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 REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 4

ARGUMENT 5

1. Insufficient evidence for armed criminal action 5

2. Insufficient evidence for resisting arrest 9

3. Abuse of discretion in denying continuance 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

***CASES*:**

State v. Austin, 411 S.W.3d 284 (Mo. App. E.D. 2013) 11, 12

State v. Blocker, 133 S.W.3d 502 (Mo. banc 2004) 17

State v. Brooks, 158 S.W.3d 841 (Mo. App. E.D. 2005) 10, 11

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993) 8

State v. Hunter, 179 S.W.3d 317 (Mo. App. E.D. 2005) 9, 10, 11

State v. Reynolds, 819 S.W.2d 322 (Mo. banc 1991) 5, 6

State v. Tyler, 587 S.W.2d 918 (Mo. App. W.D. 1979) 6

RULES:

Rule 24.09 13

Rule 24.10 13

Rule 78.07 ..... 13, 14

JURISDICTIONAL STATEMENT

Appellant adopts the Jurisdictional Statement from his initial brief.

STATEMENT OF FACTS

Appellant adopts the Statement of Facts from his initial brief.

ARGUMENT

Point I (Insufficient Evidence for Armed Criminal Action)

A. Merely displaying a firearm while entering an inhabitable structure is insufficient to prove armed criminal action

The State argues that "there should be no requirement that the victim observe the defendant enter the structure to sustain an armed criminal action conviction related to burglary." (Rsp. Brf. 12). The State asserts that "[i]f a defendant enters a house displaying a gun, he has entered the house with the use or assistance of the gun, regardless of whether the victim observed him." (Rsp. Brf. 12).

Under the State's argument, a person could be convicted of armed criminal action related to a burglary even if the weapon in question was neither used in physically gaining entry into the structure (such as shooting a hole through a door) nor used to intimidate someone prior to entry. This Court, however, rejected a similar argument in *State v. Reynolds*, 819 S.W.2d 322 (Mo. banc 1991). In that case, the defendant and another man gained entry into the victim's home by breaking the glass outside of a back door, reaching inside, and unlocking the door. *Id.* at 327. The victim shot the two men, and they were arrested by police officers outside the house. *Id.* The officers searched the defendant, and they found a knife inside his boot. *Id.* The State argued "that the evidence that the knife was on his person, and so accessible to [the defendant] during the burglary, suffices to prove the armed criminal action, whether he used the knife or not." *Id.*

After quoting the language of the armed criminal action statute, this Court determined "that the *use* of a dangerous instrument or deadly weapon is an element of the

crime." *Id.* at 328-29 (emphasis in original), citing *State v. Tyler*, 587 S.W.2d 918, 927 (Mo. App. W.D. 1979). This Court further interpreted the statute to mean "that the intention to use, without actual use, is not enough to convict under the statute." *Id.* at 329.

Here, even if Mr. Jones had intended to use the firearm had he encountered a person before entering the garage, the truth of the matter is that he did not use it. He did not use the weapon to overcome any physical obstacle—instead, he just sneaked into the garage. Also, as discussed in the next subsection, Mr. Jones did not use the firearm to intimidate anyone prior to entering the garage. Mr. Jones's conviction for armed criminal action should therefore be reversed.

B. Ms. Harvey did not see Mr. Jones until he had already entered the garage

The State argues that under the appropriate standard of review, this Court must infer that Ms. Harvey saw Mr. Jones's entry into the garage. (Rsp. Brf. 14). It is true, as the State asserts, that Ms. Harvey testified that she saw Mr. Jones "coming in [her] garage dressed in black." (TR 224). However, the full context of Ms. Harvey's statements demonstrates that she did not see Mr. Jones enter the garage. Ms. Harvey testified to the following, for instance:

> When 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). Shortly thereafter, Ms. Harvey stated the following:

> When I turned around and seen him coming in with the gun, I slammed that door and I took off running towards the first bedroom.

(TR 225).

