

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Ishmael Kedar Elijah Hunter,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

June 28, 2023

Court of Appeals Case No.  
22A-CR-2212

Appeal from the Lake Superior  
Court

The Honorable Salvador Vasquez,  
Judge

Trial Court Cause No.  
45G01-2103-F5-178

**Memorandum Decision by Judge Bailey**  
Judges Tavitas and Kenworthy concur.

**Bailey, Judge.**

## Case Summary

[1] Ishmael Kedar Elijah Hunter appeals his conviction, following a jury trial, of resisting law enforcement, as a Class A misdemeanor.<sup>1</sup> He raises one issue, namely: whether the trial court abused its discretion when it granted the State’s motion to exclude evidence of local law enforcement policies.

[2] We affirm.

## Facts and Procedural History

[3] On March 29, 2021, Hunter and his girlfriend, Dominique Pink, went to A&A Auto to retrieve some of Pink’s personal belongings located in her vehicle that had been towed. Hunter instigated an argument with A&A owner Eric Wilson and his son, Derrick, about towing Pink’s vehicle. Hunter became “irate,” started cursing at Eric, and stated, “[Y]ou Gary-ass n\*\*\*\*rs think ya’ll tough.” *Tr. v. IV* at 52, 122. Hunter pulled up his sweatshirt to reveal a handgun and repeatedly yelled “it’s a .40.” *Id.* at 59, 98, 125-26. Derrick called 9-1-1 and informed the 9-1-1 operator that Hunter had a gun. Eric asked Hunter to leave

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<sup>1</sup> Ind. Code § 35-44.1-3-1(a)(1).

the business twice, but Hunter refused. Hunter and Pink began walking toward the tow yard where Pink's vehicle was located.

[4] Officer Thorpe Facer of the Lake County Sherriff's Department arrived at A&A within three minutes of Derrick's 9-1-1 call and saw Hunter standing next to his vehicle. Officer Facer drew his firearm and ordered Hunter to place his hands on the hood of a nearby vehicle. Hunter complied. Officer Facer then approached Hunter and told him that he was going to handcuff him for officer safety. Hunter immediately jerked his hands away and tried to spin around when the officer attempted to handcuff him. When Officer Facer attempted to turn Hunter around in order to handcuff him, Hunter yelled and continued to twist and struggle against the officer. Officer Facer placed Hunter face-down against the hood of the vehicle and handcuffed him. Officer Facer then located a black Glock handgun in Hunter's vehicle in between the center console and the driver's seat.

[5] Hunter subsequently calmed down and provided his name to Officer Facer. Officers Clifford Caldwell and Mario Orueta then arrived on the scene. Officer Facer loosened Hunter's handcuffs upon his request after Hunter had been calm for approximately ten minutes. Officer Facer left Hunter standing with the other officers while he spoke with Eric and Derrick.

[6] Officer Facer returned several minutes later and informed Hunter that the Wilsons were pressing charges against him and that he was being formally arrested. Hunter then became extremely argumentative and yelled at the

officers. Hunter attempted to flee when Officer Facer was walking him to the patrol car. Hunter then attempted to head-butt Officer Facer when the officer grabbed him. Hunter swung his arms around and attempted to twist away from the grasp of Officer Facer. Hunter then reached for and tried to grab Officer Facer's uniform and duty belt near his firearm. Hunter repeatedly yelled that he was not going to enter a patrol vehicle and that he was not going to jail.

[7] Officers Orueta and Caldwell assisted Officer Facer in attempting to gain control of Hunter. Hunter continued to flail on the ground and resist the officers' attempts to gain control of him for approximately five minutes. The officers eventually were able to stand Hunter up and were attempting to place him in a patrol vehicle when Hunter threw his head forward in a head-butting motion. Officer Facer then pushed Hunter to the ground and Hunter began thrashing around. Hunter kicked Officer Facer twice while the officer was attempting to gain control of him. The officers instructed Hunter to lay on his stomach, and Hunter said, "No," and did not comply. Ex. 2A at 25:37. Officer Orueta then bound Hunter's legs with zip ties.

[8] Officer Joseph Kraus arrived in a patrol vehicle and transported Hunter to jail. Officer Kraus later testified that Hunter was "belligerent" during transport. Tr. v. V at 153. Hunter was kicking, cursing, and thrashing around, and he spat on Officer Kraus. The saliva hit Officer Kraus on the back shoulder.

[9] The State charged Hunter with three counts of intimidation, one as a Level 5 felony and two as Level 6 felonies;<sup>2</sup> battery by bodily waste, as a Level 6 felony;<sup>3</sup> and resisting law enforcement. Hunter subpoenaed and obtained the Lake County Sheriff's Department's policy on use of force. Before trial, the State orally moved to exclude the policy, and the trial court granted that motion on the ground that the evidence was irrelevant. Hunter objected to exclusion of the policy twice at trial and made an offer of proof. The jury found Hunter guilty of Level 6 felony battery by bodily waste and Class A misdemeanor resisting law enforcement. The trial court sentenced Hunter to one year suspended to probation. This appeal ensued.

