

CHAPTER X. - ESSENTIAL ELEMENTS

Judge Jess W. Ullom

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He was assisted in the preparation of this chapter by Joy D. McMillen, who works with him at the law firm of Doster, Robinson, James, Hutchison and Ullom in Chesterfield, Missouri. Ms. McMillen received her J.D. from St. Louis University in 1994.

Substantial acknowledgement is also due to Judge Thomas E. Sims for his original work on this chapter for the 1990 edition, sections of which remain unchanged in this revision. Judge Sims is now retired, after having served as municipal judge for Kansas City since 1972.

CHAPTER X ESSENTIAL ELEMENTS

10.1 INTRODUCTION

Before a judge can hold government has made a prima facie case and, after the completion of all the evidence a finding of guilt, the judge must determine that every element essential to the commission of the offense charged has been proven beyond a reasonable doubt in accordance with Missouri law.

The key to determining the elements necessary to make findings is that any judge must first read the ordinance because it represents the only basis for the charge brought against the individual. That is so because the judge may not otherwise determine what elements of proof the law requires. These are essential determinations and constitute the basis for the findings.

As always, the necessary elements in addition thereto are identification of the party charged as the violator and the place of occurrence within the geographical jurisdiction of the court.

10.2 SCOPE OF CHAPTER

An effort has been made to provide for users the essential elements of proof required to sustain judicial convictions in the most common ordinance violations heard and determined by those having jurisdiction over such offenses.

PART I TRAFFIC ORDINANCES

10.3 EXCEEDING THE SPEED LIMIT

SAMPLE ORDINANCES: MAXIMUM SPEED LIMITS & POSTED SPEED LIMITS

Except when a special hazard exists that requires lower speed for compliance with section #xxx, the limits hereinafter specified or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle at a speed in excess of such maximum limits:

- (a) Twenty-five miles per hour on all streets except those which have been designated as through streets.
- (b) Thirty-five miles per hour on all through streets. The maximum speed limits set forth in this section may be altered as authorized in section # xxx.
- (c) The speed limit posted and established by ordinance.

MINIMUM SPEED LIMITS

- (a) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is

necessary for safe operation or compliance with law.

- (b) When appropriate signs are erected, no person shall operate a motor vehicle on any controlled access street or highway at a speed of less than forty miles per hour except when reduced speed is necessary for safe operation or compliance with law.

TOO FAST FOR CONDITIONS

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having due regard to the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or street or highway conditions.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) driving a motor vehicle within the city limits;
- (2) on a street or highway (city), (and at intersection, railroad grade crossings, curves, hillcrests, winding roadways, etc.);
- (3)
 - (a) in excess of maximum speed limits specified or established (for street in this city); or
 - (b) or at such a slow speed as to impede the normal and reasonable movement of traffic; or
 - (c) unreasonable rate of speed plus specific hazardous conditions.
- (4) defendant is a resident of city - or prove signs properly posted (304.120).

* * * * *

Except for an occasional oversight, the prosecution can generally be expected to prove the first element. If there is a failure of such proof, then the court has no jurisdiction at trial to do other than find the defendant not guilty and dismiss the charge.

On occasion the prosecution will fail to prove element (2) by omitting proof of the fact that the defendant drove at a speed above the maximum lawfully permitted on a city street or highway.

The failure of proof more often occurs in connection with element (3); that is, proof that the speed limit was exceeded. Various cases have dealt with this issue. Police officer opinion

testimony of a speed estimate of defendant's vehicle is receivable in evidence. City of Webster Groves v. Quick, 323 S.W.2d 386 (Mo. App. 1959). State v. Calvert, 682 S.W.2d 474 (Mo. App. 1984). Where the speed is measured by radar, (Radio Detection and Ranging) a speed detecting device, the supporting scientific principle is now accepted by the courts (judicially noticed) and when the unit is properly functioning and properly operated it is considered to accurately measure speed in terms of miles per hour. State v. Graham, 322 S.W.2d 188 (Mo. App. 1959). A "duality of tests" of the radar unit made almost immediately before the speed measuring occasion constitutes prima facie proof, when offered, to show the machine was functioning properly at the time a defendant's speed was measured, whether at a stationary site or in the "moving mode." Calvert, Graham. The accuracy of the radar as a speed-measuring device depends upon the accuracy of the measuring device against which it is tested. City of St. Louis v. Boecker, 370 S.W.2d 731 (Mo. App. 1963). Where the evidence introduced shows that the tuning forks used to measure the accuracy of the radar unit were calibrated by electronic equipment used for that purpose, that the arresting officer observed the calibration process both before and after the arrest, and that neither required adjustment, proof of such accuracy is sufficient to make a submissible case. Kansas City v. Hill, 442 S.W.2d 89 (Mo. App. 1969). No proof of the accuracy of the electronic equipment or master machine is necessary. City of Kansas City v. Tennill, 630 S.W.2d 173 (Mo. App. 1982). See also, State v. Moore, 700 S.W.2d 880 (Mo. App. E.D. 1985).

The reader's attention is specifically directed to Section 304.120.1, RSMo, which provides in pertinent part:

No person who is not a resident of such municipality and who has not been within the limits thereof for a continuous period of more than forty-eight hours, shall be convicted of a violation of such ordinances, unless it is shown by competent evidence that there was posted at the place where the boundary of such municipality joins or crosses any highway a sign displaying in black letters not less than four inches high and one inch wide on a white background the speed fixed by such municipality so that such sign may be clearly seen by operators and drivers from their vehicles upon entering such municipality.

Therefore, the municipal judge may regard this statute as requiring proof of an additional element in an ordinance prosecution, namely, that such a sign was posted and visible to nonresident transient motorists entering the municipality or briefly within it for less than 48 hours, once proof of either relationship is introduced. The proof is of a jurisdictional nature.

10.4 FAILURE TO YIELD RIGHT OF WAY

SAMPLE ORDINANCES:

RIGHT-OF-WAY AT INTERSECTION - NO TRAFFIC CONTROLS

The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway where the intersection is not controlled by traffic controls.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Operating a motor vehicle within the city limits;
- (2) Upon a highway approaching an intersection; ("highway" is generic by definition for a public street or highway by statute, as well as case decision);
- (3) Fails to yield the right-of-way (to stop or give way) to a vehicle which has entered the intersection from a different street or highway, (a negative duty exists; i.e. to not enter the street or highway under the circumstances);
- (4) If there is no form of traffic control at such intersection;
- (5) In exercise of the highest degree of care (required by Section 304.012.1, RSMo).

