## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Jaron W. Wiggs,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

February 24, 2022

Court of Appeals Case No. 21A-CR-1341

Appeal from the Kosciusko Superior Court

The Honorable Karen A. Springer, Judge

Trial Court Cause No. 43D01-2010-F3-795

**Najam, Judge.**

## Statement of the Case

[1] Jaron W. Wiggs appeals his conviction for battery, as a Level 5 felony, and his adjudication as a habitual offender. Wiggs raises the following two issues for our review:

1. Whether the State presented sufficient evidence to support his conviction for battery, as a Level 5 felony.

2. Whether the trial court committed fundamental error when it excluded Wiggs from the bifurcated habitual-offender component of his trial.

[2] We affirm.

## Facts and Procedural History

[3] On October 9, 2020, Kosciusko County Sheriff's Department Officer Zackary Lane was escorting Wiggs, an inmate at the county jail, to the infirmary. On the way, they passed another inmate who was being escorted, Austin Michael Sherburne. As Wiggs approached Sherburne, Wiggs punched Sherburne in the mouth. The punch broke Sherburne's jaw. Officer Lane observed that,

> [a]t first [Sherburne] had his mouth shut and I could tell there was a massive amount of blood in his mouth just from what I saw on the floor. I witnessed him start gurgling blood and I told him to open his mouth and he told me it hurt. He just kind of mumbled it. At that time I said you need to open your mouth . . . . So at that point he opened his mouth, a bunch of blood went on the floor, and at that point I knew it was horrible. So I told him[,] I said, "I'm gonna pull your lip down. I have to see the injury. It's gonna hurt but I have to do it." As I pulled it

> down I could see . . . his jaw was completely split in half. At that point I [sought] higher medical action.

Tr. Vol. 2 pp. 77–78. Pamela Lynn Cretcher, the nurse at the jail's infirmary, confirmed that Sherburne's "jaw was broken" and there was "extensive damage to it." *Id.* at 91. She also observed that Sherburne was "in so much pain" that she was not able "to open his mouth." *Id.*

[4] The State charged Wiggs with battery, as a Level 5 felony, and with being a habitual offender. The trial court bifurcated Wiggs' ensuing trial. At the initial phase on the battery charge, Officer Lane and Nurse Cretcher both testified. Sherburne also testified and stated that he went "in and out of consciousness" immediately after being hit by Wiggs; that he had to be transported to a nearby hospital to have an eight-hour surgery; that he was in the hospital for "almost two" months because of the attack; that he now suffers "permanent nerve damage" through his "whole body because when I had the surgery done they had to cut through a lot of the tissue . . . just to get to the jaw due to how swollen it was"; and that the pain he suffered was "a ten" out of ten. *Id.* at 93–94.

[5] The jury found Wiggs guilty of battery, as a Level 5 felony. The court then held the second phase on the habitual offender charge. Wiggs was present in person at the beginning of the second phase, and, as the attorneys were speaking to the judge at the bench, Wiggs remained at the defense table but then became upset. Michael Speigle, the court's bailiff, observed Wiggs become "very upset speaking with his mother." *Id.* at 146. Wiggs raised his voice from "a medium

range" of volume to "a higher one" and, in the presence of the jury, said, "Fuck all you bitches," "Fuck this system," and "Fuck each one of ya." *Id.* Speigle further observed Wiggs become "enraged" with "[v]eins sticking out of his face." *Id.* Speigle attempted to "de-escalat[e]" the situation and "knew I needed to get him out of this courtroom or it was only going to get even worse." *Id.* at 146–47. Speigle asked for assistance from deputy sheriffs in the courtroom. Outside the courtroom by the elevator area, Wiggs' behavior "got worse" and "he got confrontational" with "all of the officers [who] were . . . with him and he said he was not going to participate anymore." *Id.* at 147. Speigle then specified that Wiggs said, "I don't want a fuckin trial anymore." *Id.*

[6] With Wiggs having been removed from the courtroom, the court concluded, based on Speigle's testimony, that the second phase of Wiggs' trial would proceed in his absence. Wiggs' counsel did not object to the trial court's decision. Following the State's presentation of evidence, the jury found Wiggs to be a habitual offender. The trial court then entered its judgment of conviction and sentenced Wiggs accordingly. This appeal ensued.

