

IN THE MISSOURI SUPREME COURT

SC94081

STATE OF MISSOURI,

Respondent,

vs.

CHRISTOPHER ERIC HUNT,

Appellant.

Appeal from the Circuit of Montgomery County, Missouri

Case No. 12AA-CR00039

SUBSTITUTE REPLY BRIEF OF APPELLANT CHRISTOPHER ERIC HUNT

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INTRODUCTION

Perhaps this hypothetical helps crystalize the issues. Deputy Robertson responds to a call from fellow officers that the subject of an arrest warrant, Grisham, is in a trailer. Robertson sees Grisham peeking out the window, as do several other officers. Grisham disappears. Robertson knocks, announces his presence, hears nothing, waits a moment, then breaks down the door, enters, and arrests Grisham after a struggle. The local prosecutor charges Robertson with assault and no other crime.

In a stand-alone assault case against a law enforcement officer, proper instructions would tell the jury that Robertson had the privilege to use the amount of force Robertson believed was necessary to effect the arrest. §563.046 RSMo. A proper instruction would not ask the jury to consider whether Robertson was a law enforcement officer at all.

But that was what Instructions 7 & 8 did in this, very real case. That was prejudicial error resulting in a manifest injustice in Hunt's case.

The State also charged Hunt with burglary and property damage. These complicate the case. The State apparently believes that Hunt came to the scene with full authority to arrest Alberternst. But, and this is where everything between the parties diverges, Hunt did not have a legal basis to enter the trailer because he had not actually seen Alberternst. Because he did not see Alberternst, the State argues that Hunt did not have an objective reasonable belief that Alberternst was in the dwelling. Thus Hunt could not enter unless he first obtained a search warrant, the arrest warrant notwithstanding. And when he did enter without the search warrant, he no longer was a

law enforcement officer at all.

The State thinks the jury should decide that legal question, i.e. the existence of Hunt's authority. Instruction 5 (burglary), did not tell the jury how to decide whether Hunt lost his authority as a law enforcement officer. The State concedes that this is reversible error because Instruction 5 simply treated Hunt as though he never had authority to act as a law enforcement officer at all.

Hunt contends that both the property damage instruction (Instruction 6) and the assault instructions (Instructions 7 & 8) suffer the same infirmity. None of them tells the jury how to determine whether Hunt was, or was not, clothed with the authority of a law enforcement officer when he crossed the threshold of the Alberternst dwelling.

Hunt also contends that as to burglary and property damage, the State failed to make a submissible case. Hunt contends that the arrest warrant, together with facts known to him, gave him a reasonable belief – if not an objective belief then at least a subjective belief that proved actually true – sufficient to allow him to enter without a search warrant, as a law enforcement officer fully clothed with the statutory privileges discussed below.

A bright line rule.

The bright line that Hunt believes ought to determine the burglary and property damage cases is this: If a law enforcement officer possesses a subjective reasonable belief that the subject of an arrest warrant is in a dwelling – and that belief proves true – the officer is not guilty of a knowingly unlawful entry as a matter of law. This rule allows convictions to follow when the subjective belief of the officer proves false and mischief

follows. It also protects Fourth Amendment concerns. And, it protects law enforcement officers from politically motivated or arbitrary prosecutions.

In the end, this case revolves around the meaning of the word “knowingly.” For the burglary conviction, the State asserts that “knowingly” carries an *objective* meaning as it does in the Fourth Amendment suppression cases. For the State, Deputy Hunt “knowingly entered unlawfully” if he did not have an *objective* reasonable belief that Alberternst was in the trailer. If Hunt knowingly entered Alberternst’s trailer unlawfully, the State contends that he lost his authority and the privileges that accompany that authority. And that loss extends all the way to the assault charge.

Deputy Hunt believes that he had a reasonably objective belief that Alberternst was in the trailer. But Hunt also contends that “knowingly” has a *subjective* meaning for purposes of the crimes with which he was charged. § 562.016.3, RSMo. (person acts “knowingly” if he/she is “aware of the nature [here illegality] of his conduct.”)

The State concedes that the jury had no way to determine whether Hunt’s entry was unlawful under the instructions given by the trial court. Resp.Sub.Br.66. That concession, if the Court accepts it, also means that the property damage conviction fails. This is because a law enforcement officer who reasonably believes that he has legal authority to enter to arrest has a statutory privilege to damage property to do so. And that concession also necessarily means that the assault conviction fails. Instructions 7 & 8 left the jury with the duty to determine whether Hunt’s entry was knowingly unlawful. i.e., whether Hunt stripped himself of all authority and privilege by entering unlawfully. Yet neither instruction provided the jury with any guidance on how to think about that

question. The conceded fault in Instruction 5, spills over into Instruction 6, 7, and 8. Reversal for all three convictions is required.

Hunt was either a police officer or he was not. He was if he entered with a subjective reasonable belief that Alberternst was in the trailer.

