

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Montrell Baker,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 10, 2023

Court of Appeals Case No.  
22A-CR-1884

Appeal from the Cass Superior Court  
The Honorable James Muehlhausen,  
Judge

Trial Court Cause No.  
09D01-2104-F6-94

**Memorandum Decision by Judge Brown**  
Judges Bailey and Weissmann concur.

**Brown, Judge.**

- [1] Montrell Baker appeals his conviction for resisting law enforcement as a level 6 felony and argues prosecutorial misconduct requires reversal. We affirm.

### ***Facts and Procedural History***

- [2] At approximately 2:40 a.m. on April 22, 2021, Cass County Sheriff's Deputy Michael Thomison observed Baker's vehicle traveling the wrong direction on a one-way street. Deputy Thomison traveled down another street in an attempt "to go cut him off." Transcript Volume II at 52. When Deputy Thomison "got to the intersection, . . . [Baker's vehicle] was stopped." *Id.* Deputy Thomison "initiated a traffic stop right there at that intersection with [his] lights and even angled and blocked the intersection so that he could not continue going the wrong way." *Id.* at 52-53. Deputy Thomison's police vehicle was positioned in front of Baker's vehicle, and he activated his lights which included "four facing lights, a light bar, and . . . grill lights, which are a real high visibility of lights inside the grill." *Id.* at 53. Baker "was at a complete stop," and he made eye contact with Deputy Thomison. *Id.* at 54. He drove his vehicle around the front of Deputy Thomison's police vehicle and "took off at a high rate of speed." *Id.* at 55. Deputy Thomison "spun around" and activated his siren. *Id.* Baker turned into an alley and disregarded a stop sign in the alley. He drove forty or forty-five miles per hour in the alley where the speed limit was fifteen miles per hour and stopped his vehicle near where the alley came to an end, and Deputy Thomison ordered him to exit his vehicle at gunpoint. Deputy Thomison asked him why he ran, and he said that he did not have a driver's license. Deputy Thomison detected the odor of an alcoholic beverage,

and Baker said that he had just left a bar, was lost, had been consuming alcohol that day, and was trying to listen to his GPS.

[3] On April 22, 2021, the State charged Baker with: Count I, resisting law enforcement as a level 6 felony; Count II, operating a vehicle while intoxicated endangering a person as a class A misdemeanor; and Count III, driving while suspended as a class A misdemeanor. On June 13, 2022, the court held a plea hearing at which Baker pled guilty to operating a vehicle while intoxicated endangering a person as a class A misdemeanor under Count II and driving while suspended as a class A misdemeanor under Count III. His counsel stated: “My client wants to be able to tell the jury that he took responsibility for his actions today. . . . He wants to be able to tell the jury that he took responsibility for what he actually did. He denies the resisting by fleeing in a vehicle.” *Id.* at 8.

[4] On June 14, 2022, the court held a jury trial on Count I. During the State’s opening statement, the prosecutor stated:

Thank you. Like the Judge said this is the part where I and [defense counsel], if he chooses to, which I expect he will, . . . give an opening argument of what each side believes . . . the case to be really about. And for . . . the State, . . . I think this is what the evidence is going to show, this case is about some bad choices and it’s about then trying to minimize . . . the consequences for those bad choices after the facts. So, let’s start, this is really an odd case. . . . But yesterday, the defendant, Montrell Baker, came into court and pled guilty to some of the things that he was charged with for the events that occurred on April 20, 21st of . . . 2021. Specifically, he pled guilty to driving while suspended and specifically he pled guilty to operating a vehicle

while intoxicated. Now both of those were class A misdemeanors. What remains then, and you've been instructed on the definition of that, is resisting law enforcement as a level 6 felony. . . . [Baker] admitted specifically the following things . . . . He drove drunk. Specifically, he went to the Dutch Mill and had a few beers and consumed some alcohol. And specifically, that he was in fact intoxicated. He also admitted to driving the wrong way on two different one-way streets here in Logansport. . . . So, and like I said he also admitted to driving while suspended. . . . [H]e admitted to that again yesterday and pled guilty to that as a class A misdemeanor. Why is that important? One, you would've heard some evidence about the defendant's consumption of alcohol anyway and you guys need to know, and you've been instructed now that voluntary intoxication is not a defense. . . . Those are class A misdemeanors. The remaining Count is a felony. Ladies and gentlemen, I submit to you that all of this is just about trying to avoid a felony conviction. That's what this is. We're here to minimize our bad choices –

