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Confirmation Nbr. 1953943

STATE OF OHIO

vs.

CHRISTIE ELKO

CA 19 109082

Judge:

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IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, Plaintiff/Appellee, vs. CHRISTIE ELKO, Defendant/Appellant.	Case No. CA-19-109082 Appeal from Common Pleas No. CR-17-623861-A **Brief of Appellant Christie Elko**

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I. Assignment of Error

Assignment of Error 1: The trial court erred in failing to instruct the jury that an officer's use of excessive force is a complete defense to the charge of resisting arrest. (R. 46, 49, 50).

II. Issue Presented for Review

Under Ohio law, the arresting officer's use of excessive force is a complete defense to a charge of resisting arrest, even if the underlying arrest was lawful. Here, evidence was presented at trial sufficient to support a finding that the arresting officer used excessive force in making the arrest at issue. Did the trial court err in refusing to instruct the jury on the excessive force defense?

III. Statement of the Case

In September 2016, while Christie Elko was standing outside of her second-story apartment waiting for her 13-year-old daughter to come downstairs and join her in heading out for a bite to eat, Sergeant Floyd Takacs of the Olmsted Falls Police Department approached Elko and aggressively demanded to know who she was. (T. 379:10–381:7, 382:6–10, 383:24–385:6).[1] When Elko responded by identifying herself and her address, and asking Takacs what he was "getting so f*cking nasty with her for," Takacs—who was at the location to respond to a routine domestic violence call where the dispatcher had advised him that there were no weapons and no alcohol involved—grabbed Elko by her arm without any cause to do so, and without having told her that she was under arrest, causing her to push away from him in fear of her and her daughter's safety. (T. 178:13–23; 179:5–7; 179:17–180:12; 279:3–7; 280:1–20; 384:22–386:12). From there, Takacs and fellow Olmsted Falls police officer Dan Daugherty then proceeded to tackle Elko, kick and punch her, and slam her body repeatedly against a police cruiser, despite that she was unarmed, was not attempting to flee, and did not present any legitimate threat to their safety. (T. 207:12–20; 237:20–22, State's Ex. 5 (Daugherty's dash camera); 257:15–20; 260:11–13; 314:3–11; 318:4–6, State's Ex. 7 (Takacs's dash camera); 393:10–394:25; 398:10–17). These actions were not only excessive, but needlessly and intentionally escalated a routine interaction into an aggressive and gratuitous showing of police

[1] "T." refers to the transcript of the trial proceedings dated September 3–September 6, 2019, and filed with this Court on January 6, 2020.

authority against an unarmed citizen who did nothing but reactively pull her arm away from a police officer to protect herself from further violence after he aggressively grabbed her for no apparent or possibly lawful reason. (T. 384:22–386:8–23; 387:22–388:5, State's Ex. 7 (Takacs's dash camera); 398:21–399:4; 420:3–12).

In an apparent effort to cover up for the police officers' misconduct in this incident, the State charged Elko under R.C. 2903.13 with one count of felony assault. (R. 17, at 2). Nearly a year later, after Elko sued Takacs, Daugherty, and the City of Olmsted Falls under 42 U.S.C. § 1983 for using excessive force in arresting her, the State added an additional charge of resisting arrest under R.C. 2921.33. (R. 1, and R. 17, at 2–3). In exchange for dismissal of the felony assault charge, Elko pled no contest to resisting arrest, which prompted Takacs, Daugherty, and the City of Olmsted Falls to seek dismissal of the civil case. (R. 17, at 6, Ex. 3). Specifically, citing *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), they argued that Elko could not proceed on her civil claims if she was found guilty because, under Ohio law, an officer's use of excessive force provides a complete defense to resisting arrest. (*Id.*). Soon thereafter, Elko learned that the State had withheld from her in the criminal case nearly 300 pages of potentially exculpatory evidence relating to Takacs's well-documented history of misconduct as a police officer. (*Id.* at 4–5). Thus, Elko sought and was granted leave to withdraw her no-contest plea to the resisting arrest charge. (R. 19).

Then, after having forced Elko to stand trial on the bogus criminal charges to preserve her civil claims against Takacs, Daugherty, and the City of Olmsted Falls, the State flip-flopped to take the opposite legal position it took in the civil case, arguing that Elko was not entitled to a jury instruction on the affirmative defense of excessive force. (T. 475:6–476:9; 476:18–25). This argument prompted the trial court's finding "as a matter of law that the excessive force instruction will not be given in this case." (T. 488:3–5). The jury then acquitted Elko of the felony assault

charge, but because the trial court erroneously declined to give Elko her requested jury instruction, convicted Elko of resisting arrest. (R. 46, 49, 50).

As explained fully below, the trial court abused its discretion in failing to instruct the jury on the defense of excessive force in light of (1) controlling Ohio law holding that an arresting officer's use of excessive force provides a complete defense to a charge of resisting arrest, and (2) the evidence at trial from which the jury could have reasonably concluded that that Takacs and Daugherty used excessive force so as to justify Elko's reasonable, proportional, and harmless actions in resisting. Thus, this Court should vacate Elko's conviction for resisting arrest and remand this case for a new trial in which the jury is properly instructed under Ohio law.

IV. Statement of Facts

A. The State pursued criminal charges against Elko to cover up for the misconduct of the armed police officers who needlessly attacked her in following up on a routine domestic violence call.

1. After an argument with her boyfriend, Christie Elko left her apartment to take her daughter out to eat, unaware that her boyfriend had called the police to falsely report her for domestic violence.

On September 24, 2016, Christie Elko was working in the kitchen of the Aces Bar and Grill, which was located directly below her apartment in Olmsted Falls, Ohio. (T. 187:7–10; 379:10–14). While Elko worked in the kitchen, her boyfriend Aaron Watkins was at the bar drinking and watching a football game. (T. 379:10–20). After her shift at Aces, Elko planned on spending time introducing Watkins to her thirteen-year-old daughter, who was set to arrive that afternoon. (T. 379:21–380:3). When Elko's daughter arrived, Elko and Watkins left Aces and went upstairs. (T. 379:22–380:3; 380:8–19). Once upstairs, Elko began to argue with Watkins because he had been drinking too much, and told Elko that he had just been invited to a friend's bachelor party where he intended to drink some more, instead of spending the planned family time with Elko and her daughter. (T. 380:8–381:7). The argument escalated when Watkins asked Elko if he could take her

car to the party and Elko denied him this permission, at which point Watkins "threw a fit" and "stomped down the stairs." (T. 380:22–381:3).

Frustrated and upset with Watkins and his disregard for her plans, Elko left the apartment to take her daughter for sandwiches from a deli down the street. (T. 380:9–381:7; 381:12–18; 382:1–9; 436:6–11). After Elko and her daughter left the apartment, Watkins called the police to falsely accuse Elko of hitting him (T. 172:8–12; 173:8–18, State's Ex. 3 (dispatch recording); 385:14–18; 409:3–7), presumably believing he could take Elko's car to the bachelor party once she had been arrested because it was "normal" for Watkins to threaten Elko in order to "get [his] way." (*See* T. 402:1–17; 404:8–13). Elko did not know that Watkins had actually called the police. (T. 385:14–18; 409:3–7).

