In the Missouri Court of Appeals
Eastern District

DIVISION TWO

STATE OF MISSOURI,	)	No. ED112932
	)	
Respondent,	)	
	)	
v.	)	
	)	
ROBERT YATES,	)	
	)	
Appellant.	)	Filed: December 9, 2025

Appeal from the Circuit Court of Ste. Genevieve County
The Honorable Wendy W. Horn, Judge

Introduction

Robert Yates ("Appellant") was arrested after police responded to an emergency call at a hotel in Ste. Genevieve on May 31, 2022. The State charged Appellant with first-degree drug trafficking, resisting arrest, unlawful possession of drug paraphernalia, unlawful possession of a controlled substance, and property damage. A jury convicted him on all five counts, and the circuit court entered judgment upon this verdict.

Appellant appeals this judgment and brings five points on appeal. In Point One, he argues the officers' warrantless search of his hotel room violated the Fourth Amendment. In Point Two, he contends the verdict director on the first-degree drug trafficking count

conflicted with the offense statute, thereby misleading the jury. Specifically, he asserts the instruction did not require the jury find he possessed the requisite mental state "within a motor vehicle," as required to increase the offense's classification under the statute. In Point Three, he argues the State did not sufficiently prove he took a substantial step towards first-degree drug trafficking. In Point Four, he asserts the State did not present sufficient evidence of resisting arrest because the officers did not have grounds to arrest him, nor was he "aware" of this arrest attempt. In Point Five, he argues the State did not prove he possessed the psilocin mushrooms laced with methamphetamine.

The warrantless search did not violate the Fourth Amendment because the police were responding to an exigent circumstance: the imminent destruction of evidence. Point One is denied. The verdict director did not mislead the jury because it did not conflict with the offense statute. The Missouri Approved Instruction ("MAI") used, MAI-CR 4th 425.12, had conjunctive language linked to the offense statute. As such, to convict Appellant, the jury had to find he simultaneously committed all parts of the criminal offense "within a motor vehicle." Point Two is denied. The possession of bi-phase liquid methamphetamine is itself sufficient to satisfy the substantial step requirement for first-degree drug trafficking. Point Three is denied. The State presented sufficient evidence to find Appellant resisted arrest because the officers had grounds to arrest him and the circumstances indicated they were attempting to do so, despite Appellant's claim he was unaware of the officers' intent. Point Four is denied. Appellant had exclusive possession of his truck and had constructive possession of the mushrooms found inside it. Point Five is denied.

The circuit court's judgment is affirmed.

Factual and Procedural Background

Appellant and a female companion checked into the Microtel Inn in Ste. Genevieve County, Missouri on May 31, 2022. The Microtel Inn is a two-story hotel with a roof over the main first-floor entrance. Appellant registered his vehicle as a Dodge Ram pickup truck with temporary license plates. The hotel assigned him Room 216. After checking in, the hotel manager noted Appellant brought a "basket-type thing" to his room, which raised a "red flag" in her mind. Sometime later, the fire alarm was activated inside his room. Hotel staff responded to the alarm, went into Appellant's room, and turned it off. The hotel manager called the police to check on Appellant.

Officers Christopher Bradford and Pete Unverferth, of the Ste. Genevieve City Police Department, received reports that, in addition to the fire alarms sounding, Appellant and a female companion were bringing propane tanks into their room. When they arrived at Room 216, both officers smelled a "chemical" odor consistent with methamphetamine use or production. Officer Unverferth announced himself as police. Appellant asked if he could meet the officers downstairs in approximately five minutes. Officer Unverferth found this unsatisfactory and asked Appellant to come out of his room and speak with him and Officer Bradford. Appellant refused and told the officers to come back with a warrant. During this conversation, Officer Unverferth heard movement behind the door and a toilet flush. Based upon his training and experience, Officer Unverferth feared Appellant was destroying evidence by flushing drugs down the toilet. Corporal Caleb Brown, also from the Ste. Genevieve City Police Department, arrived at

the hotel and obtained a master keycard from the front desk. As he reached the second floor, he smelled a chemical odor consistent with the use or production of methamphetamine and saw a "light haze" in the hallway.

Corporal Brown attempted to open the door with the keycard, but it only opened partially because the "stop lock" was engaged. Even still, a haze of white smoke poured out of the room and the chemical odor became much stronger. The officers concluded something had been or was on fire, and they decided to breach the door. Corporal Brown and Officer Bradford kicked in the hotel door. Appellant ran out of the bathroom, across the room, and jumped headfirst through the closed second-floor glass window. He landed on the roof over the main entrance, stepped off the gutter, and landed on the ground floor air-conditioning unit. Officer Bradford and Corporal Brown ran down the stairs and onto the parking lot to intercept him. Appellant was bleeding profusely and running towards his Dodge Ram pickup truck. The police tackled him 5 to 10 feet from the truck.

Appellant said he would not speak to the police without an attorney, but later spontaneously stated the truck was his, there was nothing illegal inside, and refused consent to search. Corporal Brown searched Appellant incident to arrest and recovered ephedrine, an ingredient in manufacturing methamphetamine, a clear plastic baggie with 4.54 grams of methamphetamine, Appellant's driver's license, and the key to a Dodge Ram pickup truck. Based upon this evidence, the officers called a canine officer to conduct a free-air sniff around the truck. The canine officer indicated a controlled substance at the lower-left driver side door seam. An officer not associated with the

original search submitted an affidavit for a warrant to search the truck. A search for the truck's temporary license plates revealed the vehicle was registered to Appellant.