As must be obvious, the question whether a person acts “knowingly” presents fundamentally different and inherently more complex issues when a law enforcement officer is involved than when a normal citizen is charged with burglary. If Hunt reasonably believed that he had authority to enter, it follows that he acted throughout as a law enforcement officer who possessed these statutory privileges: The authority to arrest under §195.505.2; the authority to damage property to enter under § 544.200 RSMo. (2012); the authority to use “such physical force as he [Hunt] reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.” § 563.046.1. The trial court did not permit any of these privileges to inform the jury’s deliberations.

Deputy Hunt's Authority to Arrest Alberternst is a Legal Question

The State now withdraws its concession it made to the Court of Appeals that Hunt had “general” legal authority to arrest Alberternst in Montgomery County, claiming now that that is a question of fact not law.

The Court of Appeals did not rely on the State's concession to reach its conclusion that Hunt acted as a law enforcement officer as a matter of law.

The question of law, as stated by Defendant, is, in the general sense, does Defendant serving as a member of a MEG have authority to make an

arrest of a person known to him to be the subject of two felony arrest warrants by forcible entry of an inhabitable structure in a county in which he is not a deputy?

The answer to that question in this case is yes. In this case, Defendant was a Deputy Sheriff in St. Charles County and a member of a MEG formed pursuant to Section 195.505 for the purpose of intensive professional investigation of drug law violations. Section 195.505.2 provides [quotation of statute omitted]:

The MEG had been summoned for the purpose of arresting Alberternst on two felony arrest warrants. Further, there is no evidence in the record demonstrating Defendant was told he was not to participate in the arrest. ... In addition, according to Section 544.200, Defendant had authority to break open any outer or inner door or window of a dwelling house in effecting an arrest. Thus, in the general sense, Defendant, as a member of the MEG, had authority to break into a structure in Montgomery County to arrest Alberternst.

Slip.Op.7.

The Court of Appeals based this conclusion on undisputed facts that remain uncontested:

- By February 5, 2009, Alberternst had acquired two felony arrest warrants. Tr.128. (Endangering the welfare of a child, Tr.278 and manufacturing methamphetamine. Tr.279.)

- On February 5, 2009, Deputy Hunt was a Deputy Sheriff in St. Charles County and an active member of an MEG.
- On February 3, Warren County Detective Chad Fitzgerald contacted Hunt directly, Tr.514, because Hunt knew Alberternst and Hunt was using Alberternst as an informant. Tr.393. Fitzgerald was not part of an MEG.
- Finally, Deputy Bill Rowe and Officer Dion Wilson (also members of the MEG) kept Deputy Hunt advised of the MEG's activities on February 5 and Wilson guided Hunt to Alberternst's trailer by cell phone. TR.522.

The State's New Position

As noted, if the issue of Hunt's authority is a question of law, the State's attempt to backpedal is meaningless.

To be sure the State did make the concession from which it now flees.

There is little question that Mr. Hunt, a deputy sheriff in St. Charles County, and a member of a multi-jurisdictional enforcement group, had (in the general sense) legal authority to arrest Mr. Alberternst. See § 195.505, RSMo Cum. Supp. 2012.

(Ct.App.Resp.Br. 25.) The State's "there is little question" now means, at least to the State, that there remains some *factual* question. This Court is perfectly capable of understanding the meaning of the idiomatic phrase "there is little question." In normal use, it means essentially there is no reasonable doubt. For that reason, the Court of

Appeals opinion could say with accuracy, though it was not necessary:

the State concedes Defendant, as a member of a MEG, had legal authority to arrest Alberternst in the general sense.

Slip.Op.7. This conclusion followed as night the day the admissions made by the State at oral argument before the Court of Appeals.

Mr. Mackelprang: ...I think it is evident from the State's brief that whether he [Hunt] was within his jurisdictional boundary or not really isn't a question for us. The question for us is did he enter unlawfully...?

Tr.Arg 37-38 (Appendix 10-11). And again, Mr. Mackelprang stated:

[T]hey [the jurors] don't always have the same understanding when a law enforcement officer will have a privilege to enter a particular residence, and in fact, it ... potentially is a complicated *legal* issue, and so for that reason... the State conceded that there was error in not defining that term....

Tr.Arg.23 (Appendix 7 – emphasis added). Again, these concessions do not mean that Hunt also lawfully entered the trailer, was permitted to break the door to enter or to use unreasonable force to make the arrest. The State's concessions do mean that if Hunt reasonably believed that he entered the trailer lawfully, he was acting as a law enforcement officer every step of the way—from entry to arrest. Again, it boils down to what “knowingly” means when a law enforcement officer is acting. Further, the jury was required to hear of the privileges Hunt possessed if he entered believing he had authority to do so—and it did not.

There are almost certainly circumstances in which a law enforcement officer, fully clothed with authority to arrest, enters a dwelling knowing that he has no business there; that the breaking to enter is not lawful or that the force used exceeded what was subjectively reasonable for a law enforcement officer to use in effecting an arrest. Any privilege can be exceeded such that it no longer protects its holder against claims of liability or even criminal conduct.

