IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 87749**
	)	
PAUL L. BAINTER,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT SUBSTITUTE BRIEF

KENT DENZEL, MOBar #46030
Assistant Public Defender
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3718
(573) 882-9855
FAX: (573) 875-2594
Kent.Denzel@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Paul Bainter appeals his conviction following a jury trial in the Circuit Court of St. Charles County, Missouri, for first degree robbery, § 569.020,[1] first degree burglary, § 569.160, resisting arrest, § 575.150, seven counts of felonious restraint, § 565.120, and eight counts of armed criminal action, § 571.015. The Honorable Lucy D. Rauch sentenced Mr. Bainter, as a persistent offender, to consecutive terms of imprisonment of life for the robbery and burglary counts, seven years for resisting arrest, fifteen years for each count of felonious restraint, and fifty years for each count of armed criminal action. As part of its opinion in ED 86381, the Missouri Court of Appeals, Eastern District, transferred this appeal to this Court pursuant to Rule 83.02. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const. (as amended 1982).

[1] All statutory citations are to RSMo 2000, unless otherwise stated.

STATEMENT OF FACTS

Two men wearing ski masks robbed the McDonald's Bar and Grill in Hazelwood in the early morning hours of December 30, 2003 (Tr. 646-47, 746).[2] The McDonald's robbery was not the subject of the case at bar.

The subject of the case at bar, rather, was the robbery of an IGA grocery store in St. Charles four days later, January 3, 2004 (L.F. 98-105). The court permitted the State to present evidence concerning the McDonald's robbery under the identification exception to the general rule prohibiting evidence of uncharged offenses (Hr.Tr. 8-19-04; 62-79).

Around 8:20 p.m. on January 3, IGA co-owner Brian Moore went into the back room of the store to check on things when a man stepped out into the corridor from the side and pointed a gun at Mr. Moore (Tr. 337, 342-43). He said, "All we want is the money. No one is going to get hurt. We're going back up to the safe." (Tr. 344). Mr. Moore turned around and the man poked the gun in his back; about that time Mr. Moore saw a second man in the back office (Tr. 344). The first man told the second he could come out now (Tr. 344). The "back room" is not open to the public and the public does not generally use the back doors in the loading area, but the store's

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[2] The Record on Appeal consists of a legal file (L.F.), the trial transcript (Tr.); the sentencing transcript (Sent.Tr.); and transcripts of pretrial hearings conducted on August 19, 2004, January 24, 2005, and March 3, 2005 (which will be referred to as (Hr.Tr.) with the appropriate date).

restrooms are in the back and those who ask are allowed to use them (Tr. 355, 359-60, 376). People do sometimes "end up in the back of the store" (Tr. 376).

Mr. Moore's son, Sean, who was sixteen at the time and worked in the store, came through the door and Mr. Moore told him they were going to do what the men said (Tr. 345, 389-90). They all went from the back room toward the front of the store (Tr. 345). When they encountered a customer the men told him to get on the floor (Tr. 345). Mr. Moore showed the men that there was no money in the safe at the front of the store (Tr. 345-46). He told them the money was in the front office; they went there and Mr. Moore emptied the cash drawers into a black plastic bag the men had with them (Tr. 346).

Some of the store's cash was kept in bundles and some was loose (Tr. 346). There were also some rolls of coins in white wrappers with orange print (Tr. 347). The store put $1 bills into bundles of twenty, with a rubber band around them, then bundled five of those stacks together using another rubber band (Tr. 363). There was something over $4,400.00 taken (Tr. 365). The videotape from the store's surveillance system was also missing when Mr. Moore checked (Tr. 367-68).

After the men got the money, they took Mr. Moore, the four employees working at the time, and two customers, back to the meat cooler in the back room (Tr. 348-49). They said no one was going to get hurt (Tr. 349). When everyone went into the cooler, the men closed the door and told everyone to stay there (Tr. 349). One employee mentioned that she knew that the cooler could be opened from the inside

(Tr. 473).[3] It also had more than one entrance/exit (Tr. 356). The robbers did not mention a specific amount of time to stay in the cooler, but Mr. Moore went out and checked after two or three minutes, which he thought was enough time for the men to leave (Tr. 349). They appeared to be gone and he called the police (Tr. 349).

All seven who were present and were ushered into the meat locker gave descriptions of the robbers and their actions:

- Mr. Moore said the two robbers wore ski masks and carried black handguns (Tr. 343-44). The first man he encountered was large -- 6'1" to 6'2", and weighing 240 to 250 pounds (Tr. 343). He carried a gun with a barrel approximately six inches long with an orange tip (Tr. 343).[4] The second man was shorter -- about 5'7" -- and "relatively large for his height" -- about 160 to 170 pounds (Tr. 344). He had a shorter barreled black handgun (Tr. 344). The larger gun looked like State's Exhibit 1 and the smaller one looked like Exhibit 3 (Tr. 343-44). Mr. Moore thought he told the police that the shorter man was wearing a denim jacket and blue jeans (Tr. 372, 379).

- Sean Moore said that the first man, who he first saw standing behind Mr. Moore, was "tall and wider" (Tr. 391, 395-96). Both men wore dark ski masks and dark clothing, though he did not recall exactly what they were wearing (Tr. 390-91, 397, 400). Both guns were dark; the first man's gun had a long barrel and the other

[3] The State also conceded this in its opening statement (Tr. 319).

[4] Mr. Moore did not mention the orange tip in his statement to the police (Tr. 368-69).

gun was about the size of a man's hand (Tr. 391-93). The first man's gun was similar to Exhibit 1 and the smaller gun was similar to Exhibit 3 (Tr. 392-93). The second, smaller man did the talking (Tr. 395). At one point, talking to the other man, he "said the name Paul, but quickly corrected himself repeating Ed several times." (Tr. 395).

- Customer Kenneth Condor said the men wore "darker" snow masks (Tr. 403). He thought they were dark blue (Tr. 404). One man was tall and the other was much shorter (Tr. 404). Condor wrote that he thought the shorter man had brown eyes, but they could have been brown or brownish green (Tr. 408-09). He did not look at the man's eyes much because of the gun (Tr. 409). The tall man had "a big Dirty Harry type gun" -- "a huge gun, just a long barrel, maybe a 44 Magnum type." (Tr. 404-05). An unidentified State's Exhibit looked like the gun, though Condor did not know whether it had the orange tip (Tr. 405, 414). The other man's gun was shorter and looked like Exhibit 3 (Tr. 406). He was wearing black, military-type boots (Tr. 406-07).

- Rachel Willman, then eighteen, an IGA employee, saw the two men behind Mr. Moore wearing dark colored ski masks; one man was bigger then the other (Tr. 418-20). They told Mr. Moore to put his hands down (Tr. 419). She sat down, but did not remember whether she was ordered to do so (Tr. 420). Ms. Willman wrote in a statement that the shorter man had brown eyes, but she thought she "messed up because [she] was nervous." (Tr. 421). She said the shorter defendant's eyes looked brown from the witness stand (Tr. 438). She also heard the shorter man talk

to the big man, saying, “Paul, Ed, Ed” (Tr. 420). All Ms. Willman remembered about the guns was that one was bigger than the other, and she remembered only that their clothing was “darker looking.” (Tr. 423).

- Another employee, seventeen year old Renee Hudson, remembered that the taller of the robbers had the larger gun; it was big and dark, with a long barrel, and was older looking (Tr. 467, 470, 472). The smaller man had a “real little” gun (Tr. 470, 472). He told Renee to give him the money from her register; he also told her not to cry, that he was not going to shoot her, he just wanted the money (Tr. 471, 475). She said the police report concerning what she said about the man’s eyes was incorrect; she actually told them his eyes were green on the outside, and were more brown than green on the inside (Tr. 475). Renee then said she remembered his eyes “distinctively” and “they were brown on the outside and green on the inside.” (Tr. 475). Renee also remembered that the mother of a friend was walking around the store and made a noise with her cart that prompted the smaller man to say, “Paul, Ed, Ed, Ed, Ed, like real fast” (Tr. 472). No one else mentioned this customer or gave a reason why she was not put in the cooler with the others.

- Terry Pointer, another customer at IGA during the robbery, said one robber was about Pointer’s own height of 6’1” and a little thinner than Pointer, thus about 250 pounds (Tr. 461-62). The other man was about 5’9” and stocky, about 230 pounds (Tr. 462). The larger man had a .44 magnum revolver with a six-inch barrel, the same as Exhibit 1 (Tr. 462). The shorter man had what appeared to Mr. Pointer to be a snub nosed .38 revolver, which was what he first thought Exhibit 3

was (Tr. 462-63). On closer inspection, Mr. Pointer said Exhibit 3 was a .22, which looks almost the same as a .38 from the side, which was his only view of the robber's gun (Tr. 463). Both men wore ski masks, either very dark blue or black, and dark gloves (Tr. 464).

- James Vails also worked at the IGA; he was nineteen (Tr. 478). He saw two men holding guns on his boss; they told the people there to get on the ground, and "everything is going to be okay." (Tr. 479). Both men were heavy-set, one was tall and the other was short; they wore dark colored ski masks and black gloves (Tr. 479, 483-84). Vails is about 5'10" or 5'11" and one man was about an inch or two shorter and the other was about an inch taller (Tr. 488-89). The shorter man wore a Marlboro jean jacket, black boots, and "very light grayish blue sweat pants." (Tr. 480-81).

The short man had a very short gun, black with a brown handle (Tr. 482). Vails could see a screw at the bottom of the handle; Exhibit 3 was the gun (Tr. 472). The larger man's gun was black with a five to six-inch long barrel and "orange paint at the tip of the barrel for a sight." (Tr. 483-84). Vails believed Exhibit 1 was the same gun (Tr. 484). He agreed that his statement to police lacked the detail to which he testified, but said, "It was a very hectic night, and everything comes back to memory." (Tr. 487).