SAMPLE ORDINANCES:

RIGHT-OF-WAY - VEHICLES APPROACHING OR ENTERING INTERSECTIONS

When two vehicles approach or enter an intersection from different streets or highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) The operation of two separate vehicles on the public way within the city limits;
- (2) Approaching or entering the same intersection from different streets or highways at approximately the same time;
- (3) (Implied) with no form of traffic control;
- (4) The driver of the vehicle on the left fails to stop or give way to the vehicle on the right;

SAMPLE ORDINANCES:

RIGHT-OF-WAY - VEHICLE TURNING LEFT

The driver of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) The operation of a motor vehicle within the city limits;
- (2) By a driver intending to turn left;
- (3) Fails to yield the right-of-way (stop or give way) to any vehicle approaching from the opposite direction;
- (4) Which is so close as to constitute an immediate hazard.

SAMPLE ORDINANCES:

RIGHT-OF-WAY AT INTERSECTION - STOP SIGNS AT INTERSECTION

The operator of any vehicle who has stopped as required by law in obedience to a stop sign at an intersection shall yield to other vehicles within the intersection or approaching so closely on the protected street as to constitute an immediate hazard, but said operator having so yielded may proceed, and other vehicles approaching the intersection on the protected street shall yield to the vehicle so proceeding into or crossing the protected street.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Operating of a motor vehicle within the city limits;
- (2) Stopped at a street intersection in obedience to a stop sign;
- (3) Fails to yield right-of-way (give way - remain stopped or slow) to vehicles within the intersection or approaching so closely on the protected street as to constitute an immediate hazard;
- (4) But after having stopped and given way may proceed;
- (5) Other vehicles then approaching the intersection of the protected street shall "give way" to the vehicle proceeding or crossing the protected street.

SAMPLE ORDINANCES:

RIGHT-OF-WAY AT INTERSECTION - YIELD SIGNS AT INTERSECTION

The driver of a vehicle approaching a yield sign....after slowing or stopping,shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection or junction of roadways. Such driver shall yield the right-of-way to pedestrians within an adjacent crosswalk. Provided, however, that if such a driver is involved in a collision with a vehicle in the intersection or junction of roadways or with a pedestrian in an adjacent crosswalk after driving past a yield sign, such collision shall be deemed prima facie evidence of his failure to yield the right-of-way.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) The driving of a motor vehicle within the city limits;
- (2) Upon a roadway with a yield sign at an intersection or junction of another roadway;
- (3) (a) Fails to "give way" (stop, slow or swerve) to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard; or
(b) Fails to "give way" (slow or stop) to pedestrians within an adjacent crosswalk;
- (4) During the time such driver is moving across or within the intersection or junction of roadways.

If a collision occurs after driving past a yield sign in the intersection, with a vehicle, or in the adjacent crosswalk with a pedestrian, a presumption arises from such collision that the driver passing the yield sign failed to yield the right-of-way. A prima facie case is made.

SAMPLE ORDINANCES:

RIGHT-OF-WAY - PRIVATE ROAD

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a vehicle within the city limits;
- (2) About to enter or cross a roadway from any place other than another roadway;
- (3) Fails to "give way" (stop, slow or swerve) to all vehicles approaching on the

roadway to be entered or crossed.

* * * * *

There has been included in the foregoing elements of proof an element that the violation occurs upon a highway. Each of the subsections contains either a direct reference to "highway" or "roadway" or implicitly refers to it by language making obvious the legislative intent; i.e., "entered the intersection from a different highway"; "before entering the intersecting roadway," etc.

Though failure to yield the right-of-way is denominated specifically as an offense "an information charging careless driving by failure to yield the right-of-way at a place where required by statute to do so, includes the offense as descriptive of what happened and in what manner defendant drove imprudently." State v. Richards, 429 S.W.2d 351 (Mo. App. 1971). An information, however, failing to state that the offense occurred on a highway (because of Section 304.010, RSMo) did not charge a crime under the statute. State v. Rollins, 469 S.W.2d 46 (Mo. App. 1971); State v. Barlett, 394 S.W.2d 434 (Mo. App. 1965). "Highways" as pointed out by the Barlett court "is to be used in its popular, rather than technical, sense and was intended to apply to all roads traveled by the public." Id. at 436 (citing) Phillips v. Henson, 326 Mo. 282; 30 S.W.2d 1065(8) (Mo. 1930).

And finally, Barlett teaches that in pleading the elements, at 436:

"The test of the sufficiency of an information is usually said to be whether it contains all the essential ingredients of the offense set out in the statute and clearly apprises the court and the defendant of what facts constitute the offense whereof the defendant is charged; and also, whether it would be a bar to subsequent prosecution for the same offense."

10.5 CARELESS AND IMPRUDENT DRIVING

SAMPLE ORDINANCES:

CARELESS AND IMPRUDENT DRIVING

No person shall drive any vehicle within this city carelessly and imprudently in disregard of the rights or safety of others, or without due caution and in a manner so as to endanger or be likely to endanger any person or property.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving any vehicle within the city limits;
- (2) Carelessly and imprudently:
 - (a) In disregard of the rights or safety of others; or
 - (b) Without due caution required by the circumstances;
- (3) And in a manner so as to endanger or be likely to endanger any person or

property.

* * * * *

The general rule is that for a valid conviction of careless driving to be upheld, the ordinance does not require a showing that a specific person was actually put in danger. State v. McNail, 389 S.W.2d 214 (Mo. App. 1965). It is essential, however, to show the property or the life and limb of others was endangered by reason of defendant's driving. State v. Todd, 477 S.W.2d 725 (Mo. App. 1972). Both the pleading and proof must treat the offense as one separate from others in the law regarding the operation of vehicles. Operation of a motor vehicle in excess of the posted speed limit has been statutorily deemed as prima facie evidence of careless and imprudent driving. See RSMo § 304.351.7.

10.6 LEAVING THE SCENE OF AN ACCIDENT

SAMPLE ORDINANCES:

ACCIDENTS INVOLVING DEATH OR PERSONAL INJURY

The driver of any vehicle involved in an accident within this city resulting in the death of or injury to any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled all the requirements of this section.

The driver of any such vehicle involved in an accident resulting in the death of or injury to any person shall give his name, address and the registration number of the vehicle he is driving and shall upon request and if available, exhibit his license or permit to drive to any person injured in such accident, and shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

The driver of any such vehicle involved in an accident resulting in the death of or injury to any person shall immediately by the quickest means of communication give notice of such accident to the police department, and give the police such information as they require, and remain at the said scene until authorized to proceed by said police.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a motor vehicle involved in an accident within the city limits;
- (2) Resulting in the death of or injury to any person;
- (3) Fails to immediately stop such vehicle at the scene of such accident or as close thereto as possible; and
- (4) Return to and remain at the scene until meeting obligations required by this law; i.e., fails to give the party injured his:
 - (a) name;

- (b) address; and
- (c) vehicle registration number; and
- (d) if requested, exhibit his driver's license or permit (to the party whose vehicle or property is involved);
- (5) Fails to render assistance to the injured party including:
 - (a) carrying him to a doctor or hospital; or
 - (b) arranging for medical care and attention;
- (6) By quickest means available give notice to the police department.

