MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James L. Graham,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 28, 2021

Court of Appeals Case No. 21A-CR-212

Appeal from the Shelby Superior Court

The Honorable David N. Riggins, Judge

Trial Court Cause No. 73D01-1909-F2-11

Najam, Judge.

Statement of the Case

[1] James L. Graham appeals his convictions for two counts of dealing in methamphetamine, one as a Level 3 felony and one as a Level 4 felony; three counts of dealing in a narcotic drug, each as a Level 5 felony; and his adjudication as a habitual offender. Graham raises a single issue for our review, namely, whether the trial court committed fundamental error when it did not *sua sponte* ask Graham, post-trial, of the reason for Graham's absence at his trial. Our Court has repeatedly rejected Graham's argument, and we do so again today. Therefore, we affirm Graham's convictions.

Facts and Procedural History

[2] In September of 2019, the State charged Graham with numerous offenses. The court held Graham's jury trial in November of 2020. Graham failed to appear at his trial, although his counsel informed the court that he had made Graham aware of the trial date. The jury found him guilty as charged *in absentia*.

[3] The court held Graham's sentencing hearing in January of 2021. Graham appeared at that hearing, where his counsel reminded the court that Graham had failed to appear at the trial. Graham did not offer any explanation or reason for his absence at trial. Further, Graham did not argue that his absence constituted a basis for error. And, at the end of the hearing, the court gave Graham an opportunity to speak, but he chose to remain silent. Tr. Vol. 4 at 50. The court then sentenced Graham to an aggregate term of thirty-two years. This appeal ensued.

Discussion and Decision

[4] On appeal, Graham asserts that the trial court committed fundamental error when it did not *sua sponte* ask Graham, either at the sentencing hearing, or at a separate evidentiary hearing, as to why Graham was not present at his jury trial. As our Supreme Court has made clear:

> Fundamental error is an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal. An error is fundamental if it made a fair trial impossible or amounted to a clear violation of basic due-process principles. This is a formidable standard that applies only where the error is so flagrant that the trial judge should have corrected the error on her own, without prompting by defense counsel.

Tate v. State, 161 N.E.3d 1225, 1229 (Ind. 2021) (citations omitted).

[5] The crux of Graham's argument on appeal turns on this Court's 1987 opinion in *Ellis v. State*. There, we stated:

> Denial of a defendant's substantive right to be present and heard at trial is fundamental error and, if not rectified, constitutes denial of fundamental due process. *Winkelman v. State* (1986), Ind. App., 498 N.E.2d 99 (citing Ind. Const., art. I Sec. 13). 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. *Bullock v. State* (1983), Ind., 451 N.E.2d 646. *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. A defendant who has been so tried, however, must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver . . . .*

525 N.E.2d 610, 611-12 (Ind. Ct. App. 1987) (emphasis added). We then went on to address whether, when the defendant is presented with the opportunity to rebut the presumption of his waiver, he is entitled to counsel. *Id.* at 612.

[6] Here, there is no dispute that the record demonstrates the rebuttable presumption that Graham had voluntarily, knowingly, and intelligently waived his right to be present at his trial when he knew of the trial date and failed to appear. Instead, Graham's argument on appeal first appears to be that our use of the word "hearing" in *Ellis* required a freestanding evidentiary hearing solely on the issue of the defendant's absence at trial. Alternatively, he appears to argue that, at the sentencing hearing, the trial court was required to *sua sponte* ask Graham the reason for his absence.

[7] There is no Indiana authority in support of Graham's arguments. Indeed, we have repeatedly rejected them. As we summarized in *Holtz v. State*:

> this Court specifically addressed the issue raised . . . in *Walton v. State*, 454 N.E.2d 443 (Ind. Ct. App. 1983). In that case, Walton failed to appear in court on the first day of his trial, and the trial court proceeded in his absence. When Walton appeared on the second day of trial, the court asked the defense if it had any "announcements to make." *Id.* at 444. Walton failed to offer any justification for his absence the previous day. On appeal, Walton argued that, upon his arrival in court, the trial court was required to ask him the reason for his absence. He cited *Gilbert [v. State*, 182 Ind. App. 286, 395 N.E.2d 429 (1979),] in support of his position. This Court [in *Walton*] stated, in relevant part, as follows:

> We believe that *Gilbert*, in part, stands for the proposition that an absent defendant who later appears in court must be afforded the opportunity to present evidence that the absence was not voluntary. The record clearly reflects the court provided Walton such an opportunity upon his arrival at trial. Although it is true the court did not directly ask Walton if he had any justification for his absence, it did ask the defense if it had any announcements to make. Walton declined to provide any explanation for his absence. We are unpersuaded that the trial court had a duty to question Walton, *sua sponte*, upon his arrival in court.

> *Id.* at 444. As we stated in a later opinion on the same issue, while it is true that the trial court must afford a defendant the opportunity to present evidence that his absence was not voluntary, this does not require a *sua sponte* inquiry. *Hudson v. State*, 462 N.E.2d 1077, 1081 (Ind. Ct. App. 1984). Rather, "the defendant *cannot be prevented* from giving an explanation." *Id.* (emphasis added).

> In the instant case, the trial court gave [the defendant] an opportunity to speak at the sentencing hearing, and he declined. Therefore, we find no error.

858 N.E.2d 1059, 1062-63 (Ind. Ct. App. 2006), *trans. denied*. Likewise, here, the trial court gave Graham the opportunity to speak at the sentencing hearing, and he declined. Therefore, we find no error, and we affirm Graham's convictions.

[8] Affirmed.

Riley, J., and Brown, J., concur.