Vails was asked to go to court during a pretrial hearing and heard one defendant, who he identified as Robert Davis, speaking to the judge (Tr. 500-01, 506-07). He recognized Davis's voice as the shorter of the robbers, who kept saying

"okay, okay, okay" during the robbery, which was not in response to anything that anyone said (Tr. 497, 500). Vails was told not to say anything at the pretrial hearing because the prosecutor did not want the public defender to know he was there (Tr. 501). Rachel Willman and Renee Hudson were also in court that day, and Rachel said that it was when she saw Davis in court that day that she "really knew it was him because I saw his eyes." (Tr. 429-30).

In the mid-afternoon on January 4, the day after the IGA robbery, off-duty St. Peters detective Michael Helm saw a white Chevrolet pickup pull in front of his house (Tr. 508, 580-83, Exhibit 52A). The driver had black hair and a mustache, and the passenger, a "heavier set-set" man, had a big mustache and a long bushy beard (Tr. 509). He had been given information in the "few weeks" leading up to that day to be on the lookout for a man matching the passenger's description (Tr. 514).

Helm called his dispatcher and "ran" the truck's license plate, and was told that it had been reported stolen (Tr. 514). He called the O'Fallon police, the city he was in, and reported the information (Tr. 514-15). He waited for their response, but when the passenger got in the truck and they pulled away, he followed and updated their location for the O'Fallon police (Tr. 515). The O'Fallon police soon arrived and Helm ended his involvement (Tr. 515).

O'Fallon officer Stephen Schneider stopped the white truck after also being told that the plates were stolen, then, because of the stolen plates, drew his gun and ordered the driver to throw the keys out the window (Tr. 521-22). Schneider intended to arrest "them" for possessing stolen license plates (Tr. 535). Instead, the driver

looked over his shoulder, then drove off, through a parking lot, across a strip of grass, and back onto the road (Tr. 522). The driver was Robert Davis and the passenger was Paul Bainter (Tr. 530-31).

Schneider followed, his lights and sirens on, as the truck crossed over I-70, then turned the wrong way, heading eastbound down the off-ramp for westbound traffic (Tr. 525). Schneider turned around and went eastbound on I-70, keeping the truck in sight in the westbound lane, until a hill and traffic blocked Schneider's view (Tr. 527-28). There was other traffic on westbound I-70; Schneider saw one vehicle swerve toward the concrete median (Tr. 526). He saw the truck stopped in a grassy area between I-70 and the outer road, so he went to the next exit and returned on the outer road to the point where the truck was stopped (Tr. 528, 538).

Another O'Fallon officer, Chad Gerler, drove westbound on I-70 to try to find the truck and to slow traffic down (Tr. 537). He saw the truck in the grassy area and saw Davis and Mr. Bainter running from it and climbing over a fence (Tr. 538). Gerler chased the men on foot, telling them they were under arrest (Tr. 538). He lost sight of Davis but caught Mr. Bainter and subdued him, after a struggle and with the assistance of other officers (Tr. 542-44).

When Gerler first tried to tackle him, Mr. Bainter dropped a camouflage pattern "fanny pack" that he was carrying when he ran from the truck (Tr. 541, 545). Davis had a red bag when Gerler saw him running (Tr. 541). In the fanny pack or within a few feet of the scene of the struggle, police found a loaded .44 revolver (Exhibit 1), a holster, a pair of black gloves, .44 and .22 caliber ammunition and five

rolls of quarters (Tr. 545-46, 554, 892-93, 898-99). An address book with Mr. Bainter's name on it and Davis's address in it was also in the pack (Tr. 903-04).

At the hospital, where Mr. Bainter was taken for injuries he received in the course of being arrested, the police seized Mr. Bainter's clothing and other possessions, including a green and black flannel jacket, a pair of shorts, a pair of sweat pants, a shirt, and a maroon ski mask that was in a pocket of the jacket (Tr. 604-05, 607). The police also seized tennis shoes that appeared to have been spray-painted with black paint (Tr. 965-66). In a pocket of the shorts there was a roll of cash; another large amount of cash was in a pocket of the sweat pants and there were smaller amounts in other pockets (Tr. 607-08). The money included five rubber-banded stacks of $1 bills, twenty bills in each stack; three $100 bills; eight $50 bills; forty-eight $20 bills; five $10 bills; a $5 bill and three loose $1 bills (Tr. 971-79).

Davis was caught with the assistance of a passing resident of the neighborhood (Tr. 562-67, 575-76). He had thrown the red bag over another fence and had grabbed the fence when he was caught (Tr. 565). The red bag contained clothing, loose change, a red bandana with coins tied into it, rolls of coins, two black nylon drawstring bags, a green ski mask and a large bundle of dollar bills with rubber bands (Tr. 907-08). One drawstring bag had a $10 and a $5 bill inside (Tr. 909). The money from the red bag included thirty-one $20 bills, forty-five $10 bills, thirteen $5 bills and sixteen stacks of $1 bills, twenty bills in each stack (Tr. 919-21).

The police also searched the white pickup after having it towed to the police station (Tr. 929-30). Inside were a denim Marlboro jacket, two Wal-Mart bags, and

one Famous Barr bag (Tr. 936, 957). In a pocket of the jacket was a brown paper bag with a stack of money and an envelope addressed to Davis (Tr. 937-38). The money included two $50 bills, thirty-two $20 bills, forty-four $10 bills, and two groups of $5 bills -- one with two bills and the other with twenty-eight (Tr. 942-44). There were also four stacks of bills with twenty $1 bills in each stack (Tr. 945).

In one of the Wal-Mart bags was a pair of light blue sweatpants and a blue ski mask, from which a cutting was made for DNA testing (Tr. 821-23, 843, 949). The DNA in the mask was consistent with that of Davis (Tr. 841-47). The other Wal-Mart bag contained two white socks, inside one of which was a loaded .22 caliber revolver (Exhibit 3) (Tr. 951-52). There were some loose coins in the other sock (Tr. 952).

The Famous Barr bag had miscellaneous clothing, a green ski mask, and tennis shoes that had been spray-painted black (Tr. 956). There was a can of black spray paint in the truck (Tr. 957). The truck also contained four rolls of coins (Tr. 960-61). The total amount of U.S. currency seized was approximately $4500.00 (Tr. 985). The State also introduced a black t-shirt with red trim, but except for having it identified immediately after eliciting that there was clothing found in the Famous Barr bag, did not provide evidence as to where or when it was seized (Tr. 957-58).

Four fingerprints with sufficient information for identification purposes were found on various bills seized; none of the four could be matched to any person -- the defendants, witnesses, police officers, or anyone else with prints on file (Tr. 983-86). There were no latent prints found on any items in the truck or on the guns (Tr. 1002-

03). The police also seized a pullover style camouflage shirt[5] (Tr. 1008-09). They did not find a white coat (Tr. 1009). Mr. Bainter weighed 300 pounds on January 12, 2004, eight days after his arrest (Tr. 1035).

The State, over both defendants' continuing objections, was permitted to present evidence concerning the robbery at McDonald's Bar on December 30, 2003 (Tr. 645-46). The investigating detective described the robbers as two white males wearing ski masks; one had camouflage pants and a dark shirt, and the other wore a white hooded jacket and dark pants (Tr. 647).

Around 1:10 a.m. on December 30, Diane Barry was getting ready to close the bar when two men came in the door wearing dark or black ski masks (Tr. 746-47). She did not see car headlights in the parking lot, which was unusual (Tr. 746). Both men were stocky; the taller one appeared to be wearing layers of clothing and his jacket was not zipped, as if it were too small or he had too many layers on underneath (Tr. 747). He also wore black gloves and dark pants (Tr. 748, 770). The smaller man wore a light colored jacket with a hood (Tr. 748). Ms. Barry told the police the larger man wore a camouflage jacket that looked relatively new (Tr. 801-02).

The taller man had layers of t-shirts, including red and black, and possibly white (Tr. 748). Exhibit 37 -- apparently seized from the white pickup -- looked familiar to Ms. Barry, because of its darkness, layered look, and "ratty look" (Tr. 771-72, 936, 957-58). Ms. Barry remembered that the shirt was "something like" white,

[5] The location from which the shirt was seized was not stated.

then black, then red, but the shirt she was shown was not the same (Tr. 804). She could not identify the gun, mask, or gloves when shown photographs by the police (Tr. 803-04).

The men pulled guns and said it was a robbery and that it was no joke (Tr. 747, 749). The taller man was the only one who spoke (Tr. 749) He told the three customers in the bar to get on the floor with their hands above their heads (Tr. 749). Ms. Barry did not get down because that would have put her out of the man's sight; instead she asked him what she should do (Tr. 749-50). He told her to get him the money (Tr. 750). He also asked her where the safe was and if she knew the combination (Tr. 750). She testified that it shocked her that he knew there was a safe; but she admitted after being shown her written statements that the man first asked if they had a safe (Tr. 750, 786-88).

Ms. Barry told him she did not know the combination (Tr. 750). He asked who did and she told him the owner (Tr. 750). He asked if it would be unusual for her to call him at that time of night and ask him the combination, and she said yes, she had never done it in twenty years (Tr. 750-51). The man came around the bar and said he wanted all the money, even the change, as well as the money from her purse and her tip jar; he pointed at various places with his gun as he named them (Tr. 751). The gun had a long barrel and a "pointy thing at the end of it." (Tr. 752). Exhibit 1 looked like the gun (Tr. 769-70). The second man also had a gun that Ms. Barry thought was like the first man's gun, though he did not get close to her (Tr. 780)

There was a bag with rolls of quarters by the cash register and he had Ms. Barry put all the money in that bag (Tr. 751-52). He asked if that was all and she said there was more in the office; he told her to show him where and walked her there at gunpoint (Tr. 752). She got all the money she could find and put it in the bag; this included their $750 "bank" for the next day, bundles of fifty one dollar bills and fifty five dollar bills, and their Saturday night "bank drop," which was still there, though, she said, December 30 was a Monday (Tr. 754).[6] The man then had Ms. Barry face the wall and put her hands up; when she looked again he was gone (Tr. 755).

