IN THE
MISSOURI SUPREME COURT

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| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | No. SC96333 |
| | ) | |
| DANIEL DUOT AJAK, | ) | |
| | ) | |
| Appellant. | ) | |

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY
5TH JUDICIAL CIRCUIT
THE HONORABLE KEITH MARQUART, JUDGE

# APPELLANT'S SUBSTITUTE BRIEF

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# INDEX

## TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**



***STATUTES*:**

***RULES*:**



***MISSOURI APPROVED INSTRUCTIONS*:**

## JURISDICTIONAL STATEMENT

Appellant, Daniel Duot Ajak, appeals his conviction of resisting arrest, Section 575.150,[1]after a jury trial in Buchanan County. (LF 118-119).[2,3] The Honorable Keith Marquart sentenced Daniel to 280 days in jail. (LF 53-54).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, section 3, Mo. Const.; section 477.070. Following an opinion by that court en banc, this Court granted Daniel's application for transfer and has jurisdiction. Article V, sections 3 and 10, Mo. Const.; Rule 83.04.

[1] All statutory references are to RSMO 2000, unless otherwise noted.

[2] Daniel also was charged with three counts of Domestic Assault, 3rd degree, §565.074; the jury found him not guilty of two of these, and hung on a third, which was later dismissed. Therefore, resisting arrest was his only conviction.

[3] The record on appeal is a transcript (TR), a legal file (LF) and exhibits (EX).

## STATEMENT OF FACTS

Daniel Duot Ajak and his girlfriend, Shanna McMackin, lived together in St. Joseph, Missouri. (TR 99-101). In February, 2015, two of Shanna's adult children, Sean Elder and Courtney Elder, also lived with them, as well as several of Sean's and Courtney's children. (TR 102). Daniel housed and provided financial support for Sean[4], Courtney and the children. (TR 112, 114).

On the evening of February 15, Sean was playing with the children in a bedroom when he heard Courtney screaming at Daniel. (TR 123). Sean looked out and saw Courtney hit Daniel. (TR 124). Daniel then pushed Courtney; he was trying to get away from her because she was grabbing his dreadlocks. (TR 125). According to Sean's trial testimony, Courtney was the aggressor. (TR 127).

Shanna had been taking a bath when this argument started; she got dressed and went downstairs. (TR 104). According to Shanna, Courtney was upset because she wanted her boyfriend to come into the house to drink, but Daniel told Courtney that her boyfriend could not come inside. (TR 105). Courtney's boyfriend was a trouble-maker. (TR 105). Courtney got in Daniel's face, yelling, and Daniel was trying to push her back. (TR 105). Shanna tried to pull them apart because Courtney had grabbed Daniel's dreadlocks and would not let go. (TR 105).

[4] Twenty-eight year old Sean had not worked for six years because of a blood disorder. (TR 120).

Sean, who has martial arts training, intervened and took Daniel to the ground. (TR 103, 110, 130). When Daniel finally got up, he went to the kitchen and retrieved a knife. (TR 106). Shanna testified that Daniel did not threaten anyone, but Courtney kept charging at him, yelling and screaming. (TR 105-106). Daniel told Shanna that he wanted her and her kids out of the house or he would kick them out. (TR 106, 110-111).

Shanna called the police because this family feud had gotten out of hand and everybody was upset. (TR 106-107). Courtney had assaulted Shanna before and Shanna knew that Courtney would not back down. (TR 115). As soon as Shanna called the police, Courtney left the house, and they have not had contact with her since. (TR 106, 112).

When the police arrived, Daniel placed the knife in the sink. (TR 111-112). Shanna and Sean met the police on the porch. (TR 82). As the police entered the house, Daniel came out of the kitchen; they told him to stop and to put his hands up. (TR 82). Daniel held his hands up and told the officers that he was the victim. (TR 83). Officer Mull placed Daniel in handcuffs. (TR 67, 82). Daniel was yelling and screaming, but it was not directed at Officer Mull; he was upset about being placed in handcuffs and he continued to state that he was the victim. (TR 68). He said that he did not do anything wrong and asked why he was being handcuffed. (TR 83).

After talking with Shanna and Sean, the officers decided to place Daniel under arrest for domestic assault, and they told him that he was under arrest. (TR

84).[5] Daniel was already in handcuffs and he was escorted outside to a patrol car by two officers. (TR 73, 96). Daniel was angry and upset and continued to state that he was the victim. (TR 95). He was screaming that he was only being taken to jail because he was black and that he was going to sue them. (TR 74, 95).

