## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Wilfredo Brignoni, Jr.,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

May 4, 2023

Court of Appeals Case No. 22A-CR-2359

Appeal from the Porter Superior Court

The Honorable Michael A. Fish, Judge

Trial Court Cause No. 64D01-1505-F6-3787

**Memorandum Decision by Judge Crone**
Judges Robb and Kenworthy concur.

**Crone, Judge.**

## Case Summary

[1] Wilfredo Brignoni, Jr., appeals his convictions for level 6 felony battery against a public safety official and class A misdemeanor possession of marijuana. We reframe the issues raised on appeal as whether the trial court erred in admitting certain evidence at trial and whether the trial court committed fundamental error in instructing the jury. The crux of Brignoni's claims of error revolves around the warrantless entry into his home that he alleges violated his constitutional rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Concluding that Brignoni has waived his challenge to the admission of evidence and that he invited any instructional error that occurred, we affirm.

## Facts and Procedural History

[2] On April 29, 2015, Portage Animal Control Officer Richard Henderlong was dispatched to the area around the South Shore Marina on a complaint that two "Pit Bull" dogs were running loose. Tr. Vol. 2 at 180. Officer Henderlong drove to the marina, and as he was speaking to the complainant, he observed two dogs running toward him, and one of them became "aggressive." *Id*. at 175. Officer Henderlong obtained his stun baton from his van and "zapped it once and it made a loud crackle noise" because that noise "usually scares the dogs" and often causes them to "run right back home." *Id*. at 175-176. After hearing the noise, the two dogs ran off in "a westerly direction." *Id.* Officer Henderlong got in his van and went down the street in search of the dogs.

[3] Officer Henderlong arrived at the address where Brignoni resided. Brignoni, Lindsay Littlefield, and their young son, W.B., were in the front yard. Brignoni quickly approached Officer Henderlong's vehicle. Officer Henderlong asked Brignoni if he owned two pit bulls. Brignoni responded that his dogs were actually "Cane Corsos." *Id*. at 180. When Officer Henderlong informed Brignoni that he believed that the dogs were running loose, Brignoni "took off running toward the back of his house towards the marina[.]" *Id*. Brignoni returned a few moments later, and Lindsay told Officer Henderlong that "the dogs were already in their kennels." *Id*. at 181. Officer Henderlong walked to the backyard to check but did not see any animals. When Officer Henderlong returned to the front yard, Brignoni told him that the dogs were kenneled. Officer Henderlong indicated that he needed to identify the dogs, and Brignoni stated that he "could show" the officer. *Id*. at 182. Brignoni led Officer Henderlong through a sliding glass door and into a "breezeway" between the house and the garage to some kennels. *Id*. at 183. While in that area, Officer Henderlong noticed "a strong odor of marijuana." *Id*. Brignoni showed his dogs to Officer Henderlong, and the officer was able to confirm that they were the two dogs he had seen running loose and that they were now kenneled.

[4] Officer Henderlong left Brignoni's residence, stopped nearby, and contacted the Portage Police Department. He reported that he had smelled marijuana in Brignoni's residence and that he was concerned for the safety of the small child residing in the home. The officer who took the call, Detective Sergeant Lisa Duncan, recognized the address as that on two outstanding Porter County

arrest warrants for "Thomas Lee Littlefield." *Id.* at 246. Detective Sergeant Duncan and Portage Police Department Officer Christian Irsa went to Brignoni's residence to serve the arrest warrants and to do a welfare check on W.B. *Id*. at 196, 245.

[5] Upon arrival, the officers noticed the smell of marijuana emanating from Brignoni's residence. As the officers walked up the driveway, Brignoni exited the home and began walking toward them in a "very agitated" manner. *Id*. at 198. Officer Irsa observed that Brignoni's eyes were bloodshot and glassy and that the odor of marijuana intensified as he got closer to the officers. Detective Sergeant Duncan believed that Brignoni "looked to be high." Tr. Vol. 3 at 3.

[6] The officers informed Brignoni that they were on the property to do a welfare check on W.B. and to serve arrest warrants on Thomas Littlefield. Brignoni told the officers that W.B. was "fine" and asked to see the arrest warrants. Tr. Vol. 2 at 200. Detective Sergeant Duncan handed Brignoni the arrest warrants and gave him time to read through them. However, when he was finished, Brignoni would not give the warrants back to her. He kept pulling them away as if he was "playing a game." *Id*. at 201. After multiple attempts to retrieve the warrants, Detective Sergeant Duncan was eventually able to obtain them from Brignoni.

[7] Brignoni continued to be extremely argumentative with the officers, insisting that Littlefield was not at the house and telling the officers "You're not coming in my house." *Id*. Brignoni called out to Lindsay to bring W.B. outside.

