MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Austin Andreas
Bradley Keffer
Keffer Hirschauer LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Courtney Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Brady A. Riley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 11, 2021

Court of Appeals Case No. 21A-CR-109

Appeal from the Cass Circuit Court

The Honorable Stephen R. Kitts, II, Judge

Trial Court Cause No. 09C01-2002-CM-179

Vaidik, Judge.

Case Summary

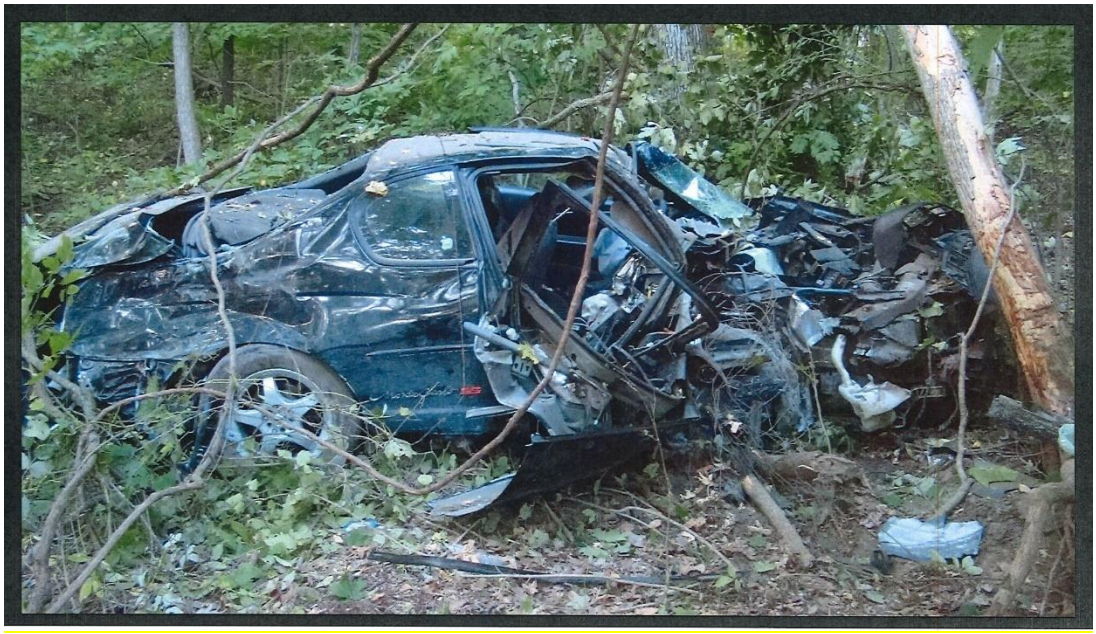
[1] In 2019, Brady A. Riley was speeding and crashed his car. His passenger sustained life-threatening injuries but survived. The State charged Riley with Class B misdemeanor criminal recklessness. Following a bench trial, the trial court found Riley guilty and ordered him to serve 180 days in the county jail and pay $28,204.64 in restitution for his passenger's medical bills and lost wages. Riley now appeals, challenging the admission of certain evidence and the court's restitution order. We affirm.

Facts and Procedural History

[2] Shortly before 7 a.m. on September 21, 2019, Indiana State Police Trooper Chris Miller was dispatched to a single-car accident on County Road 825 West in Cass County. The posted speed limit in this area is 40 m.p.h. When he arrived on the scene, Trooper Miller saw a car in a ditch. The car had struck a tree and come to rest. As he walked down an embankment into the ditch, Trooper Miller saw a group of people standing around James Marshall Hornback, who was lying on the ground about fifteen feet from the car. Hornback's left leg had been "severed," and a makeshift tourniquet had been applied to stop the bleeding. Tr. p. 33. Trooper Miller continued to the car and saw nineteen-year-old Riley inside. Riley was seated in the driver's seat "leaning to the right overhanging the center console." *Id.* at 42. He was semi-conscious and said he couldn't move because his right arm was stuck. When Trooper Miller asked Riley what happened, he said, "I don't know, I wasn't

driving." *Id.* Both Hornback and Riley were airlifted to a hospital in Fort Wayne.

[3] Trooper Richard Brown, an accident reconstructionist with the Indiana State Police, was dispatched to the scene. He collected measurements, examined the damage to the car, and took photos, including this one of the car:



Ex. 3.

