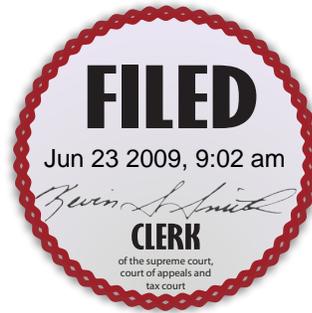


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN L. SMITH,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0810-CR-000948
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0802-FD-037233

June 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

John Smith appeals his conviction for resisting law enforcement as a class D felony.¹ Smith raises one issue, which we restate as whether the trial court abused its discretion when it declined to give a jury instruction proposed by Smith. We affirm.

The relevant facts follow. In February 2008, Smith was sitting in a black truck which was parked next to an abandoned house on Mount Street in Indianapolis. Officer Julian Wilkerson of the Indianapolis Metropolitan Police Department was patrolling the area in a fully marked squad vehicle which was equipped with a siren, full LED light bar, and corner and rear strobes. Officer Wilkerson observed Smith's parked truck and a man standing outside the driver's window. When Smith and the man standing by his truck window noticed Officer Wilkerson's squad vehicle, the man fled on foot, and Smith immediately turned on the lights of his truck and entered traffic, without signaling, on Mount Street to drive away. Officer Wilkerson activated the emergency lights and siren of his police vehicle and began to follow Smith. Officer Wilkerson gave Smith some time to stop, knowing that sometimes it takes a driver a few moments to see police lights or hear a police siren. Smith came to a stop sign but "proceeded to take off." Transcript at 80. At that time, Officer Wilkerson "pretty much knew [that he] had a vehicle refusing to stop." Id. at 80. Officer Wilkerson then immediately notified the police control operator by radio that he was in pursuit of a vehicle.

Smith drove several blocks with Officer Wilkerson in pursuit before he stopped, exited his vehicle, and "brushed something onto the ground." Id. at 81. Officer

¹ Ind. Code § 35-44-3-3 (Supp. 2006).

Wilkerson drew his firearm and ordered Smith to “get on the ground.” Id. Smith looked at Officer Wilkerson, but got back in his truck, shut the door and began driving away. Traveling at a rate of about thirty miles per hour, Smith rolled through a stop sign and drove through a parking lot occupied by pedestrians and parked vehicles. Other police officers joined Officer Wilkerson in pursuing Smith, each with their vehicle’s lights and sirens activated.

Smith again stopped his vehicle, this time on a bridge over White River, opened his door and again “brushed some objects out.” Id. at 85. Officer Wilkerson got out of his police vehicle and attempted to approach Smith with his firearm pointed at him. Smith looked at Officer Wilkerson, got back in his truck, and again drove away. Officer Wilkerson “had to run back to [his] car and start the pursuit all over again.”

After driving several additional blocks, Smith stopped his truck and opened the door, but did not exit. Officer Wilkerson ran up to Smith, pointed his firearm at Smith, and ordered him to the ground. When Smith did not exit his truck, Officer Wilkerson holstered his weapon, grabbed Smith by his jacket, and pulled him out of his truck, and ordered Smith to stop resisting and show Officer Wilkerson his hands. Smith began rolling around and flailing his arms in an attempt to avoid being handcuffed, and Officer Wilkerson sprayed him with chemical spray. After that, the officer was able to handcuff Smith.

The vehicle pursuit lasted approximately four or five minutes, and Officer Wilkerson remained closely behind Smith for the entire pursuit.

The State charged Smith with resisting law enforcement as a class D felony and resisting law enforcement as a class A misdemeanor. During Smith's trial, Smith proposed a jury instruction regarding the term "flee" in order to "offer the jury extra clarification on the definition of that word that they would not have otherwise and that is not covered through the normal court instructions." Transcript at 157. In response, the State argued that the proposed instruction "actually just confuses the issue" because it "just tosse[s] another term into the mix . . . for which there is no definition" *Id.* at 157-158. The trial court agreed with the State and declined to give Smith's proposed instruction to the jury. The court reasoned: "I do think that using the word escape in it or attempt to escape is a little confusing so far as the jury instruction goes." *Id.* at 158. A jury found Smith guilty of resisting law enforcement as a class D felony and not guilty of the class A misdemeanor charge.