In response to Watkins's call, Officer Daniel Daugherty and Sergeant Floyd Takacs of the Olmstead Falls Police Department were dispatched to Elko's apartment located at 9535 Columbia Road, above Aces. (T. 186:22–187:10; 378:14–16; 384:7–9). The dispatcher did not tell officers who the alleged suspect was or what the alleged suspect looked like, and expressly informed them that there were no weapons involved and that the alleged suspect was not dangerous. (T. 178:13–23; 179:5–7; 179:17–180:12; 279:3–7; 280:1–20).

2. With no information about the identity of the alleged suspect and no reason to suspect that he was responding to an emergent or dangerous situation, Sergeant Takacs approached Elko and needlessly escalated what should have been a routine interaction, responding to Elko's rude language with unnecessary and unlawful violence.

Officer Daugherty arrived on the scene first, with Takacs arriving a few minutes later. (T. 252:4–7). When Takacs arrived on the scene, he did not have any information about the parties involved with the call. (T. 178:13–23; 179:5–7; 179:17–180:12; 279:4–7; 280:1–20). Despite the lack of information, Takacs drove straight to Elko, who was standing in an alley near Aces. (T. 255:14–15; 281:5–7; 287:6–13, 383:7–17, State's Ex. 7 (Takacs's dash camera)). When Takacs approached Elko and asked what she was doing, Elko told Takacs that she and her daughter were going to get

some food from a deli down the street. (T. 290:22–291:8; 436:5–7). Takacs then said to Elko, "I need to know who you are." (T. 383:23–25, State's Ex. 7 (Takacs's dash camera); 435:436:2–8). Elko responded that her name was "Christie" and that she "lived upstairs, because [they] were right next to the apartment [Elko] lived in," and she "thought [Takacs] would understand" that she lived in the apartment above the bar. (T. 384:1–17; 412:24–413:14).

Despite that Elko was answering to his questions, Takacs became increasingly hostile toward her, "came up very aggressively," and immediately got "very close to [her] face." (T. 330:1–5; 384:22–385:4, State's Ex. 7 (Takacs's dash camera); 432:24–433:3; 433:19–434:2; 434:7–12). The first thing that Takacs did was "get[] into [Elko]'s face," which "started to scare [her] and made [her] very, very nervous." (T. 434:7–12). Alarmed by Takacs's hostility, Elko asked Takacs, admittedly rudely, "[w]hat the fuck are you getting nasty with me for." (T. 384:22–23, State's Ex. 7 (Takacs's dash camera). In response, Takacs, who acknowledged that it was his duty as a police officer "to avoid escalating disputes" and to resolve them "as peacefully as possible," grabbed Elko by the wrist. (T. 292:12–293:12, Def. Ex. B (police report); 297:15–24; 384:22–385:4, State's Ex. 7 (Takacs's dash camera); 398:22–399:4). By his own admission, Takacs had put his hands on Elko before he said anything to her beyond his initial greeting, and had "definitely" "touched her" before the pair began to exit the alley, and before he told her that she was under arrest (T. 228:11–25, Def. Ex. B (police report); 292:23–293:12; 310:1–4, Def. Ex. C (compiled dash camera videos); 312:24–313:18, State's Ex. 7 (Takacs's dash camera); 387:24–388:5).

When Takacs grabbed Elko, he used so much force that he left "his fingerprints and bruises all the way down [her] arm," "so hard" that Elko felt like Takacs "was trying to … squeeze through [her.]" (T. 420:3–7). His actions were so sudden and aggressive that Elko was "terrified," confused, and feared that Takacs would harm her or her daughter. (T. 311:13–15; 384:22–385:6; 386:8–12; 386:17–23; 387:22–388:5, State's Ex. 7 (Takacs's dash camera); 398:25–399:4; 420:3–12). To protect

herself, Elko "backed away" from Takacs to "get him in front of [the] dashboard cam" on Takacs' patrol car. (T. 386:17–23, State's Ex. 7 (Takacs's dash camera); 389:5–10). It was not until Takacs put his hands on Elko that she moved away from him. (T. 385:23–386:1, State's Ex. 7 (Takacs's dash camera).

3. Takacs deliberately manipulated his dash camera and body camera to ensure that he could get away with bullying Elko without having it captured on video.

Despite that Takacs had "turned [on] the body camera" on his way to the scene, Takacs's body camera did not capture any evidence of the point at which Takacs grabbed Elko because, according to Takacs, it somehow turned itself off and "malfunction[ed]." (T. 263:3–11; 265:10–21). Takacs testified that even though he only "turned [the camera] on the one time when [he] approached the scene," the camera must have turned itself off when he got out of the car and grabbed Elko, and then turned itself back on after the two were across from the alley. (T. 269:5–7; 347:9–348:25). Moreover, Takacs himself testified that there was "no way of telling whether it was working or not because it … didn't have an actual light on [it]." (T. 265:13–15). Yet, Takacs somehow knew upon returning to his car that his body camera "got turned off in the fight[.]" (T. 270:22–25, State's Ex. 10 (Takacs's body camera)).

Though Takacs could have parked his car such that his dash camera would have completely captured his interaction with Elko in the alley, including the point at which he grabbed her, Takacs parked his car just past the alley where anything that happened in the alley would be completely out of view. (T. 283:3–9; 283:16–19). While the interaction in the alley was not captured on Takacs's body camera, side-by-side video footage from Takacs's and Daugherty's dash cameras shows Takacs moving to grab Elko before the pair exited the alley. (*See* T. 301:14–302:3, 305:2–17; 306:2–13; 307:13–17; 310:14, Def. Ex. C (compiled dash cam videos, at 0:22–0:30)). This is consistent with

Elko's testimony that Takacs grabbed her right after she asked him "why the F" he was getting so "nasty" with her. (T. 384:22–23).

The State provided no documentation that the department's body cameras were defective or otherwise malfunctioning, and no evidence at all to this effect apart from the police officers' self-serving testimony.

4. After Elko and Takacs reached the parking lot across from the bar, Takacs and Daugherty tackled Elko to the concrete despite knowing that she was not armed, was not dangerous, was not trying to escape, and could not have practicably escaped or caused any harm to them.

Elko and Takacs eventually "ended up in the parking lot across the street from Ace's Bar," at which point Takacs grabbed Elko's "left arm." (T. 312:21–25; 313:8–9, Def. Ex. B (police report)). Upon seeing Takacs and Elko travel to the parking lot, Daugherty ran to Takacs and Elko and immediately threatened to tase her. (T. 203:20–25, State's Ex. 5 (Daugherty's dash camera, at 0:53–0:55); 204:11–18). Although the officers had hold of Elko's arm, they tackled her "to the ground," pressing a taser "on her back" and "pushing her" "as she went" down. (T. 207:17–20; 260:11–13; 324:9–11). Takacs and Daugherty tackled Elko despite that "it was obvious [Elko] wasn't armed" and there was no way that Elko could "physically outman" them. (T. 207:12–20; 237:20–22, State's Ex. 5 (Daugherty's dash camera); 257:15–20; 260:11–13; 314:3–11; 318:4–6, State's Ex. 7 (Takacs's dash camera); 398:10–17). Nor did officers have any reason to believe that Elko was a threat to their safety because she never "punched," "hit," "kicked," or attempted to harm Takacs or Daugherty. (T. 325:10–23, Def. Ex. B (police report)).