SAMPLE ORDINANCES:

ACCIDENTS INVOLVING DAMAGE TO VEHICLE OR PROPERTY

The driver of any vehicle involved in an accident within this city resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled all the requirements of this section.

The driver of any such vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, and shall, upon request, and if available, exhibit his license or permit to drive to the driver or occupant of or person attending any vehicle or other property damaged in such accident.

The driver of any such vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person, when said damage to all property is to an apparent extent of one hundred dollars (\$100) or more, shall immediately, by the quickest means of communication, give notice of such accident to the police department, and give the police such information as they shall require and shall remain at said scene until authorized to proceed by the police.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a motor vehicle involved in an accident within the city limits;
- (2) Resulting in damage to a vehicle or other property driven or attended by any person;
- (3) Fails to immediately stop such vehicle (he is driving) at the scene of such accident or as close thereto as possible; and
- (4) Return to and remain at the scene until meeting obligations required by this law; i.e., fails to give to the party (whose vehicle or property is damaged) his:
 - (a) Name;
 - (b) Address; and
 - (c) Vehicle registration number and if requested;

- (d) Exhibit his driver's license or permit (to the party whose vehicle or property is involved);
- (5) Give notice of the accident to the police department.

SAMPLE ORDINANCES:

DUTY UPON DAMAGING UNATTENDED VEHICLE OR OTHER PROPERTY

The driver of any vehicle which collides with or is involved in an accident within this city with any vehicle or other property which is unattended resulting in any damage to such other vehicle or property shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle or other property of his name, address and the registration number of the vehicle he is driving and shall without unnecessary delay notify the nearest office of the police department .

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Driving a motor vehicle within the city limits;
- (2) Wwhich collides with any vehicle or other property, unattended, resulting in damage to such vehicle or property;
- (3) Fails to immediately stop and locate the operator or owner of the property involved; and
- (4) Fails to give to him his:
 - (a) Name;
 - (b) Address;
 - (c) Vehicle registration number of the vehicle being driven or fails to attach in written notice form such information in a conspicuous place in or on the property damaged;
- (5) Fails to notify without unnecessary delay the nearest office of the police department.

* * * * *

The elements of proof in these ordinance examples require that the operator or driver be involved and similar proof thereof be offered. In short, mere presence at the scene of the accident obviously does not include such an operator within the reach of these ordinance examples.

Regarding the duty to report the accident to some police or judicial officer, it was held in State v. Hudson, supra, l.c. 735:

"It does not matter whether the person leaving the scene caused the injury by a culpable act, or whether it occurred through pure accident. It does not matter what kind of property it is . . ."

Further, in pleading the charge:

". . . It is no more necessary to describe the particular injury caused to the property than it is to describe the particular point in the road where it occurred."

"The crime consists in leaving the scene of the accident."

The offense was complete when the defendant, knowing a person had been injured, drove on without stopping and giving the information as required by law. State v. Harris, 212 S.W.2d 426 (Mo. 1948). It makes little difference that after leaving the scene:

"He reported to the 3rd District Police Station an hour and fifty minutes after the casualties, and there made a statement of the facts to the police...."

In order for the duty to attach under the law, it is essential the defendant "know" of injury or property damage caused by his culpability or the accident he precipitated. On that element, the Supreme Court of Missouri has held:

"We think the word "knowing," as used in the statute, means actual knowledge rather than mere constructive knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced the belief in the mind of a reasonable person." State v. Dougherty, 358 Mo. 734; 216 S.W.2d 467, 472 (Mo. 1949).

If there are several parties injured in the accident, the statutorily required information to be imparted to the victim or owner of property need only be imparted to one of them in order to "fully satisfy the statute and bar conviction." State v. Dougherty, 358 Mo. 734, 216 S.W.2d 467, 471 (Mo. 1949).

Such identification information may be imparted at the scene of the accident by defendant presenting to the victim his business card and "motor vehicle number." And that is so even though the defendant's business card does not set forth his street address as required by the statute. Dougherty, supra, l.c. 474.

10.7 DWI – ALCHOL/DRUG OFFENSES

SAMPLE ORDINANCE DEFINITIONS:

1. As used in the following ordinances, the term "drive," "driving," "operates," or "operating" means physically driving or operating a motor vehicle.
2. As used in the following ordinances, a person is in an "intoxicated condition" when he is under the influence of alcohol, a controlled substance, or drug, or any combination thereof.

SAMPLE ORDINANCES:

DRIVING WHILE INTOXICATED (OFFENSE A)

A person commits the crime of "driving while intoxicated" if he operates a motor vehicle upon any street or highway of this city while in an intoxicated or drugged condition.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Operating a motor vehicle upon any street or highway of this city;
- (2) While in an intoxicated or drugged condition. (State v. Blumer, 546 S.W.2d 790 (Mo. App. 1977); State v. Dodson, 496 S.W.2d 272 (Mo. App. 1973).)

SAMPLE ORDINANCES:

DRIVING WITH EXCESSIVE BLOOD ALCOHOL CONTENT (OFFENSE B)

A person commits the crime of "driving with excessive blood alcohol content" if he operates a motor vehicle upon any street or highway of this city with ten-hundredths of one percent or more by weight of alcohol in his blood.

ELEMENTS OF PROOF

- (1) Operating a motor vehicle upon any street or highway of this city;
- (2) While having a blood alcohol content (B.A.C.) of .10% or more or as in the current statute (with excessive blood alcohol content). (State v. Blumer, 546 S.W.2d 790 (Mo. App. 1977).)

* * * * *

The first of the essential elements of Offense A and Offense B each include:

Offense A (1) operating a motor vehicle;

Offense B (1) operating a motor vehicle.

Because it does not follow under the law that one having ten-hundredths of one percent or more by weight of alcohol in the blood is necessarily under the influence of intoxicating liquor or intoxicated at the time (each term is synonymous - City of Cape Girardeau v. Geiser, 598 S.W.2d 151 (Mo. App. 1979), the second essential element of Offense A and Offense B differs in that each requires proof that one is, at the time:

Offense A (2) in an intoxicated or drugged condition;

Offense B (2) having .10% or more by weight of alcohol in the blood.

Since the essential elements differ, Offense B may not be treated as a lesser offense of Offense

A. State v. Blumer, 546 S.W.2d 790 (Mo. App. 1977); State v. Saunders, 548 S.W.2d 276 (Mo. App. 1977).

"If the greater of the two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater." City of Mexico v. Merline, 596 S.W.2d 475 (Mo. App. E.D. 1980.)

