

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC94924
	)	
JUSTIN JONES,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MICHAEL D. BURTON, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Justin Jones appeals his convictions after a jury trial in St. Louis County, Missouri for one count of burglary in the first degree (Count I), two counts of armed criminal action (Counts II and IV), one count of attempted robbery in the first degree (Count III), one count of resisting arrest (Count V), and one count of assault in the third degree (Count VI). On February 21, 2014, Judge Michael D. Burton signed a final judgment and sentenced Mr. Jones to fifteen years in prison for Count I, eighteen years in prison for Count II, fifteen years in prison for Count III, eighteen years in prison for Count IV, five years in prison for Count V, and one year in prison for Count VI, with all of the sentences to run concurrently. (LF 132-136).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, section 3, Mo. Const.; section 477.050. This Court thereafter granted Mr. Jones's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

STATEMENT OF FACTS

Mr. Jones was charged by indictment with one count of burglary in the first degree, section 569.160 (Count I), two counts of armed criminal action, section 571.015 (Counts II and IV), one count of attempted robbery in the first degree, section 564.011 (Count III), one count of resisting arrest, section 575.150 (Count V), and one count of assault in the third degree, section 565.070 (Count VI). (LF 18-20).

Before the trial began on December 2, 2013, Mr. Jones filed a motion for continuance with an affidavit. (TR 4). Counsel for Mr. Jones first entered an appearance in the case on September 5, 2013. (TR 5). Counsel told the court that he was away from his office during most of October and part of November for a prearranged leave of absence. (TR 5-6).

Counsel for Mr. Jones argued that he needed more time to investigate Mr. Jones's mental health. (TR 5). He also argued that a witness had come to his attention in the past week. (TR 13). He stated that he had not located her yet, but that she would testify that she lived in the neighborhood where the offenses had taken place, and that she saw a man matching a description of the suspect given to the police waiting for a bus at the same time the police were searching for the suspect. (TR 13-14). Finally, counsel for Mr. Jones argued that he needed a continuance so that he could get electronic data on a cell phone forensically examined. (TR 16). The trial court denied Mr. Jones's motion for continuance primarily because the case was nearly four years old. (TR 16-17).

At a trial held from December 2 through December 4, 2013, the following evidence relevant to the issues on appeal was presented:

Carlissa Harvey lived with her two children at 12003 Rose Valley Lane in St. Louis County. (TR 213-214). Her son Marte was fifteen years old, and her son Lewis was fourteen years old. At about 11:00 p.m. on February 10, 2010, Ms. Harvey came home from shopping at Wal-Mart. (TR 215). She parked her car outside of the garage because she did not have the garage opener, and she went into the house. (TR 216). She told her sons to put their shoes on so they could help her with the groceries. (TR 216-217).

Ms. Harvey went back outside and entered the code in her keypad to open the garage door. (TR 218). When the garage door started going up, she got back into the car and backed it into the garage. (TR 218). Ms. Harvey then grabbed some bags out of the car and went to enter the house through a door at the back of the garage. (TR 219, 221; Ex. 9). There is another keypad on the wall next to the door used to shut the garage. (TR 221). Ms. Harvey entered the code into the keypad and began walking through the door into her house. (TR 222).

Before the garage door finished closing, she heard it squeal and start going back up. (TR 222). She testified that if her garage door “gets triggered, it will go back up.” (TR 222). She knew this because it would happen with her old puppy. (TR 222). Ms. Harvey further testified that as she was “was walking in” she “heard the garage going down slowly. Um. I heard it go eek, eek, eek, and it went back up. I turned around.” Later, Ms. Harvey testified, “[w]hen I heard the garage

go back up, I turned around and I seen [sic] the man coming in my garage dressed in black.” (TR 224). During cross-examination, Ms. Harvey testified “I heard my garage going down and then I heard it go back up.” (TR 267). She agreed that it was “after that that [she] notice[d] somebody is in the garage.” (TR 267).

She testified that the man was dressed in all black except for the top of his jacket or shirt. (TR 224). She did not see any facial hair or scars on the man. (TR 272). She testified that he was around 5’4’’ or 5’5’’. (TR 273). Mr. Jones is 5’9’’. (TR 386). The man was holding a gun. (TR 224). When Ms. Harvey saw the man, she slammed the door and took off running toward a bedroom. (TR 225).

Ms. Harvey’s son Lewis was in the bedroom. (TR 225). Ms. Harvey activated her alarm system. (TR 225). Ms. Harvey spoke with the police, and she told them that there was someone in her house with a gun. (TR 226). She told them that the man was dressed in all black. (TR 270). She called out to her other son Marte. (TR 227). Eventually, she could hear Marte repeating the intruder’s question about where the dope and money were located. (TR 227). Ms. Harvey kept telling him that they did not have any. (TR 227). She stayed in the bedroom because she did not have a weapon, and she did not want to make the situation worse. (TR 228-229). Eventually, she saw lights out of the window, and she knew the police were there. (TR 230).

Ms. Harvey testified that the intruder was wearing a black jacket with a blue collar. (TR 235). However, she admitted that she did not think she discussed the shirt with the police the night of the incident. (TR 288). She also told the 9-1-1

operator that the person was wearing all black. (TR 288). Ms. Harvey identified Mr. Jones as the intruder in court. (TR 237).