But it is the presence of the authority that Hunt generally possessed as a matter of law that makes “knowingly” matter, that creates the privilege and that makes it necessary for the State to prove beyond a reasonable doubt that Hunt acted knowingly unlawfully and thus exceeded the privileges.

The very existence of Hunt’s general authority as a law enforcement officer is the predicate for the State’s instructional error concession. Resp.Sub.Br.66. This is because there is no logical or legal nexus between the State’s confession of instructional error and this case if Hunt was not fully clothed with legal authority to arrest Alberternst at the moment before he entered the trailer. The jury had to take as a given that Hunt had a privilege to enter and to use subjectively reasonable force to make the arrest unless he knowingly entered unlawfully. Thus, it could not be left to the jury to determine whether Hunt carried the privileges in the first place as all three verdict directors left it; Hunt was so privileged and the jury was required to take that as the legal starting place, not as a factual dispute it could resolve. If his acts exceeded his authority and/or the scope of the privileges, then a conviction could follow. But the jury would have been required to find beyond a reasonable doubt that Hunt had knowingly exceeded either his authority or

his privileges or both – and they were not asked to do that.

So we return to “knowingly.” For the jury to find that a law enforcement officer knowingly enters a dwelling unlawfully, the jury must be told of the privileges of law enforcement officers to enter generally. It must be told what “knowingly” means in the context of a reasonable belief about a law enforcement officer’s authority with regard to the subject of an arrest warrant in a dwelling. And it must be told for purposes of an assault instruction the same things. The jury cannot be left to speculate, or to convict a law enforcement officer without more than the trial court gave it here for direction.

Because the State discusses submissibility first, Hunt will take the same approach to make reading the briefs more convenient. The word limit makes a reply to every argument impossible. Hunt does not waive any of his points on appeal because they are not addressed here.

I. (SUBMISSIBILITY)(APP.SUB.BR.VII, VIII & IX; RESP.SUB.BR.I)

A. Burglary

- 1. Is Fourth Amendment jurisprudence regarding admissions of evidence determinative of the issue whether a law enforcement officer's entry into a dwelling to arrest a person for whom arrest warrants are outstanding is "knowingly unlawful" for purposes of a burglary conviction?**

This is a case of first impression. Neither party offers a case in either a Fourth Amendment suppression context or a criminal context that answers the question in this case. There is dicta that can be read in two ways. But if the law has not been stated sufficiently clearly for there to be a bright line, how can a law enforcement officer *know* that he is acting unlawfully when he makes an arrest when he has a subjectively reasonable belief that the subject of an arrest warrant is in the dwelling – and the subject actually is there?

The State insists that Fourth Amendment cases describing certain searches and arrests as "illegal" or "unlawful" (resulting in suppression of evidence) also make an entry pursuant to an arrest warrant to make an arrest unlawful in a criminal sense. At most, the Fourth Amendment cases are filled with dicta relative to, but certainly not

controlling (or even reasonably compelling) concerning the issues in this case. Even when a court finds that the evidence/arrest should be suppressed, no case finds that the entry by police officers to make the arrest is a “knowingly unlawful entry” in a criminal sense. Indeed, the Fourth Amendment cases, with their dissents and debates about the meaning of precedent, show the quagmire through which judges wade – with months to consider the issues – and still cannot agree on the definitive legal principles and cannot establish bright lines.

And while a violation of someone’s constitutional rights may be an unlawful *civil* act, the unlawful act required to support a burglary is a *criminal* unlawful act requiring a much higher proof standard and, in this case, requiring the Court to conclude that the arrest warrant provides no authority at all for Deputy Hunt. Thus, an unlawful search does not necessarily mean that the officer knowingly entered unlawfully. To use Fourth Amendment cases to bootstrap its argument the State ignores the uncertainty in this area of the law, the difference in rights at stake here and in a suppression context, and the State’s own admission that where law enforcement officers are charged with crimes resulting from a warranted arrest, the policy implications for societal safety and order are widespread.

United States v. Gay, 240 F.3d 1222, 1226 (10th Cir. 2001) is a useful example of this judicial uncertainty. It describes the contrasting teachings of the U.S. Supreme Court in this area in a factual milieu similar to this case.

In *Payton*, the Supreme Court recognized ... [that] “an arrest warrant founded on probable cause implicitly carries with it the limited

authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” [citation omitted]

In contrast, the Supreme Court held in *Steagald* that absent exigent circumstances or consent, law enforcement officers could not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. [citation omitted]

[*The State inexplicably stops its quote here. Resp.Sub.Br.35*].

Nevertheless, the *Steagald* Court reiterated the principle articulated in *Payton* that “an arrest warrant alone will suffice to enter a suspect's own residence to effect his arrest.” *Id.* at 221.... [W]e conclude the *Payton* analysis applies.....

