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**IN THE  
COURT OF APPEALS OF INDIANA**

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NICOLE PASCHALL, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 43A05-0605-CR-250  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE KOSCIUSKO CIRCUIT COURT  
The Honorable Rex L. Reed, Judge  
Cause No. 43C01-0412-FB-222

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**November 20, 2006**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Nicole Paschall (“Paschall”) was convicted by a jury in Kosciusko Circuit Court of Class B felony dealing in cocaine. She appeals, raising three issues:

- I. Whether the trial court properly tried Paschall *in absentia*;
- II. Whether the trial court erroneously allowed Detective Donald McCune (“Detective McCune”) to testify regarding the conversation he overheard via a transmitter during the alleged drug transaction;
- III. Whether the trial court erroneously allowed Marlin Mattix (“Mattix”) to testify regarding prior uncharged alleged conduct by Paschall and her boyfriend.

Concluding that the trial court properly conducted her trial *in absentia* and that any erroneously admitted testimony was harmless error, we affirm.

### **Facts and Procedural History**

Marlin Mattix (“Mattix”) was a confidential informant of the police. He agreed to meet with the Kosciusko County Drug Task Force regarding Paschall and her boyfriend’s drug dealing. On December 13, 2004, Mattix contacted Detective McCune and told him that he had talked to Paschall, and she had agreed to sell him some cocaine later that day.

Before the transaction took place, Detective McCune met with Mattix and searched his person and his vehicle. He then placed a transmitting device on Mattix and gave him \$100 of unmarked buy-money. Mattix then went to Paschall’s apartment and bought the cocaine. Detective McCune watched the entrance to the apartment and heard the entire transaction over the transmitter. When Mattix left the apartment, he gave Detective McCune a plastic bag he had received from Paschall, which tested positive for 1.2 grams of cocaine.

The prosecutor filed an information and affidavit of probable cause on December 30, 2004, and Paschall was appointed a public defender. On September 2, 2005, Paschall filed a pro se motion for leave to hire private counsel, which was approved by the court. However, no private counsel ever filed an appearance on her behalf.

The trial court conducted a jury trial on October 4, 2005. Paschall appeared in person at the beginning of the trial and told the court that she had paid for private counsel to represent her. However, no private attorney came to the courtroom. The trial court refused to grant a continuance, and told Paschall that if her private attorney did not appear, she would be represented by the public defender. Paschall then left the court building during a morning recess. It was reported to the court that she had departed by appropriating an automobile that did not belong to her. The trial court continued the trial in her absence.

During the trial, the prosecutor asked Detective McCune about the subject of Mattix and Paschall's conversation at her apartment. Detective McCune testified that he had overheard Mattix ask whom he was to pay. Tr. p. 33. Paschall's attorney objected to this testimony stating that it was hearsay and that the tape recording would be the best evidence of the conversation. The trial court overruled this objection. Detective McCune further testified that he heard another voice say, "Count out the money" and then heard Mattix counting out the money. Tr. p. 33. Paschall's attorney again objected, and the trial court overruled his objection.

When examining Mattix, the informant, the prosecuting attorney asked him what mutual interest he had with Paschall when they first become acquainted several years

ago. Paschall's attorney objected to this question on the grounds that it could lead to 404(b) evidence of uncharged acts. The trial court overruled this objection, and Mattix testified that he had learned that Paschall and her boyfriend were dealing cocaine, and used to buy from them several years ago. Tr. p. 44.

At the conclusion of the trial, the jury found Paschall guilty. The court issued a warrant for her arrest, and she was returned to the court on January 12, 2006, for her sentencing. The court sentenced her to fourteen years, enhancing the advisory sentence due to her prior criminal record. Paschall now appeals. Additional facts will be provided as necessary.