Marte Harvey was fifteen on February 10, 2010. (TR 289). At about 11:00 that night, his mother woke him up to do the dishes. (TR 290). As he was doing the dishes, he heard the door open. (TR 292). He turned around and saw the intruder pointing a gun at him. (TR 293). Mr. Harvey identified Mr. Jones as the intruder in court. (TR 293). The intruder told him to come over to him, but Mr. Harvey just stood there. (TR 294). The intruder repeated his command, and Mr. Harvey walked over to him. (TR 294-295). The intruder then put Mr. Harvey in a chokehold and put the gun to his head. (TR 295-296).

The intruder kept asking for dope, money and weed, and Mr. Harvey did not know what he was talking about, so he told the intruder that they did not have any. (TR 296). Eventually, the intruder tried to make Mr. Harvey leave out the back door with him. (TR 297). Mr. Harvey opened the back door, but he told the intruder that he was not leaving with him. (TR 288). The intruder pulled Mr. Harvey back toward the garage door. (TR 299). As the intruder was pulling him, the intruder's phone started ringing. (TR 299). The intruder said, "Don't move." (TR 300). When the intruder reached for his phone, Mr. Harvey grabbed the intruder's gun. (TR 300). The cell phone was a dark color flip phone with a silver back. (TR 300). The intruder never answered the phone. (TR 301).

The intruder and Mr. Harvey began wrestling over the gun. (TR 301). During the struggle, the intruder started scratching Mr. Harvey's face. (TR 302).

He also bit him in his jaw and stuck his fingers in Mr. Harvey's eyes. (TR 302). Mr. Harvey let go of the gun, and the intruder pushed him to the ground. (TR 302). The intruder pointed the gun at Mr. Harvey. They looked at each other, and then the intruder left out the back door. (TR 303). Mr. Harvey ran to his mother's room, and he waited there until he heard his mother come out of the room she was in. (TR 306).

Police officers came to the house and asked Mr. Harvey questions. (TR 306). Eventually, they told him and his mother that they had found someone, and that they wanted Mr. Harvey to come identify him. (TR 306). One of the police officers put Mr. Harvey in the back of a police car and drove him to a location near his house. (TR 306-307). He saw a person that he identified as the intruder standing there. (TR 307).

Mr. Harvey testified that he did not remember if the intruder had any facial hair. (TR 318). He did not see any scars on the intruder's face. (TR 318). He further testified that the intruder was wearing black boots. (TR 318).

Kathryn Mumford of the St. Louis County Police Department testified that she was the officer who drove Mr. Harvey to the location to identify the intruder. (TR 330-331). She told Mr. Harvey that they had somebody that they would like for him to take a look at, and that he should let them know if he had ever seen him before. (TR 332-333). She drove Mr. Harvey to a location that was about two miles away from his house by car, but was only about one hundred feet walking. (TR 333). When they arrived at the location, Officer Mumford asked Mr. Harvey

if he had “seen this person before.” (TR 333). It was dark outside, so Officer Mumford “illuminated [her] patrol vehicle’s spotlight and placed it in the area of the detained subject’s face.” (TR 334). Mr. Harvey identified the man as the intruder. (TR 334).

Officer Mumford also testified that when she was driving around, she did not see anyone walking in the neighborhoods around the house where the incident took place. (TR 341). Officer Mumford stated that Mr. Jones was wearing blue jeans when he was arrested. (TR 380-381).

Robert Dean is a K-9 handler with the St. Louis County Police Department. (TR 342-343). He was told there was a suspect who was running on foot from the victim’s house. (TR 345). When he arrived to the scene of the crime, the suspect was already in custody. (TR 345). An officer asked Officer Dean to do a back track search with the dog back to the house to see if the dog could locate a weapon. (TR 345-346). Officer Dean wanted to see if the dog would track back to the victim’s house and if it could locate any evidence that the suspect might have dropped. (TR 347). The dog ended up tracking back to the victim’s house, but the dog was unable to find a weapon along the path, in the victim’s yard, a common ground area, or a small wooded area. (TR 348). Officer Dean testified that it is not possible “to locate every possible area that gloves and a weapon might have been thrown.” (TR 350). Officer Dean admitted that the dog was not given a scent to follow, and that there was no way to know who laid the scent the dog was following. (TR 359).

Officer Virgil Avery of the St. Louis County Police Department was on duty on February 10, 2010. (TR 373). He drove to the area of the robbery “to set up containment.” (TR 373). He then began looking for a “[b]lack male, wearing a black jacket, a black hat.” (TR 375). Two blocks away from the Harvey’s house, Officer Avery saw a man later identified as Mr. Jones running who matching the description of the suspect. (TR 374-375). Officer Avery identified himself as a police officer and told Mr. Jones to “stop running.” (TR 375). Mr. Jones looked in his direction and continued running. (TR 375). Officer Avery could not see Mr. Jones’s eyes. (TR 397). Officer Avery began chasing Mr. Jones. (TR 375). After about fifteen seconds, he caught up to Mr. Jones and detained him. (TR 376). Officer Avery placed Mr. Jones in handcuffs and placed him under arrest for a robbery. (TR 376).

Mr. Jones was taken to the police station. (TR 381). Officer Avery asked Mr. Jones if he could search his cell phone. (TR 381). Mr. Jones agreed to the search. (TR 383). Officer Avery testified that when he looked through the phone, he saw that there were three missed calls. (TR 383). All three of the missed calls were from February 10, 2010, with the first one occurring at 11:11 p.m. and the second and third ones occurring at 11:12 p.m. (TR 384).