Gay, 240 F.3d at 1226 (emphasis added). If the courts get tied in so many knots on these issues, how can a police officer be expected to *know* where the line is?

It is telling that the State can barely bring itself to use the word “knowingly” in its brief when describing the submissibility of the evidence supporting Hunt’s burglary conviction. Again, the critical word for purposes of submissibility here is *knowingly*.

It is clear that an objective reasonable belief standard controls the Fourth Amendment suppression cases. That standard might be fine for Fourth Amendment suppression questions because privacy rights are at stake. But where the issue is the actual knowledge of a law enforcement officer about the Fourth Amendment’s limits in a criminal context, *subjective* knowledge is the issue. “Knowingly” in the criminal context is always subjective. That is the mandate of Section 562.016.3, RSMo, which

defines “knowing” to mean that the defendant must be “aware of the nature [here illegality] of his conduct.”

When read with §569.010(8)¹ the legislature required proof beyond a reasonable doubt for a burglary conviction here that Hunt was actually aware that he had no lawful authority to enter the premises to effect the arrest warrant. The evidence here fails. As the State’s brief puts it: “The evidence certainly supported an inference that Mr. Hunt subjectively suspected or hoped that Mr. Alberternst was inside....” Resp.Sub.Br.37(emphasis added). That is enough to defeat submissibility.

It is settled law that a person who does not know that he enters an inhabitable structure unlawfully does not possess the mental state required to commit burglary, even when the entry is for the purpose of committing a crime. “When a person has the consent of a resident to enter the home, he is not guilty of burglary, regardless of what other crimes he may have committed therein.” *State v. Cooper*, 215 S.W.3d 123, 126 (Mo.banc2007).

If Hunt did not Believe Alberternst was in the Trailer, Could Hunt Enter for the Purpose of Assaulting Alberternst?

Again, the test is a *subjective* reasonable belief under Section 562.016.3. The defendant must be “aware of the nature [here illegality] of his conduct.” *Id.*

These undisputed facts support the reasonableness of Hunt’s decision to enter:

¹ “[A] person ‘enters unlawfully or remains unlawfully’ in or upon premises when he is not licensed or privileged to do so.”

² The purpose of the knock-and-talk statute is to provide notice to those inside. There is

(1) Hunt had received the initial call from Fitzgerald asking Hunt to assist Fitzgerald in finding Alberternst so that Fitzgerald could execute the Warren County arrest.

(2) He knew of the mission from its inception. Tr.514.

(3) Hunt had been told by Officer Dion Wilson by phone the details of the events of the plan to arrest Alberternst. Tr.498, 515. There is no other explanation for Hunt's arrival in his official vehicle, a St. County Sheriff's Department pick-up, at the precise location of Alberternst's abode, that evening.

(4) Hunt was asked to assist in the arrest. Tr.496

(5) Everyone agrees that a knock went unanswered on the trailer's door. Assuming that no one heard anything after the knock, it remains undisputed that the Confidential Informant's (Blake's) vehicle was parked outside the trailer.

(6) Alberternst "would be in the presence of Ruth Ann Blake." Fitzgerald, Tr.284.

(7) If the car was there, Blake was there and Alberternst was there.

(8) Fitzgerald recognized Blake's car because he had put a tracking device on it earlier that day. Tr.130.

(9) Moreover, the officers did not leave after they knocked. If they had believed no one was there, that would have been the usual course. Instead the officers surrounded the trailer and waited.

That Hunt drove up, saw the trailer surrounded by police brandishing weapons, saw Blake's car, received a nod from Fitzgerald, and knew he had the right spot because

it was surrounded, made it subjectively reasonable for Hunt to believe that Alberternst was in the trailer.

The burglary conviction here thus required proof of three things – a (1) *knowing* (2) unlawful entry with (3) a purpose to commit (here) an assault.

2. The State's Conundrum

On the one hand, the State argues that Hunt had knowledge of Alberternst's presence in the trailer sufficient to allow Hunt to form the purpose to enter the trailer for the specific reason of assaulting Alberternst. Then, it takes the opposite view; it argues that Hunt could not have a reasonable belief that Alberternst was in the dwelling.

One of these may be true, but both cannot be. One cannot enter for the purpose of assaulting someone in a trailer unless one also reasonably believes the person is actually in the trailer. A law enforcement officer cannot *knowingly* unlawfully enter a dwelling to arrest someone if he has a subjective reasonable belief that the subject of an arrest warrant is in the dwelling. A law enforcement officer who has a reasonable belief that the subject of an arrest warrant is in a dwelling has a privilege to enter the dwelling to make the arrest. Sections 195.505.2 and 544.200. Moreover, it is not necessary that the arresting officer actually see the subject of the arrest warrant to form even an objective reasonable belief. "The officers are not required to actually view the suspect on the premises." *Gay*, 240 F.3d at 1227.

