No. 84282

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IN THE
MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

TROY MARLOWE,

Appellant.

_____

Appeal from the Circuit Court of Cape Girardeau County, Missouri
The Honorable William J. Syler, Jr., Judge

_____

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions of assault of a law enforcement officer in the third degree, ' 565.082, RSMo 2000, resisting arrest, ' 575.150, RSMo 2000, unlawful use of a weapon, ' 571.030.1(1), RSMo Cum.Supp. 1998, and attempting to steal anhydrous ammonia, ' 564.011, RSMo 2000, obtained in the Circuit Court of Cape Girardeau County, for which appellant was sentenced to six months in jail, ten years of imprisonment, ten years of imprisonment, and six months in jail, respectively, the prison sentences to run consecutively, and the jail sentences to run concurrently with all the other sentences. The Missouri Court of Appeals, Eastern District, affirmed the convictions and sentences via per curiam order. ***State v. Marlowe***, No. ED78917 (Mo.App.E.D. December 18, 2001). The Court of Appeals, Eastern District, denied appellant=s motion for rehearing on February 4, 2002.

This appeal involves none of the issues reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. On March 19, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, ' 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Troy Marlowe, was charged by third amended information, as a prior and persistent offender, with assault of a law enforcement officer in the first degree, ' 565.081.1, RSMo 2000, resisting arrest, ' 575.150, RSMo 2000, unlawful use of a weapon, ' 571.030.1(1), RSMo Cum.Supp. 1998, and attempting to steal anhydrous ammonia, ' 564.011, RSMo 2000 (L.F. 21-25). On November 1-2, 2000, the cause went to trial before a jury in the Circuit Court of Cape Girardeau County, the Honorable William L. Syler presiding (Tr. 5, 30, 198).

Appellant disputes the sufficiency of the evidence to support his convictions of resisting arrest and unlawful use of a weapon (App.Br. 21, 43). Viewed in the light most favorable to the verdicts, the following evidence was adduced.

On November 15, 1999, appellant went to the home of Scott Guess, and the two of them discussed making a Agas run,@ where they would go steal anhydrous ammonia (Tr. 205). At about 10:30 p.m., appellant and appellant=s friend, Justin Constantino, went back to Guess= home, and the three of them went to WalMart, where appellant bought two five-gallon propane tanks (Tr. 207). Each tank, when filled with anhydrous ammonia, could be sold to methamphetamine manufacturers for $2,500-$3,000 (Tr. 206). On the way, the three men discussed what each would do, and appellant pulled a gun from his jacket pocket, showed the gun to the others, and said that he was the Amuscle,@ and if anything should happen, he Ahad it covered@ (Tr. 212). Then appellant put the gun back in his jacket pocket (Tr. 213). Each of the men used methamphetamine intravenously in the van before they arrived at the co-op (Tr. 210-11).

That same night, Trooper Aaron Harrison, of the Missouri State Highway Patrol, and Deputy Dwayne Whitworth, of the Cape Girardeau County police department, organized a stake-out of the

Whitewater Co-op, a store selling farming supplies, because there had been many thefts of anhydrous ammonia recently (Tr. 63-64, 150). At about 11:45 p.m., Dep. Whitworth parked up the street as back-up, and Trp. Harrison drove to the co-op, hid his patrol car, and waited (Tr. 70-72, 150).

About two minutes after Trp. Harrison was settled, appellant, Guess, and Constantino drove into the co-op, turned off the van=s headlights, and parked near the tanks of anhydrous ammonia (Tr. 72-73). Guess and Constantino each took a propane tank and went to one of the anhydrous ammonia tanks, while appellant stood watch by the front of the van, leaving the van door open for the men (Tr. 74). Trp. Harrison heard the ammonia gas escaping and the hoses being attached, and waited about five minutes to allow the men to obtain the anhydrous ammonia (Tr. 74-77).

Trp. Harrison then radioed to Dep. Whitworth to come down to the co-op (Tr. 77, 151). Trp. Harrison, who was wearing a navy blue uniform with the words AState Patrol@ on the back and a cap emblazoned with the highway patrol insignia (Tr. 65-66), came out of his hiding place, pulled out a flashlight, shone it on appellant, and said, AHighway Patrol. Get on the ground@ (Tr. 77).

Guess and Constantino fled on foot, and appellant ran to the van and got in (Tr. 77-78). Appellant put the van in reverse, and in his haste, backed into two field applicators, and stopped (Tr. 78-79). Trp. Harrison, who was now standing fifteen feet directly in front of the van, still shining his light on appellant, continued to yell at appellant that he was the Highway Patrol and ordered appellant to stop and turn off the van, but appellant put the van in drive, Afloored@ it, and drove straight for Trp. Harrison (Tr. 80-82, 145). Trp. Harrison quickly moved aside, but the front of the van hit his thigh and the driver=s side mirror hit him in the ribs (Tr. 83-84). Trp. Harrison reached out to keep from falling and ended up grabbing onto the van and swinging himself in (Tr. 83).

Trp. Harrison told appellant to stop or he would kill him (Tr. 84). Appellant abruptly stopped the van, throwing Trp. Harrison into the dash board, and then appellant fought with Trp. Harrison, elbowed him in the upper chest, jumped out the door, and fled (Tr. 85-86). During this fight, Trp. Harrison did not see appellant=s gun (Tr. 86).

Trp. Harrison chased appellant, yelling, AHighway Patrol. Stop. Get on the ground,@ and AStop, Highway Patrol, you=re under arrest@ (Tr. 86, 154). He saw appellant throw an object on the ground (Tr. 87). Dep. Whitworth, who had already apprehended Guess, cut off appellant=s escape, and ordered appellant to stop (Tr. 87, 152). Appellant, trapped between the two officers, stopped, but he refused to drop to the ground (Tr. 87). Trp. Harrison took him down, and appellant continued to resist, so Trp. Harrison applied force to his wrist until appellant gave him his hands to be handcuffed (Tr. 88). At the station, appellant was told he was under arrest for assault of a law enforcement officer, and appellant said, AI should have just shot him@ (Tr. 245). The next morning, officers recovered appellant=s gun (Tr. 177, 182). The magazine was fully loaded and had a bullet chambered (Tr. 182).

Appellant did not take the stand or call any witnesses (Tr. 256).

