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.

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IN THE COURT OF APPEALS OF INDIANA

Ian Ladwuane Rawls,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 21, 2021

Court of Appeals Case No. 21A-CR-169

Appeal from the LaPorte Superior Court

The Honorable Michael S. Bergerson, Judge

Trial Court Cause No. 46D01-1903-F3-340

Najam, Judge.

Statement of the Case

[1] Ian Ladwuane Rawls appeals his four convictions for robbery, each as a Level 3 felony; his two convictions for intimidation, each as a Level 5 felony; his conviction for resisting law enforcement, as a Class A misdemeanor; and his conviction for operating a motor vehicle without a license, as a Class C misdemeanor. Rawls presents a single issue for our review, which we restate as whether the trial court committed fundamental error when it did not exclude certain evidence against him at his trial. We affirm.

Facts and Procedural History

[2] On March 10, 2019, Lori Scurlock was working as a cashier at the Save Gas Station in Michigan City. Because it was after dark, Scurlock kept the door to the store at the station locked but would buzz customers in as needed. A sign on the door stated that customers could not wear face coverings to enter the store, which before COVID was an additional protection against criminal activity inside the store.

[3] That evening, a man approached the locked door and requested entry. Scurlock could tell that the man "didn't have on a mask," but he "kept his face turned away" from her. Tr. Vol. III at 128. Still, she got "a glimpse of him," though not "a good look," and she buzzed him in. *Id.* at 129-30. She noticed that he was wearing a hoodie, which she asked him to pull down. She further noticed that he was wearing jeans with a distinctive sewing of "little red and white squares all over" the front and back pockets. *Id.* at 136.

[4] Upon entering the store, the man immediately walked past Scurlock, put a red bandana around his face, and pulled out an apparent firearm. He then demanded Scurlock give him "all of [the] money." *Id.* at 130. Scurlock told him, "that gun is fake as f**k." *Id.* But then the man cocked the gun, and it made what Scurlock interpreted to be a sound consistent with loading the chamber, and so she complied with his demands and gave him the store's money. He then asked for all of the Swisher brand cigars, which she also gave him. She then buzzed him out of the store and called the Michigan City Police.

[5] During the robbery, Scurlock was "trying to just find something to identify" the man, such as "how tall" he was. *Id.* at 131. In her call to the police, she stated that the man was between 5'8" and 5'10", "was a medium skinned black man," and weighed "probably 200 plus." *Id.* at 136. She further described the man's clothing.

[6] Police immediately responded and believed Scurlock's description matched the description of a suspect involved in several other recent, nearby robberies, and based on those other robberies officers knew to look for a specific vehicle. And, shortly after receiving Spurlock's call, Michigan City Police Department Corporal Michael King identified a suspect vehicle driving away from the Save Gas Station. Corporal King activated his emergency lights in order to initiate a traffic stop of the vehicle, which then turned into a nearby gas station. Without putting the vehicle in park, Rawls exited the car and fled. Corporal King and another officer gave chase and apprehended Rawls. Corporal King observed that Rawls matched Scurlock's description of the Save Gas Station robber's

physical appearance. Corporal King further observed that Rawls' clothing matched Scurlock's description, especially the notable design on the jeans. In Rawls' car, officers observed a red bandana and a plastic bag full of Swisher brand cigars. Officers also later found a BB handgun in his car.

[7] Thirteen total minutes after the robbery, Corporal King drove Rawls to the Save Gas Station to see if Scurlock would be able to identify him (the "show-up identification"). Corporal King had Rawls stand next to his police vehicle and turned Rawls around so Scurlock could see the front and back of Rawls' clothing. Scurlock was approximately fifteen to twenty feet away when she looked at Rawls. Scurlock recognized Rawls as the robber, especially due to him wearing "the same clothing." *Id.* at 139. She would later describe her confidence in identifying Rawls at the station as "[one] hundred percent." Tr. Vol. II at 23.

[8] The State charged Rawls with numerous offenses. Rawls then moved to suppress Scurlock's identification of him at the show-up identification, which motion the trial court denied. At his ensuing trial, Scurlock testified, without objection, to having recognized Rawls at the show-up identification. The jury found Rawls guilty as charged, and the trial court entered its judgment of conviction and sentence accordingly. This appeal ensued.

Discussion and Decision

[9] On appeal, Rawls asserts that the trial court committed fundamental error when it did not exclude the show-up identification at his trial. Rawls does not dispute

that he failed to preserve this issue for appellate review with a proper objection during trial and, thus, to prevail on appeal he must demonstrate fundamental error. "An error is fundamental, and thus reviewable on appeal, if it made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (quotation marks omitted).

[10] However, "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*. That is because fundamental error

> is extremely narrow and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation. At the same time, *if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error*.

Durden, 99 N.E.3d at 652 (emphasis added; quotation marks and citations omitted).

[11] "An attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can readily imagine any number of viable reasons why attorneys might not object." *Nix v. State*, 158 N.E.3d 795, 801 (Ind. Ct. App. 2020), *trans. denied*; *cf. Merritt*, 99 N.E.3d at 710 ("The risk calculus inherent in a request for an admonishment is an assessment that is

nearly always best made by the parties and their attorneys and not *sua sponte* by our trial courts."). As we have explained:

> Fundamental error in the erroneous admission of evidence might include a claim that there has been a "fabrication of evidence," "willful malfeasance on the part of the investigating officers," or otherwise that "the evidence is not what it appears to be." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). But absent an argument along those lines, "the claimed error does not rise to the level of fundamental error." *Id.*

Nix, 158 N.E.3d at 801.

