SC96333

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI	)	Appeal to the
	)	Missouri Supreme Court
Respondent,	)	from the Circuit Court of
	)	Buchanan County, Missouri
v.	)	
	)	Fifth Judicial Circuit, Division 5
DANIEL DUOT AJAK,	)	
	)	The Honorable Keith Marquart,
Appellant.	)	*Judge Presiding*
	)	

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Respondent agrees that jurisdiction was originally in the Missouri Court of Appeals, Western District. Respondent further agrees that following the opinion by the Missouri Court of Appeals, Western District, en banc, this Court granted application for transfer and has jurisdiction.

STATEMENT OF FACTS

On February 15, 2015, police officers responded to 1219 North 7th Street, Buchanan County, Missouri in reference to a domestic disturbance (TR 64). Prior to arrival, officers were advised by dispatch that the disturbance possibly involved a weapon. (TR 65). Upon approaching the residence, officers observed through an open doorway a man, later identified as Daniel Ajak, approaching them. (TR 66). Officer Zeamer gave Ajak commands to stop moving and put his hands up, but Ajak failed to do so. (TR 66). Instead, Ajak continued moving toward officers. (TR 66). Because of this, Officer Mull entered the residence and detained Ajak with handcuffs for the purpose of officer safety. (TR 67). After speaking with the other witnesses present in the residence, officers conferred and determined that Ajak would be arrested for domestic assault. (TR 84). Ajak was next advised of his arrest while he was still in the residence. (TR 71-72, 84). Next, Officer Mull and Officer Graham placed themselves on each side of Ajak's body, each holding on to one of Ajak's arms, and began to walk Ajak out of the house and to the patrol unit parked outside the residence. (TR 73-74). At trial, Officer Mull testified that as he was walking Ajak to the patrol unit, Ajak was actively pulling and jerking away from Officer Mull in an attempt to get away and break Officer Mull's grip on him. (TR 74). In the process, Ajak knocked Officer Mull's nametag off of his uniform and to the ground. (TR 74). Despite this, Officers were able to get Daniel Ajak into custody inside of the patrol unit and transported to jail. (TR 75-76).

POINTS RELIED ON

I.

The trial court did not err in overruling Daniel Ajak's motion for judgment of acquittal at the close of evidence because the state's evidence was sufficient to sustain a finding of guilty beyond a reasonable doubt. Daniel Ajak's resistance to arrest occurred from the time officers told him he was under arrest until officers were later able to place him securely in custody inside the patrol unit. The entire time they were walking to the patrol unit he forcefully resisted by pulling away and twisting. The arrest was not complete at least until Daniel Ajak was secured in the patrol unit. The fact that he was ultimately not able to get away is irrelevant.

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

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

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

State v. Jackson, 645 S.W.2d 725 (Mo. Ct. App. 1982);

Reeder v. Bd. of Police Comm'rs of Kansas City, Mo., 800 S.W.2d 5 (Mo. Ct. App. 1990);

Sw. Bell Yellow Pages, Inc. v. Dir. Of Revenue, 94 S.W.3d 388 (Mo. 2002);

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State v. Jordan, 181 S.W.3d 588 (Mo. Ct. App. 2005);

State v. Larner, 844 S.W.2d 490 (Mo. Ct. App. 1992);

Joy v. Morrison, 254 S.W.3d 885 (Mo. 2008);

§ 1.090

§ 544.180

§ 575.150

§ 556.061

II.

Appellant concedes that he did not object to the submission of Jury Instruction No. 6 and any possible error was not preserved for review. This court may reverse for instructional error only if there is both error in submitting the instruction and manifest injustice to the defendant. When instructional error arises, prejudice is judicially determined by considering the facts and instruction together. Although the verdict directing instructions were read during the State's closing arguments, there was no evidence presented for the jury to consider "physical interference" as a basis for conviction. Additionally, the state offered no argument in support of such. The only evidence presented by the state was that Ajak used physical force to resist his arrest. The trial court's finding should be upheld.