As he was escorted to the patrol car, Daniel jerked his arms back and forth and twisted his body because he did not want to be escorted. (TR 74, 85). When they opened the car door, Daniel tried to pull away, but he did not break free from their hold. (TR 98). The officers placed him in the back seat and he was driven to the law enforcement center. (TR 75, 86). While in police custody, Daniel sustained injuries requiring hospital attention. (TR 157-158).

The State ultimately charged Daniel with three counts of domestic assault and one count of resisting arrest (LF 8-9).[6] The jury found him guilty only of resisting arrest. (LF 48-50; TR 181).

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[5] The prosecutor told the jury that Mr. Ajak was "placed under arrest" in the kitchen (TR 61).

[6] Initially, the State did not file any domestic assault charges. (LF 7). When the defense asked for a continuance of the initial trial setting, the State filed an amended and second amended information adding three counts of third degree domestic assault. (LF 2, 8-11). As noted, the jury found him not guilty on two of these counts and hung on the third; the trial court declared a mistrial on that count and the State later dismissed it. (LF 48, 50, 52-53).

Daniel was sentenced to 280 days in jail. (LF 53-54; TR 186). He filed a timely notice of appeal (LF 56-62), and after an opinion by the Court of Appeals, Western District, this Court granted Daniel's application for transfer.

## POINTS RELIED ON

### I.

**The trial court erred in overruling Daniel's motion for judgment of acquittal at the close of evidence, and entering judgment and sentence against him for resisting arrest, § 575.150, violating his right to due process of law as guaranteed by the U.S. Const., Amend XIV and the Mo. Const., Art. I, § 10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that it failed to establish that Daniel's verbal statements in the kitchen prevented the effectuation of his arrest and his arrest was fully complete – he was under physical restraint and full control of the police officers – in the kitchen before any physical resistance allegedly occurred on the way to the patrol car.**

*State v. Shanks*, 809 S.W.2d 413 (Mo. App. E.D. 1991);

*State v. Belton*, 108 S.W.3d 171 (Mo. App. W.D. 2003);

*State v. Ondo*, 231 S.W.3d 314 (Mo. App. S.D. 2007);

U.S. Const., Amend. XIV;

Mo. Const., Art. I §10;

§§ 544.180 & 575.150; and

Rule 29.11.

## II.

**The trial court plainly erred to the substantial prejudice of Daniel in submitting Jury Instruction No. 6 for resisting arrest which deviated from MAI-CR 3d 329.60 and § 575.150 by permitting the jury to convict Daniel if it concluded he impeded his arrest by use of mere "physical interference," because the instruction violated Daniel's rights to due process and a fair trial by a properly instructed jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and § 575.150, in that the instruction materially varied from statute, the instruction relieved the State of its burden of proof, the evidence as to whether Daniel used violence or physical force was debatable, and the prosecutor used the "physical interference" language in closing argument.**

*State v. Meeks*, 427 S.W.3d 876 (Mo. App. E.D. 2014);

*State v. Wooten*, 2016 WL 145591 (Mo. App. E.D. Jan. 12, 2016);

*State v. Caldwell*, 352 S.W.3d 378 (Mo. App. W.D. 2010);

U.S. Const. Amends V, VI and XIV;

Mo. Const. Art. I, Sections 10 and 18(a);

Section 575.150;

Rule 30.20; and

MAI-CR3d 329.60.

## ARGUMENT

### I.

**The trial court erred in overruling Daniel's motion for judgment of acquittal at the close of evidence, and entering judgment and sentence against him for resisting arrest, § 575.150, violating his right to due process of law as guaranteed by the U.S. Const., Amend XIV and the Mo. Const., Art. I, § 10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that it failed to establish that Daniel's verbal statements in the kitchen prevented the effectuation of his arrest and his arrest was fully complete – he was under physical restraint and full control of the police officers – in the kitchen before any physical resistance allegedly occurred on the way to the patrol car.**

The pivotal issue in this sufficiency point involves the definition of the phrase "effecting the arrest" under *Section 575.150*. Specifically, whether Daniel attempted to prevent the officers from "effecting the arrest," and whether his "arrest" had been effected when the officers told him that he was "under arrest" as he sat restrained in handcuffs in his kitchen, fully under their control. Daniel asserts that "arrest" has a statutory definition; it is complete at a specific point in time and does not remain "in progress" for an undefined duration. Any physical resistance offered by Daniel could not have been done with the purpose to prevent the officer from effecting his arrest because his arrest was already complete.

