No. SC94924

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JUSTIN FLOYD EUGENE JONES,

Appellant.

Appeal from the St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Michael D. Burton, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant, Justin Floyd Eugene Jones, was charged as a prior and persistent offender with one count of first-degree burglary (Count I), one count of second-degree attempted robbery (Count III), one count of resisting arrest (Count V), one count of third-degree assault (Count VI), and two counts of armed criminal action (Counts II and IV). (L.F. 14, 19-20).[1] Viewed in the light most favorable to the verdicts, the evidence presented at trial showed the following:

At around 11:00 p.m. on February 10, 2010, Carlissa Harvey returned to her home after finishing some shopping. (Tr. 213, 215). Ms. Harvey pulled her car into the driveway and went into the house through her front door to get her sons to help her unload the groceries. (Tr. 216-17). After telling her sons to help her, Ms. Harvey left the house, opened the garage door via a keypad on the outside of the garage, and backed her car into the garage. (Tr. 218). Ms. Harvey got out of the car, grabbed a few bags of groceries, and walked to the door that led from the garage into the house. (Tr. 219-22). Ms. Harvey lowered the mechanical garage door via a keypad inside the garage,

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[1] Respondent cites to the legal file as "L.F.," the trial transcript as "Tr.," and the sentencing transcript as "S.Tr."

heard the door begin to lower, and started to walk into her house. (Tr. 219-22). As Ms. Harvey was walking into the house, she heard the garage door start to go back up as if the sensors in the garage had been activated. (Tr. 222). When Ms. Harvey heard the door begin to go back up, she turned around and saw a man coming into her garage dressed in black and holding a black gun with both hands. (Tr. 224).

When Ms. Harvey saw the man coming into her garage with a gun, she turned and ran into her house and slammed the door to the garage behind her. (Tr. 225). Ms. Harvey ran into a bedroom, activated her security system alarm, and called 911. (Tr. 225-26). Unbeknownst to Ms. Harvey, her 15-year-old son, MH, was standing in the kitchen doing dishes. (Tr. 225-26, 289-92).

MH was standing with his back to the door to the garage when he heard the door to the garage open. (Tr. 292-93). MH turned around and saw a man standing in his kitchen with a gun pointed at him. (Tr. 293). The man said, "Bring your ass over here," but MH did not move. (Tr. 294). The man told MH to come to him again, and this time MH walked over to the man. (Tr. 294-95). When MH got close to the man, the man put him in a choke hold and put his gun to MH's head. (Tr. 295-96). The man kept demanding "dope, money and weed," and MH kept telling the man that he did not have any of those things. (Tr. 296).

The man tried to make MH leave the house with him through the back door, but MH resisted and said he would not leave. (Tr. 297-98). The man then grabbed MH and began pulling him toward the door to the garage when the man's cell phone rang. (Tr. 299-300). The man told MH not to move as the man attempted to retrieve the cell phone. (Tr. 300). While reaching for his cell phone, the man removed his arm from MH's neck, so MH grabbed the gun; the man did not have the opportunity to answer the phone because a struggle ensued over the gun. (Tr. 300-01). The man began scratching at MH's face and bit MH's jaw. (Tr. 302). The man also attempted to gouge MH's eyes, leaving scratches on MH's eyelids. (Tr. 302-03). When the man gouged at MH's eyes, MH let go of the gun. (Tr. 302). The man stood and pointed the gun at MH for a while before leaving the house through the back door. (Tr. 302-03).

Shortly after the man left the house, the police arrived. (Tr. 230, 305-06). Officer Virgil Avery responded to the Victorian Village Court area to set up containment, and within ten seconds saw a man running who matched the description of the suspect. (Tr. 373-75). Officer Avery identified himself as a police officer and told the man to stop running. (Tr. 375). The man looked in Officer Avery's direction and continued running. (Tr. 375). Officer Avery

caught up to the man and placed him in handcuffs. (Tr. 376). The man Officer Avery arrested was Defendant. (Tr. 379).

Officer Kathryn Mumford drove MH to Victorian Village Court to perform a show-up with Defendant; MH identified Defendant as the man who entered his kitchen with a gun and assaulted him. (Tr. 333-34). Officer Robert Dean and his K-9 partner Lass performed a trackback from the location where Defendant was arrested, and the track led back to the Harveys' house. (Tr. 348-49).

Defendant was transported to the police station. (Tr. 379). At the station, Officer Avery asked Defendant for permission to look through Defendant's phone and Defendant consented. (Tr. 381, 383). Officer Avery opened Defendant's flip phone and saw that he had three missed calls from 11:11 and 11:12 p.m. on February 10. (Tr. 383-84).

At trial, Ms. Harvey and MH identified Defendant as the man who came into their house with a gun. (Tr. 237-38, 257, 293).