[4] The State charged Riley with Class B misdemeanor criminal recklessness. The charging information alleges Riley recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to Hornback. Appellant's App. Vol. II p. 11; *see also* Ind. Code § 35-42-2-2(a).

[5] At the bench trial on December 17, 2020, Troopers Miller and Brown testified for the State. During Trooper Miller's testimony, the State sought to introduce

evidence he had issued Riley two speeding tickets in December 2017. Riley objected on Indiana Evidence Rule 404(b) grounds, but the trial court admitted the evidence. Tr. p. 35; *see* Exs. 17, 18.

[6] Trooper Brown testified about his background, training, and experience in accident reconstruction. Specifically, he testified he had taken numerous courses on accident reconstruction and had worked on over 1,200 fatalities in his thirty-five-year career. The State then sought to elicit testimony from Trooper Brown about the speed of Riley's car when he crashed.[1] At this point, Riley objected on grounds the State had not laid a proper "foundation." Tr. p. 55. In response to Riley's objection, the State asked Trooper Brown additional questions. Trooper Brown explained that to determine how fast a car was traveling when it crashed, three measurements are required: (1) the angle the car left the ground, called the "take-off angle"; (2) the distance between where the car left the ground and where it first hit the ground; and (3) how far the car traveled vertically (up or down). *Id.* Riley did not object to this testimony. Trooper Brown then testified he performed two calculations, one using two degrees as the take-off angle and the other using zero degrees. Trooper Brown said the other measurements were the same—107 feet as the horizontal distance traveled and 7.2 feet as the vertical distance traveled. Trooper Brown testified—again with no objection from Riley—that Riley had been driving between 88

[1] The police obtained a warrant for the "crash recorder" in Riley's car, but it "did not capture the events of this crash." Tr. p. 61.

and 102 m.p.h. when he crashed (depending on whether the take-off angle was two degrees or zero degrees). Riley thoroughly cross-examined Trooper Brown about the accuracy of his measurements. *See id.* at 64-76.

[7] At the conclusion of the evidence, the trial court explained that although it had admitted evidence about Riley's two speeding tickets from 2017, it "didn't know where that . . . line of questioning . . . was going to go" at the time. *Id.* at 85. But the court said it didn't consider the speeding tickets in reaching its decision:

> I'm hard pressed to say that I got anything particularly useful about that. If you were to ask me in retrospect about whether or not that information was helpful to me, I would say the circumstance that was actually offered was really too attenuated for relevance because I would say that it was too far removed in time and too limited in frequency to make the leap two (2) years later . . . .

Id. The court then found Riley guilty of criminal recklessness:

> I don't know if variables in his calculation would make a difference between 88 and 102, the difference between 88 and 102 is not really the question before me. The question is whether or not the evidence proves beyond a reasonable doubt that Mr. Riley is guilty of this act. So, if he is not guilty, beyond a reasonable doubt, I have to determine what other reasonable explanations there are for a couple of things. I have to determine what other reasonable explanation there is for this car, having suffered this damage, in this location, at 40 miles an hour. I have to figure out what other reasonable explanation is that that car go[t] from the road to where it landed or where it stopped, how that car got from the road to where it was parked and sustained

> that damage at 40 miles an hour. I don't know if the car was going 88 miles an hour, I don't know if the [car] was going 102 miles an hour, I don't know if the car was going 93.6 miles an hour. I know that that car did not sustain that damage in that location at 40 miles an hour. That is not a reasonable possibility. And I can't suggest that it's a serious question about who was driving the vehicle, based on the testimony that the person who could not remove himself from the car was the person who was not driving. That is a bold-faced lie. So, whether or not he had tickets in the past is not, is of no relevance to this all whatsoever, and whether or not he was doing 88 or 102, I cannot tell you. I can tell you that [it] did not happen at 40 miles an hour, and I can tell you he was driving. And, I can tell you that, to have been driving at a speed that would cause that on the face of it, either A: had to have been reckless or B: should have tipped you off that you [were] doing something dangerous. I understand that the situation is very unfortunate, I understand, I should say I appreciate the burden of the responsibility for it but . . . as far as I'm concerned; it is true beyond a reasonable doubt that this is what happened. That Mr. Riley is guilty of criminal recklessness[.]

Id. at 85-86.

