

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



---

### ATTORNEY FOR APPELLANT

Talisha Griffin  
Marion County Public Defender Agency  
Indianapolis, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana

Jodi Kathryn Stein  
Supervising Deputy Attorney  
General  
Indianapolis, Indiana

---

## IN THE COURT OF APPEALS OF INDIANA

---

Marcel Carter,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

June 13, 2022

Court of Appeals Case No.  
21A-CR-2554

Appeal from the Marion Superior  
Court

The Honorable Sheila A. Carlisle,  
Judge

Trial Court Cause No.  
49D29-2001-F3-729

**Najam, Judge.**

## Statement of the Case

[1] Marcel Carter appeals his convictions for resisting law enforcement, as a Level 3 felony, and resisting law enforcement, as a Level 5 felony.<sup>1</sup> Carter presents two issues for our review, which we revise and restate as follows:

1. Whether it is a defense to the crime of resisting law enforcement when a person flees out of fear for his safety.
2. Whether the court committed fundamental error when it did not allow him to present certain evidence.

[2] We affirm.

## Facts and Procedural History

[3] In December 2020, there was an arrest warrant out for Dewayne Gray because he had been involved in “shooting incidents.” Tr. Vol. 2 at 238. On December 30, Carter was at his aunt’s home on Teacup Drive in Indianapolis. That same day, police officers with the Indianapolis Metropolitan Police Department (“IMPD”) Crime Guns Task Force (“Task Force”) received “cell phone data” that placed Gray at the house on Teacup Drive. Tr. Vol. 3 at 5. Based on that information, several Task Force officers conducted surveillance on the home.

---

<sup>1</sup> Carter was also convicted of possession of marijuana, as a Class B misdemeanor, but he does not appeal that conviction.

[4] At approximately 12:00 p.m., Detective Douglas Swails observed an unknown individual leave the home. The person had a “hoodie up,” so Detective Swails could not see his face. Tr. Vol. 2 at 158. Detective Swails was only able to determine that the individual was a “black male” with the same “body type and skin color” as Gray. *Id.* Detective Swails radioed to the other officers that “a male matching the description” of Gray had exited the house and left in a purple Dodge Challenger. *Id.* at 183. Detective David Williams, who was in an unmarked vehicle, located the Challenger and followed it for “just over a half a mile.” *Id.* at 185. At that point, Detective Williams observed the driver, later identified as Carter, commit two traffic infractions. Detective Williams provided that information to uniformed Task Force officers so that they could conduct a traffic stop.

[5] Detective William Wogan pulled up behind the Challenger in a marked vehicle and activated his lights. Carter initially slowed down but continued to drive. Detective Wogan then “chirped” his siren, and Carter stopped his vehicle. *Id.* at 204. Detective Wogan and Detectives Christopher Smilko and Sergio De Leon Rodriguez, who were in a nearby vehicle, pulled up behind Carter. The three detectives exited their vehicles and approached the Challenger. The windows were “heavily tinted,” so Detective Wogan could not see Carter or determine how many people were in the car. *Id.* at 205. Detective Wogan stopped by the rear driver’s side tires and ordered Carter to roll the window down. Carter “partially” rolled the window down. *Id.* at 206. Detective Wogan was only able to see Carter’s left hand. Detective Wogan then ordered

Carter to roll the window down further and to show his right hand. Instead of complying, Carter “took off.” *Id.*

[6] The three detectives pursued the vehicle. At one point, Carter left the roadway, drove onto the grass, and came to a stop. The detectives stopped their vehicles and attempted to conduct a “high-risk traffic stop.” *Id.* at 208. However, as the officers were exiting their cars, Carter “took off again.” *Id.* Detective Wogan attempted a “pursuit intervention technique” in an attempt to stop Carter. *Id.* at 209. Detective Wogan’s vehicle struck the Challenger, but Carter “sped up” and “drove off.” *Id.* Officers continued to pursue Carter through areas of Indianapolis and into Hancock County. During the pursuit, Carter evaded stop sticks<sup>2</sup> and reached speeds in excess of ninety miles per hour. The pursuit lasted ten to twelve minutes and ultimately ended when Carter ran a red light and struck two vehicles. The driver of one vehicle died, and the passenger in that vehicle sustained injuries. After the pursuit ended, officers learned that the driver was Carter, not Gray. Officers then searched the car and found 51.4 grams of marijuana and a firearm.