The jury found Defendant guilty as charged. (Tr. 443-44). The court sentenced Defendant to fifteen years' imprisonment for Count I, eighteen years' imprisonment for Count II, fifteen years' imprisonment for Count III, eighteen years' imprisonment for Count IV, five years' imprisonment for

Count V, and one year of imprisonment for Count VI, all to be served concurrently for a total of eighteen years' imprisonment. (S.Tr. 66).

ARGUMENT

I. (sufficiency-armed criminal action)

The trial court did not err in overruling Defendant's motions for judgment of acquittal for Count II—the armed criminal action charge associated with the burglary charge—in that the State presented sufficient evidence to prove that Defendant entered Ms. Harvey's garage with the use or assistance of a deadly weapon.

Defendant argues that there was insufficient evidence that he entered Ms. Harvey's garage by, with, or through the use, assistance, or aid of a deadly weapon because he had already passed through the garage door and entered into the garage before Ms. Harvey saw him with the gun. (Def.'s Br. 19, 25). But an armed criminal action conviction related to burglary should not rest on the victim having seen the defendant enter the structure if there was sufficient evidence that the defendant entered the structure with the use or assistance of a deadly weapon, as there was here. Furthermore, Defendant's argument ignores Ms. Harvey's testimony that she saw Defendant coming into her garage displaying a gun, which the court must view in the light most favorable to the verdict under the standard of review.

A. Standard of review

When reviewing a challenge to the sufficiency of the evidence, the appellate court views the evidence in a light most favorable to the State and grants the State all reasonable inferences from the evidence. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The court will disregard all evidence and inferences contrary to the verdict. *Id*. Moreover, the appellate court will not reweigh evidence, and it will defer to the credibility determinations of the finder of fact. *State v. Haslar*, 887 S.W.2d 610, 614 (Mo. App. W.D. 1994). "Testimony of a single witness, if deemed credible by the jury, may be considered sufficient for conviction, though that testimony is uncertain or inconsistent." *State v. Uptegrove*, 330 S.W.3d 586, 590 (Mo. App. W.D. 2011). The sole issue the appellate court must determine is whether there is sufficient evidence from which the jury could have found the defendant guilty beyond a reasonable doubt. *State v. Middleton*, 854 S.W.2d 504, 506 (Mo. App. W.D. 1993).

B. Relevant record

Ms. Harvey testified that after she backed her car into the garage, she "grabbed some groceries out of [her] car and [she] went to enter into the house." (Tr. 221). She "hit" the keypad to shut the garage door. (Tr. 222). Ms. Harvey testified about Defendant's entry into her garage:

> 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.
>
> . . .
>
> 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. 222, 224). Ms. Harvey testified that she saw Defendant coming in the garage through the left side. (Tr. 224). Defendant was holding a gun with both hands. (Tr. 224). Ms. Harvey further testified: "When I turned around and seen [sic] him coming in with the gun, I slammed that door and I took off running towards the first bedroom." (Tr. 225).

C. The State presented sufficient evidence.

The State presented sufficient evidence that Defendant unlawfully entered Ms. Harvey's garage with the use or assistance of a deadly weapon because the evidence showed that Defendant displayed a gun when he entered Ms. Harvey's garage.

A person commits armed criminal action when he commits a felony by, with, or through the use, aid, or assistance of a deadly weapon. § 571.015.1, RSMo 2000. The underlying felony in this case was first-degree burglary. A person commits first-degree burglary when he knowingly enters unlawfully

an inhabitable structure for the purpose of committing a crime therein, and there is present another person in the inhabitable structure who is not a participant in the crime. § 569.160.1(3), RSMo 2000. Thus, to prove Defendant committed armed criminal action related to the burglary, the State was required to present sufficient evidence that Defendant entered Ms. Harvey's garage by, with, or through the use, assistance, or aid of a deadly weapon.

Contrary to Defendant's argument, there should be no requirement that the victim observe the defendant enter the structure to sustain an armed criminal action conviction related to burglary. If 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. This is so because the reasonable inference is that he displayed the gun to facilitate a resistance-free entry. His use of the gun is not negated if the victim did not observe his entry or even if the victim was not present at the point of entry; the defendant still chose to display the gun to assist his entry into the house and thus he used it. As such, if there was sufficient evidence that a defendant unlawfully entered a structure displaying a gun, his conviction for armed criminal action should be sustained regardless of whether he was observed or whether the victim was present at the point of entry.

Here, the evidence showed that Defendant displayed a gun when he entered Ms. Harvey's garage. Even if the Court were to find the evidence showed that Ms. Harvey did not see Defendant until he had already entered her garage—which would be contrary to the standard of review requiring the evidence be considered in the light most favorable to the verdict—there was sufficient evidence showing that Defendant entered the garage with the use or assistance of a gun.