State v. Thomas, 75 S.W.3d 788 (Mo. App. E.D. 2002);

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

State v. Doolittle, 896 S.W.2d 27 (Mo. Banc 1995);

State v. McCoy, 971 S.W.2d 861 (Mo.App. 1998);

State v. Roe, 6 S.W.3d 411 (Mo. App. E.D. 1990);

State v. Perry, 35 S.W.3d 397 (Mo. App. E.D. 2000);

State v. Haynes, 158 S.W.3d 918 (Mo. App. W.D. 2005);

Rule 30.20.

ARGUMENT

I.

The trial court did not err in overruling Daniel Ajak's motion for judgment of acquittal at the close of evidence because the state's evidence was sufficient to sustain a finding of guilty beyond a reasonable doubt. Daniel Ajak's resistance to arrest occurred from the time officers told him he was under arrest until officers were later able to place him securely in custody inside the patrol unit. The entire time they were walking to the patrol unit he forcefully resisted by pulling away and twisting. The arrest was not complete at least until Daniel Ajak was secured in the patrol unit. The fact that he was ultimately not able to get away is irrelevant.

Standard of Review

Respondent agrees with Appellant's stated standard of review.

Argument

Ajak's arrest began when officers informed him he was under arrest, and ended when he was secured inside of the patrol unit outside of his residence. (TR 72-75). Ajak's attempts to break free from the officers' grip as he was walking to the patrol vehicle, then, constitute resisting arrest through use of physical force under Missouri Revised Statute section 757.150. Section 575.150(1), RSMo Cum. Supp. 2009. Custody requires certain physical limits of confinement. *State v. Jackson*, 645 S.W.2d 725, 727 (Mo. App. Ed. 1982). These limits were not present until Ajak was situated in the patrol unit. Although arrest itself is not defined in the Missouri criminal code, statutory law,

plain meaning and previous court opinions all combine to allow for a well-developed and useful definition of arrest that can be applied to Ajak's case.

Arrest is defined in by the Missouri Legislature in section 544.180 as "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." Section 544.180, RSMo 2000. When evaluating a criminal statue such as section 575.150, the definition offered in section 544.180 is useful to consider in conjunction with the totality of relevant sources available, but should not be used in singularity, as section 544.180 is not part of the criminal code. Further, section 575.150 does not include any cross references to section 544.180. Importing a statutory definition that is not in the criminal code violates both section 1.090 and the principles of statutory construction. Section 1.090, RSMo 1957. *Reeder v. Bd. of Police Comm'rs of Kansas City, Mo*., 800 S.W.2d 5, 6 (Mo. App. Ed. 1990).

Although section 544.180 should not be incorporated into section 575.150, it is useful when constructing a comprehensive definition of arrest. When there is a term not defined by legislature, it is to be defined by its "'plain or ordinary and usual sense.'" *Sw. Bell Yellow Pages, Inc. v. Dir. Of Revenue*, 94 S.W.3d 388, 390 (Mo. Banc 2002) (quoting section 1.090). Thus, in conjunction to the definition offered in section 544.180, arrest is defined by *Webster's Dictionary* as "the taking or detaining of a person in custody by authority of law." *Webster's Third New International Dictionary* 121 (1993). This definition is similar to section 575.150 in that it contains the same elements of a person being detained, or restrained, by an officer, for the purpose of being taken into custody.

While the word arrest itself is not defined in the criminal code, the criminal offense of resisting arrest is defined in section 575.150, which, in reference to resisting arrest through use of physical force, 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), RSMo Cum. Supp. 2009.

In consideration of this statute, the Missouri appellate case of *State v. Jordan* identifies three elements of resisting arrest: (1) knowledge that a law enforcement officer is making an arrest; (2) purpose on the part of the defendant to prevent the officer from effecting the arrest; and (3) resisting the arrest by use or threat of violence or physical force. *State v. Jordan*, 181 S.W.3d 588, 592 (Mo. App. E.D. 2005) (citing *State v. Larner,* 844 S.W.2d 490, 492 (Mo. App. E.D.1992)).

State v. Belton, *State v. Shanks*, and *State v. Ondo* are all appellate cases in which defendant had been convicted at the trial court level with the criminal offense of resisting arrest. *State v. Shanks*, 809 S.W.2d 413, 414 (Mo. App. E.D. 1991) *overruled by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008); *State v. Belton*, 108 S.W.3d 171, 172 (Mo. App.