[7] The State charged Carter with resisting law enforcement, as a Level 3 felony; resisting law enforcement, as a Level 5 felony; reckless homicide, as a Level 5 felony; resisting law enforcement, as a Level 6 felony; and possession of

---

<sup>2</sup> Stop sticks are “spike strips [officers are] able to deploy in an attempt to flatten the tires of a fleeing vehicle.” Tr. Vol. 3 at 51.

marijuana, as a Class B misdemeanor.<sup>3</sup> Prior to Carter’s trial, the State filed a motion in limine seeking to prohibit Carter from presenting evidence regarding a change in IMPD’s policy on pursuits. According to the State, several months following the instant pursuit, IMPD modified its “rules and regulations for how IMPD officers should conduct vehicle pursuits of suspects.” Appellant’s App. Vol. 2 at 242. The State argued that the new policy was “wholly irrelevant” because it “was not in effect at the time of the charged activity” and that it would “prejudice” the State. *Id.* Carter objected to the State’s motion and asserted that the new policy “would not have allowed” officers to pursue Carter based only on the alleged traffic infractions. Appellant’s App. Vol. 3 at 16. He asserted that “the IMPD policy at the time in question and [the] new IMPD policy, while tangentially related, are helpful to fill in information for the jury with respect to whether a defendant’s state of mind was otherwise influenced by the actions of law enforcement.” *Id.* at 17 (emphasis removed). In other words, he maintained that the new policy was relevant to show that his “state of mind [fell] below that required for a conviction.” *Id.* at 18.

[8] The trial court held a jury trial. Prior to the start of the trial, the court told the parties to “assume the motion [in limine] is granted.” Tr. Vol. 2 at 50. During the trial, Detective Wogan testified that he never “threaten[ed]” Carter or “pull[ed]” his firearm. *Id.* at 207. In addition, Detective Smilko testified that

---

<sup>3</sup> The State also charged Carter with carrying a handgun without a license but ultimately moved to dismiss that count because Carter had a license to carry a firearm.

his “gun never left its holster” that day. Tr. Vol. 3 at 85. And Detective Rodriguez testified that he did not “unholster” his firearm “at any point.” *Id.* at 95. Detective Doug Heustis then testified about the crash. Detective Heustis testified that, approximately five seconds before the crash, Carter was driving 105 miles per hour.

[9] Carter testified in his defense. He testified that, during the initial stop, he had a “gun pointed in [his] face,” so he was “worried” about “[g]etting shot.” *Id.* at 195-96. Carter then testified that a second officer “pointed his gun” at him, which caused him to feel “panicked.” *Id.* at 196. And he testified that, as a result, he decided to “pull off” and “flee[] for [his] life.” *Id.* at 197. Then, in his closing argument, Carter argued that the “interactions” of a black male with law enforcement are “different” and that “[t]here’s a history of interactions with police” that are “negative for them.” *Id.* at 249. He then argued to the jury that the conduct he had engaged in was “self-protection.” Tr. Vol. 4 at 5. And he argued that he did not have the requisite intent to resist law enforcement because he was “concerned about his safety.” *Id.* at 7.

[10] The jury found Carter guilty as charged, and the court entered judgment of conviction. However, due to double jeopardy concerns, the court vacated Carter’s convictions for reckless homicide, as a Level 5 felony, and resisting law enforcement, as a Level 6 felony. The court then sentenced Carter to an aggregate sentence of twelve years executed in the Department of Correction. This appeal ensued.

## Discussion and Decision

### *Issue One: Defense to Resisting Law Enforcement*

[11] Carter first challenges his convictions for resisting law enforcement. A person commits resisting law enforcement if he knowingly or intentionally flees from a law enforcement officer after the officer has, by visible means, identified himself and ordered the person to stop. *See* Ind. Code § 35-44.1-3-1(a)(3) (2019). That offense is elevated to a Level 3 felony if the person operates a vehicle in a manner that causes the death of another person. *See* I.C. § 35-44.1-3-1(e). Here, Carter does not dispute that he fled from law enforcement after the officers had identified themselves and ordered him to stop. Nor does he dispute that he operated a vehicle in a manner that caused another person's death. But he contends that he only fled from the officers because he feared for his life.

[12] On appeal, Carter asks us to declare that “a defense exists under common law to a charge of resisting law enforcement by flight when the flight occurs for the purpose of seeking safety.” Appellant's Br. at 35. However, Carter argued to the jury, without restriction, that he only fled from officers because he felt unsafe. In particular, during his opening statement, Carter argued that he was “afraid he was about to be injured, he's about to be killed. And so he panics, and he drives away.” Tr. Vol. 2 at 152. In addition, he argued that his “intent was to try to protect himself.” *Id.* at 153. Carter then testified that he had a “gun pointed in [his] face,” so he became “worried” about “[g]etting shot.” Tr. Vol. 3 at 195-96. He also testified that, as a result, he decided to “flee[] for [his] life.” *Id.* at 197. Then, in his closing argument, Carter argued that, based on “a

history of interactions with police” that are “negative” for black males, he was “concerned about his safety.” *Id.* at 249; Tr. Vol. 4 at 7. In other words, Carter presented his defense to the jury. But Carter did not ask the court to instruct the jury that flight for safety is a defense to resisting law enforcement and, thus, did not preserve that argument for our consideration on appeal.

