IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	**WD78932**
v.	)	
	)	**OPINION FILED:**
	)	**February 21, 2017**
DANIEL DUOT AJAK,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Buchanan County, Missouri
The Honorable Keith Marquart, Judge

Before: Mark D. Pfeiffer, Chief Judge, and Victor C. Howard, Thomas H. Newton, Lisa White Hardwick, James Edward Welsh, Alok Ahuja, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt, Anthony Rex Gabbert, and Edward R. Ardini, Jr., Judges

Daniel Ajak appeals, following a jury trial, his conviction of misdemeanor resisting arrest, § 575.150,[1] for which he was sentenced to 280 days in the county jail. Ajak argues both that the evidence was insufficient to support his conviction and that the trial court plainly erred in submitting an erroneous verdict director. We affirm.

[1] All statutory references are to the Revised Statutes of Missouri 2000, as amended through the 2016 Cumulative Supplement, unless otherwise noted.

Background[2]

On February 15, 2015, four St. Joseph police officers were dispatched to Ajak's home to investigate an alleged domestic disturbance involving a male subject threatening to kill a woman with a knife. When the officers arrived at the residence, the front door was open, and they saw Ajak standing in the living room. Ajak was advised to put his hands up and not move. Ajak put his hands in front of him, but instead of remaining still, he walked toward the officers. One of the officers handcuffed Ajak at that point to ensure officer safety pending further investigation. Ajak was then escorted to the kitchen and placed in a chair while the officers questioned the other individuals present. Ajak began yelling and screaming, angry about being placed in handcuffs.

After questioning the other individuals present, officers decided to arrest Ajak for domestic assault. Ajak was advised that he was under arrest and would be transported to the local jail. Ajak continued yelling and screaming, claiming that he was the victim and that he wasn't going to jail. One officer located some shoes and additional clothing for Ajak and asked him to put the shoes and clothing on before transport, but Ajak refused. As the officers were walking Ajak outside to the patrol car, Ajak was "pulling and jerking and just trying to get away[,] trying to break [the officer's] grip." In doing so, Ajak knocked the name badge off of one of the officers' uniforms. As they approached the car, Ajak got very close to one officer's face, yelling and screaming, and spit on the officer. Officers were able to secure him in the patrol car and transport him to the jail.

Ajak was subsequently charged, as a persistent misdemeanor offender, with misdemeanor resisting arrest and three counts of third-degree domestic assault. Following a jury trial, Ajak was convicted of misdemeanor resisting arrest and acquitted of two counts of domestic assault. The

[2] We view the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences. *State v. Zetina-Torres*, 482 S.W.3d 801, 806 (Mo. banc 2016).

jury was unable to reach a verdict as to the third count of domestic assault, and the State voluntarily dismissed the charge. The court sentenced Ajak to 280 days in the county jail. Ajak appeals.

Analysis

Ajak raises two points on appeal. First, he argues that the evidence was insufficient to support his conviction in that his arrest was completed and no longer in progress at the time he pulled and jerked while the officers were walking him to the patrol vehicle. Second, he argues that the trial court plainly erred in submitting an erroneous verdict director, which deviated from the statutory elements of resisting arrest and relieved the State of its burden of proof.

A. The evidence was sufficient to support Ajak's conviction.

"To determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal, th[e c]ourt 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. Zetina-Torres*, 482 S.W.3d 801, 806 (Mo. banc 2016) (quoting *State v. Holmes*, 399 S.W.3d 809, 812 (Mo. banc 2013)). Our "review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." *Id*. (quoting *State v. Letica*, 356 S.W.3d 157, 166 (Mo. banc 2011)). "This is not an assessment of whether this Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (quoting *State v. Nash*, 339 S.W.3d 500, 509 (Mo. banc 2011)).

The elements of resisting arrest are simple and straightforward. "A person commits the crime of resisting . . . arrest . . . if[, knowing] that a law enforcement officer is making an arrest, . . . for the purpose of preventing the officer from effecting the arrest, . . . the person . . . [r]esists the arrest . . . by using or threatening the use of . . . physical force." § 575.150.1. Obviously, a person cannot resist with the necessary purpose of *preventing* something (the effectuation of an arrest) if that something has already come to fruition. Likewise, an officer cannot be said to be "*making* an arrest" if the arrest procedure has already concluded. Accordingly, the crux of Ajak's point on appeal is that the arrest had been completed when he allegedly resisted, and thus the elements of resisting arrest were not satisfied. To fully understand Ajak's claim, it is necessary to examine the legislative history of the resisting arrest statute and related sections of Chapter 575.

1. History of § 575.150

Before § 575.150 was enacted, resisting arrest was criminalized under § 557.215, which prohibited interference with a police officer in the performance of his duties. *State v. Thomas*, 625 S.W.2d 115, 122 n.3 (Mo. 1981) ("Section 557.215 has been repealed and Section 575.150 RSMo. 1978 substituted in its stead."). Former § 557.215 provided: "[a]ny person who shall willfully strike, beat or wound any . . . peace officer while such officer is actively engaged in the performance of duties imposed on him by law . . . shall be punished by imprisonment by the department of corrections." Case law has found an officer to be engaged in the performance of duties imposed by law when he or she was making an arrest and interpreted "arrest" to be an ongoing concept: "An arrest by a peace officer . . . continues so long as the arresting officer has the custody and control of the arrestee's movements for the purpose of delivering the person

arrested into incarceration to be held to answer the particular charge." *State v. Mallett*, 542 S.W.2d 584, 587 (Mo. App. 1976).

In 1977, however, Chapter 557 was repealed and replaced by current Chapter 575 of the new criminal code, which contained the new crimes of resisting arrest (§ 575.150), escape or attempted escape from custody (§ 575.200), and escape or attempted escape from confinement (§ 575.210). Mo. Laws 1977 S.B. 60, p. 662, § 1, eff. 1-1-79. The new § 575.200 indicated that "A person commits the crime of escape from custody or attempted escape from custody if, while being held in custody after arrest for any crime, he escapes or attempts to escape from custody." § 575.200.1. The new § 575.210 criminalized the escape or attempted escape from confinement "if, while being held in confinement after arrest for any crime, . . . such person escapes or attempts to escape." § 575.210.1. In the same bill, the legislature added to the criminal code definitions for "custody" and "confinement" but not "arrest." § 556.061. The definition of custody indicated that "a person is in custody when the person has been arrested but has not been delivered to a place of confinement." § 556.061(7). And the definition of "confinement" indicated that "a person is in confinement when such person is held in a place of confinement pursuant to arrest or order of a court." § 556.061(4)(a). The definition of "custody," however, did not identify the parameters of what it meant to be in custody, only *when* in the timeline custody occurred (after arrest). In other words, the new definitions told us only that arrest, custody, and confinement were on a continuum so that there is no gap between them—a person is either being arrested, is in custody, or is in confinement. Thus, once the new crimes were enacted, courts had to distinguish between arrest,

custody, and confinement, as the previous understanding of arrest would have included any time now separately deemed to be custody under our current statutory scheme.[3]

Shortly after the repeal of § 557.215 and the enactment of the replacement provisions in Chapter 575, the Eastern District of this court had the opportunity to address what constitutes "custody." In *State v. Jackson*, 645 S.W.2d 725, 727 (Mo. App. E.D. 1982), the Eastern District held that, for purposes of the new § 575.200 (escape from custody), "'[c]ustody' includes one person's exercise of control over another to confine the other person *within certain physical limits*." (Emphasis added.) Of course, those limits had to be locations other than statutorily defined "place[s] of confinement"; for, once a person was delivered to a place of confinement, he was no longer merely in custody, but was then in "confinement" under the criminal code. § 556.061(4)(a). Missouri courts have long held that "custody" means confinement "within certain physical limits." *See, e.g., State v. Hahn*, 625 S.W.2d 703, 705 (Mo. App. S.D. 1981); *State v. Lorenze*, 596 S.W.2d 762, 764 (Mo. App. S.D. 1980); *State v. Baker*, 199 S.W.2d 393, 396 (Mo. 1947).[4] But they have resisted applying a precise definition to "arrest" for purposes of § 575.150.

In 1991, the Eastern District was asked to determine whether the evidence was sufficient to support a resisting arrest conviction, under § 575.150, where the resistance occurred after the defendant had been handcuffed, placed in the patrol car, and transported to the station. *State v. Shanks*, 809 S.W.2d 413, 417-18 (Mo. App. E.D. 1991), *overruled on other grounds by Joy v.*

[3] "[S]tatutes are not to be interpreted as effecting any change in the common law unless clearly so indicated in the statute." *Martinez v. State*, 24 S.W.3d 10, 17-18 (Mo. App. E.D. 2000). While the legislature clearly intended to separate the concepts of arrest and custody in enacting Chapter 575, nothing in § 575.150 indicates a departure from the common law notion that "arrest" in this context was an ongoing process, rather than an isolated moment in time.

[4] These cases also offer an alternative definition of custody, "actual corporal detention." Because this definition appears to cover what we would now understand to be confinement, that aspect of the definition does not appear to apply.

Morrison, 254 S.W.3d 885 (Mo. banc 2008). After noting the statutory elements of the offense, the court held—in a matter of first impression—that, "it is logical to require that for a valid conviction of resisting arrest pursuant to § 575.150 RSMo 1986, the arrest must be in progress when the 'resistance' occurs." *Id*. at 418. The court further held (consistent with the statutory scheme of Chapter 575) that, "[o]nce the arrest has been fully effectuated[,] a defendant should be considered to be in custody." *Id*. And it determined that the facts before it reflected custody, rather than an ongoing arrest. *Id*. ("We believe [the officer] effectuated the arrest at the time he placed the defendant in his patrol car.").

Several decisions since *Shanks* have attempted to define the parameters of an arrest in order to discern, under a variety of factual scenarios, whether the arrest was fully effectuated at the time of an individual's resistance. But because there is no definition of "arrest" within either § 575.150 or the criminal code, courts turned to § 544.180 for guidance.[5] *See, e.g., State v. Ondo*, 231 S.W.3d 314, 316 (Mo. App. S.D. 2007); *State v. Belton*, 108 S.W.3d 171, 175-76 (Mo. App. W.D. 2003); *State v. Feagan*, 835 S.W.2d 448, 449 (Mo. App. S.D. 1992). Section 544.180 provides, in pertinent part: "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise."

Both Ajak and Judge Newton's dissent rely on § 544.180 to argue that his arrest had already been fully effectuated at the time of his resistance because Ajak was "actually restrained." Notably, despite their citation to § 544.180, each of the post-*Shanks* cases interpreting the resisting arrest

[5] Interestingly, the *Shanks* court did not rely on § 544.180's description of "arrest" and instead turned to case law analyzing whether a defendant had been *constructively* arrested for purposes of the Fourth Amendment. *State v. Shanks*, 809 S.W.2d 413, 418 (Mo. App. E.D. 1991) (quoting *State v. Sidebottom*, 753 S.W.2d 915, 923 (Mo. banc 1988)), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008). It is difficult to imagine how *constructive* arrest cases are relevant to the question of whether a person has resisted an *actual* arrest.

statute also indicated that "'[a]rrest' is susceptible to more than one definition, depending on its context." *Ondo*, 231 S.W.3d at 316; *Belton*, 108 S.W.3d at 175; *Feagan*, 835 S.W.2d at 449. These cases do not support the wholesale incorporation of § 544.180's description of arrest into § 575.150 for purposes of determining when the arrest process is complete, as advocated by Ajak and Judge Newton's dissent. In fact, such a simplistic approach is not supported by either the structure or the language of the statutes.

