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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER DANILYUK, Defendant and Appellant.	C068238 (Super. Ct. No. 09F08320)

A jury found defendant Alexander Danilyuk guilty of reckless driving resulting in injury (Veh. Code, § 23105, subd. (a)) and two counts of resisting a peace officer (Pen. Code, § 148, subd. (a)). The trial court imposed a four-year term of formal probation and sentenced defendant to 270 days in county jail. Defendant appeals, arguing the trial court erred in allowing both convictions of resisting a peace officer to stand as those counts were based on the same criminal act and defendant had but one objective. We agree with defendant and, accordingly, reverse his conviction on count four.

Defendant also claims the trial court erred in failing to stay the sentence imposed on his conviction for resisting a peace officer pursuant to Penal Code section 654. We disagree and affirm the remainder of the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2009 California Department of Motor Vehicles (DMV) investigator Salvador Gonzalez was conducting an investigation into unlicensed auto dealers. In the course of the investigation, Gonzalez found an ad listing vehicles for sale on a Web site called "Craig's List"; Gonzalez called the listed telephone number and spoke to a man who identified himself as "Alex." They made an appointment to meet.

Gonzalez, assisted in the undercover operation by investigators Nick Nguyen, Scott Mitchell, and James Haggerty, met defendant at his parents' home. Gonzalez looked at several cars, taking a Honda Accord and Toyota Camry for test drives. Mitchell and Haggerty followed Gonzalez in their vehicle while Gonzalez test drove each car.

Following the last test drive, Gonzalez showed defendant his badge, identified himself as an investigator for the DMV, and told defendant he was breaking the law. At the same time, Haggerty and Mitchell approached Gonzalez and defendant. Haggerty had his badge out; he announced they were all police officers. Meanwhile, Nguyen was nearby speaking with defendant's father.

Defendant told Gonzalez he was a salesperson, but defendant had no license and a representative of the company he claimed to

work for said he "was not a salesman for them." Consequently, the investigators decided to tow the Honda. Gonzalez saw a marked change in defendant's behavior when he said they were going to tow the car; defendant became "antsy." As Gonzalez began filling out paperwork to have the Honda towed, he asked Mitchell to watch defendant.

Thinking Mitchell did not hear his request, Gonzalez repeated himself. At the same time, defendant walked briskly toward the Honda and got inside. Mitchell followed defendant. He told defendant to stop and get out of the vehicle. Gonzalez approached the car and began tapping on the window, telling defendant to get out of the vehicle. Mitchell made eye contact with defendant and ordered him out of the vehicle, but defendant refused to comply. Gonzalez also banged on the vehicle window and yelled for defendant to stop.

As the officers continued telling defendant to stop and get out of the vehicle, defendant revved the engine, pulled out, and drove off. Gonzalez saw Mitchell roll on the ground and yell in pain as defendant drove off at an unsafe speed. Gonzalez believed defendant drove the car in such a way it made Mitchell fall. Defendant then drove toward Nguyen, who got into his vehicle and blocked defendant at the next intersection, where defendant surrendered.

Defendant was arrested and subsequently charged with assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c) -- count one), felony reckless driving (Veh. Code, § 23105, subd. (a) -- count two), obstruction of an

officer in the performance of his or her duty via force or violence (Pen. Code, § 69 -- count three), battery upon a peace officer (Pen. Code, § 243, subd. (c)(2) -- count four), and felony hit and run after an injury accident (Veh. Code, § 20001, subd. (a) -- count five). Defendant also was accused in counts one, three, and five with inflicting great bodily injury on his victim. (Pen. Code, § 12022.7, subd. (a).) Defendant pleaded not guilty to the charges and denied the enhancement allegations.

Jury trial began March 7, 2011. On March 10, 2011, the court granted the People's motion to dismiss the bodily injury enhancement appended to count five. At trial, Mitchell described how he came to fall on the ground during the encounter with defendant: as defendant pulled the Honda toward Mitchell, Mitchell reached out, "trying [to] keep [the car] off [him], and the car just comes right on me and knocks me down." The momentum of the car also caused Mitchell to roll across the pavement. Mitchell got up and attempted to join Haggerty in the chase for defendant; however, his wrist was "all out of shape"; "it look[ed] like an L," and he was in extreme pain. Haggerty immediately called an ambulance. Mitchell told the jury he thought defendant was trying to run him over.

Mitchell's wrist was shattered as a result of his fall. After two surgeries, including the use of screws, plates, and a bone graft, Mitchell still suffered pain in his wrist and had substantial limitations. Almost two years after the incident, Mitchell was still unable to perform his job.

