No. SC97605

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

CHARLES C. SHAW, III,

Appellant.

Appeal from Polk County Circuit Court
Thirtieth Judicial Circuit
The Honorable Michael O. Hendrickson, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant was charged in the Circuit Court of Polk County with assault in the first degree, attempted child kidnapping, and resisting arrest. (L.F. 15-17). Appellant was convicted of assault in the first degree and resisting arrest following a bench trial held June 27, 2017. (Tr. 35-169).

Appellant contests the sufficiency of the evidence to support his conviction for resisting arrest. Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

On May 19, 2013, Matthew Clark was attending church services in Fair Play with his family. (Tr. 44). During the church service, Clark took his two-year-old son outside because he was being noisy. (Tr. 45).

As Clark tried to rock his child to sleep, a man, later identified as Appellant, approached Clark as he held his son. (Tr. 45-46). Appellant did not say anything, so Clark asked Appellant if there was anything he needed, whereupon Appellant came closer to Clark. (Tr. 46). At that point, Appellant stated, "I'm the sorriest, sickest motherfucker in the world, and I need someone to kick my ass." (Tr. 47). Clark was startled by Appellant's words, and he immediately became apprehensive. (Tr. 47). Clark told Appellant, "I don't think that's going to happen, but I think somebody here could give you some help if you really need it." (Tr. 47).

Appellant dropped his head and then walked towards Clark with his head down. (Tr. 47). When Appellant raised his head, Clark noticed that Appellant's eyes were extremely dilated. (Tr. 47). Appellant started throwing punches at Clark, which Clark tried to block despite holding onto his young son. (Tr. 48-51). Clark was able to get away to the parking lot, but Appellant continued to pursue him. (Tr. 52-53). Appellant said, "I'm going to kick your ass, motherfucker, and I'm going to get your kid." (Tr. 53).

Clark was able to circle around the parking lot and go inside the church auditorium. (Tr. 54). Clark was able to get the attention of his brother-in-law, who had someone call 911. (Tr. 55). Clark handed off his son to his wife and remained in the lobby watching Appellant. (Tr. 55-56). Appellant tried to open the doors of the church to get in, but they had been locked. (Tr. 56).

Responding to a call of a burglary in process, Trooper Mark Mason of the Missouri State Highway Patrol arrived at the scene. (Tr. 69-70, 74-75). Trooper Mason was directed to the main entrance, where he saw Appellant standing in front of the doors to the main entrance with his nose to the glass, looking into the church. (Tr. 71-72). Trooper Mason approached Appellant and tried to engage him in conversation, but Appellant continued to stand approximately two feet away from Trooper Mason. (Tr. 73). After about ten seconds, Appellant turned and charged Trooper Mason while throwing punches in his direction, attempting to strike Trooper Mason. (Tr. 73, 86).

Trooper Mason drew his mace and twice deployed it against Appellant. (Tr. 74). After the second spray of mace, Trooper Mason was able to tackle Appellant and take him to the ground. (Tr. 75). Trooper Mason arrested Appellant because he believed that Appellant had attempted to assault him. (Tr. 81-82).

Although Appellant continued to struggle, Trooper Mason was able to handcuff Appellant with the assistance of three people from the church. (Tr. 76-77, 87-88). After Trooper Mason helped Appellant sit up, Appellant tried to spit on the others, so Trooper Mason returned Appellant to a face down frontal position. (Tr. 78). Appellant continued to curse and threaten to kill and hurt people. (Tr. 78, 88). Even after an ambulance arrived and fitted Appellant with a spit mask, Appellant remained combative and tried to spit on people after he was loaded onto a gurney and strapped in. (Tr. 78-79). Appellant continued to threaten to kill everybody. (Tr. 89).

Appellant waived jury trial, (L.F. 34), and did not testify or call any witnesses. (Tr. 108). The court sustained Appellant's motion to dismiss count II, the charge of attempted child kidnapping. (Tr. 104). After hearing all of the evidence and hearing argument, the court found Appellant guilty of assault in the first degree and resisting arrest. (Tr. 129-131). The court sentenced Appellant to consecutive sentences of ten years imprisonment for

assault in the first degree and three years imprisonment for resisting arrest. (Tr. 151, L.F. 37, 40-41).

On direct appeal, the Court of Appeals, Southern District, held that the evidence was sufficient to support a finding that Trooper Mason was arresting Appellant for felony attempted assault. *State v. Shaw*, 2018 WL 5919312 (Mo. App. S.D. 2018). This Court ordered this cause transferred on December 21, 2018.