E.D. 2003); *State v. Ondo*, 231 S.W.3d 314, 315 (Mo. App. E.D. 2007). All these cases, accordingly, set out to define the parameters of an arrest itself.

In *Belton*, the arresting officer told defendant he was under arrest for littering, and ordered defendant to exit his vehicle. *Belton*, 108 S.W.3d at 173. Defendant complied with the officer's command, and his wrists were handcuffed. *Id*. Next, while the officer was speaking with the driver of the vehicle in which defendant was riding, defendant sat back down into the front passenger seat of the vehicle, still handcuffed. *Id*. The officer ordered defendant to exit the vehicle, but the driver then accelerated quickly away from the officer. *Id*. The officer attempted to pull defendant from the vehicle but was not successful. *Id*. Upon review, the appellate court held that at the time defendant exited in the vehicle, the officer had placed defendant under arrest, but "obviously did not have [defendant] restrained, and he [defendant] had not submitted to [the officer's] custody." *Id*. at 176. *Belton* looked to section 544.180 for a definition of arrest. *Id*. at 175-76. *Belton* did not state that section 544.180 was to be treated as if incorporated into section 575.150 as the only definition of arrest, but rather stated it provided "useful guidance." *Id*. at 175. In reaching its conclusion that defendant was guilty of resisting arrest, *Belton* also looked to the earlier appellate case of *Shanks* for guidance. *Id*. at 175-76. Ultimately, the court held that defendant was guilty of resisting arrest by use of physical force not solely because he was able to escape, but because of the physical force defendant had to exert in order to stay in the vehicle as the officer tried to pull him out. *Id*. at 176.

In *Shanks*, the arresting officer ordered defendant out of a garage in which he was hiding. *State v. Shanks*, 809 S.W.2d 413, 417 (Mo. Ct. App. 1991) *overruled by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008). When defendant complied, he was handcuffed and placed under arrest and transported to the local police station. *Id*. at 418. Upon arrival at the police station, defendant exited the patrol vehicle, whereupon he knocked the arresting officer off balance and escaped over a fence. *Id*. The court held that, although there is no "bright line rule" for when an officer has completed an arrest, the particular arrest in *Shanks* was completed at the time defendant was initially placed into the patrol vehicle, stating "Once the arrest has been fully effectuated[,] a defendant should be considered to be in custody …We believe [the officer] effectuated the arrest at the time he placed the defendant in his patrol car." *Shanks*, 809 S.W.2d. at 418. Unlike *Belton*, *Shanks* did not use section 544.180 as a definition of arrest.

In *Ondo*, an officer responded to a domestic assault call. *Ondo*, 231 S.W.3d at 315. After review of the situation, the officer determined defendant to be the one at fault. *Id*. Defendant was then handcuffed and advised of his Miranda rights. *Id*. Next, the officer began to remove all personal items from defendant's pockets, as was his custom to do before transporting an arrestee to the jail. *Id*. When the officer was in the process of emptying defendant's pockets, defendant bent over and tried to run for the door. *Id*. The officer advised him to stop or be tased. *Id*. Defendant continued, and was tased at least twice. *Id*. After this, defendant stopped his resistance. *Id*. *Ondo* referenced *Shanks*, stating that an arrest must be in progress when the resistance occurs. *Id*. at 316. *Ondo* also clearly stipulated that arrest is susceptible to more than one definition, given its

context, as did *Belton*. *Id*. Ultimately, *Ondo* held that the arrest was in progress because 1.) defendant had not been placed in the patrol vehicle, and 2.) the officer had not completed emptying defendant's pockets. *Id*. Thus, while arrest can begin before defendant has been placed in a patrol vehicle, as in *Belton*, both *Ondo* and *Shanks* have held that it certainly ceases once defendant is placed within.

Contrary to arrest, custody has been defined by the Missouri criminal code. Custody is defined in the criminal code as when a person has been arrested but "has not been delivered to a place of confinement." Section 556.061(7), RSMo 2013. Custody has been further identified by the courts as confinement "within certain physical limits." *Jackson*, 645 S.W.2d at 727. Confinement is defined in the criminal code as when a person is "held in a place of confinement pursuant to arrest or order of a court" and remains there until the court orders their release, they bond out, or a public servant orders their release. Section 556.061(37), RSMo 2013. "Place of confinement" is further defined as "any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of a crime be held." Mo. Ann. Stat. § 556.061 (West).

