

No. SC87749

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

PAUL L. BAINTER,

Appellant.

**Appeal to the Missouri Supreme Court
From the Circuit Court of St. Charles County, Missouri
Eleventh Judicial Circuit
The Honorable Lucy D. Rauch, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions 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, obtained in the Circuit Court for St. Charles County, the Honorable Lucy Rauch presiding. Judge Rauch sentenced appellant as a persistent offender to consecutive terms of life imprisonment 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. On June 6, 2006, the Missouri Court of Appeals, Eastern District issued its opinion stating that it would reverse the judgment and remand for a new trial, but because of the general interest and importance of the issue regarding the effect of the failure to swear the jury in a criminal case, and for the purpose of reexamining existing law, transferred the case to the Missouri Supreme Court pursuant to Rule 83.02.

¹All statutory citations are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Appellant, Paul Bainter, was charged by amended information in the Circuit Court of St. Charles County with first degree robbery, §569.020,² 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 (L.F. 98-108). Appellant was charged as a persistent offender (L.F. 105). Appellant's jury trial began on March 7, 2005, before the Honorable Lucy Rauch (L.F. 2).

Appellant disputes the sufficiency of the evidence. Viewed in the light most favorable to the verdicts, the following evidence was adduced at trial: On January 3, 2004, at approximately 8:20 p.m., forty minutes before closing time, IGA co-owner Brian Moore went into the back room of the store to check on things when a large white man wearing a dark ski mask and holding a gun stepped out in front of him and pointed the gun at him (Tr. 337, 342-343, 379, 397, 404, 420, 464, 479, 483). The gun was a black handgun with a long barrel, a 44 magnum (Tr. 343, 392, 404-405, 462, 470, 483-484). The man said, "All we want is the money. No one is going to get hurt. We're going back up to the safe" (Tr. 344). When Brian turned around, the man poked the gun in the back of Brian's neck; at that time Brian saw that there was a second man in the back office (Tr. 344). The first man told the second man,

²All statutory citations are to RSMo 2000 unless otherwise indicated.

who was also white and wearing a dark ski mask, that he could come out now (Tr. 344, 397, 404, 420, 464, 479). The second man had a shorter barreled black handgun (Tr. 344, 393, 406, 462-463, 470, 482).

The first man was bigger, both in height and weight, than the second man (Tr. 343-344, 395-396, 404, 419-420, 461-462, 472, 479). Both men were heavy set; the first man weighed around 250 pounds and was a little over six feet tall, while the second man was about 5'7" to 5'9" and relatively large for his height, between 170 and 230 pounds (Tr. 343-344, 461-462, 479, 488-489). The men were wearing dark colored gloves and clothing (Tr. 400, 423, 464, 483-484). The shorter man was wearing worn-looking black military boots, a Marlboro jean jacket, and a pair of light grayish-blue sweat pants (Tr. 406-407, 480-481).

Brian Moore's sixteen-year old son, Sean, who was working that night, came through the back door and Brian told him that they were going to do what the men said (Tr. 345, 389-390). They all walked toward the front of the store (Tr. 345, 391). Customer Kenneth Condor was at the store buying soda that night, and when the robbers saw him, they escorted him to the front of the store (Tr. 345, 391-392, 403-404, 406). Another customer, Terry Pointer, had just paid for his groceries when the robbers got to the front of the store and told him to stop and sit down (Tr. 461).

Brian showed the men that there was no money in the safe, which was at the front of the store (Tr. 345-346). Brian told them that the money was in the front office (Tr. 346). The first robber went to the front office with Brian, and Brian

emptied the money from the cash drawers into a heavy duty black plastic bag that the robbers brought with them (Tr. 346, 348, 366-367, 394). While Brian was in the front office, Sean sat between the first and second registers (Tr. 393-394). Two other employees, Rachel Wilman and Renee Hudson, were also sitting by the registers (Tr. 420, 471). The second robber made Renee take the cash drawer out of the second register (Tr. 471). Sean, Rachel, and Renee heard the second man call the first man, "Paul," but then correct himself and repeat the name, "Ed" several times (Tr. 395, 420, 471-472). Another employee, James Vails, was near the third register (Tr. 479). James heard the second robber repeatedly say "okay, okay, okay" (Tr. 497). His repeated utterance of the phrase was possibly a nervous habit because he was not responding to a question (Tr. 497-498).

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 would put \$20 bills into four bundles of five hundred dollars each with each bundle having a rubber band around it (Tr. 363). The \$10 bills were put into two bundles of \$500 each, the \$5 dollar bills were put into two bundles of \$250 each, and the \$1 bills were put into five bundles of \$20 each (Tr. 363). The bundles of each denomination of bills were then held together with a larger rubber band (Tr. 363). There was about \$4,400 taken by the robbers (Tr. 365). After the men got the money, they took Brian, the four employees working at the time, and two customers, into the meat cooler in the back room (Tr. 348-349, 395, 407, 421, 464, 473, 484-

485, 487). They said no one was going to get hurt (Tr. 349). The temperature of the 10' by 15' meat cooler was kept in the low thirties (Tr. 342). There were front and back freezer-type doors to the meat cooler (Tr. 341-342, 356). The gunmen shut the front door to the cooler and told them to stay there (Tr. 349). One of the employees knew that they could get out of the meat cooler (Tr. 473). The robbers did not mention a specific amount of time to stay in the cooler, so Brian waited for two or three minutes, which he thought was enough time for the men to leave, and went out and checked the store (Tr. 349). The men had left, and Brian called 911 (Tr. 349). When he checked the back office, Brian also found that the videotape from the store's surveillance system was missing and that a phone cord had been cut (Tr. 367-368, 618).

On January 4, the day after the IGA robbery, St. Peters detective Michael Helm was off duty, when he saw a white Chevrolet full-size pickup pull in front of his house (Tr. 508). The driver had black hair and a mustache, and the passenger was a "heavier-set" man with a big mustache and a long bushy beard (Tr. 509). Detective Helm 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).

Detective Helm called the St. Peters police department and had them run the license plate on the truck (Tr. 514). He learned that the license plates had been reported stolen (Tr. 514). Because Helm lived in O'Fallon, he then called the O'Fallon police and reported the information (Tr. 514-515). As Helm was waiting for

the police to arrive, the passenger got back into the truck and the men drove away, so Helm got into his car and followed them in order to update their location for the O'Fallon police (Tr. 515). The police soon arrived, and Helm returned home (Tr. 515).

Officer Steve Schneider was one of the O'Fallon police officers who was dispatched to find the truck Helm had reported (Tr. 517). As Officer Schneider was driving to the area, a pickup truck matching the description he was given pulled right in front of him (Tr. 518). After verifying that the license plates on the truck had been reported stolen, Officer Schneider activated the lights on his marked police car, and stopped the truck in the parking lot of a daycare (Tr. 518-519). Because he stopped the truck for having stolen plates, Schneider got out of his car, drew his gun, and stayed behind the door to his patrol car (Tr. 521). He ordered the driver of the truck to throw his keys out of his open window (Tr. 521-522). Before he could do so, however, the driver briefly looked over his right shoulder, and then drove off through the parking lot, jumped a curb, drove through a grassy area, and then went north on Bryan Road (Tr. 522). The driver was Robert Davis and the passenger was appellant (Tr. 530-531, 556). Officer Schneider would have arrested appellant and Roger Davis for possessing stolen license plates had the two men not fled (Tr. 535).

Officer Schneider got back into his car, activated his lights and sirens, and began to follow the pickup truck north on Bryan Road (Tr. 525). The truck came to

the I-70 interchange, crossed over the highway, and then turned the wrong way, heading east down the off-ramp for westbound traffic on I-70 (Tr. 525). Schneider made a u-turn, crossed back over I-70, and went east on I-70 (Tr. 528). Schneider was able to keep the truck in sight for about a quarter of a mile, until a hill and traffic blocked his view (Tr. 528). There was other traffic on westbound I-70 and Schneider saw that one car had to swerve toward the concrete median to avoid the pickup that was driving the wrong way down I-70 (Tr. 526).

Schneider saw the white pickup truck in the grassy median north of the interstate (Tr. 528). He got off at the next exit and drove to where the truck had been abandoned (Tr. 528). Other officers responded to the scene (Tr. 529, 537). One of those officers was Chad Gerler, who drove westbound on I-70 to try and find the truck, and to slow traffic down (Tr. 537). He spotted the truck and saw Robert Davis and appellant run from the truck and climb over a fence, heading north (Tr. 538). Officer Gerler stopped his car and chased the men on foot, telling them that they were under arrest (Tr. 538). He saw that appellant was carrying a camouflage bag in his hand, and Davis was carrying a red bag (Tr. 541). Gerler continued to give loud verbal commands to the men to stop running because they were under arrest; it was apparent that the men knew they were being chased because appellant kept looking back at Gerler (Tr. 542).

Officer Gerler lost sight of Davis, but was able to catch up to appellant in the yard of a private residence at 750 Danny Lane (Tr. 542, 550). When Gerler

attempted to tackle appellant, he did not fall to the ground because he was so large, but the contents of the bag he was carrying did fall onto the ground (Tr. 542-543). Gerler then struck appellant in the thigh with his baton in an attempt to get him to the ground (Tr. 543). This did not work, and appellant attempted to grab a hold of the baton (Tr. 543). Finally, Gerler pointed his weapon at appellant until another officer reached them (Tr. 543-544). When another officer arrived, appellant was finally subdued and handcuffed (Tr. 544).

Gerler found the camouflage fanny pack that appellant had been carrying lying open on the ground (Tr. 545, 889, 895). There were live rounds of 44 and 22 caliber ammunition and five rolls of quarters in the fanny pack and nylon gloves, a empty black holster, and an empty Winchester box that had contained 44 caliber Magnum rounds on the ground near the fanny pack (Tr. 545, 547-548, 550-552, 889, 892-893, 896-899, 904-906). Four of the five rolls of quarters were wrapped in white paper with orange writing on it, and the other roll was wrapped in brown paper (Tr. 898-900). An address book with appellant's name on it and Davis' address in it was also in the pack (Tr. 903-904). A piece of paper in the fanny pack had handwritten directions that said "to Highway 270, North on 70, go north, and Missouri Bottom Road" (Tr. 903). Officers thought this might relate to the investigation of the robbery of the McDonald's Bar that was located in the area of Missouri Bottom Road and Villa Donna in Hazelwood (Tr. 903, 1012). Gerler found a loaded 44 caliber revolver underneath

some bushes in the area where he had struggled with appellant (Exhibit 1) (Tr. 545, 548, 550-551, 889, 892-893).

Appellant was taken to a hospital to be treated for injuries he received in the course of being arrested (Tr. 604). At the hospital, O'Fallon police officer Michael Magrew seized appellant's clothing and other possessions, including a green and black flannel jacket, a pair of shorts, a pair of sweat pants, a shirt, a pair of tennis shoes that had been spray painted black, and a maroon ski mask that was in a pocket of the jacket (Tr. 605, 607, 964-966). Officer Magrew found a roll of cash in the pocket of appellant's shorts, a large amount of cash that had been folded in half in the pocket of the sweat pants, and small amounts of cash in various other pockets (Tr. 607-608). 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. 971-979). One of the \$20 bills had staple-like holes in it (Tr. 977-978).

Robert Davis was caught with the assistance of a passing motorist, Michael Greene, who lived in the neighborhood where Davis and appellant fled (Tr. 561-562). Michael saw appellant and Davis, who was carrying a red bag, running from the white truck (Tr. 562-563). When he noticed that a police officer was chasing the two men, he decided to attempt to slow Davis down (Tr. 564). When Davis passed in front of his car, Greene got out of his car and ran after Davis (Tr. 565). Davis approached a fence, threw the red bag over the fence, and started to climb over it (Tr. 565). Greene told Davis not to move, wrestled him to the

ground, and held him in an arm lock until the police arrived (Tr. 565-566). The police arrived shortly thereafter and took Davis into custody (Tr. 567, 576, 603-604).

Officers found the red bag that Davis had thrown over the fence (Tr. 577). The bag was a Marlboro brand bag (Tr. 907). The red bag contained clothing, loose change, a red bandana with 120 quarters and 50 dimes tied into it, two rolls of quarters, a roll of nickels, a roll of pennies, two black nylon drawstring bags (Exhibit 13), a green ski mask, and a large bundle of dollar bills secured with rubber bands (Tr. 580, 593, 595, 907-908, 912-914, 917). One drawstring bag contained a \$5 and \$10 bill (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. 919-921).

