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IN THE
COURT OF APPEALS OF INDIANA

SHAWN T. O'NEILL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 07A01-0904-CR-167
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0402-FC-062
Cause No. 07C01-0612-FB-509

August 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

In this consolidated belated appeal, Shawn T. O'Neill ("O'Neill") appeals his conviction for Aggravated Battery, a Class B felony,[1] and the revocation of his probation for Sexual Misconduct with a Minor, a Class C felony.[2] We affirm.

Issues

O'Neill presents three issues for review:

I. Whether it was error to try him in absentia on the Aggravated Battery charge;
II. Whether he was entitled to a mistrial in the trial of the Aggravated Battery charge; and
III. Whether the trial court properly revoked his probation imposed for the Sexual Misconduct with a Minor conviction.

Facts and Procedural History

On August 30, 2004, O'Neill, who was facing three charges, pleaded guilty to Sexual Misconduct with a Minor. He was sentenced to eight years imprisonment, with five years suspended to probation. The State subsequently filed several probation violation notices, alleging that O'Neill had tested positive for cocaine, marijuana, and alcohol, and had failed to begin a sex offender treatment program, complete a substance abuse evaluation, and report a change in his employment.

On December 21, 2006, O'Neill and several friends were in a vehicle being driven by Quinton Thompson ("Thompson") on a road in Nashville, Indiana when they encountered a

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[1] Ind. Code § 35-42-2-1.5.

[2] Ind. Code § 35-42-4-9.

vehicle being driven by Larry Borders ("Borders") at a relatively slow speed. Borders applied his brakes to discourage tailgating, and Thompson pulled around Borders' vehicle and sped off. At a traffic light where both vehicles were stopped, Borders got out of his vehicle and began to confront Thompson about his driving.

The verbal dispute escalated into physical violence. Cathy Sacstetter ("Sacstetter") was traveling through downtown Nashville and stopped her vehicle behind a van, near a group of young men. She observed one of the men, later identified as O'Neill, strike "an older gentleman" around his head several times. (Tr. 282.) When the older man fell to his knees on the pavement, O'Neill kicked him several times. Sacstetter honked her horn and the group of young men dispersed. As Sacstetter called 9-1-1, she saw Borders stagger to his van and drive away.

Borders drove to the home of his daughter, Jennifer Bailey ("Bailey"), who is a nurse. Upon observing Borders' serious injuries, Bailey summoned an ambulance and police assistance. Borders underwent surgery to have two metal plates put into his broken jaw.[3] A few weeks later, he required surgery to repair a broken bone around his left eye.

An ensuing police investigation led to O'Neill's arrest. On December 27, 2006, he was charged with Aggravated Battery. The State also filed a probation violation notice alleging that O'Neill had committed the offense of Aggravated Battery while on probation

[3] Because of the severity of the jaw displacement, Borders was unable to regain full sensation in his jaw after the surgery.

for Sexual Misconduct with a Minor.[4]

On January 9, 2008, with O'Neill present, the trial court set his trial date in the Aggravated Battery case for March 26, 2008. O'Neill failed to appear at a pre-trial hearing,[5] and a warrant was issued for his arrest. The State moved to try O'Neill in absentia, in the event that he did not appear for trial. The trial court granted the State's motion. When O'Neill failed to appear for his jury trial on March 26, 2008, he was tried in absentia. He was found guilty as charged. At a sentencing hearing held on June 30, 2008, with O'Neill present, the trial court sentenced him to fourteen years imprisonment.

The State filed a final probation violation notice, alleging that O'Neill failed to maintain contact with probation services, to provide a change of address, and to register with the Sex Offender Registry. On July 1, 2008, the trial court conducted a probation revocation hearing. O'Neill admitted to the State's allegations, with the exception of the allegation that he had committed Aggravated Battery. The State submitted evidence of O'Neill's conviction and sentence for that offense, and the trial court found that O'Neill had violated the terms of his probation. O'Neill's probation was revoked and he was ordered to serve three years of his previously suspended sentence, consecutive to the fourteen-year sentence imposed for Aggravated Battery.

O'Neill filed notices of appeal challenging the Aggravated Battery conviction and the

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[4] On January 30, 2007, the State filed an additional notice of probation violation, alleging that O'Neill had committed the offense of Criminal Mischief while on probation. However, that notice was subsequently dismissed.

[5] At the pretrial conference, O'Neill's attorney informed the trial court that O'Neill had contacted him to say that he was in Greensburg and was on his way to court. However, O'Neill did not appear.

probation revocation. On December 18, 2008, the cases were consolidated for appeal; however, the consolidated appeal was subsequently dismissed. O'Neill obtained permission to file a belated appeal, and this appeal proceeded.

Discussion and Decision

I. Trial In Absentia

A defendant in a criminal proceeding has a right to be present at all stages of his or her trial. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. However, this right may be waived and the defendant may be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right. Jackson v. State, 868 N.E.2d 494, 498 (Ind. 2007). "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." Brown v. State, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005), trans. denied.[6]

A defendant who has been tried in absentia must be afforded an opportunity to explain his absence and to rebut the presumption of waiver. Id. As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently

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[6] O'Neill acknowledges that this is the law in Indiana, but contends that "this court should reexamine the conditions under which a defendant can be tried in absentia." Appellant's Brief at 30. He directs our attention to Crosby v. United States, 506 U.S. 255 (1993), a case in which the United States Supreme Court held that a defendant who did not appear for any part of his trial did not constitute a valid waiver of his right to be present under Federal Rule of Criminal Procedure 43. However, the Supreme Court specifically declined to address the defendant's claim that his trial in absentia was also prohibited by the United States Constitution. Id. at 262. O'Neill does not contend that Indiana has a rule similar to the federal rule; nor does he develop a cogent argument with respect to an alleged Constitutional prohibition against trial in absentia when the defendant has not appeared for any portion of his trial.

waived his right to be present at trial, and his explanation of his absence is part of the record available for review. Id.