While Officer Bradford and Corporal Brown arrested Appellant, Officer Unverferth remained in Room 216. He saw several pieces of illicit drug paraphernalia in plain view: glass pipes consistent with the use and consumption of methamphetamine, one of which had a white powdery residue inside, several rubber hoses, cylinder tanks consistent with a 3-pound camping cylinder for propane, butane lighter fluid, a lock-picking kit, razor blades, and cigarette rolling papers.

A search warrant for Appellant's truck was issued. From the truck bed's built-in lockbox, the police recovered lye, three bottles containing "one-pot" laboratories (described as portable methamphetamine laboratories), two bottles of muriatic acid, and two bottles of bi-phase liquid methamphetamine. From the truck's backseat, the police recovered acetone, another bottle of bi-phase liquid methamphetamine, lighter fluid, starting fluid, a Pyrex baking dish, plastic tubing, and plastic funnels. The police also recovered psilocin mushrooms laced with methamphetamine from within the truck. A Missouri State Highway Patrol criminalist tested the items containing methamphetamine, including the mushrooms, and determined they weighed 141.76 grams.

The State charged Appellant with first-degree drug trafficking, resisting arrest, unlawful possession of a controlled substance, unlawful possession of drug paraphernalia, and property damage. The jury convicted Appellant on all counts. The circuit court sentenced Appellant as a prior and persistent drug offender to 59 years' imprisonment.

This appeal follows. This Court will include additional facts as necessary to analyze Appellant's arguments and will address the points out of order for clarity.

Discussion

Point One: Fourth Amendment Claim

Party Positions

Appellant contends the circuit court erred in overruling his motion to suppress because the warrantless search of his hotel room was conducted without an exigent circumstance. The State argues two exigent circumstances justified the search: (1) protecting an occupant from imminent injury and (2) preventing the imminent destruction of evidence.

Preservation

As a preliminary matter, this Court must address preservation. The State argues Appellant did not preserve his Fourth Amendment claim for three reasons: (1) he did not file a written motion to suppress, as required by section 542.296,[1] (2) he stated "no objection" to the admission and publication of the evidence received as a result of the search, and (3) his point relied on is multifarious. This Court disagrees.

First, the State argues Appellant did not properly preserve his argument because he did not file a written motion, as required by section 542.296. Section 542.296.2 provides the form of a motion to suppress "shall be in writing." However, the form of a motion can be consented to by the State. *State v. Spurgeon*, 907 S.W.2d 798, 799 (Mo. App. S.D. 1995).

[1] All statutory references are to RSMo. 2016, unless otherwise indicated.

Here, like in *Spurgeon*, the State consented to the form of the motion to suppress. Appellant noticed his "Oral Motion to Suppress Evidence and Statements" for a hearing on April 26, 2024. The circuit court held the hearing on the motion to suppress on April 30, 2024. The State never objected to the hearing before it occurred. At the hearing, the circuit court explained, "[W]e … are on today on a motion to suppress … orally raised by the defendant." It then continued, "Is everybody ready?" The State responded, "Yes, Your Honor." Because the State did not object to the form of the motion—and in fact affirmatively stated it was ready for a hearing on the merits—the State lost its ability to raise this otherwise valid objection and consented to the motion's oral presentation.

The State received notice and an opportunity to be heard and the circuit court was apprised of the relevant arguments, even without a written motion. Written motions are preferred because they ensure the opposing party is "afforded adequate notice and a full opportunity to be heard." *Grease Monkey Int'l, Inc. v. Godat*, 916 S.W.2d 257, 261 (Mo. App. E.D. 1995). Here, the State received such procedural protections. Appellant filed his "Oral Motion to Suppress Evidence and Statements" four days before the hearing, putting the State on notice he would orally move to suppress evidence. The State also had a full opportunity to be heard. During the suppression hearing, the State put on 4 witnesses, entered 24 exhibits, and engaged in legal argument. The entire hearing comprised 177 transcript pages. The State knew the exact parameters of Appellant's oral motion to suppress and presented extensive evidence and argument demonstrating why the motion should be denied. Accordingly, it had both notice and an opportunity to be

heard. The oral motion sufficiently preserved Appellant's Fourth Amendment claim because the State consented to its form.

Second, the State argues the claim was not preserved because Appellant stated "no objection" to the seized evidence's admission and publication at trial. Appellant argues he only stated "no objection" because the circuit court had already granted him a continuing objection. "[W]here a defendant had requested and received a continuing objection, an affirmative statement of 'no objection' where both sides understood the defendant did not intend to repudiate the earlier objection [does] not bar direct appellate review of the merits of the motion to suppress." *State v. McWhorter*, 240 S.W.3d 761, 763 (Mo. App. S.D. 2007).

The record reveals the State and Defense Counsel came to a mutual understanding at trial that he did not intend to repudiate his prior objection. When the State moved to admit pictures of Appellant's hotel room, Defense Counsel objected and asked for a sidebar. The following exchange occurred:

> [DEFENSE COUNSEL]: Judge, at this time, based on the evidence that's being presented, I'm going to renew … the oral motion to suppress the evidence seized inside the hotel room as a result of, what we argued, was an unlawful search….
>
> [THE STATE]: Judge, I assume that -- that [Defense Counsel] wants to make that a standing motion….
>
> THE COURT: All right. And my ruling remains the same. The objection is overruled, and, of course, this may -- can be a continuing objection, if you wish. Okay?
>
> [DEFENSE COUNSEL]: Thank you.