First, it is important to note that § 544.180 is not part of the criminal code. "'[C]ode offenses' a[re] 'those offenses defined in the criminal code (Senate Bill 60) adopted in 1977, effective January 1, 1979.'" *State v. Danforth*, 654 S.W.2d 912, 919 n.5 (Mo. App. W.D. 1983) (quoting MAI-CR2d 17.00.4). Section 544.180 was first enacted in 1939. Judge Newton's dissent suggests that, because § 544.180 predates the current criminal code, "the Legislature felt no need to define 'arrest' for purposes of the criminal code or Chapter 575." Newton, J., dissenting op. at 8. But, if the legislature intended to import the definition of "arrest" from § 544.180, it could have easily included a cross-reference to that statute in either § 556.061 or § 575.150, but it chose not to do so. Thus, there appears to be no basis for assuming that the legislature intended for § 544.180 to apply to § 575.150. Therefore, the central issue is how we define "arrest" as used in § 575.150, for purposes of determining whether the arrest was ongoing at the time the defendant offered resistance.

Second, though it is true that "[w]hen the legislature enacts a statute referring to terms which have had other legislative or judicial meanings attached to them, the legislature is presumed to have acted with knowledge of these meanings," *Boyd v. State Bd. of Registration for Healing*

Arts, 916 S.W.2d 311, 315 (Mo. App. E.D. 1995), it is also true that, "[w]hen the language of a statute is unambiguous and conveys a plain and definite meaning, the courts 'have no business foraging' among the rules of statutory construction to look for or impose another meaning." *Hudson v. Marshall*, 549 S.W.2d 147, 151-52 (Mo. App. 1977) (quoting *DePoortere v. Commercial Credit Corp.*, 500 S.W.2d 724, 727 (Mo. App. 1973)). For example, in *State v. Harrison*, 390 S.W.3d 927, 928 (Mo. App. S.D. 2013), a defendant convicted of involuntary manslaughter for the death of his pregnant girlfriend's unborn child "argue[d] that his conviction [could not] be squared with a § 194.005 [Uniform Determination of Death Act] definition of death [as the 'cessation of spontaneous respiration' because] fetal respiration . . . could not cease if it never began." In other words, the defendant argued that the court was bound by the definition of "death" in the UDDA when determining his guilt of "caus[ing] the death of another person" for purposes of involuntary manslaughter under § 565.024, because the UDDA predated the involuntary manslaughter statute, and the rule of lenity required the court to interpret the involuntary manslaughter statute in the manner most favorable to the defendant. *Id*. at 929. The Southern District disagreed, noting that, while "ambiguities in statutes in criminal cases must be construed against the State, . . . this rule of strict construction does not require that the court ignore either common sense or evident statutory purpose." *Id*. (quoting *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992)). And the court determined that the definition of "death" under the UDDA had a purpose distinct from that of the involuntary manslaughter statute, such that the definition from the UDDA should not be imported into the involuntary manslaughter statute under the auspice of statutory construction. *Id*.

The purpose of § 575.150, criminalizing resisting arrest in Missouri, "is premised upon public policy considerations against self-help . . . [and] the basic concept that [alleged] unlawful arrests should be resolved in courts, not by violence in the streets."[6] *State v. Maxey*, 661 S.W.2d 641, 642-43 (Mo. App. E.D. 1983); *see also State v. Nolan*, 192 S.W.2d 1016, 1020 (Mo. 1946) (allowing citizens to resist arrest constitutes a threat to both "[t]he security of the people as well as the dignity of the law"); *State v. Merritt*, 805 S.W.2d 337, 339 (Mo. App. E.D. 1991) ("A person does not enjoy the right to resist any arrest, even an unlawful one, by a known police officer."); *State v. Reynolds*, 723 S.W.2d 400, 405 (Mo. App. W.D. 1986) ("Under [§ 575.150.1], appellant had the duty to submit to the arrest."); *State v. Nunes*, 546 S.W.2d 759, 762 (Mo. App. 1977) ("a citizen may not use force to resist any arrest, lawful or unlawful, for such self-help tends to intolerable disorder"). The resisting arrest statute is designed to protect both the officers and the arrestee throughout the entirety of their interaction with one another, from the initiation of the arrest, through the "making" of the arrest, until finally "effecting" the arrest by placing the person in custody. It is not meant to apply to a momentary snapshot in time, such as the handcuffing of a suspect or brief submission to a show of authority. Thus, much like importing the UDDA definition

[6] Judge Newton criticizes our reliance on the purpose of § 575.150, arguing that it leads to an inappropriately broad construction contrary to the general rule that we construe criminal statutes liberally in favor of the defendant. Newton, J., dissenting op. at 20. He then points out that there are other statutes serving the same purpose of protecting law enforcement and the public (*e.g.*, assault of a law enforcement officer and peace disturbance), implying that that purpose should not be read into § 575.150. This argument ignores, however, that an arrestee may resist in ways that threaten the safety of the officer or the public that do not constitute an assault or disturbing the peace and that an additional purpose of § 575.150 not present in the other statutes is also to protect *the arrestee*, who is far less likely to get injured himself if the officers are not required to use force to overcome resistance, as they are statutorily obligated to do under § 544.190.

of "death" to the crime of involuntary manslaughter, importing the description of arrest from § 544.180 is inconsistent with the purposes of § 575.150.[7]

2. The definition of "arrest"

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." § 1.090. As mentioned above, there is no definition of "arrest" in either Chapter 575 or the criminal code.[8] In accordance with § 1.090, our Supreme Court directs us "to consider statutory terms not defined by the legislature in 'their plain or ordinary and usual sense.'" *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002) (quoting § 1.090). It further directs that "[a] dictionary will provide the plain meaning of words used in a statute." *Id*. "If some ambiguity persists in the statute after consulting a dictionary, courts derive

[7] Though several cases have referred to § 544.180 as a "definition" of arrest, it is not set out in a separate definitional section, as the legislature often does when defining terms. Section 544.180 is more accurately described as identifying the necessary conditions of an arrest. It is certainly not a definition of a fully effectuated arrest, which is obviously something distinct from the simple concept of arrest, in light of the statutory language in § 575.150 regarding "making an arrest" and "effecting an arrest."

[8] In Judge Martin's dissent, she argues that "***in the absence of a definition provided by the legislature***, the rule of lenity dictates that an ambiguous criminal statute ***must*** be construed against the government and liberally in favor of a defendant." Martin, J., dissenting op. at 3. There are three flaws in this argument. First, the Missouri Supreme Court mandates, in accordance with § 1.090, that we "consider statutory terms not defined by the legislature in 'their plain and ordinary and usual sense,'" *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002) (quoting § 1.090)—not simply default to the rule of lenity. Second, "the rule of lenity applies to interpretation of statutes only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what the legislature intended." *State v. Chambers*, 437 S.W.3d 816, 820 (Mo. App. W.D. 2014) (quoting *State v. Liberty*, 370 S.W.3d 537, 547 (Mo. banc 2012)). But where, as here, we are able to derive meaning, we are not faced with "'a case of guesswork reaching out for lenity'"; therefore, "[t]he rule of lenity does not apply." *Id*. (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)). Finally, "[a]mbiguity does not result . . . merely because a word has multiple meanings. A word in a statute is ambiguous when that term *in context used* is susceptible of more than one meaning." *St. Louis Christian Home v. Mo. Comm'n on Human Rights*, 634 S.W.2d 508, 512 (Mo. App. W.D. 1982) (emphasis added). "The term of a statute plain and clear as used in the context of enactment to a person of ordinary intelligence is not ambiguous and gives no occasion for construction. That is so although the same term in another context may have a different meaning." *Id*. (internal citation omitted). Unlike Judge Martin, Judge Newton agrees with the majority to the extent that neither of the terms, "arrest" and "effected arrest," are ambiguous under § 575.150. Newton, J., dissenting op. at 15 n.13.

meaning from the intent of the legislature." *Id*. But the Court cautioned that ***"[c]ourts cannot add words to a statute under the auspice of statutory construction."*** *Id*. (emphasis added).

Though, at first blush, § 544.180 seems applicable, importing it into a statute where the legislature did not violates both § 1.090 and the rules of statutory construction laid out by our Supreme Court. According to both § 1.090 and the Supreme Court, we are to apply the plain and ordinary meaning of arrest, as defined in a dictionary. And according to the dictionary definition, "arrest," when used as a noun, means "the taking or detaining of a person *in custody* by authority of law." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 121 (1993) (emphasis added). Thus, under the plain and ordinary meaning, an arrest is ongoing unless and until a person is "in custody."

This is not to say that § 544.180 is wholly irrelevant to the question. While it is relevant to determining whether there is an arrest at all, it is not controlling as to whether an arrest is complete for purposes of § 575.150.[9] *See State v. Lee*, 498 S.W.3d 442, 457 (Mo. App. W.D. 2016) (holding that "[a]n arrest is in progress once the officer is attempting to actually restrain or control the person of the defendant" (quoting *State v. St. George*, 215 S.W.3d 341, 346 (Mo. App. S.D. 2007))). In other words, § 544.180 states a necessary condition for determining whether there is an arrest, but not a mandatory test for finding a fully effectuated arrest.

In *State v. Nicholson*, 839 S.W.2d 593 (Mo. App. W.D. 2003), this court applied § 544.180 in analyzing a sufficiency challenge for a conviction of escape from custody. *Id*. at 596-97. Citing the statutory definition of custody, this court held that the evidence was insufficient to establish

[9] To this end, the Fourth Amendment descriptions of arrest are also relevant. Obviously, one cannot be convicted of resisting arrest if no arrest ever transpires. But the descriptions in neither § 544.180 nor Fourth Amendment cases answer the question of when the process of arrest concludes.

custody because the evidence did not establish the existence of the necessary preceding arrest. *Id*. This court relied on § 544.180 and noted that the defendant was never physically restrained and never submitted to the officer's show of authority; thus, he had never been arrested. *Id.* at 597. Though not expressly stated, the crux of the court's holding was that, without an arrest, there can be no custody. *Id*. The court's reliance on § 544.180 was *not* to determine whether an arrest was still in progress but instead to determine whether there was any evidence that an arrest had occurred at all. And, in determining that there had been no arrest, the court specifically noted that "Mr. Nicholson's ability to absent himself [had not] been impaired." *Id*. at 597. Then, consistent with *Jackson*, the *Nicholson* court cited *Lorenze*, 596 S.W.2d at 764 for its holding that "[c]ustody refers . . . to where one person exercises control over the custody of another which confines such other person within certain limits" to support the determination that the defendant had never been in custody from which he could have escaped. *Nicholson*, 839 S.W.2d at 597 (quoting *Lorenze*, 596 S.W.2d at 764).

In short, though § 544.180 is helpful in establishing the existence of an arrest, it does not answer the question of when an arrest is fully effectuated for purposes of distinguishing between the crimes of resisting arrest and escape or attempted escape from custody. In light of the history of § 575.150, the plain and ordinary meaning of "arrest," and our case law definition of "custody," we hold that "arrest" is a continuing process,[10] evidenced by either actual physical restraint or submission to authority,[11] that remains in progress so long as "the officer is attempting to actually

[10] *State v. Mallett*, 542 S.W.2d 584, 586-87 (Mo. App. 1976).

[11] Section 544.180. The Fourth Amendment cases are slightly broader, requiring only "the application of physical force," rather than "actual restraint." *California v. Hodari D.*, 499 U.S. 621, 624 (1991). But both § 544.180 and the Fourth Amendment cases seem to view arrest as an isolated moment in time, rather than an ongoing process. *See, e.g., Hodari D.*, 499 U.S. at 625 ("[a] seizure is a single act, and not a continuous fact.") (quoting *Thompson v. Whitman*, 85 U.S. 457, 471 (1873)). And there can be no dispute that the phrases, "making an arrest" and "effecting

restrain or control the person of the defendant,"[12] and concludes once the arrestee is confined "within certain physical limits"[13] other than places of confinement.[14]

3. Decision of other states

The majority of cases from other states, addressing resisting arrest statutes with similar language, have concluded that arrest is a process that is not necessarily fully effectuated simply because the Fourth Amendment or another narrow description of arrest has been met.[15]

For example, in *State v. Lindsey*, 973 A.2d 314 (N.H. 2009), the New Hampshire Supreme Court rejected a challenge similar to Ajak's on a conviction of resisting arrest. In *Lindsey*, two

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an arrest" in § 575.150, contemplate "arrest" being a process, rather than an isolated moment in time. It makes sense, in the context of the Fourth Amendment, to evaluate "arrest" as an isolated moment and to identify that moment at the earliest possible time in order to afford the full protection of the amendment. "[C]onstitutional provisions for the security of person and property should be liberally construed." *Boyd v. United States*, 116 U.S. 616, 635 (1886). The primary purpose of § 575.150, however, is to criminalize resistance in order to encourage submission during the ongoing process of an arrest. Thus, defining the *process* of arrest as an isolated *moment* of "arrest" under the Fourth Amendment is simply inconsistent with the purposes of § 575.150.

