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IN THE COURT OF APPEALS OF INDIANA

Carlton Lee Wells,
Appellant-Defendant,

v.

State of Indiana
Appellee-Plaintiff.

September 22, 2021

Court of Appeals Case No. 21A-CR-612

Appeal from the St. Joseph Superior Court

The Honorable Jane Woodward Miller, Judge

Trial Court Cause No. 71D01-1805-F6-418

Tavitas, Judge.

Case Summary

[1] Carlton Lee Wells appeals his conviction for invasion of privacy, a Class A misdemeanor. On the morning of Wells' initial jury trial setting, he failed a drug test. The trial court vacated the trial setting, ordered Wells to be tested on

a biweekly basis until his rescheduled trial, and explicitly warned Wells that the court would try him in absentia if Wells failed a drug test on the new trial date. On the morning of his rescheduled jury trial, Wells again tested positive for drugs. The trial court ordered Wells' exclusion from trial and tried him in absentia.

[2] Wells alleges violations of his right to be present for all stages of his trial proceedings pursuant to the Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution. The record does not support a finding that Wells engaged in disruptive or contumacious conduct or that he otherwise interfered with the trial court's conduct of the trial on the date in question. We find that the trial court committed fundamental error in excluding Wells from his trial. Accordingly, we reverse and remand to the trial court with instructions to vacate Wells' conviction.

Issue

[3] Wells raises two[1] issues on appeal, one of which we find to be dispositive—namely, whether the trial court fundamentally erred in excluding Wells from his trial.

[1] Wells' other raised issue is whether sufficient evidence supports his conviction.

Facts

[4] On March 29, 2018, the St. Joseph County Circuit Court issued an order for protection, effective through February 21, 2020, that prohibited Wells' contact with KenQuis Crawford and required Wells to stay no less than 300 feet from Crawford and her South Bend apartment. On May 6, 2018, Patrolman Gregory Early of the South Bend Police Department was dispatched to Crawford's apartment to investigate an alleged violation of the order for protection.

[5] Patrolman Early entered the parking lot of the apartment complex and observed a white Toyota "backing out of the parking space directly in front of [Crawford's apartment]." Tr. p. 52. As the Toyota drove past his squad car, Patrolman Early recognized Wells as the driver and lone occupant. Patrolman Early turned his squad car around and followed Wells. Wells accelerated away, turned onto Prairie Avenue, a.k.a. State Road 23 ("S.R. 23"), and continued eastbound at a high rate of speed. Patrolman Early briefly lost sight of the Toyota.

[6] Off-duty reserve officer Jeff Parsons of the Starke County Sheriff's Department was traveling in the westbound lane of S.R. 23 when he observed a white vehicle traveling eastbound at a high rate of speed. The white vehicle sped through a stop sign intersection with a South Bend police squad car several car-lengths behind in pursuit. Officer Parsons observed an object—later identified as a baggie—being tossed out of the driver's side window of the white vehicle.

[7] Subsequently, Patrolman Early, assisted by Officer Michael Vanvynckt of the South Bend Police Department, initiated a traffic stop of Wells' vehicle approximately three blocks away from Crawford's apartment. Officer Parsons approached and alerted Officer Michael Vanvynckt to the presence of the baggie, which contained a white powdery substance that Officer Parsons believed to be cocaine. Officer Vanvynct delivered the baggie to Patrolman Early. Patrolman Early then returned to Crawford's residence to interview her and verified that the order for protection remained in effect.

[8] On May 11, 2018, the State charged Wells with possession of cocaine, a Level 6 felony, and invasion of privacy, a Class A misdemeanor. At the outset of Wells' initial jury trial setting on September 3, 2020, the trial court was advised that: (1) Wells was "being very contentious with [his counsel]"; and (2) the clerk's office believed Wells was impaired by drugs or alcohol. *Id*. at 12. The trial court ordered Wells to submit to drug testing stating, "I don't think I can in good conscious [sic] or ethically go forward with this [jury trial] based on the fact that I received two separate independent observations that [Wells was] impaired." *Id*. at 7-8. Wells denied using marijuana that day but admitted he might test positive for residual marijuana from prior usage.