Appellant's argument was sufficient to obtain a continuing objection and does not bar appellate review.[2]

Finally, the State alleges Appellant's claim is not preserved because Point One is multifarious. "A point relied on is multifarious if it groups together multiple, independent claims rather than a single claim of error." *State v. Hernandez*, 659 S.W.3d 614, 619 (Mo. App. W.D. 2022) (quoting *Cityview Real Est. Servs., LLC v. K.C. Auto Panel, Inc.*, 576 S.W.3d 187, 191 (Mo. App. W.D. 2019)). Here, Appellant's point states, "The trial court erred by denying [his] motion to suppress *and* admitting evidence and testimony at trial" because the hotel room search violated the Fourth Amendment (emphasis added). The State argues this point is multifarious because it addresses two separate claims: the denial of his suppression motion and the admission of the evidence at trial. This argument misses the mark: Appellant has only one *claim of error* in this point: the circuit court erred in determining the warrantless search did not violate the Fourth Amendment. However, Appellant includes two *rulings* in his point: the motion to suppress ruling and the ruling admitting the evidence at trial. *See Wallace v. Frazier*, 546 S.W.3d 624, 627 (Mo. App. W.D. 2018) (distinguishing between a "ruling" and a "claim of error"). The State cites no cases which hold including two rulings in a point relied on is multifarious.[3]

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[2] Appellant's valid continuing objection came too late to preserve any challenge to the seized property form, the photographs of evidence from the hotel room, and the officers' testimony about what they saw. However, Appellant did obtain a continuing objection as to all remaining pieces of evidence. Thus, his objection to the remaining pieces of evidence is preserved, and this Court must address the merits of Appellant's claim. *See Baker*, 103 S.W.3d at 716.

[3] The State cites *Hernandez*, 659 S.W.3d at 619–20 for this proposition, but the defendant in *Hernandez* included two *claims* in his point relied on: (1) the warrantless search

As such, this argument is deemed abandoned, and this Court proceeds to the merits. *See Republic Fin., LLC v. Ray*, 698 S.W.3d 184, 188 (Mo. App. E.D. 2024).

Analysis

"Review of a denial of a motion to suppress is limited to a determination of 'whether there is substantial evidence to support the ruling.'" *State v. McClain*, 698 S.W.3d 524, 529 (Mo. App. E.D. 2024) (quoting *State v. Fernandez*, 671 S.W.3d 856, 861 (Mo. App. W.D. 2023)). "In making that determination, we review the suppression hearing and the trial." *Id*. "This Court defers to the [circuit] court's credibility determinations and factual findings, inquiring only whether the decision is supported by substantial evidence, and reverses only if the [circuit] court's decision is clearly erroneous." *State v. Hosier*, 454 S.W.3d 883, 891 (Mo. banc 2015). "In reviewing whether the Fourth Amendment was violated, we review those questions of law *de novo*." *McClain*, 698 S.W.3d at 530.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV.[4] "Reasonableness, therefore, is the 'touchstone' of the Fourth Amendment." *State v. Waldrup*, 331 S.W.3d 668, 672 (Mo. banc 2011) (quoting *Samson v. California*, 547 U.S. 843, 855 n.4, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006)).

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violated the Fourth Amendment and (2) the information obtained as a result of the warrantless search tainted the warrant application. That is distinguishable from this case, with two *rulings.*

[4] "Article I, section 15 of the Missouri Constitution is coextensive with the Fourth Amendment; consequently, the same analysis applies under both provisions." *State v. Perry*, 548 S.W.3d 292, 298 (Mo. banc 2018) (quoting *State v. Lovelady*, 432 S.W.3d 187, 190 (Mo. banc 2014)).

In addition, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.…" U.S. Const. amend. IV. Because a warrant is generally required by the Fourth Amendment, a warrantless search is presumed unreasonable because the Fourth Amendment's plain text "condemn[s]" that practice. *Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 1379, 63 L. Ed. 2d 639 (1980).

However, this presumption can be overcome if the State demonstrates "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *McClain*, 698 S.W.3d at 533 (quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)). This exception enables law enforcement officers to handle emergencies which "present[] a 'compelling need for official action and no time to secure a warrant.'" *State v. Kirui*, 618 S.W.3d 696, 700 (Mo. App. W.D. 2021) (quoting *Missouri v. McNeely*, 569 U.S. 141, 148–49, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)). Over the years, federal and state courts have held an officer may conduct a warrantless search to "prevent the imminent destruction of evidence" or to "protect an occupant from imminent injury." *Id*. (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)); *see also McClain,* 698 S.W.3d at 533 (holding "Exigent circumstances 'exist if the time needed to obtain a warrant would endanger life, allow the suspect to escape, or risk the destruction of evidence.'") (quoting *State v. West*, 548 S.W.3d 406, 420 (Mo. App. W.D. 2018)). "In those circumstances, the delay required to obtain a warrant would bring about 'some real immediate and serious consequences'"—and so a warrantless search is deemed reasonable. *Lange*,

594 U.S. at 302 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984)). These exceptions to the warrant requirement for incursion onto constitutionally-protected property are "jealously and carefully drawn." *Hastings*, 450 S.W.3d at 486 (quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). For this reason, "[w]e cannot ... excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id*. (quoting *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948)).

"In certain narrow situations, therefore, exigency may be substituted for a warrant, but probable cause must be present before either a warrant or exigency will allow a search." *United States v. Clarke*, 564 F.3d 949, 959 (8th Cir. 2009) (quoting *Kleinholz v. United States,* 339 F.3d 674, 676 (8th Cir. 2003)). Accordingly, this Court first analyzes whether the officers had probable cause. Second, we analyze whether any exigent circumstance permitted the warrantless search.

