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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re OLIVER C., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

OLIVER C.,

Defendant and Appellant.

G048349

(Super. Ct. No. DL041703)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Maria D. Hernandez, Judge. Reversed and remanded with directions.

Jan B. Norman, 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, Lise S. Jacobson and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

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Oliver C. appeals from a judgment sustaining counts of both assault and battery of a police officer (counts 3 and 4) alleged against him in a juvenile delinquency petition. Oliver argues it was error to sustain both counts, which arose out of a single act of kicking the officer, because assault is a lesser included offense to battery. In those circumstances, the court was obligated to strike the assault count.

The Attorney General counters that the relevant crimes for purposes of the lesser included offense analysis were not “assault” (Pen. Code, § 240; all further statutory references are to this code) and “battery” (§ 242) but instead were “assault on a peace officer” in violation of section 241, subdivision (c) (hereafter § 241(c);) and “battery on a peace officer” in violation of section 243, subdivision (b) (hereafter § 243(b)). According to the Attorney General, because §§ 241(c) and 243(b) pertain to assaults and batteries committed against any one of a variety of victims listed by occupation, but do not both employ *the same list* of occupations, it is possible to commit a battery in violation of § 243(b) without also committing an assault in violation of section 241(b). Consequently, the Attorney General concludes the latter does not qualify as a lesser included offense of the former.

We agree with Oliver and reverse the judgment. Sections 240 and 242 *define* the crimes of assault and battery, respectively. Sections 241 and 243 then prescribe *punishment* for those defined crimes, which can vary depending upon the specified circumstances – including whether the victim was engaged in one of the listed occupations. At most those provisions describe variations on the crimes of assault and battery; they do not define legally separate crimes for purposes of analyzing whether the assault would qualify as a lesser included offense of a battery based on the same act.

Moreover, even if we agreed those varied circumstances should be characterized as defining distinct crimes for purposes of analyzing whether one qualifies as a lesser included offense of another, we would conclude § 241(c) actually describes *12*

different crimes, one of which is “assault . . . against the person *of a peace officer*” (italics added), while § 243 (b) actually describes *14* different crimes, including “battery . . . against the person *of a peace officer.*” (Italics added.) And because the former crime would qualify as a lesser included offense of the latter, we would still conclude the court erred by sustaining both of those counts against Oliver.

Oliver also requests we independently review the evidence produced in response to his *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531), to determine whether the trial court abused its discretion in refusing to disclose the personnel records of the police officers involved in his arrest. We have done so and find no abuse of discretion.

FACTS

In October 2012, Oliver was observed by a motorist to be “tagging” the sidewalk in front of a bank. The motorist pulled over to the side of the road and telephoned police. Based on the motorist’s description of Oliver and of the vehicle he drove away in, two Garden Grove police officers were able to locate the vehicle with Oliver in it, and detain him.

After the motorist arrived at the location where Oliver had been detained and positively identified him as the tagger, the officers proceeded to arrest Oliver. Oliver resisted their efforts to do so and during the ensuing struggle, he kicked one of the officers.

Based on those events, a delinquency petition was filed against Oliver, alleging counts of: vandalism in violation of section 594, subdivisions (a) and (b)(2)(A) (count 1); resisting arrest in violation of section 148, subdivision (a)(1) (count 2); assault on a peace officer in violation of § 241(c) (count 3); and battery on a peace officer in violation of § 243(b) (count 4.)

Following a trial, the court sustained all four counts and declared Oliver a ward of the state. Oliver was subsequently sentenced to probation.

DISCUSSION

1. Lesser Included Offense

Oliver’s argument on appeal is fairly straightforward: He contends the court erred by sustaining counts of both assault and battery against him based on his single act of kicking a police officer. Because assault is a lesser included offense to battery (*People v. Ortega* (1998) 19 Cal.4th 686, 693 (*Ortega*), disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1231), Oliver claims the court was obligated to strike the assault count, and sustain only the battery count. (*People v. Pearson* (1986) 42 Cal.3d 351, 355 [“this court has long held that multiple convictions may *not* be based on necessarily included offenses”].)

The Attorney General does not dispute Oliver’s contention that both counts 3 and 4 of the petition were based on the same act, nor the legal proposition that assault is a lesser included offense to battery. But the Attorney General nonetheless contends the court properly refused to strike count 3 because the relevant crimes at issue are not “assault” and “battery” as Oliver claims, but were instead “assault on the person of a peace officer” and “battery on the person of a [peace] officer,” under § 241(c) and § 243(b), respectively.

Sections 241(c) and 243(b) are similar, in that each specifically addresses assaults or batteries committed against any one of a list of persons identified by occupation – e.g., “peace officer, firefighter, emergency medical technician, mobile intensive care paramedic, lifeguard, process server, traffic officer” (§ 241(c).) The Attorney General asserts that due to a difference in these lists “it is possible to violate section 241, subdivision (c) without also violating section 243, subdivision (b).” (Fns.

omitted.) Thus, applying the “elements” test for assessing a claim of lesser included offense (see *People v. Reed, supra*, 38 Cal.4th at p. 1231 [holding that only the elements test, and not the accusative pleading test, is appropriate for determining what qualifies as a lesser included offense]), the Attorney General concludes that assault on a peace officer under § 241(c) is not a lesser included offense of battery on a peace officer under § 243(b).

