IN THE
MISSOURI SUPREME COURT

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 REPLY BRIEF

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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 difference in the parties' positions is the scope of the definition of "arrest." Daniel argues that an arrest is effectuated at a fixed and finite point in time, where a person is either actually restrained by the officer, or has submitted to the custody by the officer *§ 544.180*; thereafter, the person "has been arrested" and is "in custody." *See § 556.061(7)*. Respondent argues that an arrest is ongoing and remains "in progress" until a suspect is secured inside of a patrol unit, where he is then "in custody," because only then is he within "certain physical limits of confinement." (Resp. Br. 10). Perhaps to bolster its assertion that "arrest" is an indefinite and ongoing process, Respondent claims that Daniel, handcuffed in the

kitchen, was told "he *is going to be* placed under arrest," (Resp. Br. 20) (emphasis added). But the actual officer testimony at trial was that "he was told *he was under arrest*" (TR 84), and he "knew at that point *he was under arrest*." (TR 72). Clearly, the officers knew that Daniel's arrest had been effectuated.

In support of its position, Respondent argues that the Legislature's actual definition of "arrest" found in *§ 544.180* should not be applied to interpreting the crime of "resisting arrest" under *§ 575.150*, because to do so violates "the principles of statutory construction." (Resp. Br. 11). If this were true, this Court would not have used the Legislature's definition of arrest in *§ 544.180* when evaluating revocation decisions in Director of Revenue cases.

For instance, in *Smither v. Director of Revenue*, 136 S.W.3d 797 (Mo. banc 2004), this Court had to resolve whether the Appellant had been arrested for purposes of a license revocation. The trial court had held that the Director had failed to make a prima facie case for revocation, specifically finding that Appellant had not been arrested. *Id.* at 798. In reversing the trial court's decision, this Court looked to the definition of arrest found in *§ 544.180*: "The term 'arrest' is defined as the 'actual restraint of the person of the defendant, or ... submission to the custody of the officer, under authority of a warrant or otherwise.' *§ 544.180*, RSMo 2000." *Id.* at 798-799. This Court continued that, "merely informing someone he is under arrest is insufficient, and proof of physical restraint or the suspect's submission also is required to effectuate arrest." *Id. (citing California v. Hodari D.*, 499 U.S. 621, 626 (1991); and *Saladino v. Dir. of Revenue*, 88 S.W.3d

64, 68 (Mo. App. W.D. 2002) (A proper arrest requires either actual restraint or submission to the arresting officer's authority under *§ 544.180*)).

Therefore, it is clear that the use of the Legislature's *§ 544.180* definition to determine the meaning of "arrest" in *§ 575.150*, is not only appropriate, but required. As this Court has long held, "[i]n construing a statute it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times." *Cook Tractor Co. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. 2006) (citing *Citizens Elec. Corp. v. Dir. of Dept. of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989)). And "[w]hen the legislature enacts a statute referring to terms which 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." *Citizens Elec. Corp.*, 766 S.W.2d at 452.

Further, Respondent is incorrect in asserting that the Legislature's definition of "custody" supports the position that an "arrest" is an ongoing process until a suspect is "within certain physical limits." (Resp. Br. at 15). The Legislature decreed that "a person is in custody when he or she *has been arrested* but has not been delivered to a place of confinement." *§ 556.061* (emphasis added). The use of past tense assumes the arrest has been effectuated and is no longer in progress. This makes perfect sense when the Legislature used the present tense in *§ 575.150*: a person resists arrest if the officer "*is making* an

arrest" and he uses violence or physical force to prevent the officer from "*effecting* the arrest." (emphasis added). The arrest occurs at a fixed and finite point in time, when the person is physically restrained or submits to custody; from that point, the person is in custody, regardless of whether "certain physical limits" of a patrol car have been utilized.