5. Takacs made a number of misrepresentations and exaggerations in the police report, and attempted to justify them by claiming that he sometimes experiences "hallucinations" in recalling the details of stressful events.

Contrary to the officers' claims in their police reports that it was necessary to tackle Elko "to try to get the handcuffs on her," and that "it took a long time" to gain control (T. 320:3–11, Def. Ex. B (police report)), the truth was that Elko was tackled within two seconds of the officers

grabbing her by the arms. (T. 319:17–320:2, Def. Ex. B (police report). When confronted with video footage of the tackle, Takacs was forced to admit that Elko had been tackled and handcuffed within six seconds, and that she was slammed to the concrete despite that they already had control of her arms. (T. 315:17–24; 320:3–22, Def. Ex. B (police report) and State's Ex. 6 (Daugherty's body camera)). When asked why he wrote in his police report that, "we were *finally* able to take Elko to the ground," falsely suggesting a substantial struggle, Takacs testified that "hallucinations" sometimes caused him to misremember details of a stressful event. (T. 320:3–322:15, Def. Ex. B).

6. After the officers unnecessarily tackled Elko to the ground, pressed her face into the concrete, and called her a "stupid fucking dyke," Elko immediately complied with demands that she move her arms to assist them in handcuffing her, contrary to additional misrepresentations contained in the police reports.

After he and Daugherty had tackled Elko to the ground, Takacs called Elko a "stupid fucking dyke." (T. 462:10–16). While Takacs denies that he referred to Elko as a "stupid fucking dyke," he claims that he referred to her as "[a] stupid fucking bitch." (T. 330:19–331:5). The words "stupid fucking" are clearly audible on the video recording of this incident, but the third word is inexplicably inaudible, suggesting that the recording was manipulated before it was produced to Elko. (T. 333:10–21; 337:19–22; State's Ex. 8 (Takacs's body camera)).

Once on the ground, Elko surrendered each of her arms to Takacs and Daugherty immediately upon being asked to do so. (T. 230:12–232:24, State's Ex. 8 (Takacs's body camera); 324:2–22). Despite clear video evidence to the contrary (*Id.*), Takacs and Daugherty misrepresented in the police report that they had to instruct Elko to "put her hand behind her back multiple times but she continued to fight officers" (T. 231:14–232:5, Def. Ex. B (police report), at 4), and that Elko "violently resist[ed]" and "resisted being handcuffed." (T. 322:22–323:4, Def. Ex. B, at 5). Contrary to these false statements and exaggerations, it was simply not true that Takacs and Daugherty had to ask Elko multiple times for her hands or that she pulled away from them. (T. 323:8–324:22, State's Ex. 6 (Daugherty's body camera). Takacs also misrepresented that Elko "would not get up and walk

to [his] vehicle." (*See* T. 322:22–24, Def. Ex. B (police report), at 5). This, too, was false, as Takacs physically prevented Elko from getting up by "standing on [her] hands," while he shouted at her to get up. (T. 390:21–391:1, State's Ex. 7 (Takacs's dash camera)).

7. The officers continued to abuse Elko as they needlessly forced her into a police cruiser, while gloating in a manner reflecting their intent to manipulate the body and dash camera footage of the incident.

After pulling a handcuffed Elko up to her feet, Takacs and Daugherty began pushing her into Takacs's cruiser while "kicking," "punching," "slamming," and "doing everything … to hurt her" while needlessly forcing her into the car. (T. 235:1–3; 393:10–394:25, State's Ex. 7 (Takacs's dash camera); 426:19–427:6; 429:3–18, State's Ex. 9 (Takacs's rear-seat camera); 431:12–16). The officers "hit [Elko] a lot while [she] was standing" outside the car. (T. 426:20–23). Elko, who was wearing a dress and in handcuffs, told Takacs and Daugherty that she would get in the car if they would remove their hands from her and permit her the chance to do so without being shoved in. (T. 234:16–17; 235:13–18; 325:24–326:20; 393:22–394:5, State's Ex. 7 (Takacs's dash camera); 426:19–427:6; 430:1–8; 430:22–431:9, State's Ex. 9 (Takacs's rear-seat camera)). As was the case when they tackled her, Takacs and Daugherty knew that Elko was unarmed and was not making any attempt to escape, and additionally was handcuffed behind her back. (T. 234:13–18; 280:1–13; 340:15–17; 393:11–15; 427:1–8). Yet, despite her repeated requests that the officers allow her to turn around and sit down in the police cruiser, Takacs began "slamming" her against the metal of the door, while Daugherty attempted to pull her into the vehicle from the other side. (T. 426:12–24; 428:22–25; 429:3–13; 430:22–431:9; 439:18–440:8, State's Ex. 9 (Takacs's rear-seat camera).

Once Elko was inside the car, she complained that Takacs "attacked" her "in the alley" for no reason, because Elko never "touched" him. (T. 339:16–340:8; 447:10–15, State's Ex. 9 (Takacs rear-seat camera)). In response, Takacs did not deny attacking Elko, and when Elko indicated that she "want[ed] to see" video footage of their interaction in the alley (*see* T. 449:24–450:3, State's Ex. 9

(Takacs's rear-seat camera), Takacs gloated to her that she was "not gonna see nothing." (T. 329:9–17; 330:6–18, 448:15–16; 449:3–6; 450:2–6, State's Ex. 9 (Takacs's rear-seat camera)).

8. Takacs and Daugherty made no effort to obtain statements from any of the several eyewitnesses to the incident.

While Takacs transported Elko to the Strongsville County Jail, Daugherty remained at the scene along with several individuals who had witnessed what had happened. (T. 274:11–14; 341:25–344:5). Takacs testified that although a "thorough police job would have been to take statements from those witnesses" (T. 342:20–25), it would have been "unreasonable" to wait to transport Elko while he gathered evidence. (T. 343:3–13). Daugherty, who was not transporting Elko but remained on the scene, failed to obtain any statements or evidence from the several individuals standing around who could have provided witness accounts of the incident, including what really happened in the alley between Takacs and Elko and officers' needless use of force against Elko in arresting her. (*See, e.g.*, T. 343:18–24; 345:1–21; 358:25–359:3).

B. The State did not charge Elko with resisting arrest until after Elko sued Takacs, Daugherty, and the City of Olmsted Falls for violating her constitutional right to be free from excessive force.

