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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.W., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.W.,

Defendant and Appellant.

E058999

(Super.Ct.No. J239084)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court found true allegations minor had committed two counts of obstructing an executive officer in the performance of his duties (counts 1 & 2 – Pen. Code, § 69)¹ and resisting a peace officer (counts 3 & 4 – § 148, subd. (a)(1)). The court ordered minor placed in a foster care facility. On appeal, minor contends insufficient evidence supports the juvenile court’s inherent finding the officers’ actions were in lawful performance of their duties during minor’s commission of the offenses in all four counts. Minor additionally maintains the count 3 and 4 offenses were lesser included offenses of the felony counts of obstructing an executive officer in the performance of his duties and, hence, must be reversed. We affirm.

FACTUAL AND PROCEDURAL

The juvenile court initially found minor a ward of the court on June 10, 2011, after the People filed a juvenile wardship petition alleging minor had stolen his mother’s vehicle and committed second degree robbery. Minor admitted an added count of misdemeanor grand theft and the remaining charges were dismissed.

During the ensuing two years, minor was found in violation of his probation on multiple occasions, was sent to juvenile hall a number of times, and had an allegation in a subsequent juvenile wardship petition sustained. On May 3, 2013, the juvenile court issued a warrant for minor’s arrest for his failure to appear for drug court.

¹ All further statutory references are to the Penal Code.

On May 11, 2013, Officers Brian Sendldorfer and Stanley² of the Upland Police Department were dispatched to minor's mother's apartment regarding threats by minor to take his mother's car. Sendldorfer had had previous contact with the family. He knocked on the door and mother answered. Mother informed Sendldorfer minor had threatened to kill himself and began destroying the "bedroom in the apartment, flipping the bed upside down and throwing property around inside[]" after she denied him the use of her vehicle. Mother said she was afraid of minor. She informed Sendldorfer minor had an outstanding warrant for his arrest.

Mother gave the officers permission to enter the apartment. Sendldorfer saw minor in the hallway; minor ran into the bathroom as soon as he saw Sendldorfer. Minor attempted to slam the bathroom door shut, but Sendldorfer kept the door open with his arm. Stanley assisted Sendldorfer in opening the door.

Inside the bathroom, minor's brother was taking a shower. The officers reached out to grab minor's arms; minor started kicking and yelling. In order to limit minor's movement for their own safety and others, the officers placed minor in handcuffs.

The officers intended to take minor to their patrol car, but as they reached the living room, minor escalated his resistance. He went limp and started kicking and thrashing around on the floor. Sendldorfer urged minor to calm down; he told minor he was not under arrest. However, minor continued to kick and yell. Minor told the officers they "were filthy fucking pigs and that he would catch a case, kill someone, blowup the

² No first name for Officer Stanley is given in the record.

police department, kill an Upland cop.” He kicked at both officers. Minor stated he was going to elbow Stanley in the face, then moved as if to do so. Minor started spitting at Stanley. Minor threatened both of them. He started hitting his head against the ground.

The officers called for additional units in order to obtain a hobble for defendant’s legs and a spit hood. Sendldorfer then informed minor he was under arrest. When additional units arrived, they placed the hobble on defendant’s feet to get him to stop kicking. They took defendant to the hospital where he was found to have methamphetamine and marijuana in his system.

The People filed a first amended subsequent juvenile wardship petition alleging minor obstructed both Sendldorfer and Stanley in the performance of their duties (counts 1 & 2) and resisted them (counts 3 & 4). The juvenile court sustained the allegations.

A. Sufficiency of the Evidence.

Minor contends insufficient evidence supports the requisite elements of the allegations that the officers were acting in lawful performance of their duties. We disagree.

“Our review of the minor[’s] substantial evidence claim is governed by the same standard applicable to adult criminal cases. [Citation.] ‘In reviewing the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.]’ [Citation.] “[O]ur role on appeal is a limited one.” [Citation.] Under the substantial evidence rule, we must presume in support of the judgment the existence of every fact that the trier of fact could

reasonably have deduced from the evidence. [Citation.] Thus, if the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]’ [Citation.]” (*In re V.V.* (2011) 51 Cal.4th 1020, 1026.)

Section 69 proscribes “attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty” (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) “The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty.” (*Ibid.*)

“The long-standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer “*engaged in . . . the performance of . . . [his or her] duties*” unless the officer was acting lawfully at the time the offense against the officer was committed. [Citations.] ‘The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in “duties,” for purposes of an offense defined in such terms, if the officer’s conduct is unlawful. . . . [¶] . . . [T]he lawfulness of the victim’s conduct forms part of the corpus delicti of the offense.’ [Citation.]” (*In re Manuel G., supra*, 16 Cal.4th at p. 815.)

The legal elements of section 148 “are as follows: ““(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.” [Citation.]” (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894-895.) “[T]he lawfulness of an arrest is an essential element of the offense of resisting or obstructing a peace officer. [Citation.] If the officer was not performing his or her duties at the time of the arrest, the arrest is unlawful and the arrestee cannot be convicted under Penal Code section 148, subdivision (a). [Citations.]” (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409.)