[12] In *Nix*, the defendant argued that the trial court committed fundamental error when it did not *sua sponte* prohibit the State from questioning three witnesses about whether the victim had told those witnesses about the defendant's sexual assault of her. In particular, the defendant contended that the testimony of several witnesses created inadmissible drumbeat evidence that unfairly bolstered the State's case. We rejected the defendant's argument that the trial court committed fundamental error, stating:

> [The defendant] does not assert that the evidence against him was not what it appeared to be. Rather, his argument is simply that the purportedly erroneous admission of this evidence implicated his due-process rights because it made the State's evidence appear stronger than it might have actually been. But [the defendant's] argument on this issue would turn fundamental error from a rare exception to the general rule for appellate review. There are often tactical reasons for an attorney not to object to the admission of evidence or the questioning of witnesses, and, however discerning our trial courts may be, they are not expected or required to divine the mind of counsel. And,

> if a defense counsel lacks a tactical reason for not objecting to prejudicial evidence that would not have been admitted with a proper objection, the defendant has the post-conviction process available to him to pursue relief.

Id. at 801-02 (citation omitted).

[13] Here, Rawls' argument is centered on the proposition that show-up identifications are inherently suggestive. It is true as a general matter that show-up identifications are inherently suggestive, but they are not per se inadmissible. As our Supreme Court has made clear:

> The practice of conducting a one-on-one show-up between a suspect and a victim has been widely condemned as being inherently suggestive both by the United States Supreme Court and by this Court. Identification evidence gained from such show-ups, however, is not subject to a per se rule of exclusion. Rather, the admissibility of the evidence turns on an evaluation of whether, under the totality of the circumstances, the confrontation procedure was conducted in such a fashion as to lead the witness to make a mistaken identification. In making this determination, this Court considers the factual details of how the confrontation was conducted. Any exigencies associated with the police decision to utilize a show-up procedure as opposed to other alternatives are also relevant because the admission of show-up identification evidence where the procedure occurred shortly after the commission of the crime has been approved by this Court, recognizing the value of permitting a witness to view a suspect while the image of the perpetrator is fresh in the witness's mind, or where the circumstances rendered alternatives such as a photo or corporeal lineup impossible.

Wethington v. State, 560 N.E.2d 496, 501 (Ind. 1990) (cleaned up).

[14] Rawls argues that the totality of the circumstances here rendered the show-up identification inadmissible, which, he continues, implicated his due process rights. But, while Rawls asserts that an inadmissible show-up identification implicates his due process rights, he presents no cogent reasoning that the admission of the show-up identification here was a "clearly blatant violation of basic and elementary principles of due process."[1] *Durden*, 99 N.E.3d at 652. Further, in this evidentiary context, Rawls does not argue that the evidence against him was not what it appeared to be, such as a fabrication of evidence or the product of willful malfeasance by the investigating officers. *See Brown*, 929 N.E.2d at 207. He also does not suggest that the trial court here should have known that there was no "viable reason" for the lack of an objection. *Durden*, 99 N.E.3d at 652. Nor could he. As we explained in *Nix*, there are any number of reasons why an attorney might not object to the admission of evidence at trial, and our trial courts are not required to interject themselves into those decisions. 158 N.E.3d at 801-02.

[15] Rather, like the defendant's argument in *Nix*, the gravamen of Rawls' argument on appeal is simply to have this Court review the denial of his motion to suppress as if he had properly preserved that issue for appellate review. That is,

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[1] In his brief, Rawls asserts that the admission of the show-up identification was "a blatant violation of his constitutional rights" because: (1) the evidence was inadmissible; (2) Scurlock's identification of him "was substantial" to the State's case, which speaks to the weight of the evidence but not to basic and elementary principles of due process; and (3) the show-up identification served as part of the probable cause underlying a warrant that led to further inculpatory evidence, which also says nothing about how the show-up identification itself was contrary to basic and elementary principles of due process. Appellant's Br. at 28-29.

the merits of Rawls' argument is that the show-up identification was inadmissible under the usual standard for determining the admissibility of such evidence. But considering Rawls' argument on appeal "would turn fundamental error from a rare exception to the general rule for appellate review," which we will not do. *Id.* Therefore, we conclude that Rawls has not met his burden to show fundamental error in the admission of the show-up identification.

[16] In any event, even if Rawls had properly objected in the trial court to the show-up identification, the trial court had no obligation to sustain that objection on these facts. Again, show-up identifications are not "subject to a per se rule of exclusion." *Wethington*, 560 N.E.2d at 501. And, here, nothing about the circumstances in how the officers conducted the show-up identification would have been likely to lead Scurlock to make a mistaken identification. The show-up identification occurred thirteen minutes after the robbery, "while the image of the perpetrator [wa]s fresh" in Scurlock's mind. *Id.* It occurred at the same location as the robbery, and officers presented to Scurlock a man matching her own physical description of the perpetrator and wearing the same distinctive clothing as the perpetrator. There was no error in the admission of this evidence, let alone fundamental error. Thus, we affirm Rawls' convictions.

[17] Affirmed.

Tavitas, J., and Weissmann, J., concur.