## Discussion and Decision

[10] Hunter appeals only his conviction for resisting law enforcement and asserts that the trial court erred in excluding, on relevance grounds, evidence of the local law enforcement policies regarding use of force. Trial courts have wide latitude in ruling on the admissibility of evidence and in determining its relevance. *Beasley v. State*, 46 N.E.3d 1232, 1235 (Ind. 2016). Where alleged error in the admission or exclusion of evidence is properly preserved by a timely objection, we review the ruling for an abuse of discretion. *E.g.*, *Hoglund v. State*,

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<sup>2</sup> I.C. § 35-45-2-1.

<sup>3</sup> I.C. § 35-42-2-1(c)(2), (e)(2).

962 N.E.2d 1230, 1237 (Ind. 2012).<sup>4</sup> An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* Moreover, “[e]rrors in the admission or exclusion of evidence are considered harmless unless they affect the substantial rights of a party.” *Housand v. State*, 162 N.E.3d 508, 513 (Ind. Ct. App. 2020) (quotation and citation omitted), *trans. denied*; see also Ind. Appellate Rule 66(A).

[11] To prove Hunter committed the crime of resisting law enforcement, the State was required to prove that: (1) Hunter knowingly or intentionally; (2) forcibly resisted, obstructed, or interfered; (3) with a law enforcement officer; (4) while the officer was lawfully engaged in the execution of his/her duties. Ind. Code. § 35-44.1-3-1(a)(1). At trial, Hunter made an offer of proof during which he argued that the use of force policy was “relevant to determine if the officer complied [with] or violated with [sic] their [sic] own department policy.” *Tr. v. V* at 99. When pressed by the court, Hunter clarified that, “if an officer violates this policy in applying an excessive amount of force, then [it] can’t be said [the Defendant was] resisting a *proper* arrest.” *Id.* at 100 (emphasis added). Thus, Hunter argued at trial, as he does on appeal, that the use of force policy was relevant to whether or not the State could prove the officers were “lawfully

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<sup>4</sup> Because Hunter timely objected to the court’s ruling to exclude evidence of the use of force policy and made offers of proof in which the substance of the evidence was made known to the court and was apparent from the context, he preserved the issue for appeal regardless of whether the actual policy was admitted into the record. See Ind. Evid. Rule 103(a)(2). *Carter v. State*, cited by the State, is inapposite as there was no offer of proof in that case, much less one in which the substance of the evidence was made known to the court or was apparent from the context. 932 N.E.2d 1284, 1287 (Ind. Ct. App. 2010).

engaged in the execution of [their] duties” or whether, on the other hand, they were engaged in the unlawful use of excessive force. I.C. § 35-44.1-3-1(a)(1).

[12] Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence,” and “the fact is of consequence in determining the action.” Ind. Evidence Rule 401. Here, the State provided evidence that Hunter jerked his hands away and tried to spin around when Officer Facer first approached him to handcuff him. The evidence also established that, at that time, Hunter twisted and struggled against Officer Facer as the officer placed handcuffs on Hunter. Hunter then attempted to flee and head-butt Officer Facer while being walked to the police vehicle. Hunter resisted the officers’ subsequent attempts to gain control over him by twisting away and reaching for the officer’s uniform and belt where a firearm was located. Those actions constituted forceable resistance. *See, e.g., Jordan v. State*, 37 N.E.3d 525, 535 (Ind. Ct. App. 2015) (holding evidence that defendant attempted to flee and jerked, twisted, and turned away so that officer could not get control of defendant was sufficient evidence of resisting law enforcement).

[13] Moreover, it is clear that, at the time Hunter engaged in the above-referenced actions, Officer Facer was lawfully engaged in the execution of his duties; i.e., securing and then arresting Hunter. Hunter’s allegations of excessive force are only related to actions law enforcement took after Hunter forcibly resisted lawful seizure and arrest; i.e., the officers’ alleged use of “vascular neck restraints,” a “choke position,” and “zip ties” used to “hogtie” Hunter after Hunter resisted being taken to the police vehicle. Appellant’s Br. at 10-11.

Thus, before Officer Facer or any other officer applied any “force”<sup>5</sup> to Hunter, Hunter had already knowingly forcibly resisted Officer Facer while the officer was lawfully engaged in the execution of his duties. The local law enforcement’s use of force policy had no relevance to the commission of that crime because no force was used—or even alleged to have been used—by law enforcement at the time Hunter committed the crime of resisting law enforcement. That is, the use of force policy did not have a tendency to make any fact of consequence more or less probable than it would be without that evidence. Evid. R. 401.

[14] Similarly, even if the exclusion of the use of force policy was erroneous, that error was harmless as there was abundant evidence that Hunter forcibly resisted Officer Facer while he was lawfully engaged in securing and arresting Hunter and before the officers used any force against Hunter. *See* App. R. 66(A). Thus, any error did not affect Hunter’s substantial rights and was harmless.

[15] The trial court did not abuse its discretion when it excluded from evidence the proffered local law enforcement use of force policy, as that policy was not relevant to this case. And, even if the exclusion of the policy had been erroneous, the error was harmless.

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<sup>5</sup> Our Supreme Court has defined “force,” within the resisting law enforcement context, as “the use of strength, power, or violence, applied to one’s actions, in order to accomplish one’s ends.” *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993).



[16] **Affirmed.**

Tavitas, J., and Kenworthy, J., concur.