Ms. Harvey testified that she turned around and saw Defendant coming into her garage with both hands on a gun. The reasonable inference from this evidence is that Defendant displayed the gun when he entered her garage. Additionally, Ms. Harvey had just backed her car into the garage and was attempting to shut the garage door when Defendant entered. Thus, it can be reasonably inferred that Defendant knew a person was in the garage and he was using the gun to threaten that person and ensure his entry into the garage by preventing or overcoming resistance to his entry. Defendant's use of the gun had its intended effect: When Ms. Harvey saw Defendant coming in her garage with a gun, she tried to flee. Even if Ms. Harvey did not see Defendant cross the threshold into her garage, there was sufficient evidence that Defendant entered her garage with the use or assistance of a gun.

Moreover, Ms. Harvey's testimony must be considered in the light most favorable to the verdict under the standard of review. Ms. Harvey testified three times that she saw Defendant "coming in" her garage, which indicates that she saw his entry. (Tr. 224-25). Defendant argues that Ms. Harvey could not have seen Defendant until he had already entered her garage because the sensors which triggered the garage door to stop closing were inside the garage. (Def.'s Br. 25). Defendant's argument rests on inferences which are contrary to the verdict, however, and should be disregarded. Ms. Harvey testified that she saw Defendant coming into her garage holding a gun in both hands, which is sufficient evidence to support Defendant's armed criminal action conviction. *See Obasogie v. State*, 457 S.W.3d 793, 798 (Mo. App. E.D. 2014) (sufficient evidence to support an armed criminal action conviction based on first-degree burglary where the victim saw the defendant enter her house openly displaying a gun).

Defendant argues that *Obasogie* is factually distinguishable because the victim in O*basogie* saw the defendant armed with a gun prior to entering the house. (Def.'s Br. 25). *Obasogie* is not factually distinguishable from the present case, however. In *Obasogie*, the victim testified that she saw the defendant "come into the back door" and he "had a small handgun." *Id.* at 797-98. Similarly here, Ms. Harvey testified that she saw Defendant "coming

in" her garage and he was holding a gun. (Tr. 224-25). Thus, both victims testified that they saw the defendants enter their respective inhabitable structures armed with a gun.

The court in *Obasogie* did appear to construe the victim's testimony as showing that the victim saw the defendant "armed with a weapon prior to entering the house," even though the victim did not specifically testify that she saw the defendant prior to the entry. *See id.* at 797-98. The court also distinguished the facts of *Obasogie* with other cases where the defendants where both inside the house when first seen by the victims, noting that the defendants in those cases did not use the weapon to intimidate someone prior to entering the home. *Id.* at 798. The ultimate holding of *Obasogie*, however, does not require that the victim see the defendant armed prior to entry to sustain an armed criminal action conviction related to burglary:

> In the present case, [Defendant] was openly displaying the gun in his hand as [the victim] *saw him enter* her house. The jury could reasonably infer that there was an implicit threat to [the victim] by [the defendant's] display of the gun in his hand; he did not need to point the gun at her or to make an explicit verbal threat. There was sufficient evidence to sustain the conviction for armed criminal action, Count II, associated with the burglary count.

Id. (emphasis added). *Obasogie* imposes no requirement that the victim see the defendant armed prior to entry; it is sufficient if she sees him enter displaying a gun. *Obasogie* thus supports Defendant's armed criminal action conviction.

Finally, Defendant argues that "[n]umerous past cases show why [Defendant] cannot be guilty of armed criminal action," citing *State v. Reynolds*, 819 S.W.2d 322, 327 (Mo. banc 1991), *State v. Carpenter*, 109 S.W.3d 719, 721 (Mo. App. S.D. 2003), and *State v. Hopkins*, 140 S.W.3d 143, 147 (Mo. App. E.D. 2004). (Def.'s Br. 22-24). In each of those cases, the court found there was insufficient evidence that the defendant entered the house by, with, or through the use, assistance, or aid of a deadly weapon.

Reynolds and *Hopkins* are distinguishable because in those cases there was no evidence that the defendants used a deadly weapon when they entered the victims' homes. In *Reynolds*, the defendant entered the victim's house by breaking the glass out of a door and reaching inside to unlock it. 819 S.W.2d at 327. The victim shot the defendant and the defendant ran outside. *Id.* When the defendant was arrested and searched, the police found a knife in a sheath in his boot. *Id.* This was insufficient evidence that the defendant entered by, with, or through the use, assistance, or aid of a deadly weapon because "no evidence allow[ed] an inference that the knife found on the

person of defendant Reynolds was ever out of its sheath hooked within the boot during the burglary episode or that either of the [victims] was ever aware of the knife." *Id.* at 327.