*Id.* at 36-37. Baker's counsel stated: "Judge, I'm going to object. We're, we're in the opening argument. We're bound by what the evidence will show. This is a closing argument." *Id.* at 37. The court overruled the objection. The prosecutor stated:

I think the evidence is going to show that all of this is really about just minimizing the consequences for bad behavior and we're trying to avoid the felony conviction. That's the theory of the case. Because otherwise, and I, I address that now because I think otherwise you're going to think . . . what the hell, this doesn't make any sense. When you view it in that context that's the lie, that's that thing I don't have to prove. But when you view it in that context, that's the lie and I think that's why we're really here today. So, I want you to keep that in mind as you hear the evidence. Now what's that evidence going to show? That evidence is going to show

that on that night Deputy Thomison was on duty. . . . And he sees headlights. . . . That's a problem. I shouldn't be seeing headlights on a one-way street. And so he initiates or attempts to initiates a traffic stop. That's going to be all diagramed out for you and I want you to pay special attention to the testimony when we get to the pullover. The first pullover or the first attempted pullover. I want you to note specifically what the deputy says and specifically what he observed the defendant do and just to preview that a little bit, and that's really why we're here, he fled at that point. So, I want you to pay special attention to that testimony because that's really what this case is about at this point. We know he was driving. He admitted to that. We know he was also drinking. That's not a defense. We've covered that. And we know his license was suspended because he admitted to that. So, this case is about the, I submit it's going to be about actions rather than inactions, but it's going to be about the actions of the defendant and what he specifically failed to do and . . . he did attempt to . . . justify some of that. I think you'll probably hear in argument, I think you'll probably hear at some point, and, and certainly he said this to the deputy that night that he was using his GPS and he's not from here. Well, if he's using his GPS why is he turning the wrong way on one-way streets, number one. I've never had that happen to me. I've used a GPS a lot. Never been told to turn against traffic. And number two, that is not going to explain the observed driving behavior that the deputy observed and he's going to tell you about today. That's why you must pay special attention to that. That is the crux of the case. . . . So keep an open mind, listen to the evidence, you'll see it diagramed out in front of you in real time, and at the end of the day I'm going to ask you to find the defendant guilty of resisting law enforcement by fleeing in a vehicle because that's exactly what he did and I really don't think there's another interpretation of the facts of this case.

*Id.* at 37-39.

[5] In his opening statement, Baker's counsel stated:

[T]his is unusual that my client has pleaded guilty to two of the three charges. I mean, the State's going to be asking (indiscernible) that, but my client's asking you to take that into consideration that he took responsibility for his actions. He did make, the evidence will show that my client did make a mistake. He's taken responsibility for that. Don't drink and drive. He's admitted to that. Driving while suspended. He's admitted to that. And the evidence will show that my client was lost, that he is not from here and that he stopped, I think it will, the evidence will show well within, well under thirty seconds, and I will ask you to take that into consideration.

*Id.* at 39-40.

- [6] The State called Deputy Thomison as a witness, and he referred to an aerial map while testifying regarding the locations he observed Baker's vehicle, the intersection where he attempted to stop Baker, and the route of the pursuit from the intersection to the location where he eventually stopped. When asked "[w]hat did he say about the GPS," Deputy Thomison testified: "He said he was trying to listen to his GPS, and he was adamant about me turning his phone off, but his GPS was still talking when we, when the phone was with us going back to the jail." *Id.* at 60-61. The jury found Baker guilty of resisting law enforcement as a level 6 felony. The court sentenced him to concurrent terms of 730 days for resisting law enforcement as a level 6 felony under Count I and 60 days for each of his convictions under Counts II and III.

### *Discussion*

- [7] Baker asserts the prosecutor made impermissible arguments during the opening statement. He argues the prosecutor dwelled on the fact that he pled guilty to

two misdemeanor offenses the previous day, described events leading up to the traffic stop which were not relevant to the resisting law enforcement charge, and argued that his statements about GPS were inconsistent with the prosecutor's personal experience. He argues the evidence against him was weak and the prosecutor's statement "was essentially a continuous argument that the jury should discredit [him] and find him guilty of resisting law enforcement because he pleaded guilty to some different crimes on a different day." Appellant's Brief at 14. He asserts that he did not waive his argument and that, even if he did, the misconduct resulted in fundamental error.