Officer Avery testified that he did not see anyone running around the area around the Harveys’ house besides Mr. Jones when he was searching for the robbery suspect. (TR 386-387). Officer Avery testified that Mr. Jones was 5’9” tall. (TR 387). He also testified that Mr. Jones had a scar going down the left side

of his face. (TR 389). Officer Avery testified that that scar was not visible in Exhibit 23, but that the picture shows an additional scar in between his eyes. (TR 391). Mr. Jones also had facial hair and a beard on the night he was arrested. (TR 392). The State stipulated that Mr. Jones was wearing brown shoes when he was arrested. (TR 401; Ex. 6A and 6B).

After deliberation, the jury found Mr. Jones guilty of all counts. (TR 443-444). In Mr. Jones's motion for new trial, counsel asserted that the trial court should have granted his motion for continuance. (LF 124). Counsel stated that he was able to locate Marvona Seales, and that she would have testified that on the night in question, she was driving home with a friend between 11:00 p.m. and midnight. (LF 125). They stopped at a Walgreen's in the same neighborhood where the offenses occurred. (LF 125). Ms. Seales would have testified that she saw police questioning a black man about five feet four inches tall, and that the man was wearing all black with a hoodie. (LF 125). Counsel asserted that Ms. Seales would have testified that she watched the man because they did not trust the police. (LF 125-126). After the police let the man go, Ms. Seales approached him to ask what was going on. (LF 126). Counsel asserted that Ms. Seales would have testified that the man told her he had gotten off work at McDonald's, and that he was trying to catch the bus. (LF 126). Ms. Seales believed this was strange because there was a bus stop in front of McDonald's and not Walgreens. (LF 126). Counsel argued that denying a continuance violated Mr. Jones's right to a fair trial and to present a defense. (LF 126).

Counsel also reiterated in his motion that the continuance should have been granted so that he could cellphone examined by a computer forensic examiner. (LF 126). Counsel asserted that the examination would have shown that Mr. Jones received a lengthy phone call at the time of the crime that would have shown he was not the person who committed it. (LF 126-127). Counsel also pointed out that the State had used the call log evidence as material identification evidence in its case against Mr. Jones. (LF 126).

The trial court denied the motion for rehearing. (Sent. Tr. 63). This appeal follows.

POINTS RELIED ON

Point I.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and in imposing judgment and sentence against Mr. Jones for the armed criminal action associated with the offense of burglary in the first degree, because this violated Mr. Jones's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Jones gained entry into the inhabitable structure possessed by Carlissa Harvey by, with, or through the use, aid, or assistance of a deadly weapon.

State v. Carpenter, 109 S.W.3d 719 (Mo. App. S.D. 2003);

State v. Hopkins, 140 S.W.3d 143 (Mo. App. E.D. 2004);

State v. Piques, 310 S.W.2d 942 (Mo. 1958)

State v. Reynolds, 819 S.W.2d 322 (Mo. banc 1991);

United States Constitution, Amendment XIV;

Missouri State Constitution, Article I, Section 10;

Section 569.010; and

Rule 29.11.

Point II.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and in imposing judgment and sentence against Mr. Jones for the offense of resisting arrest, because this violated Mr. Jones's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Jones should have known the officer was making an arrest when the officer merely identified himself as a police officer and told Mr. Jones to stop running.

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

Jackson v. Virginia, 443 U.S. 307, 315 (1979);

State v. Hunter, 179 S.W.3d 317 (Mo. App. E.D. 2005);

State v. Whalen, 49 S.W.3d 181, 184 (Mo. banc 2001);

United States Constitution, Amendment XIV;

Missouri State Constitution, Article I, Section 10;

Section 575.150; and

Rule 29.11.

Point III.

The trial court abused its discretion in denying Mr. Jones's motion for a continuance to allow counsel for Mr. Jones to locate a witness who could have testified that she observed another person matching the description of the suspect getting on a bus shortly after the robbery and to obtain a forensic examination of Mr. Jones's cell phone because that ruling denied Mr. Jones's rights to due process, a fair trial, and to present a defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, sections 10 and 18(a) of the Missouri Constitution, in that the evidence Mr. Jones wished to produce would have contradicted evidence presented by the State that no one matching the description of the suspect besides Mr. Jones was in the area around the Harveys' house after the robbery and evidence that Mr. Jones's cell phone incriminated him; the trial court's ruling was also an abuse of discretion considering the fact that counsel for Mr. Jones entered an appearance in the case just three months before trial, counsel was out of the country for over a month during that period, and counsel was preparing for three murder trials at the same time he was preparing for Mr. Jones's trial.

State v. Brown, 902 S.W.2d 278 (Mo. banc 1995);

State v. Griffin, 848 S.W.2d 464 (Mo. banc 1993);

State v. Lopez, 836 S.W.2d 28 (Mo.App., E.D. 1992);

Washington v. Texas, 338 U.S. 14 (1967);

United States Constitution, Amendments V, VI, and XIV;

Missouri State Constitution, Article I, Sections 10 and 18(a); and

Rule 29.11.

ARGUMENT

Point I.