As to probable cause, when the officer is lawfully present in an area, the odor of an illegal drug alone is sufficient to constitute probable cause to search a premises. *State v. Fuente*, 871 S.W.2d 438, 441 (Mo. banc 1994). Here, the officers smelled a "chemical" odor consistent with methamphetamine use or production. This alone is sufficient to establish probable cause. However, the probable cause determination here is even stronger because—in addition to the odor—police knew three additional incriminating facts: (1) the officers received a report that Appellant and a female companion were bringing propane tanks into their hotel room, (2) the fire alarm in

Appellant's room was activated, and (3) Corporal Brown testified he saw a "light haze" in the hallway. All these facts support a determination of probable cause. *See Clarke*, 564 F.3d at 959 (upholding a probable cause determination under similar circumstances); *United States v. Daniels*, 930 F.3d 393, 401 (5th Cir. 2019) (same).

Turning to the exigent circumstance, "[i]t is well established that … the need to prevent the destruction of evidence … permit[s] police officers to conduct an otherwise permissible search without first obtaining a warrant." *King*, 563 U.S. at 455. "Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain." *Id*. at 461. The police can reasonably infer a defendant is imminently destroying drug evidence if (1) the police have probable cause and (2) they hear (a) a commotion behind the door and/or (b) a toilet flush. *United States v. Fiasche*, 520 F.3d 694, 698 (7th Cir. 2008); *State v. Linder*, 190 N.W.2d 91, 93 (Minn. 1971); *United States v. Gomez*, 633 F.2d 999, 1008 (2d Cir. 1980); *Commonwealth v. Silva*, 802 N.E.2d 535, 545–46 (Mass. 2004); *United States v. Renfro*, 620 F.2d 569, 572, 575 (6th Cir. 1980).

Here, the warrantless search was justified by the compelling need to prevent the imminent destruction of evidence.[5] When Officer Unverferth and Officer Bradford approached Room 216, they had reports that a man and a woman were bringing propane tanks into the room, they knew the fire alarm been activated, and, as they stood on the

[5] Because this Court holds the search was justified by the need to prevent the imminent destruction of evidence, we need not decide whether it was also justified by the need to prevent imminent injury.

second floor, they smelled a "chemical" odor consistent with the use or production of methamphetamine. When Corporal Brown arrived, he saw a "light haze" in the hallway. Officer Unverferth and Officer Bradford identified themselves as police. After this identification, Officer Unverferth testified he heard "some commotion" in the room, "like somebody was moving around in there" and then heard a toilet flush. Officer Bradford also heard a toilet flush. Both officers, based on their training and experience, worried Appellant was destroying evidence of his use or production of methamphetamine by flushing his drugs down the toilet. This evidence was sufficient to present an exigent circumstance.

Appellant claims this holding will create a "toilet flush" exception to the warrant requirement such that the exception would swallow the rule. The officers had probable cause to believe this case involved illegal drug use, a situation in which destruction of evidence occurs "most frequently" because defendants will "flush[] [the drugs] down the toilet." *King*, 563 U.S. at 461. This holding does not create a "toilet flush" exception but rather applies the destruction of evidence exception to the unique facts of this case, the context in which the destruction of evidence occurs "most frequently." *Id*.; *see also Daniels*, 930 F.3d at 401.

The circuit court did not clearly err in determining this exigent circumstance justified the warrantless search. The circuit court did not clearly err in overruling his motion to suppress and admitting evidence and testimony at trial related to the search. Point One is denied.

Point Two: Instructional Error

Party Positions

Appellant argues the circuit court plainly erred in giving Jury Instruction Number 5, using the approved MAI-CR 4th 425.12, because it excused the State from proving its case beyond a reasonable doubt. Specifically, he asserts the instruction only required the jury find he took a substantial step "within a motor vehicle," but does not require the jury to find he possessed the requisite mental state "within a motor vehicle," as required by the statute. The State contends the instruction followed the MAI and required the jury find Appellant both took a substantial step and possessed the requisite mental state "within a motor vehicle."

Analysis

Appellant concedes he did not make a timely objection under Rule 28.03 to Jury Instruction Number 5 and thus seeks plain error review under Rule 30.20. *See State v. White*, 421 S.W.3d 560, 563 (Mo. App. E.D. 2014). Plain error review is a two-step process. First, this Court must determine whether the circuit court's error was facially "evident, obvious, and clear." *State v. Wood*, 580 S.W.3d 566, 579 (Mo. banc 2019) (quoting *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014)). Second, if the appellant "establishes a facially 'evident, obvious, and clear' error, then this Court will consider whether the error resulted in a manifest injustice or miscarriage of justice." *Id*.

Plain error occurs in the instructional context when "the [circuit] court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the

instructional error affected the jury's verdict." *Id*. at 563–64 (quoting *State v. Doolittle,* 896 S.W.2d 27, 29 (Mo. banc 1995)). An instructional error has affected the jury's verdict when the instruction "omits an essential element and the evidence establishing the omitted element was seriously disputed." *Id*. at 564 (quoting *State v. Stover*, 388 S.W.3d 138, 153–54 (Mo. banc 2012)). Accordingly, this Court is "more inclined to reverse in cases 'where the erroneous instruction did not merely include a wrong word or some other ambiguity, but excused the State from its burden of proof on a contested element of the crime.'" *Id*. (quoting *State v. Mangum,* 390 S.W.3d 853, 861 (Mo. App. E.D. 2013)).

