Missouri Court of Appeals

Southern District

en banc

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	No. SD35046
	)	
CHARLES C. SHAW, III,	)	**Filed: Nov. 13, 2018**
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF POLK COUNTY

Honorable Michael O. Hendrickson

AFFIRMED

Charles C. Shaw, III ("Defendant") appeals his conviction for the class-D felony of resisting arrest.[1] *See* section 575.150.[2] Defendant's single point claims the evidence adduced at his trial was insufficient "to establish that [Defendant] was being arrested for a felony when he resisted the arrest in question." Finding no merit in that claim, we affirm.

[1] Defendant was also charged with first-degree assault and attempted kidnapping. Defendant waived his right to a jury and proceeded to a bench trial. The trial court acquitted Defendant of the attempted kidnapping charge, and Defendant does not appeal his conviction for first-degree assault.

[2] References to section 575.150 are to RSMo Cum. Supp. 2009.

Standard of Review

The standard of review is the same whether the case is tried to the court or to a jury. ***State v. Livingston-Rivard***, 461 S.W.3d 463, 466 (Mo. App. S.D. 2015).

> "To determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal, this Court does not weigh the evidence but rather accept[s] as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict, and ignore[s] all contrary evidence and inferences." *State v. Ess*, 453 S.W.3d 196, 206 (Mo.banc 2015) (internal quotations omitted). This Court, however, "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) (internal quotations omitted). Evidence is sufficient to support a conviction when "there is sufficient evidence from which a reasonable [fact-finder] might have found the defendant guilty beyond a reasonable doubt." *State v. Coleman*, 463 S.W.3d 353, 354 (Mo.banc 2015); *see also Musacchio v. United States*, ––– U.S. ––––, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016).

State v. Clark, 490 S.W.3d 704, 707 (Mo. banc 2016).

The Evidence

Viewed in the light most favorable to the judgment, as required by our standard of review, the following evidence is relevant to Defendant's claim. On Sunday, May 19, 2013, a man ("the parishioner") left the church service he was attending to take his young child outside. Once outside, he was confronted by Defendant. The parishioner did not know Defendant, who described himself to the man as the "sorriest, sickest" person "in the world," and he "need[ed] someone to kick [his] ass." Defendant threw multiple, hard punches that struck the parishioner on his upraised arm, which caused "mild bruising[.]" After being struck several times by Defendant, the parishioner "went towards [Defendant's] face" "with an open hand," then retreated with Defendant in pursuit. The parishioner was eventually able to get back inside the church. A man with keys to the church locked the doors, and someone called the police.

Mark Mason, a trooper with the Missouri State Highway Patrol, ("Trooper Mason") promptly responded to what he understood to be "a burglary in progress." Trooper Mason did not have "any detailed information" about what had happened at the church. When he arrived, he observed a man he later identified as Defendant standing close to and looking through the front doors of the church. Trooper Mason spoke to Defendant, but Defendant did not make any oral response. Instead, Defendant turned and charged toward Trooper Mason and threw one or more punches at him. Trooper Mason avoided the blows, sprayed Defendant with "mace," and eventually circled behind Defendant to take him to the ground. Defendant continued to resist Trooper Mason's efforts to control him by cursing, threatening, spitting, and fighting.

With the assistance of several parishioners, Trooper Mason was able to handcuff Defendant. Trooper Mason testified that he was "attempting to arrest" Defendant because:

> I mean, at that point, it was due to the fact that he was attacking me, and that's what I knew at that point was, I -- you know he charged and attacked me, and I was going to arrest him for that, at that point, until I discovered other facts later.

During defense counsel's cross examination, the following exchange occurred:

> Q. Well, what did you think you were arresting him for?
>
> A. At the point when I placed him in handcuffs, and arrested him, it was an attempted assault on me.
>
> Q. So, when you placed him under arrest, it was for the assault on you, the swinging at you?
>
> A. Correct.

Defendant did not testify or call any witnesses on his behalf.