Conversely, if Hunt did not have a reasonable belief that Alberternst was in the trailer, he could not have formed the requisite purpose to enter the trailer to commit the assault. All that could be said is that Hunt entered to determine whether Alberternst was

in the trailer. And while (for argument's sake) that may have made the entry unlawful, it defeats the claim that the entry was made for the purpose of committing an assault.

The burglary elements are mutually exclusive when assault is the predicate crime and a law enforcement officer has a reasonable belief that the suspect is in the dwelling. The burglary charge thus fails on submissibility grounds.

Under the State's argument, if there had been a search warrant Hunt could not be convicted of burglary even if he intended to assault Alberternst once he entered on authority of the search warrant; the entry would not be knowingly unlawful. But an arrest warrant coupled with a verified reasonable belief makes a search warrant redundant for purposes of analyzing the legality of the entry in this case.

If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Payton v. New York, 445 U.S. 573, 602-03, (1980). "The purpose of the decision [in *Payton*] was not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause." *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)(emphasis added). The arrest warrant resolves the probable cause issue.

The facts here support Hunt’s reasonable belief that he had authority to enter to effect the arrest under the warrant.

Section 544.200 thus expressly authorizes an “officer” to enter a “dwelling house” to “make an arrest.” Read with *Payton*, the statute requires what is present here—an arrest warrant and a “knock and inform.”² The indicia of Alberternst’s presence, after all, provided a reasonable belief in other officers supporting the decision to knock. And silence is not proof, or even an indication, that the suspect is not there. The “officers may take into account the fact that a person involved in criminal activity may be attempting to conceal his whereabouts.” *Valdez v. McPheters*, 172 F.3d 1220, 1226 (10th Cir. 1999).

The State cites no case for the proposition that it is unlawful for a law enforcement officer with authority to make an arrest to enter a dwelling to make an arrest where there is an arrest warrant. *Steagald v. United States*, 451 U.S. 205 (1981), simply does not address the situation *sub judice*. *Steagald* says only that the Fourth Amendment protections afforded a resident do not evaporate because police enter to execute an arrest warrant against a guest of the resident. All *Steagald* found was that the search that resulted in the conviction of the resident was illegal. Whether the entry to arrest the guest violated the Fourth Amendment was not addressed in *Steagald*.

Gay, which the State sloughs off, addresses the legality of an arrest (a seizure in Fourth Amendment parlance) when officers enter the residence of a third party to arrest

² The purpose of the knock-and-talk statute is to provide notice to those inside. There is no requirement that the officer who knocks be the one that enters.

the guest. The Court concluded that the entry to arrest the guest was lawful for Fourth Amendment purposes in the absence of a search warrant because there was an outstanding arrest warrant.

But even if the arrest had not been “unlawful” within the meaning of the Fourth Amendment’s privacy protections, it does not follow that the entry itself was *knowingly* unlawful, and thus a basis for burglary by a law enforcement officer. Two Missouri statutes reinforce this point: First, §544.216 permits an officer to “arrest on view, and *without a warrant*, any person the officer sees violating or who such officer has reasonable grounds to believe has violated any law of this state.” (Emphasis added). The necessity of seeing the person justifies the arrest without the warrant. The presence of an arrest warrant, however, permits entry on reasonable suspicion under §544.200. Again, “[t]he officers are not required to actually view the suspect on the premises.” *Gay*, 240 F.3d at 1227.

Second, §544.195 expressly permits civil damage actions where constitutional rights are violated. These statutes thus state the policy of the State: Police are to protect the public first by making the arrest, and if, in protecting the public, private rights are improperly violated, individual recompense is the proper remedy, not a criminal conviction of the policeman.

We are not quibbling here about whether evidence seized may be admitted. At stake here is whether a law enforcement officer with authority to arrest and armed with an arrest warrant *knowingly* enters a dwelling unlawfully to make the arrest. Sections 544.200 and 544.216 offer a sufficient basis to conclude that Hunt had a reasonable basis

to believe that Missouri law permitted his lawful entry. Indeed, every officer at the arrest scene who testified on the subject testified that, because there was an arrest warrant, he believed he had authority to arrest Alberternst, if Alberternst was there. *See*, e.g. Tr. 160; 174.

This is why the trial court's decision to allow Sergeant Hitchcock to testify that Hunt's entry was not lawful was prejudicial error. (App.Sub.Br.Pt.XI;Resp.Sub.Br.Pt.VI). First, Hitchcock's testimony assumes that "unlawful" for purposes of the Fourth Amendment is the same as "unlawful" for purposes of a burglary prosecution. The State's argument that Hitchcock's failure to say that the entry was knowingly unlawful absolves the trial court of error simply ignores the likelihood that a reasonable juror could assume that if one law enforcement officer concluded the entry was unlawful (even on an unrelated basis), every other law enforcement officer would know that to be true as well. The State's conceded error is made all the more egregious when the trial court permits someone to testify to a fact the jury must decide even under the State's suggested new instruction.

