (Tr. at 320.) Accordingly, the trial court's sentencing order does not indicate a sentence for Count II, and in the Abstract of Judgment, the fill-in box for "crime" next to Count II, the trial court wrote, "I." (App. at 163.) When a trial court merges two counts, effectively vacating the lesser, there is no double jeopardy violation. *Laux v. State*, 821 N.E.2d 816, 819 (Ind. 2005). As the trial court merged counts I and II in the instant case in a way that effectively vacated the lesser crime, we hold

Woodhouse was not subject to double jeopardy.

Nevertheless, when discussing Woodhouse's convictions at the end of trial, the court stated, "the defendant was found guilty by jury for the offenses of Dealing in Methamphetamine, Count 1, a class B felony, Possession of a Chemical Reagents (sic) or Precursors (sic) With Intent to Manufacture a Controlled Substance . . . Judgment of conviction was entered." (App. at 159.) As this earlier order indicates the trial court convicted Woodhouse of both counts I and II, we remand for revision of that order to reflect the merger of counts I and II, in accordance with the order entered following sentencing.

CONCLUSION

We hold the trial court did not abuse its discretion when it tried and convicted Woodhouse *in absentia* because the record supports the holding Woodhouse knowingly, voluntarily, and intelligently waived his right to be present at trial. Woodhouse waived his current argument regarding the admissibility of the pharmacy records, and he was not subject to double jeopardy because the Abstract of Judgment indicates the trial court merged counts I and II. Accordingly, we affirm the judgment of the trial court, but remand for the trial court to clarify its earlier order to properly indicate the merger of counts I and II.

Affirmed and remanded.

NAJAM, J., concurs.

RILEY, J., concurs in result.