Sean Marlowe, a customer at the bar when the robbery took place, agreed that the men had ski masks, guns, and dark gloves, but said the first man had camouflage pants (Tr. 807, 809). He did not remember the men's size or weight (Tr. 810). The first one was shorter and stockier; he "had a big long black gun, said get on the ground, put your fucking hands on your back," and Mr. Marlowe complied (Tr. 810). Mr. Marlowe said he recognized Exhibit 1 (Tr. 813).

The second man, with a light fleece hooded sweatshirt, stood at the door and never said a word (Tr. 810). The first one said to the second one, "'Ed, if anyone moves kill this mother fucker.'" (Tr. 810). He pointed at Mr. Marlowe (Tr. 810-11).

Mr. Marlowe heard the first man go behind the bar and talk to Ms. Barry, but he could not see because he was face down on the floor (Tr. 811). At some point the man took Ms. Barry to the back, while the second man watched Mr. Marlowe and the

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[6] December 30, 2003 was actually a Tuesday; presumably Ms. Barry meant that the evening before, when she started her shift, was a Monday.

two others in the bar (Tr. 746, 812). Mr. Marlowe was able to get away -- he ran to the back, kicked out a window and went out behind the bar, planning to run to a fire station for help (Tr. 812). Once outside, he saw the two robbers and thought they were chasing him; he yelled for help and ran but they did not follow (Tr. 812).

The police checked other businesses in the area for surveillance videos that might give them leads as to the robbers' identities (Tr. 648). A tape from a Citgo gas station about a mile from the bar led to the identification of Davis and Mr. Bainter by a Citgo clerk, as having been in that gas station approximately four hours before the bar robbery (Tr. 649, 651, 746-47; Exhibit 53). She picked their photos from lineups prepared after the IGA robbery, after the police decided there were similarities between the two robberies and the two men's appearance while at the Citgo station (Tr. 618-20, 667-68).

When shown the Citgo video and still photographs made from it, Ms. Barry identified one man in the video as Davis, who she knew to come into the bar (Tr. 652-53, 775-77). She decided that the man "on the left" was the first man into the bar, based on his similar clothing and size (Tr. 773-75). She did not tell the police that the man in the video was Davis; she did not recognize him until they showed him the still photo (Tr. 782). When asked how she knew it was him, Ms. Barry answered, "I had heard his name." (Tr. 782). Asked where she had heard it, she said, "All the rumors in the neighborhood." (Tr. 783).

The clerk had seen Davis in the Citgo station several times before (Tr. 735). She had never seen four of the six men in the lineup containing Davis's picture, and

she knew that Davis and another man in the lineup were regular customers (Tr. 722). She also knew that the other man did not come in on the night five days before, leaving Davis, "which looked exactly like the guy I had seen." (Tr. 721-23).

The clerk had picked another man in a different lineup shown to her before the IGA robbery (Tr. 694). That man was the "suspect" in place of Mr. Bainter in one of the two photo lineups (Tr. 741-43). The clerk did not think Mr. Bainter and the other man looked alike when their photographs were placed side by side (Tr. 741-42). Had they had similar hair and their weight difference was adjusted, she thought she would confuse them for each other (Tr. 742-43). The police asked her to try to imagine the man in the first lineup as a younger version of the man they sought (Tr. 718-19).

During closing argument, the State told the jury that the seven people in the IGA were restrained and put into the meat cooler (Tr. 1144). It then said that the fact that guns were used was what produced the substantial risk of serious physical injury (Tr. 1144-45).

The jury found Mr. Bainter guilty on all counts (L.F. 140-157).

At some point following trial, the court reviewed the trial record and had the court reporter review her notes, and determined that the jury was never sworn to try the case, though the venire panel had been sworn at the beginning of voir dire (L.F. 186; App. A-8). The court notified counsel, who included the issue in the motion for new trial (L.F. 160-62, 186). The court conducted a hearing on the motion for new trial on April 22, 2005, which hearing was apparently not on the record, at least appellate counsel was not provided a transcript of that hearing (L.F. 12). On April 26,

the court issued an order denying Mr. Bainter's motion for new trial, ruling that any defect was waived for lack of a timely objection to the failure to swear the jury (L.F. 186; App. A-8).

On May 13, 2005, the court sentenced Mr. Bainter, as a persistent offender, to consecutive terms of imprisonment of life for the robbery and burglary counts, seven years for resisting arrest, fifteen years for each count of felonious restraint, and fifty years for each count of armed criminal action (L.F. 187-93). Notice of appeal was filed, by leave of the Court of Appeals, on July 5, 2005 (L.F. 14, 195-96).

POINTS RELIED ON

I.

The trial court erred and abused its discretion in allowing the State to introduce evidence concerning the robbery of McDonald's Bar, because this denied Mr. Bainter his rights to due process of law, to a fair trial before a fair and impartial jury, and to be tried only for the offenses charged, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that the evidence concerning the McDonald's robbery did not tend to identify Mr. Bainter as a participant in the IGA robbery, because the clothing and tactics of the robbers in the two incidents were different, and there was conflicting evidence as to the robbers' physical descriptions; therefore admitting this evidence of uncharged crimes was logically irrelevant because it did not tend to prove Mr. Bainter's identity as one of the IGA robbers, or if it did, it was more prejudicial than probative, and was therefore legally irrelevant. Mr. Bainter was prejudiced because the jury was allowed to convict him because it believed he committed other, uncharged offenses.

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Sladek, 835 S.W.2d 308 (Mo. banc 1992);

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984);

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

U.S. Const., Amends VI and XIV; and

Mo. Const., Art. I, Secs. 10, 17, and 18(a).

II.

The trial court plainly erred in entering sentence and judgment against Mr. Bainter despite failing to swear the jury to try the case, in violation of Mr. Bainter's rights to due process of law and a trial by jury, as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution, and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that, although the venire panel was sworn before voir dire, the jury was never sworn to try the case. The court brought this matter to Mr. Bainter's attention after the verdict was accepted and the jury discharged, at which time the court had no jurisdiction to enter sentence and judgment because Mr. Bainter had not been found guilty by a properly sworn and seated jury.

State v. Mitchell, 199 Mo. 105, 97 S.W. 561 (1906);

State v. Frazier, 339 Mo. 966, 98 S.W.2d 707 (1936);

State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982);

State v. Bohlen, 690 S.W.2d 174 (Mo.App. E.D. 1985);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10, 18(a) and 22(a);

§ 546.070; and

Rules 27.02 and 30.20.

III.

The trial court erred in overruling Mr. Bainter's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdicts of guilty of counts 3, 5, 7, 9, 11, 13, and 15, felonious restraint, as well as the associated counts 4, 6, 8, 10, 12, 14, and 16, armed criminal action, because the rulings violated Mr. Bainter' right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that the alleged restraint of Brian Moore, Sean Moore, James Vails, Rachel Willman, Renee Hudson, Terry Pointer, and Kenneth Condor exposed those alleged victims to a substantial risk of serious physical injury, because placing the robbery victims in a meat cooler from which they easily let themselves out created no risk of injury of any kind.

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

State v. Cobbins, 21 S.W.3d 876 (Mo.App. E.D. 2000);

State v. Smith, 902 S.W.2d 313 (Mo. App. E.D. 1995);

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

§§ 565.120 and 571.015.

IV.

The trial court clearly erred in overruling Mr. Bainter's motion to suppress evidence, and abused its discretion in permitting the State to introduce all evidence concerning items seized from Mr. Bainter's possession or that he lost when he was struck by the arresting officers, because this denied Mr. Bainter his right to be free from unreasonable search and seizure, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 15 of the Missouri Constitution, in that the officers did not have probable cause to arrest Mr. Bainter because he was a passenger in the truck driven by Robert Davis, and the State did not show that Mr. Bainter was aware that Robert Davis was driving a truck with stolen plates, thus, there could only have been probable cause to arrest Davis, and arresting Mr. Bainter could not be justified on any other theory.

State v. Franklin, 841 S.W.2d 639 (Mo. banc 1992);

State v. Miller, 894 S.W.2d 649 (Mo. banc 1995);

Florida v. Royer, 460 U.S. 491 (1983);

Wong Sun v. United States, 371 U.S. 471 (1963);

U.S. Const., Amends IV and XIV;

Mo. Const., Art. I, Sec. 15; and

§ 542.296.

V.

The trial court erred in overruling Mr. Bainter's motion for judgment of acquittal at the close of the evidence, and in entering judgment on the verdict of guilty of Count 18, resisting arrest, because the rulings violated Mr. Bainter's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt: 1) that Mr. Bainter knew or reasonably should have known that he was being arrested for possession of stolen license plates, because the State did not show that Mr. Bainter, as the passenger in a truck driven by Robert Davis, knew about or had possession of the stolen license plates; or 2) that Mr. Bainter acted together with Davis to flee in a manner that created a substantial risk of serious physical injury or death to any person, because the evidence was that it was Davis who drove in such manner; there was no evidence that Mr. Bainter acted with him.

State v. Dossett, 851 S.W.2d 750 (Mo.App. W.D. 1993);

State v. Wanner, 751 S.W.2d 789 (Mo.App. E.D. 1988);

State v. Price, 980 S.W.2d 143 (Mo.App. E.D. 1998);

State v. Franco-Amador, 83 S.W.3d 555 (Mo.App. W.D. 2002);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

§ 575.150, RSMo Cum. Supp. 2003.

ARGUMENT

I.

The trial court erred and abused its discretion in allowing the State to introduce evidence concerning the robbery of McDonald's Bar, because this denied Mr. Bainter his rights to due process of law, to a fair trial before a fair and impartial jury, and to be tried only for the offenses charged, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that the evidence concerning the McDonald's robbery did not tend to identify Mr. Bainter as a participant in the IGA robbery, because the clothing and tactics of the robbers in the two incidents were different, and there was conflicting evidence as to the robbers' physical descriptions; therefore admitting this evidence of uncharged crimes was logically irrelevant because it did not tend to prove Mr. Bainter's identity as one of the IGA robbers, or if it did, it was more prejudicial than probative, and was therefore legally irrelevant. Mr. Bainter was prejudiced because the jury was allowed to convict him because it believed he committed other, uncharged offenses.