After her arrest, the State indicted Elko on a single charge of assaulting a police officer under R.C. 2903.13(A) in *State v. Elko*, Cuyahoga C.P. No. CR-16-610322-A. On September 22, 2017, nearly a year later, Elko filed suit in the Cuyahoga County Court of Common Pleas (CV-17-886321) under asserting that Takacs, Daugherty, and the City of Olmsted Falls had violated her constitutional rights, including her right to be free from excessive force. (R. 17 (Motion to Withdraw No-Contest Plea, filed June 21, 2018), at 3). On December 19, 2017, *after* Elko had filed her lawsuit, the State dismissed the 2016 indictment, re-indicted Elko in the instant case for assault, and added a charge under R.C. 2921.33(A) for resisting arrest. (R. 1; T. 366:2–13). Both Takacs and Daugherty agreed that "it would help the civil case if there was a criminal conviction" against Elko for resisting arrest. (T. 236:14–19; 352:22–354:1).

C. Elko pleaded no contest to the resisting arrest charge, prompting the State to argue that her civil case should be dismissed because "excessive force is an affirmative defense that a criminal defendant must raise in response to a charge of resisting arrest."

On February 5, 2018, Elko pled "no contest" to the resisting arrest charge in exchange for dismissal of the assault charge, believing that she had received all exculpatory evidence relating to the criminal charges against her. (*See* Pl. T. 4:9–5:3; 5:12–18; 7:11–8:4).[2]

On June 21, 2018, the State argued in the civil case that under Ohio law, an officer's use of excessive force in making an arrest is a complete defense to a charge of resisting, and that therefore under the U.S. Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), and existing Sixth Circuit precedent, Takacs's excessive force was a complete defense to the resisting arrest charge. (*See* R. 17, at 6–8, Ex. 3) (arguing that "a criminal conviction for resisting arrest in Ohio cannot stand where a criminal defendant successfully asserts the affirmative defense of pre-arrest excessive force; and a § 1983 claim of excessive force would necessarily imply the invalidity of an underlying conviction for resisting arrest.").

D. Elko sought and was granted leave to withdraw her no-contest plea after it was discovered that the State withheld voluminous evidence from Takacs's disciplinary file.

But after Elko's lawsuit was removed to federal court (*Elko v. Takacs, et al.*, N.D. Ohio Case No. 1:17-CV-02247), Elko received through civil discovery a complete copy of Takacs's personnel file. (*See* R. 17, at 3). Takacs's file consisted of 278 pages of disciplinary records and complaints concerning various incidents of Takacs's misconduct as a police officer and hostility toward women. (*Id.*). The file also included video footage of Takacs responding to a domestic violence call wherein a woman was alleged to have hit a man. (R. 42 (Elko's Opposition to the State's Motion in Limine), at 8). Immediately after Takacs left the call, his body camera recorded him stating, "If a woman even

[2] "Pl. T." refers to the separate transcript of the plea hearing dated February 5, 2018 and filed with this Court on January 6, 2020.

touches a man, I make sure she goes to jail. Yep, if a female even touches a man, I make sure she goes to jail." (*Id.* at 8–9).[3] Of those 278 pages, the State had produced just 3 pages to Elko in the criminal case prior to her plea. (*See id.* at 3–4).

Thus, on June 21, 2018, Elko moved to withdraw her plea on grounds that the State had wrongfully withheld this evidence from her. In response to this motion, the State agreed that this withholding of evidence was "concerning" and "call[ed] into question the fundamental proceedings leading up to Elko's plea" and yet, could not say why "these additional documents were not provided to the Court." R. 22, Motion to Dismiss, filed July 26, 2018, pg. 2.[4]

On July 16, 2018, the trial court granted Elko's motion to withdraw her plea and ordered the State to produce a complete copy of Takacs's personnel file. (R. 17, at 3, Ex. 1; and R. 19).

E. At trial on the criminal charges against Elko, the State reversed its position and argued that under Ohio law, an officer's use of excessive force is no defense to the crime of resisting arrest.

On September 3, 2019, at the beginning of the trial, Elko filed written proposed jury instructions as required by Crim.R. 30(A). (*See* R. 46). Concerning the resisting arrest charge, Elko requested an instruction modeled after OJI-CR-521.33-11(B) that provided, in relevant part:

> The defendant claims that Sgt. Floyd Takacs used excessive or unnecessary force in arresting her. When an arresting officer uses excessive force against a private citizen, the private citizen is justified in using force to defend against the arresting officer when she reasonably believes that such conduct is necessary to defend herself against the imminent use of unlawful force and if the force used by the private citizen was not likely to cause death or great bodily harm.

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[3] The trial court excluded this video from evidence upon Defendants' motion despite that it constitutes an admission of a party opponent under 801(D)(2). Plaintiffs are not appealing this decision.

[4] In its response to Elko's motion to withdraw her no-contest plea, the State unequivocally agreed that this withholding of evidence was "concerning" and "call[ed] into question the fundamental proceedings leading up to Elko's plea" and yet, could not say why "these additional documents were not provided to the Court." (*See* R. 22 (Motion to Dismiss, filed July 26, 2018), at 2).

> Excessive or unnecessary force means more force than necessary under the circumstances to arrest the defendant.
>
> Words alone do not justify the officer's use of force. Resort to such force is not justified by abusive language, verbal threats, or other words no matter how provocative.
>
> An officer's use of force is excessive if a reasonable officer under the same circumstances would not have believed the same force was necessary, considering the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting or attempting to evade arrest by flight.
>
> To consider whether the officer's use of force was excessive under the circumstances of this case, you may also consider other factors based on the evidence, such as whether the defendant was dangerous, the duration of the confrontation, the possibility that the defendant was armed, and how many other suspects the officer was faced with at one time …
>
> [I]f you find that the defendant proved by a preponderance of the evidence the defense of excessive force, then you must find the defendant not guilty.

(*See* R. 46, at 8–10, citing *State v. Scimemi*, 2d Dist. Clark No. 94-CA-58, 1995 Ohio App. LEXIS 2244; *Columbus v. Fraley*, 41 Ohio St.2d 173, 324 N.E.2d 735 (1975); *City of Bedford v. Gooch*, 8th Dist. Cuyahoga No. 65320, 1994 Ohio App. LEXIS 2365 (June 2, 1994); *State v. Thompson*, 4th Dist. Ross Case No. 92CA1906, 1993 Ohio App. LEXIS 5377 Nov. 9, 1993); *State v. Logsdon*, 3d Dist. Seneca Case No. 13-89-10, 1990 Ohio App. LEXIS 5749 (Dec. 4, 1990); *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939; and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

Despite having argued in the related civil case that "excessive force is an affirmative defense that a criminal defendant must raise in response to a charge of resisting arrest" (R. 17, at 6–8, Ex. 3), the State reversed its position at trial regarding this defense of excessive force. (T. 474:14–25). Specifically, citing *State v. Lorenzo*, 11th Dist. Lake No. 2001-L-053, 2002-Ohio-3495, ¶ 41 (July 3, 2002) and *State v. Sinclair*, 8th Dist. Cuyahoga No. 85235, 2005-Ohio-6011, ¶ 24 (Nov. 10, 2005), the

State misrepresented Ohio law to argue that Elko was not entitled to a jury instruction on excessive force, purportedly because she did not contest that the underlying arrest was lawful:

> [T]hey have admitted that there was probable cause for [the] arrest. They're not disputing it. As these two other cases show, if there's probable cause for an arrest, the arrest is not unlawful. And therefore she had no right – she's not getting the self-defense instruction on that ground…

(T. 475:6–476:9; 476:18–25). The State also argued, based on a self-serving misrepresentation of the evidence presented at trial, that Elko could not receive the self-defense instruction because she failed to admit to the crime of resisting arrest. (*See* T. 474:14–20; 485:5–22).