At the close of the evidence, instructions, and arguments of counsel, the jury found appellant guilty of assault of a law enforcement officer in the third degree, resisting arrest, unlawful use of a weapon, and attempting to steal anhydrous ammonia (Tr. 277, L.F. 44-45). The jury recommended the maximum punishment on at least one of the two misdemeanor convictions (Supp.L.F. 11).[1] The court, having

[1] Appellant has not provided this Court with a copy of the jury=s verdict on the other misdemeanor conviction. It is appellant=s duty to provide copies of the verdicts in the legal file.

previously found appellant to be a prior and persistent offender (Tr. 29), sentenced him to six months of imprisonment on each misdemeanor conviction, the sentences to run concurrently, and sentenced him to ten years of imprisonment on each felony, the sentences to run consecutively (Tr. 285-86, L.F. 44-46). The Missouri Court of Appeals, Eastern District, affirmed the convictions and sentences via per curiam order. ***State v. Marlowe***, No. ED78917 (Mo.App.E.D. December 18, 2001). The Court of Appeals, Eastern District, denied appellant=s motion for rehearing on February 4, 2002. On March 19, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court.

Supreme Court Rule 30.04(a).

ARGUMENT

I.

THE TRIAL COURT DID NOT CLEARLY ERR IN DENYING APPELLANT=S OBJECTION TO THE PROSECUTOR=S PEREMPTORY STRIKE OF VENIREPERSON FULTON BECAUSE APPELLANT FAILED TO PROVE THAT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OCCURRED IN THAT, AFTER APPELLANT CHALLENGED THE STRIKE, THE PROSECUTOR GAVE RACE-NEUTRAL EXPLANATIONS FOR THE STRIKE AND APPELLANT FAILED TO PROVE THAT THE PROSECUTOR=S EXPLANATIONS WERE INCREDIBLE.

For his first point on appeal, appellant claims that the trial court erred in overruling his challenge, based on ***Batson***,[2] of the prosecutor=s peremptory challenge of venireperson Fulton (App.Br. 15). Appellant argues that there were similarly situated white venirepersons who were not stricken, and therefore his convictions must be reversed (App.Br. 15).

A. Relevant Facts

At trial, at the conclusion of voir dire, the parties tendered their peremptory strikes, and appellant objected, on ***Batson*** grounds, to the prosecutor=s strike of venireperson Fulton (Tr. 47). The court noted that venireperson Fulton was the only black venireperson, and that appellant was white (Tr. 47). The prosecutor explained that he struck venireperson Fulton because she was Aa government employee who=s going to soon be a part of a class action, and I didn=t want to ask her specific questions about it, but I just

[2] ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

had the impression she might not be a good witness [sic] for the State@ (Tr. 48). Then the following exchange took place:

MR. MOORE: Judge, I don=t believe that=s a race neutral reason. There are other people who also indicated that they were members B I don=t know what the class action is, but she=s not the only one who indicated on her juror questionnaire that she was a potential member of some type of class action suit.[3]

MR. SWINGLE: Let me check.

MR. MOORE: Besides, there was no inquiry to her to show what effect, if any, that may have on her.

THE COURT: These things are always delicate. I would have this take on it, gentlemen. I=m not certain that=s entirely a race neutral explanation, with all due candor, Mr. Swingle. However, as I said, I may be wrong about this. . . .

* * *

THE COURT: . . . . So there apparently is some feeling in that direction that there has to be an explanation. **But Mr. Swingle hasn=t indicated to me that he=s either struck her for a racial reason,** nor am I compelled to think that he needs to leave her for a racial reason. But Mr. Swingle, what=s your position on your strike there?

MR. SWINGLE: Again, Your Honor, [] it wasn=t for her race. It was for the class action situation. There is another B Mr. Moore is correct. I found one other

[3] Appellant never stated who the other venirepersons were.

person that had circled class action, but those are the only two people. No, wait. Here=s a third, Sheehan. All right. Three people in a class action. Mr. Sheehan was so strong on his other answers, I definitely, definitely, definitely like Sheehan. I=m not concerned about that with him. Ms. Fulton didn=t say anything otherwise.

THE COURT: I=m not going to take this away from Mr. Swingle.

(Tr. 48-50, emphasis added). Appellant asked to be permitted to find the three questionnaires, mark them as exhibits, and submit them (Tr. 50-51). At the end of the first day of trial, appellant admitted three jury questionnaires as exhibits on the ***Batson*** issue because the questionnaires indicated that the jurors in question were involved in some type of class action suit. (Tr. 197-98).

In appellant=s motion for a new trial, he raised the ***Batson*** issue, arguing that there were Aat least@ two other venirepersons involved in a class-action lawsuit, and that one of them, venireperson Sheehan, served on the jury (L.F. 37-38). Appellant did not allege who the other venireperson or persons were.

B. Standard of Review.

"A reviewing court will set aside the trial court's finding as to whether the prosecutor discriminated in the exercise of his peremptory challenges only if such finding is clearly erroneous." ***State v. Weaver***, 912 S.W.2d 499, 509 (Mo.banc 1995). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm impression that a mistake has been committed." ***State v. Antwine***, 743 S.W.2d 51, 66 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988) (*quoting* ***Anderson v. Bessemer City,*** 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 LED.2d 518 (1985)).

C. The state=s explanation for the strike was race-neutral.

Appellant contends that the trial court erred in overruling his ***Batson*** challenge to the state=s strike of venireperson Fulton because, according to appellant, the state=s reason was not race neutral and there was a similarly situated white juror who was not struck by the state (App.Br. 15).

In analyzing ***Batson*** challenges, Missouri courts use a three-part test as set out in ***State v. Parker,*** 836 S.W.2d 930, (Mo. banc 1992), *cert. denied*, 506 U.S. 1014 (1992):

> First, the defendant must raise a ***Batson*** challenge with regard to one or more specific venirepersons struck by the state and identify the cognizable racial group to which the venireperson or persons belong. The trial court will then require the state to come forward with reasonably specific and clear race-neutral explanations for the strike . . . . Assuming the prosecutor is able to articulate an acceptable reason for the strike, the defendant will then need to show that the state's proffered reasons for the strikes were merely pretextual and that the strikes were racially motivated.

836 S.W.2d at 939.

Among the jurors the State sought to remove via its peremptory strikes was venireperson Fulton (Tr. 47). Appellant made ***Batson*** challenges to this strike, arguing that Fulton was the only African American on the jury panel (Tr. 47).

