

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

APPEALS COURT
No. 2018-P-1336

COMMONWEALTH

v.

MICHAEL VISCONTE

ON APPEAL FROM A JUDGMENT OF THE
CHELSEA DISTRICT COURT

BRIEF OF THE DEFENDANT/APPELLANT
MICHAEL VISCONTI

FOR THE APPELLANT:

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ISSUES PRESENTED

1. Where the Defendant was charged with Common Law Resisting Arrest, was it reversible error to instruct the jury on the elements of the statutory offense of Resisting Arrest, and to fail to instruct the jury that the Defendant must have had the specific intent to resist arrest required by the common law crime?

STATEMENT OF THE CASE

On January 31, 2017, a Criminal Complaint issued against Michael Visconti¹, Chelsea District Court Docket Number 1714CR0346, charging him with one count of Disorderly Conduct, G.L. c. 272, §53, and one count of common law Resisting Arrest. [R.6].²

The cases were tried before a jury, Livingston, J. presiding, on October 3 and 4, 2017. The jury found Mr. Visconti not guilty on the charge of Disorderly Conduct, and guilty on the charge of Resisting Arrest. [R.4]. Mr. Visconti was given a sentence of ninety (90) days probation. [R.4].

Mr. Visconti timely filed a Notice of Appeal. [R.7].

¹The correct spelling of the Defendant's name is used herein. The spelling used in the case caption and as docketed, "Visconte," reflects the spelling used in the District Court Criminal Complaint. Commonwealth v. Bucaulis, 6 Mass. App. Ct. 59 (1978).

²References to the Record Appendix being filed herewith are designated as "R." followed by the page number. References to the trial transcript are to the volume followed by the page number.

STATEMENT OF THE FACTS

1. The Assault on Michael Visconti

On January 31, 2017, at approximately 4:30 p.m., Mr. Visconti arrived home to find another car blocking his driveway. [Tr.I:93]. It was snowing and the ground was icy. [Tr.I:103]. He asked the couple blocking the driveway to move their car forward and then pulled into the driveway. Id. A woman inside the other car then got out, walked onto Mr. Visconti's property and started "yelling at him in his face." Id. She "then sideswipes him, basically punches him in the face, and that's when the boyfriend got out of the car." Id. He then grabbed Mr. Visconti "by the collar and threw him up against the fence." Id. The two individuals continued to attack Mr. Visconti, with the man putting him in a chokehold while the woman repeatedly kicked him in the back. [Tr.I:94].

Tracey Visconti, the defendant's wife, testified, that Mr. Visconti:

got hurt on a job in '98 lifting coils of blades and he heard pop, pop from his disks, and then he had four surgeries after the initial injury.

Q: Okay. And surgeries to what?

A: His back.

Q: Okay. And based on your observations over or of him since 1998, does it

affect his ability to do any normal tasks?

A: Yes.

Q Like what?

A: He can't do long walks. He can only walk like maybe 50 feet, not even. We haven't walked the beach since 1998. He can't go down stairs, up stairs. He can't lift anything, and he's always either -- he has to sit, stand, lie down, and mostly he's in bed.

[Tr.I:140].

Two neighbors across the street from Mr. Visconti's house witnessed the incident, with one calling 911 while the other began to film the attack.

[Tr.I:93]. Sometime later a police officer, Deryn DiOrio, arrived on scene. [Tr.I:99]. Around four minutes later a second officer, Carlos DelCompare, arrived. [Tr.I:100].

2. The Police Investigation

When he arrived, Officer DiOrio first "made contact" with Mr. Visconti, who was "extremely upset," "agitated," "angry," and "yelling." [Tr.I:55]. Officer DiOrio could tell from Mr. Visconti's appearance that "it was apparent that he was involved in an assault." [Tr.I.68].

Officer DiOrio tried to calm Mr. Visconti down but he continued to yell and was "very uncooperative."

[Tr.I:56]. However, Officer DiOrio was able to learn from Mr. Visconti what had happened, including that Mr. Visconti had been assaulted. [Tr.I:68].