### **I. Trial *In Absentia***

Paschall first contends that the trial court improperly continued the trial when it found she had disappeared from the courthouse instead of inquiring into her whereabouts. Both the Sixth Amendment of the U.S. Constitution and Article One, Section Thirteen of the Indiana Constitution guarantee a criminal defendant the right to be present during his or her trial. Fennell v. State, 492 N.E.2d 297, 299 (Ind. 1986). However, a trial court may find that a defendant in a non-capital case has waived his or her right to be present at trial if the waiver was knowingly and voluntarily made. Lampkins v. State, 682 N.E.2d 1268, 1273 (Ind. 1997) (citations omitted), modified on reh'g on other grounds, 685 N.E.2d 698 (Ind. 1997). A trial court may presume a voluntary, knowing, and intelligent waiver by a defendant who knew the scheduled trial date but failed to appear before the court. Milton v. State, 588 N.E.2d 523, 523-24 (Ind. Ct. App. 1992) (citation omitted). If a defendant is tried *in absentia*, he or she must be afforded an opportunity to explain the

absence and rebut the presumption of waiver. Id. (citation omitted). However, a defendant's continued absence coupled with a failure to notify the court and provide it with an adequate explanation constitutes waiver. Brown v. State, 181 Ind. App. 102, 107, 390 N.E.2d 1058, 1062 (1979). We review a trial court's decision to proceed with a trial *in absentia* for an abuse of discretion. Id.

There is no doubt in this case that Paschall knew the date of the trial as she initially appeared on that day, and the trial court told her it would be conducting her trial on that day. In Fennell, our supreme court said that the "best evidence" that defendant had knowledge of the trial date is the defendant's presence in court on the day the matter is set for trial. 492 N.E.2d at 299. We conclude that Paschall's presence in court on the actual day of the trial is likewise "best evidence" of her knowledge of her trial date, and therefore, the trial court properly presumed Paschall's voluntary, knowing, and intelligent waiver to be present during her trial.

Furthermore, we conclude that Paschall was given adequate opportunity to explain her departure and rebut the presumption of waiver. At Paschall's sentencing hearing, the trial court stated that it would welcome any statements on behalf of Paschall that either her attorney or she herself wanted to make. Tr. p. 71. Neither Paschall nor her attorney addressed her disappearance at trial. Rather, her counsel, said "she's taken stock in her actions, and you can see from her condition today, she realizes that what she did was very serious." Id. at 71-72. After these remarks, the trial court asked "Does the Defendant or anyone know of any reason why the Court should not pronounce judgment at this time?" Id. at 73. Paschall's public defender then replied, "No reason, Your Honor." Id.

In considering the entire record, we find that Paschall did not notify the trial court of any reason for her absence either before she left the courtroom or afterwards. She was presented with ample opportunity to explain her departure but she failed to do so. It was her burden to rebut the trial court's initial presumption that she had waived the right to be present at her trial. See Ellis v. State, 525 N.E.2d 610, 612 (Ind. Ct. App. 1987). As she made no statement concerning her departure, we conclude that the most likely reason Paschall left was because the trial court denied her request for a continuance. Therefore, we conclude that her departure was a voluntary and knowing waiver of her right to be present, and the trial court properly conducted her trial *in absentia*.

## **II. Best Evidence Rule**

Paschall next contends that Detective McCune's testimony regarding the conversation he heard via the transmitter violated Indiana Rule of Evidence 1002, known as the "best evidence rule." We review the trial court's admission of evidence for abuse of discretion. Johnson v. State, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005), trans. denied. The trial court's decision will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. Id.

Indiana Rule of Evidence 1002 states:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. An electronic record of the Indiana Bureau of Motor Vehicles obtained from the Bureau that bears an electronic or digital signature, as defined by statute, is admissible in a court proceeding as if the signature were an original.

Ind. Evidence Rule 1002 (2006).

We are compelled to note that neither at trial nor on this appeal has Paschall contested the accuracy of Detective McCune's testimony regarding the conversations he heard via the transmitter. To be entitled to reversal for the improper use of secondary evidence, "[a]n effective objection must identify an actual dispute over the accuracy of the secondary evidence." Jones v. State, 780 N.E.2d 373, 378 (Ind. 2002) (quoting Lopez v. State, 527 N.E.2d 1119, 1125 (Ind. 1988)). Because there is no dispute as to the accuracy of the testimony, any error in admitting Detective McCune's testimony in lieu of the actual tape recording of the transaction was harmless.

