

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5 August Term 2012

6  
7 (Argued: February 27, 2012 Decided: August 24, 2012)

8  
9 Docket No. 10-4104-cr

10 -----x

11 UNITED STATES OF AMERICA,

12  
13 Appellee,

14  
15 -- v. --

16  
17 DEITRON DAVIS,

18  
19 Defendant-Appellant.

20  
21 -----x

22  
23 B e f o r e : WALKER, LYNCH and DRONEY, Circuit Judges.

24 Appeal from a judgment of the United States District Court  
25 for the Eastern District of New York (Frederic Block, Judge)  
26 convicting defendant of narcotics offenses and resisting arrest.  
27 Appellant challenges his convictions as based on insufficient  
28 evidence. We AFFIRM in part and VACATE in part, and REMAND for  
29 further proceedings.

30 BRUCE R. BRYAN, Syracuse, NY, for  
31 Appellant.

32  
33 THOMAS M. SULLIVAN, Assistant U.S.  
34 Attorney for the Eastern District  
35 of New York (Susan Corkery, on the  
36 brief), for Loretta E. Lynch, U.S.  
37 Attorney for the Eastern District  
38 of New York, for Appellee.  
39

1 JOHN M. WALKER, JR., Circuit Judge:

2 Defendant-Appellant Deitron Davis appeals from a judgment of  
3 the United States District Court for the Eastern District of New  
4 York (Frederic Block, Judge), following a jury trial, convicting  
5 him of narcotics offenses and resisting arrest. On appeal, Davis  
6 argues that (1) there was no evidence from which a jury could  
7 make the requisite finding that he knew that the criminal scheme  
8 at issue involved narcotics distribution, and (2) evidence that  
9 he fled from the police and struggled against being handcuffed  
10 did not support a conviction for misdemeanor resisting arrest.  
11 We hold that the evidence supported Davis's convictions for the  
12 narcotics charges but not for resisting arrest. We therefore  
13 AFFIRM as to the former charges but VACATE and REMAND with  
14 instructions to dismiss the latter.

15 **BACKGROUND**

16 **I. Factual Background**

17 The evidence at trial demonstrated the following:

18 On June 2, 2008, employees of Forward Air shipping company's  
19 Columbus, Ohio branch received certain damaged crates that were  
20 in transit from Phoenix, Arizona, to JFK Airport in New York  
21 City. In accordance with company policy, the employees opened  
22 the packages and discovered what appeared to be plastic-wrapped  
23 bales of marijuana. Forward Air's records revealed that the  
24 shipment had been sent from Phoenix by "Carl Paplow." The bill  
25 of lading stated that the consignee was "Robert Francis" and that

1 the crates contained "rims, tires and accessories, [and] audio  
2 parts," Appendix ("App.") 23. The employees reported their  
3 discovery to local authorities, who contacted the DEA's New York  
4 office. The DEA requested that the crates be sent on to their  
5 destination in the normal course for a controlled delivery.

6 The crates arrived at JFK on June 3 and Forward Air turned  
7 them over to local DEA agents. The agents searched the crates  
8 pursuant to a warrant and discovered 258 kilograms of marijuana.  
9 They removed the marijuana, re-weighted the crates and returned  
10 them to Forward Air's JFK branch. While the crates were in DEA  
11 custody, someone (apparently not Davis) sought to retrieve the  
12 shipment from Forward Air's JFK branch using a driver's license  
13 for "Robert Francis," but was turned away as the crates were not  
14 then available.

15 On June 3, the day the crates arrived in New York, Davis's  
16 friend Kieama Hyman and her friend Sherelle (whose last name does  
17 not appear in the record) called Davis, looking for something to  
18 do. Davis picked the two women up in his black Nissan Maxima and  
19 drove to his cousin's house nearby. According to Hyman, Davis  
20 "started driving crazy" as he neared the house, App. 71, which  
21 Hyman interpreted as Davis trying not to be seen. Once they  
22 arrived at the house, Davis went inside while the two women  
23 waited in the car. Davis returned and asked Hyman whether she  
24 had identification. When she responded that she did, Davis asked  
25 her if she would help pick up some rims for his car. Hyman

1 agreed. Before they left Davis's cousin's house, Davis switched  
2 cars to a gold Toyota Avalon. He claimed that the rims would not  
3 fit inside the Maxima, though Hyman did not think the Avalon was  
4 much bigger. Davis drove Hyman and Sherelle to a nearby Home  
5 Depot. He then left the car and spoke to a man in a white van  
6 for about five minutes. He returned to the Avalon and,  
7 accompanied now by the white van, proceeded to Forward Air's JFK  
8 facility. According to a surveillance officer at the facility,  
9 Davis "drove back and forth at least twice" before parking in  
10 front of Forward Air. App. 52.