Police seized several items from Robert Davis when he was brought to the O'Fallon Police Department, including a pair of black military-style boots (Exhibit 48) and black nylon-type gloves that were similar to the ones seized from the residence on Danny Lane where appellant was apprehended (Tr. 930-931). The police also searched the white pickup after having it towed to the police station (Tr. 930, 934). Inside the truck, officers found a denim Marlboro jacket (Exhibit 22), two Wal-Mart bags, and a Famous Barr bag (Tr. 936). In a pocket of the Marlboro jacket was a brown paper bag containing a stack of money and an envelope addressed to Robert Davis (Tr. 937-938). The bag contained two \$50 bills, thirty-two \$20 bills, forty-four \$10 bills, and two groups of \$5 bills, one had two bills and the other had twenty-eight (Tr. 942-944). Three of the \$10 bills and one of the \$5 bills had

staple-like holes on them (Tr. 943-944). There were also four stacks of twenty \$1 bills each (Tr. 945).

In one of the Wal-Mart bags was a pair of light blue sweat pants (Exhibit 36) and a navy blue ski mask, from which a cutting was made for DNA testing (Tr. 821-823, 843, 949). The DNA in the mask was consistent with that of Davis, with a frequency of 1 in 148.9 quadrillion in the Caucasian population (Tr. 841-847). The other Wal-Mart bag contained two white socks, one of which contained a loaded .22 caliber revolver (Exhibit 3) (Tr. 951-952). There were some loose coins in the other sock (Tr. 952).

The Famous Barr bag contained clothing, a green ski mask, and tennis shoes that had been spray painted black (Tr. 956, 959). One of the items of clothing was a XXXL black t-shirt with red trim (Tr. 958). There was a can of black spray paint in the truck (Tr. 957). The truck also contained four rolls of quarters, three wrapped in white paper with orange writing and one wrapped in brown paper (Tr. 960-961, 963).

The total amount of currency seized in the case was approximately \$4500 (Tr. 985). Officers also seized a camouflage shirt in the case (Tr. 1008-1009).³

People present during the IGA robbery had the opportunity to view several of the items seized from appellant and Robert Davis, and make the following comparisons:

- The gun the larger robber used was similar to State's Exhibit 1, the .44 caliber gun found in the bushes of the residence at 750 Danny Lane where appellant

³The record does not reflect where this shirt was found.

was apprehended (Tr. 343, 392, 405, 462, 484, 545, 548, 550-551, 889, 892-893).

- The gun the smaller robber used was similar to State's Exhibit 3, the .22 caliber gun found inside a sock inside a Wal-Mart bag in the white pickup truck in which Davis and appellant fled from the police (Tr. 344-345, 393, 406, 463-464, 482-483, 951-952).
- The black bag the robbers used to hold the money from IGA was similar to State's Exhibit 13, the black nylon bag found in the red Marlboro duffel bag Robert Davis threw over a residential fence just before he was apprehended (Tr. 394, 577, 580, 907-908, 912).
- The black military boots the smaller robber wore were similar to State's Exhibit 48, the boots seized from Robert Davis at the O'Fallon jail (Tr. 407, 482, 930-931).
- The Marlboro jean jacket worn by the smaller robber was similar to State's Exhibit 22, the jacket found in the white pickup truck in which Davis and appellant fled from the police (Tr. 480-481, 936).
- The sweat pants worn by the smaller robber were similar to State's Exhibit 36, the sweat pants found in one of the Wal-Mart bags in the white pickup truck in which Davis and appellant fled from the police (Tr. 481, 949).

On January 27, 2004, Robert Davis appeared in court (Tr. 429).⁴ Rachel Wilman and James Vails who were working at IGA on the night of the robbery were also present in the courtroom (Tr. 429-430, 499-500). After seeing Davis look at her in the courtroom, Rachel made the following statement to the police regarding Davis:

He glanced at us when we were in the Court . . . That's when I really knew it was him because I saw his eyes. The night of the robbery he kept looking at Renee, which [sic] was sitting next to me, so I was able to recognize his eyes and part of his face.

(Tr. 429-430, 436). When she said that she “really knew it was him,” Rachel meant that she knew that Davis was “the one that was controlling us, the smaller one, when the robbery happened” (Tr. 437). While in the courtroom, James Vails recognized Davis’ voice as being that of the second robber (Tr. 500). Davis had the same nervous habit of repeating, “okay, okay, okay” as the second robber did (Tr. 500).

⁴The record does not indicate why Robert Davis was in court that day.

The officers who caught appellant and Mr. Davis called the St. Charles County Sheriff's Department (Tr. 594, 616, 619). The sheriff's department took over the crime scene (Tr. 619). It was "very obvious" to Sergeant Craig Ostermeyer that the evidence seized from appellant and Davis was connected to the IGA robbery (Tr. 619). Sergeant Ostermeyer also spoke with police officers from Hazelwood because a robbery that the Hazelwood police department was investigating shared a lot of similarities with the IGA robbery (Tr. 618, 620).

At trial, the State was allowed to present evidence regarding that similar robbery, which occurred about five miles from the IGA, at the McDonald's Bar in Hazelwood on December 30, 2003 (Tr. 645-647).⁵ After the robbery at the McDonald's bar, 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 quarter mile from the bar led to the identification of Davis and appellant by a Citgo clerk, as having been in that gas station approximately four hours before the bar robbery (Tr. 648-649, 651, 724-727, 746-747). Appellant, as depicted on the videotape, was wearing a pair of faded camouflage pants, a dark sweat shirt, a dark colored stocking cap, and dark colored gloves (Tr. 651, 654). The clerk, Samantha Dussold, spoke with appellant when he came in the store and remembered that he had a slight southern accent (Tr. 726). The videotape showed that Davis was wearing

⁵The evidence adduced at trial regarding the McDonald's Bar robbery will be presented in more detail in Point I. Appellant and Davis were not being tried for any conduct related to the McDonald's Bar robbery in this case.

a pair of dark pants and a white hooded coat (Tr. 651, 654). The clerk then picked their photos from lineups prepared after the IGA robbery, when the police decided there were similarities between the two robberies, and the two men's appearances while at the Citgo station (Tr. 618-620, 655, 667-668, 672-673, 722-723).

Ms. Barry was also shown the surveillance tape from Citgo and the still photographs made from it (Tr. 652-653). She believed that there were two men in the video that were similar in size and shape as the two robbers (Tr. 773-775). Also, Ms. Barry believed that the two men in the video wore similar dark clothing to the robbers; the man that looked similar to the first robber was wearing a hat that was the same color as the first robber's ski mask and a jacket that would not close all the way (Tr. 773-775). When she was shown State's Exhibits 53B and 53C, still photos of the two men from the video who she thought looked similar to the robbers, Ms. Barry identified Robert Davis, who she knew because he came into the bar (Tr. 775-777).⁶ Ms. Barry identified the man in State's Exhibit 53D as the bigger robber (Tr. 774-775). Robert Davis lived a few streets behind the bar (Tr. 777).

⁶Samantha Dussold, the clerk at Citgo, also identified the man in Exhibits 53B and 53C as Robert Davis, and the man in Exhibit 53D as the bigger man (who she later identified in a lineup as appellant) (Tr. 618-620, 655, 667-668, 672-673, 721-723, 726).

Robert Davis, appellant's co-defendant, did not present any evidence at trial (Tr. 1034). Appellant called Jennifer Rico, the health services coordinator for the St. Charles County Department of Corrections, to testify that he weighed 300 pounds on January 4, 2004, eight days after his arrest (Tr. 1035).

At the close of the evidence and arguments by counsel, the jury found appellant guilty of first degree robbery, first degree burglary, resisting arrest, seven counts of felonious restraint, and eight counts of armed criminal action (L.F. 187-193; Tr. 1191-1194). On May 13, 2005, Judge Rauch sentenced appellant as a persistent offender to consecutive terms of imprisonment for 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. 187-193; Sent. Tr. 26-27).

ARGUMENT

I.

The trial court did not abuse its discretion when it permitted the State to introduce evidence that appellant and his co-defendant were identified as robbing a bar four days before they robbed the IGA grocery store, because the robberies were sufficiently similar, tending to establish appellant's identity as one of the IGA robbers, in that appellant and Robert Davis used the alias "Ed" in the bar robbery and then four days and five miles away two unknown men robbed an IGA, where the robbers again used the alias "Ed," where the IGA robbers shared many similarities as appellant and Davis, and where the circumstances of the robberies was similar.

Appellant challenges the admission of evidence concerning the robbery of McDonald's Bar in Hazelwood on December 30, 2003, on the grounds that it was inadmissible evidence of other crimes that was not logically or legally relevant to prove his identity as one of the men who robbed the IGA on January 3, 2004, which was the crime for which appellant was being tried (App. Br. 31). However, the evidence was admissible to establish appellant's identity as one of the IGA robbers.

A. Standard of Review

Review of a trial court's decision to admit evidence is limited to a determination of whether the admission was an abuse of discretion. *State v. Mattic*, 84 S.W.3d 161, 169 (Mo. App. W.D. 2002). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to

shock the sense of justice and indicate a lack of careful consideration. *State v. Stephens*, 88 S.W.3d 876, 881 (Mo. App. W.D. 2002).

B. Relevant Facts

The State filed a pre-trial motion asking the trial court to allow evidence of the December 29, 2003, McDonald's Bar robbery in order to prove the identity of the IGA robbers (L.F. 54-55). Appellant objected to the motion at a pre-trial hearing held on August 19, 2004 (Hr. Tr. 8-19-04 at 62-79). On September 30, 2004, the trial court granted the State's motion to allow evidence of the McDonald's Bar robbery (L.F. 70). The trial court's order read as follows:

The State shall be permitted to adduce evidence of the MacDonal'd's [sic] bar robbery in the form of testimony and physical evidence seized, including the CITGO gas video tape and the witness identification from the tape for the following reasons: Identity in the above styled case is at issue; the victims of the alleged robbery at the Frontier IGA do not know the Defendants. The Defendants were positively identified by the witness of the CITGO video tape, a witness who knows the Defendants; the physical evidence seized and the similar clothing, physical descriptions and modus operandi, including the use of guns, ski masks, the word "Ed", the use of black, "cracked" or ribbed gloves are sufficiently specific and similar to overcome a presumption of mere coincidence, and taking into consideration the proximity of dates of alleged offenses and the fact that they took place in neighboring counties make

evidence concerning the MacDonald's [sic] bar logically and legally relevant to prove the identity of the alleged IGA robbers, not to show a mere propensity to commit robberies. The probative value of the evidence overcomes the prejudicial effect and is necessary to show the positive identification of the Defendants and why they were located (with items connected to IGA). The Court will not permit testimony about the shooting and death in the MacDonald's [sic] bar incident, unless the State can show, by additional argument, why testimony about the shooting should be permitted.⁷

(L.F. 70).

⁷No such evidence was admitted at trial.

At trial, the State presented the following evidence regarding a robbery that occurred at the McDonald's Bar in Hazelwood on December 30, 2003 (Tr. 645-646). The McDonald's Bar was located five miles from the St. Charles County line, right over the 370 bridge (Tr. 647). Around 1:10 a.m. on December 30, 2003, Diane Barry was getting ready to close McDonald's Bar when two men came in the door wearing dark colored ski masks and dark gloves and carrying guns (Tr. 745-748, 770, 809, 811).⁸ Ms. Barry did not see any headlights from a car pulling up to the bar before the men entered, which was unusual (Tr. 746). One man was taller than the other, but both were stocky (Tr. 747). The taller man was white and was wearing layers of "ratty looking" t-shirts, including red and black, and a jacket that wasn't zipped because it was too small for him (Tr. 747-749, 802). He also wore dark camouflage pants (Tr. 647, 748, 770, 809). The smaller man wore a light colored jacket with a hood (Tr. 748, 810).

The bigger robber said, "this is a robbery, this is no joke" (Tr. 749). They told the three customers in the bar to get on the floor with their hands above their heads (Tr. 749, 810). The bigger robber told the smaller robber, "Ed, if anyone moves kill this mother f-----" referring to customer Sean Marlowe (Tr. 749, 810-811). Ms. Barry remained standing but put her hands up, and asked the men what she should do (Tr. 749-750). Ms. Barry noticed

⁸Ms. Barry thought that the gloves worn by the robbers were similar to State's Exhibits 9A and 9B, the gloves found in the yard of 750 Danny Lane where appellant was apprehended (Tr. 770-771, 906).

that the bigger robber, the only one who spoke, had a “country” accent, which was distinctive (Tr. 749, 775, 813).