ARGUMENT

There was sufficient evidence from which the trial court could have found Appellant guilty of felony resisting arrest.

A. Standard of Review.

In reviewing the sufficiency of the evidence in a judge-tried case, an appellate court must determine whether there was sufficient evidence from which the trial court could have found the defendant guilty beyond a reasonable doubt. *State v. Young*, 172 S.W.3d 494, 496 (Mo. App. W.D. 2005). Under Supreme Court Rule 27.01(b), the findings of the court in a bench-tried criminal case shall have the force and effect of the verdict of a jury. *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002).

The appellate court must accept as true all evidence tending to prove guilt, together with all reasonable inferences that support the finding, and must ignore all contrary evidence and inferences. *Young*, 172 S.W.3d at 497. The appellate court does not weigh the evidence or decide the credibility of the witnesses but defers to the trial court. *Id.* Reasonable inferences may be drawn from both direct and circumstantial evidence. *State v. Salmon*, 89 S.W.3d 540, 546 (Mo. App. W.D. 2002). Circumstantial evidence alone can be sufficient to support a conviction. *State v. Mosely*, 873 S.W.2d 879, 881 (Mo. App. E.D. 1994).

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated:

> This inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319.

B. There was sufficient evidence that Appellant resisted his arrest for a felony.

Appellant's challenge to the sufficiency of the evidence to support his felony conviction for resisting arrest fails because sufficient evidence was presented to allow the court to find that Trooper Mason was arresting Appellant for a felony; that Appellant knew or reasonably should have known that the officer was making an arrest; and that Appellant resisted arrest by using or threatening the use of violence or physical force for the purpose of preventing Trooper Mason from making an arrest.

A person commits the offense of resisting arrest if that person knows or reasonably should know that an officer is making an arrest and resists the arrest by using or threatening the use of violence or physical force for the

purpose of preventing the officer from effecting the arrest. § 575.150.1(2), RSMo., 2000. Resisting arrest is a class D felony when the arrest is for a felony. § 575.150.5 RSMo., 2000.

Here, the court, as finder of fact, heard uncontroverted evidence that Appellant began throwing punches at Matthew Clark, which Clark tried to block despite holding onto his young son. (Tr. 48-51). Appellant actually hit Clark six or seven times. (Tr. 48). Clark suffered some bruising on his left forearm from Appellant's blows. (Tr. 50-51). Clark was able to get away to the parking lot, but Appellant continued to pursue him. (Tr. 52-53). Appellant said, "I'm going to kick your ass, motherfucker, and I'm going to get your kid." (Tr. 53). These actions resulted in Appellant being charged and found guilty by the trial court of assault in the first degree. (L.F. 15-17, Tr. 129).

Responding to a call of a burglary in process, Trooper Mark Mason of the Missouri State Highway Patrol arrived at the scene. (Tr. 69-70, 74-75). Trooper Mason was directed to the main entrance, where he saw Appellant standing outside of the doors to the main entrance with his nose to the glass, looking into the church. (Tr. 71-72). Trooper Mason approached Appellant and tried to engage him in conversation, but Appellant continued to stand approximately two feet away from Trooper Mason. (Tr. 73). After about ten seconds, Appellant turned and charged Trooper Mason while throwing punches in his direction, attempting to strike Trooper Mason. (Tr. 73, 86).

Trooper Mason drew his mace and twice deployed it against Appellant. (Tr. 74). After the second spray of mace, Trooper Mason was able to tackle Appellant and take him to the ground. (Tr. 75). Trooper Mason arrested Appellant because he believed that Appellant had attempted to assault him. (Tr. 81-82).

Although Appellant continued to struggle, Trooper Mason was able to handcuff Appellant with the assistance of three people from the church. (Tr. 76-77, 87-88). After Trooper Mason helped Appellant sit up, Appellant tried to spit on the others, so Trooper Mason returned Appellant to a face down frontal position. (Tr. 78). Appellant continued to curse and threaten to kill and hurt people. (Tr. 78, 88). Even after an ambulance arrived and fitted Appellant with a spit mask, Appellant remained combative and tried to spit on people after he was loaded onto a gurney and strapped in. (Tr. 78-79). Appellant continued to threaten to kill everybody. (Tr. 89).