The elements must coincide in order for one offense to be considered as a lesser included offense of the other. Blumer, supra. Offense B is regarded as a per se law; that is to say, upon a showing of the two essential elements of (1) operating a motor vehicle, and (2) while carrying a blood alcohol content of .10% or more (a cold medical fact), a submissible case is made without the need of proving by observation testimony the physical condition of the offender. Blumer, supra.

2001 Amendment of the State Statute, 577.012, RSMo, Lowering the Amount of B.A.C.

In 2001, the State Legislature amended the statutory amount of B.A.C. from ten-hundredth of one percent or more (.10%) by weight of alcohol in such person's blood to the current eight-hundredth of one percent or more (.08%) by weight of alcohol in such person's blood.

COMPARISON OF 1996 AMENDMENT STATE STATUTE TO PRIOR STATUTE

RESPECTING DEFINITION OF DRIVING OFFENSES

Significantly in 1996, the State legislature amended the statutory definition of the "operation of a motor vehicle" element of the driving while intoxicated and driving with excessive blood alcohol content offenses to exclude the phrase "being in actual physical control of a motor vehicle" from the definition. The current Missouri statutory definition is set out as follows:

"Section 577.001.1, RSMo Chapter definitions --1. As used in this chapter, the term "drive", "driving", "operates", or "operating" means physically driving or operating a motor vehicle." (As amended in 1996).

This amendment directly changed the nature of what evidence is now required to prove that a defendant is driving her car while intoxicated or with an excessive blood alcohol content. Since the amendment, it is no longer sufficient for the prosecutor to merely prove that the defendant was found in her parked car on the side of a road with the engine running or with the keys in the ignition switch. Now the prosecutor must prove the element of driving, that is to say, the prosecutor must prove that the defendant was physically operating the motor vehicle involved at the time of the stop by the law enforcement officer.

Prior to the amendment of Section 577.001, the statute defined the terms "drive," "driving," and "operating" as "physically driving or operating or *being in actual physical control of* a motor vehicle." The phrase "being in actual physical control" was construed by the courts as meaning that even though the vehicle stood motionless at the time of the officer's stop and inquiry, so

long as the defendant is shown to have maintained the vehicle in restraint or the defendant was otherwise in a position to regulate the movements of the motor vehicle, she was "operating" the vehicle for purposes of satisfying that element of the driving while intoxicated and driving with an excessive blood alcohol content offenses. State v. Swinson, 940 S.W.2d 552 (Mo. App. S.D. 1997); City of Kansas City v. Troutner, 544 S.W.2d 295 (Mo. App. 1976). Thus, prior caselaw construing the former version of Section 577.001 held that the element of operation was met where the evidence showed that the defendant driver was found asleep in his parked car with the engine of his vehicle running. State v. Swinson, 940 S.W.2d 552 (Mo. App. S.D. 1997); State v. Dey, 798 S.W.2d 210 (Mo. App. W.D. 1990). Only where the evidence demonstrated that the driver was asleep, the vehicle was motionless, the engine of the vehicle was not running and the keys to the vehicle were found in the vehicle's console, did an appellate court refuse to find that the defendant was not in actual physical control of the vehicle for purposes of satisfying the operation element of driving while intoxicated. State v. Block, 798 S.W.2d 213 (Mo. App. W.D. 1990).

In Baptist v. Lohman, 971 S.W.2d 366 (Mo.App. E.D. 1998), the element of "physically driving or operating a motor vehicle" was established by circumstantial evidence. Although no witness actually saw the defendant drive his truck, the fact of his driving was established by both the witness and the arresting officer seeing the defendant sleeping in the truck for 45 minutes with the motor running and the transmission disengaged, and no one got in or out of the truck during that time. See also Krienke v. Lohman, 963 S.W.2d 11 (Mo.App. W.D. 1998), involving similar facts.

The amendment to Section 577.001 was made to provide an incentive to intoxicated drivers to pull over and park on the side of the road until such time that they are able to lawfully operate the motor vehicle. Recent cases, however, suggest courts will still find that the defendants were "operating the motor vehicle" by circumstantial evidence. In State v. Cross, 34 S.W. 3d 175 (Mo.App. 2000), circumstantial evidence was sufficient to establish the defendant was operating the car. In Cross, defendant was found slumped over, asleep or unconscious, lying across the front seats of a parked car with its engine running and its headlights on, and with the driver's door open and defendant's legs hanging out and touching the ground. After being awakened by a police officer, the defendant turned off the car's headlights and engine and removed the keys from the ignition. The court found that this was substantial evidence to establish defendant "operating the motor vehicle." The court noted that it was unimportant defendant was not causing the car to move and his legs were hanging out the car door because he was still causing the car to function. See also Hoyt v. Director of Revenue, 37 S.W.3d 356 (Mo.App. 2000) (following the reasoning in Cross, the court found that defendant's presence in a car with the engine running and then turning off the car's engine constituted operation of the car within the meaning of Section 577.001.)

It is important to note that local ordinances should be amended to reflect the change in the state law respecting the definition of the operation element of driving while intoxicated and driving with an excessive blood alcohol content offenses. Where the applicable ordinances have not been amended as such, they should nonetheless be construed by municipal judges in accordance with the current state law.

ESTABLISHING "DRUGGED CONDITION" ELEMENT

Under the state law, operation of a motor vehicle while in a "drugged condition" meets the definition of driving while intoxicated. See RSMo. §577.010. If a motorist is under the influence of a drug to the extent that it impairs her ability, in any manner, to operate her vehicle, she is in a "drugged condition" and guilty of driving while intoxicated. State v. Falcone, 918 S.W.2d 288 (Mo. App. S.D. 1996). Absent a showing that the intoxicated condition is involuntary, use of prescription drugs is not a defense to charge of driving while intoxicated. State v. Walter, 918 S.W.2d 927 (Mo. App. E.D. 1996).

The Missouri Supreme Court has held that the proof required to establish driving under the influence of drugs should be no greater and no different from the proof required to establish driving under the influence of alcohol, other than the evidence must relate to the particular substance involved." State v. Meanor, 863 S.W.2d 884, 888 (Mo. banc 1993). However, an appellate court recently held that the evidence adduced at trial was insufficient to support a conviction of driving while intoxicated in absence of proof that the level of methamphetamine in defendant's body was sufficient to impair his driving ability. State v. Friend, 943 S.W.2d 800 (Mo. App. W.D. 1997). In reversing a conviction of driving while intoxicated, the *Friend* court explained:

It is clear that the defendant had ingested methamphetamine, but it also was established that the defendant was not under the influence of alcohol. Additional evidence bearing upon his driving ability was his driving in the wrong lane of traffic and his bizarre behavior and thought patterns. However, there was no evidence which connected his abnormal behavior with the methamphetamine....