The taller man told Ms. Barry to get him the money (Tr. 750). He asked Ms. Barry where the safe was located and if she knew the combination (Tr. 750, 811). Ms. Barry told the gunman that she did not know the combination to the safe, and said that the owner did (Tr. 750, 811). The man asked Ms. Barry if it would be unusual for her to call the owner at that time of night and ask him the combination; Ms. Barry said it would be unusual because she had never done so in the twenty years she had worked at the bar (Tr. 750-751, 811). The man said that he believed her (Tr. 751). The man then said that he wanted all the money, even change, and the money from her own purse and the tip jar (Tr. 751). He pointed his gun at each thing he named (Tr. 751). Ms. Barry collected all of the money and put it in a bag that contained several rolls of quarters that the bar kept for the pool tables (Tr. 751-752).

After she had collected all of the money, the man asked if there was any more, and Ms. Barry told him that there was more in the office (Tr. 752, 812). He walked her to the office at gunpoint (Tr. 752). The gun had a long barrel and a “pointy thing at the end of it” (Tr. 752, 770).⁹

⁹Ms. Barry thought that State’s Exhibit 1, the gun found when appellant was

apprehended, looked like the same gun that had been pointed at her during the robbery of the bar (Tr. 769-770).

Ms. Barry 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 \$1 bills and fifty \$5 bills secured with a rubber band, and their Saturday night “bank drop” that was in a sealed envelope (Tr. 754).¹⁰ Included in the money was a paid bar tab of \$38.50 made up of a \$20 bill, a \$10 bill, a \$5 bill, and three \$1 bills, which was stapled to a slip of paper with the name Brian McNamara on it (Tr. 767). When someone paid their tab, the bar always stapled their tab – a piece of paper with their name on it and the amount they owed – to the money and then wrote the date the tab was paid on the paper (Tr. 766-767). Ms. Barry was told to turn around and face the wall and put her hands up (Tr. 755). When she turned around, the man was gone (Tr. 755). She called 911 (Tr. 755).

While Ms. Barry and one of the robbers were in the office, customer Sean Marlowe was able to escape by running to the back of the bar and kicking out a window (Tr. 812). As he was running down the alley behind the bar, he saw the two robbers at the rear of the bar running away down a hill (Tr. 813).

After the robbery at the McDonald’s bar, 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 quarter mile from the bar led to the identification of Davis and appellant by a Citgo clerk, as having been in

¹⁰The Saturday night “bank drop” was dropped on the office floor before the robbers left the bar (Tr. 768).

that gas station approximately four hours before the bar robbery (Tr. 648-649, 651, 724-727, 746-747). Appellant, as depicted on the videotape, was wearing a pair of faded camouflage pants, a dark sweat shirt, a dark colored stocking cap, and dark colored gloves (Tr. 651, 654). The clerk, Samantha Dussold, spoke with appellant when he came in the store and remembered that he had a slight southern accent (Tr. 726). The videotape showed that Davis was wearing a pair of dark pants and a white hooded coat (Tr. 651, 654). The clerk then picked their photos from lineups prepared after the IGA robbery, when the police decided there were similarities between the two robberies, and the two men's appearances while at the Citgo station (Tr. 618-620, 655, 667-668, 672-673, 722-723).

Ms. Barry was also shown the surveillance tape from Citgo and the still photographs made from it (Tr. 652-653). She believed that there were two men in the video that were similar in size and shape as the two robbers (Tr. 773-775). Also, Ms. Barry believed that the two men in the video wore similar dark clothing to the robbers; the man that looked similar to the first robber was wearing a hat that was the same color as the first robber's ski mask and a jacket that would not close all the way (Tr. 773-775). When she was shown State's Exhibits 53B and 53C, still photos of the two men from the video who she thought looked similar to the robbers, Ms. Barry identified Robert Davis as the smaller robber, who she knew because he came

into the bar (Tr. 775-777).¹¹ Robert Davis lived a few streets behind the bar (Tr. 777). Ms. Barry identified the man in State's Exhibit 53D, appellant, as the bigger robber (Tr. 774-775).

C. Analysis

As a general rule, evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit similar crimes. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). However, evidence of a defendant's prior misconduct "is admissible if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." *Id.* at 13. *See also State v. Reese*, 274 S.W.2d 304, 307 ("The acid test is [the other crime's] logical relevancy to the

¹¹Samantha Dussold, the clerk at Citgo, also identified the man in Exhibits 53B and 53C as Robert Davis, and the man in Exhibit 53D as the bigger man (who she later identified in a lineup as appellant) (Tr. 618-620, 655, 667-668, 672-673, 721-723, 726).

particular excepted purpose or purposes for which it is sought to be introduced”). In the context of determining the legal relevance of uncharged crimes evidence, prejudice is a function of whether the admission of this evidence would cause a jury to convict as to the charged crimes simply because the defendant had engaged in prior bad acts or crimes, regardless of the logically relevant evidence in the case. *State v. Williams*, 976 S.W.2d 1, 4 (Mo. App. W.D. 1998); *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). The balancing of the probative value of the evidence against its prejudicial effect lies within the sound discretion of the trial court. *Bernard*, 849 S.W.2d at 13.

Generally, evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when it tends to establish motive, intent, absence of mistake or accident, common scheme or plan, identity of the person charged with the commission of the crime on trial, or signature *modus operandi* / corroboration. *Bernard*, 840 S.W.2d at 13, 17; *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence of prior misconduct that does not fall within one of the enumerated exceptions may nevertheless be admissible if the evidence is logically and legally relevant. *Bernard*, 840 S.W.2d at 13; *Sladek*, 835 S.W.2d at 311-312.

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 crime charged by showing that the defendant committed other uncharged acts that are sufficiently similar to the crime charged in time, place, and method. *Bernard*, 849 S.W.2d at 17;

State v. McDaniels, 668 S.W.2d 230, 232-233 (Mo. App. E.D. 1984); *State v. Young*, 661 S.W.2d 637, 639 (Mo. App. E.D. 1983). “More is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts.” *Young*, 661 S.W.2d at 639. The necessity to show that the uncharged and charged crimes are sufficiently similar to one another is only to link one crime to the other, tending to prove that the known perpetrator of the uncharged crime was the unknown perpetrator of the charged crime. *State v. Anthony*, 881 S.W.2d 658, 660 (Mo. App. W.D. 1994).

In this case, identity was the primary issue as was evidenced throughout appellant’s cross-examination of State witnesses, presentation of testimony, and closing argument (Tr. 1164-1179). The identity of the IGA robbers was unknown, as they wore ski masks during the robbery (Tr. 337, 342-344, 379, 397, 400, 404, 420, 423, 464, 479, 483-484). The only evidence appellant presented at trial was that he weighed 300 pounds a week after his arrest (Tr. 1035). This evidence was introduced to raise an inference that he was not the larger IGA robber, who was believed by witnesses to the robbery to weigh 250 pounds (Tr. 343-344, 461-462, 479, 488-489).

In closing argument, the first argument that defense counsel made was, “Paul Bainter didn’t commit this robbery. They have the wrong man” (Tr. 1164). Defense counsel also argued that none of the witnesses from the IGA robbery could see the robbers’ faces because they were wearing ski masks (Tr. 1164).

Because identity was an issue in this case, the trial court did not abuse its discretion in allowing the State to present testimony and argument regarding the McDonald's Bar robbery because such evidence was logically and legally relevant to prove the identity of the IGA robbers. The evidence appellant argues was erroneously admitted tended to show that appellant and Davis were the men who committed the crime charged (the IGA robbery) by showing that appellant and Davis committed an uncharged act (the McDonald's Bar robbery) that was sufficiently similar to the crime charged in time, place, and method.

First, appellant and Robert Davis were identified as the men who robbed the McDonald's Bar: both men were identified by a Citgo clerk, first in still photos taken from a surveillance video – appellant was the man in Exhibit 53D and Davis was the man in Exhibits 53B and 53C – and then in a lineup, as being in the Citgo store four hours before the robbery at the McDonald's Bar (Tr. 618-620, 649, 651, 655, 667-668, 672-673, 722-727, 746-747). The bar was located about a quarter mile from the Citgo gas station (Tr. 648). The bartender at the time of the robbery, Ms. Barry, believed that the photos of appellant (Exhibit 53D) and Davis (Exhibit 53B and 53C) looked like the two robbers (Tr. 773-777). Ms. Barry named Davis when she saw the still photo of him (Tr. 775-777). In the surveillance video and the still photos taken from the video, appellant and Davis were wearing clothing similar to that of the McDonald's robbers (Tr. 647, 651, 654, 745-749, 770, 773-775, 802, 809-811). Also, both the Citgo clerk and Ms. Barry noticed that appellant, the bigger robber, had a distinctive southern, or country, accent (Tr. 726, 749, 775,

813). Thus, appellant and Davis were identified as the perpetrators of the McDonald's Bar robbery.

Second, the McDonald's Bar robber was sufficiently similar in time, place, and method to the IGA robbery and tended to show that appellant and Davis were the men who committed both the IGA robbery and the McDonald's Bar robbery. Appellant, the bigger of the two McDonald's Bar robbers, used the name "Ed" to refer to Davis, the second robber (Tr. 749, 810-811). Ed was not either of the robbers' real names; appellant's name is Paul Leslie Bainter and Davis' full name is Robert William Davis. One of the men who robbed the IGA also used the name "Ed" to refer to his accomplice (Tr. 395, 420, 471-472). This name was clearly an alias, as the smaller robber initially referred to the bigger robber as "Paul," but then corrected himself and repeated the name "Ed" several times (Tr. 395, 420, 471-472).

The fact that appellant, one of the known McDonald's Bar robbers, referred to Robert Davis, the other known robber, as "Ed," which was an alias, tends to prove that the IGA robbers were also appellant and Davis because the IGA robbers also used the name "Ed" as an alias during the robbery. Further, before the name "Ed" was used as an alias to protect the robbers' identity, the smaller IGA robber called the larger IGA robber "Paul" (which happens to be appellant's first name), and then quickly corrected himself, and repeated the name "Ed" several times (Tr. 395, 420, 471-472).

There were other similarities between the two robberies that tended to show that appellant and Davis committed both robberies. The guns used in the McDonald's Bar and

IGA robberies were similar (Tr. 343, 392, 405, 462, 484, 545, 548, 550-551, 769-770, 889, 892-893). Both appellant and Davis and the IGA robbers wore dark ski masks and black gloves during the robberies (Tr. 337, 342-344, 379, 397, 400, 404, 420, 423, 464, 479, 483-484, 745-748, 770, 809, 811). Appellant, who weighed 300 pounds, was bigger than Davis, although both men were stocky (Tr. 747, 1035). Similarly, the first IGA robber was bigger, both in height and weight, than the second man (Tr. 343-344, 395-396, 404, 419-420, 461-462, 472, 479). Both of the IGA robbers were heavy set; witnesses believed that the first man weighed around 250 pounds and was a little over six feet tall, while the second man was about 5'7" to 5'9" and relatively large for his height, between 170 and 230 pounds (Tr. 343-344, 461-462, 479, 488-489).

Both of the robberies occurred shortly before closing time of the respective establishments (Tr. 337, 342-343, 747-748, 770, 809, 811). The robberies occurred close in time – the McDonald's bar robbery happened on December 30, 2003, four days before the IGA robbery on January 3, 2004 (Tr. 337, 342-343, 645-646). Also, the businesses robbed were close in proximity; the IGA was located in St. Charles County at 2871 Highway 94 North about a half mile north of the 370 bridge (Tr. 337). The McDonald's Bar was located five miles from the St. Charles County line, right over the 370 bridge, at 12523 Missouri Bottom Road (Tr. 647).

Appellant and Davis took both cash and coins, including numerous rolls of quarters from McDonald's Bar (Tr. 751-752, 754). At the bar, some of the cash the

robbers took had been stapled together before being put in the register to show that a tab had been paid (Tr. 766-767). The IGA robbers also took cash and rolls of coins that were wrapped in white paper with orange writing (Tr. 347, 363, 365). When appellant and Davis were eventually apprehended, numerous rolls of quarters and other coins were found in their possession; some of the coins were wrapped in white paper with orange writing similar to the coins stolen from the IGA, and some of the coins were wrapped in brown paper (Tr. 898-900). Co-mingled in appellant's fanny pack with the rolls of quarters stolen from IGA, was a piece of paper with handwritten directions to the general location of the McDonald's Bar (Tr. 898-900, 903). Officers also found many bills that had staple-like holes in them; it is a reasonable inference that money was taken from McDonald's Bar (Tr. 943-944, 977-978).