Therefore, in consideration of statutory definitions and court opinion, it is clear that custody occurs when a person has been confined within certain physical limits after a person has been arrested but before they have been delivered to formal confinement, such as a jail or prison. Even if arrest and custody may overlap, arrest cannot end before

custody has begun and, by process of exclusion, custody differs from arrest in that it has confinement within certain physical limits in addition to the element of physical restraint.

Here, Ajak was initially placed in handcuffs for officer safety upon the officers' arrival at the residence. (TR 67, 82). Next, similar to *Ondo*, after gathering all necessary facts and statements, officers determined Ajak should be placed under arrest and informed Ajak of such. (TR 72). Thus, Ajak's arrest was initiated when officers informed him that he was under arrest. (TR 84).

Similar to *Ondo* and *Shanks*, Ajak's arrest was not complete until he was secured in the patrol unit. In *Ondo*, the court stated that defendant's arrest was not complete because defendant's pockets had not been emptied and because defendant was not yet transported to the patrol unit. *Ondo*, 231 S.W.3d at 316. Here, although officers did not empty Ajak's pockets, Ajak resisted his arrest with physical force similar to the force used by defendant in *Ondo* by pulling away from the officers on either side of him and by twisting his body the entire way to the patrol unit. (TR 74, 85-86).

Similar to *Belton*, Ajak was handcuffed and informed that he was under arrest. *Belton*, 108 S.W.3d at 173; (TR 72). Also similar to *Belton*, at the time that Ajak exerted physical resistance to the officer's attempted control of him, he was not yet in the patrol unit. *Belton*, 108 S.W.3d at 176; (TR 74). Although Ajak did not actually escape the officer's control, as in *Belton*, the physical force that he exerted was in resistance to the officer's attempted control of him, and as a result the officers were pulled and pushed by Ajak and one of the officer's name tags was knocked off. (TR 74).

Finally, in consideration of the definition of custody alone, the fact that officers were not able to control Ajak's movements is evidence that Ajak was not in custody, as there were no specific, identifiable limits of his confinement. The physical limits of Ajak's range of motion as he was escorted to the patrol unit varied based upon the force of his movements. Ajak clearly broke from the area in which officers intended he stay when he twisted and turned enough to knock an officer's nametag off of his person. (TR 74). The only time that Ajak had set limits of confinement was when he was inside of the vehicle where, no matter how much he twisted and turned, he could not physically escape the exact limits of the vehicle doors, ceiling, and floor.

In conclusion, although there is no definition of arrest in the Missouri criminal code, the statutory laws of construction and relevant prior court opinions such as *Belton*, *Shanks* and *Ondo* all provide for a useful definition of arrest that can be applied to the arrest of Ajak. Although Ajak's situation does not exactly parallel the fact patterns in *Belton*, *Shanks*, or *Ondo*, it does have similar qualities and, as *Belton* and *Ondo* have all stipulated, there is no exact standard for when an arrest has been completed, but rather, each case should be evaluated on its own particular merits. *Belton*, 108 S.W.3d at 175; *Ondo*, 231 S.W.3d at 316. At the time of Ajak's physical resistance, Ajak was arrested but not yet secured in custody inside of the patrol unit. Therefore, the arrest was still in progress and this court should uphold the finding of the appellate court.

II.

Appellant concedes that he did not object to the submission of Jury Instruction No. 6 and any possible error was not preserved for review. This court may reverse for instructional error only if there is both error in submitting the instruction and prejudice to the defendant. When instructional error arises, prejudice is judicially determined by considering the facts and instruction together. There was no evidence presented nor argument for the jury to consider "physical interference" as a basis for conviction. The only evidence presented was that Daniel Ajak used physical force to resist his arrest. The trial court should be upheld. Although the verdict directing instructions were read during closing argument, no argument was made about the now contested portion of the instruction. In fact, very little was said during the State's closing argument regarding the resisting arrest charge.