11 After stopping at Forward Air, Davis left the Avalon and  
12 spoke once more with the driver of the white van. He then gave  
13 Hyman a copy of the bill of lading for the shipment and told her  
14 to go in and pick up the rims. Hyman and Sherelle went inside,  
15 where Hyman presented the bill of lading and her identification  
16 and signed some paperwork. The driver of the white van then  
17 pulled up to the Forward Air bay and loaded the crates inside.  
18 Once the crates were loaded in the van, Davis and the two women  
19 drove off in the Avalon, followed by the white van -- and by DEA  
20 agents.

21 Circling the blocks, Davis remarked that they were being  
22 followed. He pulled over and shouted at Hyman and Sherelle to  
23 get out of the car. As they did, Davis said he would be back to  
24 pick them up and drove off. The agents then turned on their  
25 strobe lights; the white van pulled over but Davis sped off in  
26 the Avalon.

1           The officers arrested Hyman and Sherelle. While under  
2 arrest, Hyman received a phone call from Davis which she answered  
3 at the officers' instruction. Davis said he would pick the two  
4 women up at a nearby intersection, but to make sure they were not  
5 followed. Hyman and Sherelle walked towards the intersection,  
6 where an agent observed Davis walking nearby.

7           The agent who saw Davis identified himself and drew his  
8 weapon, at which point Davis ran. The agent chased Davis for  
9 approximately ten minutes, during which time Davis ignored many  
10 commands to stop and the agent several times caught up with and  
11 struck Davis -- a large man at six feet seven inches -- with his  
12 baton. Davis did not fight back. Eventually, other agents  
13 joined the chase and tackled Davis. While pinned stomach-down on  
14 the ground, Davis placed his hands under his body and was  
15 "fighting [and] resisting" against being handcuffed for one or  
16 two minutes, App. 123, though he ultimately was subdued,  
17 handcuffed and arrested. There was no evidence that Davis  
18 threatened or struck out at any of the agents.

19           After arresting Davis, the agents searched him and  
20 recovered, inter alia, his driver's license and a Jet Blue  
21 Airways receipt listing Davis as a passenger on a May 6, 2008  
22 flight from Phoenix to JFK. They later confirmed with Jet Blue  
23 that Davis had been on that flight and that he previously had  
24 flown from JFK to Phoenix on May 2. They also learned that  
25 before Davis had boarded the May 2 flight, an FBI agent had asked  
26

1 him why he had no carry-on or checked luggage. Davis had  
2 responded that he planned to buy clothes in Phoenix.

3 Davis was interviewed by DEA agents after his arrest. Among  
4 other things, he claimed not to have heard of or been to Forward  
5 Air.

## 6 **II. Procedural Background**

7 Davis was tried for conspiracy to distribute marijuana in  
8 violation of 21 U.S.C. §§ 841(b)(1)(B)(vii) and 846; attempting  
9 to possess marijuana with intent to distribute in violation of 21  
10 U.S.C. § 841 (b)(1)(B)(vii); and the misdemeanor of resisting  
11 arrest in violation of 18 U.S.C. § 111(a)(1). A jury convicted  
12 him on all three counts. Hyman, Sherelle and the driver of the  
13 white van were not charged because there was no evidence  
14 contradicting their claims that they were unaware that the crates  
15 contained marijuana.

16 Davis moved for a judgment of acquittal under Fed. R. Crim.  
17 P. 29. With regard to the narcotics convictions, he argued that  
18 "there was insufficient evidence that he knew that the shipment  
19 contained a controlled substance." Special Appendix ("S.A.") 2.  
20 The district court disagreed:

21 [T]he evidence, taken in the light most favorable to  
22 the government, . . . established, inter alia, that  
23 Davis traveled to Arizona (the source of the shipment)  
24 less than a month before the shipment arrived; that he  
25 possessed a bill of lading for the shipment (albeit  
26 under another name); and that he told [Hyman] that he  
27 was excited to go pick up "his rims." A jury could  
28 reasonably infer from those facts that Davis traveled  
29 to Arizona to arrange the shipment and, therefore, that  
30 he was the intended recipient of the shipment.