[9] The trial court subsequently made the following record:

> THE COURT: I have the test results. You tested at 223. I don't know what mgs stands for, per milliliter, and the cutoff is 50.
>
> I spoke with Drug Court, one of the members of the Drug Court staff, and they say that that's new use. It's high new use. And

> when I think of that in combination, frankly, with the report I received from the Clerk's Office and the report of your behavior here in court before I came in in terms of your contact with your lawyer which I heard was very difficult and contentious, I do not think that I can in good conscious [sic] go forward with this trial today.
>
> So, what I'm going to do is send the jury home . . . . I'm going to place you on pretrial supervision where you are tested no less than twice a week. And where if you fail to show for a test when ordered to do so, I would have you picked up. And I'll have you tested on the morning your [sic] trial when we next have it, and if you are positive, we'll go forward with the trial without you. You'll have waived your right to be present by continuing to use drugs while you're on bond.

Id. at 15-16. Further, the trial court stated:

> THE COURT: [ ] . . . I've tried to think this through in a way, I've never had to tell someone not to use weed, or not to come in impaired before. This has never come up in the 14 years I've been doing this. And I don't know, Mr. Wells, if you're just naturally cantankerous and this, your behavior here with your attorney earlier and your conversations with the clerks were merely a reflection of your personality rather than impairment. There's no way for me to tell. And so, what I have to do is use my best judgment based on . . . the facts that are front [sic] of me and they tell me that you are not in condition to go forward with the trial, and I have tried then to think of how do I guarantee this doesn't happen again, and the best way that I know of to guarantee it doesn't happen again, is to have you drop[2]

[2] "Drop" refers to submitting a drug sample.

> regularly. There's no weed smoking until you get tried. And then, then the problem won't arise. Alright[?]
>
> [Wells]: Yes.

Id. at 18. The trial court vacated the trial setting, released the jury, imposed pretrial supervision orders, and rescheduled the jury trial.[3]

[10] On October 15, 2020, the morning of Wells' rescheduled jury trial, he again tested positive for THC. The trial court made the following remarks to Wells:

> Mr. Wells, it looks like you were still using Marijuana when we had our court hearing on September 3rd. I told you if you tested positive for marijuana this time, we would go ahead without you present because I cannot tell the level of impairment when someone tests positive for marijuana; unlike blood alcohol, you know, there's a set thing. What I know is that you were at this point 131 whatever "[m]g" is over the cut-off. It is less than what it was when you were here before on September 3rd, and if you'll recall, the thing about September 3rd, what started all this was that you were acting like you were impaired.
>
> [Wells]: Yeah.
>
> THE COURT: First with the clerks, and then with [defense counsel] in ways that suggested that you were impaired. At least to those who observed those interactions. That's what led me to

[3] The trial court conducted a pretrial conference on September 22, 2020, wherein it reiterated its order that Wells should timely submit to drug testing on the new trial date, October 15, 2020, in order that the trial court would receive the results before Wells' jury trial was scheduled to commence.

> ask you to be tested. The test was positive on the marijuana and that's why you were supposed to be tested since September 3rd until now, including today. We are trying to find the results from these last couple of weeks while you were also going in, I think, you told me this.

Id. at 30.

[11] After the trial court reviewed the results of Wells' available court-ordered drug tests administered after the vacated trial setting, it determined that: (1) Wells' THC level "went up instead of down" between September 11, 2020, and September 18, 2020; and (2) Wells' creatinine levels indicated that he also "tr[ied] to flush stuff out" of his system.[4] *Id*. at 35. The trial court then stated:

> Now, we're going to call the jury in in 5 minutes. I want [ ] everyone understanding where we are which is, I'm going to order that Mr. Wells be tried in absentia. I have no caselaw, I think I'm right, obviously, but I have no caselaw. This never came up in [ ] all the time I've been in the Criminal Justice System and with Mr. Wells' understanding, he's not going to be able to be here to see what happens.

Id. at 35. The trial court excused Wells from the proceedings and, without objection from Wells' counsel, conducted Wells' jury trial in absentia. Wells, thus, appeared by counsel, but was not present during any part of his jury trial.

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[4] "Creatinine is a metabolic by-product of muscle metabolism, and normally appears in urine in relatively constant quantities over a 24-hour period with 'normal' liquid intake. Therefore, urine creatinine can be used as an indicator of urine water content or as a marker identifying a specimen as urine. Increased intake of water lowers the creatinine level and may dilute the amount of drug in urine." https://www.redwoodtoxicology.com/resources/drug_info/creatinine (last visited August 27, 2021).