The trial court erred in overruling defense counsel’s motions for judgment of acquittal and in imposing judgment and sentence against Mr. Jones for the armed criminal action associated with the offense of burglary in the first degree, because this violated Mr. Jones’s right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Jones gained entry into the inhabitable structure possessed by Carlissa Harvey by, with, or through the use, aid, or assistance of a deadly weapon.

A. Standard of Review and Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a “mere modicum” of evidence, because “it could not seriously be argued that such a ‘modicum’ of

evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. “[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Mr. Jones filed a motion for judgment of acquittal at the close of the State’s evidence and again at the close of all evidence. (LF 73-76). Mr. Jones also filed a motion to dismiss along with his motion for judgment of acquittal specifically challenging the armed criminal action charge in connection with the burglary charge. (TR 404-406). Furthermore, Mr. Jones orally argued to the trial court that

there was insufficient evidence for this armed criminal action charge since there was no evidence that Mr. Jones used a gun to gain entrance into the inhabitable structure possessed by Carlissa Harvey. (TR 404-406). Finally, Mr. Jones included this issue in his motion for a new trial. (LF 115-117). Therefore, this issue is preserved for review. Rule 29.11(d).

B. Relevant Facts

On February 10, 2010, Carlissa Harvey was living with her two children at 12003 Rose Valley Lane in St. Louis County. (TR 213-214). At about 11:00 p.m., Ms. Harvey came home from shopping at Wal-Mart, and she backed her car into the garage. (TR 215, 218). She then grabbed some bags out of the car and went to enter the house through a door at the back of the garage. (TR 219, 221; Ex. 9). There is another keypad on the wall next to the door used to shut the garage. (TR 221). Ms. Harvey entered the code into the keypad and began walking through the door into her house. (TR 222).

Before the garage door finished closing, Ms. Harvey heard it squeal and start going back up. (TR 222). She testified that if her garage door “gets triggered, it will go back up.” (TR 222). She knew this because it would happen with her old puppy. (TR 222). Ms. Harvey further testified that as she was “was walking in” she “heard the garage going down slowly. Um. I heard it go eek, eek, eek, and it went back up. I turned around.” Later, Ms. Harvey testified, “[w]hen I heard the garage go back up, I turned around and I seen [sic] the man coming in my garage

dressed in black.” (TR 224). During cross-examination, Ms. Harvey testified “I heard my garage going down and then I heard it go back up.” (TR 267). She agreed that it was “after that that [she] notice[d] somebody is in the garage.” (TR 267). She testified that the person she saw was dressed in all black besides the top of his jacket or shirt. (TR 224). The man was holding a gun. (TR 224). When Ms. Harvey saw the man, she slammed the door and took off running toward a bedroom. (TR 225).

C. Analysis

Count II of the indictment charged Mr. Jones with armed criminal action, stating that he committed the burglary count charged in Count I “by, with and through, the knowing use, assistance and aid of a deadly weapon.” (LF 18). Count I alleged that Mr. Jones “knowingly entered unlawfully in an inhabitable structure . . . possessed by Carlissa D. Harvey, for the purpose of committing Robbery in the First Degree therein, and while in such inhabitable structure there was present in such inhabitable structure Carlissa D. and Marte O. Harvey, persons who were not participants in the crime.” (LF 18). Count II incorporated this count by reference. (LF 18).

Numerous past cases show why Mr. Jones cannot be guilty of armed criminal action based on this indictment. In *State v. Carpenter*, for instance, the defendant was convicted of first-degree burglary and armed criminal action. 109 S.W.3d 719, 721 (Mo. App. S.D. 2003). Evidence showed that he had broken in

the victim's door by breaking out the glass and kicking it open. *Id.* at 720. The defendant challenged the sufficiency of the evidence to support the armed criminal action conviction because the state did not prove that he gained entry into the house with the rifle he possessed. *Id.* at 721-22. The Court agreed, finding that there was no evidence that the defendant entered the house ““by, with, or through the use, assistance of” the rifle.” *Id.* at 724.

The Court reached this conclusion in part because of how the burglary count was charged. The information allege that the defendant “knowingly entered unlawfully in an inhabitable structure . . . for the purpose of committing assault therein, and while in such inhabitable structure there was present [Seymour], a person who was not a participant in the crime.” *Id.* at 721 (modifications in original). The Court determined that because of the way the information was drafted, “the crime of first-degree burglary was completed upon Appellant’s unlawful entry into Seymour’s home with the intent to assault her and with Seymour in the house at the time of entry.” *Id.* at 723.

Here, Mr. Jones was charged in the exact same way as the defendant in *Carpenter*. As such, the crime of burglary was complete as soon as Mr. Jones entered Ms. Harvey’s inhabitable structure.

Other Courts have reached the same conclusion as *Carpenter*. In *State v. Reynolds*, for instance, the evidence showed that the defendant or his accomplice broke the glass out of a back door of a home, reached inside and unlocked it. 819 S.W.2d 322, 327 (Mo. banc 1991). After his arrest, officers found a knife in a

sheath in the defendant's boot. *Id.* The Missouri Supreme Court reversed the conviction for armed criminal action because there was no evidence presented that the knife was in any way used in the commission of burglary. *Id.* at 328-29.