*Preservation*

Daniel moved for acquittal at the close of all the evidence (TR 162-163; LF 22-23), and this issue was renewed in his motion for new trial. (LF 26); *Rule 29.11(d).* Sufficiency of the evidence to support a conviction is always preserved for review. *State v. Claycomb*, 470 S.W.3d 358, 361-362 (Mo. banc 2015).

*Standard of Review*

The Due Process Clause of the Fourteenth Amendment protects a criminal 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, 363-364 (1970). "When considering the sufficiency of the evidence on appeal, this Court determines whether sufficient evidence permits a reasonable juror to find guilt beyond a reasonable doubt." *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005). Each statutory element must be proven sufficient under this standard, *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993), therefore, "it is first essential to define what constitutes [resisting an arrest]." *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999).

This Court must consider the evidence together with all reasonable inferences drawn therefrom, in the light most favorable to the verdict, while disregarding all inferences to the contrary. *State v. Biggs*, 333 S.W.3d 472, 480 (Mo. banc 2011). 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).

*Facts*

The State charged Daniel with resisting an arrest, *§ 575.150*, alleging that, "…Officer Mull, a law enforcement officer, was making an arrest of defendant and the defendant knew that the officer was making an arrest, and, for the purpose of preventing the officer from effecting the arrest, resisted the arrest of defendant by using or threatening the use of violence, physical force or physical interference." (LF 10).

As police officers entered Daniel's house, he came out of the kitchen. (TR 82). The officers told him to stop and to put his hands up. (TR 82). Daniel held his hands up and told the officers that he was the victim. (TR 83). Officer Mull placed Daniel in handcuffs. (TR 67, 82). Daniel was upset; he was yelling and screaming about being placed in handcuffs because he believed that he was the victim. (TR 68). He stated that he didn't do anything wrong and asked why he was being handcuffed. (TR 83).

Daniel sat in the kitchen with Officer Mull, handcuffed, while five other officers talked to other people in the house. (TR 71). Daniel was upset and yelling, but it was not directed at Officer Mull; he was upset about being placed in handcuffs. (TR 68).

After talking to Shanna and Sean, the officers told Daniel that he was under arrest for domestic assault. (TR 84). Officer Mull testified that Daniel "knew at that point that he was under arrest." (TR 72-73). When Daniel was told he was going to jail for domestic assault, he again said that he was the victim of the

assault; he spit blood onto the floor and Officer Mull could see there was an injury to Daniel's mouth. (TR 74-75).

Daniel, already restrained in handcuffs, was escorted by two officers, one on each arm, to a waiting patrol car. (TR 73, 96). Daniel was angry and upset and continued to state that he was the victim. (TR 95). He was screaming that he was only being taken to jail because he was black and that he was going to sue them. (TR 74, 95).

While being escorted to the patrol car, Daniel jerked his arms back and forth and twisted his body because he did not want to be escorted. (TR 74, 85). When they opened the car door, Daniel tried to pull away, but he did not break free from their hold. (TR 98). The officers placed him in the back seat of the patrol car and he was taken to the law enforcement center. (TR 75, 86).

*Argument*

Daniel was charged under *§ 575.150* with resisting arrest "by using or threatening the use of violence, physical force or physical interference." (LF 10). That statute provides:

> 1. A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle. . .for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:

(1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer;

*Section 575.150.1(1), RSMo Cum. Supp. 2009*.

As charged, the elements for resisting arrest are that Daniel: 1) knew an officer was making an arrest; 2) intended to prevent the officer from effecting the arrest; and 3) resisted with the use or threat of use of violence or physical force. The testimony at trial revealed that Daniel knew he was under arrest and that he used physical force when he pulled and twisted while being escorted by the officers. Therefore, only the second element is at issue – whether Daniel's actions could have prevented the officer from "effecting the arrest."

The Missouri Legislature has defined "arrest" as follows: "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise." *§ 544.180, RSMo 2000*. Here, Daniel's arrest was fully effectuated when Officer Mull, having already handcuffed Daniel, told him that he was under arrest for domestic assault. Daniel, then under arrest, was escorted by two police officers, one on each arm, to a waiting patrol car. (TR 73, 95). The officers were in control of him at all times. (TR 75, 98). Daniel's arrest was complete when he allegedly resisted; he was not in the process of being arrested. Therefore, any resistance he may have given the officers could not be considered resistance to his arrest; he was not "preventing the officer from effecting the arrest." *§ 575.150.1(1).*

In *State v. Shanks*, 809 S.W.2d 413, 417 (Mo. App. E.D. 1991), the evidence showed that a policeman found Shanks hiding in a garage. The officer then placed Shanks under arrest, handcuffed him, and drove him to the police station. *Id*. Once at the police station, as he was being taken from the car, Shanks shoved the officer, jumped a fence, and ran away. *Id*. In reversing Shanks' conviction for resisting arrest, the Court held:

> it is logical to require that for a valid conviction of resisting arrest pursuant to Section 575.150 [ ], the arrest must be *in progress* when the 'resistance' occurs. Once the arrest has been fully effectuated, a defendant should be considered to be in custody.

