



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

Respondent,

v.

KHAMIS D. PITIYA,

Appellant.

WD83502

OPINION FILED:
May 4, 2021

**Appeal from the Circuit Court of Linn County, Missouri
The Honorable Terry A. Tschannen, Judge**

Before Division Two: Mark D. Pfeiffer, Presiding Judge, and
Alok Ahuja and Karen King Mitchell, Judges

Khamis Pitiya appeals, following a bench trial, his convictions of two counts of felony resisting arrest, § 575.150,¹ and one count of armed criminal action, § 571.015, for which he was sentenced to concurrent terms of three years' imprisonment on each count. Pitiya raises two points on appeal. In his first point, he argues that his two convictions for resisting arrest are in violation of his right to be free from double jeopardy insofar as his resistance constituted a continuous course of conduct for which he could be punished only once. In his second point, Pitiya argues that the evidence was insufficient to support the second count of resisting arrest and that both that count

¹ All statutory citations are to the Revised Statutes of Missouri, as updated through the 2018 Supplement.

and its associated count of armed criminal action should be reversed. Finding merit in Pitiya's second claim, we affirm in part, reverse in part, and remand.

Background

On May 8, 2019, Officer Thomas Bunnell of the Brookfield City Police responded to a call reporting a vehicle weaving in and out of traffic near Highway TT on eastbound US-36. When he first noticed Pitiya's vehicle, it was traveling at 83 miles per hour in a 65 miles-per-hour zone. Officer Bunnell watched Pitiya's vehicle driving on the shoulder at variable speeds. He pulled alongside Pitiya's vehicle, made eye contact with Pitiya, and motioned for Pitiya to pull over. At that time, Pitiya's speed varied between 45 and 60 miles per hour. Instead of pulling over, Pitiya twice swerved off the shoulder into the driving lane where Officer Bunnell's vehicle was driving, forcing Officer Bunnell to slow down and change lanes to avoid a collision. Pitiya then sped up, nearly colliding with another law enforcement vehicle in front of him. Pitiya continued to pick up speed, all the while swerving between lanes and the shoulder, and Officer Bunnell followed a mile or two behind, going in excess of 100 miles per hour to keep up with Pitiya.

Officers laid spike strips at four different locations in an effort to stop Pitiya, but it was not until he hit the fourth set that his vehicle was disabled. When officers finally apprehended Pitiya, he smelled heavily of intoxicants and had bloodshot eyes and slurred speech. On the driver-side floorboard of Pitiya's vehicle was an open alcohol bottle, and in the back-passenger seat, were open beer cans and three whiskey bottles.

The State charged Pitiya with seven counts of resisting arrest, two counts of armed criminal action, and one count of driving with an excessive blood alcohol content. Before trial, Pitiya moved to dismiss all but one count of resisting arrest (specifically, Count I), arguing that conviction of more than one count violated his right to be free from double jeopardy insofar as all

of the resisting arrest charges stemmed from a continuing course of conduct.² The trial court dismissed Counts VI, VII, VIII (three counts of resisting arrest) and IX (one count of armed criminal action) pursuant to Pitiya's motion, but took Count II under advisement. The trial court later dismissed Counts IV and V (resisting arrest and armed criminal action), on the ground that the resisting arrest charge violated Pitiya's right to be free from double jeopardy; and, because the armed criminal action charge was based on the dismissed resisting arrest charge, it lacked sufficient evidentiary support. The trial court also sustained Pitiya's motion for judgment of acquittal on Count X (excessive BAC) because the State failed to present evidence of Pitiya's blood alcohol content.

The trial court convicted Pitiya of Count I (the resisting arrest charge to which Pitiya conceded guilt), Count II (resisting arrest), and Count III (armed criminal action based on Count II), finding that Pitiya committed two distinct acts of resisting arrest as alleged in Counts I and II so that convicting him of both did not violate his right to be free from double jeopardy. The trial court sentenced Pitiya to three years' imprisonment on each count, with all sentences to run concurrently. Pitiya appeals.

Analysis

Pitiya raises two claims. First, he argues that conviction of both Counts I and II violated his right to be free from double jeopardy. Second, he argues that the evidence was insufficient to support his conviction on Count II and, therefore, both Counts II and III (which was based upon Count II) must be reversed.

² At trial, Pitiya conceded guilt on Count I.

I. Pitiya’s convictions for two counts of resisting arrest did not constitute double jeopardy.

In his first point, Pitiya argues that the car chase he led law enforcement on was one continuing course of conduct and that convicting him of more than one count of resisting arrest based upon this conduct violated his right to be free from double jeopardy. We disagree.