In *State v. Hopkins*, the defendant broke into the victim's home and stabbed him with an unknown object. 140 S.W.3d 143, 147 (Mo. App. E.D. 2004). This Court held that while there was sufficient evidence to show that a dangerous instrument was used in an assault, there was virtually no evidence that it was used to commit the burglary, and reversed the armed criminal action conviction. *Id.* at 159. Also, this Court pointed out that the crime of first-degree burglary was complete once the defendant unlawfully entered the occupied home with the requisite intent. *Id.* The events that occurred after the unlawful entry are not relevant to a determination of whether armed criminal action in connection with first-degree burglary occurred. *Id.*

After counsel for Mr. Jones filed his initial brief in the Eastern District Court of Appeals, that Court determined in *Obasogie v. State* that using an implicit threat to gain entry into a house is sufficient evidence to sustain a conviction for armed criminal action associated with a burglary count. 457 S.W.3d 793, 798 (Mo. App. E.D. 2014). Counsel for Mr. Jones agrees with this general proposition, and further agrees with this Court that using a "weapon to intimidate someone *prior* to entering the home" constitutes armed criminal action associated with a burglary. *Id.* (emphasis added).

Obasogie is inapposite here, however. In *Obasogie*, the victim “saw Movant armed with a weapon *prior* to entering the house.” *Id.* In the present case, though, Mr. Jones neither implicitly threatened anyone before entering the garage nor did he intimidate anyone prior to entering the garage. Carlissa Harvey testified that if her garage door “gets triggered, it will go back up.” (TR 222). She knew this because it would happen with her old puppy. (TR 222). Ms. Harvey further testified that as she was “was walking in” she “heard the garage going down slowly. Um. I heard it go eek, eek, eek, and it went back up. I turned around.” Later, Ms. Harvey testified, “[w]hen I heard the garage go back up, I turned around and I seen [sic] the man coming in my garage dressed in black.” (TR 224). During cross-examination, Ms. Harvey testified “I heard my garage going down and then I heard it go back up.” (TR 267). She agreed that it was “after that that [she] notice[d] somebody is in the garage.” (TR 267). No reasonable juror would have been able to disregard Ms. Harvey’s testimony. *Grim*, 854 S.W.2d at 411.

It is clear from these facts that Mr. Jones had triggered the sensor on the garage door and had entered the garage *before* he was seen by Ms. Harvey. This is significant since Mr. Jones had completed the act of burglary as soon as he entered the garage. This Court has stated that “entry” is “not confined to the intrusion of the whole body, but may consist of the insertion of any part for the purpose of committing a felony.” *State v. Piques*, 310 S.W.2d 942, 945 (Mo. 1958). The Eastern District Court of Appeals similarly stated in *State v. Carter* that “the presence of any part of the burglar’s body within the premises is sufficient entry to

fulfill that requirement of burglary.” 541 S.W.2d 692, 694 (Mo. App. St. L. Dist. 1976).

There would have been no way for Mr. Jones to trigger the garage door sensor without inserting part of his body through the garage. Exhibits 10 and 11, for instance, show that the garage door sensors were located well inside the garage. Under *Piques* and *Carter*, as soon as Mr. Jones triggered the sensors, he had completed the crime of burglary. The Eastern District stated in *State v. Hopkins* that “the events that occurred subsequent to that unlawful entry are not relevant to a determination of whether ACA in connection with the underlying felony of first-degree burglary, as charged, was committed.” 140 S.W.3d 143, 159 (Mo. App. E.D. 2004). Therefore, unlike the defendant in *Obasogie*, Mr. Jones did not implicitly threaten anyone to gain entry into the garage. Furthermore, Mr. Jones did not use a “weapon to intimidate someone prior to entering the home.” *Obasogie*, 457 S.W.3d at 798.

At trial, the State argued that there was sufficient evidence because Mr. Jones entered the garage and not the main part of the house. (TR 407). It is true that the Western District Court of Appeals determined in *State v. Washington* that the garage in *that* case was not part of the inhabitable structure. 92 S.W.3d 205, 209 (Mo. App. W.D. 2002). Section 569.010(2) states that an “inhabitable structure” includes “a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) where any person lives or carries on business or other calling; or (b) where people assemble for purposes of business, government, education, religion,

entertainment or public transportation; or (c) which is used for overnight accommodation of persons. Any such vehicle or structure in ‘inhabitable’ regardless of whether a person is actually present.”

The Western District determined that the garage in that case did not qualify as an inhabitable structure exclusively because it was not connected by door to the house. 92 S.W.3d at 209. The Court stated, “what undermines inclusion of the garage within the home’s inhabitable structure is the lack of any connection between the inside of the garage and the inside of the home’s living quarters.” *Id.* The Court further stated, “[b]ecause the door leading into the home is different from the door leading into the garage, there is relatively less danger here compared to a case in which a homeowner must enter and exit the home’s living quarters through the garage.” *Id.*

Here, Exhibit 8 clearly shows a door leading from the garage directly into the house. Furthermore, Ms. Harvey testified that she walked through this door from the garage into her house. (TR 222). Therefore, under *Washington*, the garage *does* qualify as part of the inhabitable structure. This is consistent with *State v. Ashby*, where the Eastern District stated that “Missouri courts have interpreted the terms ‘building’ and ‘inhabitable structures’ broadly.” 339 S.W.3d 600, 606 (Mo. App. E.D. 2011).

Because Mr. Jones entered the inhabitable structure without the use of a dangerous instrument or deadly weapon, his conviction for armed criminal action in connection to the burglary must be reversed.