When Officer Delcompare arrived, "Officer DiOrio ... informed [him] that what allegedly happened was there was an altercation between [Mr. Visconti] and another male party where the male party held him down and the female party that's married to the other male party began to kick him while he was being held down on the floor." [Tr.I:113].

Officer DelCompare received similar information from Mr. Visconti, whom he described as "visibly upset about the incident that had transpired before [he] got on scene." Id.

3. The Arrest of Michael Visconti

Three witnesses testified concerning Mr. Visconti's arrest.

a. Testimony of Officer DiOrio

Officer DiOrio testified that he became frustrated with Mr. Visconti continuing to yell, [Tr.I:70], and told Mr. Visconti that "if he continued to disobey our orders to calm down, he would [be] subject to arrest for disorderly conduct." [Tr.I:57].

Mr. Visconti responded by saying "disorderly conduct, fuck you disorderly conduct." Id. Officer DiOrio testified that he decided to arrest Mr. Visconti on a charge of disorderly conduct, and that he told Mr. Visconti that "he would be placed under arrest." Id.

Officer DiOrio then told him "to turn around to place his hands behind his back." [Tr.I:58]. Mr. Visconti turned around and grabbed onto a fence that was a foot or two behind him. Id. Officer DiOrio instructed Mr. Visconti to let go of the fence, but he did not do so. Id. Officers DiOrio and DelCompare then grasped him and "guided" him to the ground. Id.

b. Testimony of Officer DelCompare

Officer DelCompare testified that after he arrived Mr. Visconti was "yelling, using obscene language," and that because there were other people around,³ "Officer DiOrio and I advised him to just calm it down a little bit. We understand that he was upset. Anyone that gets beat up is going to be upset. It's

³ Officer Delcompare identified three other people around, the two witnesses to the assault who had called 911 and one man who stopped and asked what was going on. [Tr.I:114].

understandable. But just to -- just tone it down."

[Tr.I:113].

Officer DelCompare told Mr. Visconti that "[i]f you keep on going with this behavior, you're going to be locked up for disorderly conduct," and that Mr. Visconti responded by stating "Fuck you disorderly conduct." [Tr.I:114].

Officer DelCompare then decided to arrest Mr. Visconti. [Tr.I:114-115]. He then told Mr. Visconti that "he needs to turn around and place his hands behind his back and that he's going to be placed under arrest for disorderly conduct." [Tr.I:114]. According to Officer DelCompare, "[i]nstead of placing his hands behind his back, [Mr. Visconti] began to fight us, swinging his arms in a violent manner, and when I got control of one of his arms, he snatched it away from me and placed it on the fence that was nearby, tightly grasping the -- tightly grasping this fence so that way I couldn't get his arms placed behind his back. [Tr.I:115]. Officer DelCompare testified that he then called Officer DiOrio over to assist him in bringing Mr. Visconti "down to the ground." Id.

c. Testimony of Edi McGarry

Edi McGarry, a neighbor who witnessed the attack on Mr. Visconti and his subsequent arrest, testified that when Officer DelCompare arrived he "[w]ent straight to Michael [Visconti]," and that "there was no communication" with Officer DiOrio. [Tr.I:100]. McGarry testified that Mr. Visconti did not touch Officer DelCompare and that "[h]e was just more upset because of what happened, and it was just like, boom, he just arrested him, and he threw him down on the ground on his stomach." [Tr.I:102]. When the arrest occurred, Mr. Visconti "was holding on to the fence because ... it was just like really slippery because it was all icy." [Tr.I:103-104].

According to Ms. McGarry, there was no announcement by the officers that Mr. Visconti was going to be arrested, and Mr. Visconti never said "Fuck you disorderly conduct" Id. Only Officer DelCompare performed the arrest and Officer DiOrio was speaking with her at the time, with his back turned to Mr. Visconti. [Tr.I:101-102].

After Mr. Visconti was thrown to the ground, Officer DelCompare "had his knee on his back, and [Mr.

Visconti] kept telling him, "I'm disabled. Please get off of my back. Get me off my stomach." [Tr.I:103].