[12] At the close of the evidence, the trial court offered the jury the choice between proceeding "straight through" with deliberations or returning the following day. *Id*. at 104. Defense counsel asked the trial court whether Wells could appear for the following day's proceedings. The following colloquy ensued between the trial court and defense counsel:

> THE COURT: Oh, I wished I had thought about that before telling the[ ] [jury] that they get to decide. Because if they decide to go through today, he's obviously not going to have any chance. Well, it doesn't matter. I guess, tomorrow if [ ] I don't know how that's going to go down that much.
>
> [Defense Counsel]: Alright. Right. I just wanted to make that record.
>
> THE COURT: I guess if he wanted to come, I don't know how it would — if he wanted to take the test and if he were below the cutoff, but I can't other than that gauge this.
>
> [Prosecutor]: He's not — he can't be below the cutoff.
>
> THE COURT: But, yes, but at this point whether he has that chance, or not, is going to depend on what the jury wants to do.
>
> * * * * *
>
> THE COURT: Because I have said from the beginning that I would let them decide. If they decide they want to go they want to go and, you know, I was certainly very clear with Mr. Wells last month that if he tested positive, he was barring himself from this thing.

Id. at 98-99. The jury elected to deliberate that evening, and the proceedings were completed in a single day. The jury found Wells not guilty of possession of cocaine and guilty of invasion of privacy. On March 10, 2021, the trial court sentenced Wells to 180 days on home detention through Michiana Community Corrections.[5] Wells now appeals.

Analysis

[13] Wells argues that, by trying him in absentia, the trial court violated his right to be present at trial under both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution. He maintains that the trial court "could have continued the trial and taken [him] into custody for violating [court] orders and [ ] ma[d]e sure he would not use [marijuana] before trial" but, instead, "denied his ability to be present and participate at trial[.]"[6] Wells' Br. p. 10.

[14] This Court typically reviews a trial court's exclusion of a defendant from the courtroom during his or her trial for an abuse of discretion. *Wilson v. State*, 30 N.E.3d 1264, 1270 (Ind. Ct. App. 2015) (citing *Illinois v. Allen*, 397 U.S. 337, 345-46, 90 S. Ct. 1057 (1970)). An abuse of discretion occurs only if the decision is clearly against the logic and effect of the facts and circumstances

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[5] Wells does not appear in the St. Joseph County Police Department Jail Tracker and appears to have served his entire sentence. *See* https://sjcindiana.com/1211/Inmate-Search (last visited September 15, 2021).

[6] Wells also argues that the trial court relied on hearsay information regarding his failed drug test and failed to conduct an evidentiary hearing wherein Wells could challenge the drug test results or question the person who conducted the drug test.

before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Wilson,* 30 N.E.3d at 1270. Here, however, Wells failed to object to his exclusion from the courtroom; he must, therefore, establish fundamental error. *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019) (Kelly failed to object to statements in violation of his right to remain silent). "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." *Isom v. State*, 31 N.E.3d 469, 490 (Ind. 2015) (quoting *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013)). "'The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process.'" *Id.* (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)).

[15] As a preliminary matter, we note that the instant matter presents a case of first impression. The trial court judge stated on the record that it did not have any caselaw to rely upon in support of her decision that Wells waived his right to be present because he tested above a certain threshold level for THC. While we may not have on-point federal and Indiana caselaw to guide us, we can extrapolate enough from the cases discussed herein to resolve the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution issues at-bar.

I. Sixth Amendment

[16] The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.

Allen, 397 U.S. at 338, 90 S. Ct. at 1058 (internal citation omitted). A defendant may lose the right to be present at trial "by consent or . . . even by misconduct." *Id*. at 342-43, 90 S. Ct. at 1060.

[17] In *Allen*, the Supreme Court of the United States ("SCOTUS") opined: "It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly process thwarted and obstructed by defendants brought before them charged with crimes." *Id*. at 346, 90 S. Ct. at 1062. The defendant in *Allen* was initially expelled during the voir dire stage of his trial after he heaped abuse upon an Illinois trial court and tried to derail the proceedings. Allen subsequently requested permission to be present for the trial, and the trial court warned Allen that he could only remain in the courtroom if he conducted himself appropriately. Soon thereafter, Allen resumed his disruptive behavior, and the trial court again ordered Allen

removed from the courtroom.[7] Yet again, the trial court offered Allen an additional opportunity to be present for the trial if he would behave; Allen "gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel." *Id*. at 341, 90 S. Ct. at 1059-60. The jury convicted Allen, the Supreme Court of Illinois affirmed, and SCOTUS denied certiorari.