Point II.

The trial court erred in overruling defense counsel’s motions for judgment of acquittal and in imposing judgment and sentence against Mr. Jones for the offense of resisting arrest, because this violated Mr. Jones’s right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Jones should have known the officer was making an arrest when the officer merely identified himself as a police officer and told Mr. Jones to stop running.

A. Standard of Review and Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a “mere modicum” of evidence, because “it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. “[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Mr. Jones filed a motion for judgment of acquittal at the close of the State’s evidence and again at the close of all evidence. (LF 73-76). Mr. Jones also orally argued that there was insufficient evidence for the resisting arrest charge. (TR 407-409). Finally, Mr. Jones challenged the sufficiency of the evidence in his motion for a new trial. (LF 111-114). This issue is therefore preserved for review. Rule 29.11(d).

B. Relevant Facts

Count V of the indictment alleged that “Police Officer Virgil Avery and Police Officer Donald May . . . were making an arrest of defendant for burglary and assault, and the defendant knew that the officers were making an arrest, and, for the purpose of preventing the officers from effecting the arrest, resisted the arrest of defendant by fleeing from the officers.” (LF 19).

Officer Virgil Avery of the St. Louis County Police Department was on duty on February 10, 2010. (TR 373). He drove to the area of the robbery “to set up containment.” (TR 373). He then began looking for a “[b]lack male, wearing a black jacket, a black hat.” (TR 375). Two blocks away from the Harvey’s house, Officer Avery saw a man later identified as Mr. Jones running who matching the description of the suspect. (TR 374-375). Officer Avery identified himself as a police officer and told Mr. Jones to stop running. (TR 375). Mr. Jones looked in his direction and continued running. (TR 375). Officer Avery could not see Mr. Jones’s eyes. (TR 397). Officer Avery began chasing Mr. Jones. (TR 375). After about fifteen seconds, he caught up to Mr. Jones and detained him. (TR 376). Officer Avery placed Mr. Jones in handcuffs and placed him under arrest for a robbery. (TR 376).

C. Analysis

Section 575.150 states that “[a] person commits the crime of resisting or interfering with an arrest, detention, or stop if, knowing that a law enforcement

officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop, or detain, the person: (1) Resists the arrest, stop, or detention of such person . . . by fleeing from such officer[.]”

As stated previously, the State charged Mr. Jones with resisting an arrest instead of resisting a detention or stop. (LF 19). The distinction between an arrest and a detention or stop is significant, because under 575.150.5, only resisting an *arrest* is a felony offense. Resisting a detention or stop, on the hand, is a misdemeanor offense. Here, at worst, Mr. Jones resisted a detention or stop.

Mr. Jones argued in the Eastern District Court of Appeals that the phrase “stop running” gave no indication that Officer Avery was attempting to actually arrest him. The Eastern District disagreed, stating that “a reasonable jury could infer that Defendant was conscious of his guilt and should have reasonably expected to be arrested for the crimes he had just committed upon being asked by a police officer to stop running.” (Slip Opinion, 14).

However, if a defendant has a guilty conscious, and is asked by a police officer to stop running, the defendant should reasonably expect to be *investigated* for the crimes. The Eastern District’s opinion assumes that police officers should automatically *arrest* everyone in a given area matching a vague description of a suspect with no investigation whatsoever. There is no support in case law for this

view. The truth of the matter is that no citizen—even someone who has actually committed a crime—should assume that police officers would be that quick to arrest.

This case is similar to *State v. Hunter*, 179 S.W.3d 317, 318-19 (Mo. App. E.D. 2005). In that case, two men broke into a store and left in a red pickup truck on Chippewa Street. *Id.* An officer responded to a 911 call, and he saw a truck on Chippewa Street matching the description given to him. *Id.* at 319. The officer made a U-turn, stopped at a stoplight behind the truck, and activated his patrol car's stoplight. *Id.* Instead of stopping, the truck drove through a red light. *Id.* The officer then turned on his roof lights and began to follow the truck. *Id.* The officer “momentarily lost sight of the pick-up truck, [and] he shortly thereafter located the truck abandoned on a lawn.” *Id.* The defendant argued that the State had failed to prove that he had committed the crime of resisting arrest. *Id.* at 320. The Eastern District agreed, finding that “[t]he record does not contain proof that Defendant reasonably should have known that, when he saw a police car following a pick-up in which he was a passenger, he was being arrested for felony burglary.” *Id.* at 321. There is no distinction between the present case, where an officer told Mr. Jones to “stop running,” and Mr. Jones had recently committed crimes in the area, and *Hunter*, where an officer attempted to complete a traffic stop, and the defendant had recently committed crimes in the area.

Mr. Jones's conviction for resisting an arrest was based on the same "unreasonable, speculative, or forced inferences" present in *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). First, Mr. Jones's conviction relies on the inference that he would have known Officer Avery was present where he was in order to investigate the crimes committed at the Harvey household. Next, Mr. Jones's conviction relies on the inference that Mr. Jones would have known Officer Avery had been given a description of the suspect and that he had matched the description of that suspect. Finally, Mr. Jones's conviction relies on the inference that Mr. Jones would have known that when Officer Avery told him to "stop running," he would have known that Officer Avery *actually* meant "stop running, you are under arrest." None of these inferences are supported by the evidence presented at trial.