Further, "MAI instructions are presumptively valid and, when applicable, *must* be given to the exclusion of other instructions." *State v. Michaud*, 600 S.W.3d 757, 760 (Mo. banc 2019) (emphasis added) (quoting *State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006)). This mandate is so powerful that if the MAI is modified in any way, this Court will presume prejudice. *Kelly v. City of Lee's Summit*, 623 S.W.3d 758, 765 (Mo. App. W.D. 2021). Because modifying an MAI would require the circuit court to wade into presumptive prejudice and risk reversible error, this Court has generally held the "[u]se of an approved instruction cannot, by definition, be deemed plain error[.]" *State v. Kerksiek*, 670 S.W.3d 32, 42 (Mo. App. W.D. 2023) (quoting *State v. Goodwin*, 891 S.W.2d 435, 438 (Mo. App. W.D. 1994)). However, "there is an exception 'where the MAI is not in 'proper form' because it fails to comport with substantive law.'" *Id*. (quoting *State v. Dominguez-Rodriguez*, 471 S.W.3d 337, 343 (Mo. App. E.D. 2015)).

The elements for first-degree drug trafficking are in section 579.065 RSMo Cum. Supp. 2020. Under the facts of this case, a person commits first-degree drug trafficking if

the person knowingly attempts to manufacture or produce more than 30 grams of any material or mixture containing any quantity of methamphetamine. Section 579.065.1(8). This specific conduct usually constitutes a class B felony. Section 579.065.2. However, if the defendant commits such an act "within a motor vehicle," the classification is increased to a class A felony. Section 579.065.3(9).

First-degree drug trafficking's approved instruction, when charged as an attempt crime, is MAI-CR 4th 425.12. Here, Jury Instruction Number 5 contained the verdict director for the first-degree drug trafficking charge and stated:

> As to Count 1, [i]f you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about May 31, 2022, in the County of Ste. Genevieve, State of Missouri, [Appellant] possessed more than 30 grams of any material or compound or mixture or preparation, containing any quantity of Methamphetamine, a controlled substance, *and*
>
> Second, that *such conduct* was a substantial step toward the commission of the offense of trafficking in the first degree by attempting to manufacture or produce more than 30 grams of any material or compound or mixture or preparation containing any quantity of Methamphetamine, a controlled substance, *and*
>
> Third, [Appellant] *did so* within a motor vehicle, *and*
>
> Fourth, [Appellant] *engaged in such conduct* for the purpose of committing such trafficking in the first degree,
>
> then you will find [Appellant] guilty of trafficking in the first degree under this instruction.
>
> …
>
> A person commits the offense of trafficking in the first degree of a controlled substance if he or she knowingly manufactures or produces more than 30 grams [of] any material or compound or mixture or preparation

> containing any quantity of Methamphetamine, knowing of the substance's content and character.

(Emphasis added). Appellant concedes Jury Instruction Number 5 follows the approved MAI, but contends it conflicts with section 579.065. He argues the "within a motor vehicle" language in paragraph Third is not connected to the mental state element in paragraph Fourth, allowing the jury to find he only committed the substantial step within the motor vehicle, without requiring a finding he possessed the requisite mental state within the motor vehicle. This Court disagrees.

When interpreting an MAI, this Court construes an "and" as a conjunctive. *Ball v. Allied Physicians Group, L.L.C.*, 548 S.W.3d 373, 389 (Mo. App. E.D. 2018); *see also Goff v. St. Luke's Hosp. of Kan. City*, 753 S.W.2d 557, 564 (Mo. banc 1988). In *Ball*, the instruction deviated from the MAI and omitted the conjunctive "and" between paragraphs First and Second. *Id*. at 389. The defendants argued this omission misdirected the jury because it did not link the two paragraphs, thus allowing the jury to impose liability without finding both paragraphs applied. *Id*. at 389–90. The omission did not prejudice the defendants, this Court held, because other conjunctive language, like the "thereby" in paragraph Second, "refer[red] the jury back to paragraph First" thus "necessarily linking them." *Id*. at 390. Accordingly, this Court held the omission of the "and" did not prejudice the defendants and was not plain error. *Id*.

To convict Appellant, paragraph First required the jury to find he "possessed more than 30 grams of any … mixture … of Methamphetamine … *and*," paragraph Second required the jury to find "*such conduct* was a substantial step towards the commission of

the offense … *and*," paragraph Third required the jury to find he "*did so* within a motor vehicle, *and*" paragraph Fourth required the jury to find he "*engaged in such conduct* for the purpose of committing such" offense. (Emphasis added). In sum, paragraphs First, Second, and Third required the jury to find he (1) possessed more than 30 grams of a methamphetamine mixture, (2) which act was a substantial step towards the commission of the offense, and (3) he committed such substantial step within a motor vehicle. Importantly, paragraph Fourth required the jury find he "engaged in such conduct," i.e., possessed more than 30 grams of a methamphetamine mixture, thereby taking a substantial step towards the commission of first-degree drug trafficking, within a motor vehicle, "for the purpose of committing such" offense.

The conjunctive "and" throughout, and the conjunctive language of "engaged in such conduct," links the "within a motor vehicle" finding in paragraph Third with the mental state finding in paragraph Fourth, indicating they are happening *together*. The instruction did not excuse the State from sufficiently proving Appellant possessed the requisite mental state "within a motor vehicle" beyond a reasonable doubt.

The circuit court did not plainly err in giving Jury Instruction Number 5. Point Two is denied.