F. The trial court erroneously refused to instruct the jury on the excessive-force defense.

Over Elko's objection, and despite that she had properly submitted written proposed jury instructions in compliance with Crim.R. 30(A), the trial court erroneously refused to instruct the jury that excessive force provides a defense to resisting arrest, concluding without explanation that, "as a matter of law that the excessive force instruction will not be given in this case." (T. 488:1–5).

The trial court's complete instruction to the jury on resisting arrest under R.C. 2921.33(A) was as follows:

> Before you can find the defendant guilty of resisting arrest, you must find beyond a reasonable doubt that on or about the 24th day of September, 2016, in Cuyahoga County, Ohio, defendant did recklessly or by force resist or interfere with a lawful arrest of herself or another.
>
> A person acts recklessly when with heedless indifference to the consequences the person disregards a substantial and justifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when with heedless indifference to the consequences the person disregards a substantial and justifiable risk and such circumstances are likely to resist.
>
> Force means any violence, compulsion or constraint physically exerted by any means upon or against a person or thing.

> Resist or interfere means to oppose, obstruct, hinder, impede, interrupt or prevent an arrest by a law enforcement officer by use of force or recklessly by any means, such as going limp or any other passive or indirect conduct.
>
> You must also decide whether the arrest was lawful. If this was a warrantless arrest, an arrest is lawful if the offense for which the arrest was being made was one for which the defendant could be arrested, such as domestic violence and/or failure to disclose personal information, the arresting officer had authority to make the arrest at the time where the alleged resistance or interference took place, and a reasonable police officer under the facts and circumstances in evidence would have believed that the elements of assault had been committed by the defendant. The State need not prove that the defendant was, in fact, guilty of the offenses, but only that the arresting officer had a reasonable belief of defendant's guilt.
>
> If you find the State proved beyond a reasonable doubt each and every one of the essential elements of the offense of resisting arrest as charged in Count 2 of the indictment, your verdict must be guilty according to your findings.

(T. 549:18–551:20).

The trial court's error in refusing to instruct the jury on the defense of excessive force was only compounded by the State's repeated statements to the jury in closing argument that such a defense was "not a thing in Ohio." (*See, e.g.*, T. 531:5–8; 535:6–7 ("You do not have a right to defend yourself from a lawful arrest."); and 538:14–15 ("She had no right to resist this lawful arrest.")).

G. The jury acquitted Elko of the felony charge of assaulting a police officer but found her guilty of misdemeanor resisting arrest due to the trial court's erroneous jury instructions.

The jury found Elko not guilty on the State's felony charge of assault on a police officer under R.C. 2903.13(A). (*See* R. 50; T. 561:21–562:1). But because the trial court erroneously refused to instruct the jury that it could consider whether the police officers used excessive force in arresting her, the jury found Elko guilty of resisting arrest under R.C. 2921.33(A). (R. 50; T. 561:21–562:9).

V. Law and Argument

A. Standard of Review

"'When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case.'" *State v. Williams*, 8th Dist. Cuyahoga No. 101121, 2015-Ohio-172, ¶ 35, citing *State v. Sims*, 8th Dist. Cuyahoga No. 85608, 2005-Ohio-5846, ¶ 12 and *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). In addition, "[w]hether jury instructions correctly state the law is a legal issue that an appellate court reviews de novo." *State v. Echevarria*, 8th Dist. Cuyahoga No. 105815, 2018-Ohio-1193, ¶ 27, citing *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 135 and *State v. Brown*, 2016-Ohio-1358, 62 N.E.3d 943, ¶ 71 (11th Dist.).[5]

Courts "must give all jury instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Joy*, 74 Ohio St.3d 178, 181, 657 N.E.2d 503, citing *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. A trial court abuses its discretion and commits "prejudicial error in a criminal case [when it] refuse[s] to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge." *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 134, quoting *State v. Scott*, 26 Ohio St.3d 92, 101, 497 N.E.2d 55 (1986). *See also State v. Sims*, 8th Dist. Cuyahoga No. 85608, 2005-Ohio-5846, ¶ 17 ("Without this instruction, [defendant] was denied a fair trial because, under the plain meaning of the instruction given, the jury could not even consider self-defense").

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[5] While it is unclear why the trial court refused to give Elko's requested instruction to the jury, the trial court's refusal to instruct the jury that excessive force is a defense to resisting arrest warrants reversal regardless of whether this Court applies abuse of discretion or *de novo* review.

B. The trial court erred in failing to instruct the jury that an officer's use of force provided a complete defense to the charge of resisting arrest.

In erroneously ruling "as a matter of law that the excessive force instruction [would] not be given in this case," (T. 488:3–5), the trial court failed to "give all jury instructions that [we]re relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *Joy*, 74 Ohio St.3d 178, at 181. As discussed below, the trial court abused its discretion in refusing to instruct the jury on Elko's right to resist against excessive and unnecessary force because (1) it is well-settled under Ohio law that a citizen has the right to reasonably resist against such unlawful force, even if the underlying arrest was supported by probable cause, and (2) viewing the evidence in a light most favorable to Elko, there was more than enough evidence upon which the jury, if properly instructed, could have found not only that officers used excessive and unnecessary force against Elko, but also that any actions she took in "resisting" arrest were only reasonably and proportionally taken to protect herself from the officer's excessive and unlawful violence.

1. Ohio law is clear that citizens have the right to reasonably resist against an officer's use of excessive or unnecessary force, even if the arrest was lawful.