In *Hopkins*, the defendant entered the victim's house through a door into the garage, which was kicked open, and then passed through doors to the house and basement, which were both pried open. 140 S.W.3d at 158. The defendant stabbed the victim in his bedroom with an unidentified sharp object. *Id.* at 147, 158-59. The object was never seen by the victim or any other witness. *Id.* at 158-59. The court found insufficient evidence that the defendant entered by, with, or through the use, assistance, or aid of a deadly weapon because it was mere speculation to assume the unidentified sharp object used to stab the victim was also used to gain entry into the victim's home. *Id.* at 159.

Conversely here, Ms. Harvey testified that she saw Defendant coming into her garage holding a gun with both hands. Thus, *Reynolds* and *Hopkins* are not analogous and do not support Defendant's argument that his armed criminal action conviction should be overturned.

Nor does *Carpenter* serve as a basis to overturn Defendant's conviction. In *Carpenter*, the evidence showed that the defendant had entered the back door of the victim's house by breaking out the glass and kicking the door

open. 109 S.W.3d at 720. While in the house, the defendant put his rifle to the victim's throat and shot at her belongings. *Id.* The court found that no evidence was presented suggesting that the defendant entered by, with, or through the aid, assistance, or use of the rifle. *Id.* at 723. In so finding, the court suggested that a defendant does not enter by, with, or through the aid, assistance, or use of a gun unless he shoots the door open or explicitly threatens the victim with the gun to compel her to open the door. *See id.*

This language was dicta, however, and should not be construed as creating a rule that entry by, with, or through the aid, assistance, or use of a gun can only be accomplished if the defendant breaks open the door with a gun or explicitly threaten the victims with the gun to gain entry. *See Obasogie*, 457 S.W.3d at 798 ("The dicta in *Carpenter* that defendant would have had to use the gun to break open the door or to display a weapon and explicitly threaten someone to gain entry, was not required by the language of the statute and was not necessary to reach its holding in that case.").

To the extent that *Carpenter* holds that entry while displaying a gun is insufficient to establish entry by, with, or through the aid, assistance, or use of the gun, such holding should be overruled. The armed criminal action statute does not contain language requiring that the deadly weapon be used in any specific manner to commit the underlying felony. *See* § 571.015.1. The

words used in the statute—by, with, through, aid, assistance, use—are not statutorily defined and are broad terms which lend themselves to a wide range of conduct.

Requiring what is suggested by the court in *Carpenter* would result in adding an element of proof to the crime of armed criminal action that is not in the statute. To the extent *Carpenter* adds such an element, *Carpenter* should not be followed. *See State v. Williams*, 126 S.W.3d 377, 385 (Mo. banc 2004) (holding that cases which added an element to the armed criminal action statute should not be followed).

Defendant unlawfully entered Ms. Harvey's garage by, with, or through the use, assistance, or aid of a deadly weapon when he entered her garage displaying a weapon in both hands. There was sufficient evidence to support Defendant's armed criminal action conviction and his point should be denied.

II. (sufficiency-resisting arrest)

The trial court did not err in overruling Defendant's motions for judgment of acquittal in that the State presented sufficient evidence that Officer Avery was attempting to arrest Defendant and that Defendant knew or should have known that Officer Avery was attempting to arrest Defendant when Defendant fled.

Defendant argues the trial court erred in denying his motions for judgment of acquittal for the charge of resisting arrest in that there was insufficient evidence showing Officer Avery was attempting to arrest Defendant when he fled and Defendant knew or should have known that Officer Avery was attempting to arrest him. (Def.'s Br. 28, 31-33). But the evidence was sufficient to show that Officer Avery had probable cause to arrest Defendant and was attempting to do so, and Defendant knew or should have known that Officer Avery was attempting to arrest him in light of the fact that he had just committed several crimes and Officer Avery identified himself as a police officer and told Defendant to stop running.

A. Standard of review

When reviewing a challenge to the sufficiency of the evidence, the appellate court views the evidence in a light most favorable to the State and grants the State all reasonable inferences from the evidence. *Grim*, 854

S.W.2d at 411. The court will disregard all evidence and inferences contrary to the verdict. *Id*. Moreover, the appellate court will not reweigh evidence, and it will defer to the credibility determinations of the finder of fact. *Haslar*, 887 S.W.2d at 614. "Testimony of a single witness, if deemed credible by the jury, may be considered sufficient for conviction, though that testimony is uncertain or inconsistent." *Uptegrove*, 330 S.W.3d at 590. The sole issue the appellate court must determine is whether there is sufficient evidence from which the jury could have found the defendant guilty beyond a reasonable doubt. *Middleton*, 854 S.W.2d at 506.

B. Relevant record

The State charged Defendant with resisting arrest by fleeing. (L.F. 19). Specifically, the indictment charged that "Police Officer Virgil Avery and Police Officer Daniel 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." (L.F. 19).