Because the two robberies were sufficiently similar to one another in time, place, and method, they tended to prove that appellant and Davis, the known perpetrators of the McDonald's Bar robbery, were also the men who robbed the IGA. Again, the robbers of both McDonald's Bar and IGA used the alias "Ed," the bar robbers were positively identified as appellant and Robert Davis, and thus this logically leads to the conclusion that the "Eds" who robbed the IGA were also the "Eds" who robbed McDonald's Bar – appellant and Robert Davis. Additionally, the IGA robbers shared many physical similarities as appellant and Davis, such weight, body build, and relative size. The circumstances of the robberies were also similar,

including similar weapons, similar time of occurrence, similar clothing and/or ski masks, and similar property taken. Also, when appellant and Davis were caught, they had items linking them to both robberies. Evidence of the bar robbery had a legitimate tendency to directly establish appellant's identity as one of the IGA robbers. As such, the evidence of uncharged crimes was relevant. In addition, the court limited the amount of evidence the State was allowed to introduce concerning the McDonald's bar robbery (L.F. 70). For example, the court did not allow the State to introduce evidence that one of the patrons of McDonald's bar was shot and killed during the robbery, but instead limited the evidence to that which established appellant's and Davis' identities as the bar robbers and the evidence which tended to show that appellant and Davis were the two unknown IGA robbers (L.F. 70). The trial court, thus, did not abuse its discretion in admitting evidence that appellant and Robert Davis were involved in the robbery of McDonald's Bar because identity was at issue in the present case – the robbery of the IGA – and evidence concerning the bar robbery was logically and legally relevant to prove that appellant and Robert Davis were also involved in the IGA robbery.

Evidence of uncharged crimes tending to show the defendant's identity for the charged crime was found to be properly admitted in *State v. Young*, 661 S.W.2d 637 (Mo. App. E.D. 1983), *State v. McDaniels*, 668 S.W.2d 230 (Mo. App. E.D. 1984), and *State v. Thurman*, 887 S.W.2d 403 (Mo. App. W.D. 1994). In *Young*, the defendant was charged with sexually attacking one victim and challenged the

admission of evidence from two other women who described similar sexual attacks upon them and identified the defendant as the perpetrator. *Young*, 661 S.W.2d at 638-639. The court held that the evidence of uncharged crimes was properly admitted because it found the defendant's methodology in the three attacks sufficiently unusual and distinctive, thereby establishing the defendant as the perpetrator of all three crimes. *Id.* at 640. Specifically, the court pointed to the following evidence as tending to prove appellant was the unknown perpetrator of the charged crime: that all three of the victims accepted rides from defendant on the premise that he would take them home; defendant drove all three to secluded parking lots and parked his car so close to another vehicle that the victims were unable to escape from the passenger side; defendant threatened victims in a similar manner; before attacking his victims, defendant first discussed oral sodomy; finally, in all three cases, defendant attempted or succeeded in committing oral sodomy upon his victims. *Id.* at 640.

Likewise, in *McDaniels*, the court found the methodology of attack of the uncharged crime and the charged crime "sufficiently similar to earmark them [both] as the handiwork of the accused." *McDaniels*, 668 S.W.2d at 233. The court related the unique methodology as follows: both the uncharged and charged crime occurred in the same general vicinity; neither woman had any prior acquaintanceship with her attacker; in each attack, defendant grabbed his victim and exhibited his knife to emphasize his threat; each time, defendant completely disrobed his victim before

engaging in both anal sodomy and intercourse; and in each case defendant used vasoline when sodomizing his victim. *Id.* The court recognized that there were dissimilarities in the two attacks, but stated “the differences pale in comparison to the striking similarities, and therefore, go to the weight, not the admissibility of the testimony.” *Id.*

In *Thurman*, the defendant was charged with first degree assault and armed criminal action after he shot a woman sitting in her car when she refused to give him her purse. *Thurman*, 887 S.W.2d at 405. At trial, the state introduced evidence that the defendant committed a subsequent assault against another victim, to which he confessed. *Id.* at 408. The defendant challenged the admission of his confession to the uncharged assault and to the admission of ballistics evidence showing that the bullet and shell casing recovered from the scene of the charged crime was fired from the same gun as the bullet and shell casing recovered from the scene of the uncharged crime to which the defendant confessed. *Id.* The Missouri Court of Appeals, Western District, found that evidence relevant and admissible because it had a “legitimate tendency to directly establish [the defendant’s] identity” as the person who committed the crime for which he was on trial, and as such found that the trial court “did not err, plain or otherwise,” in admitting such evidence. *Id.* at 409.

In this case, the two robberies were sufficiently similar in time, place, and method, which tended to prove that both robberies were the handiwork of appellant and Davis. Evidence that appellant and Davis were the men who robbed the

McDonald's Bar thus tended to prove that appellant and Davis were also the men who committed the crime for which appellant was on trial (the IGA robbery). Because identity was an issue in this case, and because the two robberies were sufficiently similar, the trial court did not abuse its discretion in allowing the State to present testimony and argument regarding the McDonald's Bar robbery because such evidence was logically and legally relevant to prove the identity of the IGA robbers.

II.

The trial court did not plainly err in entering sentence and judgment against appellant although the jury had not been sworn because appellant waived the error by not raising an objection until after the jury had returned its verdict and had been discharged. Nor has appellant shown how he was prejudiced by this error in that he has not shown how the absence of the oath meant that he was unfairly tried when the venire panel was sworn, the jury was given numerous instructions to ensure the fairness and integrity of the jury's deliberations, and the jury is presumed to follow the court's instructions.

On appeal, appellant alleges that because the jury was not sworn to "well and truly try the case" after it was empaneled, he was denied his constitutional right to trial by jury, and the jury's verdict was void (App. Br. 42). Because the jury's verdict

was void, appellant asserts that the trial court plainly erred by entering sentence and judgment against him because it did not have *jurisdiction* to do so (App. Br. 42).¹²

A. Relevant Facts

The case was tried to a jury from March 7, 2005 to March 14, 2005 (Tr. 2-10). The jury returned a guilty verdict on all counts on March 14, 2005, which the trial court received without objection (Tr. 1191-1194). The jury was polled after announcing its verdicts and all jurors indicated it was their verdict (Tr. 1194-1196). The jury was discharged without objection (Tr. 1202-1203).

¹²In his Point Relied On, appellant argues that the court had no “jurisdiction” to enter sentence and judgment because appellant had not been found guilty by a properly sworn jury (App. Br. 42). Appellant does not develop this argument in his argument section. Regardless, the failure to swear a jury cannot be characterized as a jurisdictional flaw. Jurisdiction in a criminal case attaches as a result of the issuance of the indictment or information. §541.020; Supreme Court Rule 22.01.

At some point following trial, for reasons the record does not reflect, the court reviewed the trial record and had the court reporter review her notes, and determined that the jury had not been sworn, though the venire panel had been sworn at the beginning of voir dire (L.F. 186). The court notified counsel, who included the issue in the motion for new trial (L.F. 160-162, 186). There was a hearing on the motion for new trial on April 22, 2005; however, there is not a record of the hearing (L.F. 12).

On April 26, 2005, the court issued an order denying appellant's motion for new trial (L.F. 186). The order addressed the court's apparent failure to swear the jury after it was empaneled:

With respect to the Court's apparent failure to administer the usual oath to the jury after empaneling the jury, despite announcing its intention to do so on the record, as brought to the attention of counsel after the Court reviewed the Court's trial notes and the court reporter reviewed her official notes, the Court finds that the members of the jury were sworn as members of the venire panel and questioned under oath as to their ability to follow the instructions of the Court and their qualifications to serve as jurors in the above styled cause, they were found qualified as jurors in this case, were empaneled and instructed by the Court without objection; were polled as to their verdicts and adopted their verdicts; the verdicts were accepted and ordered filed and the jury

discharged, all without objection. The Court therefore finds that the jury was sworn and any irregularity in the oath has been waived by defendants for failure to timely make an objection; that no other grounds to grant a mistrial per 547.020 RSMO nor to enter a judgment of acquittal have been raised by either defendant.

(L.F. 186). Then on May 13, 2005, the trial judge sentenced appellant as a persistent offender to consecutive terms of life imprisonment 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. 187-193; Sent. Tr. 26-27).

On appeal, appellant alleges that because the jury was not sworn to “well and truly try the case” after it was empaneled, he was denied his constitutional right to trial by jury, and the jury’s verdict was void (App. Br. 42). In reviewing appellant’s claim, the Missouri Court of Appeals, Eastern District, concluded:

We believe that under controlling precedent of the Missouri Supreme Court, where the record fails to show that the jury was sworn to try the case at any point before they began to deliberate, the trial court plainly erred.

State v. Bainter, No. 86381, *slip. op.* at 9 (Mo. App. E.D. June 6, 2006). The court stated that it would reverse the judgment of the trial court and remand for a new trial, but because of the general interest and importance of the issue of the effect of the

failure to swear the jury in a criminal case, and for the purpose of reexamining existing law, transferred the case to this Court pursuant to Rule 83.02. *Id.* at 9-10.

B. Analysis

Respondent recognizes that a jury is to be impaneled and sworn before the trial proceeds. §546.070. Also, Missouri Supreme Court Rule 27.02(d) states that the order of trial in a felony case requires that “[a] qualified jury shall be selected as provided by law and shall be sworn well and truly to try the case.” The *Bench Book for Missouri Trial Judges*, provides the language of the oath used in Missouri to swear 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 case, in which the State of Missouri is plaintiff and _____ is defendant, and a true verdict render according to the law and the evidence so help you God. Be seated please.

Bench Book, Vol. V, Ch. 3, Section 3.9(5) (1998).

The precedent that the Eastern District found to be controlling was a trio of cases from

early Missouri jurisprudence: *State v. Mitchell*, 97 S.W. 561 (1906), *State v. Berry*, 195 S.W. 998 (1917), and *State v. Frazier*, 98 S.W.2d 707 (1936). *Mitchell* held that a verdict by an unsworn jury was a nullity. *Mitchell*, 97 S.W. at 562. The Court reached that result based on the formalistic view that because Missouri law

(§546.070 and Rule 27.02) required a jury to be impaneled and sworn, then until a jury was sworn, it was not “lawfully constituted” and could not render a legal verdict. *Mitchell*, 97 S.W. at 562. Similarly, the Court in *Berry* reversed the judgment and remanded the case because the record did not show that the jury was sworn, citing to *Mitchell*. *Berry*, 195 S.W. 998 (1917).

State v. Frazier is the most recent case dealing with this issue. *Frazier*, 98 S.W.2d 707 (1936). *Frazier*, however, did not involve a situation where the jury was never sworn, but instead involved the untimely administration of an oath to the jury, after five witnesses had already testified. *Frazier*, 98 S.W.2d at 715. The defendant did not object to the oath even though it was not administered at the “threshold of the trial.” *Id.* The court recognized the holding in *Mitchell*, but stated that “a party may waive irregularities in the swearing of the jury, where there has been substantial compliance with the statute.” *Id.* The *Frazier* court went on to affirm the defendant’s sentence, holding that if a jury is sworn before they begin to deliberate, the error is not fatal, and if the defendant fails to object, as was the situation in that case, the error is waived altogether. *Id.* at 716.

In this case, the members of the empaneled jury did not raise their right hands and swear or affirm to “well and truly try the case” prior to deliberations. Respondent asserts that the failure to administer the formal oath by itself should not serve as a ground for overturning an otherwise lawful verdict where a defendant does not raise an objection until after the verdict has been returned. Contrary to appellant’s

assertion that appellant's jury was nothing more than twelve people "pulled in off the street and asked to issue a decision," respondent asserts that the record reflects that the twelve people selected to hear appellant's case did well and truly try the case, even though the formal oath was not administered.

Such a holding would not be without precedent. Authorities from other jurisdictions have addressed this issue. Some courts have "squarely rejected the proposition that a criminal verdict by an unsworn jury is a nullity, concluding instead that a complete failure to swear the jury is akin to other objections to the jury's competency or the impartiality of its deliberations, and likewise must be raised timely and must be prejudicial." *State v. Vogh*, 41 P.3d 421, 426 (Or. App. 2002). See also *Sides v. State*, 693 N.E.2d 1310, 1312 (Ind. 1998), and *State v. Arellano*, 125 N.M. 709, 712, 965 P.2d 293 (1998).