Drugs do not necessarily produce readily recognizable symptoms and behavior patterns...**Proof of impaired driving due to drugs is not as easily proven as impaired driving due to alcohol, for which a prima facie case of impairment has been statutorily established when the blood alcohol concentration reaches ten-hundredths of one percent...In order for the fact finder to conclude with reasonable certainty that the drug caused the violation, it must have some connecting evidence.**

(Emphasis supplied) Id. at 802.

10.8 LICENSES – DRIVING WITHOUT LICENSE; DRIVING UNDER SUSPENSION, REVOCATION, CANCELLATION

SAMPLE ORDINANCES:

OPERATION OF MOTOR VEHICLE WITHOUT PROPER LICENSE

It shall be unlawful for any person to operate any motor vehicle upon any street or highway of this city, unless such person has procured a valid license as an operator from the state of

Missouri.

ELEMENTS OF PROOF

The elements of proof required to prove violation of the provisions set forth in (B) above are:

- (1) Operating any motor vehicle;
- (2) Upon any street or highway of this city;
- (3) Without a valid operator's license from Missouri or a valid chauffeur's license.

SAMPLE ORDINANCES (FROM STATE STATUTE):

DRIVING WHILE LICENSE SUSPENDED, REVOKED, OR CANCELED

A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked under the laws of this state and acts with criminal negligence with respect to knowledge of the fact that his driving privilege has been canceled, suspended or revoked.

ELEMENTS OF PROOF

The elements of proof required for a **conviction** for driving while revoked/suspended **requires** the court to find:

- (1) The defendant was **operating** a motor vehicle; and
- (2) At that time the defendant's driver's license was **revoked/suspended**; and
- (3) The defendant acted with **criminal negligence**. (Should have known he was revoked or suspended).

* * * * *

The admissibility of certified department of revenue records has had a tumultuous record in Missouri. In State v. Flowers, the court interpreted Section 302.312, RSMo 1986 to allow records to be received into evidence if certified by the appropriate custodian of records. 597 S.W.2d 276 (Mo.App. E.D. 1980). The Supreme Court of Missouri then held that certified copies of public documents were still subject to the foundational requirements of authentication and hearsay before being admitted into evidence, and that Section 302.312, RSMo 1986 only permits copies to be admitted with the same effect as with the originals. Hadlock v. Director of Revenue, 860 S.W.2d 335 (Mo.banc 1993.) In 1996, Hadlock was overruled by statute. Section 302.312, RSMo was amended and now states that copies of documents from the department of revenue are admissible into evidence so long as they are certified.

COMPARISON OF 1995 AMENDED STATE STATUTE TO PRIOR LAW ON MENTAL STATE REQUIREMENT

The state law respecting driving while revoked, to-wit Section 302.321, RSMo, was amended effective August 28, 1995, to expressly include a scienter requirement which had previously not been included in the statute.

A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked under the laws of this state and acts with criminal negligence with respect to knowledge of the fact that his driving privilege has been canceled, suspended or revoked.

Significantly, the amended Section 302.321 establishes a major change in the proof required on one of the more common charges heard by municipal courts. Prior to this amendment the statute covering the offense of driving while revoked/suspended did not have any mental state requirement. However, beginning in 1987 Missouri courts had judicially imposed a requirement of proof that a defendant acted "knowingly" or "recklessly" in order to support a finding of guilt on a charge of driving while revoked/suspended. State v. Horst, 729 S.W.2d 30 (Mo. App. E.D. 1987). This decision has been repeatedly upheld. State v. Davis, 779 S.W.2d 244 (Mo. banc 1989); State v. Heard, 877 S.W.2d 644 (Mo. App. W.D. 1994); State v. Watson, 850 S.W.2d 372 (Mo. App. E.D. 1993); State v. Brown, 804 S.W.2d 396 (Mo. App. W.D. 1991); and State v. Counts, 783 S.W.2d 181 (Mo. App. S.D. 1990).

The primary effect of the 1995 amendment to Section 302.321 is to reduce the prosecution's burden of proof from this judicially imposed higher culpable mental state to the lowest culpable mental state provided in the law - "criminal negligence."

Missouri law establishes four levels of culpable mental states in Section 562.016. They are listed in the statute in the order of the difficulty of proof as follows: to act "purposely or knowingly or recklessly or with criminal negligence." To "act purposely" requires stronger proof than to "act with criminal negligence." "**Purposely**" and "**knowingly**" each refer to what is commonly thought of as intention. "**Reckless**" requires an actual awareness in fact of the risk and a conscious disregard of the risk. The lowest level of a culpable mental state is "**criminal negligence**," which requires only that the defendant should have been aware of the risk, because any reasonable person would have known of it. Of course, proof of any higher level of mental state also establishes the lower levels; i.e., proof of intent or actual awareness also satisfies the burden of proving criminal negligence.

Always remember it is the prosecutor who has the burden of proving all the essential elements of any charge. Accordingly, in a prosecution for driving while revoked/suspended it is the prosecutor's obligation to establish with proof that the defendant "should have known" that their driver's license was revoked/suspended. It is not the obligation of the defendant to establish they should not have known their driver's license was revoked/suspended. The element of criminal negligence is in accord with prior caselaw which imputed a scienter requirement of culpable

mental state notwithstanding the absence of such element on the face of the statute. A person "acts with criminal negligence" or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. RSMo §562.016.

The following is a brief list (which is not meant to be all-inclusive) of the some of the facts a prosecutor might prove, which alone or in combination, could be used to establish the defendant should have known of her revocation or suspension:

- (a) Prior citations for driving while revoked or suspended which are recent in time to the date of the present charge;
- (b) A driving record history of prior convictions for driving while revoked or suspended and/or driving with no operator's license;
- (c) The length of time the defendant had been revoked/suspended prior to the present citation;
- (d) The defendant not having a license on their person at the time they were stopped;
- (e) The driving record history showing the defendant had surrendered their license to the Department of Revenue;
- (f) The defendant's own statements that they were aware of the requirements and procedure for obtaining reinstatement;
- (g) The defendant's acknowledgment that they had received the notice of suspension from the Department of Revenue, even if they claim not to have understood what it meant;
- (h) At the time of the present offense the defendant was driving under a court order granting them a limited driving privilege;
- (i) Correspondence in the Department of Revenue file from the defendant indicating knowledge of the revocation/suspension; and/or
- (j) Often the reason for the suspension is helpful, such as with the circumstances surrounding a breath test refusal, where the police officer verbally warns the driver that a revocation shall result.

Note that proof of the converse of such foregoing facts however would tend to negate the element that the defendant should have known of the revocation or suspension. For example, proof that the defendant had possession of her driver's license at the time of her arrest for driving while revoked, or that the driving record history shows the revocation notice was very recent in relation to the date of the citation, or that the defendant had recent or multiple changes of address

that could have prevented her receipt of the suspension notice, or that the suspension was for points accumulation could all alone or in combination negate a finding of criminal negligence with respect to knowledge of the fact that her driving privilege had been suspended or revoked.