## Discussion and Decision

### *Issue One: Sufficiency of the Evidence*

[7] On appeal, Wiggs first asserts that the State failed to present sufficient evidence to show that he committed battery, as a Level 5 felony. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. We do not assess the credibility of witnesses or reweigh the evidence. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

*Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017) (citations omitted).

[8] To demonstrate battery, as a Level 5 felony, the State was required to show that Wiggs touched Sherburne "in a rude, insolent, or angry manner," which resulted in serious bodily injury to Sherburne. *See* Ind. Code § 35-42-2-1(g)(1) (2020). As relevant here, "serious bodily injury" means bodily injury that causes "(1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; [or] (4) permanent or protracted loss or impairment of the function of a bodily member or organ[.]" I.C. § 35-31.5-2-292.

[9] Wiggs asserts that the State's evidence is insufficient because the only evidence of serious bodily injury came from Sherburne's testimony, and, Wiggs continues, Sherburne lacks credibility. Wiggs' argument is contrary to our standard of review. It was for the jury, not this Court on appeal, to assess Sherburne's credibility. We reject Wiggs' argument accordingly.

[10] Still, Wiggs also contends that the jury's reliance on Sherburne's testimony violates the incredible-dubiosity rule. As the Indiana Supreme Court has made clear:

> Under this rule, a court will impinge on the jury's responsibility to judge the credibility of the witnesses only when it has

> confronted "inherently improbable" testimony or coerced, equivocal, wholly uncorroborated testimony of "incredible dubiosity." . . . A court will only impinge upon the jury's duty to judge witness credibility where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt.

*Moore v. State*, 27 N.E.3d 749, 755 (Ind. 2015) (cleaned up).

[11] The incredible-dubiosity rule is not applicable here, where the State presented three witnesses—Officer Lane, Nurse Cretcher, and Sherburne—each of whom corroborated at least some key facts from the other two. *See id.* Thus, we affirm Wiggs' conviction for battery, as a Level 5 felony.

### *Issue Two: Fundamental Error*

[12] Wiggs next asserts that the trial court erred when it held the second phase of his bifurcated trial in his absence. Wiggs does not dispute that, as his counsel did not object to the trial court proceeding in Wiggs' absence during the second phase, he has not preserved this argument for appellate review, and, therefore, to succeed on appeal he must show that the fundamental error exception to his waiver applies. As our Supreme Court has explained:

> The fundamental error exception is extremely narrow[] and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and

> elementary principles of due process. This exception is available only in egregious circumstances.

*Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (quotation marks and citations omitted). To prove fundamental error, the appellant must show "that the trial court should have raised the issue sua sponte . . . ." *Taylor v. State*, 86 N.E.3d 157, 162 (Ind. 2017).

[13] There is no question that a criminal defendant has a fundamental right to be present at his own criminal trial. *See, e.g.*, *Wilson v. State*, 30 N.E.3d 1264, 1269 (Ind. Ct. App. 2015), *trans. denied*. However:

> this right, under either the United States or Indiana Constitutions, may be waived if such waiver is made knowingly and voluntarily. [*Campbell v. State*, 732 N.E.2d 197, 204 (Ind. Ct. App. 2000).] Both this court and the United States Supreme Court have held that significantly contemptuous conduct by a defendant can function as a knowing and voluntary waiver of their right to be present. *Id.*; *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060, 25 L. Ed. 2d 353 (1970).
>
> > It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. *We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case*.
>
> * * *

> The trial court in this case decided under the circumstances to remove the defendant from the courtroom and to continue his trial in his absence until and unless he promised to conduct himself in a manner befitting an American courtroom. As we said earlier, we find nothing unconstitutional about this procedure.

*Allen*, 397 U.S. at 343, 345–46, 90 S. Ct. 1057 (emphasis added).