O'Neill was present at a hearing at which his trial date was set. At the sentencing hearing, he explained his reasons for not appearing at trial as follows. O'Neill desired to retain private counsel, as opposed to court-appointed counsel, but lacked sufficient funds by the time of trial. He expressed a belief that his absence would have resulted in a continuance, giving him additional time to work and raise funds to employ private counsel. Nevertheless, he admitted that he "intentionally didn't show up for trial." (Tr. 649.)

Accordingly, the evidence of record discloses that O'Neill was aware of his trial date and chose not to appear. O'Neill voluntarily, knowingly, and intelligently waived his right to appear at trial, and the trial court did not err by trying him in absentia.

II. Mistrial

Prior to trial, O'Neill's counsel moved for an order in limine excluding any references to O'Neill's "prior bad acts." (App. 42.) The trial court granted O'Neill's motion, and the prosecutor forewarned each of the State's eyewitnesses to make no reference to O'Neill's criminal history. However, two arguable violations of the order in limine occurred. O'Neill now contends that he was entitled to a mistrial because one witness referred to his probationary status, and a second witness apparently began to make a reference to O'Neill's possible incarceration before the trial court interrupted the response.

When Thompson was asked on direct examination by the prosecutor as to why he initially claimed O'Neill was not with him on the night in question, Thompson responded "it

was a mistake" and "I might end up in jail, you know, and he might - because he was on probation." (Tr. 439.) O'Neill's counsel made no contemporaneous objection, but at the end of Thompson's direct examination testimony, he moved for a mistrial "or other appropriate steps." (Tr. 445.) He nonetheless refused a contemporaneous admonishment.

Subsequently, Jacob Shepherd was asked why he did not initially implicate O'Neill and he responded, "Well, he said not to say and I didn't want to say it also because I didn't want to send him back to -." (Tr. 473.) The trial court immediately directed the jury to disregard the latter response. O'Neill's counsel renewed the motion for a mistrial. After argument of counsel was heard, the trial court denied the motion for a mistrial and admonished the jury as follows:

> You are instructed that you are not to consider any evidence of or reference to any prior or other criminal history of the defendant or any witnesses in this case. You are to disregard any such evidence and you are not to consider it for any purpose in your deliberations.

(Tr. 509.)

We review a trial court's denial of a mistrial motion for an abuse of discretion, because the trial court is in the best position to gauge the circumstances surrounding an event and its impact upon the jury. Pittman v. State, 885 N.E.2d 1246, 1255 (Ind. 2008). A mistrial is appropriate only when the defendant has been placed in a position of grave peril to which he should not have been subjected. Id. The gravity of the peril is measured by the conduct's probable persuasive effect on the jury. Id.

Refusal of an offer to admonish the jury constitutes a waiver of any error in the denial of a motion for a mistrial. Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001). Here, O'Neill's counsel opposed an admonition, expressing the belief that it would "aggravate the damage." (Tr. 447.) Waiver notwithstanding, O'Neill has not shown that he was subjected to grave peril necessitating the extreme remedy of a mistrial. In light of the victim's testimony that he was battered and seriously injured, and the testimony of three eyewitnesses that O'Neill was the perpetrator of the battery, we do not find it likely that the jury was unduly persuaded by a reference to probation and an interrupted, oblique reference to possible punitive consequences. We find no abuse of discretion in the trial court's denial of a mistrial.

III. Probation Revocation

O'Neill argues that his probation was revoked absent sufficient evidence, because the revocation rested in part upon the trial court's determination that he had committed Aggravated Battery. According to O'Neill, because he was improperly tried in absentia, the trial court should not have considered this conviction. Having previously determined that O'Neill was properly tried in absentia, we reject his contention that evidence of his conviction of Aggravated Battery should be discarded in our determination of whether sufficient evidence supports the revocation.

Placement on probation is a conditional liberty and not a right. Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999). A probation revocation hearing is in the nature of a civil proceeding and, therefore, the violation need only be proven by a preponderance of the

evidence. Smith v. State, 727 N.E.2d 763, 765 (Ind. Ct. App. 2000). Proof of a single violation of the conditions of probation is sufficient to support a decision to revoke probation. Bussberg v. State, 827 N.E.2d 37, 44 (Ind. Ct. App. 2005), trans. denied.

Here, O'Neill admitted to multiple probation violations, including failure to register as a sex offender, failure to maintain contact, testing positive for illegal substances, and failure to complete court-ordered probation services. Any one of these violations would have sufficed to support revocation. See id. Additionally, O'Neill's probation officer testified that he had been convicted of Aggravated Battery, and the State submitted documentation of that conviction. There is ample evidence to support the trial court's finding that O'Neill had violated the terms of his probation.

Conclusion

O'Neill was properly tried in absentia for the offense of Aggravated Battery, and he was not entitled to a mistrial. His probation in the Sexual Misconduct with a Minor case was properly revoked.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.