Point Three: Sufficiency of Evidence for First-Degree Drug Trafficking

Party Positions

Appellant argues the State did not sufficiently satisfy the substantial step requirement for first-degree drug trafficking because additional steps were needed to complete the offense. As such, he argues he took only an "intermediate step," not a

substantial one. The State argues mere possession of bi-phase liquid methamphetamine is a substantial step toward committing first-degree drug trafficking.

Analysis

The State charged Appellant with attempting to commit first-degree drug trafficking. *See* section 579.065. Traditionally, under the common-law test for attempt, the State had to demonstrate the defendant "approach[ed] the consummation" of the offense. *State v. Reyes*, 862 S.W.2d 377, 382 (Mo. App. S.D. 1993) (overruled by *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999)). And if the defendant lacked the "present ability to consummate the offense," then he could avoid criminal liability. *Id*. at 387. However, the Legislature has amended the common-law test for attempt and enacted its own: the substantial step test. *State v. Molasky*, 765 S.W.2d 597, 600 (Mo. banc 1989). Under this test, mere possession of materials "designed specifically for an unlawful purpose or that could not serve a lawful purpose under the circumstances" would constitute a substantial step towards the commission of producing illegal drugs. *State v. Wurtzberger*, 265 S.W.3d 329, 336 (Mo. App. E.D. 2008) (quoting *State v. Farris*, 125 S.W.3d 382, 387 (Mo. App. W.D. 2004)).

Under the common-law test for attempt, Appellant could argue "additional steps" were needed before he could actually manufacture and traffic methamphetamine. His argument is meritless under the statutory substantial step test. The police recovered 141.76 grams of materials or mixtures containing methamphetamine from Appellant's person and his truck, most of which was bi-phase liquid methamphetamine. Narcotics Detective Shannon Thompson, of the Mineral Area Drug Task Force, testified bi-phase

liquids are "two liquids that are stacked on top of each other" because the "bottom layer is heavier than the top layer." He further testified "in methamphetamine labs we find bottles containing bi-phase liquids, and the top layer would typically contain liquid meth after the process." Bi-phase liquid methamphetamine is one of the "final" forms of methamphetamine before it reaches its end crystal state. *See State v. Cady*, 425 S.W.3d 234, 239 (Mo. App. S.D. 2014). Bi-phase liquid methamphetamine is created specifically for the unlawful purpose of manufacturing methamphetamine and could not serve a lawful purpose under the circumstance. *See* section 579.065; *see also State v. Massey*, 60 S.W.3d 625, 627 (Mo. App. W.D. 2001).

Since these materials could not serve a lawful purpose under the circumstances, mere possession of them would constitute a substantial step towards manufacturing methamphetamine. *Wurtzberger*, 265 S.W.3d at 336 (quoting *Farris*, 125 S.W.3d at 387). Thus, this Court must now decide whether the record supports Appellant *possessed* the bi-phase liquid methamphetamine.

To prove possession, the State must establish two elements: "(1) that [the defendant] had conscious and intentional possession of the controlled substance, either actual or constructive, and (2) that [he] was aware of the presence and nature of the substance." *State v. Young*, 603 S.W.3d 305, 310 (Mo. App. E.D. 2020) (quoting *State v. Buford*, 309 S.W.3d 350, 355 (Mo. App. S.D. 2010)). "These prongs may be proven by circumstantial evidence, and may not be entirely independent of each other." *Wurtzberger*, 265 S.W.3d at 336. "A person has actual possession if he has the substance on his person or within easy reach and convenient control." *State v. Thurmond*,

616 S.W.3d 316, 324 (Mo. App. E.D. 2020). Appellant did not have actual possession of the bi-phase liquid methamphetamine found in his truck because it was not on his person or within his easy reach or control. *See State v. Whites*, 402 S.W.3d 140, 142 (Mo. App. W.D. 2013). Accordingly, this Court must determine whether Appellant had constructive possession of the materials.

"When actual possession cannot be shown, the State carries the burden of proving constructive possession coupled with facts buttressing the inferences of possession." *Young*, 603 S.W.3d at 310. "Constructive possession requires, at minimum, 'evidence that the defendant had access to and control over the premises where the controlled substances were found.'" *Thurmond*, 616 S.W.3d at 324 (quoting *State v. Clark*, 490 S.W.3d 704, 709 (Mo. banc 2016)). "If an accused person is in exclusive control of a vehicle, contraband found in that vehicle is presumed to rest within his possession and control." *State v. Barnett*, 595 S.W.3d 515, 523 (Mo. App. E.D. 2020). "If non-exclusive control over the premises is shown, however, further evidence or admission connecting the accused with the illegal drugs is required." *Young*, 603 S.W.3d at 310–11. "The fact that others also have access to an area where drugs are found does not destroy the incriminating fact that a defendant has access to that area." *Id*. at 311.

Here, the State presented sufficient evidence Appellant had exclusive possession over the truck and thus validly raised an inference he had possession and control over the bi-phase liquid methamphetamine found inside it. Officer Bradford testified an independent license plate search revealed the truck was registered to Appellant. He also testified Appellant told him he owned the vehicle.