[8] The trial court proceeded to sentencing. Hornback testified about his extensive injuries. He had his left leg amputated above the knee; a broken femur, tibia, and fibula in his right leg; a broken arm; a collapsed lung; a traumatic brain injury; and a broken nose. In addition, Hornback had six or seven surgeries, spent nearly two months in the hospital, and had been fitted with a prosthesis. The court ordered Riley to serve 180 days in the Cass County Jail and scheduled a restitution hearing.

[9] At the restitution hearing, the State presented evidence that Hornback's medical expenses totaled nearly $900,000. The State requested $28,204.64 in restitution, which was for Hornback's out-of-pocket medical expenses and lost wages. The court ordered Riley to pay $28,204.64 in restitution.

[10] Riley now appeals.

Discussion and Decision

I. Admission of Evidence

A. Speeding Tickets

[11] Riley first argues the trial court erroneously admitted evidence about the two speeding tickets he received in 2017 because it was "impermissible character evidence" under Evidence Rule 404(b)(1), which provides "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Appellant's Br. p. 22. The State responds the evidence is admissible but even if the trial court erred in admitting the evidence, the error was harmless given the court's explicit assurance it did not rely on the speeding tickets when finding Riley guilty.

[12] In determining whether an error was harmless, the reviewing court must be satisfied the conviction is supported by substantial independent evidence of guilt so there is no substantial likelihood the challenged evidence contributed to the conviction. *Konopasek v. State*, 946 N.E.2d 23, 30 (Ind. 2011). In other

words, "a conviction may stand when the error had no bearing on the outcome of the case." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). Here, the trial court stated that although it had admitted evidence of Riley's speeding tickets, that evidence played no role in its decision. Specifically, the court explained (1) the evidence was not "helpful" or "useful" because the speeding tickets were "too far removed in time" and "too limited in frequency" and (2) whether Riley "had tickets in the past" had "no relevance" "whatsoever." Tr. pp. 85-86. Because this was a bench trial, it is not clear the evidence was ultimately "admitted." But even assuming the evidence was admitted, any error was harmless because it had no bearing on the outcome of the case.

B. Speed of Car

[13] Riley next argues Trooper Brown used "unreliable methods" to calculate his speed and therefore the trial court should have excluded his testimony under Indiana Evidence Rule 702(b). Appellant's Br. p. 17. The State responds Riley has waived this argument. The State points out that although Riley initially objected on foundation grounds, he did not object again when Trooper Brown gave additional testimony about the methods he used. In response to the State's waiver argument, Riley claims the "admission of evidence constituted fundamental error." Appellant's Reply Br. p. 8 n.1.

[14] Failure to object to the admission of evidence at trial "normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." *Konopasek*, 946 N.E.2d at 27. "Fundamental error is an

extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*. To establish fundamental error, the defendant must show that, under the circumstances, the trial court erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.*

[15] Evidence Rule 702(b) provides "expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles." As our Supreme Court has explained, the adoption of Rule 702 liberalized, rather than constricted, the admission of reliable scientific evidence. *Turner v. State*, 953 N.E.2d 1039, 1050 (Ind. 2011). In addition, the "traditional and appropriate means" of attacking "shaky" evidence is through cross-examination and the "presentation of contrary evidence." *Id.* Here, the record shows Riley thoroughly cross-examined Trooper Brown. Moreover, he presented no contrary evidence.[2] With no contrary evidence, Riley has failed to prove Trooper Brown's testimony about the three measurements required to

[2] During closing argument, defense counsel actually agreed with Trooper Brown that three measurements are required to determine speed: the take-off angle, the horizontal distance traveled, and the vertical distance traveled. *See* Tr. p. 83.

determine speed was so obviously flawed that it required the court to intervene.[3] There is no fundamental error.

II. Restitution

[16] Riley contends the trial court erred in ordering him to pay restitution to Hornback because "the record does not support a causal connection between the crime and [Hornback's] alleged injuries."[4] Appellant's Br. p. 25. When imposing a sentence for a felony or misdemeanor, the trial court may order the defendant to make restitution to the victim of the crime. Ind. Code § 35-50-5-3(a). The restitution order must reflect the actual loss incurred by the victim, and the "loss must come as a direct and immediate result of" the defendant's criminal acts. *Rich v. State*, 890 N.E.2d 44, 51 (Ind. Ct. App. 2008) (quotation omitted), *trans. denied*.

