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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DEREK DAVID DRUMMOND, Defendant and Appellant.	F076051 (Super. Ct. No. 16CMS2871) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Franson, Acting P.J., Detjen, J. and Snauffer, J.

A jury convicted appellant Derek David Drummond of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)/count 1),[1] battery resulting in serious bodily injury (§ 243, subd. (d)/count 2), resisting an executive officer by force (§ 69/count 3), and resisting arrest (§ 148, subd. (a)(1)/count 7), a misdemeanor.[2] The jury also found true a great bodily injury enhancement in count 1 (§ 12022.7, subd. (a)).

On June 30, 2017, the court sentenced Drummond to an aggregate prison term of seven years eight months, the aggravated term of four years on Drummond's assault conviction, a three-year great bodily injury enhancement that attached to that count, a concurrent four-year term on Drummond's battery conviction, a consecutive eight-month term (one-third the middle term of two years) on his resisting an executive officer conviction, and a concurrent term of 298 days on his resisting arrest conviction.

On appeal, Drummond contends: (1) the evidence is insufficient to sustain his resisting a peace officer conviction; (2) the court committed instructional error; and (3) his sentence violates section 654's prohibition against multiple punishment. We find merit to Drummond's third contention, modify the judgment accordingly, and affirm as modified.

FACTS

The prosecution evidence established that on September 6, 2016, Justin Willhite went to Drummond's house in Armona and spent the night. The following morning, at around 4:30 a.m., Drummond got on top of Willhite and hit him on the face multiple

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1 All further statutory references are to the Penal Code.

2 The jury acquitted Drummond of attempting to take a firearm from a peace officer (§ 148, subd. (d)/count 4); solicitation to commit perjury (§ 653, subd. (a)/count 5); and battery on a peace officer (§ 243, subd. (b)/count 6), a misdemeanor.

times. Willhite, however, managed to push Drummond away and escape. Willhite sustained two jaw fractures, numerous nasal fractures, and a loose tooth from the assault.[3]

At approximately 2:00 p.m., the Kings County Sheriff's Department SWAT team went to Drummond's house to serve a search warrant and an arrest warrant.[4] After the deputies used a PA system for several minutes to order everyone out of the house, Christina Henson exited the residence. The deputies continued the announcement for another 10 minutes before sending a robot with a video camera and its own PA system in the house to contact Drummond. The robot allowed the deputies to see Drummond sitting on a sofa chair, just inside the front door facing up towards the ceiling.

The SWAT team sent a sheriff's canine in the house, who was followed by Deputy Trevor Lopes and other deputies. Instead of engaging Drummond, the sheriff's canine began fighting with Drummond's dog. Meanwhile, Lopes attempted to pin Drummond on the chair by pushing his left arm into Drummond's chest. Drummond began to yell and lifted his left arm up. The sheriff's canine bit Drummond on his left arm. Lopes grabbed Drummond's right arm and the sheriff's canine continued to bite Drummond's left arm as Drummond struggled with deputies, flailing his arms attempting to hit the sheriff's canine and pull away. Lopes and the other deputies then got Drummond face down on the ground with his left arm completely under him and his right arm partially under him. The sofa chair, however, went with Drummond because he was attached to it with a strap around his waist and his feet were locked into the recliner of the sofa chair.

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[3] Counts 1 and 2 were based on the assault of Willhite. The remaining counts were based on the incident later that day during which Drummond was arrested. The facts regarding the assault of Willhite are abbreviated because Drummond does not raise any issues with respect to the charges involving Willhite.

[4] Approximately 28 SWAT team members and detectives participated in serving the warrants because Drummond had reportedly been involved in a brandishing a firearm at a detentions deputy and he was known, from previous contacts, to carry a large knife in a sheath on his person.

A deputy ripped off the strap and dislodged Drummond's foot from the sofa chair as other deputies attempted to handcuff him. Drummond, however, pushed up and kicked his legs as the deputies attempted to keep him on the ground and pull his arms behind him.

During the struggle, a deputy with a rifle strapped on him got on the ground to assist in subduing Drummond. As the deputy struggled with him, the rifle wound up under Drummond. The deputy, however, hit Drummond several times in the back of the head and was able to retrieve his rifle. Eventually, the deputies were able to handcuff Drummond. A double-barreled shotgun was located 10 to 12 feet away from Drummond and a knife in a sheath was found on his person.

The Defense

With respect to the assault of Willhite, Drummond essentially testified that he punched Willhite in the jaw twice in self-defense after confronting Willhite about hitting his dog and that he kicked Willhite as he was leaving.

Later that day, Drummond was asleep when Henson told him the SWAT team was there. He did not recall hearing any announcements over a PA system. After Henson walked out of the house, the robot entered, but Drummond did not hear any announcements through the robot's PA system either. The next thing he recalled was the SWAT team entered his house and one of the deputies shot his dog. A sheriff's canine latched onto Drummond's arm, but Drummond did not strike back. After the sheriff's canine released his arm, a deputy punched Drummond, knocking out some of his teeth. The deputies grabbed Drummond and pulled him off the sofa chair and slammed him face first into the floor. Drummond did not resist and immediately put his hands behind his back. Drummond was then handcuffed and walked outside. Drummond denied that he was strapped to the sofa chair. He also denied swinging or kicking at any of the deputies or attempting to take a deputy's rifle.

DISCUSSION

The Sufficiency of the Evidence Issue

In contending the evidence does not support a finding that he used force or violence against the deputies, Drummond suggests that his movements while being arrested were involuntary because they were caused by the sheriff's canine biting him. There is no merit to this contention.