Thus, the evidence allowed the trial court, as finder of fact, to find that Appellant knew that Trooper Mason was making an arrest and that Appellant resisted arrest by using violence and threatening the use of violence or physical force for the purpose of preventing Trooper Mason from effecting the arrest.

As far as the trial court's finding that Trooper Mason was arresting Appellant for the felony of assault, (Tr. 131), the felony information alleged

that Trooper Mason was arresting Appellant for attempted assault in the second degree. (L.F. 16). Under § 565.060.1, RSMo. 2000, a person commits the class C felony of assault in the second degree if he recklessly causes serious physical injury to another person. Pursuant to § 564.011.1, RSMo., 2000, 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 defined in the same statute as conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. The conduct must be indicative of the defendant's purpose to complete the offense. *State v. Molkenbur*, 723 S.W.2d 894, 895 (Mo. App. S.D. 1987).

Here, it was reasonable for the trial court, as finder of fact, to infer that Appellant attempted to cause serious physical injury to Trooper Mason when he turned and charged Trooper Mason while throwing punches in his direction attempting to strike Trooper Mason. (Tr. 73, 86). *See State v. Herrington*, 315 S.W.3d 424, 426 (Mo. App. S.D. 2010) (defendant's actions of "flying" at victim, putting him in a choke hold, hitting him multiple times on his head and face all showed defendant's intent to cause serious physical injury); and *State v. Schnelle*, 7 S.W.3d 447, 451 (Mo. App. W.D. 1999) (testimony of victim that that the defendant unexpectedly hit her in the left eye with such force that it knocked her down and opened a wound requiring

four or five stitches allowed a reasonable juror to conclude that the defendant attempted to cause serious physical injury to the victim).

Appellant, however, contends that the evidence is insufficient because the State failed to prove that Trooper Mason contemplated arresting Appellant for a felony. (App. Br. 14, 16). In fact, the evidence showed that Trooper Mason did contemplate arresting Appellant for a felony inasmuch as Trooper Mason said that he arrested Appellant for his attempted assault on him. (Tr. 82). But in any event, Appellant's argument is misplaced because whether or not the officer "contemplated" an arrest is not a statutory element, and the State is not required to prove anything other than the statutory elements. Section 575.150.5 RSMo., 2000 does not list as a statutory element the requirement that the arresting officer contemplate an arrest for a felony. *See, e.g., State v. Wolfe*, 363 S.W.3d 114, 118 (Mo. App. S.D. 2012) (because location is not a statutory element of tampering with a judicial officer, the State need not prove beyond a reasonable doubt the location where the crime occurred); and *State v. Bradshaw*, 26 S.W.3d 461, 466 (Mo. App. W.D. 2001) (to convict the defendant, the State was required, as a matter of due process, to prove beyond a reasonable doubt each and every element of the offense set forth in the statute).

Appellant relies on *State v. Merritt*, 805 S.W.2d 337 (Mo. App. E.D. 1991), asserting that there must be evidence that the arresting officer

intended or contemplated an arrest for a felony and that the officer identify the felony for which he was arresting the defendant for. (App. Br. 15). But a fair reading of *Merritt* shows that testimony from the arresting officer that he or she "contemplated" arresting the defendant for a felony offense is not required 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. The evidence in *Merritt* was such that 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.

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. 1988), as supporting the assertion that "What is required is that the arresting officer, at the least, contemplate making an arrest and, in our case, that the deputy contemplate making a felony arrest." *Merritt*, 805 S.W.2d at 339. *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. Thus, *Wanner* does not support the proposition that the officer must contemplate a felony arrest.

Appellant also relies on *State v. Bell*, 30 S.W.3d 206 (Mo. App. S.D. 2000) for his argument that the evidence was insufficient to prove that Appellant was being arrested for a felony. (App. Br. 18-20). In *Bell*, the police were trying to arrest a man named Kenneth Campbell when the defendant started throwing rocks at the officers. *Bell*, 30 S.W.3d at 206-207. At trial, the officer "never indicated for what charge Kenneth Campbell was being arrested." *Id*. at 207. The appellate court examined the rest of the trial record, and could not determine whether Campbell was being arrested for a felony or a misdemeanor. *Id*. at 208. The court set aside the felony conviction and ordered the trial court to enter a judgment of conviction on the misdemeanor of interfering with arrest. *Id*.

The opinion in *Bell* disregards the standard of review which requires the reviewing court to consider all substantial evidence and inferences drawn therefrom in the light most favorable to the jury's verdict and reject evidence and inferences contrary thereto. *Bell*, 30 S.W.3d at 208. After correctly stating the above standard of review, the court in *Bell* nevertheless stated the following:

> [I]t 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.