*Id.* at 1269–70 (emphasis and omission original to *Wilson*). Thus, when properly preserved, we would review such issues on appeal for an abuse of the trial court's discretion. *Id.* at 1270.

[14] In *Wilson*, the trial court bifurcated the defendant's trial. During closing argument in the second, enhancement phase, the defendant "had an outburst, he struggled with [the] bailiffs, he yelled out words of profanity, directed those to members of the audience." *Id.* The trial court had the defendant removed from the courtroom and concluded that he had "waived his right, his opportunity to be here during this phase of the trial." *Id.* After excluding him from the enhancement phase, the trial court called the defendant back into the courtroom for a contempt hearing. There, the defendant continued his outburst toward the court, and he agreed with the trial court's decision to exclude him from the remaining portion of his trial.

[15] On appeal, the defendant argued that the trial court abused its discretion in excluding him because the court did not first warn him that he could be removed for being disruptive and because, in other cases, the defendants were

disruptive several times and had first been warned before they were removed. But in *Wilson* we affirmed the trial court's decision to exclude the defendant:

> the trial court was within its discretion to remove [the defendant] from the courtroom. . . . [The defendant] not only used profanity and generally disrupted the proceedings, but also became physical with the bailiffs. Furthermore, he continued to exhibit contumacious behavior in the contempt hearing, used profanity directed at the court, and agreed with the trial court's decision to exclude him from the trial. These actions amount to a waiver of [the defendant's S]ixth [A]mendment and Article I, Section 13 rights.

*Id.*

[16] However, in a recent opinion on which Wiggs relies, we held that the trial court committed fundamental error when it excluded the defendant from his trial for invasion of privacy after the defendant failed a pre-trial drug test. *Wells v. State*, 176 N.E.3d 977, 985–86 (Ind. Ct. App. 2021). In so holding, we distinguished cases that "involved an unruly defendant," including those where the defendant had been "warned by the judge that he will be removed" if the defendant continued his "disruptive" courtroom behavior. *Id.* at 985. We concluded that "[t]he instant record includes no evidence that [the defendant] engaged in disruptive conduct on the day of his rescheduled trial" and instead showed only his "failure to pass a pre-trial drug test." *Id.* Thus, we held that the trial court "did not employ available measures to protect [the defendant's] fundamental right to be present," and that "[l]ess stringent remedies, rather than automatic

ejectment, were available to the trial court that should have been employed . . . ." *Id.*

[17] We conclude that Wiggs' circumstances are readily more analogous to those in *Wilson* than to those in *Wells*. In the courtroom at the beginning of the second phase of his trial, Wiggs used profanity directed toward other, unknown persons. He began to speak in a loud volume. He became irate when the bailiff attempted to de-escalate the situation. Once removed from the courtroom, Wiggs "got confrontational" with "all of the officers [who] were . . . with him and he said he was not going to participate" in the trial "anymore." Tr. Vol. 2 at 147.

[18] In reaching its decision to exclude Wiggs, the trial court relied on Speigle's un-objected to testimony of each of those facts. In *Wilson*, we affirmed the trial court's exclusion of the defendant on similar, in-courtroom disruptive facts where the trial court had also given no warning that exclusion may result from the defendant's outbursts. Further similar to *Wilson*, prior to reaching its decision here the trial court heard evidence that Wiggs had waived his right to be present by telling the officers that "he was not going to participate" in the trial. *Id.* The instant facts are not analogous to those in *Wells*, which involved only a pre-trial drug test for an invasion-of-privacy trial and had no in-courtroom disruptive behavior.

[19] Accordingly, we cannot say the trial court here committed any error, let alone fundamental error, when it excluded Wiggs from the second phase of his trial. We therefore affirm Wiggs' adjudication as a habitual offender.

## Conclusion

[20] In sum, we affirm Wiggs' conviction for battery, as a Level 5 felony, and his adjudication as a habitual offender.

[21] Affirmed.

Vaidik, J., and Weissmann, J., concur.