“The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, [United States Supreme Court case law] recognizes that it may be the essence of good police work to adopt an intermediate response. [Citation.] A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [Citations.]” (*Adams v. Williams* (1972) 407 U.S. 143, 145-146.)

Here, Officers Sendldorfer and Stanley were acting in lawful performance of their duties both when they initially detained minor and when they eventually arrested him. They had been dispatched to mother’s apartment on a report minor was threatening to steal her car. When the officers contacted mother, she reported defendant had threatened

to kill himself and had a warrant out for his arrest. Mother said she was afraid of minor. These facts were all sufficiently indicative of potential, or actual, criminal behavior by minor to warrant his brief detention to maintain the status quo.

The fact that minor thereafter kicked, threatened, pushed, pulled, and spit at the officers, forcing them to handcuff, hobble, and obtain a spit hood, was sufficient interference in their lawful duties in detaining him which warranted minor's arrest and a true finding on the allegations. As the juvenile court concluded "police officers can detain if facts known are apparent to the officers and lead the officers to believe the persons detained . . . is involved in an activity that relates to a crime and a reasonable officer with those same facts would act in the same manner. The Court did hear evidence . . . mother had reported the minor had threatened harm to himself"

The court found "at the time of the initial contact that the officers conduct towards the minor would have been lawful and any subsequent time thereafter the officers did act lawfully based on the information available to them." The court further found "minor intended to prevent or deter the police officers from doing their lawful duty at the time of their contact and subsequent thereto, that he had a pattern of conduct and the threat of violence was in existence. The Court did hear evidence and testimony that the minor attempted to kick and spit and continue to cuss and resist the officers efforts throughout the entire time frame." Thus, the People adduced sufficient evidence the officers were acting in performance of their lawful duties to support the court's true findings.

B. Section 148, Subdivision (a)(1), Allegations as Lesser Included Offenses of the Section 69 Allegations.

Defendant contends the convictions on counts 3 and 4 must be reversed because they were lesser, necessarily included offenses of counts 1 and 2. We disagree.

“[I]t is possible to violate section 69 . . . —by attempting, through threat or violence, to deter or prevent an executive officer from performing a duty—without also violating section 148(a)(1). A person who threatens an executive officer in an attempt to deter the officer from performing a duty ‘at some time *in the future*’ [citation] does not necessarily willfully resist that officer in the discharge or attempt to discharge of his or her duty under section 148(a)(1). Accordingly, section 148(a)(1) is not a lesser included offense of section 69 based on the statutory elements of each offense. [Citations.]” (*People v. Smith* (2013) 57 Cal.4th 232, 241.) However, where the charging document alleges that minor “violated section 69 not only in the first way but also in the second way by forcibly resisting an officer[,] . . . section 148(a)(1) [is] a necessarily included lesser offense of section 69 as alleged in the” charging document for purposes of jury instruction. (*Id.* at p. 243.)

Thus, “the trial court’s instructional duty [is] as follows: Where an accusatory pleading alleges both ways of violating section 69, the trial court should instruct the jury that if it finds beyond a reasonable doubt that a defendant committed either way of violating section 69, it should find the defendant guilty of that crime. If not, the jury may return a verdict on the lesser offense of section 148(a)(1) so long as there is substantial evidence to conclude that the defendant violated section 148(a)(1) without also violating section 69.” (*People v. Smith, supra*, 57 Cal.4th at pp. 244-245.)

“The rule we affirm today—requiring sua sponte instruction on a lesser offense that is necessarily included in one way of violating a charged statute when the prosecution elects to charge the defendant with multiple ways of violating the statute—does not require or depend on an examination of the evidence adduced at trial. The trial court need only examine the accusatory pleading. When the prosecution chooses to allege multiple ways of committing a greater offense in the accusatory pleading, the defendant may be convicted of the greater offense on any theory alleged [citation], including a theory that necessarily subsumes a lesser offense. The prosecution may, of course, choose to file an accusatory pleading that does not allege the commission of a greater offense in a way that necessarily subsumes a lesser offense. But so long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense. This allows the jury to consider the full range of possible verdicts supported by the evidence and thereby calibrate a defendant’s culpability to the facts proven beyond a reasonable doubt.” (*People v. Smith, supra*, 57 Cal.4th at p. 244.)

Here, the subsequent juvenile wardship petition alleged both ways of violating section 69, attempting to deter and knowingly resisting. However, since there was no jury trial, no jury instruction on section 148, subdivision (a)(1), as a lesser, necessarily included offense was required. Contrary to minor’s contention, the People adduced evidence at trial that minor attempted to deter the officers’ future action of arresting him.

Mother reported minor did not want to be returned to juvenile hall. Minor fled from the officers upon seeing them and tried to bar them from entering the bathroom. Minor threatened both the officers present and all Upland police officers. Indeed, the People argued this theory to the court. Thus, the juvenile court could have found that minor violated the attempting to deter prong of section 69 by his threats and attempts to flee, while likewise separately violating section 148, subdivision (a)(1), by his acts of violence. “In the absence of evidence to the contrary, we presume that the court ‘knows and applies the correct statutory and case law.’ [Citations.]” (*People v. Thomas* (2011) 52 Cal.4th 336, 361.)

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

RICHLI
Acting P. J.

MILLER
J.