In response to appellant's challenge, the state explained that Fulton was a government employee who expected to be a part of a class action suit (Tr. 48). The state=s reasons for a strike need only be facially race-neutral. ***State v. Brown***, 998 S.W.2d 531, 543 (Mo.banc 1999); ***State v. Brooks***, 960

S.W.2d 479, 488 (Mo.banc 1997). "Where a prosecutor gives a reasonably specific, race-neutral reason for making peremptory strikes, the prosecutor's explanation will suffice unless there is an inherently discriminatory intent in that explanation." ***State v. Weaver***, ***supra***.

In the present case, the state=s reason for the strike was a reasonably specific, race-neutral reason. The explanations that Fulton was a government employee and involved in a class action suit were racially neutral on their face. Race is not inherent in being a government employee or part of a class-action lawsuit. ***Hernandez v. New York***, 500 U.S. at 360, 111 S.Ct. at 1866 (explanation is race-neutral even if it has a disparate impact on different races; relevant question is whether explanation, as a matter of law, demonstrates discriminatory intent). Appellant has pointed to nothing which is *inherently discriminatory* in the state=s reasons. Appellant=s argument that there was another similarly situated juror is an argument of pretext, not an argument that the state=s explanation is not facially race-neutral.

While appellant tries to suggest that the court never found the prosecutor=s explanation for the strike to be race neutral (App.Br. 15), the court ultimately stated that the prosecutor had not indicated that he had made the strike for racial reasons (Tr. 49). The court could not make this statement if it did not ultimately believe the state=s explanation to be race-neutral. In any event, the explanations offered by the state, on their face, were race-neutral, and thus the burden then shifted to appellant to prove that they were pretextual.

D. Appellant failed to challenge as pretextual the state=s explanation that it struck Fulton because she was a government employee.

Once the state has articulated an acceptable reason for the strike, it becomes incumbent upon the defendant to offer "specific evidence or analysis" showing that the State's explanations are pretextual. ***State***

v. Johnson, 930 S.W.2d 456, 460 (Mo.App.W.D. 1996). Indeed, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." ***Purkett v. Elem***, 115 S.Ct. 1769, 1771, 131 LED.2d 874 (1995).

In the present case, it cannot be said that the trial court abused its considerable discretion in denying appellant=s ***Batson*** challenge because appellant failed to prove, via specific evidence and analysis, that the state=s proffered reasons for its peremptory strike of Fulton was pretextual.

First and foremost, while the prosecution gave two race-neutral reasons for striking Ms. Fulton, that she was a government employee who was a member of a class action suit, appellant challenged *only* the explanation that she was a member of a class action suit when he observed that there were other unspecified white jurors who were also participants in class action suits. Appellant does try to argue on appeal that there was a similarly situated white juror, Jennifer Conklin, who was involved in a class action suit *and* was a government employee[4], but this argument comes too late. AIf a defendant fails to challenge the state=s explanation in the trial court, the defendant may not challenge the state=s explanation on appeal.@ ***State v. Plummer***, 860 S.W.2d 340, 346 (Mo.App.E.D. 1993).

Making no attempt to explain why a state=s reason is pretextual is akin to having failed to respond at all. ***Id.*** If the defendant fails to present evidence to support the contention that the State's explanation

[4] According to Conklin=s jury questionnaire, she was an investigator with the division of child support enforcement (App.Br. 46).

was pretextual, Missouri courts assume no ***Batson*** challenge is made, and the issue is not preserved for appeal. ***State v. White,*** 941 S.W.2d 575, 582 (Mo.App. E.D., 1997)**,** citing ***State v. Mack***, 903 S.W.2d 623, 629 (Mo.App.1995). Where a defendant fails to challenge the state's explanation, he is considered to have abandoned the issue. ***State v. Beishline,*** 920 S.W.2d 622, 626 (Mo.App. W.D. 1996). ***See also State v. Jackson***, 948 S.W.2d 138, 141 (Mo.App. E.D. 1997) (where defendant failed to respond to prosecutor=s second reason for striking venireperson, claim was not preserved).

Because appellant failed to even challenge, let alone prove via specific evidence and analysis, that the state=s explanation that he struck Ms. Fulton because she was a government employee was pretextual, appellant=s claim utterly fails. Even if one were to assume that the explanation regarding the class action suit was pretextual, the state would still have offered a race-neutral, non-pretextual explanation for striking Fulton **B** she was a government employee. This is sufficient to uphold the strike.

E. The state=s explanation that it struck Fulton because she was a member of a class action suit was not pretextual.

Furthermore, appellant failed to prove that the state=s explanation, to the extent appellant did properly challenge it, was pretextual. As noted earlier, once the state has articulated an acceptable reason for the strike, it becomes incumbent upon the defendant to offer "specific evidence or analysis" showing that the State's explanations are pretextual. ***State v. Johnson***, 930 S.W.2d 456, 460 (Mo.App.W.D. 1996). Indeed, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." ***Purkett v. Elem***, 115 S.Ct. 1769, 1771, 131 LED.2d 874 (1995).

In determining whether a defendant carried the burden of proving purposeful discrimination, the trial court views the plausibility of the state=s explanation in light of the totality of the facts and circumstances of the case. ***Parker, supra,*** at 934, 939. Facts and circumstances to be considered included (1) the existence of similarly situated white jurors who were not struck; (2) the degree or relevance between the explanations and the case to be tried Ain terms of the kind of crime charged, the nature of the evidence to be adduced, and the potential punishment;@ (3) the prosecutor=s demeanor or statements during voir dire; (4) the demeanor of the excluded jurors; (5) the trial court=s past experiences with the prosecutor; and (6) any other objective factors bearing on the state=s motive to discriminate on the basis of race, such as prevailing conditions in the community or the race of the defendant, the victim, or material witnesses. ***Parker, supra***, at 939-940.

Because Amuch of the determination, by necessity, turns upon evaluation of intangibles such as credibility and demeanor,@ trial judges are afforded considerable discretion in determining whether a defendant has established purposeful discrimination. ***Parker, supra*** at 934; ***Hernandez v. New York***, 500 U.S. 352, 111 S.Ct. 1859, 1869, 114 LEd.2d 395 (1991). "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that is settled, there seems nothing left to review." ***Id***. at 1870. As recognized in ***Antwine***:

> Jury selection is, after all, an art and not a science. By their very nature, peremptory challenges require subjective evaluations of veniremen by counsel. Counsel must rely upon perceptions of attitudes based upon demeanor, . . . , ethnic background, employment, marital status, age, economic status, social position, religion, and many other fundamental background facts. There is, of course, no assurance that perceptions

> drawn within the limited context of voir dire will be totally accurate. Counsel simply draws perceptions upon which he acts in determining the use of peremptory challenges.