[12] *State v. Lee*, 498 S.W.3d 442, 457 (Mo. App. W.D. 2016) (quoting *State v. St. George*, 215 S.W.3d 341, 346 (Mo. App. S.D. 2007)).

[13] *State v. Jackson*, 645 S.W.2d 725, 727 (Mo. App. E.D. 1982).

[14] Judge Newton suggests that our definition is overly broad, and he argues that "an expansive definition of an effected arrest will render an arrest incomplete and officers will be deemed to be 'attempting' to exercise control unless or until the suspect submits, in effect by making it virtually impossible for him or her to resist." Newton, J., dissenting op. at 21. But this argument supports our conclusion, as encouraging submission to law enforcement officers is the primary purpose of criminalizing resisting arrest. It is preferable that such submission occur at the outset, rather than follow a period of struggle. But § 575.150 criminalizes any period of struggle or flight from the time an arrest commences and the time in which it is fully effected, which requires either physical restraint or submission, **and** confinement within certain physical limits. Contrary to Judge Newton's suggestion, our approach does not require both physical restraint and submission; it requires only one of the two, coupled with confinement within certain physical limits. The reason neither physical restraint nor submission, alone, is sufficient is because, until confinement within certain physical limits is also obtained, an arrestee may break free of any physical restraint or decide that submission is no longer the preferred course of action.

[15] *See, e.g.*, *Perdue v. Commonwealth*, 411 S.W.3d 786, 793 (Ky. Ct. App. 2013); *Commonwealth v. Dobbins*, 947 N.E.2d 1100, 1101 (Mass. App. Ct. 2011); *State v. Mitchell*, 62 P.3d 616, 619 (Ariz. Ct. App. 2003); *State v. Bay*, 721 N.E.2d 421, 423 (Ohio Ct. App. 1998); *People v. Thornton*, 929 P.2d 729, 733 (Colo. 1996). Each of these states has a similar statutory scheme to our own wherein resisting arrest and escape are distinct crimes. Some break it down further than we do by creating varying degrees of escape or resisting arrest, but all of them contemplate these being separate crimes; thus, courts are required to distinguish between the concepts of arrest and custody.

police officers had reported to a home on a domestic disturbance call, where they found the defendant in the disheveled home with a knife. *Id*. at 315. The police ultimately handcuffed the defendant and two other persons and placed them on the floor. *Id*. The defendant continued to struggle and try to get up. *Id*. On appeal, the defendant claimed that the evidence was insufficient to support his conviction because, once he was handcuffed and placed on the floor, the officer was no longer "seeking to effect an arrest or detention," as the resisting arrest statute required. *Id*. at 316. Like Ajak, the *Lindsey* defendant argued that "all resistance which occurs after the moment in which an individual comes under the control of law enforcement officers is no longer culpable under the resisting arrest statute." *Id*. at 317.

In rejecting the defendant's construction, the court relied on definitions of "effect" (to cause to come into being, to bring about, accomplish, execute), "arrest" (the taking of a person into custody), and "detain" (to hold or keep in or as if in custody). *Id*. at 316-17. Noting that the policy behind the resisting arrest statute was to require persons to "follow the commands of law enforcement . . . , [to] discourage[] self-help[,] and [to] provide[] for the safety of officers,"[16] *id*. at 317 (quoting *State v. Kelley*, 899 A.2d 236, 238 (2006)), the court held that "seeking to effect an arrest . . . include[ed] the entire course of events during which law enforcement officers seek to secure *and maintain* physical control of an individual."[17] *Id*. at 317 (emphasis added) (quotation

[16] As discussed, supra, like New Hampshire, the purpose of criminalizing resisting arrest in Missouri "is premised upon public policy considerations against self-help . . . [and] the basic concept that [alleged] unlawful arrests should be resolved in courts, not by violence in the streets." *State v. Maxey*, 661 S.W.2d 641, 642-43 (Mo. App. E.D. 1983).

[17] "[T]he physical control necessary to a determination that a person is 'in custody' [i]s the level that will reasonably ensure that the person does not leave." *Thornton*, 929 P.2d at 733. *See also Commonwealth v. Knight*, 916 N.E.2d 1011, 1014 (Mass. App. Ct. 2009) ("[E]ffecting an arrest is a process that . . . ends when the person is fully detained by his submission to official force or *placed in a secure location from which he can neither escape nor harm the police officer or others nearby*." (emphasis added)).

omitted). The court "agree[d] with those jurisdictions that hold that effecting an arrest or detention is not necessarily an instantaneous event and should not be assessed by parsing out discrete, snapshot moments in time." *Id*.

The court expressly "reject[ed] the defendant's reliance upon the meaning of 'seizure' within the constitutional context to aid in the interpretation of key terms in the resisting arrest statute." *Id*. The court recognized that, "[w]hile concepts involving the restraint upon a person's liberty, such as arrest, detention and seizure may overlap in various legal contexts, the legislature's intended meaning of the phrase 'seeking to effect an arrest or detention' within the context of the resisting arrest statute controls." *Id*.

The court further noted that it

> need not define precise beginning and end points that encompass the process of "seeking to effect an arrest or detention"[; r]ather, we limit our review of the defendant's insufficiency argument to determining whether a rational jury could have concluded that the process of seeking to effect the defendant's detention was still in progress at the time he began struggling with the officers to get off the floor, even though he had been handcuffed and momentarily left to lie face down on the apartment floor.

Id. at 318.[18]

[18] Other states that have addressed the issue have likewise concluded that the question of whether an arrest has been fully effectuated is a question for the fact-finder. *See, e.g., Mitchell*, 62 P.3d at 618 ("conclud[ing] that a jury question was presented" by the defendant's claim that his arrest had been fully effectuated at the time of his resistance); *City of Columbus v. Calhoun*, 1979 WL 209411, *2 (Ohio Ct. App. Nov. 1, 1979) ("there may be a factual determination required as to whether defendant was in custody, detained or confined at the time of the offending conduct"); *Sample v. State*, 292 S.W.3d 135, 137 (Tex. Ct. App. 2008) (leaving the question of whether the defendant was in custody to "a rational jury"); *State v. Stroud*, 103 P.3d 912, 915 (Ariz. 2005) (suggesting that the question of whether a defendant's arrest was still in progress was for "a reasonable jury" to determine). The same is true here. Using the plain meaning of "arrest," a reasonable jury must make a factual determination whether the defendant to a resisting arrest charge was in custody at the time of his resistance. And that is a determination to which we will defer. Judge Newton seems to concur that this is a factual determination for the jury when he notes that, "a determination as to when actual restraint has actually been achieved likely raises a factual issue in most cases," but then concludes that "[t]his is not that case" without further elaboration. Newton, J., dissenting op. at 19.

As the majority of other states to address the issue have held, our focus, when determining whether the evidence was sufficient to support a resisting arrest conviction, should be on whether the defendant was "in custody" in the sense of being confined within certain physical limits at the time he offered resistance, rather than questioning whether the arrest is complete under an alternate definition of "arrest."[19]

We recognize that, in many cases, these two moments in time will coincide, as they did in *Shanks*. But here, as is reflected by both this opinion and the dissent, they might not. The dissent believes Ajak's arrest was fully effectuated once he was placed in handcuffs and advised that he was under arrest, all of which occurred in the kitchen.[20] Because of this, the dissent argues that Ajak's resistance during the walk to the patrol vehicle came after the arrest was fully effectuated, rendering the evidence supporting his resistance during this time insufficient to sustain his conviction. But, under the plain meaning of "arrest," we must look at whether Ajak was in custody (i.e., confined with certain physical limits) at the time of his resistance in order to discern if the arrest was still "in progress." Because he was not confined within *any* physical limits until he was

[19] Judge Newton criticizes our reliance on *Lindsey* because New Hampshire's definition of "arrest" differs from that found in § 544.180. But this distinction matters only if we are required to apply § 544.180's definition of "arrest" to § 575.150, which we are not. And unlike our statutory scheme, the definition of arrest applied by the New Hampshire court is actually found within the same chapter as its crime of resisting arrest. *See* N.H. Rev. Stat. § 594:1 (2001) (defining "arrest" as "the taking of a person into custody in order that he may be forthcoming to answer for the commission of a crime") and N.H. Rev. Stat. § 594:5 (2001) (identifying the crime of "resisting arrest").

[20] Judge Newton notes that many of the cases from other states "involved resistance that occurred within seconds of handcuffing or other exercise of control, unlike the situation here." Newton, J., dissenting op. at 19. This observation, however, further supports our interpretation of what an effected arrest means. If an arrest could be deemed fully effected upon any brief moment of compliance, regardless of other circumstances, it could decriminalize a variety of bad conduct occurring with the intent to resist, but not escape. For example, in *Belton*, the defendant's arrest would have been deemed fully effected under Judge Newton's interpretation when defendant exited the car and allowed the officer to handcuff him, as those acts constituted submission. *State v. Belton*, 108 S.W.3d 171, 173 (Mo. App. W.D. 2003). But, clearly, the officer did not have the defendant under any sort of physical control, thus freeing the defendant to reenter the car, resist the officer's efforts to remove him, and then flee as he did. *Id*. The resistance need not be immediate; to constitute resisting arrest, the resistance must occur only before the arrestee is confined within certain physical limits.

placed into the patrol car, he was not yet in custody at the time of his resistance.[21] And under the plain meaning of "arrest," until he was in custody, the arrest was still in progress, meaning that the evidence was sufficient to sustain his conviction.

Point I is denied.

B. Ajak has failed to demonstrate manifest injustice from the inclusion of erroneous language in his verdict director.

In his second point, Ajak argues that the trial court plainly erred in submitting Instruction Number 6 (the verdict director for resisting arrest) to the jury because it erroneously included the phrase, "physical interference," as a means by which the jury could find he resisted arrest. Though we agree that the instruction was erroneous, we see no basis for finding a manifest injustice.

As Ajak notes, the Eastern District recently considered the very same claim of error in *State v. Meeks*, 427 S.W.3d 876 (Mo. App. E.D. 2014). While we agree with *Meeks* that § 575.150 lays out two separate crimes—resisting one's own arrest (subsection 1) and interfering with the arrest of another (subsection 2)—and it is apparent that Instruction Number 6 erroneously conflated the two, we disagree that the error here resulted in a manifest injustice, as is required for reversal under the plain error standard of review.

"Plain errors affecting substantial rights may be considered in the discretion of the court when the error has resulted in a manifest injustice or miscarriage of justice." *State v. Chambers*, 481 S.W.3d 1, 7 (Mo. banc 2016). "For instructional error to amount to plain error, it must be clear

[21] Judge Newton states: "It was clear that the officers had ceased ***attempting*** to restrain Mr. Ajak well before they reached the patrol car because two officers escorted him, one on each arm, in handcuffs through the living room and to the front door, across the porch, and down the front steps to the patrol car." Newton, J., dissenting op. at 16. We disagree. By having officers on each of Ajak's arms during the escort to the patrol car, the officers were clearly still attempting to restrain and maintain control over Ajak's movements. Were they no longer attempting restraint, there would have been no need for the officers to have maintained physical contact with Ajak while escorting him to the vehicle.

that the trial court has so misdirected or failed to instruct the jury that manifest injustice or miscarriage of justice has resulted." *Id*. "In short, it must be apparent that the instructional error affected the jury's verdict." *Id*.