[18] Allen filed a petition for writ of habeas corpus. The district court found no constitutional violation stemming from Allen's expulsion and denied the writ. The Seventh Circuit reversed, finding Allen did not waive his right to be present by his misconduct. In reversing the Seventh Circuit, SCOTUS "decline[d] to hold . . . that a defendant cannot under any possible circumstances be deprived of his right to be present at trial[,]" *id*. at 344, 90 S. Ct. at 1061, and reasoned:

> We accept [ ] the statement of Mr. Justice Cardozo who [ ] said: *"No doubt the privilege* (*of personally confronting witnesses*) *may be lost by consent or at times even by misconduct.*" Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938), *we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself*

[7] Allen was not present for the State's presentation of its case in chief, except when he appeared briefly for identification purposes, at which time Allen resumed his abuse of the court.

> *consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.*
>
> 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.* No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag[8] him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Id. at 342-44, 90 S. Ct. at 1060-61 (internal citations and footnotes omitted) (emphasis added).

[19] SCOTUS discussed the availability of the following remedies to trial courts that are faced with disruptive defendants: (1) criminal contempt; and (2) imprisonment for civil contempt, coupled with cessation of the trial until the defendant conformed his conduct.

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[8] SCOTUS cautioned that the practice of binding and gagging defendants should be used as a "last resort" and warned that the sight of a bound and gagged defendant could prejudice him or her in the eyes of the jury and impede the defendant's participation in his defense. SCOTUS added that the practice "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen*, 397 U.S. at 344, 90 S. Ct. at 1061.

> *Another aspect of the contempt remedy is the judge's power, when exercised consistently with state and federal law, to imprison an unruly defendant such as Allen for civil contempt and discontinue the trial until such time as the defendant promises to behave himself. This procedure is consistent with the defendant's right to be present at trial*, and yet it avoids the serious shortcomings of the use of shackles and gags. . . .
>
> 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's behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint*. Prior to his removal he was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, and, [ ] the record demonstrates that Allen would not have been at all dissuaded by the trial judge's use of his criminal contempt powers. Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner. Under these circumstances we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.

Id. at 345-46, 90 S. Ct. at 1062 (emphasis added).

II. Article 1, Section 13

[20] Likewise, Article 1, Section 13 of the Indiana Constitution affords a defendant in a criminal proceeding the right to be present at all stages of his trial. *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007). A defendant may, however, be tried in absentia where the trial court determines that the defendant knowingly and

voluntarily waived that right. *Id.* In *Campbell v. State*, 732 N.E.2d 197, 204 (Ind. Ct. App. 2000), this Court noted that, although the United States Supreme Court in *Allen* addressed only the Sixth Amendment right to be present at trial, "we can perceive of no reason why an identical waiver rule should not also be applicable to Article [1], [S]ection 13 of the Indiana Constitution." *Campbell*, 732 N.E.2d at 205.

[21] Our own Supreme Court also addressed the expulsion of a similarly-obstreperous defendant in *Vaughn*. Vaughn attempted to thwart the orderly progression of his trial by "vacillat[ing] between proceeding pro se and having his court-appointed counsel represent him." *Vaughn*, 971 N.E.2d at 65. Vaughn agreed to proceed with counsel, but later advanced several motions to proceed pro se, which the trial court denied. After Vaughn's counsel brought their differences in trial strategy to the trial court's attention outside the presence of the jury, Vaughn was non-responsive to counsel and also continued to speak, despite the trial court's repeated demands for his silence. "The court ordered the jury out of the courtroom, and the bailiff briefly placed his hand over Vaughn's mouth in an attempt to quiet Vaughn." *Id*. at 67. Vaughn later agreed to cooperate and even gave testimony. The trial court denied defense counsel's subsequent motion for a mistrial.

