

RESISTING ARREST

G.L. c. 268, § 32B

The defendant is charged with resisting arrest. To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* That the defendant prevented or attempted to prevent a police officer from making an arrest of (the defendant) (another person);**

***Second:* That the defendant did so knowingly; and**

***Third:* That the officer was acting under color of their official authority at the time.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant prevented or attempted to prevent a police officer from making an arrest of (the defendant) (another person). The Commonwealth must prove that the defendant (either):

- used or threatened to use physical force or violence against the police officer (or another person) (or)**

- **used some other means which created a substantial risk of causing bodily injury to the police officer (or another person).**
(Mere flight without the substantial risk of causing bodily injury to the officer is not enough. It is up to you to determine whether the circumstances of the flight created a substantial risk.)

See *Commonwealth v. Montoya*, 457 Mass. 102, 104-105 (2010).

If the timing of the arrest is contested.

The Commonwealth must also prove that the defendant's actions occurred before the arrest was completed. An arrest is completed when a person has been detained, placed securely in custody, and is under the control of the police.

Commonwealth v. Ocasio, 71 Mass. App. Ct. 304, 311 (2008) (physical resistance to being placed in cruiser after being handcuffed may be prosecuted under § 32B); *Commonwealth v. Katykhin*, 59 Mass. App. Ct. 261, 262-263 (2003) (same). See *Commonwealth v. Grandison*, 433 Mass. 135, 143-147 (2001) (post-arrest physical resistance at stationhouse cannot be prosecuted under § 32B).

"An arrest occurs where there is (1) "an actual or constructive seizure or detention of the person, (2) performed with the intention to effect an arrest and (3) so understood by the person detained." *Id.* at 145, quoting *Commonwealth v. Cook*, 419 Mass. 192, 198 (1994). Because stopping a person for purpose of a threshold inquiry is not an arrest, the resisting arrest statute cannot apply where police have detained a person only to make a threshold inquiry rather than an arrest. See *Commonwealth v. Smith*, 55 Mass. App. Ct. 569, 574-575 (2002).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew 1) that the person was attempting to make an arrest and 2) that the person was a police officer. The Commonwealth must prove beyond a reasonable doubt that a reasonable person in the defendant’s circumstances would have understood (they were) (another person was) being arrested.

The Commonwealth must also prove beyond a reasonable doubt that the defendant knew the person was a police officer. You may consider whether the officer was in uniform or, if not in uniform, identified themselves by exhibiting their credentials as a police officer while attempting to make the arrest. Such credentials would include a badge, insignia, identification card, police radio, or other police equipment such as a clearly identified police vehicle. You may examine any evidence regarding the defendant’s actions or words, and all of the surrounding circumstances, to help you determine whether the defendant knew the person was a police officer and whether a reasonable person would have known the police officer was attempting to make an arrest.

“The standard for determining whether a defendant understood that he was being arrested is objective -- whether a reasonable person in the defendant’s circumstances

would have so understood.” *Commonwealth v. Grant*, 71 Mass. App. Ct. 205, 208 (2008), citing *Commonwealth v. Cook*, 419 Mass. 192, 199 (1994). To prove that a reasonable person in the defendant’s position would have understood that the seizure was to effect an arrest, there must be some objective communication, through the police officers’ words or actions before or during their pursuit, of the intent to arrest. *Grant, supra* at 209-210. See also *Commonwealth v. Quintos Q.*, 457 Mass. 107, 109 (2010) (“Although it is true that police do not need to use the word “arrest” in order for there to be an arrest, it does not follow that saying the word “stop” was the equivalent of an arrest in this case.”)

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that that the officer was acting under color of their official authority at the time. A police officer acts “under color of official authority” when, in the regular course of assigned duties, they make a judgment in good faith, based on the surrounding facts and circumstances, that they should make an arrest.

If the Commonwealth has proved all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. Right to Self Defense

A police officer may not use unreasonable or excessive force in making an arrest. A person is allowed to use reasonable force to protect themselves from physical

harm when unreasonable or excessive force is used. If a police officer uses unreasonable or excessive force to make an arrest, the person who is being arrested may defend themselves with as much force as reasonably appears necessary. The person arrested is required to stop resisting once they know or should know that if they stop resisting, the officer will also stop using unreasonable or excessive force.

If there is some evidence that the police used unreasonable or excessive force, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense.

To prove that the defendant did not act in self-defense, the Commonwealth must prove at least one of the following four things beyond a reasonable doubt:

- 1) That the police officer did not use excessive or unnecessary force; or**
- 2) That the defendant did not reasonably believe that the police officer was using unreasonable and excessive force and putting the defendant's personal safety in immediate**

danger; or

3) That the defendant did not do everything that was reasonable in the circumstances to avoid physical combat before resorting to force; or

4) That the defendant used more force to defend themselves than was reasonably necessary in the circumstances.

See Instruction 9.260 Self-Defense; Defense of Another.

See *Commonwealth v. Moreira*, 388 Mass. 596, 601-602 (1983); *Commonwealth v. Eberle*, 81 Mass. App. Ct. 235, 239 (2012). A defendant may be entitled to this instruction if, taking all reasonable inferences in favor of the defendant, there is sufficient evidence of self-defense to raise the issue. See *Commonwealth v. Urkiel*, 63 Mass. App. Ct. 445, 451-452 (2005); *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 651 (2004).

2. **Unlawful arrest not a defense. It is not a defense to this charge that a police officer was attempting to make an arrest which was unlawful, if the officer was acting under color of their official authority and used only reasonable force in attempting to make the arrest.**

G.L. c. 268, § 32B(b).

3. **Evidence of Intoxication. You may consider whether the defendant was intoxicated in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant knew that the person(s) with whom they were**

engaged (was a) (were) police officer(s) acting under the color of their authority, and also knew that they were preventing or attempting to prevent the officer(s) from effecting an arrest.

Commonwealth v. Lawson, 46 Mass. App. Ct. 627, 630 (1999) (intoxication is a defense to the knowledge element of the offense, i.e., whether “defendant both knew that the persons with whom he was engaged were police officers acting under the color of their authority and that he was preventing or attempting to prevent them from effecting an arrest”).

NOTE:

1. **Flight.** Running away to evade the police does not itself constitute resisting arrest (G.L. c. 268, § 32B), even while being chased for a stop or patfrisk, unless a reasonable person in the defendant’s position would have understood that the attempted seizure was to effect an arrest. *Commonwealth v. Grant*, 71 Mass. App. Ct. 205, 208-210 (2008).

2. **Unreasonable or Excessive Force.** “The question whether an officer’s use of force is reasonable or necessary is one to be decided by the fact finder considering all of the surrounding circumstances.” *Commonwealth v. Garvey*, 99 Mass. App. Ct. 139, 146 (2021), citing *Commonwealth v. Moreira*, 388 Mass. 596, 602 (1983). Similarly, the “related question, whether the defendant used reasonable force to defend himself, [is a question] of fact for a jury to decide... .” *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 652 (2004). While Massachusetts cases offer no explicit definition of what actions by police constitute unreasonable or excessive force in this context, the factfinder may consider all evidence presented about the circumstances of the arrest and the actions or words of the police officer and the accused, evidence of the police department use of force policy, or expert testimony to determine whether the use of force was reasonable or necessary to carry out official duties. See *Garvey*, 99 Mass. App. Ct. at 146-149. In the context of assessing a claim of excessive force brought under 42 U.S.C. § 1983, consideration is given to “the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.” *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).