[8] The Indiana Supreme Court has held:

The purpose of an opening statement is primarily to inform the jury of the nature of the case and the nature of the defense and just how the evidence as presented fits into the charges filed and the defense made. *Blume v. State* (1963), 244 Ind. 121, 189 N.E.2d 568. The opening statement is not evidence and the jury is so instructed. Neither is an argument permitted. Therefore, the defendant can not be said to have been harmed unless the State has abused its privilege in making the opening statement by misstatement or false statements which have prejudicially misled a defendant.

*Buise v. State*, 258 Ind. 321, 324, 281 N.E.2d 93, 96 (1972), *reh'g denied*. See also Ind. Code § 35-37-2-2 (providing that, after the jury is impaneled and sworn, "[t]he prosecuting attorney shall state the case of the prosecution and briefly state the evidence by which he expects to support it"). The scope and content of an opening statement "are within the sound discretion of the trial judge and a

cause will not be reversed unless a clear abuse of discretion is shown.” *Vanyo v. State*, 450 N.E.2d 524, 526 (Ind. 1983), *reh’g denied*.

- [9] In reviewing a properly preserved claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct and, if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury’s decision rather than the degree of impropriety of the conduct. *Id.*
- [10] When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Id.* If the party is not satisfied with the admonishment, then he or she should move for mistrial. *Id.* Failure to request an admonishment or to move for mistrial results in waiver. *Id.* Baker did not request an admonishment or a mistrial. Where a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id.* Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. *Id.* It is error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.* We presume the jury followed the trial court’s instructions and applied the law to the evidence. *Fox v. State*, 997 N.E.2d 384, 390 (Ind. Ct. App. 2013), *trans. denied*.



[11] The record demonstrates, as Baker argues, that the prosecutor’s opening statement contained improper argument. The prosecutor went beyond “stat[ing] the case of the prosecution and briefly stat[ing] the evidence by which he expects to support it.” *See* Ind. Code § 35-37-2-2. Nevertheless, we conclude that the improper argument did not rise to the level of fundamental error or make a fair trial impossible. While the prosecutor argued that Baker was just trying to avoid a felony conviction and admitted to committing the charged misdemeanors and also referred to his own experience using GPS, he also asked the jury to pay special attention to the testimony regarding Deputy Thomison’s first attempt to initiate a traffic stop and his observations of Baker’s actions and stated that it would “be all diagramed out for you” and “that’s really why we’re here, he fled at that point.” Transcript Volume II at 38. He further stated “listen to the evidence,” “you’ll see it diagramed out in front of you in real time,” and “at the end of the day I’m going to ask you to find the defendant guilty of resisting law enforcement by fleeing in a vehicle.” *Id.* at 39.

[12] Moreover, the trial court’s preliminary instructions stated: “The trial of this case will proceed as follows: first the attorneys will have an opportunity to make opening statements. These statements are not evidence and should be considered only as a preview of what the attorneys expect the evidence will be.” *Id.* at 29. The State elicited testimony from Deputy Thomison regarding Baker’s vehicle traveling the wrong direction on a one-way street, his attempt to stop him by pulling in front of his stopped vehicle at an intersection and activating his emergency lights, the fact he made eye contact, how he drove

around his police vehicle and “took off at a high rate of speed,” that he activated his siren and pursued him, and that Baker drove forty or forty-five miles per hour and disregarded a stop sign in an alley. *Id.* at 55. Deputy Thomison referred to an aerial map during his testimony to show the locations where he observed Baker’s vehicle, the intersection where he attempted to stop him and he drove around his police vehicle, the route of the pursuit from the intersection to the location where he eventually stopped and was detained, and the distance he drove after leaving the intersection. He also testified regarding Baker’s explanations including that he was lost, had consumed alcohol, and was using his GPS. Defense counsel thoroughly cross-examined Deputy Thomison. The court’s final instructions to the jury stated “[y]ou are the exclusive judges of the evidence, which may be either witness testimony or exhibits,” “it is your duty to decide the value you give to the exhibits you receive and the testimony you hear,” “[s]tatements made by the attorneys are not evidence,” and “[y]our verdict should be based only on the evidence admitted and the instructions on the law.” *Id.* at 79-80. Under the circumstances and in light of the evidence, we cannot say the prosecutor’s improper argument resulted in fundamental error or made a fair trial impossible.

[13] For the foregoing reasons, we affirm Baker’s conviction.

[14] Affirmed.

Bailey, J., and Weissmann, J., concur.