

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.

G.L. c. 268, § 32B(b).

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.

G.L. c. 268, § 32B(c). See *Commonwealth v. Winston W.*, 61 Mass. App. Ct. 1106, 808 N.E.2d 1257, 2004 WL 1124719 (No. 03-P-407, May 20, 2004) (unpublished opinion under Appeals Court Rule 1:28) (plainclothes officer was sufficiently identified by verbally identifying himself, carrying a police department radio, and badge visibly clipped to his belt).

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

Commonwealth v. Grant, 71 Mass. App. Ct. 205, 880 N.E.2d 820 (2008) (defendant must know that attempted seizure is to effect an arrest, based on police words or actions communicating that intention before or during pursuit). See *Commonwealth v. Muhammad Taroon*, 71 Mass. App. Ct. 1116, 883 N.E.2d 343, 2008 WL 859688 (No. 06-P-1415, April 1, 2008) (unpublished opinion under Appeals Court Rule 1:28) (defendant must know both that person is a police officer and 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 securely in custody, and is under the control of the police.

Commonwealth v. Ocasio, 71 Mass. App. Ct. 304, 882 N.E.2d 341 (2008) (physical resistance to being placed in cruiser after being placed under arrest and handcuffed may be prosecuted under § 32B); *Commonwealth v. Katykin*, 59 Mass. App. Ct. 261, 794 N.E.2d 1291 (2003) (same). Compare *Commonwealth v. Grandison*, 433 Mass. 135, 143-147, 741 N.E.2d 25, 34-37 (2001) (post-arrest physical resistance at stationhouse cannot be prosecuted under § 32B) with *Commonwealth v. Joe Wayne Baker*, 72 Mass. App. Ct. 1111, 891 N.E.2d 716, 2008 WL 2951797 (No. 07-P-1363, August

4, 2008) (unpublished opinion under Appeals Court Rule 1:28) (evidence of post-arrest conduct does not require reversal where, unlike *Grandison*, Commonwealth did not argue that charge could be proved by post-arrest conduct), and *Commonwealth v. Richard P. Unaitis*, 57 Mass. App. Ct. 1111, 784 N.E.2d 50, 2003 WL 721146 (No. 01-P-1657, March 3, 2003) (unpublished opinion under Appeals Court Rule 1:28) (*Grandison* indicated that it “has no bearing on prosecutions based on a continuing course of conduct” and therefore jury could properly hear about defendant’s continued lashing out after arrest in an uninterrupted “single chain of events” rather than subsequent and distinct acts).

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.

SUPPLEMENTAL INSTRUCTIONS

1. *Police use of unreasonable or excessive force.*

A police officer may not use unreasonable or excessive force in making an arrest. A person is allowed to use reasonable force to protect (himself) (herself) 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 (himself) (herself) with as much force as reasonably appears necessary. The person arrested is required to stop resisting once (he) (she) knows or should know that if he stops 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 three things beyond a reasonable doubt:

***First:* 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**

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

***Third:* That the defendant used more force to defend (himself) (herself) than was reasonably necessary in the circumstances.**

Commonwealth v. Rodriguez, 370 Mass. 684, 692 n.10, 352 N.E.2d 203 (1976); *Commonwealth v. Kendrick*, 351 Mass. 203, 211; 218 N.E.2d 408, 414 (1966); *Commonwealth v. Urkiel*, 63 Mass.App.Ct. 445, 826 N.E.2d 769 (2005); *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 818 N.E.2d 1069 (2004). See *Commonwealth v. James Manns*, 56 Mass. App. Ct. 1114, 779 N.E.2d 1005, 2002 WL 31749107 (No. 01-P-224, Dec. 9, 2002) (unpublished opinion under Appeals Court Rule 1:28) (failure to use term "self defense" not error where jury was informed that it could consider whether any resistance was in response to excessive police force).

For additional notes on self defense see Instruction 9.260 ("Self Defense").

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 his (her) official authority and used only reasonable force in attempting to make the arrest.

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

Commonwealth v. Lawson, 46 Mass. App. Ct. 627, 708 N.E.2d 148 (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, 880 N.E.2d 820 (2008).