*Shanks*, 809 S.W.2d at 418 (emphasis in the original) (footnote omitted).

In *State v. Belton*, 108 S.W.3d 171 (Mo. App. W.D. 2003), the Court rejected the defendant's claim that his conviction for resisting arrest was founded on insufficient evidence because the arrest was complete before he began to resist. Although handcuffed, Belton refused to get out of his car so that the patrolman could take him into custody. *Belton*, 108 S.W.3d at 172. *Belton* distinguished between the facts in that case and those in *Shanks*:

> Hagerty had not progressed that far in arresting Belton. While Haggerty was attempting to arrest Belton, Belton refused to heed Hagerty's command to get out of the car. [ ] Hagerty obviously did not have Belton restrained, and he had not submitted to Hagerty's authority.

108 S.W.3d at 176. Clearly the defendant in *Belton* was not sufficiently restrained or under control of the officer and the arrest was not complete when he resisted.

In *State v. Ondo*, 231 S.W.3d 314 (Mo. App. S.D. 2007), the Appellant was handcuffed and was in the process of being searched when he bent over and made a move towards the door. The officers had to deploy their Tasers two times before the Appellant stopped resisting. *Id.* On appeal, the Appellant argued that the arrest was complete because he had been placed in handcuffs, and therefore, his resistance came after the arrest was over. The Southern District held that the evidence was sufficient to show that Appellant was resisting arrest because the officers were still in the process of arresting the defendant. *Id.* at 316. "The process to arrest Appellant had not proceeded as far as in *Shanks* where the defendant was secured in the police car and transported to the police department." *Id.* Although Appellant had been handcuffed and had been read his *Miranda* warnings, the evidence indicated that Appellant had not been placed in the patrol car, and the officer had not completed his arrest procedures, which included emptying the pockets of the arrestee. *Id.* Appellant resisted the officer's attempts to empty his pockets and resorted to violence to complete his purpose. *Id.*

A review of the above cases makes clear that the critical element in distinguishing whether an arrest has been fully effectuated is whether the arrestee has been sufficiently restrained and is under the control of the arresting officers. The circumstances in Daniel's case are closer to *Shanks* than to *Belton* or *Ondo*. Daniel had been told he was under arrest, placed in handcuffs and forced out of his

home by law enforcement. He was sufficiently restrained and under the control of the officers as they escorted him to the patrol car. He was under the control of the officers at all times and his arrest was complete before he began jerking his arms and twisting his body. (TR 74, 85). While he tried to pull away, he never broke free from their hold. (TR 98). The officers placed him in the back seat of the patrol car and he was driven to the law enforcement center. (TR 75, 86). Any resistance that was offered was not done until after the arrest was over – after Daniel was in custody.

Respondent will likely argue that, "arrest" in *§ 575.150* has a different meaning than the Legislature gave it in *§ 544.180*, and that "arrest" is actually an ongoing process. The Legislature, however, is fully capable of providing additional definitions in statutes where it deems it necessary to do so, and when it wrote *Chapter 575*, the Legislature did not redefine "arrest," or give it a different meaning than the definition of "arrest" already set forth in *§ 544.180*. This Court presumes that the Legislature is aware of existing law. *Frye v. Levy*, 440 S.W.3d 405, 420 (Mo. banc 2014). The Legislature has never set forth a different statutory definition for "arrest," other than that contained in *§ 544.180*.

When the Legislature enacted Chapter 575, Offenses Against the Administration of Justice, it included three crimes that create a timeline of a suspect's interaction with law enforcement: *§ 575.150* created the offense of resisting "arrest, detention, or stop"; *§ 575.200* created the offense of escape or attempted escape from custody, which occurs while the suspect is "being held in

custody *after arrest* for any crime" (emphasis added); and *§ 575.210* created escape or attempted escape from confinement, which occurs while a suspect is "being held in confinement after arrest for any crime." These three statutes address successive events, starting with "arrest, detention or stop" then to "custody," and ending in "confinement."