In *Meeks*, the Eastern District found that, "because 'physical interference' was included and stated in the disjunctive as an alternative means of resisting, the instruction erroneously gave the jury the option of basing its conviction on 'physical interference' alone," which effectively "relieved [the State] of its burden of proving that Meeks resisted his own arrest by one of the means set forth in the statute." *Meeks*, 427 S.W.3d at 880.

Though it is true that "[a] violation of due process arises when an instruction relieves the State of its burden of proving each and every element of the crime[,] . . . [a] verdict directing instruction that omits an essential element rises to the level of plain error [only] if the evidence establishing the omitted element was seriously disputed." *State v. Cooper*, 215 S.W.3d 123, 126 (Mo. banc 2007). But, "if the evidence establishing the omitted element was not in dispute, the jury's verdict would not have been affected and no plain error relief need be given." *Id*.

Here, unlike in *Meeks* and its progeny,[22] the nature of Ajak's resistance was not disputed at trial. Instead, what Ajak disputed was that he resisted *at all*—not that his resistance was something other than "physical force." *See Cooper*, 215 S.W.3d at 127 (discussing cases finding no plain error where the defense presented was that the defendant committed no crime at all, rather than challenging the element omitted from the verdict director).

[22] *See also State v. Wooten*, 479 S.W.3d 759 (Mo. App. E.D. 2016); *State v. Dudley*, 475 S.W.3d 712 (Mo. App. E.D. 2015) (both relying on *Meeks* in finding plain error in the submission of verdict directors referring to "physical interference" where the defendants were charged with resisting their own arrests).

Furthermore, unlike in *Meeks*, the State here did *not* urge the jury to find that Ajak's actions constituted "physical interference," as opposed to "physical force." In fact, Ajak does not argue that his actions of "pulling and jerking" in an effort to break the officers' grips constituted anything other than physical force.[23] *See Belton*, 108 S.W.3d at 175 (concluding that "physical force" includes "exerting the strength and power of [one's] bodily muscles to overcome [an officer's] attempts to [control an arrestee's actions.]"). And, because that issue was *not* disputed at trial, there was simply no evidence presented that would have supported a finding that Ajak resisted in some manner that would constitute "physical interference" but not "physical force."

In *Meeks*, the Eastern District noted that "[w]hatever constitutes 'physical interference,' we must presume it is something different than 'physical force.'" *Meeks*, 427 S.W.3d at 881 n.3. Though we can envision a distinction when evaluating the actions of a third party, we find it difficult, at best, to conceive of a scenario in which an arrestee can "physically interfere" with his own arrest without simultaneously resisting by use of "physical force," as that phrase is understood by our courts. The absence of any sort of meaningful distinction between the phrases in this context should preclude a finding of manifest injustice.

[23] "To determine prejudice, the Court considers the facts and instructions together." *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988). The only other conduct Ajak engaged in while the arrest was in progress was yelling and spitting on an officer. Though this conduct would not constitute "physical force," as that phrase has been described in prior cases, it also could not constitute "physical interference" necessary to support a conviction under § 575.150. *See State v. Miller*, 172 S.W.3d 838, 846 (Mo. App. S.D. 2005) ("'physical force' [does not] include virtually any action or inaction that subjectively offends an officer"). Before conduct can be deemed "physical interference" under § 575.150.1(2), it must be done "for the purpose of preventing the officer from effecting the arrest." *Cf. City of Columbia v. Hardin*, 963 S.W.2d 6, 10 (Mo. App. W.D. 1998) (finding that defendant's action of putting her arms around her son, whom officers were attempting to arrest, did not constitute "physical interference" insofar as her purpose was "to comfort him because he was scared."). Because spitting on an officer is unlikely to prevent an arrest, it does not seem reasonable that preventing the arrest was Ajak's purpose in spitting on the officer. Thus, the only evidence that the jury was given to support the conviction supported a finding that Ajak used "physical force."

In short, though the instruction was erroneous insofar as it potentially omitted an essential element, the omitted element was not disputed at trial; thus, there is no basis for finding a manifest injustice.

Point II is denied.

Conclusion

The evidence was sufficient to support Ajak's conviction of resisting arrest. Ajak has failed to demonstrate either a manifest injustice or a miscarriage of justice from the instructional error. The trial court's judgment is affirmed.

/s/ Karen King Mitchell
Karen King Mitchell, Judge

Chief Judge Mark D. Pfeiffer, and Judges James Edward Welsh, Lisa White Hardwick, Anthony Rex Gabbert, and Edward R. Ardini, Jr., concur.

Judge Welsh writes a separate concurring opinion, in which Judge Gabbert joins.

Judge Thomas H. Newton dissents in a separate opinion, in which Judges Victor C. Howard, Alok Ahuja, Cynthia L. Martin, and Gary D. Witt join.

Judge Martin writes a separate dissenting opinion, in which Judge Ahuja joins.

In the Missouri Court of Appeals Western District

STATE OF MISSOURI, **Respondent,** **v.** **DANIEL DUOT AJAK,** **Appellant.**	**WD78932** **OPINION FILED:** **February 21, 2017**

Concurring Opinion

I concur in the majority opinion and write only to express my own opinion that effecting an arrest may overlap having a person in custody. The fact that the legislature has created a crime for the escape or attempted escape from custody does not mean that resistance for the purpose of impeding an officer from effecting an arrest (with no hope of escape) cannot be punished. As noted by the majority, the phrases "making an arrest" and "effecting an arrest" in section 575.150 contemplate "arrest" being a process, rather than any given isolated moment in time—isolated moments such as being handcuffed in the kitchen or being delivered to a police car. As a part of the ongoing process of an arrest, an officer would be effecting an arrest up until the detainee is delivered to a place of confinement.

Where the majority and the Eastern District of this court in *State v. Shanks*, 809 S.W.2d 413 (Mo. App. 1991), get side tracked is in equating resisting arrest by force with escape or attempted escape. I would concede that resisting arrest by fleeing, attempted escape from custody, and attempted escape from confinement may very well fit in a continuum and that one crime would necessarily end where the next begins. In this case, however, there is no indication that Ajak was attempting to flee or escape. He was resisting arrest by force. He was seeking to prevent his arrest by being physically obstreperous. Whether his resistance occurs on the way to the patrol car, in the patrol car, or from the patrol car to his place of confinement is of no consequence. In all three instances, he is resisting his arrest.

Just as effecting an arrest may extend beyond the initial exercise of control of a person, so it may extend beyond the actual custody of a person. Although unnecessary to the disposition of this case, I would find that resisting arrest could occur at any point until the detainee is delivered to a place of confinement.

/s/ James Edward Welsh
James Edward Welsh, Judge

In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI,	)	
	)	**WD78932**
Respondent,	)	
v.	)	**OPINION FILED:**
	)	
DANIEL DUOT AJAK,	)	**February 21, 2017**
	)	
Appellant.	)	

DISSENTING OPINION

Giving "effected arrest" an expansive definition, the majority misinterprets a statute by adding language to it and seeks guidance from other jurisdictions with different statutory provisions.[1] I respectfully dissent.

[1] The circumstances underlying this case illustrate the potential dangers of an overly broad interpretation of an "effected arrest." Mr. Ajak allowed the officers to detain him with handcuffs in his own home, but objected vociferously as they investigated a purported domestic disturbance that he contended had victimized him. He continued to yell and scream when told he was arrested for investigation of domestic assault. None of this conduct constituted resisting arrest. Somehow, between the time he left his kitchen under police escort, without shoes or clothing appropriate to the weather, and until he was placed in a holding cell, he sustained injuries requiring hospital attention. While he was charged with resisting arrest for allegedly jerking and twisting as he was being placed into the patrol car, domestic assault charges were not added until months later. Had he not been so charged, he could not have been convicted of resisting arrest only. *See State v. Dossett*, 851 S.W.2d 750, 753 (Mo. App. W.D. 1993) (Lowenstein, J., concurring) (noting that officer did not arrest the defendant "for any violation stemming from what the officer saw," thus reversal of resisting arrest conviction was appropriate). The testimony of the State's witnesses, Mr. Ajak's girlfriend and her adult children whom Mr. Ajak housed and supported financially, was insufficient to prove the State's domestic-assault allegations, so he was acquitted of these charges. Still, Mr. Ajak was convicted of resisting arrest; he served 280 days in jail.

The State posited to the jury during opening statement that Mr. Ajak was under arrest as he sat handcuffed in his kitchen and was told in the presence of six armed police officers that he was being arrested for investigation of domestic assault. Specifically, during its opening statement, the prosecutor stated that the evidence would show that Mr. Ajak was "placed under arrest" once the police officers concluded their investigation in the home and before they took him out to the "patrol unit." To that point, Mr. Ajak's only adverse conduct had consisted of yelling. When his counsel argued to the court that the evidence was insufficient at the close of the State's case and at the close of all the evidence, she stated that yelling was not enough to establish that Mr. Ajak had tried to prevent the officers from arresting him and that the State failed to prove that he was trying to break away or flee.[2] On appeal, Mr. Ajak argues that his arrest was fully effectuated when the officer, having already handcuffed him, told him he was under arrest for investigation of domestic assault. Any conduct that occurred before the arrest did not rise to the level of physical force or violence. The alleged resistance of jerking and twisting "could not be considered resistance to his arrest," because his arrest was complete or effectuated before this conduct occurred. The State argues on appeal that it was when the officers attempted to place Mr. Ajak in

[2] Counsel also argued before the *en banc* Court that Mr. Ajak's twisting and jerking conduct outside at the patrol car did not constitute the physical force or violence required to prove resisting arrest, suggesting that physical action not culminating in breaking away or fleeing is insufficient to prove resisting arrest. Our courts have rejected this interpretation, finding that simply drawing an arm back or yanking a hand away can constitute the physical force required to prove resistance. *State v. Reynolds*, 723 S.W.2d 400, 404 (Mo. App. W.D. 1986) (stating that this was "a sufficient amount of physical force under the statute to constitute resisting arrest").

custody, in the patrol car, that he resisted. Thus, his arrest was still in progress when the resistance occurred, and the trial court properly submitted the case to the jury.

I. Submissibility

With respect to the first point, because this appeal raises trial court error in overruling a motion for judgment of acquittal at the close of evidence and challenges the sufficiency of the evidence to prove guilt beyond a reasonable doubt for resisting arrest, the challenge goes to the submissibility of the case. *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993) (noting that "any guilty verdict subsequently rendered by the jury is wholly irrelevant to the question of whether the case was sufficient to go to the jury at all"). Our review is limited "to determining whether the evidence is sufficient to persuade any reasonable juror as to each of the elements of the crime, beyond a reasonable doubt." *Id.* In this respect, we turn to the statute to compare the evidence that has been introduced with the statutory elements of the crime. *See, e.g., State v. Liberty*, 370 S.W.3d 537, 543-44 (Mo. banc 2012) (determining whether evidence was sufficient to convict defendant of promoting child pornography, court discusses evidence, sets forth applicable statute, and analyzes whether conduct fit within statutory definition). Accordingly, "it is first essential to define what constitutes [resisting an arrest]." *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999), *holding modified on other grounds by State v. Claycomb*, 470 S.W.3d 358 (Mo. banc 2015). This appeal hinges on the *timing of the resistance* in relation to the arrest and what constitutes an effected arrest under the statute.

II. Statutory Elements

Under section 575.150,

> 1. A person commits the crime of resisting or interfering with arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:
>
> (1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer; or
>
> (2) Interferes with the arrest, stop or detention of another person by using or threatening the use of violence, physical force or physical interference.
>
> 2. This section applies to:
>
> (1) Arrests, stops, or detentions, with or without warrants;
>
> (2) Arrests, stops, or detentions, for any crime, infraction, or ordinance violation; and
>
> (3) Arrests for warrants issued by a court or a probation and parole officer.