Around 11:20 p.m. on February 10, 2010, Officer Virgil Avery received a dispatch for a robbery. (Tr. 373). Officer Avery was on duty, in a marked car, and wearing a uniform. (Tr. 373). He responded to Victorian Village Court, an area "a couple blocks" from Ms. Harvey's house, to set up

containment. (Tr. 373-74). When he arrived, he got out of his car to canvas the area. (Tr. 374). Within ten seconds of arriving at the scene, Officer Avery saw a man running who matched the description of the suspect: Defendant. (Tr. 374-75). Officer Avery identified himself as a police officer and told Defendant to stop running. (Tr. 375). Defendant looked in Officer Avery's direction and continued running. (Tr. 375). Officer Avery caught up to Defendant and placed him in handcuffs. (Tr. 376).

Officer Avery testified regarding his intent in chasing Defendant:

Q. [by the prosecutor:] What, if anything, happened when you detained him or when you caught up to him?

A. [by Officer Avery:] I placed him in handcuffs.

Q. Okay. At that point, what was he – what were you chasing him for? What did you believe he was under arrest for?

A. A robbery.

(Tr. 376).

C. The State presented sufficient evidence.

A person commits the crime of resisting an arrest, detention, or stop if the person knows or reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or stop the person, and, for

the purpose of preventing the officer from effecting the arrest, stop, or detention, the person flees from the officer. § 575.150.1(1), RSMo Supp. 2010.

Defendant argues that the evidence did not show he was resisting arrest as charged; rather, at worst, it showed he was resisting a detention or stop. (Def.'s Br. 31). Viewed in the light most favorable to the verdict, however, the evidence showed that Officer Avery was attempting to arrest Defendant, not detain or stop him. Officer Avery set up containment in Victorian Village Court in response to a robbery dispatch in the area. Within ten seconds, Officer Avery saw Defendant, who matched the description of the suspect, running. Officer Avery identified himself as a police officer and told Defendant to stop running. When Defendant continued running, Officer Avery gave chase for the purpose of placing Defendant under arrest for robbery. Taken together, this evidence leads to the reasonable inference that Officer Avery was attempting to arrest defendant, not stop or detain him, when he told Defendant to stop running.

In support of his argument that Officer Avery was only attempting, at most, to stop or detain him, Defendant posits that an arrest without any investigation in this situation would have been unreasonable. (Def.'s Br. 31-32). But Officer Avery had probable cause to arrest Defendant because Officer Avery saw Defendant running in an area where crimes had just

occurred and Defendant matched the description of the suspect; therefore, further investigation was not required to make an arrest. *See State v. Whitley*, 743 S.W.2d 482, 484 (Mo. App. E.D. 1987) (finding probable cause to arrest where the defendant matched the description of the suspect given by the victim and the defendant was found shortly after the crime in the same neighborhood as the crime); *State v. Worthon*, 585 S.W.2d 143, 147 (Mo. App. S.D. 1979) (finding probable cause to arrest where the officer saw a man fitting the general description of the suspect running away from the area of the crime within a few minutes of the crime).

In arguing for reversal of this conviction, Defendant relies on *State v. Hunter*, 179 S.W.3d 317, 321 (Mo. App. E.D. 2005), wherein the court reversed the defendant's conviction for resisting arrest because there was insufficient evidence that the police officer was making an arrest of the defendant when he fled. Defendant argues that there "is no distinction between the present case, where an officer told [Defendant] to 'stop running,' and [Defendant] 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." (Def.'s Br. 32).

In *Hunter*, however, 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. *Id.* at 319, 321. At that point, the defendant's truck drove through a red light, and the officer activated his roof lights and began following the truck. *Id.* at 319. Thus, 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. And unlike Officer Avery, the officer in *Hunter* did not order the defendant to stop or otherwise attempt to stop him prior to the defendant giving chase. Finally, Officer Avery testified that he chased Defendant intending to arrest him for robbery, and the court in *Hunter* noted that the officer never testified that he intended to arrest the defendant when he turned on his roof lights and followed the defendant's truck. *See id.* at 321. *Hunter* is distinguishable and does not support Defendant's argument for reversal.

Defendant also argues that "there was no reason for [him] to know that Officer Avery was attempting to make an arrest." (Def.'s Br. 33). But the evidence showed that Defendant, after committing the crimes of burglary,

robbery, assault, and armed criminal action,[2] was running away from the crime scene when a uniformed officer identified himself as an officer and commanded him to stop running. (Tr. 374-75). A reasonable jury could infer that Defendant 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. *See State v. Austin*, 411 S.W.3d 284, 293 (Mo. App. E.D. 2013) (jury entitled to infer the defendant was conscious of his guilt where the defendant fled and hid upon officer's attempt to arrest him). This evidence, taken in the light most favorable to the verdict, was sufficient to prove that Defendant knew or reasonably should have known that Officer Avery was making an arrest when he commanded Defendant to stop running.