[17] Here, the record shows Hornback suffered a loss as a direct and immediate result of Riley's criminal acts. Riley was driving at least 88 m.p.h. in a 40 m.p.h. zone. He drove into a ditch and struck a tree. The force of the impact destroyed Riley's car. *See* Ex. 3. Hornback was thrown from the car, and his left leg was severed.

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[3] Riley also argues Trooper Brown's methods are unreliable because he "employed a custom, homemade, PVC pipe framework to measure the initial path of the crash vehicle." Appellant's Br. p. 20. But as Trooper Brown explained at trial, he did not use the template for any of his measurements. Rather, he used it as a visual aid to follow the path of Riley's car. *See* Tr. p. 52.

[4] The State argues Riley forfeited his right to appeal this issue because he filed his Notice of Appeal before the trial court issued the restitution order. We choose to address the merits of this issue.

[18] Riley relies on two cases to support his argument there is no causal connection in this case: *Akins v. State*, 39 N.E.3d 410 (Ind. Ct. App. 2015), and *Utley v. State*, 699 N.E.2d 723 (Ind. Ct. App. 1998), *trans. denied*, *overruled in part by Snow v. State*, 77 N.E.3d 173 (Ind. 2017). Both cases are easily distinguishable.

[19] In *Akins*, the defendant pled guilty to Class A misdemeanor resisting law enforcement for resisting Indianapolis Metropolitan Police Department Officer Antwon Keyes outside a bar in Indianapolis on December 15, 2013. As part of the plea agreement, the defendant agreed to pay restitution to the City of Indianapolis. At the sentencing hearing, the defense requested a separate hearing on restitution because it had recently learned Officer Keyes had a broken leg, but it hadn't seen "any documentation to that effect" yet. *Akins*, 39 N.E.3d at 412. At the restitution hearing, the State presented evidence Officer Keyes "had experienced a leg injury on December 15, 2013, while struggling with an unidentified 'suspect' or 'person.'" *Id.* The trial court ordered the defendant to pay $27,966.71 in restitution to the City of Indianapolis.

[20] On appeal, the defendant argued the trial court erred in ordering him to pay restitution because there was "no evidence that he caused Officer Keyes' injury." *Id.* The State agreed there was "no evidence to support the order" and therefore did not "oppose remand for a new restitution hearing." *Id.* As we explained it, there was "no evidence that Officer Keyes' injury occurred in connection with Akins' arrest." *Id.* at 413. We noted the State charged the defendant with resisting law enforcement as a Class A misdemeanor, which

didn't require proof of injury. *Id.* We remanded the case for a new restitution hearing.

[21] Riley argues this case is like *Akins* because the State charged him with Class B misdemeanor criminal recklessness, which doesn't require proof of injury (instead of Level 6 felony criminal recklessness, which does). However, just because the State did not charge Riley with Level 6 felony criminal recklessness doesn't mean Riley's criminal recklessness did not cause Hornback's injuries. Unlike *Akins*, where the record was silent about who caused Officer Keyes's injury, here there is plenty of evidence Riley caused Hornback's injuries. Riley was speeding and crashed, ejecting Hornback from the car and severing his left leg. *Akins* does not support Riley's argument.

[22] In the second case, *Utley*, the defendant was charged with reckless homicide and leaving the scene of an accident. The jury acquitted him of reckless homicide but convicted him of leaving the scene of an accident, and the trial court ordered the defendant to pay the victim's funeral expenses. On appeal, we reversed the restitution order:

> Here, the jury did not convict Utley of reckless homicide. Rather, he was convicted of failing to stop at the scene of an accident. It is apparent in this case that the deceased was an accident victim and not a victim of a crime as contemplated by Ind. Code § 35-50-5-3. Consequently, no funeral, burial, or cremation costs were incurred by the victim's estate **because of** Utley's failure to stop at the scene of the accident.

Utley, 699 N.E.2d at 729 (emphasis added). Here, unlike the defendant in *Utley*, Riley was not acquitted of the criminal conduct that caused Hornback's injuries. Rather, Riley was convicted of criminal recklessness for speeding and crashing, which caused Hornback's injuries. *Utley* does not support Riley's argument either. We therefore affirm the trial court's restitution order.

[23] Affirmed.

Bradford, C.J., and Brown, J., concur.