Detective Sergeant Duncan walked to the front door to speak with Lindsay as Brignoni and Officer Irsa stood to the side. Brignoni continued to shout at the officers while continuously looking over his shoulder. When Officer Irsa noticed that "things started to get heated" between Detective Sergeant Duncan and Lindsay, he told Brignoni to "stay put" and walked over to assist. *Id.* at 205. Rather than stay where he was, Brignoni ran into the house, closed the storm door behind him, and locked it while looking out at the officers. Officer Irsa continued to speak to Brignoni through the door, and Brignoni eventually unlocked and opened the door slightly and asked to again see the arrest warrants. Officer Irsa told him that he would not give him the warrants "because [he] didn't return [them] the first time." *Id.* at 206. Because Brignoni had opened the door slightly, Officer Irsa placed his body in the gap so that Brignoni could not shut and lock the door. Brignoni became upset by this and told Officer Irsa to "get out of [my] house." *Id.* at 207.

[8] Officer Irsa then walked past the threshold of the home. In response, Brignoni "straight-arm shoved" Officer Irsa in the shoulder to try to push him back out. *Id.* Officer Irsa told Brignoni that he was under arrest. Brignoni refused to turn around to be handcuffed and instead pulled away from Officer Irsa. This resulted in an "all-out fight" that culminated in Brignoni punching and striking Officer Irsa. *Id.* at 208-09. Officer Irsa was eventually able to take Brignoni into custody. Because Detective Sergeant Duncan could hear "some kind of scuffling" coming from the lower level of the home, she walked through the

home with Lindsay to do a protective sweep and look for Littlefield. Tr. Vol. 3 at 10. Littlefield was not located.

[9] Thereafter, Officer Irsa contacted the prosecutor's office to obtain a search warrant for Brignoni's residence. The search warrant was issued permitting officers to search for marijuana. The search revealed various strains of marijuana located in a kitchen cabinet along with empty baggies, rolling papers, and an ashtray.

[10] The State charged Brignoni with level 6 felony maintaining a common nuisance, level 6 felony neglect of a dependent, level 6 felony battery against a public safety official, level 6 felony resisting law enforcement, and misdemeanor possession of marijuana. Brignoni filed a motion to suppress the marijuana, arguing that the initial warrantless entry into his residence violated his rights under both the Fourth Amendment to the Federal Constitution and Article 1, Section 11 of the Indiana Constitution. Brignoni also filed a motion to dismiss the resisting law enforcement and battery counts for the same reasons. Following a hearing, the trial court denied both motions.

[11] Prior to trial, the State moved to dismiss the maintaining a common nuisance and neglect of a dependent charges, which the trial court granted. A bifurcated jury trial began on March 1, 2022. The jury found Brignoni guilty of the battery and possession charges but not guilty of resisting law enforcement. Brignoni subsequently admitted to a prior drug-related conviction, which supported the enhancement of his possession conviction from a class B to a class A

misdemeanor. Following a sentencing hearing, the trial court imposed an aggregate two-and-one-half-year sentence, with six months executed in the Porter County Jail and the rest suspended to probation. This appeal ensued.

## Discussion and Decision

## Section 1 – Brignoni has waived any challenge to the trial court's admission of evidence.

[12] We first address Brignoni's assertion that "[i]t was error for the trial court to deny [his] motion to suppress, and the introduction of evidence at trial violated [his] Fourth Amendment rights against unreasonable seizure of his person" and his rights under Article 1, Section 11 of the Indiana Constitution. Appellant's Br. at 12. Because this appeal follows a completed trial and conviction, the issue is more properly characterized as a request to review the trial court's decision to admit any challenged evidence. *Casillas v. State*, 190 N.E.3d 1005, 1012 (Ind. Ct. App. 2022), *trans. denied*.

[13] The State argues that Brignoni waived any evidentiary challenge by failing to make a specific objection at trial.[1] We agree. "As a general rule, the failure to object at trial results in a waiver of the issue on appeal." *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002). "A pre-trial motion to suppress does not preserve

[1] In his brief, Brignoni does not specify what evidence he claims was obtained in violation of his constitutional rights and erroneously "introduced" at trial. However, as already noted, in his motion to suppress, he requested suppression of "the alleged marijuana" found in his "automobile and/or home." Appellant's App. Vol. 2 at 39, 43. He did not object at trial when the marijuana or the officers' testimony regarding the marijuana was introduced into evidence.

an error for appellate review; rather, the defendant must make a contemporaneous objection providing the trial court with an opportunity to make a final ruling on the matter in the context in which the evidence is introduced." *D.A.L. v. State*, 937 N.E.2d 419, 421 (Ind. Ct. App. 2010). The rule requiring a contemporaneous objection "is no mere procedural technicality; instead, its purpose is to allow the trial judge to consider the issue in light of any fresh developments and also to correct any errors." *Shoda v. State*, 132 N.E.3d 454, 461 (Ind. Ct. App. 2019).