" ' "When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." ' [Citations.] When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 848–849.)

Section 69 states: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment … or by both …."

"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." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.)

"[U]nder the express terms of the statute, the second type of violation occurs when a defendant 'knowingly *resists*, by the use of force or violence, such officer ….' Other than forceful resistance, the terms of the statute do not require that a defendant use any other manner of force or violence on the person of the executive officer. We also note

the CALCRIM instruction on section 69 instructs juries that they must find that the defendant used 'force[or violence] *to resist* an executive officer.' (CALCRIM No. 2652, italics added.) Like the statute, the instruction does not require more than forceful resistance." (*People v. Bernal* (2013) 222 Cal.App.4th 512, 518.)

Drummond was charged and tried on the theory that he used force or violence to resist the deputies. The prosecution presented evidence that while the deputies attempted to get him off the sofa chair and on to the floor to handcuff him, Drummond struggled with them, flailing his arms and attempting to strike the sheriff's canine. When Drummond was on the floor, he continued to struggle by kicking his legs and resisting the deputies' efforts to place his arms behind his back so he could be handcuffed. These circumstances clearly support the jury finding that Drummond resisted an executive officer by force.

During his testimony, Drummond did not claim, as he now suggests, that the sheriff's canine biting him caused him to unintentionally flail his arms, kick the deputies, or use any type of force against them. Instead, he testified that he did not resist arrest and he admitted that the sheriff's canine let go of his arm before the deputies took him to the floor. Thus, we conclude that the evidence supports the jury's finding that he forcibly resisted the deputies' attempts to take him into custody. (Cf. *People v. Carrasco* (2008) 163 Cal.App.4th 978, 985–986 [defendant's conduct in struggling with deputies and placing his hands underneath his body in attempt to avoid being arrested was sufficient to sustain conviction for violating section 69].)

The Alleged Instructional Error

Drummond contends that because resisting arrest, in violation of section 148, subdivision (a)(1), is a lesser included offense of a violation of section 69, the court prejudicially erred by its failure to sua sponte charge the jury on resisting arrest as a lesser included offense to count 3, which charged him with resisting an executive officer by force.

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) A trial court must instruct on a lesser included offense if there is substantial evidence the defendant is guilty only of the lesser. (*Id*. at p. 118.)

In *People v. Belmares* (2003) 106 Cal.App.4th 19 (*Belmares*), we held that a violation of section 148, subdivision (a)(1), is not a lesser included offense of a violation of section 69 under either the statutory elements test or the pleadings test. Regarding the statutory elements test, we reasoned that "resisting is not a lesser included offense of deterring since one can deter an officer's duty *in the future* (§ 69) without resisting the officer's discharge or attempted discharge of a duty *at that time* (§ 148, subd. (a)(1))." (*Id*. at p. 24.) Regarding the accusatory pleading test, we held that resisting was not a lesser included offense of deterring. We reasoned that the words " 'deter' " and " 'prevent' " in section 69, and the words " 'delay' " and " 'obstruct' " in section 148, subdivision (a)(1), "have noteworthy differences" suggesting "a legislative intent not to incorporate into either statute the meanings of the words of the other." (*Belmares*, *supra*, at pp. 25–26.)

In accord with *Belmares*, we conclude that the court was not required to instruct on resisting arrest in violation of section 148, subdivision (a)(1), because that offense is not a lesser included offense of a violation of section 69. However, even if it were a lesser included offense, on the facts of this case, an instruction would not have been required.

A trial court does not have a sua sponte duty to instruct the jury on lesser included offenses when there is " 'no evidence that the offense was less than that charged.' " (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

As discussed above, the prosecution's case established that Drummond forcibly resisted the deputies' efforts to take him into custody. Drummond testified that he did nothing to resist the deputies. Thus, the record shows that if Drummond was guilty at all, he was guilty of forcibly resisting an executive officer. Since the record does not contain any evidence that Drummond committed the lesser offense, the court would not have been required to charge the jury on resisting arrest as to count 3 even if it were a lesser included offense of resisting an executive officer by force.

The Section 654 Issue

Drummond contends that his convictions for resisting an executive officer by force in count 3 and resisting arrest in count 7 were both related to his actions against Lopes. Thus, according to Drummond, because his resisting was a single act accomplished over a short period of time with a single objective and there was no evidence of separate, distinct crimes directed at Lopes, the court erred by imposing sentence on both convictions. Respondent contends the court erred in imposing sentence on both convictions because both underlying counts charged Drummond with resisting being arrested by Lopes. We agree that section 654 prohibited the court from imposing punishment on Drummond's resisting arrest conviction.

Section 654, subdivision (a), provides, in pertinent part:

> "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."

"Case law has expanded the meaning of 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.' " (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240.) Section 654 does not allow concurrent sentences. (*People v. Deloza* (1998) 18 Cal.4th 585.)

During closing arguments, the prosecutor argued that Drummond was guilty of resisting arrest because he failed to come out of the house when the deputies were trying to coax him out through the announcements on the PA system. He also argued that the resisting an executive officer by force conviction occurred when Drummond struggled with the deputies inside the house. It is clear from the prosecutor's argument that the two convictions were based on different conduct by Drummond. However, since both offenses were committed during an indivisible course of conduct during which Drummond had the same objective, i.e., to avoid being arrested, and he was charged with resisting arrest by only one deputy, we agree with the parties that the court violated section 654 when it imposed a concurrent term on count 7.

DISPOSITION

The judgment is modified to stay the 298-day term the court imposed on count 7. As modified, the judgment is affirmed.