

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Antonio K. Rush,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 30, 2020

Court of Appeals Case No.
20A-CR-722

Appeal from the Wayne Superior
Court

The Honorable Gregory A. Horn,
Judge

Trial Court Cause No.
89D02-1501-F5-10

Pyle, Judge.

Statement of the Case

- [1] Antonio K. Rush (“Rush”) was convicted, following a jury trial, of one count of Level 5 felony burglary and two counts of Level 5 felony attempted burglary. On appeal, Rush argues that the trial court abused its discretion when it: (1) removed him from the courtroom and continued the trial in his absence; and (2) ordered him to pay a \$1,000 supplemental public defender fee. Concluding that the trial court did not abuse its discretion, we affirm the trial court.
- [2] We affirm.

Issues

1. Whether the trial court abused its discretion by removing Rush from the courtroom and continuing the trial in his absence.
2. Whether the trial court abused its discretion by ordering Rush to pay a \$1,000 supplemental public defender fee.

Facts

- [3] During the early morning hours on January 4, 2015, Rush and an accomplice shattered the drive-thru window and entered a Low Bob’s Tobacco store in Richmond. Once inside, Rush placed cartons of cigarettes and cigars into a black trash bag. Thereafter, Rush exited the store through the backdoor, which triggered the store’s alarm. Rush and his accomplice then headed to a second Low Bob’s Tobacco store, into which they attempted to enter. After triggering the alarm, the men fled without removing any inventory.

[4] As a result of the first two incidents, an officer from the Richmond Police Department set up surveillance across the street from a third Low Bob's Tobacco store. The officer observed a vehicle pull into the tobacco store's parking lot. Rush and his accomplice attempted to enter the store by shattering the glass of the front door. The officer surveilling the tobacco store relayed his observations to another officer pulling into the store's parking lot. After seeing the officer pull into the lot, Rush and his accomplice fled on foot into a wooded area. Officers pursued the men but were unable to catch them. At some point, Rush returned to his vehicle and attempted to flee, and the police stopped him shortly thereafter.

[5] On January 27, 2015, the State charged Rush with: Count 1, Level 5 felony burglary for breaking and entering the first Low Bob's tobacco store; Count 2, Level 5 felony attempted burglary for attempting to break and enter the second Low Bob's tobacco store; and Count 3, Level 5 felony attempted burglary for attempting to break and enter the third Low Bob's tobacco store. Rush's bond was set at \$10,000, and he was released from jail after paying a ten percent cash bond in the amount of \$1,000. Rush's bail bond agreement contained the following language: "[I]f judgment for a fine, Court costs, restitution, public defender's fees, or probation user's fees is ordered against me, the cash deposit less administrative fee may be applied by the Clerk to the payment of the above,

upon Court order.”¹ Following Rush’s initial hearing, the trial court mailed Rush a copy of the initial hearing order, which included the following language:

Bail remains in the amount of \$10,000.00, and Defendant may continue to be released upon the ten percent cash bail previously posted; *Defendant is notified [that] the cash deposit may be forfeited if Defendant fails to appear as ordered or it may be retained by the Court to help defray the costs of his Court appointed attorney, if any, and/or to pay Court costs, probation user fees, administrative fees, and other costs, fees, and expenses which the Court determines are appropriate.*

(App. Vol. 2 at 27) (emphasis added).

[6] Subsequently, Rush failed to appear for a pre-trial hearing scheduled for February 2, 2017. As a result, the trial court issued a bench warrant for Rush’s arrest and his bond was forfeited and ordered to be held until further order of the trial court. In September 2019, Rush was arrested on the outstanding warrant and held in jail pending trial.

[7] Rush’s four-day jury trial began in February 2020, and Rush was represented by counsel. On the third day of trial, before the jury returned for the afternoon session, Rush personally addressed the trial court and read a motion to dismiss his case. The trial court denied the motion. Rush began to argue with the trial court about the denial of his motion and his previous failure to appear. The

¹ Rush did not include a copy of his bail bond agreement in his Appendix. However, we were able to locate the document on Odyssey. *See* Ind. Appellate Rule 27 (“The Record on Appeal . . . consist[s] of the Clerk’s Record and all proceedings before the trial court . . . whether or not transcribed or transmitted to the Court on Appeal.”). Pursuant to Indiana Evidence Rule 201(a)(2)(C), we take judicial notice of this document from the underlying cause.

trial court informed Rush several times that it had denied his motion and that he would be found in contempt if he did not stop arguing. The trial court then warned Rush that he would be removed from the courtroom and sent back to jail if his disruptive behavior continued. Thereafter, the jury returned to the courtroom and the following exchange occurred:

Judge: Be seated please. Thank you.