[14] Brignoni attempts to clarify in his reply brief that he is not challenging the admission of any specific piece of evidence. Rather, he asserts that he is simply challenging the overall sufficiency of the State's foundational evidence offered at trial justifying Officer Irsa's warrantless entry into his home, claiming that it was much less "robust" than that offered during the suppression hearing, Reply Br. at 5. However, he quite plainly has not preserved any error for our review in this regard. He is correct that if a defendant makes a contemporaneous objection during trial, and the foundational evidence is not the same as at the suppression hearing stage, the trial court must determine whether certain evidence is admissible based upon the testimony and evidence presented at trial. *Casillas*, 190 N.E.3d at 1012. However, his failure to make any such specific objection relieved the trial court here of making that determination, and our appellate review of this issue has clearly been waived.

## Section 2 – Brignoni invited any error in the instruction of the jury.

[15] Brignoni next challenges the trial court's instruction of the jury. He contends that the trial court erred in giving final instruction number 16, entitled "Defense of Home," because the instruction was incomplete in that it did not include "a statement of Indiana public policy on defense of dwelling." Appellant's Br. at 22. However, Brignoni concedes that he was the party who tendered the version of final instruction number 16 that was ultimately given to the jury. Nevertheless, he claims that he may still challenge the trial court's failure to give "a more complete" instruction because the error is fundamental. Appellant's Br. at 23. We disagree.

[16] The doctrine of invited error, which is based on the legal principle of estoppel, forbids a party from taking advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or misconduct. *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2019). However, invited error is more than a "passive lack of objection standing alone." *Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019). Rather it is only "when a passive lack of objection ... is coupled with counsel's active requests ... [that] it becomes a question of invited error" rather than simple waiver. *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014). Unlike a mere failure to object to an alleged trial error, which results in waiver that "generally leaves open an appellant's claim to fundamental error review, invited error typically forecloses appellate review

altogether," even when constitutional claims are at issue. *Batchelor*, 119 N.E.3d at 556.

[17] To establish invited error, rather than mere waiver, "there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, well-informed trial strategy." *Id*. at 558. For example, in *Miller v. State*, our supreme court found invited error in jury instructions where defense counsel had requested the instruction and thus "did far more than simply fail to object" to it. 188 N.E.3d 871, 875 (Ind. 2022). Similarly, in *Isom v. State*, our supreme court found invited error when the allegedly erroneous jury instruction was affirmatively sought by the appellant. 170 N.E.3d 623, 646 (Ind. 2021) ("An unobjected-to instruction coupled with an active request for related instructions raises the question of invited error.").

[18] Here, Brignoni submitted a document to the trial court entitled "Proposed Final Jury Instruction on the Castle Doctrine" that, in addition to the relevant statutory text of Indiana Code Section 35-41-3-2(i) regarding the lawful use of force against a public servant, included a lengthy statement also taken from the text of the statute regarding the legislative findings and public policy underlying the passage of the statute. Appellant's App. Vol. 2 at 130.[2] As observed by the

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[2] The Castle Doctrine is an affirmative defense to the crime of battery on a public safety official when that official has unlawfully entered a person's dwelling. *Cupello v. State*, 27 N.E.3d 1122, 1124 (Ind. Ct. App. 2015). Our legislature codified the Castle Doctrine at Indiana Code Section 35-41-3-2(i). The version of Indiana Code Section 35-41-3-2 in effect at the time of Brignoni's crimes provided in relevant part:

> (a) In enacting this section, the general assembly finds and declares that it is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion by another individual or a public

State, the lengthy document was not an instruction at all, as it was not drafted in a manner that would have made it suitable for reading to a jury. Upon review of the document, the trial court informed defense counsel, "I appreciate your Castle Doctrine instruction except it's non-pattern." Tr. Vol. 3 at 25. After the court explained its difficulty with the form of the instruction, defense counsel responded, "Right. Right. … I hear you." *Id*. at 25-26. The court asked Brignoni to "refashion it" so that the court could "consider it a little more favorably[.]" *Id*. at 26.

[19] Ultimately, Brignoni submitted an updated final instruction number 16 regarding "Defense of Home." Appellant's App. Vol. 2 at 171. The tendered instruction did not include any of the public policy or legislative intent language that had been included in the prior submitted proposed instruction. After discussion on the record regarding all final instructions, defense counsel announced his agreement "to final instructions one through [nineteen] as

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> servant. By reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion, however, the general assembly does not intend to diminish in any way the other robust self defense rights that citizens of this state have always enjoyed. Accordingly, the general assembly also finds and declares that it is the policy of this state that people have a right to defend themselves and third parties from physical harm and crime. The purpose of this section is to provide the citizens of this state with a lawful means of carrying out this policy.
> …
> (i) A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:
> …
> (2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or
> (3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect.

tendered." Tr. Vol. 3 at 158-59. Accordingly, Brignoni not only tendered and requested the challenged instruction, but he also explicitly agreed to its use.

[20] Under the circumstances, we conclude that Brignoni invited any error regarding final instruction number 16, and he is foreclosed from now asserting fundamental error. Thus, we may not address the issue on appeal. *Batchelor*, 119 N.E.3d at 556. His convictions are affirmed.

[21] Affirmed.

Robb, J., and Kenworthy, J., concur.