1 Id. at 3. As to his conviction for resisting arrest, Davis  
2 pointed out that the government had offered no evidence that  
3 Davis had directed any force at the arresting officers. He  
4 contended that evidence demonstrating only that he had not  
5 yielded to arrest was legally insufficient for a conviction. The  
6 district court rejected this argument as well, concluding that  
7 Davis's willful use of physical force in making it difficult for  
8 officers to handcuff him permitted a conviction for resisting  
9 arrest.

10 The district court entered a judgment of conviction on all  
11 counts and sentenced Davis principally to a 60-month term of  
12 imprisonment. Davis appeals from that judgment on the grounds  
13 raised in his Rule 29 motion.

## 14 DISCUSSION

### 15 I. Standard of Review

16 "We review challenges to evidentiary sufficiency de novo,  
17 'view[ing] the evidence presented in the light most favorable to  
18 the government, and . . . draw[ing] all reasonable inferences in  
19 its favor.'" United States v. Szur, 289 F.3d 200, 219 (2d Cir.  
20 2002) (quoting United States v. Autuori, 212 F.3d 105, 114 (2d  
21 Cir. 2000)). "A defendant challenging the sufficiency of the  
22 evidence supporting a conviction faces a heavy burden." United  
23 States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002) (internal  
24 quotation marks omitted). We must uphold the conviction as long  
25 as "any rational trier of fact could have found the essential

1 elements of the crime beyond a reasonable doubt." Jackson v.  
2 Virginia, 443 U.S. 307, 319 (1979).

## 3 **II. Convictions for the Narcotics Offenses**

4 With regard to Davis's convictions for conspiring to  
5 distribute marijuana and attempting to possess marijuana with  
6 intent to distribute, the question before us is straightforward:  
7 Was the evidence at trial legally sufficient to support a finding  
8 that Davis knew that the shipped crates contained a controlled  
9 substance?

10 To prove that a person possessed a controlled substance with  
11 intent to distribute, the government must prove "that the  
12 defendant knew he was dealing with a controlled substance."  
13 United States v. Torres, 604 F.3d 58, 65-66 (2d Cir. 2010). The  
14 same holds true for drug conspiracy charges. See id. at 66. The  
15 government need not prove that the defendant knew the specific  
16 drug at issue, but only that he was dealing with some controlled  
17 substance. See United States v. Morales, 577 F.2d 769, 776 (2d  
18 Cir. 1978).

19 On appeal, as he did in his Rule 29 motion before the  
20 district court, Davis relies on a line of this Court's decisions  
21 reversing convictions for insufficient evidence that the  
22 defendant knew the specific object of the criminal scheme at  
23 issue. For example, in United States v. Ogando, 547 F.3d 102 (2d  
24 Cir. 2008), this Court reversed the conviction of a taxi driver  
25 who was scheduled to pick up a drug smuggler at an airport. We



1 held that the evidence -- which consisted of the defendant's  
2 presence at the airport, earlier presence at another airport  
3 where another co-conspirator was arrested, and associations with  
4 certain other co-conspirators -- "simply show[ed] that  
5 [defendant] was a livery cab driver regularly used by members of  
6 this conspiracy." Id. at 108; see also Torres, 604 F.3d at 70-71  
7 (defendant's suspicious behavior in attempting to take delivery  
8 of narcotics shipment did not indicate knowledge that the  
9 shipment contained drugs); United States v. Lorenzo, 534 F.3d  
10 153, 160-61 (2d Cir. 2008) (defendant's periodic involvement with  
11 conspirators, including transferring money to one, was indicative  
12 of illegal behavior but did not demonstrate knowledge that the  
13 conspiracy involved narcotics); United States v. Rodriguez, 392  
14 F.3d 539, 546-48 (2d Cir. 2004) (evidence demonstrated only that  
15 defendant served as a lookout for some sort of illicit  
16 transaction, not that he knew it was a drug transaction  
17 specifically); United States v. Friedman, 300 F.3d 111, 126 (2d  
18 Cir. 2002) (evidence of calls between conspirator and defendant,  
19 and that defendant furnished guns to conspirator, did not  
20 demonstrate that defendant knew that the object of the conspiracy  
21 was extortion); United States v. Samaria, 239 F.3d 228, 236-38  
22 (2d Cir. 2001) (gypsy cab driver's presence in car with  
23 conspirators, and assistance with loading non-transparent boxes  
24 containing stolen credit card information, did not demonstrate  
25 knowledge of conspiracy to commit credit card fraud), abrogated  
26

1 on other grounds, United States v. Huevo, 546 F.3d 174, 180 n.2  
2 (2d Cir. 2008).