[22] Although *Vaughn* did not involve expulsion from the courtroom, that case illustrates the competing interests trial judges face regarding unruly defendants. Those competing interests are the right to be present and the right to a fair trial—unimpeded by disruptive behavior. In affirming the denial of the

mistrial, our Supreme Court concluded that the brief restraint did not cause actual harm where the incident was cursory, minor, and resulted from Vaughn's own willful misconduct, and did not even elicit an immediate objection. Our Supreme Court did, however, enumerate various "better practice[s]" that the trial court could have employed before the "brief[ ] restraint" was used. *See id.* at 69. These better practices included: (1) "warn[ing] . . . that if [Vaughn] did not stop talking that he would be prevented from talking"; (2) having a bailiff or security officer present for Vaughn's foreseeably uncooperative testimony; (3) "establishing on the record and outside the presence of the jury the rules or expectations for [Vaughn]'s behavior in front of the jury"; and (4) clarifying beforehand the consequences Vaughn could face for ongoing misconduct. *Id*. at 69-70.

III. Analysis

[23] Here, the State argues that Wells "appeared in court under the influence of a controlled substance for the second time" after being warned of the consequences of doing so and, thereby, "voluntarily waived his right to be [in the courtroom] for his trial." State's Br. p. 8. We cannot agree. The instant case is distinguishable from the above-cited cases, each of which involved an unruly defendant, who, "after he [was] warned by the judge that he will be removed if he continue[d[his disruptive behavior, [ ] nevertheless insist[ed] on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial c[ould] [ ]not be carried on with him in the court room." *See Allen*, 397 U.S. at 343, 90 S. Ct. at 1060-61. Such is not the case here.

[24] The instant record includes no evidence that Wells engaged in any disruptive conduct on the day of his rescheduled trial; and the trial court entered no such findings. We feel compelled to draw a distinction between the defendants' extremely contumacious and disruptive conduct in *Allen* and *Vaughn* and Wells' failure to pass a pre-trial drug test. To be sure, by failing drug tests administered before his successive jury trial settings, Wells showed flagrant contempt for the trial court's explicit orders, and the trial court was warranted in imposing contempt sanctions.[9]

[25] As SCOTUS cautioned in *Allen*, "courts must indulge every reasonable presumption against the loss of constitutional rights." *See Allen*, 397 U.S. at 343, 90 S. Ct. at 1060 (quoting *Johnson*, 304 U.S. at 464). The trial court here did not employ available measures to protect Wells' fundamental right to be present. Less stringent remedies, rather than automatic ejectment, were available to the trial court that should have been employed before the trial court excluded Wells from his trial. The trial court here failed to employ less severe measures to ensure an orderly courtroom. Furthermore, the trial court failed to identify Wells' behavior that would indicate that Wells did not have the ability to behave on the day of his trial. Even if Wells exhibited disruptive behavior, as the above-cited cases have pointed out, several options were available to encourage obedience. The all-or-nothing approach is difficult to uphold

[9] The trial court did not conduct a direct criminal contempt proceeding or actual contempt hearing that we can surmise from the record.

without the attempt of these less severe options where a fundamental right is at stake.[10]

[26] By excluding Wells from the proceedings, before the application and exhaustion of lesser contempt penalties, the trial court foreclosed Wells from hearing the presentation of evidence against him and assisting with his defense. Moreover, unlike the disruptive defendants in *Allen* and *Vaughn*, Wells was denied any opportunity to reclaim his right to be present, which eschews fundamental fairness.

[27] For the foregoing reasons, we find that exclusion from trial violated the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution. SCOTUS's admonition that "the contempt remedy should be borne in mind by a judge in the circumstances of" a case like *Allen* affirms our belief that less extreme instances of misconduct, as here, warrant less extreme sanctions, and certainly not the deprivation of fundamental rights. *See Allen*, 397 U.S. at 346.

[28] We conclude that Wells has carried his burden of establishing that his exclusion from trial blatantly violated basic and elementary principles, involved substantial potential for harm, and effectuated a denial of fundamental due

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[10] We recognize the trial court judge's hesitation to: (1) conduct Wells' trial after his first failed drug test; and (2) proceed with the rescheduled trial after Wells' second failed drug test. We also appreciate that the trial court judge may have observed worrisome behavior from Wells; however, because the record on appeal is silent regarding Wells' conduct on the day of the rescheduled jury trial, we simply lack an evidentiary basis to justify Wells' exclusion.

process. *See Isom*, 31 N.E.3d at 490. Thus, we conclude that the trial court committed fundamental error in violation of the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution. Accordingly, we reverse the trial court and remand to the trial court with instructions to vacate Wells' conviction.

Conclusion

[29] The trial court committed fundamental error in excluding Wells from his trial. We reverse and remand with instructions to vacate Wells' conviction.

[30] Reversed and remanded.

Mathias, J., and Weissmann, J., concur.