4. Trial Proceedings.

The trial of this matter occurred on October 3 and 4, 2017. [R.4]. At the outset of the trial, the judge stated:

Well, count two you say resisting arrest common law. Do you know what the elements are for the common law resisting arrest? Is everyone in agreement that it's the same as statutory resisting arrest? I'm not aware of any difference.

[Tr.I:4-5]. Defense counsel responded by stating "I'm assuming that's what it is, Judge." [Tr.I:5]. The judge responded, stating: "All right. Well, I am, too. Resisting arrest is a statutory offense. I don't know why they say common law, but it's the same elements, so I'm going to instruct on the same elements." Id. Defense counsel made no further response. The prosecution's only response was to state "thank you." Id.

On the charge of Resisting Arrest, the judge instructed the jury as follows at the close of trial:

There are four elements to resisting arrest. First element: The defendant prevented or attempted to prevent a

police officer from making an arrest of the defendant. That's element number one.

Element number two, the officer was acting under the color of his official authority when he went to make the arrest.

Element number three, the defendant resisted by using or threatening to use physical force or violence against the police officer.

Fourth, the defendant did so knowingly. That is to say that the defendant knew at the time that he was acting to prevent an arrest by a police officer who was acting under color of his official authority.

As I have indicated, the Commonwealth must prove that the police officer was acting under color of official authority. A police officer acts under color of official authority when in the regular course of assigned duties he makes a judgment in good faith based on the surrounding facts and circumstances that he should make an arrest.

The Commonwealth must also prove the defendant knew that the person seeking to make an arrest was a police officer. The Commonwealth may do so by proving that the officer was in uniform and displaying his credentials, such as a badge.

The Commonwealth must prove that the defendant knew that the officer was attempting to arrest him. The Commonwealth must also prove that the defendant's resistance occurred before the arrest was completed. An arrest is completed when a person has been detained, placed and securely in

custody and is under the control of a police officer.

So in summary, there are, as I've told you, four elements to this offense. First, the defendant prevented or attempted to prevent a police officer from arresting the defendant; second, the officer was acting under color of his official authority at the time; third, the defendant resisted by using or threatening to use physical force or violence against the police officer; and, fourth, the defendant did so knowingly. That is to say the defendant knew at the time that he was acting to prevent an arrest by a police officer acting under the color of his official authority.

[Tr.I:176-177].

ARGUMENT

I. THE INSTRUCTIONS TO THE JURY ON COMMON LAW RESISTING ARREST OMITTED AN ESSENTIAL ELEMENT OF THE CRIME, CREATING A SUBSTANTIAL LIKELIHOOD OF MISCARRIAGE OF JUSTICE.

Mr. Visconti was charged with Common Law Resisting Arrest. [R.6]. At the time of trial, neither the prosecution, defense counsel, nor the Court knew the elements of the common law crime, or the proper instructions to give the jury for the crime. [Tr.I:4-5]. Without objection from either party, the judge determined to instruct the jury on the elements of the statutory offense, G.L. c. 268, §32B, and did so. Id. Both the judge and defense counsel opined that they were simply assuming that the elements of the two crimes were the same. Id.

In fact, as addressed herein, the instructions for the statutory offense did not accurately reflect the elements of the common law crime. Because the defendant did not object to the incorrect instruction, the error should be reviewed to determine whether it created a substantial likelihood of miscarriage of justice. See Commonwealth v. Niemic, 427 Mass. 718, 720 (1998) (errors in jury instruction not objected to

at trial reviewed for "a substantial likelihood of a miscarriage of justice").

In reviewing the instructions given in this case, the Court should:

Review the entire charge to the jury to determine the interpretation a reasonable jury would place on the judge's words, . . . consider[ing] the strength of the Commonwealth's case to determine whether the outcome 'of the trial might have been different had the error not been made.'

Commonwealth v. King, 460 Mass. 80, 85 (2011) (quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002)).