Standard of Review

Daniel Ajak did not object to the giving of Instruction No. 6, therefore the issue was not preserved and this Court may only review the issue for plain error pursuant to Rule 30.20.

Argument

Instructional error seldom constitutes plain error. *State v. Thomas*, 75 S.W.3d 788 (Mo. App. E.D. 2002). To prevail on a claim of plain error, a defendant must prove that the error resulted in manifest injustice or a miscarriage of justice. *State v. Roe*, 6 S.W.3d 411, 415 (Mo. App. E.D. 1990). When instruction error arises, prejudice is judicially

determined by considering the facts and instructions together. *State v. Perry*, 35 S.W.3d 397, 398 (Mo. App. E.D. 2000).

The issue Daniel Ajak raises is similar to that in *State v. Haynes*. *Haynes*, 158 S.W.3d 918 (Mo. App. W.D. 2005). Which says "[f]or instruction error to be plain error the defendant must show more than mere prejudice." *Id*. at 919.

Plain error can only be shown if "the trial judge so misdirected or failed to instruct the jury as to cause a manifest injustice or a miscarriage of justice." *Id*. This has occurred only if "it is apparent that the instructional error affected the jury's verdict." *State v. McCoy*, 971 S.W.2d 861, 864 (Mo.App. 1998). It is Mr. Ajak's burden to show he suffered a manifest injustice. *Id*.

There is no reason to believe that any instructional error affected the jury's verdict. There was no evidence presented or argument made to support a claim that the resisting arrest was by "physical interference." Every officer testified regarding the force defendant used when they were arresting him. Officer Mull testified that upon arriving at the residence, Officer Zeamer gave Mr. Ajak clear and concise commands to put his hands up and not move. (TR 66). He testified Mr. Ajak failed to do so and continued toward Officer Zeamer. (TR 66). Officer Mull testified as he and Officer Graham were approaching the car, Mr. Ajak was jerking back and forth trying to break their grip from him and that while doing this, Mr Ajak was pulling and jerking and just trying to get away and trying to break his grip. (TR 74).

Officer Zeamer testified as well that he told Mr. Ajak to stop moving and stand still. (TR 82). He testified Mr. Ajak continued coming at officers and had to be stopped

by Officer Mull and detained. (TR 83). Officer Zeamer described officers then talking with witnesses present and thereafter making the decision to arrest Mr. Ajak. At that point, he is advised he is going to be placed under arrest and Officers Graham and Mull begin to affect the arrest by transporting Mr. Ajak to the patrol unit. While they were walking Mr. Ajak to the portal unit, he was pulling and trying to pull away from Officer Mull and Officer Graham, twisting his body, and at one point turned and spit on Officer Mull. (TR 85-86).

Officer Graham testified as he was opening the patrol vehicle door to place Mr. Ajak in the backseat, he began to fight back and pull away from officers. He then spit in Officer Mull's face. (TR 96).

Furthermore, there was no argument made to the jury regarding the issue of "physical interference." All evidence presented proved the defendant's use of physical force. Mr. Ajak has not shown he suffered a manifest injustice. Appellant makes no explanation how the outcome would have been different.

According to *State v. Doolittle*, in order to show manifest injustice, it must be "apparent to the appellate court that the instructional error affected the jury's verdict." *Doolittle*, 896 S.W.2d 27, 29 (Mo. Banc 1995). This case is differentiated from *State v. Meeks*, relied on by appellant, in that there was no argument and no evidence presented regarding physical interference. *Meeks*, 427 S.W.3d 876 (Mo. App. E.D. 2014). All evidence and argument referred to the physical force appellant used in resisting the arrest.

This Court should uphold the appellate court's ruling.

CONCLUSION

For the reasons stated in the argument portion of the Respondent's brief, the judgment of the appellate court should be upheld.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief contains 4,240 words, as determined by Microsoft Word software; and,

2. Electronic copies of the above and foregoing brief were provided through the Missouri e-Filing system on this 12th day of September, 2017, to: Amy M. Bartholow, Attorney for Appellant, at Amy.Bartholow@mspd.mo.gov.

Kristina S. Zeit