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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY HENDERSON,

Defendant and Appellant.

C069101

(Super. Ct. No. 11SCR07058)

A jury convicted defendant Billy Henderson of felony evading (Veh. Code, § 2800.2, subd. (a); count I). The jury acquitted defendant of two counts of felony resisting with force or violence (Pen. Code, § 69; counts II and III) but convicted him of two counts of the lesser included offense of misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1)). In bifurcated proceedings, defendant admitted a strike prior and four prior prison terms.

The court sentenced defendant to state prison for an aggregate term of nine years.

Defendant appeals. He contends (1) the trial court prejudicially erred in failing to instruct the jury on unanimity in connection with the two felony/misdemeanor resisting counts, and (2) the trial court erred in failing to stay the sentence on one of the two misdemeanor resisting counts. We reject both contentions and will affirm the judgment.

FACTS

Defendant does not raise an issue that requires a detailed recitation of the facts underlying the felony evading offense. Suffice it to say that defendant led officers on a high-speed chase and committed traffic violations along the way. The chase ended when defendant crashed after an “S” curve in the road. Defendant crawled out of the car, and was handcuffed behind his back and placed in a patrol car. During the officers’ accident investigation, defendant wanted to get out of the patrol car to urinate, but when told he would be tased if he tried to run, he decided otherwise.

California Highway Patrol Officers Arnulfo Lazo and Robert Gardner transported defendant to a hospital for a medical clearance before taking him to jail. According to Officer Lazo, when they removed defendant from the car, he tried to break free and run, but they grabbed him and used “pain compliance” to escort him inside the hospital, where he started yelling. According to Officer Gardner, defendant was compliant from the car to the hospital.

Inside the emergency room, the officers had defendant sit in a chair. After a short time, defendant got up and yelled for “help” and a “witness.” He yelled for at least a minute, refused to sit down, and tried to leave the hospital. The officers pulled him from the door and forced him to the ground. Defendant struggled and hit his head on the doorjamb, causing his head to bleed. The officers tried to hold him, but he kicked and flailed even with his hands still handcuffed behind his back. Officer Gardner held defendant’s legs. Defendant tried to kick Officer Gardner several times. Officer Gardner tied defendant’s shoelaces together and radioed for backup. Meanwhile, Officer Lazo

held defendant's torso and a nurse held defendant's head. Defendant tried to bite Officer Lazo's arms. Defendant fought for a long time. Other officers arrived and put defendant in leg restraints. Defendant continued to yell that he needed a witness. Five officers and the nurse put defendant face down on a gurney. After defendant was medically cleared, they transported him to and carried him inside the jail.

DISCUSSION

I

Citing the evidence that he resisted arrest in both the parking lot of the hospital and inside the hospital, defendant contends the trial court was required to instruct the jury on unanimity. The People respond that defendant's resistance was a continuous course of conduct. We conclude that the trial court did not err. Further, assuming error, the error is harmless beyond a reasonable doubt.

“Defendants in criminal cases have a constitutional right to a unanimous jury verdict. [Citation.] From this constitutional principle, courts have derived the requirement that if one criminal act is charged, but the evidence tends to show the commission of more than one such act, ‘either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.’ [Citation.]” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) The prosecutor may make an election in his or her statements and argument to the jury. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418.)

Here, defendant was charged with two counts of felony resisting (Pen. Code, § 69), one for each officer (Officer Gardner and Officer Lazo), which required evidence of defendant's use of force or violence. The jury acquitted defendant of the felony resisting offenses but convicted him of two counts of misdemeanor resisting. (Pen. Code, § 148, subd. (a)(1).) The evidence reflects that defendant resisted both officers, using force or violence, only in the emergency room. In the emergency room, defendant kicked

at Officer Gardner and tried to bite Officer Lazo. Although there was evidence of a separate incident of defendant's resisting in the parking lot of the hospital, there was no evidence defendant resisted both officers using force or violence in the parking lot. The only evidence of defendant's resisting in the parking lot came from Officer Lazo, who testified as follows: "As soon as we arrived [at the hospital] I got the defendant out of the back seat of our patrol car. And as soon as I got him out he tried to break away from me and run into the parking lot," and "Myself and Officer Gardner grabbed him and used pain compliance and escorted him back into the hospital." Officer Gardner testified defendant was compliant from the patrol car to the hospital.

Defendant's act of "tr[ying] to break away . . . and run" is not an act of force or violence but instead is an act of resisting.

"A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791.) Where there is not any possibility that the jury could disagree on the facts required for each offense, a unanimity instruction is not needed. (*People v. Beardslee* (1991) 53 Cal.3d 68, 93-94.)