10.9 STEALING (LARCENY)

SAMPLE ORDINANCES (FROM STATE LAW)

STEALING - GENERALLY

Section 570.030, RSMo Stealing

1. A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

ELEMENTS OF PROOF

The elements of stealing are:

- (1) An appropriation;
- (2) The appropriation is of property or services;
- (3) The property or services belong to another;
- (4) The appropriation is made with the purpose to deprive the other thereof; and
- (5) Such appropriation is accomplished either without the owner's consent or by deceit or coercion. See e.g. State v. Chapman, 876 S.W.2d 15 (Mo. App. E.D. 1994); State v. Reed, 815 S.W.2d 474 (Mo. App. E.D. 1991); and State v. Bradshaw, 643 S.W.2d 834 (Mo. App. E.D. 1982).

* * * * *

It should be commonly recognized as fundamental that each of the elements aforesaid must be proven by the prosecution beyond a reasonable doubt. It is also fundamental that the person who has stolen be identified if conviction is to be sustained. That is sufficient when testimony is given which clearly identifies the defendant even though it is not elicited by direct question and answer, State v. Storll, 767 S.W.2d 602 (Mo. App. E.D. 1989), and even if he is one of a group stealing (committing the act).

Because elements of stealing typically require a completed act; i.e., the theft accomplished, an "attempted" stealing may not be prosecuted as stealing in violation of a city ordinance, whether "without consent," by "false pretense" or by "coercion." City of Kansas City v. Bibbs, 548 S.W.2d 264 (Mo. App. 1977). "Attempt" is separate and distinct from the offense itself and must be prosecuted under a separate ordinance. Bibbs, supra; State v. Thomas, 438 S.W.2d 441 (Mo. 1969).

10.10 PEACE DISTURBANCE

SAMPLE ORDINANCE (FROM STATE LAW)

PEACE DISTURBANCE

§574.010, RSMo Peace disturbance

1. A person commits the crime of peace disturbance if:
 - (1) He unreasonably and knowingly disturbs or alarms another person or persons by:
 - (a) Loud noise; or
 - (b) Offensive language addressed in a face-to-face manner to a specific individual and uttered under circumstances which are likely to produce an immediate violent response from a reasonable recipient; or
 - (c) Threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out; or
 - (d) Fighting; or
 - (e) Creating a noxious and offensive odor; or
 - (2) He is in a public place or on private property of another without consent and purposely causes inconvenience to another person or persons by unreasonably and physically obstructing:
 - (a) Vehicular or pedestrian traffic; or
 - (b) The free ingress or egress to or from a public or private place.

ELEMENTS OF PROOF (WITH DISCUSSION)

- (1) Unreasonably and knowingly component:

The defendant must cause alarm to a person in circumstances where it is not reasonable to cause alarm. Causing alarm by yelling, "Watch out for the truck!" in order to avoid an accident is reasonable.

To satisfy the knowingly element, it must be shown that the defendant is aware that his conduct is causing alarm to others. Such knowledge can be shown by prior complaints to the defendant.

- (2) Disturbs or alarms component is limited to five methods under the state statute:

- (A) Loud noise or

A city ordinance penalizing shouting and breach of peace did not apply to shouting of a preacher at a religious meeting. City of Louisiana v. Bottoms, 300 S.W. 316 (Mo. App. 1927).

- (B) Offensive language addressed in a face-to-face manner to a specific individual and uttered under circumstances which are likely to produce an immediate violent response from a reasonable recipient; or

The Supreme Court has held that offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient. State v. Swoboda, 658 S.W.2d 24, 26 (Mo. banc 1983). "Missouri courts have held that statutes abridging speech are constitutional to the extent that they prohibit only that speech which is likely to incite others to immediate violence." Id. at 25 (citing) City of St. Louis v. Tinker, 542 S.W.2d 512 (Mo. banc 1976); City of Kansas City v. Thorpe, 499 S.W.2d 454 (Mo. 1973). In Swoboda, the Missouri Supreme Court held that former section 574.010.1(1)(b), RSMo 1978, was unconstitutionally overbroad because it sought to prohibit abusive language which unreasonably and knowingly causes alarm to any listener in the vicinity of speaker, even if not directed toward listener.

In a recent case, an appellate court reversed a conviction for peace disturbance where there was no evidence adduced in the record that the defendant used offensive language that was likely to produce immediate violent response from victim. State v. Bickings, 910 S.W.2d 370 (Mo. App. S.D. 1995).

In Bickings, defendant's wife had called the sheriff complaining that her husband had assaulted her. When the officers arrived, defendant was sitting on the front porch of the house and proceeded to tell the officers: "I'm not going to jail. You'll just have to shoot me" or "kill me." Defendant's wife told the officers that she and defendant were separated, that defendant had come uninvited to the house and began arguing with her, and that defendant had assaulted her by shoving her up against a wall and holding her there with his forearm. Defendant was subsequently convicted of disturbing the peace.

Upon review, the appellate court reversed the peace disturbance conviction because the state had not submitted any evidence to show that defendant committed any of the conduct proscribed by the state peace disturbance statute. Specifically, Defendant's wife had testified that defendant did not disturb her peace, did not assault her, and that she had only wanted defendant to leave. She did not testify about what words defendant used, and the record did not reveal elsewhere what type of language defendant used. The Bickings court observed:

Nowhere does the record reveal any evidence to indicate that [defendant] used offensive language that was likely to produce an immediate violent response from [defendant's wife.] The record is void of any evidence to lead a reasonable juror to find [defendant] guilty beyond a reasonable doubt of peace disturbance.

Id. at 372.

C. Threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out; or

The prosecutor must show that (1) defendant threatened to commit a felonious act; and (2) a substantial likelihood that such threatened criminal conduct would occur existed. The prior state disturbing the peace statute making it a crime to unreasonably and knowingly disturb or alarm another person by "threatening to commit a crime against persons" was held to be

unconstitutionally overbroad. State v. Carpenter, 736 S.W.2d 406 (Mo. banc 1987), certiorari denied 108 S.Ct. 1300, 485 U.S. 992, 99 L.Ed.2d 510. In *Carpenter*, the Supreme Court of Missouri explained:

The statute contemplates punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law. No distinction is made as to the degree of criminal activity that the provision encompasses. A person could be convicted regardless of how minor or insubstantial the purportedly threatened crime may be. Such prohibited offenses could include threatening to publicly display explicit sexual materials, section 573.060, RSMo 1986, or even threatening to steal a book from a library, section 570.210, RSMo 1986. The state's interest in prohibiting persons from threatening to commit offenses such as these does not outweigh the public interest in exercising free speech.

