

**Summary of SC94924, *State of Missouri v. Justin Floyd Eugene Jones***

Appeal from the St. Louis County circuit court, Judge Michael D. Burton

Argued and submitted September 10, 2015; opinion issued January 26, 2016

**Attorneys:** Jones was represented by Samuel Buffaloe of the public defender's office in Columbia, (573) 77-9977, and the state was represented by Rachel Flaster of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man appeals his convictions for armed criminal action associated with a first-degree burglary conviction and for resisting arrest. In a decision written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the judgment. Five judges agree the evidence was sufficient for the jury to find, beyond a reasonable doubt, that the man committed armed criminal action because he committed the burglary with the aid and assistance of a gun. All seven judges agree there was a reasonable basis for the jury to infer that the man knew or reasonably should have known he was under arrest by the officer who intercepted him as he was fleeing a crime scene. All seven judges also agree the trial court did not abuse its discretion in overruling the man's motion for continuance made the morning of trial.

In an opinion joined by one other judge, Judge George W. Draper III concurs in part and dissents in part. He agrees the trial court did not err in overruling the man's motion for judgment of acquittal on the charge of resisting arrest and the man's motion for a continuance. He disagrees, however, that the evidence was sufficient for the jury to find, beyond a reasonable doubt, that the man committed armed criminal action during the course of the burglary because the man completed the burglary as soon as he crossed the threshold into the garage and there was no evidence he did so by, with or through the use, assistance or aid of the gun he possessed. He would reverse this conviction.

**Facts:** A woman returned home from the grocery store late one night in February 2010. She parked in her driveway and entered her home through the front door, asking for help unloading the groceries. She then opened the automatic garage door and backed her vehicle into the attached garage. She carried a few bags of groceries to the garage's entrance to the house and pressed a keypad to close the garage door. Before she entered the home, she heard the door stop and go back up, as it was programmed to do if its threshold sensors were triggered. She turned toward the garage door and saw Justin Jones coming into the garage, holding out a black gun in both hands. The woman ran into the house, slamming the door behind her, activated her alarm and called police. One of her sons was doing dishes while this occurred. He turned toward the door and saw Jones pointing a gun at him. Jones put the son in a headlock, demanding drugs and money. When the son said he did not have any, Jones pushed the son through the house toward the garage. When Jones' cell phone rang, the son tried to grab the gun, and the two struggled over the gun before Jones hit the son's jaw and tried to gouge his eyes. Jones pointed the gun at the son and then fled out the back door without firing a shot. The son directed officers who responded toward the direction Jones had fled. Another officer who responded set up an area of containment. He saw a man matching the perpetrator's description running from the direction of the woman's house. He identified himself as a police officer and told the man to stop running. Ultimately, the officer caught the man – Jones – and arrested him for attempted robbery. Other officers and a K-9 unit performed a "trackback" from where Jones was arrested and were led back to the woman's home. The son later identified Jones as the man who

attacked him. The state charged Jones with first-degree burglary and attempted first-degree robbery, each with an associated charge of armed criminal action, as well as with third-degree assault and resisting arrest. At the close of the state's case at trial, Jones moved for a judgment of acquittal, arguing there was insufficient evidence to support the armed criminal action charge associated with first-degree burglary because there was no evidence he actually "used" the gun to enter the garage or "used" the gun to intimate the woman into granting him entry. He also contended there was insufficient evidence that he resisted arrest. The trial court overruled the motion, and the jury found Jones guilty as charged. The court entered judgment accordingly and sentenced Jones. He appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The evidence was sufficient for the jury to find, beyond a reasonable doubt, that Jones committed armed criminal action in association with the first-degree burglary because he committed the burglary with the aid and assistance of a gun. Under section 571.015.1, RSMo, a person commits armed criminal action if he commits a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." When interpreting a statute, this Court must give meaning to every word or phrase of the legislative enactment. The three prepositions – by, with or through – and the three nouns they modify – use, assistance or aid – demonstrate that section 571.015.1 was intended to reach as broadly as possible, creating any one of nine permutations for the jury to find Jones guilty. The legislature did not define these words, and so this Court gives them their plain and ordinary meaning as found in the dictionary. Given the context of the statute, "use" does not mean or suggest the weapon must have been necessary to commit the crime or that, but for the defendant's use of the weapon, the crime could not have occurred. Even if the definition of "use" did not encompass Jones' conduct, the terms "assistance" and "aid" reach even further, with both referring to help given. There was sufficient evidence for the jury to find Jones committed burglary by making his entry into the garage with the assistance or aid of a gun, regardless of whether Jones first broke the plane of the garage's entrance with his gun, foot or knee. When the woman saw Jones immediately after he crossed the threshold into the garage, he already was holding his gun out in both hands, pointing it at her. It is not necessary that he use the gun to overcome a barrier to entry or to threaten someone into granting entry, and the gun was readily accessible to Jones. The jury reasonably could infer the gun bolstered Jones' confidence to enter a garage he knew might be occupied, and the gun gave him ready means to overcome any resistance and assurance that the presence of the gun would prevent or deter resistance in the first instance.