Gay's second prong is subjectively met with the undisputed, recited-above facts as well. Blake told the police that Alberternst was staying there. As *Gay* notes, "the officers relied on the confidential informant to form their belief Mr. Gay was within the dwelling at the time of entry.... [T]he officers could reasonably rely on the confidential informant's personal knowledge concerning Mr. Gay's residence; thus, the officers possessed an objectively reasonable belief Mr. Gay lived at the Pottinger Street residence at the time of entry." *Id.* at 1226-27.

The undisputed evidence – giving the State its full due on review – shows that Hunt had a reasonable subjective basis to believe that Alberternst was in the trailer. And that, coupled with the arrest warrant, defeats any claim that Hunt *knowingly* entered the trailer unlawfully.

3. A Bright Line Test

The proper bright line is this one: Where there is an arrest warrant and an officer enters a dwelling based on a reasonable subjective belief that the suspect is in the dwelling and the subject of the warrant is indeed in the dwelling, the entry cannot be knowingly unlawful. There was clearly at least a subjectively reasonable basis for the entry – because the belief proved true. This bright line still leaves in place that possibility of a burglary conviction where there is no warrant, or where there is a warrant but an officer simply enters using an arrest warrant as a predicate to steal property because the suspect is not in the dwelling. *Post hoc* proof of the reasonableness of the belief ought to insulate the officer from politically-motivated or arbitrary prosecution.

B. The Equally Plausible Inference Rule

Finally, the State’s brief’s claims that Hunt tried to justify his entry by claiming he saw things that others did not see was proof of a guilty mind because from it one can infer that Hunt was trying to justify the entry, not protect the seizure of the evidence that followed. If Hunt believed the arrest was valid, it follows that he wanted the evidence gathered upon his entry (meth-making tools) to result in a conviction. That is an equally compelling inference from the evidence, particularly given Hunt’s legal authority to be there.

The State contends that the circumstantial evidence rule's abrogation and the standard of review make it unnecessary for the Court to consider Hunt's argument that there are equally plausible explanations for his long drive to Alberternst's trailer. *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. 1998) reads *State v. Grim*, 854 S.W.2d 403, 414 (Mo. 1993), as relieving a prosecutor of "an affirmative duty to disprove every reasonable hypothesis except that of guilt" to obtain a conviction. *Id.* To the extent that *Chaney* now means that where *equally* plausible inferences of guilt exist, the State meets its burden of proof by convincing the jury that one of them is true (not more true, but simply as likely true as the other), it should be, respectfully, re-examined.

Deputy Hunt's theory of the case was that he was asked to assist in the arrest by Dion Wilson and Bill Rowe; that he had lawful authority to enter the dwelling where Alberternst was to arrest Alberternst; and that he had authority to use force to do so. The State's theory was that Hunt entered the dwelling without legal justification to do so -- that he was not acting as a police officer at all. Thus whether Hunt "drove so far" *for the purpose of* assaulting Alberternst or "drove so far" to arrest Alberternst because he was asked by fellow officers to assist in the arrest of a person with whom Hunt was very familiar, and used force because, by every account, Alberternst resisted the arrest, was for the jury to decide on the issue of whether Hunt entered for the purpose of committing a crime.

The Due Process Clause of the Fourteenth Amendment prohibits the conviction of any defendant "except upon evidence that is sufficient fairly to support a conclusion that *every element* of the crime has been established *beyond a reasonable doubt.*" *Jackson v.*

Virginia, 443 U.S. 307, 314–15 (1979). (Emphasis added.) In holding that the reasonable doubt standard of proof is grounded in the constitution, the United States Supreme Court stated:

[U]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

In re Winship, 397 U.S. 358, 364 (1970).

The standard of proof beyond a reasonable doubt ... ‘plays a vital role in the American scheme of criminal procedure,’ because it operates to give ‘concrete substance to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.’

Jackson, 443 U.S. at 315, 99 S.Ct. at 2787 (quoting *Winship*, 397 U.S. at 363, 90 S.Ct. at 1072). Where the State’s evidence does not defeat an *equally* plausible inference, proof beyond a reasonable doubt does not exist. The constitutional protections embodied in the presumption of innocence and the requirement of proof beyond a reasonable doubt require that courts rigorously apply standards assuring submissibility.

This discussion matters because the State suggests that Hunt’s after-arrest comments regarding what he saw create an inference of his knowledge that his entry into

the trailer was criminally unlawful – that he knew that he entered the trailer unlawfully. Resp.Sub.Br.42-44.

That argument must be read against Hunt’s authority to be at the arrest scene as an officer with jurisdiction to arrest. It is at least equally plausible, given that authority, that Hunt’s comments infer his concern, as a police officer, that although he had legal authority to enter the trailer to make the arrest, the absence of a search warrant might render the evidence seized – the meth production equipment that all concede was there – subject to suppression. Hunt was as likely concerned that Alberternst, though arrested on the two previous warrants, might escape conviction for this meth production effort.