Under Ohio law, where there is evidence of "excessive or unnecessary force by an arresting officer, a private citizen may … use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances." *Columbus v. Fraley*, 41 Ohio St.2d 173, 180, 324 N.E.2d 735 (1975). In *Fraley*, the Ohio Supreme Court "abolished the common law privilege to resist an unlawful arrest," while "leaving an exception for cases where excessive force is being used against the arrestee." *State v. Ali*, 154 Ohio App.3d 493, 2003-Ohio-5150, 797 N.E.2d 1019, ¶ 12 (7th Dist.), citing *Fraley*. Since *Fraley*, every appellate court in Ohio, including the Eighth District, has recognized that an officer's use of excessive or unnecessary force is a defense to a charge of resisting, even if the underlying arrest was lawful. *See, e.g., Contreras v. Simone*, 112 Ohio App.3d 246, 247, 678 N.E.2d 593

(8th Dist.1996) ("The trial court gave instructions to the jury as follows: 'If you believe that force was unnecessary or excessive against the defendant in processing the arrest, the defendant has a right to resist that unnecessary or excessive force.' The jury necessarily determined in appellant's criminal trial that excessive force was not used by appellee in effectuating appellant's arrest. If the issue of excessive force had been resolved in appellant's favor by the jury, he would have received an acquittal on the charge of resisting arrest."); *City of Middleburg Hts. v. Szewczyk*, 8th Dist. Cuyahoga No. 89930, 2008-Ohio-2043, ¶ 29-31, quoting *Fraley* ("Even if we determined that his arrest was unlawful, it is well established that: 'In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.' A review of the evidence does not show that [Defendant] was privileged to resist his arrest because of excessive or unnecessary force by the police.").[6]

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[6] *See also State v. Barnes*, 1st Dist. Hamilton Nos. C-170355 and C-170356, 2018-Ohio-3894, ¶ 14 ("Resisting arrest is justified where the defendant is effectively being assaulted and responds with reasonable force to protect his safety..."); *Springfield v. Hoffman*, 2d Dist. Clark No. CA 2293, 1987 Ohio App. LEXIS 10436, at *6-7 ("The court properly instructed the jury that they could find the defendant not guilty if they found that the police used excessive force."); *State v. Logsdon*, 3d Dist. Seneca Case No. 13-89-10, 1990 Ohio App. LEXIS 5749, at *4 (Dec. 4, 1990) ("[I]t is implicit in the Court's analysis in *Fraley* ... that an allegation of unnecessary or excessive force should be regarded a defense to a charge of resisting arrest."); *State v. Thompson*, 4th Dist. Ross Case No. 92-CA-1906, 1993 Ohio App. LEXIS 5377, at *11 (Nov. 9, 1993) ("The use of excessive force by the arresting officer is a defense to the charge of resisting arrest."); *City of Mansfield v. Studer*, 5th Dist. Richland Nos. 2011-CA-93 and 2011-CA-94, 2012-Ohio-4840, ¶ 97 ("[E]xcessive force is an affirmative defense to resisting arrest."); *State v. Bolton*, 2018-Ohio-1551, 111 N.E.3d 545, ¶ 22 (6th Dist.), quoting *Fraley*, 41 Ohio St.2d 173, 175 ("[Defendant]'s resistance cannot be excused unless there was 'excessive or unnecessary force by an arresting officer.'"); *State v. Ali*, 154 Ohio App.3d 493, 2003-Ohio-5150, 797 N.E.2d 1019, ¶ 12 (7th Dist.), citing *Fraley* ("The Supreme Court abolished the common law privilege to resist an unlawful arrest ... but le[ft] an exception for cases where excessive force is being used against the arrestee."); *Akron v. Recklaw*, 9th Dist. Summit No. 14671, 1991 Ohio App. LEXIS 394, at *5 (Jan. 30, 1991) ("As in *Fraley*, [the city ordinance] contains an exception for 'excessive or unnecessary force by an arresting officer'" to the crime of resisting arrest); *Columbus v. Carsey*, 10th Dist. Franklin Nos. 82AP-834 and 82AP-835, 1983 Ohio App. LEXIS 15238, at *7 (Dec. 15, 1983) ("We find that the jury had a right to believe ... the evidence submitted by the defendant that the police officers were using excessive force. Therefore, the instruction requested by defendant was proper and the jury should have been given instructions

Despite this binding and unanimous precedent, the State wrongly argued below that the defense of excessive force is "not a thing in Ohio." (*See* T. 531:5–8; 532:2–3; 532:8–12; 535:6–7; and 538:14–15). Specifically, relying on *State v. Lorenzo*, 11th Dist. Lake No. 2001-L-053, 2002-Ohio-3495 (July 3, 2002) and *State v. Sinclair*, 8th Dist. Cuyahoga No. 85235, 2005-Ohio-6011 (Nov. 10, 2005), the State argued, misleadingly, that "if there is probable cause for an arrest a defendant cannot claim self-defense." (T. 475:6–476:9).

While Defendants' construction here is in a sense correct, in that a defendant has no right to "defend" himself from an otherwise lawful arrest, it misses the point that—pursuant to the well-established precedent set forth above—an otherwise lawful arrest made with excessive force gives a defendant a right to resist to the extent reasonable to protect herself from that excessive force.

Accordingly, the *Sinclair* decision—which involved an arrest of a defendant who was found with eight grams of crack cocaine, and who "elbowed the police, ... attempted to flee and fought with the officers, by flailing his arms, striking officers, and refusing to obey all police commands to stop"—did not address the issue of whether the arresting officers used excessive force and does not even mention the term "excessive force" at all. *Sinclair*, 2005-Ohio-6011, ¶ 5.

Similarly, the *Lorenzo* decision—which involved an adult male defendant who (1) had just assaulted his father, resulting in "large abrasions on his [father's] face and forehead"; (2) "appeared to be intoxicated and was repeatedly screaming" and cursing at the responding police officers in the presence of his two small children; (3) refused to obey the officers' "repeated instructions to relax and calm down ... or he would be arrested," and (4) physically resisted the officers' efforts to arrest

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concerning the law with regard to a citizen's rights under such circumstances."); *State v. Ashley*, 11th Dist. Ashtabula No. 97-A-0011, 1997 Ohio App. LEXIS 6030, at *10 (Dec. 31, 1997) ("[Fraley] implicitly held that the use of excess force by the police in effectuating an arrest may be a defense to the charge of resisting arrest."); and *Village of Blanchester v. Newland*, 12th Dist. Clinton No. CA-83-07-008, 1984 Ohio App. LEXIS 10876, at * 7–8 (Sept. 17, 1984) ("[Defendant] is basically correct in contenting that if the arresting officer used excessive or unnecessary force, then [he] could use force to resist arrest.").

him after he refused to calm down—did not involve any analysis of whether the officers used excessive force and also does not so much as mention the term "excessive force." *Lorenzo*, 2002-Ohio-3495, ¶ 3-4.

Thus, the *Sinclair* and *Lorenzo* courts' respective statements that "[a]n instruction on self-defense is only proper where the arrest has been unlawful" has no bearing on a case like this one requiring an analysis of whether the arresting officers used excessive force in making an otherwise lawful arrest. *Sinclair*, 2005-Ohio-6011, ¶ 23; *Lorenzo*, 2002-Ohio-3495, ¶ 41. As made clear in *Fraley*, these are two separate questions. And in both *Sinclair* and *Lorenzo*, unlike here, the respective Defendants not only did not apparently make the excessive force argument, there would have been no legitimate basis for them to have done so. *See Sinclair*, 2005-Ohio-6011, ¶ 5, *Lorenzo*, 2002-Ohio-3495, ¶ 3-4 (discussed above).