Despite owning the truck, Appellant argues he jointly possessed the materials because a female companion rode in the car with him. Unlike the traditional joint possession case, there was no direct evidence multiple people were in the vehicle at the same time. *See State v. Woods*, 284 S.W.3d 630, 633 (Mo. App. W.D. 2009) (police stop car with multiple men inside). Appellant asks this Court to infer the female companion rode in the truck because she checked into the hotel with him and because she helped bring items out of the truck and into the hotel. However, this argument ignores this Court's standard of review. This Court accepts "all reasonable inferences that support the verdict, and ignores all contrary … inferences." *State v. Lehman*, 617 S.W.3d 843, 846–47 (Mo. banc 2021) (quoting *State v. Gilmore*, 537 S.W.3d 342, 344 (Mo. banc 2018)). Here, Appellant requests this Court make a contrary inference. While it was possible the female companion rode in the truck with him, it was reasonable for the jury to infer the female companion met him at the hotel and never once exercised control over the truck. This Court thus ignores Appellant's contrary inference.

Because the State sufficiently proved Appellant had exclusive possession over the truck, the jury could reasonably infer the mixtures and materials containing methamphetamine found in the truck were under his possession and control.

However, even if this Court assumes the possession was joint—which it was not—the State still presented sufficient evidence to convict Appellant. When joint control of a vehicle exists, the State must demonstrate "some further evidence or admission connecting the accused with the illegal drugs." *State v. Zetina-Torres*, 482 S.W.3d 801, 807 (Mo. banc 2016) (quoting *State v. Purlee*, 839 S.W.2d 584, 588 (Mo. banc 1992)).

"There are several additional incriminating circumstances that would support an inference of a defendant's knowledge and control of the controlled substance when joint possession exists" such as:

> Finding a large quantity of drugs in the vehicle;
>
> Finding drugs having a large monetary value in the vehicle;
>
> Easy accessibility or routine access to the drugs;
>
> The odor of drugs in the vehicle;
>
> The presence of the defendant's personal belongings in close proximity to the drugs;
>
> Making false statements in an attempt to deceive the police;
>
> The defendant's nervousness during the search;
>
> The defendant's flight from law enforcement;
>
> The presence of drugs in plain view;
>
> Other conduct and statements made by the accused; and
>
> The fact that the defendant rented the vehicle.

Id. (quoting *State v. Stover,* 388 S.W.3d 138, 147 (Mo. banc 2012)).

Here, the State presented sufficient evidence establishing a connection between Appellant and the bi-phase liquid methamphetamine found in his truck. Appellant owned the truck and had routine access to it. Appellant was in close proximity to the illicit materials because he was arrested 5 to 10 feet from the truck. One bottle of bi-phase liquid methamphetamine was in plain view in the back seat of Appellant's truck. Appellant's conduct also indicated a consciousness of guilt. After the officers arrested Appellant, he told them there was "nothing illegal" in the truck. This was obviously false,

as the officers recovered 141.76 grams of materials containing methamphetamine—over four times the minimum weight for first-degree drug trafficking—and the tools and ingredients necessary to manufacture the drug. Appellant also exhibited a consciousness of guilt by fleeing from the police when they found him in a room with methamphetamine smoke and illicit drug paraphernalia. The State thus met its burden to show additional incriminating circumstances supporting an inference of his constructive possession over the bi-phase liquid methamphetamine found in his truck.

Because the State sufficiently proved Appellant had exclusive possession of the truck, the jury could reasonably infer the bi-phase liquid methamphetamine found in the truck was under his constructive possession and control. Because Appellant had possession of materials which served no lawful purpose under the circumstances, he took a substantial step towards manufacturing methamphetamine. *See Wurtzberger*, 265 S.W.3d at 336. Accordingly, the State presented sufficient evidence to support Appellant's conviction for attempted first-degree drug trafficking. The circuit court did not err in denying Appellant's motion for judgment of acquittal and entering a judgment of conviction. Point Three is denied.

Point Five: Sufficiency of the Evidence for Mushroom Possession

Party Positions

Appellant argues the State failed to establish he constructively possessed the mushrooms because it did not sufficiently prove he had joint possession of the drug. He contends the State "provided no pictures or testimony about where the mushrooms were located" and so there was "nothing to support an inference that he was aware of the

mushrooms' presence, much less evidence that he knew of their nature." The State argues it need not prove joint possession because Appellant had exclusive control over his truck and thus had constructive possession of the mushrooms inside it.

Analysis

While it would have been preferable for the police to have photographed the mushrooms along with the other evidence seized from the truck, the State presented sufficient evidence for the jury to believe the officers recovered the mushrooms from Appellant's truck. "[I]f accepted as true by the fact trier, the testimony of a single witness is sufficient to establish any fact[.]" *K.E.S. v. S.R.S.*, 700 S.W.3d 544, 557 (Mo. App. E.D. 2024) (quoting *Guengerich v. Barker*, 423 S.W.3d 331, 341 (Mo. App. S.D. 2014)). Officer Bradford testified he recovered the mushrooms from Appellant's truck and bagged and tagged the mushrooms himself. A Missouri State Highway Patrol criminalist testified the mushrooms contained psilocyn and methamphetamine, both unlawful controlled substances. The jury accepted this testimony as true when it convicted Appellant for possession of a controlled substance.

As explained in Point Three, because the State sufficiently demonstrated Appellant had exclusive possession of the truck, the jury could reasonably infer the mushrooms found in his vehicle were under his constructive possession and control. *See Barnett*, 595 S.W.3d at 523. The State thus presented sufficient evidence to convict Appellant of unlawful possession of a controlled substance. As stated in Point Three, even if we would presume the possession of the mushrooms was joint, additional evidence exists to establish Appellant's knowledge and control of them.

The circuit court did not err in denying his motion of acquittal and entering a judgment of conviction. Point Five is denied.