Mr. Rush: Excuse me, ladies and gentlemen, I apologize for wasting you[r] . . . time but as of today, this trial will no longer go on because [I have] an unfair Judge in front of me—

[State]: --I—

Mr. Rush: --as far as come off (inaudible)—

[State]: --I object to (inaudible)—

Mr. Rush: --(inaudible) go back where they have me. They have me incarcerated. For a failure to appear. They have not acknowledged my failure to appear. Take me out.

Judge: The court would show that Mr. Rush has chosen to return to the Wayne County Jail. That was on his own motion, on his own volition and on his own doing. And therefore, we will proceed—

Mr. Rush: --(Inaudible)

Judge: --We will proceed—

Mr. Rush: --(Inaudible)

Judge: We will proceed in his absence.

[Defense Counsel]: Your Honor, I would just ask that uh, the jurors be given instruction as far as that has no bearing on his guilt or innocence.

Judge: Absolutely.

[Defense Counsel]: Thank you.

Judge: That's very appropriate. Um, ladies and gentlemen, you're admonished that Mr. Rush's actions and behavior here and desire to go back to jail is of his own doing but that has no bearing on his guilt or innocence. You still have to find him guilty if you find him guilty beyond a reasonable doubt and that burden remains on the State of Indiana to prove that. So, um, it has no bearing on his guilt or innocence. Okay.

[Defense Counsel]: Your Honor, for record purposes[,] Mr. Rush has a right to counsel and I guess by him excusing himself, that's his decision[.] I would ask that maybe we do something else rather than proceed?

Judge: I don't know what that would be.

[Defense Counsel]: I don't either.

Judge: This is not—I'm going to say it's a common occurrence but um, it's happened before and unfortunately it leaves you in a situation where you still have the ethical obligation to represent him to the best of your ability even in his absence and then I would expect you would go over there again tomorrow or tonight, talk to him and see if he wants to appear tomorrow because he has the right to come back tomorrow. So, I appreciate where you [are] at but—

[Defense Counsel]: --I understand.

Judge: We are going to proceed.

[State]: Just to clarify the record, I believe you said [that] this has happened before[.] I just want to make sure that we're aware this happening before hasn't happened to our case or our defendant. We're talking about separate incidents, right?

Judge: We're talking about other—other cases.

[State]: Okay, to be fair to Mr. Rush.

Judge: And not with Mr. Rush.

[State]: Okay.

Judge: Um, . . . Mr. Rush has chosen to leave, that's up to him but the burden still remains on the State of Indiana. So, we'll proceed.

(Tr. Vol. 3 at 79-81). Rush did not return for the remainder of the third day of trial. On the fourth day of trial, Rush returned to the courtroom. Thereafter, the jury found Rush guilty of all three counts as charged.

- [8] In March 2020, the trial court sentenced Rush to four (4) years for the burglary conviction and three (3) years for each attempted burglary conviction, all to be served concurrently with each other. Initially, the trial court waived all court costs and fees. However, the State alerted the court to the fact that Rush had posted a cash bond. The trial court then ordered that Rush pay “the sum of \$1,000 to the Supplemental Public Defender Fund[.]” (App. Vol. 2 at 202-03). Rush now appeals.

Decision

- [9] Rush argues that the trial court abused its discretion when it: (1) removed him from the courtroom and continued the trial in his absence; and (2) ordered him to pay a \$1,000 supplemental public defender fee. We will address each argument in turn.

1. Rush's Removal from the Courtroom

- [10] Rush argues that the trial court abused its discretion by removing him from the courtroom. Specifically, he argues that “at no time did he verbally waive his right to be present or request to be removed from the courtroom.” (Rush's Br.

13). We review the decision to exclude Rush for an abuse of discretion. *Wilson v. State*, 30 N.E.3d 1264, 1270 (Ind. Ct. App. 2015), *trans. denied*. “An abuse of discretion occurs when the trial court’s decision is clearly against the logic, facts, and circumstances presented. We do not reweigh evidence.” *Id.* (citations omitted).

[11] As a preliminary matter, we note that Rush has waived appellate review of his argument because he failed to preserve his claim of error by raising a proper objection at trial. *See Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000) (holding that grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal), *reh’g denied*. Waiver notwithstanding, the trial court did not abuse its discretion.

[12] The Sixth Amendment to the United States Constitution and Article 1, section 13 of the Indiana Constitution both grant a defendant in a criminal proceeding the right to be present at all stages of his trial. *Wilson*, 30 N.E.3d at 1269. However, that right is not absolute and may be waived if it is done so knowingly and voluntarily. *Id.*

[13] Here, the record reveals that outside the presence of the jury, Rush presented the trial court with a motion to dismiss his case, which the trial court denied. After Rush questioned the trial court’s ruling, the trial court informed Rush several times that the motion had been denied. Rush continued to argue with the trial court, and the court warned Rush that his continued disruptive behavior would result in his removal from the courtroom. After the jury

returned to the courtroom, Rush again became disruptive and addressed the jury directly by telling the jurors that the “trial will no longer go on[.]” (Tr. Vol. 3 at 79). Rush then stated “[t]ake me out.” (Tr. Vol. 3 at 80). Thereafter, the trial court granted Rush’s request and removed him from the courtroom. Rush’s counsel later acknowledged that Rush had “excus[ed] himself[]” from the courtroom. (Tr. Vol. 3 at 80).