In sum, neither *Sinclair*, *Lorenzo*, nor surely any other case the State manages to dig up and misrepresent in responding to this brief, does anything to overturn the well-established and binding principle cited above (also, hypocritically, by the State itself in the civil case), and moored by *Fraley*, holding that a citizen may reasonably resist against an arresting officer's use of excessive force "whether or not the arrest is illegal under the circumstances." *Fraley*, 41 Ohio St.2d at 180. As discussed immediately below, this precedent mandated that the excessive force instruction be given in light of the evidence entered at trial.

2. The evidence at trial was more than sufficient to warrant an instruction on excessive force.

A defendant's requested jury instruction should be given if there is "sufficient evidence, which if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Stephens*, 2016-Ohio-384, 59 N.E.3d 612, ¶ 17 (8th Dist.), citing *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978), paragraph one of the syllabus. In determining whether there is sufficient evidence to warrant a defendants' requested instruction, the court "must view the

'evidence in the light most favorable to the defendant" and where "there is conflicting evidence on the issue … the instruction must be given to the jury." *Stephens*, 2016-Ohio-384, ¶ 19, quoting *State v. Robinson*, 47 Ohio St.2d 103, 110-113, 351 N.E.2d 88 (1976). *See also id.*, ¶ 25 ("The trial court improperly usurped the jury's role by making its own evaluation of the weight of the evidence in deciding not to give the self-defense instruction."); *City of Parma v. Treanor*, 2018-Ohio-3166, 117 N.E.3d 970, ¶ 19 (8th Dist.) ("[W]hether [defendant] can withstand his burden of proving that he acted in self-defense is a question for the trier of fact, not this court."); and *State v. Robert D. Smith*, 11th Dist. Lake No. 10-014, 1984 Ohio App. LEXIS 10872, at *9 (Sep. 21, 1984) ("It is prejudicial error to refuse to submit an instruction of law on a legal defense if that defense is properly supported by evidence.").

As explained below, Elko was entitled to an instruction on excessive force because there was plenty "of evidence to support a conclusion that the officers used excessive or unnecessary force against [her] and that [she] reasonably" resisted the officers. *See State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, 837 N.E.2d 823, ¶ 24 (2d Dist.). Thus, because the jury was entitled to believe the State's evidence that Elko "did resist *and also* the evidence submitted by [Elko] that the police officers were using excessive force … the jury should have been given instructions concerning the law with regard to a citizen's rights under such circumstances" and it was error for the trial court to deny Elko her requested excessive force instruction. *See Columbus v. Carsey*, 10th Dist. Franklin Nos. 82-AP-834 & 82-AP-835, 1983 Ohio App. LEXIS 15238, at *7 (Dec. 15, 1983) (emphasis added).

a. A jury could have reasonably concluded that Takacs and Daugherty used a degree of force against Elko that was excessive and unnecessary.

Allegations that an arresting officer used excessive force "are to be analyzed under [the] 'objective reasonableness standard'" defined by the U.S. Supreme Court in *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *See Strickland v. Tower City Mgmt. Corp.*, 8th

Dist. Cuyahoga No. 71839, 1997 Ohio App. LEXIS 5802, at *12 (Dec. 24, 1997). *See also State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 24 ("Although the Supreme Court's decisions in *Garner* and *Graham* involved an officer's civil liability … these cases nonetheless help to define the circumstances in which the Fourth Amendment permits a police officer to use deadly and nondeadly force"). This inquiry

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396 (internal citations omitted). Thus, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them…" *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir.2005), quoting *Graham*, at 397.

Additionally, "the Supreme Court has consistently held that where the underlying crime is only a nonviolent misdemeanor, a lesser degree of force is authorized." *Bauer v. City of Cincinnati*, S.D.Ohio No. 1:09-cv-46, 2011 U.S. Dist. LEXIS 122872, at *19 (Oct. 24, 2011), citing *Tennessee v. Garner*, 471 U.S. 1, 12, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). *See also Thacker v. Lawrence Cnty.*, 182 F. Appx. 464, 472 (6th Cir. 2006) ("[D]isorderly conduct is not a violent or serious crime, and this fact weighs in favor of using less force in arresting [a suspect]"). At trial, Takacs testified that he "put his hands on [Elko]" because she had supposedly failed to identify herself in violation of R.C. 2921.29, which was, at most, a non-violent misdemeanor. (*See* T. 288:1–8).

Here, there was more than enough evidence from which the jury could have reasonably concluded, based on the above legal standards, that Takacs used excessive force in grabbing Elko by the wrist with no apparent reason to do so. This includes evidence showing that:

- Elko did in fact immediately identify herself as requested, and told Takacs that she "lived upstairs (T. 384:1–17; 412:24–413:14; 437:8–15);

- Elko was in the process of showing Takacs her driver's license at the time he grabbed her (T. 462:3–6; 464:9–24);

- Elko was not moving away from Takacs or attempting to flee from him in any way (T. 385:23–386:1, State's Ex. 7 (Takacs's dash camera); Def. Ex. C (compiled dash cam videos, at 0:22–0:30);

- Takacs had been advised by the dispatcher that there were no weapons and no alcohol involved in the alleged domestic dispute at issue (T. 179:5–25; 280:1–281:2);

- Elko, a female of normal build and physical capabilities, who was not intoxicated, had no reasonable belief that she could successfully flee from or resist arrest from one, let alone two armed male police officers (T. 314:3–11; 318:4–11, State's Ex. 7 (Takacs's dash camera); 340:12–17; 398:10–17);

- Takacs and Daugherty admitted that "it was obvious [Elko] wasn't armed," (T. 257:15–20; 260:11–13; 314:3–11), and that she was not a danger or a threat to their safety (T. 318:4–11), and had not attempted to harm them. (T. 325:10–23; 392:2–8; 398:10–11);

- Takacs deliberately manipulated both his dash camera and body camera so as to get away with bullying Elko without having it be captured on video (T. 283:3–19; 333:10–21; 337:19–22, State's Ex. 8 (Takacs's body camera); 347:9–348:25), including the State's complete lack of evidence showing that the body cameras were defective or otherwise malfunctioning (T. 222:20–24);

- Takacs and Daugherty attempted to justify their use of excessive force by misrepresenting their interaction with Elko with numerous false statements in their police reports that were contradicted by the dash camera and body camera video entered at trial (T. 315:17–24; 319:17–322:15, Def. Ex. B (police report) and State's Ex. 6 (Daugherty's body camera));

- Takacs gloated to Elko, after she told him that his excessive use of force would be seen on the video, that "you're not going to see nothing" on the video (T. 329:9–17; 330:6–18, 448:15–16; 449:3–450:6, State's Ex. 9 (Takacs's rear-seat camera));

- Takacs and Daugherty failed to take any recorded statements from the several witnesses who observed the incident (T. 343:18–24; 345:1–21; 358:25–359:3);

- Daugherty attempted to impugn Elko's credibility by lying under oath in testifying that he saw "no sign" that Elko's boyfriend Mr. Watkins was drunk (T. 214:15–215:
3), despite body camera video that was later entered at trial (of which Daugherty was apparently unaware) recording Daugherty saying that he smelled alcohol on Watkins, and that Watkins was an "emotional roller coaster," and had "probably gone back to the bar." (T. 217:6–218:1, Def. Ex. A (Daugherty's dash camera);

- Takacs was provoked to use force by Elko's use of rude language in questioning him, as opposed to any legitimate reason (T. 384:22–23, State's Ex. 7 (Takacs's dash camera) and Def. Ex. C (compiled dash cam videos); 399:1–4) and,

- Takacs had no explanation for why he grabbed Elko other than his claim that she was attempting to get away from him (T. 296:13–25; 287:22–288:8, Def. Ex. B (police report)), which the jury was entitled to disbelieve based on the evidence to the contrary (T. 292:12–293:12; 385:23–386:1, State's Ex. 7 (Takacs's dash camera)).