In *Vogh*, the Oregon Court of Appeals addressed a claim of whether the complete failure to swear a jury deprived a defendant of the right to a trial by jury and whether a verdict by an unsworn jury is a nullity and therefore void. *Vogh*, 41 P.3d at 423. The court noted that no Oregon case was directly on point. *Id.* at 425. Admittedly, the court in *Vogh* noted that its review of case law from other jurisdictions showed that authority was divided and that no particular consensus existed. *Id.* However, the court found that many of the cases that held that a verdict by an unsworn jury is a nullity were dated and reached that result "based on the formalistic view that, until sworn, the jury is not 'lawfully constituted' and cannot

render a legal verdict.” *Id.*¹³ The court cited Missouri’s *State v. Mitchell* as an example of such a case. *Id.*

Ultimately, the *Vogh* court held that the defendant’s claim should be held to the same standard that Oregon courts apply to other “fair trial” objections, and so in the absence of a timely objection, “the failure to administer an oath to the jury, without any other showing of juror misconduct or prejudice, will not serve as a

¹³Not all cases based on the formalistic view of the jury are dated. In its opinion below, the Court of Appeals cited to *Keller v. State*, 583 S.E.2d 591, 593 (2003)(finding that a defendant may not waive the trial court’s complete failure to administer an oath to the jury), and *State v. Godfrey*, 666 P.2d 1080, 1082 (1983)(in dicta stating that if oath had not been given at all, instead of five minutes after the jury began deliberations, the court would have reversed even absent any showing of actual prejudice).

ground for overturning an otherwise lawful verdict.” *Vogh*, 41 P.3d at 429. In reaching its decision to follow a more functional approach, the *Vogh* court found that the “absence of the oath does not mean – at least not in any necessary way – that the defendant was unfairly tried” and explained the other safeguards in place to ensure a fair trial:

The oath does not stand alone as the sole procedure that guarantees that the jury will try the case based on the admissible evidence and the applicable law. To the contrary, numerous additional mechanisms serve the same purpose, including but not limited to *voir dire*, peremptory juror challenges, precautionary instructions channeling the jury’s deliberations, the vigilance of an unbiased trial judge, and representation by competent counsel.

Id. at 428.

In *State v. Sides*, the Indiana Supreme Court held that any error in failing to swear the jury at all was waived by the defendant’s failure to make a timely objection. *Sides*, 693 N.E.2d 1310, 1312 (Ind. 1998).

In *State v. Arellano*, the defense counsel admitted that he was aware that the jury had not been sworn and that as a tactical move he deliberately did not call this to the trial court’s attention until after the jury returned its verdict and was finally discharged. *Arellano*, 965 P.2d at 294. The trial court recalled the jurors after they had returned their verdict and had been discharged, administered the oath, and

asked if the jurors had followed the oath during trial and deliberations in rendering its verdict. *Id.* The court noted that the purpose of administering the oath to jurors is to “ensure that the jurors conduct themselves at all times as befits one holding such an important position.” *Id.* at 295. The court found that although the jury was not administered the formal oath before they rendered the verdict, the jury understood the “spirit of the oath” and purpose of the jury selection process because it was emphasized in the voir dire procedures and jury instructions. *Id.* Specifically, the court referred to the voir dire questions and jury instructions that not only impressed upon the jurors the solemnity of the jury selection process and its important purpose to find impartial persons to try the case, but also made the jury understand their duty to determine facts of the case only from the evidence presented in court, and to deliver a verdict free from prejudice. *Id.*

Admittedly, *Arrellano* differs from the present case slightly because in affirming the judgment, the court noted favorably the fact that the trial court recalled the jury *after* it had rendered a verdict and was discharged, administered the oath, and ascertained that the jurors understood the solemnity of the proceedings and had been committed to performing their duty to decide the case on the evidence and follow the law as fair and impartial jurors. *Id.* Here, the trial court did not recall the jury after it rendered its verdict in order to conduct such an examination. Nonetheless, it is telling that the *Arrellano* court thought it was more important that

the jury acted in accordance with the oath in rendering their verdict than actually being sworn before deliberating.

Another difference in *Arrellano* is that the record in *Arrellano* showed that the defendant purposely did not bring the failure to swear the jury to the court's attention until after the verdict. *Id.* at 296. The court found that the actions of the defendant's counsel constituted not only a waiver of his client's right to a sworn jury, but also a poor tactical move that the court would not reward. *Id.* Finally, the court found that there was nothing in the record to show that the failure to administer the oath until after the verdict in any way prejudiced the defendant. *Id.*

First, respondent asserts that the failure to administer the formal oath by itself should not serve as a ground for overturning an otherwise lawful verdict where a defendant does not raise an objection until after the verdict has been returned. See *Vogh*, 41 P.3d at 429; *Sides*, 693 N.E.2d at 1312. In arguing to the contrary, appellant urges only that, in criminal cases, the complete failure to swear the jury implicates the defendant's constitutional right to a fair trial by an impartial jury and renders a trial fundamentally unfair (App. Br. 48-49). Appellant equates this to structural error that defies analysis by harmless error standards (App. Br. 48-49). However, appellant cites no cases that so hold and in fact, numerous cases addressing other issues that implicate a defendant's right to a fair trial by an impartial jury – such as juror misconduct – do not treat it as structural error.

Rather, as a rule, a defendant must timely raise and preserve a claim that some aspect of the trial violated his right to a fair trial by an impartial jury. See generally, *State v. Merritt*, 750 S.W.2d 516, 518 (Mo. App. W.D. 1988)(a defendant who is aware of juror misconduct cannot gamble on a verdict by remaining silent and thereafter take advantage of the matter by first asserting it in a motion for a new trial); see also *State v. Vinson*, 503 S.W.2d 40, 41 (Mo. App. Springfield Dist. 1973), and *State v. Brown*, 599 S.W.2d 498, 502 (Mo. banc 1980)(appellant's knowledge of the alleged juror misconduct prior to the conclusion of trial prevented its consideration when raised for the first time in the motion for new trial). Moreover, to be entitled to relief on such a claim, the objectionable procedure must actually be prejudicial to the defendant's interests. *Vinson*, 503 S.W.2d at 42 (trial judge heard the evidence offered concerning a magazine jurors looked at during the trial and concluded no prejudice to the defendant resulted).

The same is true of related claims, such as those involving a juror's actual eligibility and qualifications to serve as a juror. A defendant must raise an objection to the juror's competency or eligibility in a timely way and cannot, instead, do so only after gambling on a favorable jury verdict. See e.g., *State v. Hamilton*, 996 S.W.2d 758, 761 (Mo. App. S.D. 1999)(Failure to object to jurors selected and affirmatively expressing satisfaction with the jury waives any claim concerning the jury or the manner of its selection, even when those claims of error are constitutionally based).

Appellant has not provided a reason why this court should treat a failure to administer the oath to the jury as more fundamental in nature – and thus, “structural” – than the jurors’ actual performance of their duties in conformance with that oath, or the jurors’ eligibility or competence to be jurors. In *Vogh*, the court stated that:

In so observing we do not denigrate the significance of the jury’s oath or its value in vindicating a defendant’s fundamental constitutional rights to a fair trial before an impartial jury. [citation omitted] But neither do we elevate it above the other aspects of our trial procedures that serve the same ends.

Vogh, 41 P.3d at 428. See also *Sides*, 693 N.E.2d at 1312.

Second, the record of this case demonstrates that the twelve people selected to hear appellant’s case did “well and truly try the case,” even though the formal oath was not administered. Members of the jury were sworn as members of the venire panel and questioned under oath as to their ability to follow the instructions of the court and their qualifications to serve as jurors. The record reflects that after the venire panel was empaneled, the court described the importance of *voir dire* to select a jury of qualified and impartial people (Tr. 28). The court asked the members of the venire panel to raise their right hands, and read the following oath to them: “Do each of you solemnly swear or affirm that you will give true answers to such questions as may be asked of you by court and counsel, touching on your qualifications to serve as jurors in this cause now coming for trial so help you?” (Tr.

28). The venire members responded, “I do” (Tr. 28). It should thus be presumed that the jurors did answer questions truthfully when they indicated during voir dire that they could be fair and unbiased, and could follow the instructions of the court.

There were other safeguards present in this case that ensured that appellant had a fair trial by an impartial jury. The venire panel was instructed that the charge of any offense is not evidence and creates no inference that any offense was committed, or that either defendant was guilty of an offense; that the defendants were presumed to be innocent unless and until they found them guilty; and that the State had the burden of proving beyond a reasonable doubt that either defendant was guilty (Tr. 29-30). After the jurors were empaneled, they were instructed that at the conclusion of the trial they would receive further instructions regarding the rules they had to follow in their deliberations; that jurors must follow established rules; that it was their duty to follow the law as the trial court gave it to them; that nothing the court said or did was intended to indicate the court’s opinion of the facts; that it was the jury’s duty to determine the facts only from the evidence and reasonable inferences; that their decision had to be based only on the evidence presented to them in the courtroom; that they had to decide the witnesses’ credibility, and the weight and value of the evidence; that questions, opening statements, and statements or arguments of the attorneys address to another attorney or to the court were not evidence; and that they should draw no inference from the fact an objection was made, and should disregard a question should an objection be sustained (Tr.

312-316). The jury also received the standard instructions after the evidence was concluded and before the case was submitted to them for deliberation (Tr. 1085-1138).

Clearly, the twelve people chosen after voir dire questioning by both parties to sit in judgment of appellant and his co-defendant were not merely people “pulled in off the street and asked to issue a decision.” Like the jury in *Arellano*, appellant’s jury understood the “spirit of the oath” because it was emphasized in the voir dire procedures and jury instructions. Appellant’s jury understood the solemnity of the proceedings and their duty to well and truly try the case even though they did not swear to that phrase. As the court in *Vogh* found, “[t]he oath does not stand alone as the sole procedure that guarantees that the jury will try the case based on the admissible evidence and the applicable law.” *Vogh*, 41 P.3d at 428.

Finally, in its opinion the Missouri Court of Appeals, Eastern District stated that in Missouri swearing a jury is not a mere formality because jeopardy attaches when a jury is impaneled and sworn, and double jeopardy protection may be applicable thereafter. *State v. Bainter*, No. 86381, *slip op.* at 9 (Mo. App. E.D. June 6, 2006). At first glance, the court’s argument seems ominous: if the jury is not sworn, then jeopardy has not attached, and a defendant might fall victim to being put twice in jeopardy for the same offense; in such a circumstance, how would a defendant protect himself from an overzealous prosecutor?

What seems to be a quandary, upon further examination, is not problematic. Although it is an oft-repeated maxim that the double jeopardy clause attaches in a jury trial when the jury is empaneled and sworn, it does not take much searching to find that this is not a bright-line rule. For example, in cases where the jury fails to agree on a verdict, where the trial court has declared a mistrial (not due to the state's misconduct), or where the trial court terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence, although the jury has been sworn, jeopardy has not attached because there has been no finding as to the defendant's guilt or innocence. See *State v. Smith*, 988 S.W.2d 71, 78 (Mo. App. W.D. 1999)(discussing when jeopardy attaches and when double jeopardy provision is applicable); *Serfass v. United States*, 420 U.S. 377, 391-392, 95 S.Ct. 1055 (1975)(finding that jeopardy does not attach unless a question of the defendant's guilt or innocence is involved).

Conversely, where there *has* been a finding as to the defendant's guilt, as in this case, jeopardy would necessarily attach even though the jury was not formally sworn. Double jeopardy analysis does not end simply because the jury was not sworn as the Court of Appeals suggests. Because appellant was convicted in this case, he would be protected by the double jeopardy clause from being re-tried for the same offenses. This is because the double jeopardy clause protects, in applicable part, "against a second prosecution for the same offense *after conviction*."

And it protects against multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969)(emphasis added).

This analysis would also hold true if the defendant had been acquitted by a jury that had not been sworn. To hold otherwise, and to find that jeopardy did not attach because the jury was not sworn, would necessarily mean re-trying a defendant even after an acquittal by an unsworn jury. Also, in *Vogh*, *Sides*, and *Arellano*, it is interesting to note that the courts were seemingly unconcerned about the possibility that the defendants in those cases would lack the protection of the double jeopardy clause because their respective juries were not sworn. Perhaps this is because these courts recognized that because the defendants had been convicted, jeopardy had attached.