As charged here, the elements for resisting arrest can be set forth as (1) knowing that an officer is making an arrest, and (2) intending to prevent the officer from effecting the arrest, (3) a person resists with the use or threat of use of violence or physical force.[3] With no question before this Court about whether Mr. Ajak knew he was under arrest or used physical force when he pulled and tried to jerk away from the officers,

[3] While I would not need to address the second point on appeal (erroneous verdict director that included "physical interference" in the instruction), I would observe that a conviction for resisting one's own arrest requires proof of the use or threat of use of violence or physical force. Interference with a third party's arrest includes, with those alternative requirements, "physical interference." The prosecutor argued in closing that Mr. Ajak resisted arrest by engaging in a number of behaviors,

only the second element is at issue, and the Legislature has given no definitional guidance in this chapter as to what constitutes an effected arrest.[4]

A. Statutory Interpretation

"The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007). We derive legislative intent "from the words of the statute itself." *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002). And we consider "the words used in their plain and ordinary meaning." *State v. Wahby*, 775 S.W.2d 147, 151 (Mo. banc 1989). We also "must not be guided by a single sentence . . ., but [should] look to the provisions of the whole law." *State v. Haskins*, 950 S.W.2d 613, 615 (Mo. App. S.D. 1997). We presume that the Legislature is aware of existing law. *Frye v. Levy*, 440 S.W.3d 405, 420 (Mo. banc 2014). And, of particular relevance in the context of a criminal statute, where alternative interpretations are equally plausible, as I believe they are here, our statutory canons require that we adopt the interpretation most favorable to the defendant. *See State v. Chase*, 490 S.W.3d 771, 776 (Mo. App. W.D. 2016).

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including those that could constitute physical interference, from the moment police officers entered the home and until he was placed in a holding cell at the law enforcement center. To secure a conviction of someone charged with resisting his or her own arrest, however, requires proof of use or threat of use of violence or physical force to prevent officers from effecting an arrest—not proof of physical interference, and certainly not physical interference during detention, custody, or confinement. That the circuit court instructed the jury on an element not part of a resisting-arrest case, I would suggest, is some evidence of an erroneous interpretation of the statute. Additional discussion of the second point on appeal appears following my opinion on point one.

[4] Nor has the Missouri Legislature, other than defining "arrest" in Chapter 544, ever set forth a statutory definition for an "arrest" in the former criminal code (RSMo Cum. Supp. (1979)), its predecessors, or Chapter 575.

B. Offenses Against the Administration of Justice

Section 575.150 addresses the offenses of resisting "arrest, detention, or stop." It can be viewed as part of a timeline marking the start of an offender's involvement with the criminal justice system, an involvement that may lead to and end in confinement. The other offenses on this timeline—collectively constituting "offenses against the administration of justice"—are escape or attempted escape from custody, § 575.200, which occurs while the offender is "being held in custody after arrest for any crime," and escape or attempted escape from confinement, § 575.210, which occurs while an offender is "being held in confinement after arrest for any crime."

The points on this timeline do not overlap; one begins when the other ends.[5] The Legislature has defined "custody" to mean that "a person is in custody when the person *has been arrested* but has not been delivered to a place of confinement." § 556.061(7) (emphasis added). Thus, "custody" begins *after* an arrest has concluded, and ends when the arrestee has been delivered to a place of confinement. Similarly, the Legislature defined "confinement" to mean that "[a] person is in confinement when such person is held in a place of confinement pursuant to arrest or order of court . . ." § 556.061(4). Thus, "confinement" begins when "custody" ends—at the moment an arrestee has been delivered to, and is being held in, a place of confinement. Further underlining its intent to define confinement as a particular place, the Legislature has classified the crime of escape or attempted escape from confinement depending on whether the place from

[5] In this regard, I respectfully disagree with the concurring opinion, which would render the statute that criminalizes escape or attempted escape from custody superfluous by finding that an arrest is not effected until the actor has been delivered to a place of confinement.

which the offender escapes is the Department of Corrections or a county or private jail or city or county correctional facility. § 575.210.2 & .3.

The distinction between points on the timeline is significant where the evidence does not support the actual crime charged. For example, in *State v. Rickman*, 23 S.W.3d 914 (Mo. App. S.D. 2000), the court reversed a conviction for escape from custody because the evidence showed that the defendant had escaped from the Lawrence County jail following his arrest on a number of felony charges. Because he had been delivered to a place of confinement before he escaped, the court held that the defendant could not be convicted, as charged, for escape from custody, stating, "Due process requires that a defendant cannot be charged with one offense and be convicted of another." *Id.* at 915, *see also State v. Edsall*, 781 S.W.2d 561, 564 (Mo. App. S.D. 1989) (setting forth "the principle that where the act constituting the crime is specified in the charge the State is held to proof of that act"). *Rickman* illustrates how the delineations between each part of this timeline are not strictly matters of fact for the jury to decide. Arrest, custody, and confinement are discrete events along the timeline, and it cannot be left to a jury alone to decide whether the evidence is legally sufficient to show that one event has ended and the next has begun. In rare cases, the evidence is so clear that the issue can be decided as a matter of law—where no reasonable person could conclude that an arrest had not been made when the resistance occurred, the question need not be submitted to the factfinder.

The court has a gatekeeping role in deciding whether the evidence is sufficient to show that the resistance or attempt to escape has occurred, as charged, before the arrest has been effected, an arrestee is in custody, or an arrestee has been delivered to

a place of confinement. If, as here, the evidence is not sufficient, the case is not submissible to the jury.

C. Definitions

1. Terms of Art

While the Legislature has defined "custody" and "confinement," it did not define "stop," "detention," or "arrest" in this chapter, and I would presume that lawmakers left the terms undefined with the understanding that these words are "terms of art" representing legal concepts that have a well-established legal meaning. It is also apparent that the Legislature felt no need to define "arrest" for purposes of the criminal code or Chapter 575, because it has included the section 544.180 definition of arrest in every criminal procedure section of the state's statutory law since 1879. RSMo 1879 § 1826. "Arrest" would not need to be defined in the crimes' sections of the law because it is a criminal procedure and not a substantive crime. Still, the Legislature, by separately addressing conduct at each point on the timeline, has unmistakably indicated its intent to distinguish among resisting a stop, a detention, and an arrest, and escaping or attempting to escape custody and escaping or attempting to escape confinement. And "'[w]hen the legislature enacts a statute referring to terms that have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action.'" *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825-26 (Mo. banc 2014)) (quoting *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006)); *see also, e.g., Estate of Nelson v. Mo. Dep't of Social Servs.,* 363 S.W.3d 423, 426 n.5 (Mo. App. W.D. 2012); *Boyd v. State Bd. of Registration for Healing Arts*, 916

S.W.2d 311, 315 (Mo. App. E.D. 1995) (construing "knowingly," court relies on other legislative enactments using the term, as well as judicial definitions to find a scienter requirement under a statute addressing fraud under Medicare or Medicaid); and § 1.090 (providing that "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import").

Section 575.150 was first enacted in 1977. Before that date, the U.S. Supreme Court had given shape to its undefined terms in seminal cases such as *Terry v. Ohio*, 392 U.S. 1 (1968). This case gave content to the meaning of a "stop" by recognizing that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22. The U.S. Supreme Court also described the concept of "detention" as "an investigative 'seizure' upon less than probable cause for purposes" that include interrogation. *Id*. at 905 n.16. Called on to determine whether FBI agents had probable cause to believe that a crime had been committed before they arrested the defendants, the Court in *Henry v. United States*, 361 U.S. 98, 103 (1959), stated that when the agents "interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." *See also California v. Hodari D.*, 499 U.S. 621, 624-28 (1991) (stating that an arrest under the Fourth Amendment requires either touching or submission in addition to a show of authority and that a seizure of the person is a single act, rather than an ongoing or continuous fact) (citing *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862) ("[A]n officer *effects an arrest* of a person whom he has authority to arrest by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding

him") (emphasis added), and *Thompson v. Whitman*, 18 Wall. 457, 471, 21 L. Ed. 897 (1874) ("A seizure is a single act, and not a continuous fact")); *Terry*, 392 U.S. at 19 n.16 (stating, "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred").[6]

The protection against unreasonable searches and seizures accorded under the U.S. Constitution led the courts to define the boundaries of lawful police conduct when effecting a stop, or detaining a person, or placing someone under arrest, and to determine whether evidence seized during a stop, detention, or arrest is admissible in evidence. While the facts may differ, plainly, a stop, a detention, and an arrest, addressed by our Legislature in one statutory provision, are police actions that occur early on the timeline, before a person is in police custody. I look to Fourth Amendment jurisprudence mainly to shed light on where an arrest falls on the timeline of what the Legislature has defined as distinct offenses against the administration of justice.

2. Section 544.180

The legal definition for an "arrest" is "[a] seizure or forcible restraint, esp. by legal authority." BLACK'S LAW DICTIONARY (10TH ED. 2014). Similarly, the Legislature has defined arrest in section 544.180 by stating that "[a]n arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the

[6] The U.S. Supreme Court more recently enunciated what constitutes a seizure under the Fourth and Fourteenth Amendments to the U.S. Constitution by according continuing viability to *California v. Hodari D.*, 499 U.S. 621 (1991), and *United States v. Mendenhall*, 446 U.S. 544 (1980), in *Kaupp v. Texas*, 538 U.S. 626, 629-30 (2003) (stating that a seizure "occurs when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."'").

officer, . . .” Under this definition, “[a]n arrest is ‘actual restraint’ of the defendant *or* ‘his submission to the custody of the officer.” *Minor v. Dep't of Revenue*, 136 S.W.3d 825, 827 (Mo. App. E.D. 2004) (emphasis added); *see also Johnson v. Mo. Dep’t of Health & Senior Servs.*, 174 S.W.3d 568, 581 (Mo. App. W.D. 2005) (stating that, in the absence of a statutory definition for a particular term or phrase, “a definition used in a similar legal context may be employed”). Because no argument has been made that Mr. Ajak submitted to the officers’ custody, our concern is his actual restraint and when that occurred. In the context of addressing the right of an officer to use “all necessary means to effect” an arrest under section 544.190, which since 1879 has been paired with the statutory definition of “arrest,”[7] one Missouri court has observed, “The law expects an officer in making an arrest to be the aggressor and imposes the duty to press forward to overcome all resistance to bring the arrestee under *physical restraint*.” *State v. Nunes*, 546 S.W.2d 759, 763 (Mo. App. 1977) (emphasis added).

Because this Court has indicated that, in the absence of a statutory definition for a particular term or phrase, “a definition used in a similar legal context may be employed,” it is fair to say that the touchstone of an effected arrest in Missouri is bringing the arrestee under physical restraint or control.[8] *Johnson*, 174 S.W.3d at 581. And thus that resisting arrest means the use or threat of use of violence or physical

[7] RSMo 1879 § 1827.

[8] The dictionary definition for restraint includes “a means, force or agency that restrains, checks free activity, or otherwise controls” and “a deprivation of liberty.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1937 (1971). While a factual issue could be presented as to when restraint, control, or deprivation of liberty actually occurs, this is not that case.

force with the purpose of preventing a law enforcement officer from bringing the arrestee under physical restraint or control.[9]

Analyzing what constitutes "actual restraint," this Court noted in *State v. Nicholson*, 839 S.W.2d 593, 596-97 (Mo. App. W.D. 1992), that U.S. Supreme Court precedent (*Hodari D.*) and section 544.180 are consistent in defining "an arrest as the suspect's actual restraint by force or the suspect's submission to the officer's custody," and ruled that Mr. Nicholson was not under arrest when he fled because the officer did not in any way *limit his freedom or attempt to control him*, such as by attempting to handcuff him, placing her hand on him, or drawing a weapon to restrain his mobility.[10] While *Nicholson* involved an escape-from-custody charge, one of its elements is escape after arrest, which requires a determination that an arrest has been made. § 575.200. In the absence of a statutory definition for "actual restraint," the focus in *Nicholson* on the concept of "actual restraint" as control or a limitation on freedom by, for example, handcuffing, touching, or drawing a weapon is instructive. In cases discussing the

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[9] At least one Missouri-based legal commentator has indicated that the section 544.180 definition is applicable in a number of common situations, including,

> [when] (1) it is contended than an "arrest" occurred before the officer became aware of the facts justifying an arrest; (2) a suit is brought for false arrest against an officer or private individual; (3) an individual is prosecuted for resisting arrest or for assaulting or killing an officer purportedly in the act of arresting; (4) an individual is prosecuted for the crime of escaping from arrest.