Moreover, there is no guarantee under the statute that a substantial likelihood exists that such threatened criminal conduct will ever occur. There may be many situations where the threatened activity will neither be imminent nor likely. Consequently, the statute acts to smother speech otherwise protected by the First Amendment in that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972).

D. Fighting or

An indictment charging that defendant unlawfully assaulted a prosecutor, and beat, struck, kicked, and bruised him, in an angry and quarrelsome manner, to the disturbance of others and against the peace and dignity of the state, was sufficient. State v. Dunn, 73 Mo. 586 (1881).

Under a statute which proscribed fighting in a public place an affray, an indictment charging defendant with fighting in a public road and highway was sufficient. State v. Warren, 57 Mo.App. 502 (1894).

E. Creating a noxious and offensive odor

A petition alleging that defendant had a tract of land near houses on which dead animals were at times left unburied for several days, causing the air to be polluted with odors, and that impurities from the bodies of the animals were carried by water through the soil so as to pollute water on the premises of adjoining landowners, stated facts showing a public nuisance. State ex rel. Lamm v. City of Sedalia, 241 S.W. 656 (Mo. App. 1922).

or

(3) Unreasonably and physically obstructing traffic and entrances

In City of St. Louis v. Goldman, 467 S.W.2d 99 (Mo. App. 1971), *certiorari denied* 92 S.Ct. 718, 404 U.S. 1040, 30 L.Ed.2d 731, the Court held that there was sufficient to sustain a conviction for violating a municipal disturbing the peace ordinance where the evidence showed that (1) defendant was picketing a department store; (2) defendant was handcuffed to the revolving doors of the store; (3) a substance was placed in the lock of handcuffs which prevented them from being opened with a key; and (4) a crowd of 40 to 50 people gathered to watch the spectacle, thereby impeding traffic.

Goldman should be read narrowly with regard to picketing activities because the phrase "physically obstructing traffic and entrances" connotes a physical barricade impeding the passage of persons and their vehicles where they have a lawful right to travel. Disturbing the peace ordinances are not violated where persons are not physically prevented from crossing picket lines and afforded ingress and egress to which they are lawfully entitled.

The successful prosecution of peace disturbance whether brought under a law so entitled or one entitled disorderly conduct requiring acts "calculated to disturb the peace," does not depend upon testimony from those persons in the presence of the offender that their peace was disturbed. City of DeSoto v. Hunter, 122 S.W. 1092, 145 Mo. App. 430 (1909); City of St. Louis v. Goldman, 467 S.W.2d 99 (Mo App. 1971); cert. denied, 92 S.Ct. 718 404 U.S. 1040, 30 L.Ed.2d 731. The ultimate conclusion in that regard is for the fact finder. But one may not be convicted of such an ordinance violation when, while a member of a crowd gathered to confront the village marshal, he used loud and offensive language alone. Village of Salem v. Coffey, 88 S.W. 772, 93 S.W. 281, 113 Mo. App. 675. (1896).

10.11 HINDERING AND INTERFERING WITH A POLICE OFFICER

SAMPLE ORDINANCES:

OBSTRUCTING AND RESISTING CITY OFFICER (PART 1 OF 2)

Any person who shall in any way or manner obstruct, molest, resist or otherwise interfere with any city officer or inspector or any member of the police force in the discharge of his official duties, shall be guilty of a misdemeanor.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) (a) Any person (identification) who within the city;
- (b) Shall in any manner hinder, obstruct, molest, resist or otherwise interfere with;
- (c) Any city officer or inspector or any member of the police force;
- (d) In the discharge of his official duties.

SAMPLE ORDINANCES:

**OBSTRUCTING AND RESISTING CITY OFFICER
(PART 2 OF 2)**

Any person who shall attempt to prevent any member of the police force from arresting any person, or shall attempt to rescue any person in the custody of a member of the police force, or from anyone called to assist the police officer, shall be guilty of a misdemeanor.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) (a) Any person (identification) who within the city;
- (b) Shall attempt to prevent any member of the police force from arresting any person; or
- (c) Shall attempt to rescue any person in the custody of a member (of the police force); or from anyone called to assist the police officer.

* * * * *

It was established by Missouri law as long ago as June 30, 1891, that it is every citizen's duty to submit to arrest when informed of the warrant or the arrest effected or attempted. **State v. Bateswell, 105 Mo. 609, 16 S.W. 953 (1891); State v. Nolan, 192 S.W.2d 1016 (Mo. 1946).** Whether one knew of the arrest effected or attempted with or without warrant before resisting it, is a question for the fact finder. **Bateswell, supra.**

The citizen sought to be arrested is held to know the authority and character of a police officer uniformed and exhibiting a badge including the right to effect the arrest of such citizen. **State v. Lowry, 12 S.W.2d 469 (Mo. 1928).** It is only after the arrest is effected when the uniformed officer has the duty to inform the citizen of his authority (warrant or no warrant) and the cause or charge for which arrested. Notice is not required, however, where the arrest is made at the time the offense giving rise to it is committed in the officer's presence or at the conclusion of a "fresh pursuit." **State v. Nolan, 192 S.W.2d 1016 (Mo. 1946); State v. Caffey, 436 S.W.2d 1 (Mo. 1969); State v. Peters, 242 S.W. 894 (Mo. 1922).**

Therefore, it is no defense to an arrest on probable cause for peace disturbance that one is innocent of the offense; nor may acquittal of the underlying charge of peace disturbance (or the charge for which arrested) provide a defense compelling acquittal for resisting the officer's arrest on the original peace disturbance offense. **State v. Velas, 537 S.W.2d 881 (Mo. App. 1976); State v. Reynolds, 723 S.W.2d 400 (Mo. App. W.D. 1986).** Probable cause, the basis for the original charge, only requires that:

"the actions committed in his presence and the circumstances observed by him would lead a reasonable person to believe he was witnessing the commission of a misdemeanor by the person arrested. **State v. Sampson, 408 S.W.2d 84, 87 (Mo. 1966).**" **Velas, supra.**

". . . One who resists a lawful arrest, though he be innocent of the arresting charge or albeit the statute under which he is arrested proves to be unconstitutional, is subject to criminal prosecution for resisting. State v. Briggs, 435 S.W.2d 361, 364 [5] (Mo. 1968)." Velas, supra.

A separate issue from "resisting arrest," as made clear in State v. Nunes, 546 S.W.2d 759 (Mo. App. 1977) is that of self-defense to the use of force utilized in an assault upon an arrestee by the arresting officer so excessively as to put his life or limb in peril.

"This right of self-defense, it must be understood, does not resist the arrest but the excessive force. Therefore, self-defense is not available to the arrestee who uses more force for self- protection than reasonably appears necessary. As corollary, an arrestee who provokes the use of force against him may not excuse his resistance by self-defense."