There is actually one more page of transcript relating to the events during the McDonald's robbery (Tr. 645-818) than to the IGA robbery (Tr. 335-507). The McDonald's robbery was a prominent part of the State's case, but it should not have been allowed to present that evidence, because, as evidence of other uncharged crimes

it was of little significance other than to cause prejudice to Mr. Bainter by painting him in the jury's eyes as nothing more than a habitual armed robber, who, even despite any doubts as to his guilt in the IGA robbery, should be convicted nonetheless because he had allegedly committed other crimes.

Standard of Review

The trial court is afforded broad discretion in assessing the admissibility of evidence, and its ruling on the admissibility of the evidence will not be interfered with on appeal absent a clear abuse of discretion. ***State v. Mozee***, 112 S.W.3d 102, 105 (Mo.App. W.D. 2003). But that discretion is not unfettered. ***State v. Williams***, 673 S.W.2d 32, 35 (Mo. banc 1985). This Court "will take issue with the trial court in cases where we conclude there has been an abuse of discretion." ***State v. Dudley***, 912 S.W.2d 525, 529 (Mo.App. W.D. 1995), *citing* ***State v. Henderson***, 826 S.W.2d 371, 374 (Mo.App. E.D. 1992).

Admissibility of Evidence of Uncharged Crimes

Evidence must be logically and legally relevant to be admissible. ***State v. O'Neal***, 718 S.W.2d 498, 502 (Mo. banc 1986). Evidence is logically relevant if it "has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial" and it is legally relevant if "its probative value outweighs its prejudicial effect." ***State v. Bernard***, 849 S.W.2d 10, 13 (Mo. banc 1993).

"Generally speaking, the bad character of an accused is not suitable for inquiry unless he tenders an issue involving his character." ***State v. Oates***, 12 S.W.3d 307, 313 (Mo. banc 2000). As a general rule, "evidence of prior uncharged misconduct is

inadmissible for the purpose of showing the propensity of the defendant to commit such crimes." ***State v. Barriner***, 34 S.W.3d 139, 144 (Mo. banc 2000).

Trial courts should be wary of evidence concerning other crimes because the admission of this kind of proof "tends to run counter to the rule that forecloses using an accused's character as the basis for inferring guilt." ***Dudley***, 912 S.W.2d at 528. The admission of other crimes evidence not properly related to the cause on trial violates the defendant's right under the Missouri Constitution, Article I, §§ 17 and 18(a), to be tried for the offense with which he is charged by the information. ***State v. Burns***, 978 S.W.2d 759, 760 (Mo. banc 1998).

The concept behind these rules is basic:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948).

As noted above, evidence of other crimes is logically relevant where the evidence in question tends to directly establish the defendant's guilt. ***Dudley***, 912 S.W.2d at 529. While a defendant's propensity to commit a crime may be logically relevant, it is not legally relevant because the prejudicial effect of such evidence outweighs its probative value. *Id*., at 528. "It is only where the evidence of other crimes is offered to prove an issue other than propensity that the probative value of such evidence tends to increase." *Id*.

The probative value of other crimes evidence increases when it can be shown that the evidence is offered to prove an issue other than propensity or bad character. ***State v. Taylor***, 663 S.W.2d 235, 239 (Mo. banc 1984). Five common exceptions where courts have determined other crimes evidence is legally relevant are where the evidence tends to establish: (1) motive; (2) intent; (3) absence of mistake or accident; (4) common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) identity. *Id*. Evidence of prior misconduct that does not fall within one of the five enumerated exceptions may nevertheless be admissible if the evidence is logically and legally relevant. ***Bernard***, 849 S.W.2d at 13.

In extending the list of exceptions to a new *modus operandi*/corroboration exception in ***Bernard***, this Court described the identity exception:

> The signature *modus operandi*/corroboration exception approximates the long established, well recognized exception that allows evidence of prior uncharged misconduct for the purpose of proving the identity of

> the wrongdoer. If the identity of the wrongdoer is at issue, the identity exception permits the state to show the defendant as the culprit who has committed the sexual crime charged by showing that the defendant committed other uncharged sexual acts that are sufficiently similar to the crime charged in time, place and method. *For the prior conduct to fall within the identity exception, there must be more than mere similarity between the crime charged and the uncharged crime. The charged and uncharged crimes must be nearly "identical" and their methodology "so unusual and distinctive" that they resemble a "signature" of the defendant's involvement in both crimes*.

Bernard, 849 S.W.2d at 17 (citations omitted; emphasis added). Indeed, in ***State v. Gilyard***, 979 S.W.2d 138, 140-41 (Mo. banc 1998), the Court did not even refer to identity as an exception to the general rule; it said that "evidence of prior uncharged misconduct is admissible to show motive, intent, absence of mistake or accident, common scheme or plan, or a signature *modus operandi*."[7] Further, "Because the prejudice of corroborative evidence is high, the probative value of the offered evidence must meet a high standard." *Id*., at 141.

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[7] The case cited by ***Gilyard***, ***State v. Roberts***, 948 S.W.2d 577, 591 (Mo. banc 1997), lists "identity" as a separate exception from "signature/*modus operandi*" but does not discuss the matter as the defendant's identity was not at issue in ***Roberts***.

The Court of Appeals has followed this rule. In ***State v. Henderson***, 105 S.W.3d 491, 496 (Mo.App. W.D. 2003), the Western District said that,

> Following [***Bernard***], this court held that evidence offered under the identity exception must meet the same test for admission as that offered under the newly-recognized signature *modus operandi* exception; *i.e.*, that the offenses are so similar and unique as to constitute the signature of the accused.

Citing ***State v. Anthony***, 881 S.W.2d 658, 660 (Mo.App. W.D. 1994); *also see* ***State v. Vowell***, 863 S.W.2d 954, 957 (Mo.App. S.D. 1993).

Here, the State argued that it was *not* that the McDonald's and Citgo[8] evidence proved either a common scheme or plan or a signature/*modus operandi*, but that it was otherwise admissible to prove identity (Hr.Tr. 8-19-04, 64-65, 74-75). Its argument was flawed, because, as noted, to meet the identity exception, the evidence must meet the *modus operandi* exception. As in ***Bernard***, in ***State v. Conley***, 873 S.W.2d 233, 236 (Mo. banc 1994), this Court said, the "'signature *modus operandi*/ corroboration exception[,]' . . . *similar to the identity exception*, authorizes evidence of an uncharged crime if the offenses are nearly identical and their methodology so unusual and distinctive that they amount to a signature of the defendant involved in both crimes." (emphasis added).

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[8] The Citgo video and identification is probative, if at all, only of the identity of the McDonald's robbers.

Judge Thomas said in his partial concurrence in ***Bernard*** that he "regret[ted] having planted the seed for an exception for signature crimes/corroboration" in ***State v. Sladek***, 835 S.W.2d 308 (Mo. banc 1992).[9] He also noted in ***Sladek***, in discussing the underpinnings of the new signature *modus operandi*/corroboration exception that would later be adopted in ***Bernard***, that:

> The identification exception requires a unique and highly similar modus operandi for the series of crimes. The strength of the inference that identifies the defendant depends upon two things: first, the extent to which the defendant's crimes are distinctive from crimes committed by others; and second, the extent to which the defendant's prior crimes and the crime charged are similar. It would not be good enough to simply show that this defendant, now charged with robbery, committed a robbery last month and also one the month before[.]

Sladek, 835 S.W.2d at 316 (Thomas, J., concurring).

To the extent that the signature *modus operandi*/identity exception, unlike the signature *modus operandi*/ corroboration exception, is still valid, this Court's

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[9] Although not at issue here, Mr. Bainter notes that Chief Justice Wolff joined Judge White in Judge Limbaugh's dissent in ***Gilyard***, arguing that evidence admitted under the signature *modus operandi*/corroboration exception was actually propensity evidence and that the ***Bernard*** exception should be overruled. ***Gilyard***, 979 S.W.2d at 143-45 (Limbaugh, J., dissenting).

decisions make it clear that the identity exception nonetheless depends on a unique crime, which is not present here. The State was required to show that the two robberies were nearly identical and of unusual methodology. It failed to supply this proof. Indeed, it acknowledged that it could not show such identity (Hr.Tr. 8-19-04, 74-75). And even if "identity" evidence (which was really nothing more than an attempt to prove that Mr. Bainter committed both robberies), were admissible in general, the link here was too tenuous to outweigh its prejudicial effect. The two crimes and the perpetrators were too dissimilar to consider the evidence of the McDonald's robbery as probative that Mr. Bainter robbed the IGA.

The only similarities between the two were two men in dark ski masks, one of who had a large revolver. But one McDonald's robber wore either a camouflage jacket and dark pants (Tr. 748, 801-02), or camouflage pants (Tr. 810), and the other wore a light colored fleece jacket (Tr. 748, 801-02, 810). On the other hand, one of the IGA robbers wore dark clothing (Tr. 400, 423), while the other wore either blue jeans or light blue sweatpants, and a denim jacket (Tr. 372, 480-81).

Further, the evidence was not consistent as to which of the men had the larger gun. The witnesses were uniform as to the IGA robbery -- all but one remembered that the taller man had the larger gun, and the other witness did not say which man had which gun (Tr. 343-44, 391-93, 404-06, 423, 462-63, 470, 482-84). But one witness to the McDonald's robbery said the guns looked the same, while the other said the shorter man had a large gun, and he did not describe the other gun (Tr. 752, 780, 810).

And the robbers' tactics were very different. Both IGA robbers told the people they would not be hurt (Tr. 344, 474-75), but at McDonald's, only one man spoke, harshly, threatening to shoot one customer if anyone moved (Tr. 810-11). He also told everyone to get on the floor and put their "fucking hands" on their backs (Tr. 810). But at IGA, one robber told a crying teenage employee, "I'm not going to shoot you, all I want is the money" (Tr. 475). Finally, only one robber was involved in collecting money at McDonald's; the other stayed by the door (Tr. 750-55, 810). At IGA, one man got the money from the front office (Tr. 345-46), and the other collected money from at least one cash register (Tr. 471).