Importantly, the events are not overlapping. Rather, the Legislature defined "custody" to mean "a person is in custody when the person *has been arrested* but has not been delivered to a place of confinement." *§ 556.061(7)* (emphasis added). In other words, "custody" begins *after* an arrest has concluded, and ends when the suspect has been delivered to a place of confinement. Also, the Legislature defined "confinement" to mean that "[a] person is in confinement when such person is held in a place of confinement pursuant to arrest or order of court…" *§ 556.061(4)*. In other words, "confinement" begins when "custody" ends – at the moment the suspect has been delivered to, and is being held in, a place of confinement. Confinement is a particular place, such as the Department of Corrections or a county or private jail or city or county correctional facility. *See § 575.210.2 & .3*.

While defining "custody" and "confinement," the Legislature did not define "arrest" in the criminal code. Indeed, it had no need to do so because the definition of arrest is found in *§ 544.180*. This definition has been in every criminal procedure section of Missouri statutes since 1879. *RSMo. 1879, § 1826*. "'When the legislature enacts a statute referring to terms that have had other

judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action.'" *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W. 3d 815, 825-826 (Mo. banc 2014) (quoting *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006).

Not only has "arrest" been given a Legislative definition for well over 100 years, the concepts of "stop" and "detention" were well-defined by the Supreme Court of the United States before *Section 575.150* was first enacted in 1977. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) (a police "stop" is when: "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest," and "detention" is "an investigative 'seizure' upon less than probable cause for purposes" that include interrogation. *Id. at 19, n.16*). The boundaries of police conduct –stop, detention, arrest – have been well-defined, not only by the Legislature, but by the courts in Fourth Amendment jurisprudence. It would be improper for this Court to redefine arrest for purposes of *§ 575.150*, as something other than the Legislative definition provided in *§ 544.180*.

Again, under *§ 544.180*, "[a]n arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer…" They are alternative definitions: "actual restraint" *or* "submission to the custody." *Minor v. Dep't of Revenue*, 136 S.W.3d 825, 827 (Mo. App. E.D. 2004). If a

statute defines a term or phrase, that definition must be used. *Johnson v. Mo. Dep't of Heath and Senior Servs.*, 174 S.W.3d 568, 581 (Mo. App. W.D. 2005). In the absence of such a definition, a definition used in a similar legal context may be employed. *Id.* Therefore, the meaning of an "effected arrest" for *Section 575.l50*, should be bringing the arrestee under physical restraint or control. *Section 544.180.* And "resisting arrest" means the use or threat of use of violence or physical force with the purpose of preventing a law enforcement officer from bringing the arrestee under physical restraint or control.

Here, Daniel's arrest was made and "effectuated" in his kitchen. He had been sitting in handcuffs with a police officer while five additional officers moved through his home questioning the other residents. When their investigation concluded, they determined that Daniel would be arrested and they told him that he was under arrest for domestic assault and was going to be taken to jail. At this point, Daniel was under actual physical restraint, and the arrest had been *made.* From that point, Daniel was in "custody" – he "ha[d] been arrested but ha[d] not been delivered to a place of confinement. *Section 556.061(7).* It was clear that the officers had ceased attempting to restrain Daniel well before they arrived at the patrol car – he had been handcuffed and two officers escorted him, one on each arm, through the house, down the front steps to the waiting patrol car. No previous action by Daniel prevented the effecting of his arrest, which was complete when they left the kitchen.

The term "arrest" or "effected arrest" are not ambiguous under *§ 575.150*, but even if they were, this Court must apply the rule of lenity in interpreting a statute. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007) (when interpreting a criminal statute with ambiguous terms, the rule of lenity requires the statute "to be strictly construed against the state"). Especially regarding a penal statute, this Court should not expand the definition or the act of "arrest" beyond that which has been set forth explicitly by the Legislature.

The Legislature has adopted many other offenses that serve the purpose of criminalizing actions that potentially expose law enforcement to harm, including first, second and third degree assault of a law enforcement officer, (*§§ 565.081*, *565.082* and *565.083*), and peace disturbance, *§ 575.010*. The Legislature has also defined what actions constitute a criminal offense once an arrestee is in "custody," *§ 575.200*, and when he is in "confinement." *§ 575.210*. And while Daniel's conduct may fit under one of those statutes, in does not fit under *§ 575.150*, and this Court should not give that statute a broader scope to reach his actual conduct. To give the statute a much broader scope than the Legislature intended will "embrace persons and acts not specifically and unambiguously brought within their terms." *Salazar*, 236 S.W.3d at 646. A more expansive definition of an "effected arrest" as an ongoing process, would render an arrest incomplete and officers will be deemed to be "attempting" to exercise control until the suspect submits, thus making it impossible for him to resist. If the Legislature wishes to change its definition of "arrest," it may do so.