In sum, the purpose of the oath is to awaken the conscience of the jury and impress upon the jurors the serious duty imposed upon them. *Arellano*, 965 P.2d at 295. Clearly, the voir dire process and jury instructions awakened the conscience of the jury and impressed upon the jurors the serious duty imposed upon them. So, although the empaneled jury was not administered a formal oath, appellant received a fair trial by an impartial jury. Further, appellant waived the defect in the administration of the oath because he failed to raise an objection until after the verdict had been returned and the jury dismissed. Finally, even though the jury was not sworn, appellant would be protected by the double jeopardy clause from being

re-tried for the same offenses because he was convicted. Appellant's claim should be denied.

III.

The trial court did not err in overruling appellant's motion for a judgement of acquittal on Counts 3, 5, 7, 9, 11, 13, and 15, the felonious restraint of Brian Moore, Sean Moore, James Vails, Rachel Wilman, Renee Hudson, Terry Pointer, and Kenneth Condor (as well as the corresponding counts of armed criminal action), because the evidence was sufficient to show that appellant unlawfully restrained these seven people and exposed them to a substantial risk of serious physical injury in that the evidence showed that appellant prevented these seven people from leaving the IGA grocery store by brandishing a gun and then forced them to enter the store's meat cooler, again by brandishing a gun, told them to stay inside the cooler, where the temperature was kept in the low thirties, and shut the door to the cooler.

Appellant argues that the evidence was not sufficient to support the seven counts of felonious restraint, and the corresponding armed criminal action counts, because putting the seven robbery victims inside a meat cooler from which they easily let themselves out did not create a substantial risk of serious physical injury (App. Br. 50).

A. Standard of Review

In reviewing a claim that evidence was insufficient, this Court determines whether there is sufficient evidence from which a reasonable finder of fact could make a finding beyond a reasonable doubt. *State v. Warren*, 141 S.W.3d 478, 489

(Mo. App. E.D. 2004); *State v. Langdon*, 110 S.W.3d 807, 811 (Mo. banc 2003). In applying this standard, this Court views the evidence in the light most favorable to the State and grants the State all reasonable inferences from the evidence, disregarding all contrary evidence and inferences. *State v. Warren*, 141 S.W.3d at 489-490. This Court does not weigh the evidence. *Id.* at 490. In this situation, the jury determined the credibility of the witnesses, and was entitled to believe all, some, or none of the testimony of the witnesses. *Id.*

B. Analysis

Appellant was charged with seven counts of felonious restraint, one count for each person present at the IGA on January 3, 2004 (L.F. 98-108). 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.” §565.120. The information charged appellant with felonious restraint as follows:

[O]n or about January 3, 2004, in the County of St. Charles, State of Missouri, [] the defendant, acting in concert with another, knowingly restrained [name of victim], unlawfully and without consent so as to interfere substantially with his liberty and exposed [victim’s name] to a substantial risk of serious physical injury.

(L.F. 99).

There is no requirement that the restraint involved occur over a long period of time; rather, the issue is whether the restraint was itself substantial. *State v. Abel*, 939 S.W.2d 539, 541 (Mo. App. E.D. 1997). Serious physical injury is defined in §565.002, as “physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.”

In determining whether the defendant exposed the victim to a substantial risk of serious physical injury, this Court has found that:

Whether the victim suffered serious physical injury is irrelevant. Also, the use of a dangerous weapon is not required to prove felonious restraint. . . .

Whether unlawful restraint exposes a victim to the risk of serious physical injury is to be determined from all of the circumstances. . . . Missouri courts . . . [focus] on the defendant’s behavior for evidence of physical intimidation or violence which, if repeated or carried further, could have seriously injured the victim or threats of or the propensity to commit violence which, if carried out, could have seriously injured the victim.

State v. Smith, 902 S.W.2d 313, 315 (Mo. App. E.D. 1995); *State v. Cobbins*, 21 S.W.3d 876, 878 (Mo. App. E.D. 2000). “Threat of injury from a weapon is sufficient to substantiate the charge” of felonious restraint. *State v. Brigman*, 784 S.W.2d 217, 221 (Mo. App. W.D. 1989).

In this case, the evidence was sufficient to sustain appellant’s conviction for seven counts of felonious restraint. Appellant, acting with another, interfered

substantially with the freedom of the seven people in the IGA grocery store on January 3, 2004, by entering the store with a gun and pointing it at people, preventing the seven people from leaving the IGA and making them sit or lie on the ground, and finally forcing them to enter a meat cooler, where the temperature was kept in the low thirties, telling them to stay there, and shutting the door to the cooler (Tr. 337, 342-345, 379, 391-392, 397, 403-404, 406, 420, 461, 464, 479, 483). This restraint was substantial. *Abel*, 939 S.W.2d at 541.

In restraining Brian Moore, Sean Moore, James Vails, Rachel Wilman, Renee Hudson, Terry Pointer, and Kenneth Condor, appellant, acting with another, exposed them to a substantial risk of serious physical injury when he brandished a gun at the people in the store and ordered them to follow his directions: appellant poked his gun in the back of Brian's neck to get Brian to show him the safe; appellant ordered one customer to the front of the store, and ordered another customer who was about to leave the store to stay inside the store; appellant, acting with another, "watched" the employees and customers at the front of the store while holding a gun and made one employee take the cash drawer out of a register; appellant ordered Brian at gun point to give him the store's money, and finally, appellant ordered the seven people to walk to the back of the store and into a 10' x 15' meat cooler (Tr. 344-346, 348-349, 366-367, 391-392, 394-395, 403-404, 406-407, 421, 461, 464, 471, 473, 484-485, 487).

Appellant asserts that the robbery victims were only restrained when they were physically in the meat cooler (App. Br. 53). Next, appellant argues that it “stands to reason that the risk of harm must flow from the circumstances of the restraint itself,” and argues that placing the robbery victims in a meat cooler from which they easily let themselves out did not create a risk of serious physical injury (App. Br. 50, 52). Appellant also argues that finding that the robbery victims were restrained by the robbers’ guns would mean that every armed robbery would also be a felonious restraint (App. Br. 53-54).

Appellant’s arguments to the contrary, there was sufficient evidence to support appellant’s convictions for felonious restraint. In this case, appellant substantially interfered with the victims’ liberty by using guns to “tell” the victims where they could and could not go inside the store and then using guns to direct the victims into a meat cooler. The fact that the victims were able to exit the meat cooler because the door happened to unlock from the inside, and because the store owner was brave enough to leave the cooler, does not mean that there was insufficient evidence that appellant and Davis exposed the victims to a substantial risk of serious physical injury in retraining them, through the threat of guns, in the meat cooler. The fact that appellant used a gun to threaten and control the robbery victims was sufficient evidence to substantiate the charges of felonious restraint. *Brigman*, 784 S.W.2d at 221. Additionally, finding that there was sufficient evidence to support appellant’s convictions for felonious restraint would not make every armed robbery a felonious restraint

as well. The crime of felonious restraint requires a “substantial interference” with liberty, which would not be the case in all armed robberies. §565.120. In this case, however, there was substantial interference with the victims’ liberty.

The evidence established that appellant, acting with another, exposed the seven people in the IGA grocery store during the robbery to the risk of serious physical injury and interfered substantially with their liberty; therefore, there was sufficient evidence from which the jury could find appellant guilty of felonious restraint. Because the evidence was sufficient to establish appellant’s guilt of the crime of felonious restraint of the seven robbery victims, the trial court did not err in overruling appellant’s motion for a judgment of acquittal on the seven counts of felonious restraint and the corresponding armed criminal action counts. Appellant’s third point on appeal must fail.

Should this Court find that there was insufficient evidence to prove felonious restraint, discharge would not be the proper remedy; in similar circumstances this Court has remanded for entry of judgment of conviction and sentencing for false imprisonment, a lesser included offense of felonious restraint. *Cobbins*, 21 S.W.3d at 879-880.

IV.

The trial court did not err in denying appellant's motion to suppress and in admitting evidence seized from the residential yard where officers were finally able to subdue and arrest appellant and evidence seized from appellant at the hospital because all of this evidence was seized incident to a lawful arrest.

Appellant argues that there was no probable cause to arrest him for possessing stolen license plates because he was merely the passenger in the truck, that his arrest could not be justified on any other theory, and that therefore items seized pursuant to his arrest should be suppressed as fruit of an unlawful arrest (App. Br. 57).

A. Standard of Review

Review of a trial court's ruling on a motion to suppress is limited to determining whether the evidence is sufficient to support the trial court's ruling. *State v. Kampschroeder*, 985 S.W.2d 396, 398 (Mo. App. E.D. 1999). The Court of Appeals views the facts and any reasonable inferences therefrom in a light most favorable to the ruling of the trial court and disregards any contrary evidence and inferences. *Id.* "The fact there is evidence from which the trial court could have arrived at a contrary conclusion is immaterial." *Id.* As long as the trial court's ruling is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* The credibility of witnesses and the weight of the evidence are matters to be resolved by the trial court. *State v. Perrone*, 872 S.W.2d 519, 521 (Mo. App. S.D. 1994). The court may consider the record made at the

pretrial hearing, the record made at trial prior to the introduction of the evidence sought to be suppressed, and the record as it existed when the motion for new trial was denied, for it is at that point that the trial court has made its final determination of the admissibility of the evidence. *State v. Howard*, 840 S.W.2d 250, 251 (Mo. App. E.D. 1992).

B. Relevant Facts

On January 4, the day after the IGA robbery, St. Peters detective Michael Helm was off duty, when he saw a white Chevrolet full-size pickup pull in front of his house (Tr. 508). The driver had black hair and a mustache, and the passenger was a “heavier-set” man with a big mustache and a long bushy beard (Tr. 509). Detective Helm 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).

Detective Helm called the St. Peters police department and had them run the license plate on the truck (Tr. 514). He learned that the license plates had been reported stolen (Tr. 514). Because Helm lived in O’Fallon, he then called the O’Fallon police and reported the information (Tr. 514-515). As Helm was waiting for the police to arrive, the passenger got back into the truck and the men drove away, so Helm got into his car and followed them in order to update their location for the O’Fallon police (Tr. 515). The police soon arrived, and Helm returned home (Tr. 515).

Officer Steve Schneider was one of the O’Fallon police officers who was dispatched to find the truck Helm had reported (Tr. 517). As Officer Schneider was

driving to the area, a pickup truck matching the description he was given pulled right in front of him (Tr. 518). After verifying that the license plates on the truck had been reported stolen, Officer Schneider activated the lights on his marked police car, and stopped the truck in the parking lot of a daycare (Tr. 518-519). Because he stopped the truck for having stolen plates, Schneider got out of his car, drew his gun, and stayed behind the door to his patrol car (Tr. 521). He ordered the driver of the truck to throw his keys out of his open window (Tr. 521-522). Before he could do so, however, the driver briefly looked over his right shoulder, and then drove off through the parking lot, jumped a curb, drove through a grassy area, and then went north on Bryan Road (Tr. 522). The driver was Robert Davis and the passenger was appellant (Tr. 530-531, 556). Officer Schneider would have arrested appellant and Roger Davis for possessing stolen license plates had the two men not fled (Tr. 535).

Officer Schneider got back into his car, activated his lights and sirens, and began to follow the pickup truck north on Bryan Road (Tr. 525). The truck came to the I-70 interchange, crossed over the highway, and then turned the wrong way, heading east down the off-ramp for westbound traffic on I-70 (Tr. 525). Schneider made a u-turn, crossed back over I-70, and went east on I-70 (Tr. 528). Schneider was able to keep the truck in sight for about a quarter of a mile, until a hill and traffic blocked his view (Tr. 528). There was other traffic on westbound I-70 and Schneider

saw that one car had to swerve toward the concrete median to avoid the pickup that was driving the wrong way down I-70 (Tr. 526).

Schneider saw the white pickup truck in the grassy median north of the interstate (Tr. 528). He got off at the next exit and drove to where the truck had been abandoned (Tr. 528). Other officers responded to the scene (Tr. 529, 537). One of those officers was Chad Gerler, who drove westbound on I-70 to try and find the truck, and to slow traffic down (Tr. 537). He spotted the truck and saw Robert Davis and appellant run from the truck and climb over a fence, heading north (Tr. 538). Officer Gerler stopped his car and chased the men on foot, telling them that they were under arrest (Tr. 538). He saw that appellant was carrying a camouflage bag in his hand, and Davis was carrying a red bag (Tr. 541). Gerler continued to give loud verbal commands to the men to stop running because they were under arrest; it was apparent that the men knew they were being chased because appellant kept looking back at Gerler (Tr. 542).