Courts should "examine the trial judge's instructions in their entirety 'to determine their probable impact on the jury's perception of the fact-finding function.'" Commonwealth v. Baseler, 419 Mass. 500, 502 (1995) (quoting Commonwealth v. Mejia, 407 Mass. 493, 495 (1990)).

A. Common Law Resisting Arrest requires the Commonwealth prove the Defendant acted with a specific intent of resisting arrest.

Few Massachusetts decisions have considered the crime of common law resisting arrest, and those few to do so have been primarily addressed to whether

Massachusetts recognizes the common law right to resist an unlawful arrest. See e.g., Commonwealth v. Moreira, 388 Mass. 596, 601 (1983) (abolishing the common law right to resist an unlawful arrest); Commonwealth v. Montes, 49 Mass. App. Ct. 789 (2000).

Other states that have examined the issue, however, have concluded that, as with other common law crimes, scienter is an element of resisting arrest, and the prosecution must prove that the defendant possessed a specific intent to prevent or interfere with an arrest to be guilty of resisting arrest at common law. In City of Seattle v. Gordon, 342 P.2d 604, 606 (Wash. 1959), for example, the Washington court addressed whether a codification of common law resisting arrest incorporated the specific intent that exists at common law. Finding that it did, the court noted that “[a]t common law, scienter was an element of every crime...Resisting arrest was a crime at common law. Scienter was an element.” Id.

In Gordon, the issue was whether the defendant could possess the requisite specific intent “if an officer does not disclose his authority and the accused does not know that he is an officer and is attempting to arrest him for an offense.” Id. However,

other cases have recognized that the need to prove specific intent extends to the act itself, and hold that a jury must find that a defendant, in acting, did so with the purpose of preventing his arrest.

In State v. Blanton, 398 A.2d 1328, 1332 (N.J. Super. App. Div., 1979), for example, the New Jersey court held that “flight knowingly intended to prevent a police officer from effecting an arrest ... constitutes guilt of the common-law crime of resisting arrest.” Blanton found that the judge’s instructions to the jury would be deemed sufficient “if the jurors could understand therefrom that flight from a police officer with knowledge by the fugitive that the officer was attempting to arrest him *and with the purpose of* avoiding or frustrating that arrest” were required elements of the crime. Id. at 1332 (emphasis added).

Though apparently not addressed by Massachusetts courts in the context of resisting arrest, Massachusetts decisions interpreting the scienter requirements of the common law are consistent with the New Jersey and Washington decisions on common law resisting arrest. In Commonwealth v. Lefkowitz, 20 Mass. App. Ct. 513, 517 (1985), this Court

acknowledged the defendant's position that "mental culpability is required as an element of all crimes which have their origin in the common law," while rejecting the rule's extension to a statutory crime. See also Commonwealth v. Mixer, 207 Mass. 141, 142 (1910) ("In the prosecution of crimes under the common law apart from statute, ordinarily it is necessary to allege and prove a guilty intent").

In Commonwealth v. Peulic, 103 N.E.3d 771 (Mass. App. Ct., Rule 1:28 Decision, April 13, 2018), this Court addressed the appropriate jury instruction where specific intent was an element of the crime. Peulic found the jury instruction in that case, which related to the requirement of proving that the defendant intended to place a victim in fear of bodily harm, was "unilluminating because, among other reasons, 'it did not emphasize that the defendant must have acted with purpose or have intended certain consequences.'" Id. (citing Commonwealth v. Gunter, 427 Mass. 259, 269 (1998)).

Peulic further explained that where specific intent is an element, the Court must explain to the jury "the Commonwealth's burden on the specific intent element in a charged offense . . . -- that a defendant

must not only have consciously intended to take certain actions, but that he also consciously intended certain consequences . . . to result from his actions." Peulic, 103 N.E.3d at 771 (quoting Commonwealth v. Deschaine, 77 Mass. App. Ct. 506, 513 (2010)).

The same requirement -- that the jury be instructed that it must find that the defendant not just intended to act, or acted knowingly, but that he intended the specific consequence that is an element of the crime -- is as applicable to the common law crime of resisting arrest as it is to other common law specific intent crimes.