3 In each of these cases, save Torres, the defendant played a  
4 role subordinate to that of the principal engaged in the criminal  
5 conduct charged, and the defendant plausibly could have fulfilled  
6 that role without knowing the scheme's criminal nature. That is,  
7 it is conceivable that the criminal enterprises at issue could  
8 have functioned as planned without the requisite criminal  
9 knowledge of the taxi driver (Ogando), the money transferor  
10 (Lorenzo), the lookout (Rodriguez), the frequent caller and gun  
11 supplier (Friedman), and the driver and box loader (Samaria).  
12 This case is easily distinguishable from those cases, in which  
13 the overall circumstances of each case did not support a finding  
14 beyond a reasonable doubt that the defendant had the requisite  
15 knowledge. The evidence in this case established, either  
16 directly or by inference, that Davis played a principal role,  
17 even a managerial one, in the drug conspiracy and for that reason  
18 would have reasonably possessed the requisite criminal knowledge.

19 Torres, 604 F.3d 58, in which we reversed a conviction for  
20 conspiracy to distribute cocaine, presented a factual scenario  
21 closer to this one. Davis relies upon it to argue that the  
22 evidence here is insufficient to prove his knowledge that the  
23 Forward Air packages contained a controlled substance. In  
24 Torres, the defendant Torres and several other men, in suspicious  
25 fashion, had attempted to receive a UPS delivery of certain bulky  
26 packages addressed to Torres. They greeted the deliveryman

1 outside the destination address, presented a driver's license for  
2 Torres that listed him as living at a different address, and  
3 followed the deliveryman after he refused to turn over the  
4 packages. Eventually, UPS and the police discovered that the  
5 packages contained cocaine and staged a controlled delivery at a  
6 UPS store. Once again, Torres suspiciously attempted to receive  
7 the packages, and this time was arrested. Reviewing his  
8 conviction, this Court concluded that the evidence supported  
9 findings that "Torres had a connection with the Packages" and  
10 that, based on his suspicious behavior, he "was most likely aware  
11 that the Packages contained contraband of some kind." Id. at 69.  
12 But the record did not contain "any evidence that Torres knew the  
13 Packages contained narcotics," such as "evidence as to the nature  
14 of Torres's associations with the persons who shipped the cocaine  
15 or with the persons who expected to distribute it." Id. at  
16 70-71. Because "[t]here was no evidence of any conduct by Torres  
17 other than his efforts to gain possession of the Packages," this  
18 Court held that there was no evidence that Torres knew of the  
19 Packages' contents. Id. at 71.

20 There may be tension between Torres and decisions in other  
21 circuits as to whether an inference of guilty knowledge may be  
22 drawn from suspicious behavior of an intended recipient of a  
23 narcotics package. See United States v. Hernandez, 17 F. App'x  
24 464, 467 (7th Cir. 2001) (collecting cases for the proposition  
25 that "[a] jury may infer a defendant's guilty knowledge based on  
26 the suspicious circumstances surrounding receipt of a drug

1 shipment"); see also, e.g., United States v. Hernández, 218 F.3d  
2 58, 66-67 (1st Cir. 2000) (affirming convictions based on, inter  
3 alia, the facts that one defendant was the intended recipient of  
4 the shipment and thereafter controlled the packages, and another  
5 defendant drove evasively after taking possession of the  
6 packages); United States v. Gbemisola, 225 F.3d 753, 759-60 (D.C.  
7 Cir. 2000) ("The Southeast Asian shippers placed heroin in the  
8 false bottoms of the pots -- in an amount (and value) the jury  
9 could reasonably have doubted they would have entrusted to  
10 recipients who thought they were merely importing artifacts, and  
11 in a location that would have been particularly risky if an  
12 'innocent' recipient had decided to use the cooking pots for  
13 their apparent purpose."); United States v. Brown, 33 F.3d 1014,  
14 1015-16 (8th Cir. 1994) (affirming the conviction of a defendant  
15 who tried to take receipt of a UPS delivery of drugs in facts  
16 resembling those in Torres); cf. United States v. Quilca-Carpio,  
17 118 F.3d 719, 722 (11th Cir. 1997) ("[A] prudent smuggler is not  
18 likely to entrust such valuable cargo to an innocent person  
19 without that person's knowledge." (internal quotation marks  
20 omitted)). But cases of this sort are fact-dependent. In this  
21 case, we have no doubt, based on all the evidence, that the jury  
22 permissibly could have inferred Davis's guilty knowledge.

