

RESISTING ARREST - FLIGHT ALLEGED
(N.J.S.A. 2C:29-2a)

[Count _____ of T]he indictment charges the defendant with committing the crime of resisting arrest by flight [and by using or threatening to use force or physical violence against _____] AND/OR [using any (other) means to create a substantial risk of causing physical injury to_____]. The indictment reads as follows:

(Read Indictment)

The statute on which this charge is based reads as follows:

A person is guilty ... if he, by flight,¹ purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest . . . [and uses or threatens to use physical force or violence against the law enforcement officer or another] AND/OR [uses any (other) means to create a substantial risk of causing physical injury to the public servant or another].²

In order to convict the defendant of this charge, the State must first prove beyond a reasonable doubt that defendant committed the basic offense³ of resisting arrest. The four elements of that offense are:

1. That _____ was a law enforcement officer.
2. That _____ was effecting an arrest.

¹ P.L. 2000, c. 18, section 2, effective April 28, 2000, creates N.J.S.A. 2C:29-2a(2), which makes it a fourth degree offense to resist arrest “by flight.”

² N.J.S.A. 2C:29-2a(1) to (3).

³ In State v. Simms, 369 N.J. Super. 466, 472 (App. Div. 2004), the Court reversed a conviction for third degree resisting arrest because, “although the jury was told which elements had to be found in order for defendant to be guilty of some crime, that is, resisting, resisting by flight, or resisting by physical force, it was not made aware of the significance of its findings in terms of the seriousness, i.e., the grading, of the offense. It should have been clearly apprised of that consequence of its various findings.” This language, however, appears to depart from numerous appellate decisions holding that juries should not be instructed as to the sentencing consequences of their decisions in order not to distract them from their essential fact-finding function. Since this portion of Simms was intended to provide the “context that we consider defendant’s plain-error argument that the jury should have been charged on self-defense”(id. at 472), the Committee has decided not to specify the degree of each form of resisting arrest in this model charge. Rather, in describing the various elements of the offense, as well as in the final paragraphs that describe the various verdicts that the jury can arrive at, the charge uses the terms “basic offense” (disorderly persons resisting), “more serious offense” (fourth degree resisting with flight), and “the most serious offense charged in the indictment, which is the most serious form of the crime” (third degree resisting pursuant to N.J.S.A. 2C: 29-2a(1)(a) or (b)).

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3. That defendant knew or had reason to know that _____ was a law enforcement officer effecting an arrest.
4. That defendant purposely prevented or attempted to prevent _____ from effecting the arrest.

The first element that the State must prove beyond a reasonable doubt is that _____ was a law enforcement officer. A law enforcement officer is a person whose public duties include the power to act as an officer for the detection, apprehension, arrest and conviction of offenders against the laws of this State.⁴

The second element that the State must prove beyond a reasonable doubt is that _____ was effecting an arrest. It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided (he/she) was acting under color of (his/her) official authority and provided the law enforcement officer announces (his/her) intention to arrest prior to the resistance.⁵

The third element that the State must prove beyond a reasonable doubt is that the defendant knew or had reason to know that _____ was a law enforcement officer effecting an arrest.⁶ A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.⁷

The fourth element that the State must prove beyond a reasonable doubt is that defendant purposely prevented or attempted to prevent _____ from effecting the arrest. A person acts purposely with respect to the nature of his/her conduct or a result of his/her conduct if it is his/her

⁴ See N.J.S.A. 2C:25-19c.

⁵ Where the issue arises, the jury should also be instructed that the State must prove beyond a reasonable doubt that the law enforcement officer was, in fact, acting under color of law and did announce (his/her) intention to arrest. See State v. Kane, 303 N.J. Super. 167, 181-182 (App. Div. 1997).

⁶ State v. Parsons, 270 N.J. Super. 213, 222 (App. Div. 1994).

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conscious object to engage in conduct of that nature or to cause such a result. That is, a person acts purposely if he/she means to act in a certain way or to cause a certain result. A person acts purposely with respect to attendant circumstances if he/she is aware of the existence of such circumstances or he/she believes or hopes that they exist. “With purpose,” “designed,” “with design,” or equivalent terms have the same meaning.⁸

Purpose and knowledge are conditions of the mind which cannot be seen and can only be determined by inference from conduct, words or acts. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary, members of the jury, that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and his/her conduct, and from all he/she said and did at the particular time and place, and from all the surrounding circumstances.

If you find that the State has failed to prove any one of these elements beyond a reasonable doubt, then you must find the defendant not guilty.