B. The instructions to the jury did not adequately instruct on the specific intent required to commit common law Resisting Arrest.

While Mr. Visconti was charged with common law Resisting Arrest, the jury was instructed from the model jury instructions for the statutory crime of resisting arrest, G.L. c. 268, §32B. [Tr.I:176]. Compare Criminal Model Jury Instructions for Use in the District Court, § 7460 - Resisting Arrest. Specifically, relevant to intent, the judge instructed

the jury that the elements of the crime included that "the defendant resisted by using or threatening to use physical force or violence against the police officer," and that "the defendant did so knowingly. That is to say that the defendant knew at the time that he was acting to prevent an arrest by a police officer." [Tr.I:176]. The judge further instructed that "[t]he Commonwealth must also prove the defendant knew that the person seeking to make an arrest was a police officer," and . . . "knew that the officer was attempting to arrest him." [Tr.I:176-177].

The Court's instructions reflected the statutory offense, which provides that "[a] person commits the crime of resisting arrest if he *knowingly* prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another." G.L. c. 268, §32B (emphasis added). However, the instructions failed to encompass the common law requirement of specific intent, and in particular the requirement that the jury find that the defendant's *purpose* in acting was to prevent his arrest. See Blanton, 398 A.2d at 132.

Massachusetts courts have often noted that the common law concepts of specific and general intent are

difficult to define for a jury and that attempts to do so "can obscure more than [they] illuminate[]."

Commonwealth v. Deschaine, 77 Mass. App. Ct. 506, 513 (2010). However, the case law also recognizes that "knowledge" does not equate to specific intent. Rather, "[i]n a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." Deschaine, 77 Mass. App. Ct. at 513 (citations omitted).

Thus, while it was unnecessary for the trial court to have used the particular terms in instructing the jury in this case, the question must be whether the instructions that were given accurately conveyed the elements which must be found in order to convict a defendant of common law resisting arrest. Peulic, 103 N.E.3d at 771. In Peulic, this Court emphasized that an instruction where specific intent is an element must "emphasize that the defendant must have acted with purpose or have intended certain consequences." 103 N.E.3d at 771.

The instructions given to the jury in this case did not satisfy that requirement in that they did not emphasize or even correctly state the intent required

by the common law crime. To the contrary, the jury was instructed only that it must find that the defendant “knew at the time that he was acting to prevent an arrest by a police officer.” [Tr.I:176]. That is, the jurors were not instructed that Mr. Visconti must have acted intending to prevent or hinder his arrest, only that he could have known that his actions may have such an effect. This instruction was consistent with the concept of general intent, but not specific intent as required by the common law. See Deschaine, 77 Mass. App. Ct. at 513.

C. The erroneous jury instructions created a substantial likelihood of miscarriage of justice.

The omission of a specific intent instruction to the jury likely had a significant effect on the outcome of this case. From the evidence before it, the jury could have found that Mr. Visconti was told he was being arrested and then turned around and held onto the fence behind him. It also could have concluded that Mr. Visconti “knew” that holding onto the fence would make his arrest more difficult.

On the instructions that were given -- that Mr. Visconti only need to have acted knowing that he was

acting to prevent an arrest by a police officer -- these findings would have been sufficient to require the jury to return a guilty verdict against Mr. Visconti.

However, had the jury been properly instructed on the required intent, the result likely would have been very different. In particular, the jury could have found from the evidence that while he objectively understood that holding onto the fence would interfere with his arrest, Mr. Visconti's intention in grabbing the fence was not to prevent his arrest but to prevent injury to his back. That evidence included testimony that at the time of the arrest it was snowing and icy, the sidewalk where Mr. Visconti was standing was slippery, Mr. Visconti had a severe back injury for which had undergone multiple surgeries, and he had just been attacked and kicked multiple times in the back.

From this evidence the jury reasonably could have found that Mr. Visconti's intention in grabbing onto the fence was to try to avoid further injury to his back. Had it been correctly instructed that Mr. Visconti must have intended to resist arrest when he grabbed onto the fence, the jury easily could have

found that Mr. Visconti was not guilty of common law Resisting Arrest.