Officer Gerler lost sight of Davis, but was able to catch up to appellant in the yard of a private residence at 750 Danny Lane (Tr. 542, 550). When Gerler attempted to tackle appellant, he did not fall to the ground because he was so large, but the contents of the bag he was carrying did fall onto the ground (Tr. 542-543). Gerler then struck appellant in the thigh with his baton in an attempt to get him to the ground (Tr. 543). This did not work, and appellant attempted to grab a hold of the baton (Tr. 543). Finally, Gerler pointed his weapon at appellant until another officer

reached them (Tr. 543-544). When another officer arrived, appellant was finally subdued and handcuffed (Tr. 544).

Gerler found the camouflage fanny pack that appellant had been carrying lying open on the ground (Tr. 545, 889, 895). There were live rounds of 44 and 22 caliber ammunition and five rolls of quarters in the fanny pack and nylon gloves, a empty black holster, and an empty Winchester box that had contained 44 caliber Magnum rounds on the ground near the fanny pack (Tr. 545, 547-548, 550-552, 889, 892-893, 896-899, 904-906). Four of the five rolls of quarters were wrapped in white paper with orange writing on it, and the other roll was wrapped in brown paper (Tr. 898-900). An address book with appellant's name on it and Davis' address in it was also in the pack (Tr. 903-904). A piece of paper in the fanny pack had handwritten directions that said "to Highway 270, North on 70, go north, and Missouri Bottom Road" (Tr. 903). Officers thought this might relate to the investigation of the robbery of the McDonald's Bar that was located in the area of Missouri Bottom Road and Villa Donna in Hazelwood (Tr. 903, 1012). Gerler found a loaded 44 caliber revolver underneath some bushes in the area where he had struggled with appellant (Exhibit 1) (Tr. 545, 548, 550-551, 889, 892-893).

Appellant was taken to a hospital to be treated for injuries he received in the course of being arrested (Tr. 604). At the hospital, O'Fallon police officer Michael Magrew seized appellant's clothing and other possessions, including a green and black flannel jacket, a pair of shorts, a pair of sweat pants, a shirt, a pair of tennis shoes that had been spray painted

black, and a maroon ski mask that was in a pocket of the jacket (Tr. 605, 607, 964-966). Officer Magrew found a roll of cash in the pocket of appellant's shorts, a large amount of cash that had been folded in half in the pocket of the sweat pants, and small amounts of cash in various other pockets (Tr. 607-608). 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. 971-979). One of the \$20 bills had staple-like holes in it (Tr. 977-978).

Appellant did not object to any of Gerler's testimony about the evidence he found incident to appellant's arrest at 750 Danny Lane (Tr. 545-548). Nor did appellant object to the testimony of Tiffany Fischer, the crime scene investigator from the St. Charles County Sheriff's Department, regarding her seizure of the items found by Officer Gerler at 750 Danny Lane (Tr. 889-893). When the State moved to admit the items seized during Ms. Fischer's testimony, for example the actual gun Gerler found in the bushes, defense counsel objected "based upon the objections previously stated" (Tr. 893). Defense counsel then asked the court to consider her objection as a continuing one for each of the items seized from 750 Danny Lane (Tr. 895).

Again, appellant did not object to any of Gerler's testimony about the evidence he seized from appellant at the hospital (Tr. 607-608). Nor did appellant object to the testimony of Tiffany Fischer regarding that evidence (Tr. 964). It was only when the State sought the admission of the actual items seized, that appellant objected (Tr. 965-966, 970-980).

Prior to trial appellant filed a motion to suppress the evidence seized incident to his arrest, and testimony regarding that evidence, on the basis that his arrest was unlawful (L.F. 52-53). Now on appeal, appellant argues that the trial court erred in permitting the State to introduce “all evidence” concerning items seized from 750 Danny Lane and the hospital (App. Br. 57).

C. Preservation – appellant waived his claim as to testimony about items seized from him from 750 Danny Lane and the hospital.

To the extent that appellant argues on appeal that the trial court erred in allowing *testimony* regarding the items seized incident to appellant’s arrest, this claim is not preserved for appeal. At trial, appellant did not object to the testimony regarding this evidence, and only specifically objected to the admission of the actual items seized from the yard at 750 Danny Lane and at the hospital. Because appellant never objected, in a timely or untimely manner, to the trial *testimony* regarding those items, appellant waived any claim of error regarding the trial court’s admission of that testimony. Failure to object at the earliest opportunity to the admission of evidence constitutes a waiver of the claim on appeal. *State v. Cosby*, 976 S.W.2d 464, 467 (Mo. App. E.D. 1998). *See State v. Olivares*, 868 S.W.2d 122, 127 (Mo. App. W.D. 1993)(point on appeal waived where objection to testimony not made until line of inquiry had ended and exhibit was offered). A party on appeal is held to the specific objections presented to the trial court. *State v. Reed*, 971 S.W.2d 344, 348 (Mo. App. W.D. 1998). If this Court should choose to review this claim, it is reviewable for plain

error only. *State v. Rousan*, 961 S.W.2d 831, 842 (Mo. banc 1998), *cert. denied* 524 U.S. 961 (1998).

D. Analysis

To begin with, appellant can not show that he was prejudiced by the admission of actual evidence (the gun, money, ski mask, etc.) into evidence because Officer Gerler and Ms. Fischer testified – without objection – regarding the items seized from appellant (Tr. 545-548, 607-608, 889-893, 964). A defendant suffers no prejudice and cannot complain about the admission of evidence over objection where similar evidence is admitted without objection. *State v. Simms*, 131 S.W.3d 811 (Mo. App. W.D. 2004). Additionally, the trial court did not err, plainly or otherwise, in admitting the actual items seized incident to appellant's arrest, including items found lying in the yard at 750 Danny Lane and items seized from appellant at the hospital, or in admitting testimony regarding those items, because that evidence was seized pursuant to a legal arrest.

“The Fourth Amendment of the United States Constitution preserves the right of the people to be secure against unreasonable searches and seizures.” *State v. Miller*, 894 S.W.2d 649, 651 (Mo. banc 1995). A motion to suppress is a tool whereby people “aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may . . . suppress the use in evidence of the property or matter seized.” §542.296.

In this case, appellant was arrested and then the officers seized several of his possessions that were lying in the yard, including ammunition, rolls of quarters, nylon gloves,

an empty black holster, appellant's address book containing Davis' name, a piece of paper with directions to a location where an armed robbery had occurred only a few days prior, and a loaded 44 caliber revolver (Tr. 545-548, 550-552, 889, 892-899, 903-906). Appellant was taken to a hospital after he was arrested and more of his possessions were seized, including a maroon ski mask and a large amount cash (Tr. 604-608, 964-966, 971-979). Pursuant to a valid arrest, a police officer may search an individual's person and the area within the individual's immediate control and may seize items found if the items have evidentiary value in connection with the crime for which the individual is arrested. *State v. Williams*, 978 S.W.2d 454, 459 (Mo. App. E.D. 1998). The issue, therefore, is whether appellant's arrest was valid.

Appellant was arrested without a warrant. An arrest without a warrant is valid only if it is based on probable cause. *State v. Clayton*, 995 S.W.2d 468, 477 (Mo. banc 1999), *cert. denied*, 528 U.S. 1027, 120 S.Ct. 543 (1999). "Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." *Id.* Probable cause must be based on information known to the arresting officer at the time of the arrest and is determined by the collective knowledge of and facts available to all of the officers participating in the arrest; the arresting officer need not possess independent knowledge of all of the available information. *Id.* While an officer may rely on information from another officer in developing probable cause, the State must show that the officer who disseminated

the information had probable cause to have made the arrest himself. *State v. Kinkead*, 983 S.W.2d 518, 519 (Mo. banc 1998).

Appellant argues that the officers did not have probable cause to arrest appellant for possessing stolen license plates (or receiving stolen property) because he was merely the passenger in the truck and there was no other evidence that he possessed the plates (App. Br. 57, 60). Appellant cites to no authority in support of his argument that the fact a truck has stolen license plates must be attributed to the driver, not the passenger, in the absence of other information (App. Br. 60). Officer Schneider was not able to ascertain who owned the truck because the occupants of the truck chose to flee from Schneider when he pulled them over.

Even if there was not enough information for Schneider to have probable cause to arrest appellant for possessing stolen license plates, there was probable cause to arrest appellant by the time he was actually arrested. Appellant and Robert Davis fled from Officer Schneider after he had stopped them for driving a truck with stolen plates and told Davis (the driver) to throw his keys out of the window (Tr. 521-522). Instead of complying, Davis and appellant fled in the truck, and while being pursued by Officer Schneider (who had activated the lights and sirens on his patrol car), they drove the wrong way on I-70 (Tr. 525-526). When they drove the wrong way on I-70, they caused other cars to swerve to avoid them (Tr. 525-526). This conduct provided probable cause to arrest appellant for committing a traffic violation and/or resisting arrest.

Then, both appellant and Davis abandoned the truck on the side of I-70, and fled on foot (Tr. 528, 538). When Officer Gerler began chasing appellant and Davis on foot, he yelled at them to stop because they were under arrest, but appellant merely looked back at the officer and kept running (Tr. 538, 542). The officer continued to command appellant to stop, but he refused to obey (Tr. 538, 542). Again, this conduct provided probable cause to arrest appellant for resisting arrest.

Then, when Officer Gerler was finally able to catch up with appellant in the yard of a private residence at 750 Danny Lane, appellant resisted Gerler, and even attempted to grab a hold of Gerler's baton (Tr. 542-543, 550). Respondent notes that appellant's trial counsel admitted that "when [appellant] and Mr. Davis refused to stop in the stolen truck and when he tussled with Officer Gerler he resisted arrest. When they drove down the highway the wrong direction, that was resisting arrest" (Tr. 1165). Once again, officers had probable cause to arrest appellant when he attempted to grab a hold of Gerler's baton. Appellant was clearly resisting arrest when he attempted to grab the baton.

Once appellant was arrested in the yard of 750 Danny Lane, officers seized items that were found lying in plain view in the area where officers had struggled to arrest appellant, including appellant's open fanny-pack, a gun, and money (Tr. 545, 547-548, 550-552, 889, 892-899, 904-906). Officers also seized appellant's clothing and shoes, and the items in the clothing, at the hospital (Tr. 604-605, 607-608, 964-966, 971-979).

Because there was probable cause for officers to arrest appellant, the trial court did not err, plainly or otherwise, in admitting the evidence seized pursuant to appellant's arrest.

V.

The trial court did not err in overruling appellant's motion for judgment of acquittal at the close of all evidence, nor in entering judgment and sentence for felony resisting arrest because the evidence presented was sufficient to support appellant's conviction in that the evidence showed that law enforcement officers were making an arrest of appellant and Robert Davis for the possession of stolen license plates, that appellant knew or reasonably should have known that the officers were making an arrest, that appellant and Robert Davis resisted the arrest by fleeing from the officers, and that appellant, acting with Robert Davis, fled in such a manner that created a substantial risk of serious physical injury or death to other people.

Appellant argues that the evidence was insufficient to sustain such a conviction for felony resisting arrest in that there was insufficient evidence presented that (1) appellant knew or reasonably should have known that he was being arrested, and (2) that appellant acted together with Robert Davis to flee in a manner that created a substantial risk of serious physical injury or death to any person (App. Br. 63).

A. Standard of Review

"A directed verdict of acquittal is authorized only where there is insufficient evidence to support a guilty verdict." *State v. Holloway*, 992 S.W.2d 886, 889 (Mo. App. S.D. 1999). In reviewing the sufficiency of the evidence to support a criminal conviction, a reviewing court views the evidence, together with all reasonable inferences drawn therefrom, in the

light most favorable to the state and disregards all evidence and inferences to the contrary. *State v. Silvey*, 894 S.W.2d 662, 673 (Mo. banc 1995). Review is limited to determining whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *Id.* Appellate courts do not weigh the evidence or determine the reliability or credibility of the witnesses. *State v. Broseman*, 947 S.W.2d 520, 525 (Mo. App. W.D. 1997). Circumstantial evidence is afforded the same weight as direct evidence. *Hutchison v. State*, 957 S.W.2d 757, 767 (Mo. banc 1997).