Further, the identification of Mr. Bainter as one of the McDonald's robbers was dubious. Mr. Bainter was not initially identified as being one of the men in the Citgo station before the McDonald's robbery -- the Citgo clerk picked another man in a different lineup shown to her after the McDonald's robbery but before the IGA robbery (Tr. 694). That man was "the suspect" in place of Mr. Bainter in one of the lineups she was shown at that point, and she did not think that that man and Mr. Bainter looked alike when their photographs were placed side by side (Tr. 741-43).[10] She only picked the photos of Mr. Bainter and Mr. Davis from lineups prepared after the IGA robbery, after the police decided there were similarities between the two robberies (Tr. 618-20, 667-68).

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[10] The officer places the suspect's photograph in the top middle position in every lineup -- the most prominent position (Hr.Tr. 1/24/05 26).

The State argued below that the robbers' use of the name "Ed" in both the McDonald's and IGA robberies makes the McDonald's evidence admissible. But it never showed why merely presenting the evidence that one of the IGA robbers first said, "Paul," then repeated "Ed" several times (Tr. 395, 420, 471-72), would not have served its purpose, without the prejudice caused by the testimony that the name "Ed" was used in an earlier robbery. The State alleged that *Paul* Bainter committed the IGA robbery. Presenting evidence that one robber called the other "Paul" thus had a modicum of probative value implicating Mr. Bainter. And it was also inculpatory that the robber apparently tried to correct a mistake by using the name "Ed," thus making it more likely that the robber's real name was Paul, not Ed.

But evidence, not of a similar mistake, but that a robber, perhaps named Ed and perhaps not, victimized the McDonald's Bar, added nothing to the evidence that there was some evidence that "Paul" robbed the IGA. At the very least, the minimal probative value of the presence of a possibly fictitious Ed at both establishments was greatly outweighed by the prejudice of the mass of irrelevant McDonald's evidence.

The State also argued below that the fact that the two pairs of robbers were of similar stature and that one carried a similar weapon in both incidents tied the two incidents together such that proof of the one tended to prove the other. But two heavy-set men, one taller than the other, describes a large portion of the population. And using a large revolver is far short of a signature.

Ski masks, guns, and gloves are common accessories of armed robbers, and their use by one pair of men does not tend to establish that they are the same pair that

committed another robbery. These were not signature crimes, and proof of one did not tend to prove the other. All the State accomplished was to create undue and unfair prejudice against Mr. Bainter in the jury's minds by presenting him as having the propensity to commit robbery. That prejudice was far greater than any probative value of the evidence concerning the McDonald's robbery. That evidence, and the related evidence from the Citgo video and identification should have been excluded. The court's failure to do so was an abuse of discretion. This Court must therefore reverse Mr. Bainter's convictions and remand for a new trial.

II.

The trial court plainly erred in entering sentence and judgment against Mr. Bainter despite failing to swear the jury to try the case, in violation of Mr. Bainter's rights to due process of law and a trial by jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that, although the venire panel was sworn before voir dire, the jury was never sworn to try the case. The court brought this matter to Mr. Bainter's attention after the verdict was accepted and the jury discharged, at which time the court had no jurisdiction to enter sentence and judgment because Mr. Bainter had not been found guilty by a properly sworn and seated jury.

Jury selection was completed just before noon on the second day of trial (Tr. 1, 221, 308-10). The court allowed the sixteen persons who were to make up the jury and alternates to go to lunch before proceeding further (Tr. 310). After lunch, before the panel was brought back into the courtroom, the court said, "And we're ready to proceed to bring the jury up to place them under oath and read the preliminary instructions and opening statements." (Tr. 312). The transcript indicates that the jury was brought into the courtroom and the court welcomed them, and proceeded to read MAI-CR3d 300.06 (entitled, "After the Jury is Sworn"), and Instructions 1 and 2 (MAI-CR3d 302.01 and 302.02 (Tr. 312-16). But the jury was not, in fact, sworn.

At some point following trial, the court reviewed the trial record and had the court reporter review her notes, and determined that the jury was never sworn to try the case, though it had been sworn at the beginning of voir dire (L.F. 186; App. A-8). The court notified counsel, who included the issue in the motion for new trial (L.F. 160-62, 186). The court conducted a hearing on the motion for new trial on April 22, 2005, which hearing was apparently not on the record; at least undersigned counsel was not provided a transcript of that hearing (L.F. 12).

Thereafter, the court issued an order finding that the jury was "sworn" because, without any objection, the members were sworn as members of the venire panel and questioned as to their ability to follow the court's instructions and their qualifications to serve; they were found qualified and empanelled and instructed without objection; they were polled as to their verdicts, which were accepted; and they were then discharged (L.F. 186) (App. A-8). The court ruled that any defect was waived for lack of a timely objection (L.F. 186).

Article I, Section 18(a) of the Missouri Constitution states in relevant part, that "in criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county." Section 22(a) of Article I states, "That the right of trial by jury as heretofore enjoyed shall remain inviolate. . . ." The Sixth Amendment to the United States Constitution, which applies to the states via the Fourteenth Amendment, is similar: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. . . ."

The question, then, is what it means to have a trial by jury, and whether the failure to swear the jury to "well and truly to try the case" is a denial of that right. To effectuate these constitutional rights, Missouri has also adopted § 546.070 (App. A-9): "The jury being impaneled and sworn, the trial may proceed in the following order. . . ." Rule 27.02 (App. A-12 - A-13) also addresses this subject:

> The order of trial by jury in felony cases shall be as follows:
>
> * * * *
>
> (d) A qualified jury shall be selected as provided by law and shall be sworn well and truly to try the case.
>
> (e) The court shall read to the jury MAI-CR3d 300.06, 302.01, and 302.02.
>
> * * * *

As quoted by the Court of Appeals in its decision below, the *Bench Book for Missouri Trial Judges*, Vol. V, Ch. 3, § 3.9(5) (1998), sets out the oath for swearing a selected jury:

> Members of the jury, please rise and raise your right hand to be sworn. You and each of you do solemnly swear that you will well and truly try the issues in this cause, in which the State of Missouri is plaintiff and _____ is the defendant, and a true verdict render according to the law and the evidence so help you God. Be seated, please.

So the answer is that to have a jury, the twelve people in that group must be sworn to "well and truly" try the case. Very simply, this Court set out a clear standard

a hundred years ago. In ***State v. Mitchell***, 199 Mo. 105, 97 S.W. 561, 562 (1906) the Court said: "[t]he sole error upon which a reversal [was] sought, is that the record upon its face disclose[d] that the jury which tried and convicted defendant was not sworn to try the cause and a true verdict render according to the law and the evidence." The Court reviewed the authorities from other states:

> It is essential to the legality of any criminal trial that there should be a lawfully constituted tribunal, and where such tribunal is composed in part of a jury to whom the statute, in the plainest and most unmistakable terms, declares a given oath must be administered, how can the tribunal be considered as lawfully constituted unless the jurors actually take the oath literally or in substance?

Id., *quoting*, ***Slaughter v. State***, 28 S.E. 159 (Ga. 1897). The Court concluded, "the record proper in a criminal appeal must show that the jury was sworn to try the cause, and [because] this record fails to do so, the judgment must be reversed, and the cause remanded for a new trial." *Id*.

The Court adhered to its ruling in ***State v. McKinney***, 221 Mo. 467, 120 S.W. 608 (1909):

> Among the first things required by the statute (section 2627, Rev. St. 1899 [Ann. St. 1906, p. 1556]) to be done in the trial of a criminal case before a jury is that the jury be impaneled and sworn. This same question underwent full consideration, and the authorities were extensively reviewed, by Gantt, J., in the recent case of [***Mitchell***], in

> which it is held that, if the record proper in a criminal case fails to show that the jury was sworn to try the cause, the judgment will be reversed, and the cause remanded. That case is decisive of the case at bar, and leaves nothing further to be said upon the subject.

The most recent pronouncement from this Court on this general issue appears to be in ***State v. Frazier***, 339 Mo. 966, 98 S.W.2d 707, 715 (1936), in which the principle was relaxed, but only slightly:

> While, in the course of ordinary procedure, the jury should be sworn to try a cause before any evidence is received, yet it is our opinion that, *if the record shows they were sworn during the progress of the trial and before they had begun to deliberate upon their verdict*, the error is not fatal; and is waived if the defendant fails to object and except at the time.

(emphasis added). By implication, the error is fatal, and not waived, where, as here, the jury was *never* sworn, much less before deliberations.

The issue of the failure to timely swear a jury has not arisen since ***Frazier***, but there have been statements that show that ***Mitchell*** is still valid. In ***State v. Shaw***, 636 S.W.2d 667, 671 (Mo. banc 1982), this Court considered the trial court's failure to read MAI-CR2d 1.08(a) (the "recess instruction," now MAI-CR3d 300.04), to the venire panel at the first recess. The Court held that there was no error because, "[t]he jury does not exist until the veniremen selected therefor are sworn to service in that

capacity." *Id*., *citing Black's Law Dictionary*, 768-69 (5th ed. 1979). The Court of Appeals relied on ***Shaw*** in ***State v. Bohlen***, 690 S.W.2d 174, 177 (Mo.App. E.D. 1985), to hold that there was no error in the trial court's failure to sequester the panel of prospective jurors after they had been selected, but not sworn.

If no jury exists before being sworn, then *a fortiori* Mr. Bainter was denied his fundamental constitutional right to trial by jury, which is a defect not susceptible to an unintentional waiver. *See*, ***State v. Sharp***, 533 S.W.2d 601, 605 (Mo. banc 1976) ("a criminal defendant has a right to waive his constitutional right to a jury trial provided such waiver is voluntarily, knowingly and intelligently made.").

The State's argument below was that ***Frazier***, along with cases gleaned from other states, indicates that the "modern trend" is a "functional" approach rather than adherence to a technical ritual -- it claimed that the oath to the venire panel was the functional equivalent of the oath to try the case. But the only oath administered to Mr. Bainter's "jury" was the following oath to the venire panel:

> Members of the jury, please rise and raise your right hand to affirm.
>
> You do solemnly affirm that you will well and truly try the issues in this cause, in which the State of Missouri is the plaintiff and _____ is the defendant, and a true verdict render accordingly to the law and the evidence, under the pain and penalty of perjury as provided by law. Be seated, please.