Point Four: Sufficiency of Evidence for Resisting Arrest Count

Party Positions

Appellant argues there was insufficient evidence to support his resisting arrest conviction. Appellant contends the officers did not attempt to arrest him because they did not have grounds to arrest him nor did they announce their intention to do so. Alternatively, Appellant argues he was not "aware" of the fact they were attempting to arrest him.[6] The State argues the officers had grounds to arrest Appellant when they found him in a room with drug paraphernalia and methamphetamine smoke. The State also argues the jury could have reasonably inferred Appellant jumped through a closed second-floor glass window because he was aware the officers were attempting to arrest him.

Analysis

> Resisting arrest has three elements:
>
> (1) that [Appellant] knew or reasonably should have known that a law enforcement officer was making an arrest or attempting to lawfully detain or stop him; (2) that he resisted this arrest, stop or detention by fleeing from that officer; and (3) that he did so for the purpose of preventing the officer from effecting the arrest, stop or detention.

[6] Although not raised by the parties, this point is multifarious because it contains multiple claims of error in one point. *See Hernandez*, 659 S.W.3d at 619. Because this Court can discern and separate the independent claims, we exercise our discretion to review *ex gratia*. *Id*. at 620.

State v. Jones, 479 S.W.3d 100, 109 (Mo. banc 2016) (quoting *State v. Pierce*, 433 S.W.3d 424, 434 (Mo. banc 2014)). An officer attempts to arrest a person when (1) they have grounds to do so (i.e., an arrest would be lawful under the circumstances) and (2) (a) the officer announces their intention to detain or arrest the suspect or (b) the circumstances indicate the officer is attempting an arrest. *See Pierce*, 433 S.W.3d at 434 ("The evidence was sufficient for the jury to find that Pierce continued running after he dropped the bag that gave the officer probable cause to arrest him and, more importantly, that he continued to run after the officer told Pierce he was under arrest and ordered him to stop."); *Jones*, 479 S.W.3d at 110 ("It is not necessary for the officer to specifically say, 'you are under arrest,' when the circumstances indicate the officer is attempting an arrest.") (quoting *State v. Chamberlin*, 872 S.W.2d 615, 619 (Mo. App. E.D. 1994)); *State v. Hopson*, 168 S.W.3d 557, 561–62 (Mo. App. E.D. 2005) (holding while the officer had no grounds to arrest when the traffic stop began, once the defendant threw baggies of cocaine base out of his car and fled, the officer had grounds to arrest and his pursuit with his emergency lights activated and at a high rate of speed indicated the officer was attempting an arrest).

Here, as to the first element, the officers had grounds to arrest Appellant. They could have lawfully arrested him when they found him in a room strewn with illicit drug paraphernalia in plain view and heavy with methamphetamine smoke. *See State v. Rowland*, 73 S.W.3d 818, 824 (Mo. App. S.D. 2002).

Turning to the second element, the officers need not have yelled "you are under arrest" because the circumstances indicated they were attempting an arrest. The officers

had probable cause to believe Appellant possessed unlawful drug paraphernalia and caused substantial property damage. When the officers chased Appellant after making these findings, the circumstances clearly indicated their intention to arrest him. *See Hopson*, 168 S.W.3d at 561–62 (after a defendant threw a cocaine base baggie from his car, the officer's chase with his emergency lights activated and at a high rate of speed indicated he was attempting an arrest). Appellant cannot avoid criminal liability for his actions merely because he bolted before the officers told him he was under arrest. Such a reading would be a hyper-formalist interpretation of section 575.150 that the Supreme Court of Missouri rejected in *Pierce*, 433 S.W.3d at 434 (holding a defendant is not "immune from arrest (or prosecution for resisting arrest) as long as he runs before the officer attempts to arrest him, nor would such a rule be supported by the language of the statute.").

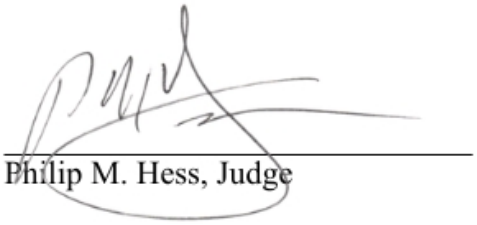
Having established the officers attempted to arrest Appellant, this Court now addresses Appellant's argument he was not "aware of that fact." A defendant's knowledge may be proven by "circumstantial evidence and reasonable inferences drawn from the circumstances surrounding the event." *State v. McCauley*, 528 S.W.3d 421, 429 (Mo. App. E.D. 2017) (quoting *Hopson*, 168 S.W.3d at 562–63). The officers announced themselves as police. When they entered Appellant's hotel room, they were wearing their police uniforms. This is sufficient evidence Appellant knew or should have known the officers were policemen. *Id*. at 428. As to whether Appellant knew or should have known the officers were attempting to arrest him, the officers chased Appellant after they discovered him in a room with illicit drug paraphernalia in plain view and heavy with

methamphetamine smoke. He jumped through a closed second-floor glass window onto the roof, stepped off the gutter, and landed on the ground floor air-conditioning unit, injuring himself. It would have been reasonable for the jury to infer Appellant took these drastic actions because he was "aware" the officers were attempting to arrest him and he wanted to prevent the officers from completing the arrest.

Sufficient evidence existed from which a reasonable jury could find Appellant guilty beyond a reasonable doubt of resisting a lawful arrest. The circuit court did not err in denying Appellant's motion for acquittal and entering a judgment of conviction. Point Four is denied.

Conclusion

The circuit court's judgment is affirmed.



Philip M. Hess, Judge

Michael S. Wright, Presiding Judge and
Virginia W. Lay, Judge concur.