In full context, these two statements do not suggest that Ms. Harvey actually saw Mr. Jones enter the garage. Instead, the statements are clear that Ms. Harvey did not turn around until she heard the garage door going back up. The phrase "coming in" is not inconsistent with the notion that Mr. Jones had already entered (however slightly) before he was seen by Ms. Harvey. This is especially true considering that Ms. Harvey testified to the following:

> If the garage is going down and something triggers the motion, it will be like um. If it gets triggered, it will go back up. I kind of heard it. I heard my garage. I was listening to it as I was walking in, and I heard the garage going down slowly. Um. I heard it go eek, eek, eek and it went back up. I turned around.

(TR 222). Ms. Harvey also testified that it was after she heard the garage door go back up that she noticed someone in the garage. (TR 267).

Counsel argued in Mr. Jones's initial brief that Mr. Jones had entered the garage when he triggered the sensors based on the fact that the sensors were located inside the garage. (App. Brf. 26), citing State's Exhibits 10 and 11. The State asserts that this argument "rests on inferences which are contrary to the verdict." (Rsp. Brf. 14). However, it is the State's own exhibits that show the sensors were located within the garage. (Exhibits 10 and 11). Furthermore, it was the State's own witness (Ms. Harvey) who testified that she did not turn around until after the garage sensors had been triggered. (TR 222, 267). Finally, it was also Ms. Harvey who testified upon questioning

by the State as to how the sensors in the garage worked. (TR 222). The State now asks this Court to disregard its own uncontroverted evidence. However, no reasonable juror could have disregarded this evidence, and neither should this Court. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). Because Mr. Jones had already entered the garage before he used the firearm, this Court should reverse his conviction for armed criminal action.

Point II (Insufficient evidence for resisting arrest)

In order to be guilty of committing the crime of resisting arrest, a defendant must know (or reasonably should know) that an officer is making an arrest, and the officer must actually be contemplating an arrest. Section 575.150; *see also State v. Christian*, 184 S.W.3d 597, 603 (Mo. App. E.D. 2006). The State spends three pages of its substitute brief arguing that Officer Virgil was in fact contemplating an arrest. (Rsp. Brf. 22-25). However, Mr. Jones does not contest that element of the charge. Instead, counsel argued in Mr. Jones's initial brief that there was insufficient evidence that Mr. Jones should have known that Officer Virgil was making an arrest when Officer Virgil merely identified himself as an officer and told Mr. Jones to "stop running." (TR 375).

The State attempts to distinguish the present case from *State v. Hunter*, 179 S.W.3d 317 (Mo. App. E.D. 2005) by arguing that in *Hunter*, "the only indication that the police officer was making an arrest or attempting to stop or detain the defendant was that the police officer made a U-turn, stopped at a stoplight behind the truck in which the defendant was a passenger, and shined a spotlight into the truck." (Rsp. Brf. 24-25). The State then asserts that "the defendant's truck drove through a red light, and the officer activated his roof lights and began following the truck." (Rsp. Brf. 25). The State argues that "the officer did not attempt to complete a traffic stop prior to the defendant fleeing as Defendant argues; he merely shined a spotlight into the defendant's truck." (Rsp. Brf. 25). Finally, the State argues that shining a light into a truck is distinguishable from telling a person to stop running. (Rsp. Brf. 25).

The flaw in the State's argument is that it relies on the fleeing to have occurred after the officer shined a light into the defendant's truck instead of after the officer activated his roof lights. However, the following passage from *Hunter* shows that this is not how the Eastern District Court of Appeals treated the facts of the case:

> Indeed, the facts merely show that Officer Farrow stopped his patrol car at a stoplight behind a pick-up truck matching the dispatcher's description and shined a spotlight into the truck. The record reveals that as soon as Officer Farrow activated his spotlight, the driver of the pick-up truck drove through the red light **prompting Officer Farrow to activate his roof lights and <u>follow the pick-up truck.</u>** The record does not contain proof that Defendant reasonably should have known that, **when he saw a police car <u>following a pick-up</u>** in which he was a passenger, he was being arrested for felony burglary.