In finding Defendant guilty of the felony of resisting arrest (count III), the trial court stated:

> With regard to count III, the Court, I believe overstated when it pronounced its decision overruling the Defendant's motion for directed verdict as to count III, that the language by the prosecutor used in the charging document[3] is superfluous.
>
> While it may, to some extent be, in order for the Court to find the Defendant guilty of a felony resisting arrest, the Court needs to make certain determinations and one of those is that he was being arrested for a felony.
>
> And indeed, that's what the officer was arresting him for. Arresting this Defendant for assaulting the officer.
>
> Further, as I said before, the Court finds that the Defendant knew or should have reasonably known that this officer was arresting him for, at the very least, if not for attempting to arrest him for assaulting the officer.
>
> Therefore the Court finds the Defendant guilty, beyond a reasonable doubt, as to count III.

Analysis

At the time of Defendant's offenses, section 575.150 provided, in relevant part:

> 1. A person commits the crime of resisting . . . arrest . . . if, knowing that a law enforcement officer is making an arrest, . . . or the person reasonably should know that a law enforcement officer is making an arrest, . . . for the purpose of preventing the officer from effecting the arrest, . . . the person:
>
> (1) Resists the arrest . . . of such person by using or threatening the use of violence or physical force . . . .
>
> . . . .
>
> 5. Resisting . . . an arrest is a class D felony for an arrest for a:

[3] The information filed by the State alleged: "[I]n violation of Section 575.150, RSMo, [Defendant] committed the class D felony of **resisting an arrest** . . . in that . . . [Trooper Mason], a law enforcement officer was making an arrest of [D]efendant for attempted assault 2nd degree, and [D]efendant knew or reasonably should have known that [Trooper Mason] was making an arrest, and, for the purpose of preventing [Trooper Mason] from effecting the arrest, resisted the arrest of [D]efendant by using or threatening the use of violence or physical force."

(1) Felony . . . . [or] [r]esisting an arrest . . . by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person . . . otherwise, resisting . . . an arrest . . . in violation of subdivision (1) or (2) of subsection 1 of this section is a class A misdemeanor.

In this case, the information charged that the felony for which Trooper Mason was arresting Defendant was "attempted assault 2nd degree." Section 565.060, RSMo Cum. Supp. 2006, provided in relevant part that:

1. A person commits the crime of assault in the second degree if he:

. . . .

(3) Recklessly causes serious physical injury to another person; . . . .

. . . .

3. Assault in the second degree is a class C felony.

Section 564.011[4] provided in relevant part that:

1. A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A **"substantial step"** is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

. . . .

3. Unless otherwise provided, an attempt to commit an offense is a:

. . . .

(3) Class D felony if the offense attempted is a class C felony.

Finally, then and now, section 562.021[5] provides in relevant part that:

4. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting

[4] References to section 564.011 are to RSMo 2000.
[5] References to section 562.021 are to RSMo 2016.

> knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely[.]

Here, Trooper Mason testified that (1) Defendant physically charged him and threw one or more punches at him, (2) this conduct caused Trooper Mason to spray Defendant with mace and take him to the ground by tackling him, and (3) Defendant continued physically to resist arrest after being taken to the ground to the point that Trooper Mason required the help of parishioners to place Defendant in handcuffs. Trooper Mason also testified that he was arresting Defendant for "attempted assault on me."

The trial court specifically stated that, in order to find Defendant guilty of count III, it was required to find "that [Defendant] was being arrested for a felony[,]" and it specifically found that Trooper Mason was the victim of the felony for which Defendant was arrested.

The evidence noted above was sufficient to permit a reasonable fact-finder to find beyond a reasonable doubt that Trooper Mason was arresting Defendant for the felony of attempted assault on Trooper Mason in the second degree. *See* ***State v. Ralston****,* 400 S.W.3d 511, 519, 518-20 (Mo. App. S.D. 2013) (a jury in a criminal case may "choose between reasonable inferences"; also noting that the "equally valid inferences rule" no longer applies); *see also* ***State v. Nibarger***, 304 S.W.3d 199, 202 (Mo. App. W.D. 2009) (discussing the application of section 564.011in the context of an offense that did not specifically include "attempt" in the statutory language that defined the offense).[6]