(per the opinion of the Court of Appeals): *Bench Book*, Vol. V, Ch. 3, § 3.9(6).

Even if the test in Mr. Bainter's case is "substantial compliance," as set out in ***Frazier***, 98 S.W.2d at 715, the difference between swearing an oath to answer questions and an oath to "try the issues" and "render a true verdict" is extreme. What was administered to Mr. Bainter's jury was not substantial compliance with § 546.070 and Rule 27.02(d) -- because there was *no* compliance with the statute and Rule. There was no oath to "well and truly try the case" administered to the twelve individuals who purportedly found Mr. Bainter guilty, therefore, he did not have a trial by a legally constituted jury. If twelve people may be pulled in off the street and asked to issue a decision without being sworn to follow the law and render a true verdict according to the evidence, then Mr. Bainter had a jury trial. But that was the only jury he was provided.

Plain Error

Because this issue was not presented to the trial court before the verdict was accepted, Mr. Bainter requests plain error review. Plain error review is warranted where "the alleged error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice inexorably results, if left uncorrected." ***State v. Hadley***, 815 S.W.2d 422, 423 (Mo. banc 1991); Rule 30.20. This is such a case. Further, the question in this case whether there is a manifest injustice is different from the norm.

There are errors of federal constitutional magnitude that are subject to harmless error analysis. ***Chapman v. California***, 386 U.S. 18, 22-23 (1967). Such "trial errors" occur during the presentation of the evidence to the jury and can be quantitatively

assessed in the context of the other evidence. ***Arizona v. Fulminante***, 499 U.S. 279, 307-08 (1991). But the "deprivation of certain basic protections will necessarily render a trial fundamentally unfair, *i.e.*, structural defects which defy analysis by harmless error standards." ***State v. Goucher***, 111 S.W.3d 915, 917 (Mo.App. S.D. 2003) (*citing*, ***Fulminante***, 499 U.S. at 309-10).

In this case there was a complete failure to swear the jury -- it was not simply delayed and accomplished later, but before the verdict was reached. In such a case, Mr. Bainter was denied his right to a jury trial because the unsworn jury did not exist. ***Shaw***. That complete denial of a fundamental right created a manifest injustice, indeed a structural error that Mr. Bainter could not, and did not waive, and this Court must therefore reverse his convictions and remand for a new trial.

III.

The trial court erred in overruling Mr. Bainter's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdicts of guilty of counts 3, 5, 7, 9, 11, 13, and 15, felonious restraint, as well as the associated counts 4, 6, 8, 10, 12, 14, and 16, armed criminal action, because the rulings violated Mr. Bainter' right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that the alleged restraint of Brian Moore, Sean Moore, James Vails, Rachel Willman, Renee Hudson, Terry Pointer, and Kenneth Condor exposed those alleged victims to a substantial risk of serious physical injury, because placing the robbery victims in a meat cooler from which they easily let themselves out created no risk of injury of any kind.

After the IGA robbers got the money, they took Mr. Moore, the four employees then working, and two customers, back to the meat cooler in the back room (Tr. 348-49). They said no one was going to get hurt (Tr. 349). When everyone went into the cooler, the men closed the door and told everyone to stay there (Tr. 349). One employee mentioned that she knew that the cooler could be opened from the inside (Tr. 473).[11] It also had more than one entrance/exit (Tr. 356). The robbers did not mention a specific amount of time to stay in the cooler, but Mr. Moore went

[11] The State also conceded this in its opening statement (Tr. 319).

out and checked after two or three minutes, which he thought was enough time for the men to leave, and they appeared to be gone (Tr. 349).

Standard of Review

Before the State can deprive Mr. Bainter of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364 (1970); *also see*, ***State v. O'Brien***, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.*, at 318.

This Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id*. It disregards inferences contrary to the verdict, "unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *Id*. The Court must also ensure that the jury did not decide the facts "based on sheer speculation." *Id*. at 414. Neither the jury nor this Court may "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

Discussion

Mr. Bainter was charged by information under Counts 3, 5, 7, 9, 11, 13, and 15 with felonious restraint, § 565.120, and in Counts 4, 6, 8, 10, 12, 14, and 16, he was charged with their related armed criminal action counts, § 571.015 (L.F. 99-104).

§ 565.120, provides:

> 1. A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.

Here, the evidence was undisputed that the robbery victims and witnesses easily extricated themselves from the meat cooler -- they were only in it for two or three minutes (Tr. 349). And they were able to exit without outside assistance. Therefore, there was no risk of serious physical injury, and the State failed to prove that element of the felonious restraint counts.

None of the seven alleged victims suffered any injury. True, the Court of Appeals has noted that in a felonious restraint case, whether the victim actually suffered serious physical injury is irrelevant. ***State v. Cobbins***, 21 S.W.3d 876, 878 (Mo.App. E.D. 2000). Still, the State has to prove that the unlawful restraint exposed the victim to a "substantial risk of serious physical injury." *Id.* Whether the restraint exposed the victim to a substantial risk of serious physical injury is to be determined from all of the circumstances. *Id*., at 879.

The prosecutor argued that the restraint occurred when the victims were put into the meat cooler (Tr. 1144). But she added that "anytime guns are involved there is a substantial risk of serious physical injury." (Tr. 1145). It stands to reason that the risk of harm must flow from the circumstances of the restraint itself. Otherwise, almost every armed robbery would also constitute felonious restraint, for in almost every robbery is the victim restrained at least briefly.

Serious physical injury is defined in Missouri as "physical injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the functions of any part of the body." § 565.002(6); *also see*, ***State v. Smith***, 902 S.W.2d 313, 315 (Mo.App. E.D. 1995). Further, it is the *restraint* that must have exposed the robbery victims to a substantial risk of serious physical injury : "Whether unlawful restraint exposes a victim to the risk of serious physical injury is to be determined from all of the circumstances." *Id*. Here there was no evidence of a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the functions of any part of the body.

In ***Smith***, the Court found the following evidence did not result in a substantial risk of serious physical injury: Smith grabbed the thirteen-year old victim's wrist, leading her out of a yard, directing her to another house and leading her into the garage; Smith then forced a glass pipe into the victim's mouth causing her to gag; defendant then forced the victim to take off her clothes and forced her to perform an act of sodomy on him. *Id*. at 314-315. Throughout all of this, the victim was crying, scared and terrified. *Id*. at 314, 318. The Court of Appeals found that Smith's acts did

not create a substantial risk of death, nor were they capable of causing serious disfigurement or protracted impairment of any part of the victim's body. *Id*. at 316. *Also see*, ***Cobbins*** (defendant picked up woman hitchhiker with cerebral palsy; he locked the car door on her and took her wallet; he removed her glasses, punched out the lenses and threw the lenses away; as a result, the victim's vision was blurred; victim was then ordered out of the car and had to walk for help; this was insufficient to support a felonious restraint conviction).

In the instant case, there is less evidence of an exposure to a substantial risk of serious physical injury than in ***Smith***. The people in the store were in no danger because the meat cooler could be opened from the inside (Tr. 473).

To the extent that case law holds as the State argued below, that the mere possibility of harm is sufficient, *see*, ***State v. Brigman***, 784 S.W.2d 217, 221 (Mo.App. W.D. 1989) ("Threat of injury from a weapon is sufficient to substantiate the charge"), then this formulation runs afoul of the prohibition set out in ***Whalen***, against supplying missing evidence, or giving the State the "benefit of unreasonable, speculative or forced inferences." 49 S.W.3d at 184. Speculating that the presence of a weapon *might* have led to serious physical injury, is exactly what this Court disapproved in ***Whalen***.

As Mr. Bainter argued above, that would make every armed robbery also a felonious restraint, but there is no indication that the legislature intended such a result. Especially after it took extensive pains to make known its desire to punish the use of a weapon twice in robbery cases -- once to raise the robbery from second to first degree,

and a second time to add the charge of armed criminal action [12] -- the legislature knew that to punish the use of that weapon a third time, as felonious restraint, would take an overt statement of that intent. It made no such declaration.

The mere fact that the seven robbery victims were placed in a meat cooler from which they could, and did, easily walk out, does not allow a conclusion that they faced a substantial risk of serious physical injury. They were not locked in the cooler, and they were left alone to walk out after only a few minutes (Tr. 349, 473). There was no violence used against anyone in the store, and the robbers even said no one was going to get hurt (Tr. 349). These facts fall short of proof beyond a reasonable doubt of a *risk* of injury, rather than mere speculation that such injury was possible.

The State did not prove that the restraint exposed the seven robbery victims and witnesses to a substantial risk of serious physical injury, and thus did not prove beyond a reasonable doubt all of the elements of felonious restraint. Because the evidence was insufficient to support the verdicts, this Court must reverse Mr. Bainter's felonious restraint convictions. Further, Counts 4, 6, 8, 10, 12, 14, and 16, armed criminal action, cannot stand if there is insufficient evidence to support the associated underlying offense. ***State v. Weems***, 840 S.W.2d 222, 228 (Mo. banc 1992).

However, where a conviction of a greater offense (felonious restraint) has been overturned for insufficiency of the evidence, an appellate court may remand for entry of a conviction on the lesser-included offense (false imprisonment) if the evidence

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[12] *See*, ***Missouri v. Hunter***, 459 U.S. 359, 368-69 (1983).

was sufficient for the jury to find each of the elements of the lesser-included offense and the jury was required to find those elements in reaching its verdict on the greater offense. ***Whalen***, 49 S.W.3d at 187-88. In order to prove false imprisonment the State had to prove that Mr. Bainter knowingly restrained the seven people unlawfully and without consent so as to interfere substantially with their liberty. *Id*. at 880, *citing*, § 565.130.1.

They were in fact placed in the meat cooler without their consent, which restricted their freedom of movement, albeit briefly. Under the relevant standard of review, the jury could have found Mr. Bainter guilty of false imprisonment. Therefore, this Court can remand for entry of judgment and sentence for the class A misdemeanor of false imprisonment. *Id*. And, because Mr. Bainter was found to be a prior and persistent offender, the trial court can determine his sentences for these misdemeanor crimes on remand.