Id. at 21 (emphasis added). It is clear that the Eastern District considered the fleeing to have occurred after the officer activated his roof lights.[1] While it is true that shining a

[1] *See also State v. Brooks*, 158 S.W.3d 841, 851-52 (Mo. App. E.D. 2005). *Brooks* was a companion case to *Hunter*, focusing on the driver of the car instead of the passenger. In reversing the defendant's conviction for resisting arrest because "a reasonable juror could not have found that Defendant should have known that he was being arrested," the Eastern District did not mention a spotlight at all. *Id.* Instead, the Court focused on what

spotlight into a truck is different than ordering a person to "stop running," there is simply no distinction between an officer activating the lights on his or her patrol car and an officer ordering a person to "stop running." *Id.* In fact, if anything, an officer activating his or her emergency lights is a clearer indication of the officer's intentions than the ambiguous phrase "stop running."

The State does not argue that the phrase "stop running" should generally put a person on notice that an officer is attempting to make an arrest. Instead, the State argues that Mr. Jones would have somehow interpreted Officer Avery's words differently than the average person simply because he had recently committed crimes in the surrounding area.[2] The State cites *State v. Austin*, 411 S.W.3d 284, 293 (Mo. App. E.D. 2013) for the proposition that "[a] reasonable jury could infer that [Mr. Jones] was conscious of his guilt and expected to be arrested for the crimes he had just committed upon being asked by a police officer to stop running." (Rsp. Brf. 26). However, *Austin* is completely inapposite; it merely states that "the jury was entitled to infer Defendant was conscious of his guilt" when the defendant "fled and hid" as police officers attempted to arrest him. 411 S.W.3d at 293. *Austin* in no way implies that a person who has recently committed a

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the defendant should have known after the officer activated his vehicle's emergency lights. *Id.*

[2] It goes without saying that Mr. Jones in no way concedes his guilt. However, counsel for Mr. Jones acknowledges that this Court must view the evidence for this claim in the light most favorable to the verdict.

crime should be aware that any officer who tells him to "stop running" is actually trying to arrest him.

No person—even someone who has actually committed a crime—should assume that a police officer would automatically arrest everyone in a given area matching a vague description of a suspect with no investigation whatsoever. 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 (Abuse of Discretion in Denying Continuance)

A. Mr. Jones's claim that trial counsel's late entry of appearance, long absence from the office, and cumbersome workload necessitated a continuance is preserved for review

In a verified motion for continuance filed before Mr. Jones's trial began, counsel for Mr. Jones argued that a continuance was necessary because he had been entered in the case for only three months, because he had been out of the country for over a month during that time period, because he was responsible for managing eighteen attorneys, and because he was preparing three murder cases for jury trials. (LF 35-36).

The State argues that this justification is not preserved for review because it was not specifically mentioned in Mr. Jones's motion for a new trial. (Rsp. Brf. 39), citing Rule 78.07(a). However, Rule 78.07(a) states that "[w]here definite objections or requests were made during the trial in accordance with Rule 78.09, including specific objections to instructions, a general statement in the motion of any allegations of error based thereon is sufficient."

As stated previously, counsel specifically cited in his verified motion for continuance why his cumbersome workload made it necessary to obtain a continuance. (LF 35-36). In Mr. Jones's motion for a new trial, counsel stated the following:

> The trial court erred when it did not grant Mr. Jones' verified motion for continuance pursuant to Mo. Sup. Cr. R. 24.09 and 24.10 (West 2013). A

> written verified motion was submitted and filed with the court. The motion was heard on the record and denied. A continuance was required by law to [sic] in order to secure Mr. Jones' rights to effective assistance of counsel, a fair trial, present a defense, due process, equal protection and against cruel and unusual punishment. . . The denial of the continuance violates these rights.

(LF 124).