The jury found defendant guilty of reckless driving as charged in count two, and two misdemeanor counts of resisting a peace officer on counts three and four (as lesser included offenses to obstructing a peace officer with violence and battery upon a peace officer). The jury acquitted defendant of the remaining charges.

At sentencing, the trial court stayed imposition of sentence and placed defendant on four years of formal probation for his conviction on count two. The court also ordered defendant to serve matching concurrent terms of 270 days each for the two counts of resisting a peace officer (counts three and four), but stayed his sentence on count four pursuant to Penal Code section 654. Various fines and fees were also imposed.

Defendant appeals.

DISCUSSION

I.

Defendant contends it was error to convict him of two counts of resisting or obstructing a peace officer because both counts arose "out of a single incident in which the defendant [had] but one objective." We agree.

"'[M]ultiple convictions may not be based on necessarily included offenses.'" (*People v. Ortega* (1998) 19 Cal.4th 686, 692, italics omitted.) "'"The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another

offense, the latter is a necessarily included offense."'" (*Ibid.*)

Here, in count three, defendant was charged with violating Penal Code section 69, "in that . . . defendant did unlawfully attempt by means of threats and violence to deter and prevent Department of Motor Vehicles Investigator Scott Mitchell, who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty."

In count four, defendant was charged with violating Penal Code section 243, subdivision (c)(2), "in that . . . defendant did unlawfully use force and violence and inflict an injury upon the person of Department of Motor Vehicles Investigator Scott Mitchell, when said defendant knew and reasonably should have known that said person was a peace officer then and there engaged in the performance of his/her duty."

In their closing, the People argued defendant was guilty of both these charges because defendant knocked Mitchell to the ground when he drove away in the car. This was appropriate because a defendant may be charged with "different statements of the same offense" and "may be convicted of any number of the offenses charged." (Pen. Code, § 954.)

Rather than convict defendant of the crimes with which he was charged, however, in both counts the jury found defendant guilty of the lesser included, misdemeanor charge of resisting a peace officer in violation of Penal Code section 148,

subdivision (a)(1). Thus, defendant was convicted twice of resisting a peace officer based on the same criminal conduct. This was error.[1] Defendant's conviction on count four is therefore reversed and stricken.

II.

Defendant further contends that, pursuant to Penal Code section 654, his convictions for resisting a peace officer (counts three and four) should not result in a separate punishment from his conviction for reckless driving (count two).[2]

Penal Code section 654 is intended to ensure that punishment is commensurate with a defendant's criminal culpability. (*People v. Perez* (1979) 23 Cal.3d 545, 550-551.) It expressly prohibits multiple sentences where a single act violates more than one statute. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) It also prohibits multiple punishments where the defendant commits more than one act in violation of different statutes when the acts comprise an indivisible course of conduct having a single intent and objective. "If all of the offenses were incident to one objective, the defendant may be punished for any one of such

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[1] Because we find error and strike defendant's conviction on count four, we need not address defendant's claim that trial counsel was ineffective for failing to object to defendant's conviction on count four.

[2] Because we strike defendant's conviction on count four, we consider this claim only as it relates to count three.

offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

"'"The initial inquiry in any [Penal Code] section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." [Citation.] Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it.' (*People* v. *Porter* (1987) 194 Cal.App.3d 34, 38.) 'However, when there is no dispute as to the facts, the applicability of Penal Code section 654 is a question of law.' (*People* v. *Ratcliffe* (1981) 124 Cal.App.3d 808, 816.)" (*People v. Stringham* (1988) 206 Cal.App.3d 184, 202.)

Defendant argues that reckless driving was the means by which he resisted arrest and thus he cannot be punished for both. But reckless driving was just one of the means by which he resisted arrest. Prior to fleeing the scene, defendant attempted to lock himself in the car in order to avoid arrest. Only when that proved unsuccessful did defendant drive away. Defendant's attempt to avoid arrest by locking himself in the car was separate from his reckless driving attempt to evade

police and separate punishment does not violate Penal Code section 654.

III.

Defendant also claims the trial court erred in failing to stay the restitution fine imposed on his conviction for resisting a peace officer. Because we conclude imposing defendant's sentence on count three did not violate Penal Code section 654, we also conclude there was no error in imposing the restitution fine on count three.

DISPOSITION

Defendant's conviction on count four, resisting a peace officer, is hereby reversed and stricken. The judgment is otherwise affirmed. The trial court is hereby directed to amend the minute and probation orders to be consistent with this opinion.

RAYE, P. J.

We concur:

MURRAY, J.

DUARTE, J.