743 S.W.2d at 64.

The only argument appellant presented to the trial court was that there were allegedly other white jurors who were parties to class action suits (Tr. 48). While true that the court should consider the state's treatment of similarly situated white jurors in analyzing a ***Batson*** claim, the failure to strike a similarly situated white juror does not, by itself, mandate reversal. ***State v. Frison***, 775 S.W.2d 314, 317 (Mo.App. E.D. 1989).

First of all, appellant failed to even specifically identify a similarly situated juror at the time the challenge was made. He only observed that there were other jurors who were allegedly part of a class action suit. One cannot tell whether another juror is similarly situated to the stricken juror when one does not even know who the other juror is in order to make a comparison.

Appellant did attempt to do so later when he offered the juror questionnaires into evidence, but this was too late. ***Batson*** challenges must be made and completed prior to the venire being excused and the jury sworn. ***State v. Parker***, 836 S.W.2d 930, 935 (Mo.banc 1992). It is necessary for appellant to put on specific evidence and analysis to demonstrate his belief that an explanation for a strike is pretextual so that the prosecution might have an opportunity to respond. In the present case, the prosecution was not given this opportunity because appellant failed to meet his burden of putting on any specific evidence or analysis as to how and why certain jurors were similarly situated.

In fact, it was the *state* which actually specifically identified another juror, Sheehan, who was involved in a class action suit. Sheehan and Fulton were not similarly situated, however. As the prosecutor pointed out, Sheehan had responded to voir dire questions in such a manner as to cause the state to affirmatively *want* him on the jury despite Sheehan=s involvement in a class action suit, whereas Fulton had not given such answers (Tr. 50).

The record also demonstrates that Sheehan was a former police officer in the military. (Tr. 15). Fulton had no apparent law enforcement experience, unless one counts her job as a Achild support technician@ with the Division of Child Support Enforcement (App.Br. 47). In light of the fact that this case involved charges including assault of a law enforcement officer and resisting arrest, a potential juror=s law enforcement experience would be particularly relevant to the state in determining which jurors to keep and which to let go.

Similarly, the other allegedly Asimilarly-situated@ juror, later determined to be Jennifer Conklin, had a degree in criminal justice (S.Tr. 16). This also is a relevant characteristic differentiating Conklin from Fulton, particularly in light of the charges at issue in the case.

Finally, the state also said it struck Fulton because she was a government employee; appellant made no claim or argument that Sheehan or Conklin were government employees as well. In fact, appellant did not even challenge the government employee status as a pretextual reason at trial. Appellant thus conceded at trial that the state=s explanation as to Fulton being struck because she was a government employee was both race-neutral and non-pretextual, which it was.

To summarize, the only argument of pretext appellant presented to the trial court was that there were similarly situated white jurors in that there were white jurors who were also parties to a class action suit,

thereby suggesting that the state=s explanation that he struck Fulton because of her participation in a class action suit was pretextual. However, appellant never challenged the state=s other reason for the strike, that Fulton was a government employee. This explanation was race-neutral and not pretextual and, in and of itself, was sufficient to uphold the state=s strike of Fulton. Furthermore, the other jurors were not similarly situated in light of the fact that they had additional characteristics Fulton did not have which made them attractive to the state in light of the case. Appellant=s claim is thus without merit and should be denied.

II.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT=S MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT II, FELONY RESISTING ARREST, BECAUSE THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JUROR TO FIND THAT APPELLANT WAS BEING ARRESTED FOR STEALING ANHYDROUS AMMONIA, WHICH IS A FELONY, IN THAT THE ARRESTING OFFICER TESTIFIED HE WAS ARRESTING APPELLANT FOR STEALING ANHYDROUS AMMONIA.

For his second point on appeal, appellant claims that the trial court erred in denying his motion for a judgment of acquittal on Count II, felony resisting arrest (App.Br. 21). Appellant claims that he and his cohorts had only attempted to steal anhydrous ammonia, which is a misdemeanor, and therefore he could only be convicted of misdemeanor resisting arrest (App.Br. 21).

A. Facts.

At trial, the evidence showed that Trooper Aaron Harrison was hiding when appellant and his coconspirators drove onto the co-op (Tr. 70-73). Trp. Harrison saw two men carry propane tanks to the anhydrous tanks, heard the tanks being put on the ground, heard the hoses being connected, and heard the sound of the gas valve being opened (Tr. 74-75). He then waited Afour or five minutes@ to let the men obtain some anhydrous ammonia (Tr. 75-77). At that point, he stepped out, shone his light on appellant, and said, AHighway Patrol. Get on the ground@ (Tr. 77). Appellant ran to the van, Afloored it,@ almost running over Trp. Harrison and striking him in the legs and chest with the van, fought with Trp. Harrison, elbowing him in the upper chest, and finally running away, only stopping when he was trapped by a second officer, and even then refusing to cooperate (Tr. 80-88, 145). After appellant was subdued, Trp. Harrison

returned to the scene, unhooked the propane tank, and took it to the police station, where testing confirmed that the tank contained anhydrous ammonia (Tr. 187-88). Trp. Harrison testified that he was arresting appellant for the felony of stealing anhydrous ammonia, because he knew they had already obtained some anhydrous ammonia at the time he tried to arrest them (Tr. 122-23).

B. Standard of review.

In assessing whether there is sufficient evidence to support a conviction, the appellate court must accept as true all of the evidence and inferences favorable to the state, and disregard all evidence and inferences to the contrary. ***State v. Grim***, 854 S.W.2d 403, 405 (Mo. banc 1993), *cert. denied* 510 U.S. 997 (1993), ***State v. Dulany***, 781 S.W.2d 52, 55 (Mo. banc 1989). The review is limited to a determination of whether there is sufficient evidence from which a reasonable finder of fact could find the defendant guilty beyond a reasonable doubt. ***State v. Grim***, 854 S.W.2d at 405. A jury may believe or disbelieve all, part, or none of the testimony of any witness. ***State v. Hineman***, 14 S.W.3d 924, 927 (Mo.banc 1999).

C. Evidence was sufficient to show that appellant was guilty of felony, as opposed to misdemeanor, resisting arrest.

AA person commits the crime of resisting arrest if he or she, knowing that a law enforcement officer is making an arrest and for the purpose of preventing that officer from effectuating such arrest, resists the arrest by using or threatening the use of violence or physical force.@ ***State v. Webber***, 982 S.W.2d 317, 324-25 (Mo.App. S.D. 1998); ' 575.150.1(1), RSMo 2000.