Officer Avery's use of the phrase "stop running" would not indicate to a reasonable person that the officer is intending to arrest him or her. Because there was no reason for Mr. Jones to know that Officer Avery was attempting to make an arrest, his conviction for resisting arrest must be reversed.

Point III.

The trial court abused its discretion in denying Mr. Jones's motion for a continuance to allow counsel for Mr. Jones to locate a witness who could have testified that she observed another person matching the description of the suspect getting on a bus shortly after the robbery and to obtain a forensic examination of Mr. Jones's cell phone because that ruling denied Mr. Jones's rights to due process, a fair trial, and to present a defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, sections 10 and 18(a) of the Missouri Constitution, in that the evidence Mr. Jones wished to produce would have contradicted evidence presented by the State that no one besides Mr. Jones was in the area around the Harvey's house after the robbery and evidence that Mr. Jones's cell phone incriminated him; the trial court's ruling was also an abuse of discretion considering the fact that counsel for Mr. Jones entered an appearance in the case just three months before trial, counsel was out of the country for over a month during that period, and counsel was preparing for three murder trials at the same time he was preparing for Mr. Jones's trial.

A. Standard of Review and Preservation

The decision of whether to grant a motion for continuance lies in the sound discretion of the trial court. *State v. Brown*, 902 S.W.2d 278, 289 (Mo. banc

1995); *State v. Griffin*, 848 S.W.2d 464, 468 (Mo. banc 1993). If the court denies a motion for continuance, that decision will be reviewed for an abuse of discretion. *State v. Lopez*, 836 S.W.2d 28, 32 (Mo.App., E.D. 1992). An abuse of discretion will be shown if the defendant demonstrates that he was prejudiced by the denial of the motion. *Id.*

Before the trial began, Mr. Jones filed a motion for continuance with an affidavit. (LF 32-45; TR 4). Counsel for Mr. Jones first entered an appearance in the case in September. (TR 5). Counsel told the court that he was away from his office during most of October and part of November for a prearranged leave of absence. (TR 5-6). The trial began on December 2nd. (TR 4).

Counsel for Mr. Jones argued that he needed more time to investigate Mr. Jones's mental health. (TR 5). He also argued that a witness had come to his attention in the past week. (TR 13). He stated that he had not located her yet, but that she would testify that she lived in the neighborhood where the offenses had taken place, and that she saw a man matching a description of the suspect given to the police waiting for a bus at the same time the police were conducting a search for the suspect. (TR 13-14). He stated in his motion for continuance that the name of this witness is Marvonea Seales. (LF 40-41). Finally, counsel for Mr. Jones argued that he needed a continuance so that he could get electronic data on a cell phone forensically examined. (TR 16). The trial court denied Mr. Jones's motion for continuance primarily because the case was nearly four years old. (TR 16-17).

Mr. Jones also included this issue in his motion for a new trial. (LF 125). Thus, this issue is preserved for review. Rule 29.11(d).

B. Analysis

The United States Supreme Court stated in *Washington v. Texas* that a defendant “has the right to present his own witnesses to establish a defense.” 338 U.S. 14, 18-19 (1967). The Court further stated that “[t]his right is a fundamental element of due process of law.” *Id.* Similarly, the Missouri Constitution specifically provides “[t]hat in criminal prosecution the accused shall have the right to appear and defend, in person and by counsel; to have process to compel the attendance of witnesses in his behalf.” Art. I § 18(a), Mo. Const.

In this case, the trial court was faced with two choices—either grant Mr. Jones’s request for a continuance and delay the trial, or deny the motion for continuance and go forward even though defense counsel was alleging he could undermine two important aspects of the State’s case if given additional time.

First, counsel for Mr. Jones stated that a witness named Marvonea Seales had come to his attention in the week before the trial. (TR 13-14; LF 40-41). He stated that he had not located her yet, but that she would testify that she lived in the neighborhood where the offenses had taken place, and that she saw a man matching a description of the suspect given to the police waiting for a bus at the same time the police were conducting a search for the suspect. (TR 13-14).

Counsel noted in the motion for a new trial that he was able to locate Ms. Seales,

and that she would have testified that on the night in question, she was driving home with a friend between 11:00 p.m. and midnight. (LF 125). They stopped at a Walgreen's in the same neighborhood where the offenses occurred. (LF 125). Ms. Seales would have testified that she saw police questioning a black man about five feet four inches tall, and that the man was wearing all black with a hoodie. (LF 125). This matched the description of the intruder gives by Ms. Harvey. (TR 272-273). Counsel asserted that Ms. Seales would have testified that she watched the man while he was being questioned because she did not trust the police. (LF 125-126). After the police let the man go, Ms. Seales approached him to ask what was going on. (LF 126). Counsel asserted that Ms. Seales would have testified that the man told her he had gotten off work at McDonald's, and that he was trying to catch the bus. (LF 126). Ms. Seales believed this was strange because there was a bus stop in front of McDonald's and not Walgreens. (LF 126).

This testimony would have been very important at trial because of the State's emphasis that no one else was walking around at the time the officers apprehended Mr. Jones. Officer Mumford, for instance, testified that when she was driving around the neighborhood, she did not see anyone walking in the area around the Harvey's house. (TR 341). Officer Avery also testified that he did not see anyone running in the area around the Harvey's house besides Mr. Jones when he was searching for the robbery suspect. (TR 386-387). This erroneously left the jury with the impression that no one besides Mr. Jones could have committed the robbery.