The inference the jury was told to draw was that Hunt had no legal authority to be there at all. It was not allowed to infer the opposite. In addition to the reasons previously stated, the burglary evidence and the property damage evidence did not present a submissible case because it did not rule out the *equally* plausible inference here described.

C. Property Damage

Section 544.200 does not trump the Fourth Amendment. It is also true that no court has determined whether Section 544.200 violates the Fourth Amendment. The State argues that the statute “does not authorize” entry. Resp.Sub.Br.39. The statute ends with the phrase “if he be refused admittance.” If the State’s reading is correct, an officer is expressly authorized to tear the house apart stick by stick, but may not go in. The statutory permission to break is designed to permit admittance and that means entry under any reading of the English language.

Officers knocked at the door and announced themselves. The occupants denied admittance. That a subsequent officer broke the door to get in does not alter the meaning of the statute. The statute means that the occupant can avoid the damage if she chooses, but if she remains silent, the damage will follow. Indeed, the concern of the statute is the property, not the preservation of privacy. *State v. Gibbs*, 224 S.W.3d 126, 136-37 (Mo. App. 2007). The purpose of the statute is served by notice, no matter by whom given.

Given Hunt's authority to be there, the existence of the arrest warrant, his conceded knowledge of that arrest warrant, his reasonable (and proven true) belief that Alberternst was in the dwelling, the previous knock and announce, and the continued presence of the informant's car, the State failed to make – and could not make – a submissible case of property damage.

Conclusion

Because the State failed to make a submissible case of burglary and property damage, reversal is required with a remand with directions to dismiss those charges.

II. BURGLARY INSTRUCTIONAL ERROR (APP.SUB.BR.I-III)(RESP.SUB.BR.II)

The parties' various positions on the claims of instructional error regarding burglary are set out in their respective briefs. Only a narrow reply is necessary. In part, this is because the State concedes that "the trial court erred in failing to instruct the jury on the meaning of "enter unlawfully." Resp.Sub.Br.66. And although this Court may choose to ignore the concession, the State is quite right when it says that "it is critically important that law enforcement officers be able to carry out their duties without fear of being arbitrarily or improperly convicted of a crime...." Resp.Br.71. So the Court should accept the concession as governing.

Correction of the error in the burglary instruction requires more than the State is willing to give, however. The question whether a law enforcement officer *knowingly* enters unlawfully is the question the jury was required to answer -- if the Court believes that Hunt's authority to act is a factual question. Respectfully, it is not a factual question, and if it is not, then the whole issue of Hunt's privileges comes into play and is not fully resolved by a definition of "enter unlawfully." The Court of Appeals understood that the State's concession did not go far enough.

Such an instruction should include a definition of "unlawful entry" and also should explain to the jury when a law enforcement officer might be justified in entering. We find the failure to give such an instruction in this

case affected the jury's verdict and caused manifest injustice or miscarriage of justice.

Slip.Op.13. Respectfully, the Court of Appeals panel got this issue right.

On the Instruction C issue (App.Sub.Br.III), again the reasoning of the Court of Appeals is compelling, finding the failure of the trial court to give that instruction reversible error.

Defendant's proffered Instruction C essentially provides part of a proper instruction on first-degree burglary in this case, as it allows the jury to consider when a law enforcement officer might be justified in entering. [It required the] ... jury to consider the definition of “enter unlawfully” and any justification defense as it applies the facts of the case because those factors are critical to determining whether Defendant “act[ed] as a law enforcement officer lawfully using force.”

* * *

We agree with Defendant's contention that these statutes [§§ 563.021 and 544.200] should be incorporated in the trial court's instruction defining “entered unlawfully” and describing when a law enforcement officer might be justified in entering.

Slip.Op.14.

Conclusion

If the Court finds the State presented a submissible case on the burglary issues, the trial court nevertheless erred and plainly erred in instructing as it did on the burglary charge. Reversal and remand are required.

IV. INSTRUCTIONAL PLAIN ERROR (ASSAULT) (APP.SUB.BR.V-VI;RESP.SUB.BR.IV)

The State contends that Hunt raises new points in this Court that were not raised in the Court of Appeals. Hunt disagrees. Nevertheless, the holding of the Eastern District as to questions of law and plain error, which followed unexpected concessions by the State as to Hunt's general authority to arrest Alberternst and instructional error, counsel that issues related to plain error be fully explicated in this brief regarding issues not contained in Hunt's initial brief in the Court of Appeals.

Hunt has never contended that review of the assault instructions would be for anything other than plain error. At trial the State had steadfastly contended that Hunt had no legal authority (general or otherwise) to be at the arrest scene. The trial court accepted that legal conclusion and instructed the jury accordingly on all three charges. The acceptance of that conclusion by the trial court found its way into the trial court's refusal to submit Instruction C and the trial court's decision to give Instruction 7 (assault) and thus permit the jury to decide the question of Hunt's legal authority.