The failure to accurately instruct the jury that it must find that Mr. Visconti intended to resist his arrest effectively lowered the Commonwealth's burden of proof. Massachusetts recognizes that mistakes of this type constitute reversible error. See Baseler, 419 Mass. at 503-504 (erroneous deadly force instruction was reversible error because it "lowered the Commonwealth's burden of proving that the defendant did not act in self-defense").

In determining whether an incorrect jury instruction created a "substantial likelihood of miscarriage of justice, Courts:

Review the entire charge to the jury to determine the interpretation a reasonable jury would place on the judge's words, . . . consider[ing] the strength of the Commonwealth's case to determine whether the outcome 'of the trial might have been different had the error not been made.'

Commonwealth v. King, 460 Mass. 80, 85 (2011) (quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002)).

Because the erroneous jury instructions in this case precluded the jury from finding Mr. Visconti not guilty of resisting arrest because he lacked the

required intent, it can only be concluded from the facts of this case that the jury's verdict "might have been different had the error not been made." King, 460 Mass. at 85. Indeed, in light of the evidence of Mr. Visconti's injuries, the weather conditions at the time of his arrest, and the fact that the jury acquitted him of the disorderly conduct charge on which he originally was arrested, there is a strong likelihood that the jury would have reached a different result had it been given the proper instruction.

Accordingly, this Court should conclude that the erroneous jury instructions in this case created a substantial likelihood of miscarriage of justice requiring reversal of Mr. Visconti's conviction.

D. The failure to object to the erroneous jury instructions constitutes ineffective assistance of counsel.

Defense counsel's failure to determine the elements of Common Law Resisting Arrest prior to trial, [Tr.I:4], or to object to the inaccurate jury instructions concerning the same issue, constituted ineffective assistance of counsel and denied Mr. Visconti his right to counsel as guaranteed by the

Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Declaration of Rights.

Under Article 12, this Court's inquiry is two-fold:

[F]irst, that defense counsel's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer' and second that the defendant's case was prejudiced by counsel's conduct such that the conduct 'has likely deprived the defendant of an otherwise available, substantial ground of defense.'

Commonwealth v. White, 409 Mass. 266, 272 (1991), quoting Commonwealth v. Sefarian, 366 Mass. 89, 96 (1974).

Under the Sixth Amendment, a defendant's right to counsel is violated if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984).

Here, defense counsel failed to educate himself on the elements of the common law charge against Mr. Visconti and as a result failed to object to a jury

instruction that did not accurately convey to the jury the specific intent required to commit that crime.

These failures cannot be categorized as strategic choices by counsel or otherwise disregarded. As Commonwealth v. Azar, 435 Mass. 675, 689 (2002), noted, "there is no reasonable tactical basis for a failure to object to a mistaken and unfavorable (to the defendant) definition of an element of the crime."

The same reasoning applies here. There was no rational basis for counsel to have failed to object to an inaccurate jury instruction that reduced the Commonwealth's burden of proof with respect to Mr. Visconti's intent. Indeed, the transcript in this case is explicit that counsel's failure to object to the instructions was not a tactical decision by counsel, but reflected counsel's unfamiliarity with the elements of the crime. [Tr.I:4]. Consequently, defense counsel's performance fell "measurably below that which might be expected from an ordinary, fallible lawyer" and created a substantial likelihood of a miscarriage of justice for the same reasons discussed in Section C, *supra*.

CONCLUSION

For all of the foregoing reasons, this Court should reverse Mr. Visconti's conviction on the charge of Common Law Resisting Arrest and grant such other relief as the Court deems appropriate.

Respectfully submitted,
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ADDENDUM

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Sixth Amendment to the
United States Constitution

Fourteenth Amendment to the
United States Constitution

Article 12 of the Massachusetts
Declaration of Rights.

Massachusetts General Laws Chapter 265, §32B
Resisting Arrest

Criminal Model Jury Instructions for Use in the
District Courts, Instruction 7460, Resisting Arrest

**Sixth Amendment to the
United States Constitution**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**Fourteenth Amendment to the
United States Constitution, Section 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Article 12 of the Massachusetts
Declaration of Rights.**

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Massachusetts General Laws Chapter 268, §32B
Resisting Arrest

Section 32B.