(2) There was a reasonable basis for the jury to infer that Jones knew or reasonably should have known he was under arrest. Jones concedes the evidence was sufficient to prove the officer was attempting to arrest him for the crimes committed in the woman's home and that he fled from the officer to avoid his actions. He argues only that the officer did not say he was under arrest. It is not necessary for the officer to say "you are under arrest" when the circumstances indicate the officer is attempting an arrest. Here, the officer was in uniform, identified himself as a police officer and gave a verbal command for Jones to stop running. Further, this occurred as Jones was running away from the scene of his crimes, which is evidence of consciousness of guilt. The jury was entitled to consider what Jones knew and what Jones had just done when deciding whether Jones had reason to believe the officer was attempting to arrest him for those felonies. Further, Jones does not contest his convictions for burglary, attempted robbery and assault.

(3) The trial court properly overruled Jones' motion for continuance. It was within the trial court's discretion to do so, and no prejudice resulted. Jones moved for a continuance on the morning of trial. At the time, the case was four years old, and Jones had received four previous continuances. Last-

minute continuances are not favored and should be granted only if they meet certain requirements of Rule 24.10. Jones' motion did not meet these requirements. The motion did not explain how the name of a witness he wished to find had come to light or why, in the exercise of due diligence, defense counsel could not have identified her and secured her testimony earlier, nor would her testimony have impeached the testimony of the officers. Her speculation that a third person committed the crimes would not have been admissible, and the motion failed to raise her testimony above mere speculation by stating she had firsthand knowledge of the third party's guilt and Jones' innocence. In addition, delay was not necessary to obtain a call log of Jones' cell phone, and the motion failed to state that counsel exercised due diligence in attempting to obtain the log earlier. Other claims Jones now makes were not raised in his motion for continuance or his motion for a new trial and, therefore, are not properly before this Court. Even were Jones seeking plain error review of those claims, he offers no explanation as to how he was prejudiced.

**Opinion concurring in part and dissenting in part by Judge Draper:** The author agrees the trial court did not err in overruling the man's motion for judgment of acquittal on the charge of resisting arrest and the man's motion for a continuance. The author disagrees, however, that the evidence was sufficient for the jury to find, beyond a reasonable doubt, that the man committed armed criminal action during the course of the burglary because the man completed the burglary as soon as he crossed the threshold into the garage and there was no evidence he did so by, with or through the use, assistance or aid of the gun he possessed. A conviction for burglary requires distinct findings of both unlawful entry and intent to commit a crime therein. Other cases have held, in similar factual scenarios, that a defendant completed unlawful entry to commit a burglary and then used a weapon thereafter to commit additional offenses once the burglary was complete. The principal opinion's expansive reading of section 571.015 essentially construes its "nine permutations" in such a way as to render "use, aid, or assistance of a weapon" synonymously with intent to use a weapon or mere possession of a weapon during the commission of another offense. Even adopting such an expansive reading, there is still no evidence in the record demonstrating how Jones used the gun or how the gun assisted or aided him in crossing the threshold into the garage. The burglary was complete when he unlawfully entered the garage, with some part of his body triggering the sensors – before the woman saw him or the gun. He undoubtedly used the gun to assist and aid him in remaining unlawfully inside the woman's home and to commit the subsequent robbery and assault. The state could have charged Jones with remaining unlawfully by use of the gun or arming himself with a deadly weapon when effecting entry into the garage, but the state did not use these alternatives in charging him. As such, the author would reverse Jones' conviction for armed criminal action associated with burglary.