23 First, the evidence here did not link Davis only to the  
24 receipt of the drugs but also to their initial shipment. Davis,  
25 traveling without luggage, flew from New York to Phoenix, where  
26 the shipment originated, a month before he attempted to receive

1 the crates. Viewing that evidence in the light most favorable to  
2 the government and as the district court correctly concluded,  
3 "[a] jury could reasonably infer . . . that Davis traveled to  
4 Arizona to arrange the shipment." S.A. 3. And because it  
5 logically can be inferred that one who arranges a shipment knows  
6 its contents, the jury here easily could have found from the  
7 totality of the evidence that Davis knew precisely what was in  
8 the shipped packages.

9 Second, as noted earlier, the evidence showed that Davis had  
10 an authoritative role in the criminal scheme. See United States  
11 v. Cruz, 363 F.3d 187, 199 (2d Cir. 2004) (a jury may reasonably  
12 infer guilty knowledge from evidence that the defendant exercised  
13 authority within the conspiracy itself); Samaria, 239 F.3d at 235  
14 (same). He controlled the circumstances surrounding the pick up  
15 -- choosing when to pick up the crates, how to pick up the  
16 crates, and who would pick up the crates. Specifically, Davis  
17 recruited Kieama Hyman and her friend to pick up the crates even  
18 though he easily could have done so himself; switched cars at his  
19 cousin's house; directed Hyman to use her identification to  
20 retrieve the crates from Forward Air; and it appears that he  
21 obtained a van with a driver to pick up the crates. See United  
22 States v. Medina, 32 F.3d 40, 44 (2d Cir. 1994) (affirming  
23 conviction in part because defendant approved participation of an  
24 additional co-conspirator and supplied a gun); United States v.  
25 Tussa, 816 F.2d 58, 63 (2d Cir. 1987) (affirming conviction of  
26 defendant who took part in the negotiations leading to a drug  
27 delivery).

1 Third, the evidence showed that Davis concealed his  
2 involvement in the criminal conspiracy: the crates were not  
3 addressed to him (but to "Robert Francis"); he recruited another  
4 person without knowledge of the true contents of the crates to  
5 pick them up; and he lied to this person by telling her that he  
6 did not have his driver's license even though he did. This  
7 evidence supports an inference of Davis's knowledge of the  
8 crates' contents. See, e.g., Hernandez, 218 F.3d at 66 ("That  
9 the name of the consignee was fabricated" supported the  
10 conclusion that the defendant knew the container's contents.);  
11 United States v. Johnson, 57 F.3d 968, 972 (10th Cir. 1995)  
12 ("Similarly probative of [defendant's] guilty knowledge is the  
13 fact that [defendant] listed on the airbill a false name and  
14 nonexistent address for the package's destination."). These  
15 facts, along with the fact that the bill of lading identified the  
16 recipient as "Robert Francis" rather than Davis, and a person  
17 claiming to be "Robert Francis" first tried to retrieve the  
18 crates, are inconsistent with Davis's statements to Hyman that  
19 the crates contained rims for his car.

20 Finally, Davis's possession of the bill of lading supports  
21 an inference that he had the requisite knowledge. For one, taken  
22 together with his recruitment of select people, it gave him not  
23 only the "prospect[] of having sole dominion over the [crates],"  
24 see Torres, 604 F.3d at 71, but sole dominion itself.  
25 Furthermore, as we previously have observed, "possession of  
26 documents relat[ing] to the crime" may support an inference of  
27

1 knowledge. Cruz, 363 F.3d at 199; see also Samaria, 239 F.3d at  
2 235 (same).

3 Taken together, these circumstances easily permitted an  
4 inference that Davis, far from being an unwitting courier for a  
5 drug-distribution conspiracy, was a willing (if not central)  
6 participant who knew that the shipment contained narcotics. See  
7 United States v. Stewart, 485 F.3d 666, 671 (2d Cir. 2007)  
8 (collecting cases for the proposition that a defendant's guilty  
9 knowledge "may be established through circumstantial evidence").  
10 We therefore have no difficulty affirming Davis's convictions on  
11 the narcotics counts.

### 12 **III. Conviction for Resisting Arrest**

13 The conviction for resisting arrest, however, presents a  
14 different picture. 18 U.S.C. § 111 provides:

15 (a) In general.--Whoever--

16  
17 (1) forcibly assaults, resists, opposes, impedes,  
18 intimidates, or interferes with [a U.S. officer or  
19 employee] while engaged in or on account of the  
20 performance of official duties . . .