“The determination of whether the protections against double jeopardy apply is a question of law which this court reviews de novo.” *State v. Mullenix*, 73 S.W.3d 32, 34 (Mo. App. W.D. 2002). We defer “to the trial court’s factual findings and credibility determinations.” *Id.* (quoting *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000)).

The federal double jeopardy clause “protects defendants not only from successive prosecutions for the same offense after either an acquittal or a conviction, but also from multiple punishments for the same offense.” *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012) (quoting *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992)). “[W]hen a defendant’s conduct is continuous,” we focus “on the conduct the legislature intended to proscribe under the statute” to determine if multiple punishments are permissible.³ *Id.* “Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature.” *Id.* at 546-47 (quoting *McTush*, 827 S.W.2d at 186). “To determine whether the legislature intended multiple punishments, a court looks first to the ‘unit of prosecution’ allowed by the statutes under which the defendant was charged.” *Id.* at 547 (quoting *State v. Sanchez*, 186 S.W.3d 260, 267 (Mo. banc 2006)).

³ Section 556.041(4) provides:

When the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if . . . [t]he offense is defined as a continuing course of conduct and the person’s course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Section 575.150.1(1) indicates that

[a] person commits the offense of resisting or interfering with arrest . . . if he or she knows or reasonably should know that a law enforcement officer is . . . attempting to lawfully . . . stop an individual or vehicle, and for the purpose of preventing the officer from effecting the . . . stop or detention, he or she . . . [r]esists the . . . stop . . . by using or threatening the use of violence or physical force or by fleeing from such officer.

Our courts have held that “the appropriate unit of prosecution for the crime of resisting arrest is the substantive act of undertaking a resistance to the arrest.” *Stuart v. State*, 565 S.W.3d 766, 774 (Mo. App. E.D. 2019) (citing *State v. Good*, 851 S.W.2d 1 (Mo. App. S.D. 1992)). And, because the statute provides two distinct acts that constitute resistance—(1) threatening the use of violence or physical force and (2) fleeing the officer attempting the stop—a person who engages in both acts may be charged with and convicted of multiple offenses.⁴

Here, Pitiya was charged in Count I with resistance “by fleeing at high rates of speed, specifically eastbound on US-36 at rates of speed between 105 and 120 miles per hour.” In Count II, he was charged with resistance by “us[ing] physical force or interference by attempting to hit Brookfield Police Officer Lt. T. Bunnell’s patrol vehicle multiple times as Lt. Bunnell attempted to effect a stop of defendant’s vehicle on US-36 highway.” Each of these acts is a distinct method of resisting under § 575.150.1(1). Additionally, the evidence indicated that the acts occurred at distinct times: when Pitiya twice attempted to hit Lt. Bunnell’s vehicle by moving from the shoulder into Lt. Bunnell’s lane of traffic, as charged in Count II, Pitiya was traveling

⁴ Missouri courts have repeatedly found separate offenses “where the conduct is dissimilar or the actions are separated in time. Where the counts are based on different acts or a separate mens rea is formed for each act, crimes are different in nature.” *State v. Barber*, 37 S.W.3d 400, 404 (Mo. App. E.D. 2001) (rejecting a double jeopardy challenge to multiple convictions of unlawful use of a weapon based on distinct acts of exhibiting the weapon); *see also State v. Tyler*, 196 S.W.3d 638, 641 (Mo. App. W.D. 2006) (rejecting a double jeopardy challenge to multiple assault convictions where each conviction “involved a different method of assault”); *State v. Harris*, 243 S.W.3d 508, 512 (Mo. App. W.D. 2008) (distinguishing *State v. Collins*, 154 S.W.3d 486 (Mo. App. W.D. 2005) by noting that the acts in *Collins*, where no double jeopardy violation occurred, involved “different forms of offensive contact,” whereas the conduct in *Harris* was all the same).

slower than 60 miles per hour and increased his speed to over 105 miles per hour, as charged in Count I, only *after* his attempt to hit Lt. Bunnell's vehicle. Because each of Pitiya's separate acts of resistance is a separate unit of prosecution, Pitiya's right to be free from double jeopardy was not violated by his conviction of both counts.

Point I is denied.

II. The evidence was insufficient to support Pitiya's conviction for felony resisting arrest on Count II.

In his second point on appeal, Pitiya argues that the evidence was insufficient to support his conviction for felony resisting arrest in Count II and that, by extension, it was also insufficient to support his conviction for armed criminal action in Count III, which was based on the resistance charged in Count II. We agree in part.