Surely this passage from Mr. Jones's motion for a new trial is sufficient to satisfy Rule 78.07(a). The motion for a new trial refers back to the verified motion for continuance, making the specific claims present within the motion for continuance preserved for review. The fact that counsel later specifically referred to what he would have been able to do had a continuance been granted does not negate the general claim that the trial court erred in not granting the verified motion for continuance. This claim is therefore preserved for review.

B. Marvona Seales's testimony would have contradicted the implication that there was no one else in the area fitting the description of the suspect

Trial counsel argued below that Marvona Seales was a necessary witness because she could have testified that she saw another person matching the description of the suspect in the general area where the crimes were committed on the night in question. (LF 125-126). In his initial brief, Mr. Jones asserted that this testimony

could have contradicted the implication that no one in the area where the crimes were committed matched the description of the suspect besides Mr. Jones. (App. Brf. 37-38).[3] The State asserts the following in arguing that Ms. Seales's testimony would not have contradicted the testimony of the officers:

> The officers merely said that they did not see anyone else in the area; Ms. Seales's testimony that she did see another person in the area would not prove that the officers who testified at trial, in fact, saw this other person in the area, and so her testimony would not have contradicted that of the officers.

(Rsp. Brf. 36).

This assertion ignores the clear implication of the officers' testimony. Officer Mumford, for instance, testified to the following:

> The State: During that period of time, about how many people did you see at about 11:00 p.m. on February 10th, 2010?
>
> Officer Mumford: No one on foot.
>
> The State: How many people did you see in black jackets and black hats and blue jeans running?

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[3] The State correctly asserts that this argument was not presented below. However, because Ms. Seales could not be located at the time of trial, counsel never had the opportunity to present her testimony. Therefore, the admissibility of her testimony was not at issue below.

Officer Mumford: I did not see anybody matching that description.

(TR 341). Later, Officer Avery testified to the following:

The State: Officer Avery, when you and Officer May were canvassing the area, how many other people did you see running around at about 11:15 p.m.?

Officer Avery: None.

The State: Did you see anybody else running around in a black cap?

Officer Avery: No.

The State: Anybody else running around in a black coat?

Officer Avery: No.

The State: Anybody else running around in blue jeans and stripy shirt?

Officer Avery: No.

The State: Anybody else other than this defendant?

Officer Avery: No.

(TR 386-387).

The State was clearly attempting to show that there was no one else in the area of the crime matching the suspect's description. Furthermore, the State told the jury during closing argument that Mr. Jones was "[t]he only guy out there [who] matched the description." (TR 421). The testimony of Ms. Seales could have contradicted this implication, and the jury should have had an opportunity to consider this testimony.

C. *State v. Blocker* supports the argument that counsel's motion for a continuance should have been granted

In *State v. Blocker*, 133 S.W.3d 502, 505 (Mo. banc 2004), this Court determined that "[t]he trial court abused its discretion in denying [the defendant] the opportunity to introduce evidence in support of his defense against serious felony charges. In that case, the defendant asked for a continuance in order to secure the testimony of a pharmacist, who would have testified that a member of the defendant's household had a prescription for the controlled substance the defendant was alleged to have possessed. *Id.* This Court determined that "[w]hether [the defendant] was holding the pill for the use of a household member with a prescription is a jury question." *Id.*

Here, counsel alleged that he needed the opportunity to get the 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).

In *Blocker*, the jury was left with the impression that there would have been no legal reason for the defendant to have been in possession of the controlled substance. Here, the jury was left with the impression that the call log from Mr. Jones's phone was inculpatory.

The State argues that this evidence was unnecessary because Officer Avery was able to access the call log from the phone. (Rsp. Brf. 38). While this is true, it goes without saying that counsel believed the call log from the phone was incomplete, and that a complete examination of the phone would have been exculpatory.

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 reverse 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,

/s/ Samuel Buffaloe

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Certificate of Compliance and Service

I, Samuel 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, and this certificate of compliance and service, the reply brief contains 3,353 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 12th day of August, 2015, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Rachel Flaster, Assistant Attorney General, at Rachel.flaster@ago.mo.gov.

/s/ Samuel Buffaloe
_____
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