John Scurlock, *Arrest in Missouri*, 29 UNIV. OF K.C. L. REV. 117, 120 (1961).

[10] Of note is that we did not distinguish in this case between the meaning of an arrest under the Fourth Amendment and its meaning in the context of the crimes delineated in Chapter 575.

"actual restraint" element of an arrest, the courts generally find that a defendant is under arrest from the time an officer takes control of his or her movements.[11]

3. *Shanks* Framework

Our courts have considered whether resisting arrest has been proven in cases presenting their own unique circumstances. *State v. Shanks*, 809 S.W.2d 413 (Mo. App. E.D. 1991), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008), provides a useful starting point.[12] Interpreting section 575.150, the court stated that, as a matter of logic, "for a valid conviction of resisting arrest . . . the arrest must be *in progress* when the 'resistance' occurs. Once the arrest has been fully effectuated a defendant should be considered to be in custody." *Id.* at 418. The court in *Shanks,*

[11] *See, e.g.*, *State v. Sampson*, 408 S.W.2d 84, 87 (Mo. 1966) (grabbing the arm of a man who reached into his pocket at the approach of police officers was sufficient to constitute an arrest, thus allowing the admission into evidence of items found when searching his person); *State v. Stokes*, 387 S.W.2d 518, 522 (Mo. 1965) (telling defendant to stand up was sufficient to control his movements, thus search of his person was incident to a lawful arrest and trial court did not err in admitting articles found into evidence). One of the cases the majority finds controlling on the concept of an arrest having virtually no end point, *State v. Mallett*, 542 S.W.2d 584, 587 (Mo. App. 1976), quotes both *Sampson* and *Stokes*, which apply the definition of arrest in section 544.180 for the principle that a defendant is under arrest "from the moment a police officer takes control of his movements." The court in *Mallett* addressed the crime of an assault on an officer in the performance of his duties, and, to determine whether those duties were ongoing up to the point of delivering the arrestee to jail, the court relied on cases from other jurisdictions because "no Missouri case law has been found dealing squarely with the duration of an arrest *once it has been effected*." *Id.* at 586 (emphasis added). *See also* Scurlock, *supra* n.9 at 121 (observing that "actual restraint" under section 544.180 "entails submission by physical coercion or immediate threat thereof" and "need not be of any particular degree or duration"). Professor Scurlock also states, "When the officer announces that he is making an arrest and the suspect comes along quietly or is forcibly made to accompany the officer, no doubt exists that an arrest *has been made*." *Id.* at 122 (emphasis added).

[12] The majority notes that the court in *Shanks* believed that the defendant's arrest had been effected when he was placed in the police car, or long before they had reached the police station and he fled. Because the precise point at which the arrest had been effected in *Shanks* was not at issue, I do not consider the court's statement of belief as either controlling or persuasive here.

however, defined neither "arrest" nor an "effected arrest."[13]

III. Arrest Effected

Based on the meaning of arrest as discussed above and within the *Shanks* framework, the arrest was ***made*** and hence "effectuated" in Mr. Ajak's kitchen. He had been sitting with his wrists handcuffed behind his back next to the kitchen table in the company of a police officer while five additional responding officers circulated through the home questioning the other occupants. When their investigation concluded, the officers determined that Mr. Ajak would be arrested, and they told him that he was under arrest for domestic assault and would be transported to the local jail. At this point, his mobility was limited, and he was under the officers' control; thus, he was physically restrained, so the arrest had been ***made***. Mr. Ajak was in "custody," which is to say that he "ha[d] been arrested but ha[d] not been delivered to a place of confinement. § 556.061(7). With six armed police officers in the house and Mr. Ajak in handcuffs and informed by officers that he had been arrested, actual restraint had

[13] In contrast, in at least three resisting-arrest cases considering the definition of an arrest, our courts asserted that the definition varies depending on context. *State v. Ondo*, 231 S.W.3d 314, 316 (Mo. App. S.D. 2007) (citing *State v. Feagan*, 835 S.W.2d 448, 449 (Mo. App. S.D. 1992), court states, "'Arrest' is susceptible to more than one definition, depending on its context."), and *State v. Belton*, 108 S.W.3d 171, 175 (Mo. App. W.D. 2003); *see also State v. Mitchell*, 62 P.3d 616, 619-20 (Ariz. Ct. App. 2003) (stating that "constitutional protections regarding searches and interrogations address different considerations than are applicable here and may produce different results," and "[a] person may be 'under arrest' and entitled to certain constitutional rights and privileges, but for purposes of the crime of resisting arrest in Arizona, the arrest may not yet have been 'effected' on the same person."). If this is indeed so, then the term is ambiguous as used in section 575.150 and requires that we apply the rule of lenity in interpreting it. *See State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007) (when interpreting a criminal statute with ambiguous terms, the rule of lenity requires the statute "to be strictly construed against the state"). I do not, however, believe that "arrest" or an "effected arrest" is ambiguous under section 575.150.

been achieved.[14] Our case law and legislative intent require no more under the meaning of "arrest" and what constitutes "effecting the arrest." It was clear that the officers had ceased ***attempting*** to restrain Mr. Ajak well before they reached the patrol car because two officers escorted him, one on each arm, in handcuffs through the living room and to the front door, across the porch, and down the front steps to the patrol car. Although he refused to put on shoes and other clothing, yelled, and screamed, saying that he was the victim, he did not use physical force until he was about to be placed into the patrol car.

The State failed to present evidence that the officers had any other procedures to undertake to effect the arrest as in *State v. Ondo*, 231 S.W.3d 314, 315 (Mo. App. S.D. 2007). I could question the validity of *Ondo*, given its reliance on a single officer's idiosyncratic arrest procedure to fix the moment at which an arrest is effected under the statute and on its apparent failure to recognize that an arrest is effected *either* by the exercise of sufficient restraint *or* submission to the officer's custody, which are mutually exclusive. Still, even under *Ondo,* because no testimony was submitted to tell us what the officers' arrest procedure entailed and because the statute instructs that an arrest is made by the defendant's actual restraint, I would find that the arrest had been effected under our criminal law well before Mr. Ajak started to use physical force.

I am unpersuaded that *State v. Belton*, 108 S.W.3d 171 (Mo. App. W.D. 2003), compels a different result. There, although Mr. Vincent Belton had been told he was

[14] *Cf. State v. Jackson*, 645 S.W.2d 725, 727 (Mo. App. E.D. 1982) (observing that a person can be in custody, defined as "one person's exercise of control over another to confine the other person within certain physical limits," "even though his guard is several yards away").

under arrest and handcuffed, he was sitting in a car his wife was driving, refused to get out at the officer's command, and resisted the officer's efforts to pull him from the car before his wife started to drive away. *Id.* at 173. The officer had not actually restrained Mr. Belton, because, under the circumstances, handcuffs alone were not enough to place him within the officer's control. In contrast, under the circumstances here, handcuffs and the presence of six armed officers in the home were sufficient to show that Mr. Ajak had actually been restrained in the kitchen.

IV. Interpreting Criminal Law

Unlike the majority, I am further unpersuaded by the decision in *State v. Lindsey*, 973 A.2d 314 (N.H. 2009), and cases from other jurisdictions, such as *State v. Mitchell*, 62 P.3d 616, 619 (Ariz. Ct. App. 2003), where an effected arrest is viewed as an undefined continuum apparently to further the interest in protecting "peace officers and citizens from substantial risk of physical injury." First, the state's definition of "arrest" is not similar to our own. The New Hampshire statute clearly reflects a legislative judgment that an arrest is an ongoing procedure by stating that an arrest is "the taking of a person in custody in order that he may be forthcoming to answer for the commission of a crime." N.H. Rev. Stat. Ann. § 594:1 (2001). Second, the facts are distinguishable. In *Lindsey*, that a man had been handcuffed and placed face down on the floor was deemed insufficient to complete the arrest, as he struggled—yelling, kicking, and screaming—shortly thereafter to get up. *Lindsey*, 973 A.2d at 318 (finding that brief time period defendant was on the floor handcuffed "did not serve to conclude the process of seeking to effect his detention"). *See also Fallon v. State*, 221 P.3d 1016, 1020 (Alaska Ct. App. 2010) (on the basis of a statute similar to New Hampshire's,

court finds that if a man is handcuffed by one arm, his arrest is not complete for purposes of resisting arrest, because "the taking of a person into custody" is a process, and a contrary interpretation would not further the statute's purpose, i.e., "protecting the police and citizens from substantial risk of physical injury.").

Interestingly, their only common thread is in defining an arrest as a process; they otherwise freely range between extremes, from finding that an arrest has concluded when a suspect simply walks to a parked car as ordered by police and "assumes the position" to when a suspect arrives at an intake center for booking. *See People v. Thornton*, 929 P.2d 729, 735 (Colo. 1996) (finding that compliance with police direction constituted submission to the officers' physical control and thus the defendant had been arrested and was in custody for purposes of the escape-from-custody statute when he "broke and ran"); and *State v. Bay*, 721 N.E.2d 421, 130 Ohio App.3d 772, 775 (Ohio Ct. App. 1998) (finding that police officers "were still engaged in completing the formal charging process," the court upholds a resisting-arrest conviction where the defendant went limp after leaving the police cruiser some ten feet from the intake center and fell to the ground).[15]

I would also observe that *Mitchell* and the case on which it relies, *Lewis v. State*, 30 S.W.3d 510, 513-14 (Tex. Ct. App. 2000), involved resistance that occurred within seconds of handcuffing or other exercise of control, unlike the situation here. In fact, Officer Mull testified that after Mr. Ajak had been informed he was under arrest, "[w]e

[15] In contrast to such widely varying and unpredictable application of this view of arrest, Professor Scurlock refers to the statutory actual-restraint or submission requirements as "objective fact." Scurlock, *supra* n.9, at 125.

tried to get him to put on the clothing for a couple of minutes." While a determination as to when actual restraint has actually been achieved likely raises a factual issue in most cases, this is not that case.

I agree that protecting peace officers, citizens, and the arrestee herself is indeed a laudable goal and an important societal interest, it does not, however, under principles of due process and canons of statutory construction, permit the courts to interpret a criminal statute broadly.[16] *See, e.g., State v. Treadway*, 558 S.W.2d 646, 652-53 (Mo. banc 1977) (stating, "In construing a penal statute, the general rule is that a criminal statute must be construed liberally in favor of the defendant and strictly against the state."), *disapproved on other grounds by Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980). Were we seeking to discern legislative intent in using certain language in a regulatory enactment or civil statute, it would be appropriate to construe the words as broadly as possible to afford the greatest possible protection to human health and the environment or interests in workplace safety. Section 575.150, however, is a criminal statute. Its violation can result in a deprivation of liberty, and we cannot presume "that the legislature intended the punishment to extend farther [sic] than is expressly stated." *Id.* at 653 (citation omitted). As well, the Legislature has adopted any number of other

[16] I would add that at least one Missouri case identifies the purpose of an obstruction-of-justice law as follows: "The person then who obstructs or resists such officer in performing his duty rises up against the power of the state, and should be punished for his crime . . . as one who disregards the well-being and good of the government of his state." *State v. Lowry*, 12 S.W.2d 469, 475 (Mo. 1928) (quoting *Perkins v. Wilcox*, 242 S.W. 974, 977 (1922)); *see also State v. Nunes*, 546 S.W.2d 759, 762 (Mo. App. 1977) (noting change in law and stating that "citizen may not use force to resist any arrest, lawful or unlawful, for such self-help tends to intolerable disorder"). With this broader purpose in mind and given other statutes criminalizing aggressive acts against the police and others, it would appear that fixing the point of an effected arrest when actual restraint occurs would be wholly consistent with Missouri precedent and Legislative intent.

offenses that serve the critically important purpose of criminalizing conduct that potentially exposes a law enforcement officer or the public to harm. Offenses against the person include first, second, and third degree assault of a law enforcement officer and others, §§ 565.081, 565.082, 565.083, and offenses against public order include peace disturbance, § 574.010. The Legislature has also spoken as to what actions constitute a criminal offense once the citizen is in "custody," § 575.200, and further when the citizen is in "confinement." § 575.210. The State determined under which statute it wished to charge Mr. Ajak, and, under these facts, the State chose the wrong statute.