[6] Defendant argues in his reply brief that the offense of attempt to commit assault in the second degree by recklessly causing serious physical injury to another person does not exist because a person who acts purposely cannot act recklessly. This argument is incorrect. First, attempt requires that the defendant take a substantial step toward the commission of the intended offense and act for the purpose of committing the intended offense; not that the defendant complete the intended offense (*e.g.*, by actually recklessly causing

Because we conclude that sufficient evidence supports Defendant's conviction, we must address his reliance on several cases that might suggest otherwise, beginning with ***State v. Merritt***, 805 S.W.2d 337 (Mo. App. E.D. 1991). Defendant cites ***Merritt*** as holding that "[t]he relevant inquiry is what the arresting officer contemplated when making the arrest, not whether the defendant was guilty of the underlying charge." While that statement does appear, it is incorrect to characterize it as a "holding" because it was not necessary to its disposition of the case, and we believe it to be an incorrect statement of the law insofar as it can be – and has been – read to *require* testimony from the arresting officer that he or she "contemplated" arresting the defendant for a felony offense in order to sustain a felony-resisting-arrest conviction.

In ***Merritt***, the arresting officer thought that he would be arresting the defendant for the sale of marijuana, a felony offense. ***Id.*** at 338, 340. However, as the officer approached the defendant's vehicle to arrest him, the officer saw only a misdemeanor amount of marijuana, and he did not observe any drug sale taking place. ***Id.*** at 339. In upholding the defendant's felony resisting arrest conviction on the basis of the officer's testimony that he planned to arrest defendant for the sale of marijuana, the ***Merritt*** court cited ***State v. Wanner***, 751 S.W.2d 789, 791 (Mo. App. E.D. 1998), as supporting the assertion that, "What is required is that the arresting officer, at the least, contemplate

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serious physical injury to another person). Section 564.011, RSMo Noncum. Supp 2014. Second, section 562.021.4 specifically provides that an act done purposely or knowingly establishes recklessness. We also note that the State could have charged the felony for which Defendant resisted arrest as attempted assault of a law enforcement officer in the second degree by recklessly causing serious physical injury to a law enforcement officer under section 565.082.1(3), RSMo Cum. Supp. 2012. However, the State chose to charge the felony for which Defendant resisted arrest as attempted common assault in the second degree. We analyze the evidence and the trial court's verdict in light of the offense actually charged in count III. *See* ***State v. Ralston***, 400 S.W.3d 511, 517 (Mo. App. S.D. 2013) ("As our high court stated in [*State v.*] *Miller*[, 372 S.W.3d 455 (Mo. banc 2012)], '[a] criminal defendant, 'as a matter of due process, is entitled to notice of the charges against him and may not be convicted of any offense of which the information or indictment does not give him fair notice.'" 372 S.W.3d at 466 (quoting ***State v. Goddard***, 649 S.W.2d 882, 889 (Mo. banc 1983)). "The State is required to prove the elements of the offense it charged, not the one it might have charged." ***Miller***, 372 S.W.3d at 467.

making an arrest and, *in our case, that the deputy contemplate making a felony arrest*." ***Merritt***, 805 S.W.2d at 339 (emphasis added). ***Wanner***, however, only holds that if an officer never intends to effectuate an arrest *at all*, the defendant cannot be said to have resisted an arrest when he flees from that officer. 751 S.W.2d at 791. ***Wanner*** does *not* support the proposition that the officer must contemplate a *felony* arrest.

Under the circumstances in ***Merritt***, it was understandable to relate what the officer was thinking before he made the arrest because the officer's initial *thought* that the defendant was committing a felony was the *only* evidence the State presented on whether a felony had been committed. Unfortunately, subsequent decisions have latched onto ***Merritt's*** statement that the officer must "contemplate making a felony arrest[,]" 805 S.W.2d at 339, and mistakenly deemed it to be a necessary requirement to sustain a conviction for any felony-level resisting arrest. To the extent that ***Merritt*** and its progeny can be so read, we decline to follow them. *See* ***State v. Jordan***, 181 S.W.3d 588, 592 (Mo. App. E.D. 2005) (citing ***Merritt*** for the proposition that the relevant inquiry is not whether the defendant is guilty of the charge for which he is arrested, but whether the arresting officer contemplated making a felony arrest); ***DeClue v. State***, 3 S.W.3d 395, 399 (Mo. App. E.D. 1999) (citing ***Merritt*** as support for holding that there was an insufficient factual basis for movant's guilty plea to felony resisting arrest because the record did not indicate that the arresting officer intended to arrest movant for felony); and ***State v. Patterson***, 489 S.W.3d 907, 915-16 (Mo. App. W.D. 2016) (noting that ***Merritt*** requires a showing beyond a reasonable doubt that the officer contemplated making a felony arrest).