(a) A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

(1) using or threatening to use physical force or violence against the police officer or another;
or

(2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another.

(b) It shall not be a defense to a prosecution under this section that the police officer was attempting to make an arrest which was unlawful, if he was acting under color of his official authority, and in attempting to make the arrest he was not resorting to unreasonable or excessive force giving rise to the right of self-defense. A police officer acts under the color of his official authority when, in the regular course of assigned duties, he is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him.

(c) The term "'police officer'" as used in this section shall mean a police officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such police officer while attempting such arrest.

(d) Whoever violates this section shall be punished by imprisonment in a jail or house of correction for not

more than two and one-half years or a fine of not more than five hundred dollars, or both.

**Criminal Model Jury Instructions for Use in the
District Courts, Instruction 7460**

RESISTING ARREST

The defendant is charged with resisting arrest. Section 32B of chapter 268 of our General Laws provides as follows:

"A person commits the crime of resisting arrest if he [she] knowingly prevents or attempts to prevent a police officer, acting under color of his [her] official authority, from effecting an arrest of [himself] or another [either] by using or threatening to use physical force or violence against the police officer or another; or [by] using any other means which creates a substantial risk of causing bodily injury to such police officer or another."

In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt: First: That the defendant prevented or attempted to prevent a police officer from making an arrest (of the defendant) (or) (of another person); Second: That the officer was acting under color of his (her) official authority at the time; Third: That the defendant resisted: either by using, or threatening to use, physical force or violence against the police officer (or another person); or by using some other means which created a substantial risk of causing bodily injury to the police officer (or another person); and Fourth: That the defendant did so knowingly; that is to say, that the defendant knew at the time that he (she) was acting to prevent an arrest by a police officer acting under color of his (her) official authority.

As I have indicated, the Commonwealth must prove that the police officer was acting "under color of official authority." A police officer acts "under color of official authority" when, in the regular course of assigned duties, he (she) makes a judgment in good

faith, based on the surrounding facts and circumstances, that he (she) should make an arrest.

The Commonwealth must also prove that the defendant knew that the person seeking to make the arrest was a "police officer." The Commonwealth may do so by proving that the officer was in uniform or, if not in uniform, identified himself (herself) by exhibiting his (her) credentials as a police officer while attempting to make the arrest. Such credentials would include such things as a badge, insignia, identification card, police radio, or other police equipment such as a clearly identified police vehicle.

The Commonwealth must prove that the defendant knew that the (officer was) (officers were) attempting to arrest him (her).

The Commonwealth must also prove that the defendant's resistance 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.

In summary, then, the Commonwealth must prove four elements beyond a reasonable doubt: First: That the defendant prevented or attempted to prevent a police officer from making an arrest (of the defendant) (or) (of another person); Second: That the officer was acting under color of authority at the time; Third: That the defendant resisted: either by using, or threatening to use, physical force or violence against the police officer (or another person) or by using some other means which created a substantial risk of causing bodily injury to the police officer (or another person); and Fourth: That the defendant did so knowingly; that is to say, that the defendant knew at the time that he (she) was acting to prevent an arrest by a police officer acting under color of his (her) official authority.

If the Commonwealth has proved beyond a reasonable doubt all four elements of the crime, you should return a verdict of guilty. If it has failed to prove any element of the offense beyond a reasonable doubt, you must return a verdict of not guilty.

Rule 16(k) Certification of Compliance

I, Brad A. Compston, counsel for the Appellant, hereby certify that this brief complies with the rule of Court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18 and 20.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS
14th DAY OF JANUARY, 2019.

/s/ Brad A. Compston
Brad A. Compston
BBO# 640520

CERTIFICATE OF SERVICE

I, Brad A. Compston, hereby certify that on January 14, 2019, I filed the attached documents through the Electronic Filing Service Provider (Provider) for electronic service to the following registered Users:

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