The evidence was sufficient to support Defendant's conviction for resisting arrest, and Defendant's point should be denied.

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[2] It should be noted that Defendant does not contest the sufficiency of the evidence supporting his convictions for burglary, robbery, assault, or armed criminal action as related to the robbery.

III. (motion for continuance)

The trial court did not abuse its discretion in denying Defendant's motion for a continuance because Defendant was not prejudiced by the lack of continuance as none of the absent evidence would have changed the outcome of trial.

Defendant argues that the trial court abused its discretion in denying a motion for continuance because the evidence Defendant wanted more time to obtain "would have contradicted evidence presented by the State that no one besides [Defendant] was in the area around the Harvey's [sic] house after the robbery and evidence that [Defendant's] cell phone incriminated him[.]" (Def.'s Br. 34). Defendant was not prejudiced by the denial of the motion, however, because this evidence would not have resulted in a different outcome.

A. Standard of review

"In most circumstances, the decision to grant a continuance rests in the sound discretion of the trial court." *State v. Griffin*, 848 S.W.2d 464, 468 (Mo. banc 1993). "A very strong showing is required to prove abuse of that discretion, with the party requesting the continuance bearing the burden of showing prejudice." *State v. Schaal*, 806 S.W.2d 659, 666 (Mo. banc 1991). "In our review of the denial of the continuance, we indulge every intendment in

favor of the trial court's exercise of its discretion." *State v. Baller*, 949 S.W.2d 269, 273 (Mo. App. E.D. 1997).

B. Relevant record

Defendant was charged with the offenses against him on February 11, 2010. (L.F. 1-2). Defendant's original attorney entered his appearance on February 22, 2010. (L.F. 2). Between February 22, 2010, and the beginning of the trial on December 2, 2013, Defendant moved for and was granted four continuances. (L.F. 8, 10, 11). Defendant also filed several pro se motions, including nine separate motions for change of appointed counsel. (L.F. 7, 8, 9, 10, 12).

According to Defendant's verified motion for continuance, filed December 2, 2013, defense counsel Stephen Reynolds entered his appearance on September 5, 2013. (L.F. 35). Counsel asserted that from October 17, 2013, until November 19, 2013, counsel was out of the country for a pre-scheduled leave of absence from the office. (L.F. 35).

Immediately preceding the start of trial, the court held a hearing on the motion for continuance. (Tr. 4-19). Defense counsel argued that the court should grant the continuance because 1) the examiner who conducted Defendant's mental health evaluation did not have certain records related to Defendant's childhood head injuries, and counsel needed additional time to

secure those records; 2) a witness had come to defense counsel's attention in the previous week who would testify that at the time of the crimes she lived in the neighborhood and saw an African-American man with dreadlocks waiting for a bus at the time of the police search, and counsel needed additional time to investigate that witness; and 3) that defense counsel needed to obtain a forensic evaluation of the cell phone, and counsel needed an additional 45 days to do so. (Tr. 5-9, 13-14, 16). In his written motion, defense counsel argued that witness "Marvonea Seals" would testify that "at the time of the incident she saw an African-American man with dreadlocks waiting for a bus and that this man is the person responsible for the alleged crimes in this case." (L.F. 41). Defense counsel also argued that a forensic examination of the cell phone would "show that [MH's] testimony and/or memory is inaccurate," in that it would show that Defendant "received and answered a telephone call which was minutes in length at or near the time of the alleged incident." (L.F. 41).

In denying the request for a continuance, the court noted that it had concerns about granting another continuance in light of the case being so old. (Tr. 17). The court also noted that defense counsel did not bring any of these issues to the court's attention at a hearing the previous week. (Tr. 18). The court stated that it did not hear anything that would indicate that the

witness described by defense counsel would be of any benefit to the defense. (Tr. 19). The court denied the motion for continuance. (Tr. 23).

Defendant filed a motion for new trial, which included his claim that the court erred in denying his request for a continuance. (L.F. 124-27). In the motion for new trial, Defendant alleged that counsel located "Marvona Seales" in Dallas, Texas on "December 2, 2012." (L.F. 126). Defendant alleged that Ms. Seales would have testified to the following:

> Between 11 and 12 pm [sic] on February 10, 2100, [sic] Marvona was driving home with a friend, Beatrice Powell. Marvona saw there were several police officers at the U-Haul store near the intersection of Highway 367 and Parker Road in St. Louis County, MO. At the time she was living at 6678 Chesapeake near a Walgreens and in the same neighborhood as the offenses. She remembers the night because it was close to Valentine's Day and Beatrice wanted to stop at Walgreens and get something for her fiancée [sic]. They stopped at the Walgreens. Beatrice went inside and Marvona stayed in the car. Marvona saw the police questioning a man about 5 feet 4 inches tall and about 19 years old wearing all black with a hoodie. When Beatrice came out of the store, Marvona said she wanted to watch the police because

> she does not trust the police. The two sat in the car and watched the police. The police had dogs. The police let the suspect go. Marvona then asked the suspect what was going on. He said he had just got off work at McDonalds and was trying to catch the bus. She thought that was strange because it was her understanding that the bus stop is in front of the McDonalds and not in front of the Walgreens. She asked him if he needed the ride. He declined.