B. Relevant Facts

The information charged that appellant, acting in concert with another, committed the class D felony of resisting arrest pursuant to §575.150, RSMo Cum. Supp. 2003 (L.F. 104-105). The verdict-directing instruction instructed the jury as follows:

First, that on or about January 4, 2004, in the County of St. Charles, State of Missouri, Officer Stephen Schneider was a law enforcement officer, and

Second, that Officer Stephen Schneider was making an arrest of the defendant, Paul Bainter, and Robert Davis for possession of a stolen license plate, and

Third, that defendant, Paul Bainter, knew or reasonably should have known that a law enforcement officer was making an arrest of the defendant, Paul Bainter, and

Fourth, that for the purpose of preventing the law enforcement officer from making the arrest, the defendant, Paul Bainter, and Robert Davis resisted by fleeing from the officer, and

Fifth, that Robert Davis fled in such a manner that created a substantial risk of serious physical injury or death to a person or persons in that Robert Davis operated the motor vehicle eastbound in the westbound lanes of I-70 causing westbound vehicles to swerve out of the defendant, Paul Bainter, and Robert Davis' way,

then you are instructed that the offense of resisting arrest has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Sixth, that with the purpose of promoting or furthering the commission of that resisting arrest, the defendant, Paul Bainter, acted together with Robert Davis in committing that offense, then you will find the defendant, Paul Bainter, guilty under Count 18 of resisting arrest.

(L.F. 135).

The evidence in the light most favorable to the verdict is as follows: On January 4, the day after the IGA robbery, St. Peters detective Michael Helm was off duty, when he saw a white Chevrolet full-size pickup pull in front of his house (Tr.

508). The driver had black hair and a mustache, and the passenger was a “heavier-set” man with a big mustache and a long bushy beard (Tr. 509). Detective Helm 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).

Detective Helm called the St. Peters police department and had them run the license plate on the truck (Tr. 514). He learned that the license plates had been reported stolen (Tr. 514). Because Helm lived in O’Fallon, he then called the O’Fallon police and reported the information (Tr. 514-515). As Helm was waiting for the police to arrive, the passenger got back into the truck and the men drove away, so Helm got into his car and followed them in order to update their location for the O’Fallon police (Tr. 515). The police soon arrived, and Helm returned home (Tr. 515).

Officer Steve Schneider was one of the O’Fallon police officers who was dispatched to find the truck Helm had reported (Tr. 517). As Officer Schneider was driving to the area, a pickup truck matching the description he was given pulled right in front of him (Tr. 518). After verifying that the license plates on the truck had been reported stolen, Officer Schneider activated the lights on his marked police car, and stopped the truck in the parking lot of a daycare (Tr. 518-519). Because he stopped the truck for having stolen plates, Schneider got out of his car, drew his gun, and stayed behind the door to his patrol car (Tr. 521). He ordered the driver of the truck to throw his keys out of his open window (Tr. 521-522). Before he could do so,

however, the driver briefly looked over his right shoulder, and then drove off through the parking lot, jumped a curb, drove through a grassy area, and then went north on Bryan Road (Tr. 522). The driver was Robert Davis and the passenger was appellant (Tr. 530-531, 556). Officer Schneider would have arrested appellant and Roger Davis for “possessing stolen license plates” had the two men not fled (Tr. 535).

Officer Schneider got back into his car, activated his lights and sirens, and began to follow the pickup truck north on Bryan Road (Tr. 525). The truck came to the I-70 interchange, crossed over the highway, and then turned the wrong way, heading east down the off-ramp for westbound traffic on I-70 (Tr. 525). Schneider made a u-turn, crossed back over I-70, and went east on I-70 (Tr. 528). Schneider was able to keep the truck in sight for about a quarter of a mile, until a hill and traffic blocked his view (Tr. 528). There was other traffic on westbound I-70 and Schneider saw that one car had to swerve toward the concrete median to avoid the pickup that was driving the wrong way down I-70 (Tr. 526).

C. There was sufficient evidence to support appellant’s conviction for felony arresting arrest.

There was sufficient evidence that appellant knew he was being arrested. Respondent acknowledges the holdings in *State v. Dossett*, 851 S.W.2d 750, 752 (Mo. App. W.D. 1993); *State v. Brooks*, 158 S.W.3d 841 (Mo. App. E.D. 2005); and *State v. Hunter*, 179 S.W.3d 317 (Mo. App. E.D. 2005). In all three cases, the court held that when a police officer merely

turns on his lights and siren in an attempt to stop an automobile, 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 a full arrest. *Dossett*, 851 S.W.2d at 752; *Brooks*, 158 S.W.3d at 851-852; *Hunter*, 179 S.W.3d at 320-321. The holdings in these cases result from the reasoning that the gravamen of the offense is resisting an arrest, not flight from an officer. *State v. Long*, 802 S.W.2d 573, 575-576 (Mo. App. S.D. 1991). Further, in *Brooks* and *Hunter* – which involved co-defendants and thus the same factual scenario – the court noted that the officer never testified that when he turned on his lights and followed the vehicle that he intended to arrest the defendants. *Id.* These cases can be distinguished from the present case.

Here, Officer Schneider testified that when he initially activated the lights on his marked police car, and pulled Robert Davis and appellant over in a parking lot for driving a truck with stolen license plates, he intended to arrest the two men for that offense (Tr. 535). Appellant and Davis knew that this was not a “routine stop” at the time of the stop because when Schneider got out of his patrol car, he drew his gun, and stayed behind the door to his patrol car (Tr. 521). He then ordered the driver of the truck (Davis) to throw his keys out of his open window (Tr. 521-522). Instead of obeying Schneider’s orders, Davis looked over his right shoulder and then drove off through the parking lot (Tr. 522). Schneider then got back into his car, activated both his lights and sirens, and followed the pickup truck until it drove the wrong way down I-70, presumably in attempt to “shake” Schneider (Tr. 522, 525).

This was evidence from which the jury could infer that appellant knew that Officer Schneider was trying to arrest him. In *State v. Chamberlin*, the court found that there was sufficient evidence for the jury to infer that the defendant should have known the trooper pursuing him was making an arrest. *Chamberlin*, 872 S.W.2d 615 (Mo. App. W.D.1994). In *Chamberlin*, evidence was presented that the trooper intended to arrest the driver of the vehicle. *Id.* at 618. The trooper pursued the vehicle at high speed with lights and siren activated. *Id.* When the vehicle stopped and the driver fled on foot, the trooper yelled at the driver to stop, drew his weapon and continued in pursuit. *Id.* at 619. The court found that from this evidence, a jury could have found the defendant guilty of resisting arrest. *Id.*

Similarly, in this case evidence that the officer stopped Davis and appellant, drew his gun, and ordered them to throw the keys to the truck out of the truck window, and then continued to follow Davis and appellant with his lights and sirens activated after they had sped off, was sufficient evidence for a jury to find that appellant knew that Schneider was attempting to arrest him. It is interesting to note that appellant's trial counsel repeatedly told the jury during closing argument that appellant was guilty of resisting arrest: "Now, Mr. Bainter resisted arrest. That he did. When he and Mr. Davis refused to stop in the stolen truck and when he tussled with Officer Gerler he resisted arrest. When they drove down the highway the wrong direction, that was resisting arrest. Don't spend your time on this charge" (Tr. 1165); "Now, Mr. Bainter resisted the police, we're not disputing that" (Tr. 1176); "he didn't deserve to be charged with anything more than the stolen truck and resisting arrest"

(Tr. 1176). Trial counsel even asked the jury to acquit appellant “of a crime that he committed in this case, resisting arrest” (Tr. 1179).

Appellant states several times that he had no way of knowing that Schneider was attempting to arrest him for possession of stolen license plates on a vehicle driven by Robert Davis (App. Br. 66-67). However, nothing in the statute, nor the verdict director, required that appellant know for what crime Schneider was attempting to arrest him and Davis. §575.150.1; (L.F. 135). *State v. Orton*, 178 S.W.3d 589, 593 (Mo. App. E.D. 2005)(there is no authority for the proposition that to support a resisting arrest charge, the State must prove that the officer informed the defendant of the exact offense for which he was being arrested). Appellant notes that “possession of stolen license plates” is not an actual crime, and suggests that the crime might have been receiving stolen property (App. Br. 67, n. 15). Appellant also appears to suggest that appellant was not “actually subject to arrest for possessing stolen license plates,” because he was not driving the truck (App. Br. 69). Even assuming that Schneider could not lawfully arrest appellant at that point, the statute makes it clear that it is not a defense to the crime of resisting arrest that the law enforcement officer was acting unlawfully in making the arrest. §575.150.4.

There was also sufficient evidence that appellant *acted together* with Robert Davis in fleeing from Schneider in such a manner that created a substantial risk of serious physical injury to any person. Appellant points to the language in the verdict director, which stated that appellant “acted together with Robert Davis” in committing the offense of resisting arrest, and argues that the evidence was insufficient to show that appellant acted together

with Davis to flee in such a way that created a substantial risk of serious physical injury to any person because Davis, not appellant, was the one who had physical control of the truck and drove the truck the wrong way on I-70 (App. Br. 68-69). Appellant does not allege that the act of fleeing by driving the wrong way down I-70 and causing oncoming traffic to swerve toward the median was not conduct that created a substantial risk of physical injury or death (App. Br. 68-69).

A person is held accountable for a crime arising from both his own conduct and from the conduct of another for which he is criminally responsible. §562.036. A person is criminally responsible for the conduct of another when he “aids or agrees to aid or attempts to aid such person in planning, committing or attempting to commit the offense.” §562.041.1(2).

The central tenet of accomplice liability is the notion that all who act together “with a common intent and purpose” in committing a crime are equally guilty. *State v. Biggs*, 170 S.W.3d 498, 504 (Mo. App. W.D. 2005). The legal effect is the same regardless whether an individual is a principal or an accomplice in the commission of a crime, and Missouri makes no distinction between principals and accessories. *Id.* An accomplice is no less guilty than a principal. *Id.* Because no distinction of guilt is recognized between principal and accomplice in the law, “the State [is] not required to charge [a] [d]efendant as an accomplice since charging a defendant as a principal or as an aider or encourager as the same legal effect and, even if charged as a principal, the case may be submitted to the jury on the theory of accomplice liability.” *Id.*

Any evidence that tends to show “affirmative participation” by an accomplice to aid a principal is sufficient to support a conviction. *State v. Parsons*, 152 S.W.3d 898, 903 (Mo. App. W.D. 2005). “The requirement of affirmative participation may be satisfied by inference” including “presence at the scene of the crime, flight therefrom, and association with others involved before, during, and after the commission of the crime.” *Id.* Also, “[a] permissible inference of guilt may be drawn from the acts or conduct of a defendant, subsequent to an offense, if they tend to show a consciousness of guilt and a desire to conceal the offense or a role therein.” *State v. Isa*, 850 S.W.2d 876, 894 (Mo. banc 1993); *State v. Ramsey*, 874 S.W.2d 414, 417 (Mo. App. W.D. 1994). In this case, the evidence was sufficient to support the jury’s finding that appellant acted together with Robert Davis to resist arrest.

The evidence presented at trial showed that appellant and Davis had committed two robberies together on December 31, 2003, and January 3, 2004. The men were together on January 4, 2004, the day after the IGA robbery when Officer Schneider pulled them over, and instead of surrendering, drove the wrong way down I-70. If appellant and Davis did not have a commonality of purpose, appellant could have gotten out of the truck when Officer Schneider pulled them over, but he did not. Instead, appellant remained in the truck, and like Robert Davis, fled on foot when the truck stopped on the side of I-70. “Companionship before and after an offense is a circumstance from which one’s participation in the crime may be inferred.” *Parsons*, 152 S.W.3d at 905. Also, as stated above, the requirement of affirmative

participation may be satisfied by inference including flight from the scene of the crime. *Id.* From this evidence, it would be reasonable for the jury to infer that Davis *and* appellant were purposefully fleeing together after Officer Schneider pulled them over.

Although Robert Davis was the person driving the truck in such a manner that created a substantial risk of serious physical injury or death to a person, both appellant and Davis acted together in fleeing from the police for the purpose of preventing Schneider from effecting an arrest, instead of surrendering to Schneider's authority (L.F. 135; Tr. 521-522). Thus, there was sufficient evidence that appellant acted together with Davis in committing felony resisting arrest by fleeing in such a manner that created a substantial risk of serious physical injury or death to a person.

CONCLUSION

For the foregoing reasons, respondent asks that this Court affirm appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 21,422 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of August, 2006, to:

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RESPONDENT'S APPENDIX

Sentence and Judgment..... A1