However, because false imprisonment is a misdemeanor, the associated counts of armed criminal action are not supportable, in that § 571.015.1 by its terms requires the conviction of an underlying felony: ". . . any person who commits any *felony* under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action. . . ." (emphasis added). Therefore, Mr. Bainter must be discharged as to those seven counts.

IV.

The trial court clearly erred in overruling Mr. Bainter's motion to suppress evidence, and abused its discretion in permitting the State to introduce all evidence concerning items seized from Mr. Bainter's possession or that he lost when he was struck by the arresting officers, because this denied Mr. Bainter his right to be free from unreasonable search and seizure, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 15 of the Missouri Constitution, in that the officers did not have probable cause to arrest Mr. Bainter because he was a passenger in the truck driven by Robert Davis, and the State did not show that Mr. Bainter was aware that Robert Davis was driving a truck with stolen plates, thus, there could only have been probable cause to arrest Davis, and arresting Mr. Bainter could not be justified on any other theory.

The State presented evidence that Robert Davis was driving a truck with stolen license plates. It presented nothing, however, that provided probable cause to arrest Mr. Bainter merely for being a passenger in that truck.

In the mid-afternoon on January 4, the day after the IGA robbery, St. Peters detective Michael Helm was off duty when he saw a white Chevrolet pickup pull in front of his house (Tr. 508, 580-83, Exhibit 52A). He later identified the driver as Robert Davis and the passenger as Mr. Bainter (Tr. 530-31). Helm called his dispatcher and "ran" the truck's license plate, and was told that it had been reported

stolen (Tr. 514). He called the O'Fallon police, the city he was in, and reported the information (Tr. 514-15).

O'Fallon officer Stephen Schneider stopped the white truck after also being told that the plates were stolen, then, because of the stolen plates, drew his gun and ordered the driver to throw the keys out the window (Tr. 521-22). Schneider intended to arrest "them" for possessing stolen license plates (Tr. 535). Instead, the driver looked over his shoulder, then took off, through a parking lot, across a strip of grass, and back onto the road (Tr. 522).

After a chase, with Davis still driving, the men stopped the truck and ran (Tr. 525, 527-28). Mr. Bainter was caught and arrested after being chased on foot (Tr. 542-44).

The Applicable Law and Standard of Review

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause. . . ." United States Constitution; Amendment IV; *also see*, Mo. Const. Art. I, Sec. 15. Generally, a search or seizure is allowed only if the police have probable cause to believe the person has committed or is committing a crime. ***Beck v. Ohio***, 379 U.S. 89, 91 (1964). The State bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled. ***State v. Franklin***, 841 S.W.2d 639, 644 (Mo. banc 1992); § 542.296.6.

Appellate review of a motion to suppress is limited to a determination of the sufficiency of the evidence to sustain the trial court's finding. ***State v. Wise***, 879 S.W.2d 494, 503 (Mo. banc 1994). An appellate court will reverse the trial court's ruling only if that ruling is clearly erroneous. ***State v. Trenter***, 85 S.W.3d 662, 668 (Mo.App. W.D. 2002). The ruling is clearly erroneous if this Court is left with a definite and firm impression that a mistake has been made. *Id*.

"In reviewing the trial court's ruling on a motion to suppress, the facts and any reasonable inferences arising therefrom are to be viewed in a light most favorable to the ruling of the trial court." ***State v. Carter***, 955 S.W.2d 548, 560 (Mo. banc 1997). "As in all matters, a reviewing court gives deference to the trial court's factual findings and credibility determination, but reviews questions of law *de novo*." ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc 1998).

The Fourth Amendment also allows a so-called ***Terry*** [13] stop, which is a minimally intrusive form of seizure or "semi-arrest" that is lawful if the police officer has a reasonable suspicion supported by articulable facts that those stopped are engaged in criminal activity. ***State v. Miller***, 894 S.W.2d 649, 651 (Mo. banc 1995). But the State did not attempt to justify the search and seizure of Mr. Bainter and his possessions as a ***Terry*** stop. Its theory was that Schneider intended to arrest "the defendants" for "possessing the stolen license plates" (Tr. 535). Arresting Mr. Bainter could not be justified on that basis.

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[13] ***Terry v. Ohio***, 392 U.S. 1 (1968).

There was nothing presented by the State to indicate that Mr. Bainter, as the passenger, possessed the stolen plates.[14] Therefore, it did not meet its burden of establishing probable cause to arrest him. If the license plates on the truck were stolen, that fact must be attributed to the driver, not the passenger, at least where the State presented no other information available at the time that linked Mr. Bainter and the license plates.

Nor did Mr. Bainter's flight provide probable cause. First, the State did not argue that flight was the basis for the arrest. It relied solely on the intent to arrest for the license plates. And it is not correct that flight provides probable cause, where there is no basis to arrest in the first place. Under ***Florida v. Royer***, 460 U.S. 491, 498 (1983), a person stopped by the police may decline to listen to questions and simply go on his or her way. If the option to 'move on' is chosen, the person 'may

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[14] Mr. Bainter also notes that the State failed to prove the basis of the dispatcher's information that the plates were stolen. *See*, ***State v. Norfolk***, 966 S.W.2d 364, 367 (Mo.App. E.D. 1998) (State's failure to produce evidence regarding origin of information on which officers relied -- how information that car was reported stolen was first obtained by police -- required suppression); ***State v. Kinkead***, 983 S.W.2d 518, 519 (Mo. banc 1998) (trial court could not find probable cause to arrest where State did not present evidence showing how or why a name comes to be entered into database for drivers with suspended licenses).

not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.' *Id*.

Again, all Mr. Bainter did was leave when Davis stopped the truck in which Mr. Bainter was a passenger. He chose not to stay and listen, and that did not create the probable cause that was necessary to justify his arrest, and that was lacking.

All Evidence Seized Should Have Been Excluded

Under the "fruit of the poisonous tree" doctrine, evidence obtained as a direct result of an illegal search must be suppressed. ***Miller***, 894 S.W.2d at 656-57; ***Wong Sun v. United States***, 371 U.S. 471 (1963).

> In determining whether the exclusionary rule should apply to render evidence inadmissible as 'fruit of the poisonous tree,' the question is 'whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Id., at 488. Had the officers not violated the Fourth Amendment by arresting Mr. Bainter for merely being a passenger in a truck that had stolen license plates, they never would have discovered the property Mr. Bainter carried, including the .44 caliber revolver, holster, black gloves, .44 and .22 caliber ammunition, address book, green and black flannel jacket, shorts, sweat pants, shirt, maroon ski mask, tennis shoes, and cash. That evidence should not have been admitted against Mr. Bainter at trial.

Mr. Bainter's Fourth Amendment right to be secure in his person from overzealous law enforcement was violated by his seizure and subsequent search without probable cause that he committed a crime. This Court must reverse his conviction and remand for a new trial without any of the evidence obtained from the point he was seized.

V.

The trial court erred in overruling Mr. Bainter's motion for judgment of acquittal at the close of the evidence, and in entering judgment on the verdict of guilty of Count 18, resisting arrest, because the rulings violated Mr. Bainter's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt: 1) that Mr. Bainter knew or reasonably should have known that he was being arrested for possession of stolen license plates, because the State did not show that Mr. Bainter, as the passenger in a truck driven by Robert Davis, knew about or had possession of the stolen license plates; or 2) that Mr. Bainter acted together with Davis to flee in a manner that created a substantial risk of serious physical injury or death to any person, because the evidence was that it was Davis who drove in such manner; there was no evidence that Mr. Bainter acted with him.

In the mid-afternoon on January 4, the day after the IGA robbery, St. Peters detective Michael Helm was off duty when he saw a white Chevrolet pickup pull in front of his house (Tr. 508, 580-83, Exhibit 52A). The driver was Robert Davis and the passenger was Paul Bainter (Tr. 509, 530-31). Helm called his dispatcher and "ran" the truck's license plate, and was told that it had been reported stolen (Tr. 514). He called the O'Fallon police, the city he was in, and reported the information (Tr. 514-15). When they arrived Helm ended his involvement (Tr. 515).

O'Fallon officer Stephen Schneider stopped the white truck after also being told that the plates were stolen, then, because of the stolen plates, drew his gun and ordered the driver to throw the keys out the window (Tr. 521-22). Schneider intended to arrest "them" for possessing stolen license plates (Tr. 535). Instead, the driver looked over his shoulder, then took off, through a parking lot, across a strip of grass, and back onto the road (Tr. 522).

Schneider followed, his lights and sirens on, as the truck crossed over I-70, then turned the wrong way, heading east down the off-ramp for westbound traffic (Tr. 525). Schneider turned around and went eastbound on I-70, keeping the truck in sight in the westbound lane, until a hill and traffic blocked Schneider's view (Tr. 527-28). There was other traffic on westbound I-70; Schneider saw one vehicle swerve toward the concrete median (Tr. 526). He saw the truck stopped in a grassy area between I-70 and the outer road, so he went to the next exit and returned on the outer road to the point where the truck was stopped (Tr. 528, 538).

The State submitted Count 18, resisting arrest, alleging that Mr. Bainter resisted arrest by acting together with Davis, and that Davis resisted arrest by fleeing "in such a manner that created a substantial risk of serious physical injury or death" when he drove the wrong way on I-70 (L.F. 135; App. A-11).

Standard of Review

As in Point II, before the State can deprive Mr. Bainter of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364 (1970); *also see*, ***State v.***

O'Brien, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.*, at 318.

This Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id*. It disregards inferences contrary to the verdict, "unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *Id*. The Court must also ensure that the jury did not decide the facts "based on sheer speculation." *Id*. at 414. Neither the jury nor this Court may "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

Discussion

§ 575.150, RSMo Cum. Supp. 2003 (App. A-10), states in relevant part:

> 1. A person commits the crime of resisting or interfering with arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully

stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:

(1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer;

* * * *

5. Resisting or interfering with an arrest for a felony is a class D felony. Resisting an arrest by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person is a class D felony; otherwise, resisting or interfering with an arrest, detention or stop is a class A misdemeanor.