Defendant also relies on this district's opinion in ***State v. Bell***, 30 S.W.3d 206 (Mo. App. S.D. 2000), in arguing that "where the basis for an officer's arrest [is] unclear from the evidence presented, and could have been a number of criminal offenses defined as assault that were both felonies and misdemeanors[,]" then the evidence is insufficient to support a conviction for felony resisting arrest.

In ***Bell***, the jury had to find, beyond a reasonable doubt, that when the defendant interfered with the arrest, the officer was attempting an arrest for a felony under section 565.081, RSMo 1994.[7] 30 S.W.3d at 207. In reviewing whether sufficient evidence supported that finding, we correctly stated that we "must consider all substantial evidence and inferences drawn therefrom in the light most favorable to the jury's verdict, and must reject evidence and inferences contrary thereto." ***Id.*** at 208 (citing ***State v. Van Orman,*** 642 S.W.2d 636, 637 (Mo. 1982)). Unfortunately, after having correctly stated the applicable standard of review, we then ignored it and reweighed the evidence in a manner forbidden to appellate courts. ***Id.***

While ***Bell*** does not explicitly call for direct evidence that the arresting officer contemplated arresting for a felony, it implies that proposition, which led to our wrongly setting aside a defendant's felony conviction because the officer *could have* arrested the defendant for conduct that *could have* constituted either a felony or misdemeanor. 30

[7] The defendant was convicted of felony interfering with an arrest for an assault committed by Kenneth Campbell. ***Bell***, 30 S.W.3d at 207. No claim of error regarding jury instructions was raised on appeal in ***Bell***, and the defendant did "not dispute that there was evidence that Kenneth Campbell assaulted a law enforcement officer, which could have been a felony under [section] 565.081, RSMo 1994, or that Kenneth Campbell was arrested." ***Id.*** At the time of the conduct at issue, that section provided:

1. A person commits the crime of assault of a law enforcement officer in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to a law enforcement officer.
2. Assault of a law enforcement officer in the first degree is a class A felony.

S.W.3d at 208. After noting that "no direct evidence [was] presented that indicated for what charge Kenneth Campbell was arrested[,]" ***id***. at 207, we then stated that

> it may have been *probable* that Kenneth Campbell was being arrested for felony assault on a law enforcement officer, as there was evidence of a severe and prolonged attack upon the arresting officer by Kenneth Campbell and his brother, [Gregg Campbell]. But the evidence *falls short* of establishing this basis for arrest *beyond a reasonable doubt*. There was a variety of charges for which Kenneth Campbell could have been arrested [some constituting felonies and some misdemeanors]. *It would have been simple for the State to show what the officer was arresting Campbell for. Failing to show this, when it could have been easily established, casts doubt on the State's contentions*.

Id. at 208 (emphasis added).

The italicized language in our quotation from ***Bell*** concerns matters of weighing evidence and drawing inferences that are solely within the province of the fact-finder, not an appellate court. Our standard of review for reviewing the sufficiency of the evidence to support a conviction contains no provision for taking potential evidence that was *not* presented and *subtracting* it in some unknown amount from the *weight* of the probative evidence that *was* presented. As a result, we now overrule ***Bell*** as wrongly decided, and it should no longer be followed.

To make matters worse, our error has been relied upon and repeated by our sister districts. *See* ***Jordan***, 181 S.W.3d at 593; ***Patterson***, 489 S.W.3d at 914-16; and ***State v. Burnett***, 492 S.W.3d 646, 652-53 (Mo. App. E.D. 2016).