Section 575.150.4, RSMo 2000, provides that: AResisting, by means other than flight, or interfering with an arrest for a felony is a class D felony; otherwise, resisting or interfering with arrest is a class A

misdemeanor.@ AThe statutory language makes it plain that resisting arrest is a felony offense only if the underlying offense is a felony and the resistance is accomplished by a means other than flight.@ ***State v. Furne***, 642 S.W.2d 614, 616 (Mo.banc 1982). AThe relevant inquiry is not whether defendant is guilty of the charge for which he was arrested, but whether the arresting officer contemplated making a felony arrest.@ ***DeClue v. State***, 3 S.W.3d 395, 397 (Mo.App. E.D. 1999).

In ***State v. Merritt***, 805 S.W.2d 337, 338-39 (Mo.App. E.D. 1991), a police officer saw what he thought was a drug sale, walked up to the defendant=s truck, identified himself as a deputy sheriff and asked the defendant to identify himself, and the defendant started to drive away. The officer told the defendant that he was under arrest, but the defendant did not stop, and the outside mirror of his truck struck the officer in the ribs and the officer was dragged for about 60 feet. ***Id.*** at 339. The defendant was arrested a short time later, but no drugs were found. ***Id.*** The defendant appealed, claiming that the evidence was insufficient to show that the officer was arresting him for a felony or that the defendant resisted by a means other than flight. ***Id.*** The Court of Appeals, Eastern District, held that the testimony of the officer that he was planning to arrest the defendant for the sale of marijuana was sufficient to show that appellant was being arrested for a felony, and the evidence that the officer was hit by the truck and dragged as the officer held on was sufficient to show that the defendant did more than merely flee. ***Id.*** at 340.

Similarly, in the case at bar, the evidence showed that Trp. Harrison waited until appellant=s gang had actually taken some of the anhydrous ammonia, and then he stepped out, identified himself as a police officer and ordered them to drop to the ground (Tr.77). Trp. Harrison was very clear that he was arresting

them for stealing anhydrous ammonia,[5] not attempting to steal anhydrous ammonia, because he knew they had already obtained some of the anhydrous ammonia before he tried to arrest them (Tr. 122-23). This evidence was sufficient to show that, at the time appellant hit Trp. Harrison with his van, fought with him inside the van, and then ran off, Trp. Harrison was trying to arrest him for committing a felony. The fact that the state later decided to charge appellant only with attempt to steal anhydrous ammonia is immaterial. ***DeClue v. State***, 3 S.W.3d at 397. Therefore, appellant=s point must fail.

Appellant argues that ***State v. Bell***, 30 S.W.3d 206 (Mo.App. S.D. 2000), conflicts with ***Merritt***, and requires that the evidence at trial prove that the defendant was actually guilty of committing the felony for which the officer was arresting the defendant (App.Br. 21-23). However, ***Bell*** does not say that. In ***Bell***, the police were trying to arrest a man named Kenneth Campbell, and appellant started throwing rocks at the officers. ***State v. Bell***, 30 S.W.3d at 206-207. At trial, the officer never Aindicated for what charge Kenneth Campbell was being arrested.@ ***Id.*** at 207. The appellate court examined the rest of the trial record, and could not determine whether Campbell was being arrested for a felony or a misdemeanor. ***Id.*** at 208. The court stated that: AIt would have been simple for the State to show what the officer was arresting Campbell for. Failure to show this, when it could have been easily established, casts doubt on the

[5] AThe theft of any amount of anhydrous ammonia is a class D felony.@ Section 570.030.4, RSMo 2000.

State=s contentions.@ ***Id.*** The court then set aside the felony conviction and ordered the trial court to enter a judgment of conviction on the misdemeanor of interfering with arrest. ***Id.***

Bell does not say that the evidence at trial must establish that the defendant actually committed a felony. ***Bell*** merely requires that there be some evidence that the officer was arresting the defendant for a felony. Thus, ***Bell*** does not conflict with ***Merritt.*** In the case at bar, Trp. Harrison testified that he was arresting appellant for a felony (Tr. 122-23). Thus, in the case at bar, unlike in ***Bell***, there was direct evidence that appellant was being arrested for a felony. Because ***Bell*** is distinguishable on its facts from the case at bar, appellant=s reliance on ***Bell*** is misplaced, and his point must fail.

Appellant cites numerous other cases with which he claims ***Merritt*** conflicts (App.Br. 25-26). None of them conflict. In ***State v. Furne***, 642 S.W.2d 614, 616-617 (Mo.banc 1982), this court found insufficient evidence not because the state failed to prove that the defendant actually committed an act which he knew to be a felony, but because the state failed to plead or put on any evidence that the grounds for the arrest, disorderly conduct, constituted either a felony or a misdemeanor, and thus failed to prove that the arrest was for a crime or ordinance violation.

In ***State v. Johnson***, 830 S.W.2d 36, 38 (Mo.App.W.D. 1992), the state admitted that it failed to plead that the offense for which the defendant was arrested was a felony and that they failed to prove it was a felony.

In ***State v. Burton***, 801 S.W.2d 380 (Mo.App.W.D. 1990), the alleged felony underlying the defendant=s resisting arrest conviction was interfering with the arrest of another person. However, the state failed to

indicate whether the defendant had interfered with an arrest for a felony or a misdemeanor. Thus, the state failed to prove that the defendant was being arrested for a felony at the time he resisted.

In ***State v. Johnson***, 741 S.W.2d 70, 73 (Mo.App.S.D. 1987), the information failed to even allege the offense which the defendant was supposed to have committed and for which he was being arrested when he resisted. The state also failed to prove what statute or ordinance the defendant had supposedly violated and for which he was being arrested. While the officer had tried to testify that he thought the defendant had a concealed weapon, there was no evidence to justify the officer=s conclusion.

None of the cases appellant cites require the state to put on independent evidence of an actual commission of the alleged underlying felony before a conviction for felony resisting arrest will be sustained. All of the cases simply require there to be direct evidence that the defendant was being arrested for a felony.

In the present case, there was such evidence, as already explained above. Appellant=s claims of conflict within the caselaw are without merit, as is his claim that the evidence was insufficient in this case. Appellant=s point is thus without merit and should be denied.

III.

THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT=S INSTRUCTION Z, RESISTING ARREST BY FLIGHT, BECAUSE THERE WAS NO BASIS FOR ACQUITTING HIM OF THE GREATER OFFENSE IN THAT THE UNDISPUTED EVIDENCE SHOWED THAT APPELLANT USED OR THREATENED THE USE OF PHYSICAL FORCE IN RESISTING HIS ARREST.