Expanding the act of arrest, as the majority rules, into an ongoing activity or continuum that does not cease until an individual is confined within "certain physical limits" (short of confinement in a place of confinement), such as a patrol car, gives "actual restraint" and an "effected arrest" a scope far broader than intended and will "embrace persons and acts not specifically and unambiguously brought within their terms." *Salazar,* 236 S.W.3d at 646. This also sets the stage for a bright line that the majority purportedly eschews. Making the patrol car the point at which an arrest has typically concluded will further distort legislative intent by effectively establishing a bright line with no statutory basis. *See, e.g., Commonwealth v. Knight*, 75 Mass. App. Ct. 735, 739 (2009) (ruling that arrest is not complete until defendant is "placed in a secure location [notably a police cruiser] from which he can neither escape nor harm the police officer or others nearby") (citing *Commonwealth v. Katykhin*, 59 Mass. App. Ct. 261, 262-63 (2003) (finding arrest was not "effected" until defendant was "fully detained in the cruiser")).

Further, an expansive definition of an effected arrest will render an arrest incomplete and officers will be deemed to be "attempting" to exercise control unless or until the suspect submits, in effect by making it virtually impossible for him or her to resist.[17] As noted above, the definition does not require both that a person actually be restrained *and* that he or she submit to custody for an arrest to be made. Other than *Ondo* and *Belton*, I have been unable to find any other Missouri case that appears to require both restraint and submission.

My approach gives effect to legislative intent, applying definitions already codified. The majority, on the other hand, creates a definition for custody to distinguish it from an "arrest." Curiously, the majority fails to use the statutory definition of "custody" in discussing custody as the focal point for deciding whether an arrest has been effected. *See Johnson v. Mo. Dep't of Health & Senior Servs.*, 174 S.W.3d at 581 (stating that "[i]f a statute defines a term or phrase, that definition must be used"); *State v. Harris*, 156 S.W.3d 817, 822 (Mo. App. W.D. 2005) (stating, "The statutory definition should be followed in the interpretation of the statute to which it relates and is intended to apply and supersedes the commonly accepted dictionary or judicial definition and is binding on the courts" (quoting *State ex rel. Nixon v. Estes*, 108 S.W. 3d 795, 798 (Mo. App. W.D. 2003)). While the "custody" definition appears in Chapter 556, all of the definitions in section 556.061 apply "in this code," which refers to the "criminal code" as it existed when Senate Bill 60 was adopted in 1977. *State v.*

[17] As a matter of logic and common sense, if an arrestee submits, he or she cannot be charged with resisting arrest, because the arrest is effected upon his or her submission.

Danforth, 654 S.W.2d 912, 919 n.5 (Mo. App. W.D. 1983). Both resisting arrest and escape or attempted escape from custody were included in the 1977 criminal code.

The majority cites *State v. Jackson*, 645 S.W.2d 725, 727 (Mo. App. E.D. 1982), to purportedly find a ready-made "custody" definition that adds words to an existing statutory definition. The court in *Jackson* not only similarly fails to rely on the statutory definition of "custody" in determining whether the defendant was in custody when he escaped from a hospital x-ray room, but also states that the term custody "***includes***" the exercise of control "to confine the other person within certain physical limits." *Id.* (emphasis added). Because the court did not state that confinement "within certain physical limits" is the ***only*** definition of custody, this is fragile ground indeed on which to build a definition for "custody" to add to the resisting-arrest statute.[18]

The majority suggests that I run afoul of statutory construction canons by looking to the section 544.180 definition of arrest to understand the Legislature's intent in adopting the resisting arrest statute. I would reiterate, however, that our supreme court has stated that in seeking to ascertain legislative intent, "the reviewing court

[18] Also curious is the majority's reference to *State v. Baker*, 199 S.W.2d 393, 396 (Mo. 1947), for the concept that "custody" has long included the concept of confinement of another person "within certain limits." In that case, the defendant had escaped from a prison farm while guards were no closer than some 200 yards, and our supreme court ruled that he was in the officers' custody "within the intendment of the statute." *Id.* at 395. It does not appear that the farm was fenced in any way, and the prisoners who stayed and worked there were permitted to go outside for fresh air after supper, as long as they remained within certain geographical limits, such as a river bank, and returned to the dormitory at roll call. *Id.* at 394-95. The defendant in *Baker* was not confined within certain physical limits, other than the arbitrary distance limits set by the guards. Similarly, in *State v. Hahn*, the defendant had been taken to a hospital for medical attention and, after he was treated, "he and the officers were walking through the hospital. Defendant was not cuffed nor under any physical restraints. Suddenly, defendant broke and ran from the building...." *State v. Hahn*, 625 S.W.2d 703, 705 (Mo. App. S.D. 1981). The court concluded that he had left their physical and constructive custody (not defined as a *place* of physical limitation), thus affirming his conviction for escape from custody. *Id.*

should take into consideration statutes involving similar or related subject matter when those statutes shed light on the meaning of the statute being construed." *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992).

Because section 544.180 immediately precedes a section defining the rights of police officers in effecting an arrest, I believe that relying on it to discern legislative intent in using the phrase "effecting an arrest" in the resisting-arrest statute provides a firmer foundation than relying on a dictionary definition for arrest and reaching back to a 1982 case defining "custody" as ***including*** confinement within certain physical limits to make this a required endpoint for an effected arrest. If the Legislature had wanted an effected arrest to be defined as taking place from the moment a suspect is informed that he or she is under arrest until that individual is placed into a patrol car or police van or even at some later time, it would have said so by extending resistance to an effected arrest to the point that the actor is confined "within certain physical limits."

Mr. Ajak was handcuffed and in police ***detention*** as the officers conducted their investigation. Then he was actually physically restrained or controlled by the officers when he was told he was under arrest, he was in handcuffs, and he was surrounded by armed officers in the kitchen. His freedom was effectively limited; he was not at liberty to ignore the police presence and go about his business. *Kaupp v. Texas*, 538 U.S. 626, 629-30 (2003). The ***arrest*** had been effected. He did not begin to pull or jerk away until sometime later, then in police ***custody***, he was about to be placed into the patrol

car.[19] No evidence showed that Mr. Ajak used or threatened to use violence or physical force in the house to prevent the officers from effectuating his actual, physical restraint. Yelling and screaming do not constitute violence or physical force.[20] The arrest had been effected in the kitchen, and Mr. Ajak was in the officers' **custody** when they walked him out to the patrol car and placed him into the back seat. Had he been charged with attempted escape from custody, the evidence may have been sufficient to prove that offense, but he was not so charged.[21]

Because I would have granted Mr. Ajak's first point and reversed the conviction, I would not have addressed the second point on appeal. But I also dissent from that part of the majority opinion.

V. Erroneous Jury Instruction

In the second point, Mr. Ajak argues that the trial court plainly erred in submitting Instruction number 6 (the verdict director for resisting arrest) to the jury because it erroneously included the phrase "physical interference" as a means by which the jury could find that he resisted arrest. Mr. Ajak acknowledges that this claim is not preserved for review because he neither objected to the instruction nor raised this claim

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[19] Unlike the facts in *State v. Mitchell*, 62 P.3d 616 (Ariz. Ct. App. 2003), and *Lewis v. State*, 30 S.W.3d 510, 513-14 (Tex. Ct. App. 2000), the record does not show that Mr. Ajak's conduct before being placed in the patrol car followed his arrest in the kitchen by mere seconds. In fact, the officers spent an unspecified amount of time attempting to get Mr. Ajak to put shoes and other clothing on before escorting him out of the house, which appeared in the admitted exhibits to be set back from the street where the police car would have been positioned to transport him.

[20] Nor did the evidence show that Mr. Ajak threatened to use violence or physical force while he was yelling and screaming.

[21] And if his conduct did not fit the crime of escape or attempted escape from custody, then he would not have been guilty of that offense either. We cannot by judicial fiat criminalize behavior that the Legislature has chosen not to criminalize.

of error in his motion for new trial. *See* Rule 29.11(d).[22] Thus, he requests that we review his claim for plain error. "Plain errors affecting substantial rights may be considered in the discretion of the court when the error has resulted in a manifest injustice or miscarriage of justice." *State v. Chambers*, 481 S.W.3d 1, 7 (Mo. banc 2016). "For instructional error to amount to plain error, it must be clear that the trial court has so misdirected or failed to instruct the jury that manifest injustice or miscarriage of justice has resulted." *Id*. "In short, it must be apparent that the instructional error affected the jury's verdict." *Id*.

Instruction number 6, based on the erroneous charge brought by the State asserting guilt for resisting his own arrest by means of violence, physical force, or physical interference, advised the jury to find Mr. Ajak guilty of resisting arrest, if it found beyond a reasonable doubt each of the following propositions:

> First, that on or about February 15, 2015, in the County of Buchanan, State of Missouri, Officer Mull was a law enforcement officer, and
>
> Second, that Officer Mull was making an arrest of the defendant for domestic assault, and
>
> Third, that defendant knew that a law enforcement officer was making an arrest of the defendant, and
>
> Fourth, that for the purpose of preventing the law enforcement officer from making the arrest, the defendant resisted by using violence, physical force, *or physical interference*[.]

(emphasis added).

Mr. Ajak argues that inclusion of the phrase "physical interference" in the Fourth paragraph was erroneous because it is not a statutory element of resisting one's own

[22] All rule references are to the Missouri Supreme Court Rules (2015).

arrest. He also argues that he suffered a manifest injustice because, by including this phrase, the State was relieved of its burden of proving that Mr. Ajak resisted by one of the means actually provided by statute (using violence or physical force).

The Eastern District recently considered the same claim of error in *State v. Meeks*, 427 S.W.3d 876 (Mo. App. E.D. 2014). In *Meeks*, the defendant was charged with resisting arrest, and the verdict director submitted at trial included a paragraph allowing the jury to convict the defendant if it found "that for the purpose of preventing the law enforcement officer from making the arrest, the defendant resisted by using physical force or physical interference." *Id*. at 878. Though the defendant neither objected to the instruction nor included this claim of error in his motion for new trial, he nevertheless requested plain error review on appeal. *Id*. at 877. The defendant argued that § 575.150 does not create criminal liability for physically interfering with one's own arrest; liability attaches to physical interference only when a third party acts to prevent the arrest of another.[23] *Id*. at 878. The Eastern District agreed, holding that "[t]he plain language of [§ 575.150] contemplates two distinct crimes—resisting one's

[23] The statute provides:

> A person commits the crime of resisting or interfering with arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:
>
> (1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer; or
>
> (2) Interferes with the arrest, stop or detention of another person by using or threatening the use of violence, physical force or physical interference.

§ 575.150.1.

own arrest [subsection (1)] and interfering with another's arrest [subsection (2)]." *Id*. And because "'[p]hysical interference' in the statute plainly refers only to interfering with someone else's arrest[,] . . . [it] is not an element of the crime of resisting one's own arrest." *Id*. We agree.