(L.F. 125-26). Defendant argued that this testimony "was and is material because it indicates that another person and not the defendant is the correct suspect in this case." (L.F. 126).

Defendant also claimed in the motion that a continuance was necessary to conduct a forensic examination of the cell phone. (L.F. 126-27). Defendant argued that an examination of the phone would have "undermined [MH's] credibility and shown that [MH's] testimony and/or memory was inaccurate and that [Defendant] was not the perpetrator of the alleged crimes." (L.F. 126-27).

Defendant did not claim in the motion that a continuance was necessary because counsel was absent from the country from October 17,

2013, to November 19, 2013, was managing eighteen attorneys, or was preparing for other trials. (L.F. 124-27).

During the hearing on the motion for new trial, Defendant rested on his written motion with the exception of claiming that Defendant filed a pro se motion for continuance on November 5, 2013, but that motion was never file-stamped or logged into Casenet. (S.Tr. 60-61).

C. The trial court did not abuse its discretion in denying Defendant's motion for continuance.

In his motion for continuance, Defendant claimed a continuance was necessary to secure witness Marvonea Seales. (L.F. 40-41). "When the ground for continuance is absence of a witness, the party requesting the continuance must state facts showing the materiality of the testimony, due diligence upon the part of defendant to obtain the witness's testimony, the particular facts the witness will prove, and reasonable grounds to believe the attendance or testimony of the witness can be procured within a reasonable time." *State v. McCarter*, 820 S.W.2d 587, 588-89 (Mo. App. E.D. 1991) (citing Rule 24.10). "Furthermore, the refusal to grant a continuance for a missing witness will not be reversed on appeal unless the witness's testimony would probably result in a different outcome." *State v. Dodd*, 10 S.W.3d 546, 554-55 (Mo. App. W.D. 1999).

Defendant failed to establish the materiality of Ms. Seales's testimony in his motion for continuance. In his motion, Defendant alleged that Ms. Seales would have testified that she lived in the neighborhood of the crime, and that "at the time of the incident she saw an African-American man with dreadlocks waiting for a bus and that this man is the person responsible for the alleged crimes in this case." (L.F. 41). Defendant did not indicate how Ms. Seales would have known that this man, and not Defendant (whom both victims identified as the suspect), was the person who committed the crimes. The motion merely stated that this witness saw an African-American man waiting for a bus "at the time of the incident[.]" (L.F. 41). The motion did not even indicate that the person was waiting for the bus in the area of the crime. (*See* L.F. 40-41). Based on the motion, Defendant failed to establish that the absence of this witness prejudiced him. *See Dodd*, 10 S.W.3d at 555 ("Failure to comply with Rules 24.09 and 24.10 [(requiring the motion for continuance to show the materiality of the witness's testimony and the facts the witness would prove)] alone is sufficient to sustain the trial court's ruling.").

Defendant also failed to show the materiality of this witness in the hearing on the motion for continuance or establish that he was prejudiced by this witness's absence in his motion for new trial or hearing on the motion for new trial. At the hearing on the motion for continuance, defense counsel

stated that Ms. Seales would testify that "she lived in the neighborhood and she saw an African American man with dreadlocks waiting for a bus at the time of the police search or the response to the call in this case, and that this man is the person responsible for the alleged crimes in this case." (Tr. 13). This allegation, like the allegations contained in the motion for continuance, did not establish that this witness was material. The allegation did not state that Ms. Seales saw this other person in the neighborhood; it only stated that Ms. Seales lived in the neighborhood and saw another African-American person at a bus stop at some undisclosed location. (Tr. 13). Defendant failed to establish, based on these allegations, that Ms. Seales was a relevant witness.

In his motion for new trial, defense counsel included more details about Ms. Seales's expected testimony, but this testimony still did not establish that Defendant was prejudiced by her absence at trial. In the motion, defense counsel alleged that Ms. Seales was in the neighborhood on the evening of the crimes, and she saw a young man in the area of the crimes being questioned by the police between 11 and 12 p.m. (L.F. 126). Ms. Seales would testify that the man she saw being stopped by the police was an African-American man who was about five feet and four inches tall, and was wearing all black. (L.F. 126). Defense counsel argued this testimony was "material because it

indicates that another person and not the defendant is the correct suspect in this case." (L.F. 126). But that evidence did not indicate that this man and not Defendant was the person who committed the crimes. This testimony would, at best, establish that there was another African-American man in the general vicinity of the crimes who matched the general description of the suspect. As this testimony failed to establish that Defendant was not the perpetrator, Defendant was not prejudiced by the denial of a continuance to secure this witness for trial.