Finding support in ***Bell*** and ***Merritt***, the Eastern District in ***Jordan*** again held that the State must establish that the officer "contemplated making a felony arrest" and must establish a basis for the felony arrest beyond a reasonable doubt. 181 S.W.3d at 592-93. In doing so, it highlighted that the officer did not testify that he contemplated arresting the defendant or that he intended to arrest the defendant for a felony. ***Id.*** at 593. The

court determined that "[s]ince there were a variety of charges for which [the d]efendant could have been arrested, we cannot say the evidence established a basis for a felony arrest beyond a reasonable doubt." ***Id.*** The Eastern District applied these same requirements in 2016 in ***Burnett***, 492 S.W.3d at 652-53 (citing ***Bell*** and ***Jordan*** to support its holding that, because the officer might have contemplated arresting for either a misdemeanor or felony, the state failed to present sufficient evidence to prove felony resisting arrest beyond a reasonable doubt).

In considering what evidence was sufficient to sustain a conviction for felony tampering with physical evidence, the Western District of our court reviewed the facts and holding of ***Jordan*** and ***Bell*** and extended their logic to the crime of tampering with physical evidence. ***Patterson***, 489 S.W.3d at 915-16. Just as ***Bell*** and ***Jordan*** had required the State to prove beyond a reasonable doubt that the underlying arrest was for a felony, ***Patterson*** required the State to prove beyond a reasonable doubt that a felony prosecution was impaired. ***Id.*** at 916. As in ***Bell*** and ***Jordan***, the Western District re-weighed certain evidence by "discount[ing]" evidence it found "unclear[.]" ***Id.***

To the extent that these opinions require the State to present direct evidence of what the officer contemplated when arresting the defendant, or use language that harkens back to the now-repudiated "equally valid inferences" rule explicitly rejected by our high court in ***State v. Grim***, 854 S.W.2d 403, 413-14 (Mo banc 1993), we decline to follow them.

Defendant's point is denied, and the judgment of the trial court is affirmed.

DON E. BURRELL, J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, C.J. – CONCURS IN SEPARATE OPINION

JEFFREY W. BATES, J. – CONCURS

GARY W. LYNCH, J. – CONCURS

DANIEL E. SCOTT, J. – CONCURS

WILLIAM W. FRANCIS, JR., J. – CONCURS

MARY W. SHEFFIELD, J. – CONCURS

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APPEAL FROM THE CIRCUIT COURT OF POLK COUNTY

Honorable Michael O. Hendrickson, Circuit Judge

CONCURRING OPINION

I concur in the result. I write separately because I believe the majority opinion unnecessarily "overrules" a previous decision of this Court and is unnecessarily broad. This case is straightforward. As noted in the majority opinion, for the charge of resisting arrest to be a felony the State had the burden of proving that the underlying offense was a felony. In this court-tried case, the court, after reviewing the evidence, found that the offense was a felony. The issue presented to us by Appellant is whether there was sufficient evidence to establish that Appellant was being arrested for a felony when he

resisted arrest. That is to say that we must determine if there is sufficient evidence to support that decision.

Appellant presents his argument that "[n]othing in the record supports the finding that Officer Mason was arresting [Appellant] for assault in the 2nd degree. The relevant inquiry is what the arresting officer contemplated when making the arrest, not whether the defendant was guilty of the underlying charge." I disagree and join with the majority in rejecting Appellant's proposition that the relevant inquiry on whether there was sufficient evidence that the offense that precipitated the arrest was a felony is what the arresting officer contemplated when making the arrest. Law enforcement officers are not required to determine at the time of an arrest whether the arrest is for a felony or a misdemeanor. Furthermore, the conclusion of the officer on that issue is not dispositive of the ultimate decision to charge resisting that arrest as a felony or misdemeanor. It is not incumbent upon the officer to state he was arresting someone for a felony. It is an objective, not a subjective, test whether the underlying arrest was for a felony or misdemeanor. To the extent that ***State v. Merritt***, 805 S.W.2d 337 (Mo.App. E.D. 1991), and its progeny have been used to hold that it is the subjective intent of the officer, I would also decline to follow them.