From this same evidence, as well as Takacs's and Daugherty's additional admissions that Elko was not running away from them as they tried to handcuff her (T. 316:7–12; 317:11–13; 319:21–320:2, citing Def. Ex. B (police report)), the jury could have also reasonably concluded that it was objectively unreasonable for Takacs and Daugherty to tackle Elko to the ground and repeatedly slam her against the police cruiser despite knowing that she was unarmed, and no credible threat to escape or cause them any harm (T. 325:24–325:15; 340:12–17; 398:13–17). *See Phillips v. Stevens*, S.D.Ohio No. 2:04-cv-207, 2007 U.S. Dist. LEXIS 60215, at *23 (Aug. 16, 2007), quoting *Lyons v. City of Xenia*, 417 F.3d 565 (6th Cir. 2005) ("[T]ackling a suspect … rise[s] to the level of excessive force where the [suspect] did not pose a tenable threat to the officers' safety …"); *Landis v. Baker*, 297 F.Appx. 453, 464 (6th Cir.2008) ("[I]t was clear that forcefully tackling and pinning down a suspect who was unarmed would constitute excessive force."); *Nelson v. Mattern*, 844 F.Supp. 216, 222 (E.D.Pa.1994) ("Although [the suspect] did flee from the police, no evidence suggests that he was armed. Therefore, forcefully tackling him … was unreasonable …"); *Pelton v. Purdue*, 731 Fed.Appx. 4178, 426 (6th Cir.2018) ("At the time of the tackle, all [the suspect] had done to warrant a belief that he presented a danger to the officers or others was pull his arm away from [the officer]. A juror could reasonably conclude that [the officer]'s use of force in response was excessive…"); *Morrison v. Bd. of Trustees*, 583 F.3d 394, 407 (6th Cir.2009) ("Gratuitous violence inflicted upon a subdued detainee constitutes an excessive use of force, even when the injuries suffered are not substantial."); *Bultema v. Benzie Cty.*, 146 Fed.Appx. 28, 36 (6th Cir.2005) ("It is beyond doubt that

the act of a police officer hitting a restrained suspect … is excessive force."); *Pigram v. Chaudoin*, 199 F.Appx. 509, 513 (6th Cir.2006) ("[T]here was simply no governmental interest in slapping [the suspect] after he had been handcuffed, nor could a reasonable officer have though there was.").

b. A jury could have reasonably concluded that Elko reasonably resisted only to protect herself against Takacs's and Daugherty's excessive force.

Relying on *State v. Latessa*, 11th Dist. Lake No. 2006-L-108, 2007-Ohio-3373, ¶ 52, the State also misleadingly argued below that Elko could not receive an instruction on excessive force because she "denied resisting arrest." (T. 474:9–475:1). But *Latessa*, like *Sinclair* and *Lorenzo* discussed above, the only two other cases on which the State's argument against the excessive force instruction was based, is yet another case dealing only with the broader notion of "self defense" in response to an arrest, and, like *Sinclair* and *Lorenzo*, does not analyze or even mention the term "excessive force."

In *Latessa*, the defendant appealed the trial court's refusal to instruct the jury on self-defense, having claimed that he was acting in self-defense in defending against charges of assault for scratching and punching officers in a scuffle that took place during his arrest. *Id.* at ¶ 6, ¶ 11, ¶ 50. Because the defendant's "entire defense was predicated upon [his] denial of using force to resist," the appellate court held that "the trial court did not abuse its discretion by denying his request." *Id.* at ¶ 52. More specifically, while the officer testified that the defendant "punched him in the face and began to run away," thus causing the ensuing scuffle, the defendant denied this entirely, and claimed that he was calmly walking into his house to call the police station when the officer tackled him for no legitimate reason. *Id.* at ¶ 6-7. Thus, the jury could not have legitimately found that the defendant was acting in self defense by walking into his home. Excessive force was simply not at issue.

Here, of course, unlike the defendant in *Latessa*, Elko's "entire defense was [not] predicated upon [her] denial of using force to resist" arrest. *Id.* Rather, as explained above, the evidence at trial was more than sufficient to allow the jury to conclude that any conduct taken by Elko in "resisting"

arrest was a justifiable and reasonable response to protect herself from the officers' use of excessive force in grabbing her arm, tackling her to the concrete, and repeatedly kicking and shoving against a police car without having any legitimate cause to do any of these things.

Thus, to the extent that the trial court's denial of the excessive-force instruction was based on *Latessa* and the State's related self-serving claims that Elko denied resisting arrest (*see* T. 474:14–20; 485:5–22),[7] that denial was similarly in error. *See Fritz*, 2005-Ohio-4736, ¶ 23 ("Under [defendant's] version of events, the officers were the aggressors and their actions caused him to believe that he was in imminent danger of bodily harm. Although [defendant] testified that the injury to [the officer] was not intentional, he specifically testified that he attempted to move [the officer's] hand from his face so that he could breathe. The jury could have reasonably concluded that [the defendant] purposefully used force to protect himself from [the officers].").

VI. Conclusion

Contrary to the State's misrepresentations at trial, Ohio law is clear that Elko was not required to submit to Takacs's and Daugherty's use of excessive force against her simply because it happened during an otherwise lawful arrest. For the reasons stated above, this Court should reverse Elko's conviction for resisting arrest and remand this case for a new trial before a jury that is properly instructed under Ohio law on a citizen's right to reasonably resist against an officer's use of excessive force.

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[7] On cross-examination, the State asked Elko a series of loaded questions apparently calculated to support their argument, based on *Latessa*, that Elko did not actually resist her arrest and thus could not be entitled to the excessive-force instruction as a result. (T. 399:22–400:3). But even leaving aside that *Latessa* did not involve analysis of the excessive-force instruction at all, and that Elko's responses to these questions are properly viewed as nothing more than a layperson's denial that she committed *the crime* of resisting arrest, the evidence at trial could only support a finding that Elko used some measure of resisting force in pulling away from Takacs when he grabbed her, and in protecting herself from harm when the officers tackled her to the ground and slammed her against the police cruiser, whether or not the officer's use of force was excessive. *Latessa* thus has no legitimate application here.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on February 26, 2020, using the Court's electronic-filing system, which will serve this document on counsel of record for all parties.

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