As argued in the introduction, whether Hunt had authority to be at the arrest scene is a legal question, not a factual one under the undisputed facts of this case. Section

195.505 gave him that authority and the State does not argue to the contrary. What the State does say now, rather facilely, is that Hunt's authority became a factual question for the jury to decide.

The issue is more complex than the State appreciates. First, as a matter of law Hunt could arrest Alberternst. He was a member of an MEG with that authority under Section 195.505. Hunt could not arrest Alberternst in the trailer that night, unless Hunt had a reasonable belief that Alberternst was in the trailer. While an *objective* reasonable belief might be necessary to sustain the arrest against a Fourth Amendment challenge, a *subjective* reasonable belief in Hunt defeats any claim that Hunt acted *knowingly* unlawfully when he entered the trailer. This is particularly true when the subjective belief proves to be objective truth – Alberternst was there. The State employs after-the-fact justification to show Hunt's purpose in entering the trailer was to assault Alberternst; after-the-fact verification also proves convincingly the reasonableness of Hunt's beliefs concerning Alberternst's presence in the trailer. Thus, if Hunt entered the trailer with a subjective belief that he had authority to enter the trailer, he remained a police officer when he crossed the threshold and when he attempted to arrest Alberternst.

Unlike burglary, assault is a standalone crime; it does not require proof of an intent to commit another crime. A police officer can be guilty of assault if he/she uses more force than he/she believes is necessary to make the arrest. And this is so even when the officer enters lawfully. It is the magnitude of the force employed that is at issue, not the use of force.

But here, the State argues that Hunt shed all authority when he entered the trailer because, the State contends, he entered unlawfully. “[E]ven assuming Mr. Hunt was a law enforcement officer, he was not acting as a law enforcement officer when he unlawfully entered the trailer.” Resp.Sub.Br.78. The assault conviction under the instructions given thus turn on the correctness of the premise – that Hunt unlawfully entered the trailer. But for the reasons stated, that premise is an *ipsi dixt* that ignores the State’s clear instructional concession that Hunt may have had authority to enter the trailer and the jury was not so instructed. This is the basis for the State’s argument that the burglary instruction was erroneous.

Thus, the assault conviction under Instruction 7 depends on whether Hunt knowingly entered unlawfully. If Hunt did enter knowingly unlawfully, he carried with him no privilege to assault Alberternst. But if he had a reasonable belief (which proved true) that Alberternst was in the trailer, Hunt remained a law enforcement officer and the jury had to be instructed that he was a law enforcement officer. The only issue before the jury should have been the magnitude of the force used.

Without the burglary charge, this would be an easy case. The jury would be instructed that Hunt was a law enforcement officer and that Hunt would be guilty of assault only if Hunt used greater force than Hunt believed was reasonably necessary to effect the arrest.

This is the source of Hunt’s cumulative plain error argument. The burglary instruction permitted the jury to assume that Hunt entered unlawfully because the instruction did not inform the jury of the times when the law permits a law enforcement

officer to enter lawfully and did not inform the jury of a law enforcement officer's privilege to use force to effect an arrest. If there was an error – as the Court of Appeals rightly found and as the State concedes – in the burglary instruction, it therefore necessarily infected the assault instruction. The State's argument about the rectitude of Instructions 7 & 8 collapses if Hunt's entry was not knowingly unlawful. If Hunt reasonably believed he entered lawfully, he remained a law enforcement officer acting as a law enforcement officer at every step of the way. Again, the State's whole argument depends of the entry being knowingly unlawful – a mental state that stripped Hunt of any authority to act. At a minimum, the assault instructions too, should have required a definition of unlawful entry as previously discussed, and a further explication of the privileges that attach to law enforcement officers. Its failure to do so was plain error requiring reversal.

Conclusion

Due to instructional plain error, reversal and remand of the assault conviction is required.

CONCLUSION

Respectfully, the burglary and property damage convictions must be reversed and the assault conviction reversed and remanded.

Respectfully submitted,

Dated: August 19, 2014

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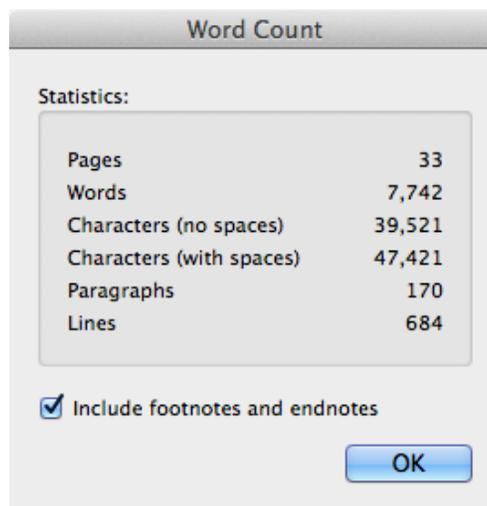
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

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CERTIFICATE OF SERVICE

I certify that in filing this document with the MO Supreme Court through the electronic filing system an electronic copy of this document and Appendix was served on counsel named below on this 19th day of August, 2014.

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