The State failed to prove each of the elements of the resisting arrest offense that it charged. *See State v. Rickman*, 23 S.W.3d 914, 915 (Mo. App. S.D. 2000) ("Due process requires that a defendant cannot be charged with one offense and be convicted of another."). Specifically, the State's evidence fails to prove that Daniel used violence or physical force while he was being arrested. Therefore, this Court should vacate his conviction and discharge him from his sentence.

## II.

**The trial court plainly erred to the substantial prejudice of Daniel in submitting Jury Instruction No. 6 for resisting arrest which deviated from MAI-CR 3d 329.60 and § 575.150 by permitting the jury to convict Daniel if it concluded he impeded his arrest by use of mere "physical interference," because the instruction violated Daniel's rights to due process and a fair trial by a properly instructed jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and § 575.150, in that the instruction materially varied from statute, the instruction relieved the State of its burden of proof, the evidence as to whether Daniel used violence or physical force was debatable, and the prosecutor used the "physical interference" language in closing argument.**

*Preservation and Standard of Review*

Daniel did not object to the giving of Instruction No. 6. This allegation of error is therefore not preserved for review. *State v. Vaughn*, 11 S.W.3d 98, 105 (Mo. App. W.D. 2000). Daniel respectfully requests this Court review the allegation for plain error pursuant to *Rule 30.20*. An unpreserved allegation of instructional error reaches the level of plain error if the appellant establishes "that the trial judge so misdirected or failed to instruct the jury as to cause manifest

injustice or a miscarriage of justice." *Vaughn*, 11 S.W.3d at 105. A manifest injustice occurs as a result of instructional error where "it is apparent that the instructional error affected the jury's verdict." *Id.* Where, as here, the faulty instruction gave Daniel's jury the opportunity to convict him on less than all the elements of the offense the instructional error clearly affected the jury's verdict.

*Facts*

The State charged Daniel in Count I with resisting a misdemeanor arrest (LF 10). It alleged that Daniel resisted his arrest by Officer Mull "by using or threatening the use of violence, physical force or physical interference" (LF 10). At trial, Officer Mull and other officers explained how Daniel, already handcuffed, was told that he was under arrest, and that as he was being escorted by two officers to the patrol car, he jerked his arms and twisted his body (TR 74, 85). The officers remained in control of Daniel, and he never broke free from their hold (TR 74, 85, 98). When they opened the car door, Daniel tried to pull away, but he did not break free (TR 98). The officers placed him in the back seat of the patrol car and he was driven to the law enforcement center (TR 75, 86).

For Count 1, the State offered the following instruction:

**INSTRUCTION NO. 6**

As to Count 1, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about February 15, 2015, in the County of Buchanan, State of Missouri, Officer Mull was a law enforcement officer, and

Second, that Officer Mull was making an arrest of the defendant for domestic assault, and

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

Fourth, that for the purpose of preventing the law enforcement officer from making the arrest, the defendant resisted by using violence, physical force, or ***physical interference,*** then you will find the defendant guilty under Count 1 of resisting arrest.

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

(LF 35) (emphasis added). Instruction number 6 was not objected to by defense counsel (TR 164-165).

In arguing the resisting count, the prosecutor told the jury that "the fourth element is really the one that you all will probably need to deliberate on for the purpose of proving in that arrest the Defendant resisted by using violence, physical force or ***physical interference***." (TR 169) (emphasis added).

*Analysis*

As fully discussed in Point I, *Section 575.150* criminalizes resisting or interfering with an arrest. The statute prohibits either resistance or interference as follows:

> (1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer; or
>
> (2) Interferes with the arrest, stop or detention of another person by using or threatening the use of violence, physical force or physical interference.

*Section 575.150*. " 'Physical interference' in the statute plainly refers only to interfering with someone else's arrest and, therefore, is not an element of the crime of resisting one's own arrest." *State v. Meeks*, 427 S.W.3d 876, 878 (Mo. App. E.D. 2014). "When the facts of the case involve only the defendant's arrest, including the phrase 'physical interference' is inappropriate because the statute only uses that language in reference to the arrest of another person." *Id.* at 879.