10.12 WEAPONS VIOLATIONS

SAMPLE ORDINANCES:

UNLAWFUL USE OF WEAPONS

- (A) A person commits the crime of unlawful use of a weapon if he knowingly:
- (1) Carries concealed upon or about his person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or
 - (2) Exhibits, in the presence of one (1) or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or
 - (3) Possesses or discharges a firearm or projectile weapon while intoxicated; or
 - (4) Carries a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any school, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof, or into any public assemblage of persons met for any lawful purpose.
- (B) Subdivisions (1), (2) and (4) of subsection A of this section shall not apply to or affect any of the following:
- (1) All state, county and municipal law enforcement officers possessing the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;
 - (2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime;
 - (3) Members of the armed forces or national guard while performing their official duty;

- (4) Those persons vested by article V, section 1 of the Constitution of Missouri with judicial power of the state;
 - (5) Any person whose bona fide duty is to execute process, civil or criminal.
- (C) Subdivision (1), (3) and (4) of subsection A of this section do not apply when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible. Subdivision (1) of subsection A of this section does not apply when the actor is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game, or is in his dwelling unit or upon business premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state.

ELEMENTS OF PROOF

The essential elements of proof for a violation of section A of this ordinance may be separated out as follows:

- (A) (1) 1. A person (identification);
 - 2. Knowingly carries concealed on or about his person within the city;
 - 3. A knife, firearm, a blackjack or any other weapon readily capable of lethal use; or
- (2) 1. A person (identification) within the city;
 - 2. Knowingly exhibits, in the presence of one (1) or more persons;
 - 3. Any weapon readily capable of lethal use;
 - 4. Any weapon readily capable of lethal use; in an angry or threatening manner; or
- (3) 1. A person (identification);
 - 2. Knowingly possesses or discharges a firearm or projectile weapon;
 - 3. While intoxicated; or
- (4) 1. A person (identification) within the city;
 - 2. Knowingly carries a firearm or any other weapon readily capable of lethal use;
 - 3. Into any church or place where people have assemble for worship, into any school, into any election precinct on any election day, into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof, or into any public assembly of persons met for any lawful purpose.

The defendant must raise any of the elements of section B or C as special negative defense so as to come within an exempted class or activity. Prosecutor then has burden of proving defendant was not engaged in the exempted activity or class.

* * * * *

Discussion on Carrying a Concealed Weapon:

As long ago as 1925, the Missouri Supreme Court defined "carrying a concealed weapon" upon one's person as including weapons found "about" the person. State v. Scanlan, 273 S.W. 1062 (Mo. 1925). Proof that the loaded revolver was found by a trooper beneath the jacket upon which the defendant had laid his head in the rear seat of the car was sufficient to sustain conviction for carrying a concealed weapon "on or about" his person. State v. Tillman, 454 S.W.2d 923 (Mo. 1970).

However, where police officers observed a defendant place a gun in a paper sack and then place the sack immediately in the locked trunk of a car, it is clear the obvious intent was to place the gun in the trunk and not to carry it concealed. State v. Jordan, 495 S.W.2d 717 (Mo. App. 1973). It was, thereafter, obviously "not within defendant's easy reach and convenient control." The latter represents that "test" to determine whether the weapon is "on or about" the person. The "test" of "concealment" is "whether the weapon is carried so as not to be discernible by ordinary observation." Jordan, supra; Crone, supra; State v. Bordeaux, 337 S.W.2d 47 (Mo. 1960).

It is concealed "on or about" the defendant's person if found in the crevice between the seat portion and back portion of the driver's seat because "within his easy reach and convenient control" State v. Hall, 508 S.W.2d 200 (Mo. App. 1974), and "not discernible by ordinary observation" from outside the vehicle. State v. Achter, 514 S.W.2d 825 (Mo. App. 1974).

The prosecution is not required to plead and prove that the defendant charged does not come within any exceptions to the law permitting the carrying of a concealed weapon, Achter, supra.

Weapons discernible only when they are able to be seen from one vantage point are nevertheless concealed. State v. Miles, 101 S.W. 671 (1907).

Where a weapon is found during the routine inventory search under the front seat in accordance with South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976) procedures following defendant's arrest for careless and imprudent driving and driving under the influence he may be charged and convicted for carrying a concealed weapon. State v. Gibeson, 614 S.W.2d 14 (Mo. App. 1981); State v. Peterson, 525 S.W.2d 599 (Mo. App. 1975); State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979).

A prima facie case was made "of carrying a concealed weapon" where the arresting officer testified he approached the car in which the defendant was seated as a passenger and because he had seen him reach forward between his legs as if to conceal something, reached under the passenger seat and retrieved a sawed-off shotgun concealed within the meaning of the statute. State v. Shaw, 647 S.W.2d 612 (Mo. App. 1983).

Court established in State v. Baldwin, 571 S.W.2d 236 (Mo. banc 1978) a test to determine whether the . . . "enumerated weapon constituted a dangerous and deadly weapon. That it depended on a variety of factors such as: (1) the nature of the instrument; (2) the surrounding circumstances; (3) the person carrying the weapon; and (4) possible peaceful use of the instrument.

SAMPLE ORDINANCES:

DISCHARGING FIREARMS - GENERALLY

It shall be unlawful for any person within the city limits of the city to shoot or discharge any gun revolver, air rifle or air-gun, pistol or firearms of any description, whether the same is loaded with powder and ball or shot or with "blank" cartridges, or any kind of explosives whatsoever provided that nothing contained in this section shall apply to persons discharging firearms in the defense of person or property, not to legally qualified sheriffs or police officers and other persons whose bonafide duty is to execute process, civil or criminal, make arrests or aid in conserving the public peace, not to persons discharging "blank" cartridges as a final salute at a military funeral or memorial service as members of a ceremonial firing party or firing squad.

ELEMENTS OF PROOF

The essential elements of proof for a violation of this ordinance may be separated out as follows:

- (1) Any person (identification);
- (2) Within the limits of the city to;
- (3) Shoot or discharge any gun, revolver, air rifle, or air-gun, pistol or firearm of any description (whether loaded with powder and ball or shot with "blank" cartridges, or any kind of explosives).

The above provisions do not apply to:

- (1) Persons discharging firearms in the defense of person or property;
- (2) Qualified sheriffs or police officers;
- (3) Other persons whose bona fide duty is to execute process, civil or criminal, make arrests or aid in conserving the public peace; nor
- (4) Persons discharging "blank" cartridges as a final salute at a military funeral or memorial service as members of a ceremonial firing party or firing squad.

Again, the defendant must raise any of the foregoing as a special negative defense to come within the exempted class. The prosecutor then has burden to prove defendant was not engaged in such activity as claimed.