21  
22 shall, where the acts in violation of this section  
23 constitute only simple assault, be fined under this  
24 title or imprisoned not more than one year, or both,  
25 and where such acts involve physical contact with the  
26 victim of that assault or the intent to commit another  
27 felony, be fined under this title or imprisoned not  
28 more than 8 years, or both.

29  
30 (b) Enhanced penalty.--Whoever, in the commission of  
31 any acts described in subsection (a), uses a deadly or  
32 dangerous weapon (including a weapon intended to cause  
33 death or danger but that fails to do so by reason of a  
34 defective component) or inflicts bodily injury, shall  
35 be fined under this title or imprisoned not more than  
36 20 years, or both.

1 Davis was tried and convicted under the misdemeanor clause in  
2 Section 111(a). We therefore must decide whether the evidence  
3 permitted the jury to find, beyond a reasonable doubt, that Davis  
4 "forcibly assault[ed], resist[ed], oppose[d], impede[d],  
5 intimidate[d], or interfere[d] with [a U.S. officer or employee]  
6 while engaged in or on account of the performance of official  
7 duties" and, in doing so, committed "simple assault."

8 **A. "Simple Assault" Under Section 111(a)**

9 In United States v. Chestaro, 197 F.3d 600 (2d Cir. 1999),  
10 we considered a vagueness challenge to the predecessor version of  
11 Section 111, which was identical to the current version in  
12 relevant part.<sup>1</sup> The appellant in that case argued that "simple  
13 assault," which delineates misdemeanor conduct, was not clearly  
14 defined and that the statute therefore did not sufficiently  
15 distinguish between misdemeanors and felonies. We disagreed. We  
16 noted "the settled principle of statutory construction that,  
17 absent contrary indications, Congress intends to adopt the common  
18 law definition of statutory terms.'" Id. at 605 (quoting United  
19 States v. Shabani, 513 U.S. 10, 13 (1994)). We also pointed out  
20 that the term "simple assault" appears elsewhere in the U.S. Code  
21 -- in 18 U.S.C. § 113 -- and that it had "been held to 'embrace  
22 the common law meaning'" in that context. Chestaro, 197 F.3d at

---

1 <sup>1</sup> Section 111(a)'s felony clause, not at issue here,  
2 previously provided that "in all other cases, [the perpetrator]  
3 would be fined under this title or imprisoned not more than three  
4 years, or both." In 2002, Congress boosted the maximum prison  
5 term for the felony to eight years. And in 2008, Congress  
6 replaced "in all other cases" with the language "where such acts  
7 involve physical contact with the victim of that assault or the  
8 intent to commit another felony."



1 605 (quoting United States v. Stewart, 568 F.2d 501, 504 (6th  
2 Cir. 1978)). We therefore held that "simple assault," as used in  
3 Section 111(a), incorporated the established common law  
4 definition of the phrase: a crime, not involving touching,  
5 "committed by either a willful attempt to inflict injury upon the  
6 person of another, or by a threat to inflict injury upon the  
7 person of another which, when coupled with an apparent present  
8 ability, causes a reasonable apprehension of immediate bodily  
9 harm." Chestaro, 197 F.3d at 605, 606 (internal quotation marks  
10 omitted); see also United States v. Vallery, 437 F.3d 626, 631  
11 (7th Cir. 2006) ("Under the common law, physical contact is the  
12 line of demarcation between simple assault and battery.").

13 Following Chestaro, we clarified that "simple assault"  
14 retains its common law definition in the context of the current  
15 version of Section 111(a). See United States v. Hertular, 562  
16 F.3d 433, 440 (2d Cir. 2009). Thus, for a defendant to be guilty  
17 of the misdemeanor of resisting arrest under Section 111(a), he  
18 necessarily must have committed common law simple assault. See  
19 id.

20 We recognize that there is disagreement among the federal  
21 courts of appeals in interpreting Section 111(a)'s use of "simple  
22 assault." The main problem, as explained by the Ninth Circuit,  
23 is that Section 111(a) "appears to prohibit six different types  
24 of actions" -- assaulting, resisting, opposing, impeding,  
25 intimidating and interfering -- "only one of which is 'assault,'  
26 but then it draws the line between misdemeanors and felonies  
27 solely by referencing the crime of assault." United States v.