In this case, the State submitted an instruction for resisting which permitted the jury to find Daniel guilty of a crime that does not exist – physical interference with his own arrest. Thus, the jury did not need to find Daniel used violence or physical force to resist his arrest and the State was relieved of proving all elements of the crime. *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988) ("A verdict-directing instruction must contain each element of the offense charged and must

require the jury to find every fact necessary to constitute essential elements of the offense charged") (citing *State v. Krause*, 682 S.W.2d 55 (Mo. App. E.D. 1984) and *State v. Rodgers*, 641 S.W2d 83 (Mo. banc 1982)). The instruction was erroneous.

Further, the use of this defective instruction was "plain error" resulting in "manifest injustice." *Rule 30.20*. Instructional error is plain error "when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *State v. Doolittle*, 896 S.W.2d 27, 29 (Mo. banc 1995) (*citing State v. Nolan*, 872 S.W.2d 99, 103 (Mo. banc 1994). In making this determination whether the erroneous instruction affected the verdict, the reviewing court will reverse if the instruction "did not merely allow a wrong word or some other ambiguity to exist, it excused the state from its burden of proof on [a] contested element of the crime." *Doolittle, supra*, at 30. An element is contested if the evidence does not establish it "beyond serious dispute." *See State v. Brokus*, 858 S.W.2d 298, 302-303 (Mo. App. E.D. 1993).

Whether Daniel used force to resist arrest was *the* contested element in Count 1 and it was not established beyond serious dispute. Indeed, Daniel has alleged that the evidence was insufficient to establish violence or physical force was used during his arrest (Point I). Whether Daniel's actions might be sufficient to make him guilty of resisting arrest was clearly an open question for the jury.

Indeed, in *State v. Miller*, 172 S.W.3d 838, 356 (Mo. App. S.D. 2005), Judge Rahmeyer questioned, in concurrence, whether "exerting the strength and power of bodily muscles" had expanded the concept of physical force beyond its original meaning.

Though Instruction Number 6 was drawn from MAI-CR 3d 329.60, it was flawed by the addition of "physical interference." It is clear that MAI-CR 3d 329.60.2 is meant to address *either* resisting or interference with arrest and it contains language appropriate to either form of the charge. Pattern instruction 329.60.2 is titled "2. RESISTING, OTHER THAN BY FLIGHT, OR INTERFERING WITH ARREST." In *State v. Caldwell*, 352 S.W.3d 378, 384 (Mo. App. W.D. 2011), the Court noted that there were but five ways to resist arrest, "using violence, threatening to use violence, using physical force, threatening to use physical force, or by fleeing." *Id.* (citing *State v. Belton*, 108 S.W.3d at 175. Conspicuously absent from that list is any mention of "interfering" as a means of resisting arrest.

Indeed, the plain language of *§ 575.150* clearly contemplates two distinct crimes – resisting one's own arrest and interfering with another's arrest. *State v. Meeks*, 427 S.W.3d at 878. "'Physical interference' in the statute plainly refers only to interfering with someone else's arrest and, therefore, is not an element of the crime of resisting one's own arrest." *Id.* "[B]y omitting 'physical interference' from the subparagraph for resisting one's own arrest, the legislature intended to exclude that as a means of committing that particular crime." *Id.* at

878-879. Moreover, as noted by the Eastern District, "even if we thought it should have been included in that subparagraph, 'courts cannot add words to a statute under the auspice of statutory construction.'" *Id.* at 879 (quoting *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012)).

Just because the pattern instruction contains the option of "physical interference" does not mean it may be used in a resisting prosecution. "If an instruction following MAI-CR3d conflicts with the substantive law, any court should decline to follow MAI-CR3d or its Notes on Use." *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). The option of instructing on "physical interference" is plainly included for use in interfering prosecutions and not as a new, non-statutory means of committing the offense of resisting arrest under *§ 575.150.1(1)*.

In *State v. Meeks*, *supra*, the Appellant raised a plain error challenge to the resisting arrest verdict director because it deviated from the statute by including "physical interference" as an alternative to "violence" or "physical force" as a way to resist arrest. The Eastern District found plain error and reversed the Appellant's conviction, holding:

> In sum, neither the statute nor the MAI authorize "physical interference" as a means of resisting Meeks's own arrest. Including that phrase in the verdict director so misdirected the jury and excused the State from its burden of proof that it appears to this Court to have affected the verdict.

*Meeks*, 427 S.W.3d at 881. Importantly, while there was evidence in *Meeks* of the type of "muscle exertion"[7] that may have been sufficient to constitute "physical force," manifest injustice still resulted:

> Because "physical interference" was included and stated in the disjunctive as an alternative means of resisting, the instruction erroneously gave the jury the option of basing its conviction on "physical interference" alone. That is not a lawful basis for holding him guilty of resisting his own arrest under the statute. Therefore, the State was relieved of its burden of proving that Meeks resisted his own arrest by one of the means set forth in the statute.