[13] To the extent Carter’s argument is that underlying facts demonstrate as a matter of law that he fled for his safety and, thus, that his convictions cannot stand, we cannot agree. As our Supreme Court has stated, “while counsel may argue that a defendant’s actions are reasonable or unreasonable, it’s ultimately for the jury to decide whether there’s evidence of a knowing or intentional fleeing under the statute.” *Batchelor v. State*, 119 N.E.3d 550, 565 (Ind. 2019). Stated differently, whether a defendant proved his defense and negated the mens rea element of a crime is a question of fact for the jury, not one of law for this Court. And, here, the jury was properly instructed regarding the necessary mens rea for the crime of resisting law enforcement. *See* Appellant’s App. Vol. 3 at 60-61.

[14] At trial, the jury heard Carter’s evidence and argument that he lacked the requisite mens rea because he was “concerned about his safety.” Tr. Vol. 3 at 7. In addition, the jury heard the State’s evidence that none of the police officers threatened Carter or drew their weapons but that Carter nonetheless fled and led officers on a ten- to twelve-minute, high-speed chase that ended only after Carter crashed into two cars. It is clear that the jury found the State’s evidence to be more credible and rejected Carter’s defense. Carter’s argument on appeal asks us to reweigh evidence, which we cannot do.



[15] In sum, Carter asks this Court to recognize a “common law defense” to resisting law enforcement. Appellant’s Br. at 20. However, as Carter acknowledges, the crime of resisting law enforcement “requires the defendant to have a specific intent—knowingly or intentionally—to commit the crime.” *Id.* at 21. Here, the jury was properly instructed on the requisite intent, and Carter did not offer an additional or different instruction. In addition, Carter presented evidence and argued to the jury that he lacked the requisite intent to commit the crime. As such, Carter presented his defense, and he has not shown reversible error.

### ***Issue Two: Admission of Evidence***

[16] Carter next asserts that the trial court erred when it excluded evidence of IMPD’s revised policy regarding pursuits. Prior to the start of his trial, the court granted the State’s motion in limine and excluded any evidence regarding the changes to IMPD’s policy that occurred eight months after the instant offenses. On appeal, Carter asserts that the court erred when it granted that motion because the evidence of the new policy was “relevant” to show that “he did not have the requisite culpability[.]” Appellant’s Br. at 30. And he asserts that it “was not prejudicial to the State.” *Id.* at 32.

[17] A pretrial hearing or a motion in limine is appropriate to determine the admissibility of evidence outside of the jury’s presence in order to avoid prejudice. *See House v. State*, 61 N.E.3d 1230, 1233 (Ind. Ct. App. 2016). In order to preserve an error for appellate review, however, a party must do more than challenge the ruling on a motion in limine. *Id.* The evidence must be

offered at trial to give the trial court an opportunity to rule on its admissibility at that time. *Id.* Here, Carter failed to offer any evidence regarding IMPD’s new policy at trial. As such, he has not preserved this issue for our review. *See Miller v. State*, 716 N.E.2d 367, 370 (Ind. 1999).

[18] To prevail on appeal, then, Carter must demonstrate fundamental error. “The fundamental error exception 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.” *Hastings v. State*, 58 N.E.3d 919, 922 (Ind. Ct. App. 2016). Harm is found when the error “is so prejudicial as to make a fair trial impossible.” *Id.*

[19] Carter has not directed us to any case law, and we find none, to demonstrate that a trial court is required to sua sponte admit evidence that the defendant did not himself seek to admit.<sup>4</sup> In any event, we agree with the State that, if there were any error in the court’s pretrial decision to exclude evidence regarding a policy change, the error did not constitute a clearly blatant violation of his due process rights. Nothing about the court’s preliminary decision prevented Carter from attempting to admit that evidence at trial or from otherwise presenting his

---

<sup>4</sup> To support his fundamental-error argument, Carter relies on *Littler v. State*, 870 N.E.2d 276, 279 (Ind. 2007), in which the Supreme Court held that the court’s erroneous exclusions of evidence to support a claim of self-defense was not harmless error. However, unlike here, the defendant in that case attempted to admit the evidence and, thus, preserved the error for appeal. *Id.* at 278. Similarly, Carter cites *Griffin v. State*, 664 N.E.2d 373 (Ind. Ct. App. 1996). In that case, this Court held that the court’s exclusion of evidence that may have made a positive impact on the defendant’s alibi defense was not harmless error. *Id.* at 377. But, again, the defendant in that case attempted to admit the evidence at trial.

defense to the jury. Carter has not demonstrated that the court committed fundamental error.

[20] In sum, Carter has not demonstrated reversible error regarding his defense because he was able to present evidence to the jury that he had fled for his safety. And Carter has not shown that the court committed fundamental error when it granted the State's motion in limine to preclude Carter from presenting evidence of a change in IMPD's policy. We therefore affirm Carter's convictions.

[21] Affirmed.

Bradford, C.J., and Bailey, J., concur.