(THE FOLLOWING SHOULD BE USED WHEN DEFENDANT DENIES FLIGHT)

If you find that the State has proven the basic offense of resisting arrest beyond a reasonable doubt, you must continue your deliberations to consider whether the State has proven beyond a reasonable doubt that he/she committed the more serious offense of resisting arrest by the act of flight. The defendant denies any flight (OR the defendant denies that the acts constituted flight). Mere departure from a place where a crime has been committed does not constitute flight. The State must prove beyond a reasonable doubt that the defendant, fearing that he/she would be arrested, fled for the purpose of evading that arrest.

OR

(THE FOLLOWING SHOULD BE USED WHERE DEFENDANT HAS NOT

⁷ N.J.S.A. 2C:2-2b(2).

⁸ N.J.S.A. 2C:2-2b(1).

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**DENIED THAT HE/SHE LEFT THE SCENE BUT CLAIMS THAT
HE/SHE DID SO FOR A REASON OTHER THAN EVADING ARREST)**

If you find that the State has proven the basic offense of resisting arrest beyond a reasonable doubt, you must continue your deliberations to consider whether the State has proven beyond a reasonable doubt that he/she committed the more serious offense of resisting arrest by the act of flight. The defendant (OR the defense) has not denied that he/she left the scene, but claims that his/her purpose was not to evade arrest, but, rather, was to:

[SET FORTH EXPLANATION SUGGESTED BY DEFENSE]

The State must prove beyond a reasonable doubt that the defendant, fearing that he/she would be arrested, fled for the purpose of evading that arrest.

If you find that the State has proven beyond a reasonable doubt all five elements of the offense, then you must find the defendant guilty of resisting arrest by flight. If the State has failed to prove the fifth element beyond a reasonable doubt, you must find the defendant guilty only of the basic offense of resisting arrest.

If you find that the State has proven all of the above elements either of resisting arrest or the more serious offense of resisting arrest by flight beyond a reasonable doubt, you must continue your deliberations to consider the offense charged in the indictment, which is the most serious form of the crime of resisting arrest: namely,

[CHOOSE APPROPRIATE ALTERNATIVE]

whether the State has proven beyond a reasonable doubt that, in resisting arrest, the defendant used or threatened to use physical force or violence against a law enforcement officer or another.⁹ “Another” against whom physical force or violence is used or threatened does not include defendant himself/herself.¹⁰ Physical force means the exercise of strength or power against the victim. That force need not entail pain or bodily harm and need not leave any mark.¹¹ Physical

⁹ N.J.S.A. 2C:29-2a(3)(a).

¹⁰ State v. Bunch, 180 N.J. 534, 546 (2004).

¹¹ State v. Brannon, 178 N.J. 500, 504 and 510 (2004).

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violence means dynamic power showing great strength, power, intensity, fury, and destructiveness.¹²

[OR]

whether the State has proven beyond a reasonable doubt that, in resisting arrest, the defendant used any (other) means to create a substantial risk of causing physical injury to a public servant or another.¹³ “Another” against whom any (other) means of creating a substantial risk of causing physical injury is used does not include defendant himself/herself.¹⁴ Physical Injury means physical pain, illness, or any impairment of physical condition.¹⁵ A substantial risk is one that is of such a nature and degree that, considering the nature and purpose of the defendant’s conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable-person would observe in the defendant’s situation. In other words, the State must prove beyond a reasonable doubt that defendant knew that it was very likely that his/her conduct would create a risk of causing physical injury to _____, but that he/she went ahead anyway, where a reasonable person would not. I have already defined knowing for you.

If you find that the State has proven beyond a reasonable doubt this (these) last element(s) of the offense then you must find the defendant guilty of resisting arrest by [choose applicable provision(s) of N.J.S.A. 2C:29-2a(3)], the offense charged in the indictment, the most serious form of the crime of resisting arrest. If the State has failed to prove this last element beyond a reasonable doubt, then you must find the defendant guilty of either the basic offense of resisting arrest, or the more serious crime of resisting arrest by flight, depending on whether or not you find that the State has proven the element of flight beyond a reasonable doubt.¹⁶

¹² Id. at 510.

¹³ N.J.S.A. 2C:29-2a(3)(b). Although the broad definition of “public servant” in N.J.S.A. 2C:27-1g is applicable to Chapter 29 offenses, there is no need to define that term any differently than “law enforcement officer” in the context of resisting arrest. “[N.J.S.A. 2C:29-2] was altered before enactment...to limit the broad category of ‘public servant’ to ‘law enforcement officer’...” Cannel, Criminal Code Annotated, Comment 1, N.J.S.A. 2C:29-2 (2006 Ed.).

¹⁴ State v. Bunch, 180 N.J. 534, 546 (2004).

¹⁵ N.J.S.A. 2C:11-1a. See State v. Wallace, 158 N.J. 552, 558 (1999).

¹⁶ N.J.S.A. 2C:1-13a and State v. Ragland, 105 N.J. 189 (1986). The jury should be provided with a verdict form which will allow them to record which verdict they have entered.