For his third point on appeal, appellant claims that the trial court erred in refusing his Instruction Z, which would have instructed the jury on Count II, Amisdemeanor resistance by flight@ (App.Br. 28). Appellant argues that the jury should have been allowed to consider whether appellant merely fled without using any violence or physical force (App.Br. 29).

A. Facts.

At trial, the undisputed evidence was that, after Trooper Aaron Harrison announced who he was and ordered appellant to stop, appellant ran to his van, got in, put it reverse, Afloored it,@ hit two field applicators, put the van in forward, and, even though Trp. Harrison was standing directly in front of the van and continuously yelling for him to stop, appellant Afloored@ the van, forcing Trp. Harrison to get out of the way to avoid being hit, and even then appellant still struck Trp. Harrison with the van, the front of the van hitting him in the thigh, and the mirror hitting him in the ribs (Tr. 80-84, 145). Trp. Harrison managed to get inside the van, where appellant brought the van to a sudden stop, throwing Trp. Harrison into the dashboard, appellant fought Trp. Harrison, elbowing him in the upper chest, and appellant then broke free and ran away (Tr. 85-86).

At trial, during the instruction conference, appellant offered Instruction Z, which read as follows:

As to Count II, if you do not find the defendant guilty of resisting arrest as submitted in Instruction No. 15, you must consider whether he is guilty of resisting arrest under this instruction.

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 16, 1999, in the County of Cape Girardeau, State of Missouri, A. M. Harrison was a law enforcement officer, and

Second, that A. M. Harrison was making an arrest of the defendant for stealing anhydrous ammonia, and

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

Fourth, that for the purpose of preventing the law enforcement officer from making the arrest, the defendant resisted by fleeing from the officer, then you will find the defendant guilty under Count II of resisting arrest by flight.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(Supp.L.F. 12).

B. Law on giving instructions on lesser included offense.

Trial courts are not obligated to instruct on a lesser included offense unless there is a basis for a verdict acquitting the defendant of the greater offense and convicting him of the included offense. ***State v. Mease***, 842 S.W.2d 98, 110-11 (Mo.banc 1992), *cert. denied* 508 U.S. 918 (1993); ' 556.046.2, RSMo 2000.

Section 575.150, RSMo 2000, provides, in pertinent part, as follows:

> A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, . . . for the purpose of preventing the officer from effecting the arrest, . . . the person: (1) Resists the arrest . . . of such person by using or threatening the use of violence or physical force or by fleeing from such officer . . . .

If the defendant uses or threatens to use violence or physical force in resisting the arrest, the crime is a felony, but if the defendant flees without such conduct, the crime is a misdemeanor. Section 575.150.4, RSMo 2000.

C. Appellant was not entitled to an instruction on misdemeanor resisting arrest because there was no basis for acquitting him of the greater offense and convicting him of the lesser.

Appellant contends that he was entitled to an instruction on misdemeanor resisting arrest, which he considers to be a lesser-included offense (App.Br. 29). However, it is not certain that misdemeanor resisting arrest is a lesser-included offense of felony resisting arrest. ***State v. Good***, 851 S.W.2d 1 (Mo.App.S.D. 1992), suggests that misdemeanor resisting arrest is not a lesser-included offense of felony resisting arrest under ' 556.046.1(3) because the two require proof of different elements. ***Good*** also acknowledges however, that misdemeanor resisting arrest *may* be a lesser degree of felony resisting arrest.

This question need not be answered in the present case, however, because even if misdemeanor resisting arrest is a lesser included offense of felony resisting arrest, appellant would still not be entitled to the instruction because there was no basis to acquit appellant of the greater offense and convict him of the

lesser. In the case at bar, the undisputed evidence was that appellant used physical force in resisting the arrest. The evidence showed that, when Trp. Harrison announced who he was and told the men to stop, appellant ran for the van, got in, put the van in reverse, and backed into the field applicators, which brought the van to a stop (Tr. 77-79). At that point, Trp. Harrison was directly in front of the van, shining his 30,000 candlepower light at appellant, continuously yelling that he was an officer and that appellant had to stop (Tr. 77, 80-81). Then, appellant put the van in drive and Afloored it,@ driving directly at Trp. Harrison (Tr. 80-82, 145). Appellant would have run over Trp. Harrison if Trp. Harrison had not moved out of the way, and even though Trp. Harrison tried to get out of the way, appellant still hit him with the front of the van and the side mirror on the van (Tr. 83-84). At the station, when told he was being arrested for assaulting a law enforcement officer, appellant said, AI should have just shot him@ (Tr. 245), which shows his intent. Under these facts, there is no basis for acquitting appellant of resisting arrest by using or threatening to use physical force; when appellant drove directly towards the officer and hit him with the van, appellant both threatened the use of physical force and actually used physical force in resisting his arrest. This evidence leaves no room for an inference that appellant merely fled without using or threatening to use physical force. Appellant=s argument on this point is entirely premised on his belief that the jury found that he did not act purposefully when he drove the van at Trp. Harrison, which he claims is evidenced by the fact that the jury did not find him guilty of first degree assault, but rather third degree assault (App.Br. 28). Appellant believes that the jury could not simultaneously find that appellant Arecklessly created a grave risk of death or serious physical injury@ to Trp. Harrison Aby driving a van directly at@ Trp. Harrison, as required for third degree assault, and that, Afor the purpose of preventing the

law enforcement officer from making the arrest, [appellant] resisted by using violence or physical force,@ as required for resisting arrest (S.L.F. 4, 7).

Appellant=s argument, essentially, is that if a person recklessly creates a grave risk of death or serious physical injury, he could not have done so by purposefully using physical force. This is patently illogical. It is the very purposeful use of physical force which recklessly created the grave risk of death or serious physical injury. One certainly can use physical force on purpose but be reckless as to the consequences of the use of that force. Indeed, the term Arecklessly@ means to consciously disregard a substantial and unjustifiable risk that circumstances exist ***or that a result will follow***. MAI-CR3d 319.16.

In the present case, the jury found that appellant purposefully drove the van at Trp. Harrison in order to resist arrest, and thus was guilty of resisting arrest, but that in doing so, he recklessly created a grave risk of death or serious physical injury to Trp. Harrison, as opposed to actually intending to kill or injure Trp. Harrison, and thus found him guilty of third degree, as opposed to first degree assault. The jury ***never*** rejected the fact that appellant purposely drove the van at Trp. Harrison, as appellant repeatedly suggests in his brief (App.Br. 28, 31). In fact, the jury *had* to find that appellant drove the van at Trp. Harrison to find him guilty of third degree assault: A[If] you find and believe . . . the defendant recklessly created a grave risk of death or serious physical injury . . . ***by driving a van directly at A.M. Harrison*** . . . A (SLF 4) (emphasis added). The jury merely rejected that appellant had the purpose or intent of killing or injuring Trp. Harrison.