The above passage contains language demonstrating that the reviewing court weighed the evidence and drew inferences in a manner reserved solely for the fact-finder and not the appellate court, in contravention of the standard of review. *State v. Young*, 172 S.W.3d 494, 497 (Mo. App. W.D. 2005). But in abolishing the "equally valid inferences rule," this Court held that under the proper standard of review, any potentially "innocent explanation" for any of the evidence must be disregarded as to accept it would be to fail to view the evidence in the light most favorable to the verdict. *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998). As the reviewing court in *Bell* appeared to invoke the equally valid inferences rule, *Bell* should not be followed.

Moreover, the implication raised by *Bell* that the State must present direct evidence of what the officer contemplated when arresting the defendant, (App. Br. 19), invokes the now discredited "circumstantial evidence rule," which required that "where the conviction rests on circumstantial evidence, the facts and circumstances to establish guilt must be consistent with each other, consistent with the guilt of the defendant, and inconsistent with any reasonable theory of his innocence." *See State v. Grim*, 854 S.W.2d 403, 405–407 (Mo. banc 1993). This Court, in *Grim*, abrogated the circumstantial evidence rule. Because the court in *Bell* did not follow the appropriate standard of review and reweighed the evidence, it should no longer be followed.

Finally, Appellant relies on *State v. Jordan*, 181 S.W.3d 588 (Mo. App. E.D. 2005) which cited both *Merritt* and *Bell* 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. *Jordan*, 181 S.W.3d at 592 (App. Br. 20-21). In *Jordan*, a police officer observed the defendant driving a vehicle without brake lights or a license plate and waived the car down. *Jordan*, 181 S.W.3d at 590. After the officer attempted to reach into the vehicle and turn off the ignition, the defendant accelerated, catching the officer's arm in the car until he was able to free it and turned the car away, causing the car to hit the officer's knee.

Jordan, 181 S.W.3d at 590-591. Eventually, Appellant lead officers on a high speed chase through a residential area during which the defendant rammed one of the officer's cars with his vehicle. *Id.*

Noting that the arresting officer did not testify at trial that he contemplated arresting the defendant or that he intended to arrest the defendant for a felony, the court in *Jordan* 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.* at 593. Again, this analysis demonstrates that the reviewing court in *Jordan* failed to accept as true all evidence tending to prove guilt, together with all reasonable inferences that support the finding, and ignore all contrary evidence and inferences.

Pursuant to § 575.150.5 RSMo., 2000, the State bears the burden of proving that the arrest which was resisted was for a felony. But contrary to Appellant's position, the determination of whether there was sufficient evidence that the offense that precipitated the arrest was a felony is not simply what the arresting officer contemplated when making the arrest, which is not required by the statute. The conclusion of the officer on the issue of whether the arrest is for a felony, while at time relevant, is not dispositive of the ultimate decision to charge resisting that arrest as a felony or misdemeanor. Nor is there any requirement that the State present direct

evidence, such as the arresting officer's testimony, in determining whether the arrest of the defendant was for a felony. In determining whether the State has shown whether the arrest was for a felony, the finder of fact should consider all of the evidence, not just the testimony of the arresting officers.

The evidence presented in the present case showed that Appellant assaulted Matthew Clark, which resulted in his arrest and conviction for assault in the first degree. Appellant's further actions in trying to open the doors of the church to get in resulted in a call to law enforcement regarding a burglary[1] in process. Finally, Appellant charged Trooper Mason while throwing punches in his direction, attempting to strike him, and Trooper Mason arrested Appellant because he believed that Appellant had attempted to assault him, which as discussed above, constituted a felony. Thus, there were several felonies for which Appellant was aware that he could have been arrested for. Trooper Mason was aware of both a possible burglary by Appellant as well as Appellant's attempted assault on him. Considering all of the evidence presented to the finder of fact, there was sufficient evidence that

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[1] Both burglary in the first degree (§ 569.160, RSMo., 2000) and burglary in the second degree (§ 569.170, RSMo., 2000) were classified as felonies at the time of Appellant's arrest.

Trooper Mason was attempting to arrest Appellant for a felony and that Appellant knew that Trooper Mason was trying to arrest him when he continued to resist and tried to prevent his arrest. This point should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,946 words, excluding the cover and certification, as determined by Microsoft Word 2010 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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