"When reviewing [a challenge to] the sufficiency of evidence supporting a criminal conviction, [we] give[] great deference to the trier of fact." *State v. Kelliker*, 605 S.W.3d 440, 444 (Mo. App. W.D. 2020) (quoting *State v. Oliver*, 293 S.W.3d 437, 444 (Mo. banc 2009)). Our review "is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." *Id.* (quoting *Oliver*, 293 S.W.3d at 444). "In applying this standard, the Court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence and disregards all evidence and inferences to the contrary." *Id.* (quoting *Oliver*, 293 S.W.3d at 444).

As mentioned above, when the person "knows or reasonably should know" that an officer is attempting a stop, § 575.150.1(1) proscribes resisting a stop by either: (1) "using or threatening the use of violence or physical force"; or (2) "fleeing from such officer." Resisting arrest by *any* means is a class A misdemeanor unless the underlying arrest is "for a . . . [f]elony; [a w]arrant issued for failure to appear on a felony case; or [a w]arrant issued for a probation violation on a

felony case.” § 575.150.5. Under those circumstances, resisting arrest is a class E felony. *Id.* Resisting arrest also becomes a class E felony where the resistance is accomplished by *flight* and “the person fleeing creates a substantial risk of serious physical injury or death to any person.” *Id.*

Here, in Count II, Pitiya was charged with felony resisting arrest insofar as he “*used physical force* or interference by attempting to hit Brookfield Police Officer Lt. T. Bunnell’s patrol vehicle multiple times as Lt. Bunnell attempted to effect a stop of defendant’s vehicle on US-36 highway.” Count II of the second amended information did not charge Pitiya with resisting the stop by fleeing, yet the charging document alleged that he “*creat[ed] a substantial risk of serious physical injury or death to any person.*” (Emphasis added.) Count II charged resistance by the use of physical force, but it elevated the charge to a felony with the allegation that Pitiya created a substantial risk of serious physical injury or death to any person. Creating a substantial risk of serious physical injury or death, however, elevates a charge from a misdemeanor to a felony only where the method of resistance is *flight*. Under the plain language of the statute, where the resistance alleged involves the use or threatened use of physical force or violence, the charge may be elevated to a felony only if the underlying arrest is “for a . . . [f]elony; [a w]arrant for failure to appear on a felony case; or [a w]arrant for a probation violation on a felony case.”

Pitiya argues that the evidence was insufficient to support a finding that his use of force created a substantial risk of serious physical injury or death. But this argument misses the point. The State was not required to prove that Pitiya’s use of force created a substantial risk of serious physical injury or death under Count II, because the method of resistance alleged in the charging document was not flight. But, to maintain a *felony* conviction, the State needed to prove that the underlying arrest or stop was “for a . . . [f]elony; [a w]arrant for failure to appear on a felony case; or [a w]arrant for a probation violation on a felony case.” And the State failed to either allege or

prove the nature of the underlying arrest or stop. Accordingly, Pitiya's conviction for a class E felony cannot stand.

Pitiya does not challenge the sufficiency of the evidence to support any of the remaining elements of resisting arrest as charged in Count II and urges us to "enter a misdemeanor conviction for resisting a lawful stop" as a result of the State's alleged failure to prove the substantial risk of serious physical injury or death. Though we disagree with Pitiya's rationale, we agree that his conviction should be reduced to a misdemeanor on Count II for the reasons stated above. *See State v. Luster*, 544 S.W.3d 263, 266 (Mo. App. E.D. 2017) ("Where a conviction is reversed on appeal for a reason that would not affect a lesser-included offense, the appellate court may remand the case for entry of a conviction on the lesser-included offense."). Therefore, we reverse his conviction on Count II and remand for the trial court to enter a conviction for misdemeanor resisting arrest and resentence Pitiya accordingly.

Finally, because Count III (armed criminal action) was predicated on the felonious nature of Count II,⁵ and Count II—as proven—was only a misdemeanor, Count III must be reversed as well.

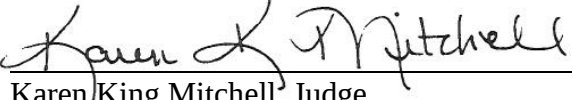
Point II is granted.

Conclusion

Pitiya's two convictions for resisting arrest, based on two different means of resistance committed at distinct times, do not constitute double jeopardy. His conviction in Count II, however, should have been for a misdemeanor, rather than a felony. We reverse Pitiya's conviction on Count II and remand to the trial court with directions to both enter conviction on

⁵ "Any person who commits *any felony* under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the offense of armed criminal action." § 571.015.1 (emphasis added).

Count II for misdemeanor resisting arrest and resentence Pitiya accordingly. In light of our decision regarding Count II, Pitiya's conviction in Count III for armed criminal action is reversed and vacated.


Karen King Mitchell, Judge

Mark D. Pfeiffer, Presiding Judge, and Alok Ahuja, Judge, concur.