Appellant=s entire argument on this point rests on this faulty premise that the jury rejected the driving of the

van at Trp. Harrison as the physical force[6] used to resist arrest. That premise being faulty, the rest of

[6]Respondent would note that appellant, in arguing that resisting arrest by flight is a lesser included offense of resisting arrest by means of violence or physical force, cites two cases suggesting that there has been an issue in other cases that the same conduct could consist of either flight or force (App.Br. 30). In both of the cases appellant cites, the courts ruled that their was sufficient evidence that the defendant had used physical force. See ***State v. Merritt***, 805 S.W.2d 337 (Mo.App.E.D. 1991) (defendant=s truck struck deputy and partially dragged him for 60 feet); ***State v. Tibbs***, 772 S.W.2d 834 (Mo.App.S.D. 1989) (defendant, with arresting officer in car, drove 44 miles at speeds up to 70 m.p.h. and told officer that he couldn=t go to jail but would rather Ago out@, which was thought to mean drive into a bridge abutment). Appellant cites no authority wherein driving a vehicle and striking the

appellant=s argument collapses because there is simply no basis in the evidence to acquit him of the greater offense of resisting arrest by use of physical force and convict him of the lesser offense of resisting arrest merely by flight. Therefore, the trial court did not err in refusing appellant=s Instruction Z, and appellant=s point must fail.

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officer with it is considered mere flight, and not force.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT USED METHAMPHETAMINE DURING THE TRIP TO THE CO-OP BECAUSE ADMISSION OF THE EVIDENCE DID NOT VIOLATE THE RULE AGAINST ADMITTING EVIDENCE OF UNCHARGED CRIMES IN THAT THE EVIDENCE WAS ADMISSIBLE TO PROVIDE A COMPLETE PICTURE OF THE CRIME AND WAS ADMISSIBLE TO SHOW MOTIVE TO STEAL ANHYDROUS AMMONIA. IN ANY EVENT, APPELLANT HAS NOT SHOWN PREJUDICE.

For his fourth point on appeal, appellant claims that the trial court erred in admitting evidence that he used methamphetamine in the van on the way to steal anhydrous ammonia (App.Br. 36). Appellant argues that this evidence was inadmissible because it was not related to any contested issue in the case (App.Br. 36).

A. Facts.

At trial, the evidence showed that as appellant and his two coconspirators drove to the co-op to steal anhydrous ammonia, they each used methamphetamine by way of intravenous injection (Tr. 210-11). When officers caught and arrested appellant=s coconspirator Scott Guess, they searched his person, and found a hypodermic needle which contained methamphetamine (Tr. 108-109, 155). When officers finally caught and arrested appellant, they asked him when was the last time he used methamphetamine, and he answered that he and Mr. Guess had used methamphetamine that evening (Tr. 148).

B. Standard of Review.

The trial court has broad discretion in deciding whether to admit or exclude evidence. ***State v. Johns***, 34 S.W.3d 93, 103 (Mo.banc 2000), *cert. denied*, 121 S.Ct. 1745 (2001). On appeal, the trial court=s

ruling as to the admission or exclusion of evidence will not be disturbed unless there has been a clear abuse of discretion. ***Id.*** AJudicial discretion is deemed abused only when a trial court=s ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.@ ***State v. Neff***, 978 S.W.2d 341, 345 (Mo.banc 1998).

C. Evidence of appellant=s methamphetamine use was admissible.

Even though evidence of appellant=s use of methamphetamine was evidence of an uncharged crime, it was still admissible as part of the complete picture of the crime and to show appellant=s motive.

The general rule is that evidence of uncharged misconduct is inadmissible to show the defendant=s propensity to commit the charged crimes. ***State v. Bernard***, 849 S.W.2d 10, 13 (Mo.banc 1993). Evidence of other crimes is generally deemed admissible when it has the tendency to establish motive, intent, absence of mistake or accident, common scheme or plan, or identity. ***State v. Mayes***, 63 S.W.3d 615, 629 (Mo.banc 2001). AAn additional exception is recognized for evidence of uncharged crimes that are part of the circumstances or the sequence of events surrounding the offense charged. This evidence is admissible to present a complete and coherent picture of the events that transpired.@ ***State v. Morrow***, 968 S.W.2d 100, 107 (Mo.banc 1998), *cert. denied* 525 U.S. 896 (1998) (citations omitted).

Evidence of uncharged crimes that are part of the circumstances or sequence of events surrounding the offense is admissible. If the evidence helps to present a complete and lucid picture of the crime charged, it is not required that the evidence be sorted and separated so as to exclude the testimony tending to prove the crime for which a defendant is not on trial.

State v. Myers, 997 S.W.2d 26, 35 (Mo.App. S.D. 1999). A prosecutor Ais entitled to paint a complete picture of the crime charged@ even though some of the evidence surrounding the circumstances of the crime Amight be viewed as evidence of an uncharged crime.@ ***State v. Troupe***, 863 S.W.2d 633, 637 (Mo.App. E.D. 1993).

In ***Troupe***, the defendant was prosecuted for kidnaping and sodomizing a young boy, and during the trial, the state introduced evidence that the defendant had the victim smoke a cigarette containing PCP. ***Id.*** at 635, 637. On appeal, the defendant claimed that this was evidence of an uncharged crime, and therefore should have been excluded. ***Id.*** at 637. The Court of Appeals denied the defendant=s claim, holding that: AThe State is entitled to paint a complete picture of the crime charged. Evidence regarding the events during the time victim was kidnapped is not rendered inadmissible merely because it might be viewed as evidence of an uncharged crime.@ ***Id.*** (citation omitted).