The sole issue is whether the trial court abused its discretion when it declined to give a jury instruction proposed by Smith. Instructing the jury is generally within the trial court's discretion and is reviewed only for an abuse of that discretion. Overstreet v. State, 783 N.E.2d 1140, 1163-1164 (Ind. 2003), cert. denied, 540 U.S. 1150, 124 S. Ct. 1145 (2004). When reviewing the refusal to give a proposed instruction, this court considers: (1) whether the proposed instruction correctly states the law, (2) whether the evidence supports giving the instruction, and (3) whether other instructions already given cover the substance of the proposed instruction. Driver v. State, 760 N.E.2d 611, 612 (Ind. 2002). An abuse of discretion will be found only where the individual instruction is

erroneous or where the instructions, taken as a whole, misstate the law or otherwise mislead the jury. Reaves v. State, 586 N.E.2d 847, 855 (Ind. 1992).

Smith's proposed jury instruction provided:

"Flee" as used in the resisting law enforcement statute means a knowing attempt to escape law enforcement.

AUTHORITY: Wellman v. State, 703 N.E.2d 1061 (Ind. Ct. App. 1998).

Appellant's Appendix at 68.

Smith argues that the trial court abused its discretion by failing to define the word "flee." We observe that the purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it, and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. Overstreet, 783 N.E.2d at 1163. With respect to definitional instructions, the trial court has a duty to give further instructions defining words used in other instructions only if the words are of a technical or legal meaning normally not understood by jurors unversed in the law. Martin v. State, 262 Ind. 232, 246, 314 N.E.2d 60, 70 (1974), reh'g denied, cert. denied, 420 U.S. 911, 95 S. Ct. 833 (1975). It is within the discretion of the trial court whether or not to include definitions in an instruction. Coonan v. State, 269 Ind. 578, 586, 382 N.E.2d 157, 163-164 (1978), cert. denied, 440 U.S. 984, 99 S. Ct. 1798 (1979); McPherson v. State, 178 Ind. App. 539, 553, 383 N.E.2d 403, 413 (1978). Where terms are in general use and can be understood by a person of ordinary intelligence, they need not be defined. Roche v. State, 690 N.E.2d 1115, 1128 (Ind. 1997), reh'g denied; see also McFarland v. State, 271 Ind. 105, 112, 390 N.E.2d 989, 994 (1979) ("Terms used in instructions should be

defined by the court where they have a technical meaning, or may be misapplied by the jury; but where the terms are in common use and are such as can be understood by a person of ordinary intelligence they need not be defined or explained in the absence of anything in the charge to obscure their meaning.”) (quoting 23A C.J.S. Criminal Law § 1191, p. 484).

In our view, the trial court correctly determined that the jury would understand a term such as “flee” in these circumstances without further explanation. Officer Wilkerson testified that he pursued Smith for approximately four or five minutes with his emergency lights and siren activated, and that he remained closely behind Smith for the entire pursuit. Smith stopped his truck several times to “brush some objects” out of his truck, and each time Smith looked at Officer Wilkerson before he got back in his truck and drove away. Transcript at 81, 85. Once stopped, Smith did not get out of his truck and attempted to avoid being handcuffed. Although Smith eventually stopped his truck and was subdued, the evidence is clear that he was aware of Officer Wilkerson’s presence and that Officer Wilkerson wanted him to stop his truck, yet Smith failed to do so repeatedly and only on his own terms.

Although Smith’s proposed instruction may have further elaborated on the definition of the term “flee” in explaining that it means “to escape,” we do not see how the jury was misled by not receiving such an elaboration or explanation. The jurors were not misled or given too little explanation regarding the meaning of the term “flee.” We cannot say that the trial court abused its discretion when it declined to give Smith’s

proposed instruction. See, e.g., Roche, 690 N.E.2d at 1128 (finding no error in the failure of the trial court to define the term “mitigation” because such term is in general use and can be understood by a person of ordinary intelligence); see also Jenkins v. State, 424 N.E.2d 1002, 1004 (Ind. 1981) (observing that the term “sexual gratification” has no special legal meaning, but is used in its ordinary sense, and that “[t]here is no rule of law requiring the judge to instruct juries regarding the meaning of such common terms”); McFarland, 271 Ind. at 112, 390 N.E.2d at 994 (finding no error in the failure of the trial court to give defendant’s proposed instruction defining the terms “malice” and “in a sudden heat”); Fuller v. State, 261 Ind. 376, 381, 304 N.E.2d 305, 309 (1973) (observing that the words “disease” and “lesion” were not technical words and holding that the ordinary juror would not be confused or misled by the words without an accompanying definitional instruction).²