*Id.* at 880.

The facts of Daniel's case are even more compelling for reversal than the facts in *Meeks*. In *Meeks*, when the officers approached the building and saw Meeks standing inside an open front door, Meeks slammed the door shut. *Id.* at 877. The officers went inside with their weapons drawn and found Meeks crouching in a stairwell. *Id.* When an officer yelled "Police. Let me see your hands," Meeks did not comply. *Id.* Officers grabbed Meeks and tried to force him down onto his stomach; one officer kicked Meeks behind the knee to get the knee to buckle. *Id.* The larger officers were able to force Meeks to

[7] The State had alleged that Meeks used physical force when he pushed back against the officers. *Id.* at 880.

the ground, but Meeks was "pushing up the entire time" trying to get back to his feet. *Id.*

Conversely, Daniel approached the officers with his hands up and submitted to being restrained in handcuffs (TR 67, 82-83). While upset about being viewed as the aggressor and not the victim in the situation, he sat in the kitchen with Officer Mull while the other officers investigated (TR 71). After being told that he was under arrest, and already in handcuffs, Daniel was escorted to a patrol car by two officers (TR 72-72, 96). Daniel was angry and upset and continued to state that he was the victim, that he was only being taken to jail because he was black and that he was going to sue them (TR 74, 95). As he was being escorted to the patrol car, Daniel jerked his arms back and forth and twisted his body because he did not want to be escorted (TR 74, 85). When the officers opened the car door, Daniel tried to pull away, but he did not break free from their hold (TR 98). The facts of Daniel's case are certainly less egregious, and if Meeks was entitled to a new trial because of the faulty jury instruction, Daniel is as well.

Also, in *State v. Wooten*, 479 S.W.3d 759 (Mo. App. E.D. 2016), the defendant was pulled over by two police officers for a traffic stop. Rather than wait for the officers to approach his vehicle, Wooten got out of his car and began taking items out of his pockets and placing them on the roof of his car. *Id.* at 760. The officers approached Wooten quickly and ordered him to show them his hands. *Id.* Wooten ignored the officers and continued to remove items from his pockets, including a small plastic bag the officers saw that they believed to contain an

illegal controlled substance. *Id.* The officers told Wooten that he was under arrest and attempted to secure Wooten's hands, but he resisted and, as they struggled, all three of them fell to the ground. *Id.* Eventually, Wooten gave up and the officers were able to handcuff him. *Id.*

As in *Meeks*, the issue on appeal was whether it was plain error to include "physical interference" in the verdict director where only the defendant's arrest was at issue and not the arrest of a third person. *Id.* Again, the Eastern District held that "resisting one's own arrest involves the threat or use of force or violence but does not include 'physical interference' as a means to commit the crime." *Id.* at 761. As a result, the jury was misdirected and the State was excused from meeting its burden of proof. *Id.* The State conceded that the instruction was erroneous. *Id.*

In reviewing for plain error, the Court found that the State's assertion in closing argument that Wooten used "physical interference" in the commission of the crime and the jury's request during deliberations for the definition of "physical interference" illustrates the misdirection this erroneous instruction caused. *Id.* Again, if Meeks and Wooten were entitled to new trials based on the same faulty jury instruction, Daniel is entitled to a new trial as well because the same plain error and prejudice occurred in his case.

Daniel has a right to due process and a fair trial by a properly instructed jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri

Constitution. The language in Instruction No. 6, permitting Daniel's jury to find him guilty on proof of "physical interference," relieved the State of its burden of proof to Daniel's prejudice. Had the jury been properly instructed that they could only find Appellant guilty for his use of violence or physical force, it likely would have acquitted him. To let this verdict stand would amount to a miscarriage of justice and work a manifest injustice. This Court should remand this case for a fair trial before a properly instructed jury.

## CONCLUSION

Because the evidence was insufficient to support Daniel's conviction for resisting arrest, this Court must reverse his conviction and sentence (Point I). Alternatively, because the jury was incorrectly instructed as to the crime of resisting arrest, this Court must grant Daniel a new trial (Point II).

Respectfully submitted,

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## Certificate of Compliance

I, Amy M. Bartholow, 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 **7,659** words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 18th day of July, 2017, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Kristina Zeit, Assistant Attorney General, at kzeit@co.buchanan.mo.us.

*/s/ Amy M. Bartholow*

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