[14] Because Rush expressly requested to leave the courtroom, we conclude that he knowingly and voluntarily waived his right to be present in the courtroom. *See Campbell v. State*, 732 N.E.2d 197, 205 (Ind. Ct. App. 2000) (explaining that an express request to leave the courtroom resulted in an “voluntary[] and knowing waiver” of the defendant’s rights to be present). Accordingly, the trial court did not abuse its discretion by removing Rush from a portion of his trial.

2. Supplemental Public Defender Fee

[15] Next, Rush argues that the trial court abused its discretion when it ordered him to pay a \$1,000 supplemental public defender fee without first determining his ability to pay the fee or indigency. “[D]ecisions to impose restitution, fines, costs, or fees, are generally left to the trial court’s discretion.” *Kimbrough v. State*, 911 N.E.2d 621, 636 (Ind. Ct. App. 2009). An abuse of discretion has occurred when the trial court’s 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. *Coleman v. State*, 61 N.E.3d 390, 392 (Ind. Ct. App. 2016). If the fees imposed by the trial court fall within the

parameters provided by statute, we will not find an abuse of discretion. *Berry v. State*, 950 N.E.2d 798, 799 (Ind. Ct. App. 2011).

[16] Rush contends that the imposition of the fee was improper because “[t]he inquiry into [his] ability to pay the fees was non-existent as to his indigency[.]” (Rush’s Br. 24). In support of his assertion, Rush cites to statutes that require an indigency hearing before imposing a public defender or representation fee, INDIANA CODE §§ 35-33-7-6, 33-40-3-6, and 33-37-2-3.² In response, the State argues that INDIANA CODE § 35-33-8-3.2(a)(2), which explains the conditions a trial court may impose when admitting a defendant to bail, controls the resolution of this case. We agree with the State.

[17] INDIANA CODE § 35-33-8-3.2(a)(2) provides that when a defendant executes:

(A) a bail bond by depositing cash or securities with the clerk of the court in an amount not less than ten percent (10%) of the bail; and

(B) an agreement that allows the court to retain all or a part of the cash or securities to pay fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted.

A portion of the deposit, not to exceed ten percent (10%) of the monetary value of the deposit or fifty dollars (\$50), whichever is the lesser amount, may be retained as an administrative fee. *The clerk shall*

² The first statute, INDIANA CODE § 35-33-7-6, provides that the trial court may impose a public defender supplemental fund fee before completing the initial hearing. Under this statute, the trial court is required to determine whether the defendant is indigent. I.C. § 35-33-7-6(a). The next statute, INDIANA CODE § 33-40-3-6, provides that the trial court may order the defendant to pay the costs of representation after making a finding of an ability to pay. The last statute, INDIANA CODE § 33-37-2-3, provides that the trial court may impose part of the costs of representation upon a convicted person, provided that the trial court first determine that such person is not indigent. Further, this Court has held that INDIANA CODE § 33-37-2-3 “explicitly requires an indigency hearing.” *Berry*, 950 N.E.2d at 801-02.

also retain from the deposit under this subdivision fines, costs, fees, and restitution as ordered by the court, publicly paid costs of representation that shall be disposed of in accordance with subsection (b), and the fee required by subsection (d).

(Emphasis added).

[18] In *Wright v. State*, 949 N.E.2d 411, 416 (Ind. Ct. App. 2011), this Court held that “the indigency hearing requirement of INDIANA CODE § 33-37-2-3 does not apply when a defendant has entered into a cash bail bond agreement pursuant to section 35-33-8-3.2(a)(2).” The *Wright* Court explained that “[a] plain reading of [s]ection 35-33-8-3.2(a)(2) . . . leads us to the conclusion that the absence of language requiring an indigency hearing means that when a bail bond agreement is executed, such a hearing is not required.” *Id.* Further, this Court has previously held that pursuant to subsection (a)(2), when a defendant pays ten percent of his bail, “that amount is subject to retention by the clerk of the court for the reimbursement of publicly paid costs of representation.” *Dillman v. State*, 2 N.E.3d 774, 776 (Ind. Ct. App. 2014).

[19] Here, Rush paid ten percent of his bond amount and entered into a cash bond agreement pursuant to subsection (a)(2), wherein he agreed that the cash bond may be applied to the payment of a public defender’s fee. Thus, no indigency hearing was required for imposing the cost of the supplemental public defender fee. *Wright*, 949 N.E.2d at 416. Therefore, we conclude that the trial court did not abuse its discretion when it ordered Rush to pay the \$1,000 supplemental public defender fee.

[20] Affirmed.

Kirsch, J., and Tavitas, J., concur.