In the case at bar, as in ***Troupe***, the prosecutor was entitled to paint a complete picture of the events of that night, including the events during the drive over when the three coconspirators divided up the tasks in stealing the anhydrous ammonia and used methamphetamine. The evidence showed that appellant and Mr. Guess met and discussed stealing the anhydrous ammonia, an essential ingredient in manufacturing methamphetamine, then met again with Mr. Constantino, then drove to WalMart and bought propane tanks, then, while driving to the co-op, discussed what each person would do in carrying-out the theft, they all used methamphetamine, and they arrived at the co-op, obtained some anhydrous ammonia, and were apprehended (Tr. 70-87, 205, 207, 210-13). Because the prosecutor was entitled to present a complete picture of the events surrounding the crime, the prosecutor was not required to excise evidence of appellant=s use of methamphetamine during the trip to the co-op. Therefore, the trial court did not abuse its discretion in overruling appellant=s objection to this evidence, and appellant=s point must fail.

Furthermore, the evidence was admissible to show motive. In ***State v. Hunn***, 821 S.W.2d 866 (Mo.App. E.D. 1991), the defendant was convicted of robbery. On appeal, he claimed the trial court abused its

discretion in allowing the introduction of evidence that he went to an area to purchase drugs, and that drugs were found on his person when he was arrested. ***Id.*** at 871. This Court held that the evidence of appellant=s drugs use was admissible to prove his motive for committing the robbery; to get money to buy drugs. ***Id.*** at 872.

Similarly, in the case at bar, the evidence that appellant used methamphetamine proves his motive to steal anhydrous ammonia; to help make more methamphetamine. Therefore, this evidence was admissible, and appellant=s point must fail.

D. Appellant has not shown prejudice.

Even assuming, *arguendo*, that the evidence was erroneously admitted, appellant has not shown prejudice. The evidence already established that appellant was stealing anhydrous ammonia, that anhydrous ammonia has no lawful use in a small container, and that anhydrous ammonia is a necessary ingredient in the manufacture of methamphetamine (Tr. 174, 185-86). Even though appellant did not plead guilty to attempted stealing of anhydrous ammonia, and forced the state to prove every element beyond a reasonable doubt, even he conceded, in opening statement, that the evidence of that crime would be strong (Supp Tr. 99-100, 106). It is a matter of common knowledge that those who are involved in making methamphetamine also use the drug. In light of the strong evidence that appellant was obtaining an essential ingredient in the manufacture of methamphetamine, the evidence that appellant also used the drug did not prejudice any of his convictions. Therefore, appellant=s point must fail.

V.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT=S MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT III, UNLAWFUL USE OF A WEAPON, BECAUSE THE EVIDENCE WAS SUFFICIENT TO PROVE APPELLANT WAS CARRYING A CONCEALED WEAPON IN THAT THE EVIDENCE SHOWED THAT APPELLANT PUT A FULLY LOADED .25 CALIBER PISTOL IN THE POCKET OF HIS COAT.

For his fifth point on appeal, appellant claims that the trial court erred in overruling his motion for a judgment of acquittal (App.Br. 43). Appellant argues that it was possible that appellant had the gun in plain view in the van, and that Trooper Aaron Harrison just did not see it (App.Br. 43).

A. Standard of review.

In assessing whether there is sufficient evidence to support a conviction, the appellate court must accept as true all of the evidence and inferences favorable to the state, and disregard all evidence and inferences to the contrary. ***State v. Grim***, 854 S.W.2d 403, 405 (Mo. banc 1993), *cert. denied* 510 U.S. 997 (1993), ***State v. Dulany***, 781 S.W.2d 52, 55 (Mo. banc 1989). The review is limited to a determination of whether there is sufficient evidence from which a reasonable finder of fact could find the defendant guilty beyond a reasonable doubt. ***State v. Grim***, 854 S.W.2d at 405. A jury may believe or disbelieve all, part, or none of the testimony of any witness. ***State v. Hineman***, 14 S.W.3d 924, 927 (Mo.banc 1999).

B. Evidence was sufficient to prove unlawful use of a weapon.

Section 571.030.1(1), RSMo Cum.Supp. 1998, defines the crime of unlawful use of a weapon, and provides, in pertinent part, as follows: AA person commits the crime of unlawful use of weapons if he

knowingly: (1) Carries concealed upon or about his person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use . . . .@ The essential elements of the offense are the knowing concealment and accessibility of a functional lethal weapon. ***State v. Purlee***, 839 S.W.2d 584, 590 (Mo.banc 1992). The test of concealment is Awhether a weapon is so carried as not to be discernible by ordinary observation.@ ***Id.***

> [A] weapon is not concealed simply because it is not discernible from a single vantage point if it is clearly discernible from other positions. It may be concealed, however, where it is discernible only from one particular vantage point.

Purlee, id., *citing* ***State v. Cavin***, 555 S.W.2d 653, 654 (Mo.App. 1977), *citing* ***State v. Miles***, 101 S.W. 671, 672 (Mo.App. 1907).

In ***State v. Crews***, 722 S.W.2d 653, 654 (Mo.App.S.D. 1987), the defendant put a gun in his jacket pocket, which an officer discovered during a pat-down search. The defendant was convicted of unlawful use of a weapon, and on appeal, he claimed that the evidence was insufficient to show that the gun was concealed. ***Id.*** The court of appeals disagreed, pointing out that the officer had observed appellant walking toward him and had arrested him before finding the gun, and that: AIf the weapon had not been concealed, there was no reason that it would not have been seen by the officer.@

In the case at bar, the evidence showed that, in the van ride to the co-op, appellant took a .25 caliber handgun from his jacket pocket, showed it to Scott Guess, and told him that he was the Amuscle,@ and if anything should go wrong, he Ahad it covered@ (Tr. 106, 212). After making these statements, appellant put the gun back in his jacket pocket (Tr. 213). When Trooper Aaron Harrison was at the co-op, he

watched appellant for about five minutes, jumped in the van and fought with appellant, but did not see a gun (Tr. 74-77, 85-86). When appellant ran away, Trp. Harrison observed appellant throw something, and the next morning, his gun was found in the same area where appellant threw the object (Tr. 87, 177, 182). After being told that he was charged with assaulting a law enforcement officer, appellant said, AI should have just shot him@ (Tr. 245).

This evidence shows that appellant had a gun in his jacket pocket on the trip to the co-op and up until the time he tossed the gun away when he was about to be captured. If appellant had not been concealing the gun in his jacket pocket, Trp. Harrison would have seen it as he watched appellant standing outside the van for several minutes, and as he fought with appellant inside the van. These facts were sufficient to show that appellant put his loaded .25 caliber handgun inside his jacket pocket, where it was concealed from ordinary observation. Therefore, the evidence was sufficient to sustain his conviction for unlawful use of a weapon, and his point must fail.

CONCLUSION

In view of the foregoing, respondent submits that appellant=s convictions and sentence should be affirmed.

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 Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 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 July, 2002.

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