1 Chapman, 528 F.3d 1215, 1218-19 (9th Cir. 2008). "Therefore, it  
2 is unclear whether the statute prohibits acts of resistance,  
3 opposition, impediment, intimidation, or interference that do not  
4 also involve an underlying assault." Id. at 1219. Several of  
5 our sister circuits have taken the same approach as, or similar  
6 approaches to, this Court -- namely, requiring some form of  
7 common law simple assault for Section 111(a) misdemeanor  
8 convictions. See Chapman, 528 F.3d at 1218-22; Vallery, 437 F.3d  
9 at 630-34; United States v. Hathaway, 318 F.3d 1001, 1008-09  
10 (10th Cir. 2003).

11 But two circuits have taken a different approach. In United  
12 States v. Gagnon, 553 F.3d 1021 (6th Cir. 2009), the Sixth  
13 Circuit, interpreting the predecessor version of Section 111,  
14 opined that the approach taken by this Court and others  
15 "disregards five of the six actions Congress specifically  
16 delineated" and thus makes "a great deal of what § 111 does say  
17 entirely meaningless." Id. at 1026. That court therefore held  
18 that in the context of Section 111(a), "simple assault" is not  
19 limited to its common law meaning, but is "a term of art that  
20 includes the forcible performance of any of the six proscribed  
21 actions in § 111(a) without the intent to cause physical contact  
22 or to commit a serious felony." Id. at 1027 (emphasis omitted).  
23 Construing the current version of Section 111, the Fifth Circuit  
24 followed the Sixth Circuit's lead. See United States v.  
25 Williams, 602 F.3d 313, 317 (5th Cir. 2010). The Fifth Circuit  
26 reasoned that the Sixth Circuit's reading "avoid[s] rendering  
27 superfluous the other five forms of conduct proscribed by

1 § 111(a)(1).” Williams, 602 F.3d at 317. That court also found  
2 it “more consonant with the dual purpose of the statute, which,  
3 the Supreme Court has noted, is not simply to protect federal  
4 officers by punishing assault, but also to ‘deter interference  
5 with federal law enforcement activities’ and ensure the integrity  
6 of federal operations by punishing obstruction and other forms of  
7 resistance.” Id. (quoting United States v. Feola, 420 U.S. 671,  
8 678 (1975)).

9 While we do not find this reasoning to be without basis, we  
10 ultimately are not persuaded by it. First, as in any task of  
11 statutory construction, “[w]e begin with the statute’s text.”  
12 United States v. Lyttle, 667 F.3d 220, 223 (2d Cir. 2012). And  
13 as we noted in Chestaro, it is well-settled that “where a federal  
14 criminal statute uses a common-law term of established meaning  
15 without otherwise defining it, the general practice is to give  
16 that term its common-law meaning.” United States v. Turley, 352  
17 U.S. 407, 411 (1957); see Chestaro, 197 F.3d at 605. In defining  
18 misdemeanor conduct under Section 111(a), Congress chose to use  
19 the specific phrase “simple assault,” which as noted earlier has  
20 a longstanding and precise meaning under the common law.

21 Second, not only does “simple assault” have an established  
22 common law meaning, it does not appear to have a contrary meaning  
23 in the vernacular, the U.S. Code or anywhere else. It therefore  
24 would have been a peculiar phrase for Congress to employ for some  
25 other, unspecified meaning -- especially after courts had  
26 assigned the phrase its common law meaning in the context of  
27 Section 113. See United States v. Delis, 558 F.3d 177, 183 (2d

1 Cir. 2009). Indeed, so far as we can tell, no court, except for  
2 the Fifth and Sixth Circuits in construing this law, has ever  
3 understood "simple assault" as "'a term of art that includes the  
4 forcible performance of [assaulting, resisting, opposing,  
5 impeding, intimidating, or interfering] without the intent to  
6 cause physical contact or to commit a serious felony.'" See  
7 Williams, 602 F.3d at 317 (quoting Gagnon, 553 F.3d at 1027)  
8 (emphasis omitted). And our textual analysis gives us no reason  
9 to believe that Congress had that understanding.

10 Third, it bears noting that Congress continued its use of  
11 "simple assault" in Section 111(a) when it amended the statute in  
12 2008. That amendment preceded the Fifth and Sixth Circuit's  
13 interpretation of "simple assault" discussed earlier.<sup>2</sup> Indeed,  
14 it appears that every court to have interpreted Section 111(a)'s  
15 use of "simple assault" before Congress amended the statute gave  
16 the phrase its common law meaning.<sup>3</sup> One would think that

---

1 <sup>2</sup> Although the Sixth Circuit interpreted the predecessor  
2 version of Section 111 in Gagnon, Congress had already amended  
3 the statute when that case was decided. See 553 F.3d at 1024  
4 n.2.