Clearly, not all arrests utilize a patrol car, and not all suspects are transported immediately. For instance, officers have routinely placed handcuffed arrestees on the curb while completing a "search incident to arrest" of a vehicle, see *State v. Hicks*, 354 S.W.3d 627, 631 (Mo. banc 2011) (an officer handcuffed Hicks and placed her on the curb while he searched her vehicle incident to arrest.) Such persons have clearly "been arrested" and were "in custody," such that the arrest was no longer "in progress."

Further, *State v. Jackson*, 645 S.W.2d 725 (Mo. App. E.D. 1982), does not support Respondent's expansive redefinition of "arrest." In *Jackson*, the Court examined whether the evidence was sufficient for the defendant to be convicted of escape from custody. Jackson was injured in a car accident, and when he arrived at the hospital, a nurse called the police after she noticed that Jackson was carrying a concealed weapon. *Id*. at 727. An officer arrived, arrested Jackson, and then waited outside the X-ray room while a technician examined Jackson. *Id.* Jackson then managed to escape through a window. *Id.*

On appeal, Jackson argues that he did not commit the crime of escape from custody because he was not in custody of the officer when he left the hospital. *Id.*

The court of appeals held that the evidence was sufficient to find that Jackson escaped from custody when he left the x-ray room, because "[t]he custody of defendant in the instant case was neither abandoned nor transferred; it remained with the arresting officer who waited outside the door so as to confine defendant to the x-ray room and who did not grant defendant permission to leave." *Id.* Under those facts, the court held that "'[c]ustody' includes one person's exercise of control over another to confine the other person within certain physical limits." *Id.* "A person can be in custody even though his guard is several yards away." *Id.*

Respondent contorts this language to assert that "[custody] has been further identified by the court as confinement 'within certain physical limits.'" (Resp. Br. at 15). But the Eastern District only stated that the definition of custody "includes" the scenario presented in *Jackson*; it did not say that custody *requires* "certain physical limits," as Respondent would have this Court believe.

Indeed, 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. *State v. Shanks*, 809 S.W.2d 413, 417-418 (Mo. App. E.D. 1991). In *Shanks*, the defendant was handcuffed, placed in a patrol car and taken to the police station; upon exiting the patrol car, he knocked the officer over and fled. *Id.* at 418. On appeal, Shanks argued that he was improperly charged with resisting arrest because his arrest had been fully effectuated before he fled or used any force. *Id.* The appellate court agreed, but the patrol car was not a dispositive factor in determining whether the arrest was "in progress" when *Shanks* fled, as

Respondent suggests (Resp Br. at 14). Rather, the Court noted that by the time Shanks was placed in the patrol car, he had been handcuffed and read his *Miranda* warning, and therefore, his arrest had been effectuated. *Id.* It was no longer in progress. *Id.*

The same is true here. The evidence does not support Daniel's conviction, because at the time any minimal force[1] was used by Daniel, the officer was no longer "making an arrest" *§ 575.150*; rather, Daniel was being "held in custody after arrest." *§ 575.200.* There are many other offenses that serve the purpose of criminalizing actions that potentially expose law enforcement to harm, but Daniel's conduct does not fit under *§ 575.150*, and this Court should not give that statute a broader scope to reach his actual conduct. Rather, as the State's evidence fails to prove that Daniel used violence or physical force to prevent the officer from making an arrest, this Court should vacate his conviction and discharge him from his sentence.

[1] While Respondent asserts that Daniel "spit in Officer Mull's face" (Resp. Br. 20), Officer Mull actually testified that "Daniel got real close to my face and was yelling and screaming *and in doing so* spit on the side of my face." (TR 74) (emphasis added). This is hardly the intentional act that Respondent portrays.

II.

Daniel relies on his opening brief as to Point II.

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,

/s/ Amy M. Bartholow

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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. This brief contains **1,852** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 25th day of September, 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 Prosecuting Attorney, at kzeit@co.buchanan.mo.us.

/s/ Amy M. Bartholow

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