Additionally, based on the allegations contained in Defendant's motion for new trial, it appears as though the testimony of this witness would not have been admissible. "To be admissible, evidence that another person had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person committed some act directly connecting him with the crime." *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. banc 1998). "The evidence must be of the kind that directly connects the other person with the *corpus delicti* and tends clearly to point to someone other than the accused as the guilty person." *Id.* "Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime

by another, is not admissible." *Id.* Here, Ms. Seales's testimony would not tend to prove that this other person committed any act directly connecting him to the crime. Her testimony would have no other effect than to cast a bare suspicion on this other individual, and, as such, her testimony would have been inadmissible. As her testimony would have been inadmissible, Defendant was not prejudiced in the trial court's denial of his motion for continuance to secure her testimony.

Defendant argues that Ms. Seales's testimony would have contradicted the testimony of two officers who indicated that they did not see anyone other than Defendant in the area around the crime scene. (Def.'s Br. 38). This argument is not preserved as it was not presented to the trial court in support of the motion for continuance. In any event, even as specified in the motion for new trial, Ms. Seales's testimony would not have contradicted the testimony of the two officers who testified at trial. 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.

Defendant also claimed in his motion for a continuance that a continuance was necessary to have his cell phone forensically examined. (L.F.

41-42). But Defendant's motion for continuance failed to allege that counsel exercised his due diligence in attempting to obtain this evidence prior to the first day of trial. (L.F. 34, 41). Defense counsel failed to articulate how he had engaged in his due diligence to obtain this information without requesting the continuance. As such, the trial court did not abuse its discretion in denying Defendant's motion for continuance. *See Dodd*, 10 S.W.3d at 555 (finding failure to comply with rules related to motions for continuance, including requirement that the party requesting the continuance show due diligence in obtaining the witness's testimony, is sufficient by itself to sustain the trial court's denial of a motion).

Additionally, as this evidence would not have changed the outcome of the trial, Defendant was not prejudiced by the court's denial of the continuance to obtain this evidence. Defendant claimed in his motion for continuance that a forensic examination of the phone would reveal that Defendant "received and answered a telephone call which was minutes in length at or near the time of the alleged incident." (L.F. 41). Defendant contended that this evidence would show that MH's testimony was inaccurate and that Defendant was not the perpetrator of the crimes. (L.F. 41). Evidence that Defendant received a phone call "at or near the time of the alleged incident" would not have even contradicted MH's testimony, as MH was

reticent to place an exact time on the time that Defendant entered his home. (Tr. 309). Thus, even if this evidence would have shown that Defendant received a phone call that was minutes in duration near the time of the crimes, this was not inconsistent with MH's account; Defendant could have had this call prior to entering the house. As this evidence would not have contradicted MH's testimony, Defendant was not prejudiced by its absence at trial.

It is also of note that a forensic examination was not necessary to obtain the information Defendant claims was necessary for his defense. Defendant claimed in his motion for continuance that he needed additional time to have the cell phone forensically examined to adduce evidence that Defendant received a phone call that was minutes in length at or near the time of the crimes. (L.F. 41). But Officer Avery was able to look at the phone's call logs and testify as to the times of three missed calls on the date of the crimes. (Tr. 383-84). As Officer Avery—not a forensic cell phone examiner—was able to obtain this type of information from the phone, it seems that no forensic examination of the phone was necessary to obtain the same information for Defendant. Because a forensic examination was not necessary to obtain the evidence Defendant wished to obtain, the trial court did not abuse its discretion in denying the motion for continuance.

Defendant additionally argues that the denial of his motion for continuance was an abuse of discretion because counsel entered an appearance in the case three months before trial, during that time period counsel was responsible for managing 18 attorneys and was preparing three murder cases for a jury trial, and counsel was out of the country for a month during that period. (Def.'s Br. 39). Defendant did not assert these as grounds for a continuance in his motion for new trial, and thus this claim is not preserved for appellate review. *See* Rule 78.07(a).

Moreover, defense counsel did not file his motion for continuance until the first day of trial, despite having been entered on the case for over three months. (L.F. 32). The fact that defense counsel had been entered in the case for just three months did not render the court's denial of the motion for continuance an abuse of discretion. *See Baller*, 949 S.W.2d at 273 (finding no abuse of discretion where defense counsel was hired and entered his appearance twenty days before trial).

Defendant's point should be denied.

CONCLUSION

The trial court did not commit reversible error. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,162 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 27th day of July, 2015, to:

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