² Smith cites Wellman v. State, 703 N.E.2d 1061 (Ind. Ct. App. 1998), in support of his argument. In Wellman, we observed that “flight” means “a knowing attempt to escape law enforcement when the defendant is aware that a law enforcement officer has ordered him to stop or remain in place once there.” 703 N.E.2d at 1063. The issue in Wellman was whether there was sufficient evidence for the jury to find that the defendant’s act of walking away constituted fleeing. Id. at 1062-1063. To “flee” as used in this statute is not limited to attempting to escape apprehension. As was apparently the case here, a defendant may be fleeing in an effort to buy time in order to dispose of incriminating evidence while knowing that ultimately he will be apprehended. Such conduct would still fit within the definition of the crime. Further, a trial court is not obligated to give a definitional instruction for the sole reason that the word or phrase was defined in a court case. See, e.g., Valentine v. State, 257 Ind. 197, 202-203, 273 N.E.2d 543, 545-546 (1971) (affirming trial court’s refusal to give instruction regarding definition of the phrase “great bodily harm,” even though the phrase was specifically defined in Froedge v. State, 249 Ind. 438, 233 N.E.2d 631 (1968), because the phrase “defines itself” and “further clarification of the phrase . . . was unnecessary”).

Smith also argues that his proposed instruction “would have clarified the mental component of the charged crime.” Appellant’s Brief at 7. In order to convict Smith of resisting law enforcement, the State had to prove that Smith “knowingly or intentionally” fled from a law enforcement officer. Ind. Code § 35-44-3-3.³ The trial court determined that Smith’s proposed instruction was covered by other instructions given to the jury. Indeed, the trial court had instructed the jury that the crime of resisting law enforcement included the element of “knowingly or intentionally” fleeing law enforcement.⁴

³ Ind. Code § 35-44-3-3 provides in part:

- (a) A person who knowingly or intentionally:

* * * * *

- (3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer’s siren or emergency lights, identified himself or herself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

- (b) The offense under subsection (a) is a:

- (1) Class D felony if:

- (A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense;

⁴ The trial court’s Instruction No. 4 to the jury stated as follows:

A person who knowingly or intentionally flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer’s siren or emergency lights, identified himself or herself and ordered the person to stop commits resisting law enforcement, a Class A misdemeanor. The offense is a Class D felony if the person uses a vehicle to commit it.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

Appellant's Appendix at 51. As it relates to the intent element of resisting law enforcement, the jury was fully informed that in order to be guilty of resisting law enforcement, Smith must have done so intentionally. The trial court did not abuse its discretion. See, e.g., Alexander v. State, 520 N.E.2d 99, 100 (Ind. 1988) (holding that jury instructions, which stated that the crime of resisting law enforcement included element of "knowingly or intentionally" fleeing from a law enforcement officer, fully informed the jury that intent was an essential element of the crime). See also McCurry v. State, 558 N.E.2d 817, 819 (Ind. 1990) (where a subject is properly covered by a given instruction, it is not error to fail to give a tendered instruction on the same subject); McFarland, 271 Ind. at 112, 390 N.E.2d at 994 (holding that defendant's proposed instructions regarding the statutory definition of a crime were not improperly refused by the trial court because the substance of the proposed instructions were adequately covered by the instructions actually given).

For the foregoing reasons, we affirm Smith's conviction for resisting law enforcement as a class D felony.

-
1. The Defendant
 2. *Knowingly or intentionally*
 3. Fled from Julian Wilkerson, a law enforcement officer;
 4. After Julian Wilkerson had, by visible or audible means, identified himself and ordered the Defendant to stop
 5. And the Defendant used a vehicle to commit the offense.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Resisting Law Enforcement, a Class D felony, as charged in Count I.

Appellant's Appendix at 51 (emphasis added).

Affirmed.

CRONE, J., and BRADFORD, J. concur.