Here, the State does not challenge Mr. Ajak's claim of error; instead, the State merely argues that Mr. Ajak did not suffer a manifest injustice as a result of the error because there was neither evidence nor argument presented supporting a finding of "physical interference," as opposed to either "physical force" or "violence." In *Meeks*, however, the Eastern District concluded that a manifest injustice had occurred simply because "the instruction included an element of a crime for which [the defendant] had not been charged, and thereby misdirected the jury as to the applicable law and excused the State from its burden of proof on the charged crime." *Id*.

Without reading *Meeks* as holding that the error present here *always* results in a manifest injustice, we agree with Mr. Ajak that the instruction so misdirected the jury that manifest injustice or miscarriage of justice occurred. The second amended misdemeanor information charging Mr. Ajak with resisting arrest, mistakenly stated that he did so "by using or threatening the use of violence, physical force or *physical interference*." (emphasis added) And this was, in fact, how the State tried the case. The officers testified to a variety of obstreperous behaviors on Mr. Ajak's part from the time they entered the home until they placed him in the patrol car and then immediately placed him in a holding cell at the law enforcement center due to his hostile behavior. He allegedly moved toward them, yelled, screamed, spit, was physically uncooperative, threatened to sue them, refused to follow directions, and jerked and twisted to try to

loosen the officers' grip. In addition, the prosecution referred to all of this behavior, some of which may have constituted violence or physical force and some of which may have constituted physical interference, in closing, stating,

> The fourth element is really the one that you all will probably need to deliberate on for the purpose of proving in that arrest the Defendant resisted by using violence, physical force or *physical interference*. So that's the fourth element of the resisting arrest charge that you have to consider. The officer obviously testified to his behavior of jerking away, of trying to get away from them as they walked him out, yelling at them, saying you're not taking me to jail and then screaming in his face and spitting in Officer Mull's face. So all of those different factors are things that you consider in looking at the fourth element of resisting arrest. (emphasis added).

The prosecutor also argued,

> With regard to the resisting arrest charge, it doesn't matter that he wasn't able to actually get free. The officers thank goodness know what they're doing and were able to keep a hold of him. They're trained to do that thankfully. Otherwise who knows what would have happened. That's not an element. That's not an element that we have to prove that he actually got away. He used for the purpose of preventing them from arresting him, he didn't want to be arrested, he's ticked off. He believes he's the victim of everything. So he's trying to jerk away from them, you're not taking me to jail. And it took three officers to get him into the patrol unit and actually transport him and call ahead for a cell because he continued even after being in the patrol unit to scream and yell and say he's the victim and he's going to sue everybody under the sun. The officers did not – the officers' testimony is that when they first arrived at the residence they gave verbal commands to hands up, stop, you know, stay where you are, put your hands up.
>
> The officer – I think Officer Zeamer is the one that testified exactly how his hands were, actually demonstrated. His hands were in front of him. His hands weren't up in the air as any normal person would do. His hands were in front of him and he continued to rush towards them. And that's when they detained him. At that point he wasn't even under arrest. They were detaining him, which they told him, to figure out what happened. They tried to talk to him, but he just yelled and screamed I'm the victim, get them out of my house. I want them out of here, this is my house, yelled and screamed.

Because the prosecution put a full range of behavior in issue before the jury and we cannot know on what basis it reached its determination, I believe that the instructional error resulted in a manifest injustice and to rule otherwise establishes a conflict with Eastern District holdings, including *Meeks*, to the contrary. *See State v. Wooten*, 479 S.W.3d 759, 761 (Mo. App. E.D. 2016); *State v. Dudley*, 475 S.W.3d 712, 716-17 (Mo. App. E.D. 2015). I would grant this point and would have remanded for retrial on the resisting charge had I not also determined that the trial court erred in submitting that charge to the jury.

VI. Conclusion

Because the trial court erred in submitting the resisting arrest charge to the jury and Mr. Ajak has demonstrated manifest injustice from the submission of an erroneous verdict director, I would reverse.

/s/ Thomas H. Newton
Thomas H. Newton, Judge

In the Missouri Court of Appeals Western District

STATE OF MISSOURI,	)	
	)	
Respondent,	)	**WD78932**
	)	
v.	)	**OPINION FILED:**
	)	
DANIEL DUOT AJAK,	)	**February 21, 2017**
	)	
Appellant	)	

DISSENTING OPINION

I join in the dissent, but write separately to emphasize that if the majority opinion prevails, then the rule of lenity requires the reversal of Mr. Ajak's conviction as a matter of law.

In order for Mr. Ajak's conviction of resisting arrest to withstand scrutiny on appeal based on a sufficiency of the evidence challenge, we must be persuaded that the evidence at trial was "sufficient to persuade any reasonable juror as to each of the elements of the crime, beyond a reasonable doubt." *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993).

The majority and dissenting opinions agree that an essential element of the crime of resisting arrest pursuant to section 575.150 is that a law enforcement officer is "making an arrest." Both opinions agree that the offenses of escape or attempted escape from confinement (section 575.210), escape or attempted escape from custody (section 575.200), and resisting arrest (section

575.150), fall along a continuum or timeline without overlap, such that one offense ends when the other begins. Both opinions acknowledge that section 556.061(7) defines "custody" as "when the person ***has been arrested*** but has not been delivered to a place of confinement."[1] (Emphasis added.) Thus, both opinions acknowledge that the dispositive question in Mr. Ajak's case is whether Mr. Ajak ***had been arrested***, (in other words, was in custody), when he pulled and jerked as officers walked him from his house to a patrol car.

To resolve this question, the phrase "making an arrest" must be defined. The majority and dissenting opinions agree that "making an arrest" is a process. But the majority and dissenting opinions disagree about when the process of making an arrest ends and custody begins.

The majority opinion defines "custody" as "confinement within certain physical limits" other than those which qualify as "confinement" for purposes of section 575.210.[2] The majority opinion thus concludes that "making an arrest" encompasses all law enforcement interaction with a suspect until the point in time when the suspect is confined within certain physical limits, as in a patrol car.

The dissenting opinion concludes that "making an arrest" encompasses all law enforcement interaction with a suspect until an arrest is complete, a point in time informed by section 544.180, which provides that "[a]n arrest is made by an actual restraint of the person of the defendant, ***or*** by his submission to the custody of the officer." (Emphasis added.) The dissent thus argues that because the actual restraint of a person or submission of a person to the custody of an officer is an

[1]As the majority opinion points out, the legislature has also effectively ascribed a definition to the term "confinement" to mean the Department of Corrections or a county or private jail or city or county correctional facility. Section 575.210.2 & 3. The line of demarcation between "confinement" and "custody" is not at issue in this case.

[2]*See* note 1, *supra*.

arrest, actual restraint or submission to custody marks the moment in time when the process of making an arrest ends and custody begins. Plainly, the dissenting opinion's view of "custody" would include confinement of a suspect within a physical limit, but would not require confinement of a suspect within a physical limit.

I join with the dissent because other Missouri cases addressing when the process of "making an arrest" ends have also turned to section 544.180 to inform when an arrest has been made, and thus when custody begins. In *State v. Feagan*, 835 S.W.2d 448, 449 (Mo. App. S.D. 1992), the Southern District observed that "[t]he term 'arrest' is subject to more than one definition, depending upon the statute and the facts of the particular case." *Id*. (quoting MAI-CR 3d 333.00). *Feagan* held that applicable to section 575.150, "'[a]n arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority or a warrant or otherwise,'" a definition drawn from section 544.180. In *State v. Belton*, 108 S.W.3d 171, 175 (Mo. App. W.D. 2003), this court also held that "'[a]rrest' is susceptible to more than one definition, depending on its context." However, *Belton* agreed with *Feagan* that "[i]n the context of resisting arrest, the . . . definition in section 544.180 . . . provides useful guidance." *Id*. (citing *Feagan*, 835 S.W.2d at 449).

Feagan and *Belton* share the dissent's reliance on section 544.180 to define the point in time when an arrest is made, and thus when the process of "making an arrest" is completed. At the same time, both cases recognize that the term "arrest" is imprecise, and susceptible to several definitions. We have held in a similar scenario that ***in the absence of a definition provided by the legislature***, the rule of lenity dictates that an ambiguous criminal statute ***must*** be construed against the government and liberally in favor of a defendant. *See State v. Chase*, 490 S.W.3d 771, 776 (Mo. App. W.D. 2016). The sufficiency of the evidence standard cannot be sustained if an essential

element of a crime has not been defined by the legislature, and is susceptible to several reasonable meanings.

> As the State bears the burden to establish each element of a charged offense beyond a reasonable doubt, it follows that the State cannot sustain its burden when an essential element of a charged offense lacks a clear and accepted definition.

Id.

Therein lies the weakness in the majority opinion. The dissenting opinion avoids any issue with the rule of lenity by relying (appropriately so) on section 544.180 to afford legislative guidance about when the process of making an arrest ends. In contrast, by rejecting section 544.180 as controlling on this subject, the majority opinion: concludes that the legislature has offered no guidance on the meaning of "making an arrest;" adopts a definition of "making an arrest" that is in conflict with prior precedent on the subject; and leaves the phrase "making an arrest" without a clear and accepted definition. *Cf. Feagan*, 835 S.W.2d at 449; *Belton*, 108 S.W.3d 171, 175. The necessary effect of the majority opinion is to require application of the rule of lenity to reverse Mr. Ajak's conviction. "[S]trictly construing the phrase ['making an arrest'] as used in section [575.150], we conclude that [Mr. Ajak's] alleged conduct is not encompassed by the statute." *Chase*, 490 S.W.3d at 776 (addressing the absence of legislative guidance and the lack of a clear and accepted definition of the phrase "fugitive from justice" as used in section 571.010.1(2)).

There is no question that use of section 544.180 to inform when the process of "making an arrest" is complete requires a fact-specific inquiry into whether an arrest has been made or remains in process. However, we have no problem asking a jury to decide whether an arrest has been made when a suspect is charged with escape from custody under section 575.200.1. Pursuant to section 556.061(7), "a person is in custody ***when the person has been arrested*** but has not been delivered

to a place of confinement."[3] (Emphasis added.) To determine whether a person has been arrested, the pattern instruction for escape from custody, MAI-CR 3d 329.72, asks the jury to determine in paragraph Third whether the "defendant was then in the control of [name of law enforcement officer], a law enforcement officer."[4] Equating "has been arrested" with being "in the control of law enforcement" is wholly consistent with the dissenting opinion's reliance on section 544.180, which describes an arrest as "actual restraint" or "submission to custody."

The majority opinion does not quarrel with the dissenting opinion's conclusion that if "making an arrest" ends when a suspect is actually restrained or submits to the custody of an officer, then the evidence at trial was not sufficient to permit a reasonable juror to conclude beyond a reasonable doubt that law enforcement was "making an arrest" when Mr. Ajak pulled and jerked as he was being escorted to a police car. Either the dissenting opinion has correctly defined "making an arrest" by reference to section 544.180, or the majority opinion's definition of "making an arrest" creates an ambiguity that requires application of the rule of lenity. In either case, reversal of Mr. Ajak's conviction is required.

/s/ Cynthia L. Martin
Cynthia L. Martin, Judge

[3]The existence of a statutory definition of "custody" highlights another weakness in the majority opinion, as the majority announces an alternative definition of "custody" that is markedly different from that specified by the legislature.

[4]The majority opinion's reliance on *State v. Jackson*, 645 S.W.2d 725, 727 (Mo. App. E.D. 1982) to argue that "control" ***requires*** confinement within certain physical limits reflects an over reading of *Jackson*. The Eastern District held only that "'[c]ustody ***includes*** one person's exercise of control over another to confine the other person within certain physical limits." *Id*. The words "include" and "require" are not synonymous. *Jackson* cannot be fairly read to hold that confinement within certain physical limits is ***required*** in order to exercise control over another, and can only be fairly read to hold that confinement within certain physical limits is an example of exercised control over another.