1 <sup>3</sup> In Gagnon, the Sixth Circuit relied partly on the Eighth  
2 Circuit's earlier statement that "in the context of § 111, the  
3 definition of simple assault is conduct in violation of § 111(a),  
4 which does not involve actual physical contact, a dangerous  
5 weapon, serious bodily injury, or the intent to commit murder or  
6 another serious felony." United States v. Yates, 304 F.3d 818,  
7 822 (8th Cir. 2002); see also Gagnon, 553 F.3d at 1026 n.6. In  
8 Yates, however, the Eighth Circuit made clear that it adopted the  
9 common law meaning of "simple assault" and only then used the  
10 language contained in a neighboring statute to limit the  
11 definition further. See Yates, 304 F.3d at 821-22. In other  
12 words, the Eighth Circuit narrowed the common law meaning of  
13 "simple assault" for purposes of Section 111(a); it did not  
14 expand that meaning to include Section 111(a)(1)'s five remaining  
15 acts.

1 Congress, in amending the statute, would have corrected such a  
2 broad misreading had one existed.

3 Furthermore, we do not believe, as the Fifth and Sixth  
4 Circuits have worried, that ascribing "simple assault" its common  
5 law meaning "render[s] superfluous the [non-assault] forms of  
6 conduct proscribed by § 111(a)(1)." Williams, 602 F.3d at 317.  
7 While we are not called upon today to interpret Section 111(a)'s  
8 felony clause, we note that the statute's five non-assault acts  
9 would appear to be criminally prohibited by the felony clause  
10 "where such acts involve . . . the intent to commit another  
11 felony." Thus, our interpretation does not necessarily run afoul  
12 of the preference against "interpretations of statutes that  
13 render language superfluous." Conn. Nat'l Bank v. Germain, 503  
14 U.S. 249, 253 (1992).<sup>4</sup>

15 **B. Davis's Conduct**

16 To be guilty of the misdemeanor of resisting arrest, Davis  
17 must have, inter alia, committed common law simple assault: a  
18 crime, not involving touching, "committed by either a willful  
19 attempt to inflict injury upon the person of another, or by a  
20 threat to inflict injury upon the person of another which, when  
21 coupled with an apparent present ability, causes a reasonable

---

1 <sup>4</sup> We recognize that the Fifth and Sixth Circuits'  
2 interpretation of "simple assault," as a broad "term of art"  
3 encompassing all of the actions listed in Section 111(a)(1),  
4 would better "deter interference with federal law enforcement  
5 activities," which the Supreme Court has identified as part of  
6 Congress's intention in enacting Section 111. See Feola, 420  
7 U.S. at 678. But we believe that the plain text of Section 111  
8 and the other considerations described above command the  
9 interpretation that we have given it.

1 apprehension of immediate bodily harm." Chestaro, 197 F.3d at  
2 605 (internal quotation marks omitted).

3 The evidence adduced at trial did not permit such a finding.  
4 It showed only that Davis ran from a DEA agent and, when  
5 ultimately tackled to the ground, struggled against being  
6 handcuffed -- primarily by putting his hands under his stomach.  
7 While one of the arresting agents (the one who had chased Davis  
8 on foot) testified on direct examination that Davis was  
9 "fighting" during his arrest, App. 123, any suggestion that Davis  
10 was striking blows, rather than more passively resisting being  
11 handcuffed, was retracted by the agent. On cross-examination,  
12 the agent testified that (1) Davis did not punch or attack anyone  
13 during his arrest, (2) Davis was "using his muscles to avoid  
14 having the hands forced behind his back to be cuffed," App. 131-  
15 32, and (3) certain injuries to the agent resulted from a fall  
16 during the chase and not from any aggressions by Davis. Thus,  
17 there was no evidence that Davis engaged in any conduct  
18 whatsoever that demonstrated a desire to injure an agent or would  
19 cause an agent to apprehend immediate injury.

20 Davis's conviction for resisting arrest therefore must be  
21 overturned.

## 22 CONCLUSION

23 For these reasons, we AFFIRM the judgment of the district  
24 court with respect to Davis's convictions on the narcotics  
25 counts, but VACATE his conviction for resisting arrest. We  
26 REMAND with directions to dismiss the Section 111(a) count and  
27 for resentencing consistent with this opinion.