### **III. Testimony of Prior Uncharged Alleged Conduct**

Paschall lastly contends that the trial court erroneously allowed Mattix to testify that he and Paschall had a mutual interest in cocaine and that he had bought cocaine from Paschall and her boyfriend in the past. We review the admissibility of this evidence under the abuse of discretion standard, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. Dumes v. State, 718 N.E.2d 1171, 1174 (Ind. Ct. App. 1999) (citations omitted). In determining admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor. Id.

Paschall contends that Mattix's testimony violated Indiana Rule of Evidence 404(b), which provides in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ind. Evidence Rule 404(b) (2006). This rule attempts to prohibit a jury from

making the “forbidden inference” that because of a defendant’s criminal propensity, he or she committed the charged act. Bald v. State, 766 N.E.2d 1170, 1173 (Ind. 2002).

When we assess the admissibility of evidence under Rule 404(b), our court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to the rule. Wilhelmus v. State, 824 N.E.2d 405, 414 (Ind. Ct. App. 2005).

Mattix testified that he found out Paschall and her boyfriend were dealing cocaine, and that he used to buy from them. Tr. p. 44. He further testified that Paschall and her boyfriend had “preyed on [him] and other people in the community.” Id. at 45. He called Paschall’s boyfriend a “parasite, just a cancer [that] relished in making the money, having the power, using the women and the wives” and destroying families. Id. The prosecutor then asked Mattix how Paschall “fit into that,” and Mattix testified: “They were a team, her and her boyfriend.” Id.

As the Indiana Supreme Court stated in Lannan v. State, 600 N.E.2d 1334, 1338 (Ind. 1992), “the general rule prohibiting the state from offering character evidence merely to show the defendant is a ‘bad guy’ and therefore probably committed the crime with which he is charged remains as fundamental today as ever.” “The notion that the State may not punish a person for his character is one of the foundations of our system of jurisprudence.” Id.

In this case, the trial court clearly abused its discretion in allowing Mattix’s soliloquy on the bad character of Paschall and her boyfriend. Testimony that Paschall’s



boyfriend was a “cancer” and a “parasite” preying on the community through his drug business and that Paschall was his partner in these endeavors had no probative value weighing on the specific crime at issue. Rather, it was a blatant attempt to paint the picture of Paschall and her boyfriend as “bad guys” with the propensity to commit the crime of dealing cocaine.

However, the erroneous admission of character and uncharged bad act evidence to prove guilt does not always require reversal. Such errors are harmless when, for example, there is overwhelming evidence of the defendant’s guilt. See Martin v. State, 779 N.E.2d 1235, 1242 (Ind. Ct. App. 2002), trans. denied. In this case, Detective McCune testified in depth about the sting operation and how he had wired Mattix and given him money for the transaction. He further testified that he watched the entrance to the apartment building where the drug transaction was to take place and saw Mattix leave and then give him a plastic bag that later tested positive for cocaine.

In addition to Detective McCune’s testimony, Mattix also testified at length about the transaction. Mattix said that he contacted Paschall and asked to “make a buy.” Tr. p. 46. He then testified about going to her apartment and having Paschall ask him if he was wearing a wire and even pat him down and turn his jacket inside out. Id. at 48. Mattix said that Paschall then went and got a plastic bag of cocaine and handed it to him. Id. at 49. We conclude that the testimony of both of these witnesses amounted to overwhelming evidence of Paschall’s guilt, and therefore the trial court’s erroneous admission of improper Rule 404(b) character evidence was harmless.

### **Conclusion**

We conclude that the trial court properly conducted Paschall's trial *in absentia*, and that any erroneously admitted testimony was harmless error.

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.