With our standard of review then, we review whether there is substantial evidence for the factfinder to find beyond a reasonable doubt that the underlying arrest was for a felony. In order to determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal,[1] this Court does not weigh the evidence but rather accepts as true all evidence proving guilt together with all

[1] Both issues are analyzed under the same standard of review. ***State v. Browning***, 357 S.W.3d 229, 233 (Mo.App. S.D. 2012).

reasonable inferences supporting the verdict. ***State v. Clark***, 490 S.W.3d 704, 707 (Mo. banc 2016). Further, we disregard all contrary evidence and inferences. ***Id.*** We may not, however, supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. ***Id.*** This standard of review applies both to cases tried to a jury and to cases tried to the court. ***State v. Livingston-Rivard***, 461 S.W.3d 463, 466 (Mo.App. S.D. 2015).

In this case, there was sufficient evidence to permit a reasonable fact-finder, in this case the court, to find beyond a reasonable doubt that Mason was arresting Appellant for the felony of attempted assault in the second degree on Mason in multiple ways, including recklessly causing serious physical injury to Mason, when Appellant resisted the arrest. Mason testified that (1) Appellant physically charged him and threw one or more punches at him, (2) this conduct caused Mason to spray Appellant with mace and take him to the ground by tackling him, and (3) Appellant continued physically to resist arrest after being taken to the ground to the point that Mason required the help of church parishioners to place Appellant in handcuffs. Mason also testified that he was arresting Appellant for "attempted assault on me." Appellant's conduct clearly was a substantial step toward the commission of the offense of assault of Mason in the second degree by recklessly causing serious physical injury to Mason, and Appellant clearly engaged in that conduct for the purpose of committing the assault. We review that evidence and decide if it is sufficient evidence to support the judgment.

On the contrary, ***State v. Bell***, 30 S.W.3d 206 (Mo.App. S.D. 2000), was a case where the defendant was convicted of felony interfering with an arrest, not resisting arrest. This Court found in ***Bell*** insufficient evidence to permit a reasonable jury to

conclude beyond a reasonable doubt that the arrest was for a felony. Because we do not have the transcript of the original trial, it is pure speculation that our court improperly re-weighed the evidence. This Court stated: "the jury was instructed that they had to find that when Defendant interfered, the officers 'were making an arrest of Kenneth Campbell for Assault of a Law Enforcement [sic] in the First Degree.' There was, however, no direct evidence presented that indicated for what charge Kenneth Campbell was arrested." ***Id.*** at 207. This Court further stated, "the evidence falls short of establishing this basis for arrest beyond a reasonable doubt. There was a variety of charges for which Kenneth Campbell could have been arrested. It would have been simple for the State to show what the officer was arresting Campbell for." ***Id.*** at 208. This Court noted that Campbell might have been charged with interfering in the arrest of his brother or many different types of assault, some misdemeanor and some felonies. ***Id.***

There is no question that it is the State's burden to prove every element of a case. This Court found in ***Bell*** that the State had not met that burden. It is not for this Court to second-guess that finding without the benefit of the transcript and legal arguments made at the time. The bigger issue I have with the majority opinion concerns the fact that ***Bell*** was a jury case and the case before us was a court-tried case. In the case presently before us, the fact-finder was qualified to determine that the underlying charge was a felony based on the evidence presented to it. In fact, the court had the evidence before it that the arrest was for an assault on the officer. The court determined it was felony assault. In reaching its decision in a jury-tried case, the majority opinion does not clarify how the fact-finder makes the decision that the underlying crime was a felony or a misdemeanor. If the jury is to decide, I do not know how the ***Bell*** jury could know intuitively that Bell

was being arrested for a felony. The ***Bell*** jury had to be presented with evidence of the charge against Campbell and whether it was a felony. There is nothing in the ***Bell*** opinion that indicates that the jury was presented with the evidence of what charge Campbell was being charged with. I believe we should confine ourselves to the legal questions presented to us; we need not create more problems than we solve.

Nancy Steffen Rahmeyer, C.J. – Concurring Opinion Author