Again, the verdict director here alleged that Officer Schneider was making an arrest of Mr. Bainter for "possession of a stolen license plate," that Mr. Bainter knew or reasonably should have known that Schneider was arresting him, and for the purpose of preventing Schneider from making the arrest, Mr. Bainter resisted arrest by fleeing in such a manner that created a substantial risk of serious physical injury or death because *Davis* drove the wrong direction on I-70 (L.F. 135; App. A-13).

I. *There was no evidence that Mr. Bainter knew he was being arrested for possession of stolen license plates*

The State failed to show that Mr. Bainter knew or reasonably should have known that he was being arrested for possession of the license plates -- stolen or

otherwise -- on a truck driven by Robert Davis. As noted by the Court of Appeals in ***State v. Dossett***, 851 S.W.2d 750, 752 (Mo.App. W.D. 1993):

> [A] traffic stop initiated by a police officer turning on his lights and siren in an attempt to stop an automobile is not the factual situation contemplated by the resisting arrest statute. When an officer decides to stop an automobile and activates his lights and siren, the driver of the automobile being signaled to stop does not know what is in the mind of the officer and does not know whether or not the officer intends to make an arrest or intends only to make a routine stop which does not constitute the full arrest that § 575.150 contemplates. Because of the driver's lack of knowledge of the officer's intent, in cases such as this, it is impossible to satisfy the twin requirements of the statute that the person know that an officer is making an arrest, and that the officer is making an arrest.

Dossett, 851 S.W.2d at 752, *citing*, ***State v. Wanner***, 751 S.W.2d 789 (Mo.App. E.D. 1988). Here, the State failed to prove beyond a reasonable doubt that Mr. Bainter reasonably should have known that Schneider was arresting him for possessing stolen license plates.[15] ***Dossett***, *supra*, 851 S.W.2d at 752.

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[15] Mr. Bainter also points out that there is no such offense of "possession of stolen license plates." It is conceivable that the State intended this as an instance of receiving stolen property. *See*, §§ 570.010(12) and 570.080.

Mr. Bainter recognizes that § 575.150 has been amended since the ***Dossett*** decision, and that fleeing a lawful detention or stop *is* now contemplated by § 575.150 (*see*, § 575.150, RSMo 1994; § 575.150, RSMo Cum. Supp. 1996). But Mr. Bainter was not charged with resisting a stop or detention; he was charged with resisting an *arrest*. "The state is held to proof of the elements of the offense it charged, not the one it might have charged." ***State v. Price***, 980 S.W.2d 143, 144 (Mo.App. E.D. 1998) (citation omitted). Thus, Mr. Bainter could not know that *he* was being arrested for Davis's possession of stolen plates, or even for the offenses Davis committed in flight from his stop and contemplated arrest.

II. *Mr. Bainter did not create a substantial risk of serious physical injury to any person*

Because Mr. Bainter was not the driver and had no control over the truck, he cannot be held accountable for the chase, or for Davis's conduct in endangering the travelers on I-70. The evidence showed only that it was Davis who took off when he was stopped by Officer Schneider, that it was Davis who drove the wrong way down the off ramp and onto westbound I-70, and that it was Davis who forced at least one other vehicle to swerve towards the concrete median (Tr. 522, 525-28). Mr. Bainter did none of those actions. And although the State charged him as acting in concert with Davis, it did *not* allege that he aided or encouraged Davis in any way; it alleged only that Mr. Bainter acted together with Davis (L.F. 135).

There was no such evidence. There was no evidence that Mr. Bainter drove the truck at any time. There was no evidence that Mr. Bainter took part in steering the

truck the wrong way through interstate highway traffic. There was not even any evidence, had the State charged Mr. Bainter simply with *aiding* Davis, that he did anything to assist Davis's effort, such as letting him know where to turn or where any pursuit might be or what the police were doing.

This situation is analogous to cases involving joint possession of controlled substances. *See*, ***State v. Franco-Amador***, 83 S.W.3d 555 (Mo.App. W.D. 2002) (nervousness and flight were not sufficient evidence of constructive possession of drugs hidden in car, because defendant, though driving, just met owner and had never been in car prior to when it was stopped). Here, the evidence was only that Mr. Bainter was but a passenger: when Davis was stopped by Officer Schneider, when Davis took off from that stop, and when Davis endangered motorist's lives. Without some indication that Mr. Bainter was connected to the dangerous driving, there was no evidence that he acted together with Davis in resisting arrest.

The State failed to satisfy the requirements of § 575.150 that Mr. Bainter was actually subject to arrest for possessing stolen license plates, that he knew or reasonably should have known that Schneider was making an arrest for that offense, and that Mr. Bainter created or acted with Davis to create a substantial risk of death or serious physical injury to any person. Therefore, this Court must reverse Mr. Bainter's conviction under Count 18, resisting arrest, and order him discharged on that count.

CONCLUSION

For the reasons set forth in Point I, appellant Paul Bainter respectfully requests that this Court reverse his convictions and sentence and remand for a new trial. For the reasons set forth in Point II, Mr. Bainter respectfully requests that this Court reverse his convictions and sentence on Counts 3, 5, 7, 9, 11, 13, and 15, felonious restraint, and Counts 4, 6, 8, 10, 12, 14, and 16, armed criminal action, and discharge him therefrom. For the reasons set forth in Point III, Mr. Bainter respectfully requests that this Court reverse his convictions and sentence and remand for a new trial without admission of the evidence of the McDonald's robbery. For the reasons set forth in Point IV, Mr. Bainter respectfully requests that this Court reverse his convictions and sentence and remand for a new trial without admission of the evidence unlawfully seized from his person and possession. For the reasons set forth in Point V, Mr. Bainter respectfully requests that this Court reverse his conviction and sentence on Count 18, resisting arrest, and discharge him therefrom.

Respectfully submitted,

_____

Kent Denzel, MOBar #46030
Assistant Public Defender
3402 Buttonwood
Columbia, Missouri 65201-3718
(573) 882-9855
FAX: (573) 875-2594
Kent.Denzel@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 17,007 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in June, 2006. According to that program, these disks are virus-free.

On the _____ day of June, 2006, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

_____
Kent Denzel

APPENDIX

TABLE OF CONTENTS

Missouri Revised Statutes

Chapter 546

Trials, Judgments and Executions in Criminal Cases

Section *546.070*

August 28, 2005

Order of trial--instructions, requirements.

546.070. The jury being impaneled and sworn, the trial may proceed in the following order:

(1) The prosecuting attorney must state the case and offer the evidence in support of the prosecution;

(2) The defendant or his counsel may then state his defense and offer evidence in support thereof;

(3) The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permit them to offer evidence upon their original case;

(4) In every trial for a criminal offense the court shall instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving the verdict, which instructions shall include a definition of the term reasonable doubt;

(5) Unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall conclude the argument.

(RSMo 1939 § 4070, A.L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A effective 10-1-84)

Prior revisions: 1929 § 3681; 1919 § 4025; 1909 § 5231

Effective 10-1-84

Missouri Revised Statutes

Chapter 575

Offenses Against the Administration of Justice

Section *575.150*

August 28, 2005

Resisting or interfering with arrest--penalty.

575.150. 1. A person commits the crime of resisting or interfering with arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:

(1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer; or

(2) Interferes with the arrest, stop or detention of another person by using or threatening the use of violence, physical force or physical interference.

2. This section applies to arrests, stops or detentions with or without warrants and to arrests, stops or detentions for any crime, infraction or ordinance violation.

3. A person is presumed to be fleeing a vehicle stop if that person continues to operate a motor vehicle after that person has seen or should have seen clearly visible emergency lights or has heard or should have heard an audible signal emanating from the law enforcement vehicle pursuing that person.

4. It is no defense to a prosecution pursuant to subsection 1 of this section that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

5. Resisting or interfering with an arrest for a felony is a class D felony. Resisting an arrest by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person is a class D felony; otherwise, resisting or interfering with an arrest, detention or stop is a class A misdemeanor.

(L. 1977 S.B. 60, A.L. 1996 H.B. 1047, A.L. 2002 H.B. 1270 and H.B. 2032)

Rule 27.02. Felonies - Order of Trial

The order of trial by jury in felony cases shall be as follows:

(a) The court shall read to the jury panel MAI-CR 3d 300.02.

(b) The voir dire examination shall be conducted.

(c) Before each recess or adjournment of the court, the court shall read to the jury the applicable portion of MAI-CR 3d 300.04.

(d) A qualified jury shall be selected as provided by law and shall be sworn well and truly to try the case.

(e) The court shall read to the jury MAI-CR 3d 300.06, 302.01, and 302.02.

(f) The attorney for the state shall make an opening statement. The attorney for the defendant may make an opening statement or it may be reserved.

(g) The attorney for the state shall offer evidence on behalf of the state.

(h) The attorney for defendant may move for judgment of acquittal.

(i) The attorney for defendant may make an opening statement if it has been reserved.

(j) Evidence may be offered on behalf of defendant.

(k) The parties, respectively, may offer evidence in rebuttal only, unless the court, for good cause shown or believing that the interests of justice will be served thereby, permits the parties to offer evidence upon their original cases.

(l) The attorney for defendant may move for judgment of acquittal.

(m) After conferring with counsel, the court shall instruct the jury in the manner provided by Rule 28.02.

(n) The court shall fix the length of time for the arguments and shall announce same to counsel. The attorney for the state shall make the opening argument, the attorney for defendant shall make an argument, and the attorney for the state shall conclude the argument. Each side may waive its right to argument.

(o) The original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberations and shall be returned to the court and filed at the conclusion of the jury's deliberations.

(p) MAI-CR 3d 312.10 may be given when appropriate, after extended deliberation by the jury.

(q) For second stage proceedings in death penalty cases, the order of those proceedings shall be in accordance with Supplemental Notes on Use applicable to the 313.00 Series in MAI-CR 3d.

(Adopted June 13, 1979, eff. Jan. 1, 1980.Amended Feb. 21, 1989, eff. Jan. 1, 1990.)