Had Mr. Jones been granted a continuance, Ms. Seales could have contradicted the officers' testimony. She could have testified that not only were the officers wrong about no one else being present in the area around the Harvey's house, but that the officers were also wrong about no one else matching the description of the suspect. The jury should have had an opportunity to consider this testimony.

Next, counsel for Mr. Jones argued that he needed a continuance so that he could get electronic data on a cell phone forensically examined. (TR 16). Specifically, Mr. Jones alleged that a forensic examination of his cell phone would reveal "that he received and answered a telephone call which was minutes in length at or near the time of the alleged incident." (LF 41). Counsel alleged that this would have contradicted Mr. Harvey's testimony that the intruder received a call on his cell phone but did not answer it. (LF 41). This evidence would have shown that Mr. Jones was not the perpetrator of the alleged crimes. (LF 41). Counsel for Mr. Jones stated that he could have the examination completed with forty-five days. (LF 41). Once again, the jury should have had an opportunity to consider this evidence.

It is true that Mr. Jones was charged with the crimes on February 10, 2010, and counsel for Mr. Jones was asking for a continuance on December 2, 2013. (LF 1, 4). However, with such a long period of time between Mr. Jones being charged and the trial, surely an extra forty-five days would not have caused undue harm.

This is especially true considering that counsel for Mr. Jones did not begin his representation of Mr. Jones until September 5, 2013. (LF 35). He took over at that point in time because a private attorney contracted by the public defender system was unable to handle the complexity of Mr. Jones's case. (LF 36). Also, counsel for Mr. Jones was out of the country from October 17, 2013 through November 19, 2013. (LF 35). Furthermore, counsel for Mr. Jones was responsible for managing eighteen attorneys, and he was preparing three murder cases for a jury trial. (LF 36).

Because of the exceptional circumstances faced by counsel for Mr. Jones, it was an abuse of discretion for the trial court to deny the motion for a continuance. The evidence counsel intended to produce would have been extremely relevant to Mr. Jones's defense. In Missouri, a refusal to grant a continuance "will not be reversed on appeal unless it is reasonably probable that the witness' testimony will result in a different outcome." *State v. Fuller*, 837 S.W.2d 304, 307 (Mo. App. W.D. 1992)(citation omitted). Because the evidence at trial identifying Mr. Jones as the intruder was weak, had counsel for Mr. Jones been given a continuance, it is likely the outcome of Mr. Jones's trial would have been different.

It is true that both Ms. Harvey and Marte Harvey identified Mr. Jones as the intruder. (TR 237, 307). However, there is strong reason to believe that Mr. Jones was *not* the intruder. Ms. Harvey did not see any facial hair on the intruder, and Marte Harvey did not remember seeing any. (TR 318). However, Mr. Jones *did* have facial hair on the night in question. (Ex. 23).

Next, Ms. Harvey testified that the intruder was around 5'4'' or 5'5''. (TR 273). Mr. Jones, though, is 5'9.'' (TR 386). Ms. Harvey also told the 9-1-1 operator that the intruder was wearing all black. (TR 288). Marte Harvey testified that the intruder was wearing black boots. (TR 318). However, Mr. Jones was wearing blue jeans and had on brown shoes. (TR 380-381; Ex 5, Ex. 6A, and Ex. 6B).

Next, neither Ms. Harvey nor Marte Harvey observed any scars on the intruder. (TR 272, 318). However, exhibit 23 shows a scar in between Mr. Jones's eyes. (TR 391). Furthermore, Officer Avery testified that Mr. Jones has a scar going down the left side of his face that was not visible in Exhibit 23. (TR 389, 391).

Finally, the intruder used a gun during the robbery. (TR 293). However, the officers were unable to find any weapon despite searching for one with a search dog. (TR 350). It is therefore likely that the intruder took the gun with him (and was therefore *not* Mr. Jones).

Mr. Jones is taller than the intruder, has facial hair, and was wearing different clothes than the intruder. It is likely Mr. Jones was just in the wrong place at the wrong time when he was seen by the police officers. The testimony of Ms. Seales that a different person fitting the description of the intruder was in the area at the same time Mr. Jones was apprehended likely would have convinced the members of the jury to acquit Mr. Jones. Similarly, if a forensic examination of Mr. Jones's phone showed that he had actually received a call and spoken on the

phone at the same time as the robbery, the jury likely would have acquitted Mr. Jones.

The trial court abused its discretion in denying Mr. Jones's request for a continuance, and this error was prejudicial. Mr. Jones therefore respectfully asks this Court to reserve each of Mr. Jones's convictions and remand for a new and fair trial.

CONCLUSION

As discussed in point one, because there was insufficient evidence that Mr. Jones entered an inhabitable structure with the use of a weapon, his conviction for armed criminal action as charged in Count II must be reversed.

As discussed in point two, because there was insufficient evidence that Mr. Jones knew he was being arrested, Mr. Jones's conviction for resisting arrest must be reversed.

As discussed in point three, because the trial court abused its discretion in denying Mr. Jones's request for a continuance, this Court should reverse all of Mr. Jones's convictions and remand the case for a new and fair trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel E. Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,609 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 15th day of June, 2015, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Samuel Buffaloe

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