The trial court did not err in failing to instruct on unanimity with respect to felony resisting. The only evidence that defendant used force or violence in resisting both officers for the felony charges involved an incident inside the hospital emergency room. There was no possibility that the jury could disagree on which act defendant committed with force or violence.

We note that the prosecutor, in his opening statement and closing arguments, cited the struggle inside the hospital—referring to the kicks to Officer Gardner, the bites to Officer Lazo, and the need for additional people to contain defendant—as the evidence supporting the charged felony resisting with force and violence counts (count II—Officer Gardner; count III—Officer Lazo).

Moreover, defendant was acquitted of the *felony* offenses. The court did instruct on unanimity with respect to the lesser included offenses of misdemeanor resisting. We reject defendant's claim that the unanimity language in CALCRIM No. 2656 was "insufficient under the facts of this case." The bench notes for the unanimity instruction (CALCRIM No. 3500) indicate that unanimity language is included in other instructions "where the issue is most likely to arise. If a case raises a unanimity issue and other instructions do not adequately cover the point, give this instruction." CALCRIM No. 2656 adequately covered the point, so there was no need for CALCRIM No. 3500. The language was substantially the same. We find no error.

II

The trial court imposed concurrent one-year county jail terms for misdemeanor resisting, the lesser included offense on both counts II and III. Defendant contends the trial court was required to stay one of the sentences pursuant to Penal Code section 654. He argues that his acts of resisting both officers were part of an indivisible transaction and do not fall under the multiple victim exception. The People agree. Defendant's acts of misdemeanor resisting were not part of an indivisible transaction. Thus, we do not need to discuss the multiple victim exception.

Penal Code section 654, subdivision (a) provides, in relevant part, as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."¹

¹ *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*) recently decided, "By its plain language [Penal Code] section 654 does not bar multiple punishment for multiple violations of the same criminal statute," disapproving "[c]ontrary dictum in a footnote to *Neal v. State of California* (1960) 55 Cal.2d 11, 18, footnote 1." (*Correa*, at p. 334.) The

“Case law has expanded the meaning of [Penal Code] section 654 to apply to more than one criminal act when there was a course of conduct that violates more than one statute but nevertheless constitutes an indivisible transaction. [Citation.] ‘Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the “intent and objective” of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]’ [Citation.]”

““The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial. [Citation.] The factual finding that there was more than one objective must be supported by substantial evidence. [Citation.]’ [Citation.]” (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240 (*Hairston*); see *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136; *People v. Coleman* (1989) 48 Cal.3d 112, 162.) Defendant’s failure to raise a Penal Code section 654 claim in the trial court does not forfeit the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

Substantial evidence supports the trial court’s implied factual determination that defendant’s crimes of misdemeanor resisting were not part of a single, indivisible transaction. Defendant resisted the officers by trying to break away and run in the

new interpretation has prospective application only (*id.* at pp. 334, 344-345); thus, *Correa* does not apply here.

parking lot. Officer Lazo had to use pain compliance to gain control over defendant. Then the two officers escorted defendant into the emergency room, where defendant sat in a chair and, a short time later, tried to leave the hospital, requiring the officers to take him to the ground and eventually put leg restraints on him.

Contrary to defendant's and the People's claim otherwise, the facts here are similar to those in *Hairston, supra*, 174 Cal.App.4th 231, where this court affirmed the imposition of concurrent one-year jail terms for each of three violations of Penal Code section 148. Both defendant and the People ignore defendant's conduct in the parking lot. *Hairston* concluded the three convictions were not based on a single course of conduct or incident to one objective, upholding the trial court's implied finding that the defendant "formed a new and independent intent with each officer he encountered" (*Hairston*, at p. 240) in three different locations in an apartment complex during a foot chase (*id.* at pp. 236, 239-240).

Here, defendant formed a new and independent intent to flee from custody on each occasion, the first time in the parking lot and the second time in the emergency room. "[T]he purpose of [Penal Code] section 654 is to ensure that a defendant's punishment will be commensurate with his culpability." (*Correa, supra*, 54 Cal.4th at p. 341.) The trial court recognized that the evidence supported two lesser included misdemeanor offenses of resisting, having so instructed the jury ("defendant committed at least one act of resisting, obstructing, or delaying a peace officer without force and violence"; CALCRIM No. 2656). We conclude that substantial evidence supports the trial court's implied finding at sentencing that section 654 did not apply.

We note an error in preparation of the abstract of judgment. The misdemeanor offenses appear as concurrent one-year *prison* terms. These terms should appear under "Other orders," as concurrent one-year county jail terms.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment reflecting that concurrent one-year county jail terms were imposed for misdemeanor resisting, the lesser included offense to both counts II and III, and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

HULL, J.