Initially, we note that in making that argument, the Attorney General has confused the two statutes. Section 241(c) – the one which the Attorney General notes applies to a potential victim not covered by § 243(b), actually pertains to *assault*, which is the lesser of the two crimes. However, the point applies equally when the statutes are reversed, as § 243(b) also names potential victims not mentioned in § 241(c). Thus, the basic question raised by the Attorney General’s argument remains: do these statutes define distinct assault and battery crimes for purposes of determining whether the former qualifies as a lesser included of the latter? The answer is no.

Our Supreme Court has written two opinions addressing whether the Legislature’s establishment of what might be characterized as a variation on a traditional lesser included offense would nonetheless still qualify as such, even though the variation involves a factual element not necessarily found in the greater offense. In the first case, *Ortega, supra*, 19 Cal.4th 686, the court concluded that grand theft auto, as defined in section 487, subdivision (d)(1), automatically qualifies as a lesser included offense of robbery, even though not all robberies involve the taking of automobiles. The court explained that the crime of theft takes several forms, and that it would be error to treat “every *form* of theft as a separate offense. . . . Grand theft, therefore, is not a separate offense, but simply the higher degree of the crime of theft.” (*Ortega*, at p. 696, italics added.) And because “[t]heft, *in whatever form* it happens to occur, is a necessarily included offense of robbery” (*id.* at p. 699, italics added), a grand theft established by the taking of an automobile qualifies.

However, three years later, in *People v. Sanchez* (2001) 24 Cal.4th 983 (*Sanchez*), disapproved on another ground in *People v. Reed, supra*, 38 Cal.4th at pp. 1228-1231, the Supreme Court determined that the crime of gross vehicular manslaughter while intoxicated is *not* a lesser included offense of the crime of murder – despite the fact that every intermediate appellate court that had considered the issue to that point had concluded it was. *Sanchez* drew a distinction between the crime of vehicular manslaughter while intoxicated and the crime of “manslaughter generally” (*Sanchez*, at p. 991) and concluded the former does not fall within the traditional rule that “manslaughter” is always a lesser included offense to murder. The majority distinguished *Ortega* on the basis that the inclusion of theft (in all its forms) as a lesser included offense to robbery has long been established in our legal tradition, whereas a similar relationship between all forms of vehicular manslaughter and murder has not: “Although we recognize that historically manslaughter in general has been considered a necessarily included offense within murder, that long and settled tradition has not extended to *the more recently enacted forms of vehicular manslaughter* that require proof of additional elements.” (*Sanchez*, at p. 992, italics added.)

Although the dissent in *Sanchez* argued there was no rational distinction to be made, because the crime of manslaughter, in whatever form, was equally well established as a lesser included offense to murder in our legal tradition, the Penal Code firmly supports the majority’s analytical distinction between these scenarios. Whereas the Penal Code defines the crime of “theft” in one statute (§ 484), and then follows that definition with several other statutes explaining aspects of *that crime* (see, e.g., §§ 485-490.5 [explicitly referencing the crime of “theft”]), the crimes of “gross vehicular manslaughter” and “vehicular manslaughter while intoxicated” *do not* follow the Penal Code’s definition of traditional “manslaughter,” and are not otherwise dependent upon that traditional crime for their existence.

“Gross vehicular manslaughter” and “vehicular manslaughter while intoxicated” are both *defined* in section 191.5, which sets forth not only the elements of those crimes – including the requirement that commission of each is dependent on the defendant’s violation of specified provisions of the Vehicle Code proscribing driving under the influence of drugs or alcohol – but also the prescribed punishment for each. The crime of “manslaughter” is then *separately defined* in section 192, which also provides that “manslaughter” is divided into three kinds, one of which is *ordinary* “vehicular manslaughter” that does not involve any required violation of the Vehicle Code. Section 193 then specifies punishment for the three kinds of “manslaughter.”

In our view, the Legislature’s intention to establish *separate* crimes of “gross vehicular manslaughter” and “vehicular manslaughter while intoxicated,” rather than treating them as a mere extension of the traditional crime of “manslaughter,” is reflected in its decision to define those offenses and prescribe punishment for them separately, rather than adding them into the preexisting scheme which had already defined manslaughter as including regular “vehicular manslaughter.” Thus, as the Supreme Court concluded in *Sanchez*, there is no justification for automatically extending the “long and settled tradition” of treating manslaughter as a lesser included offense to murder “to the *more recently enacted forms* of vehicular manslaughter.” (*Sanchez, supra*, 24 Cal.4th at p. 992, italics added.)

Applying the same statutory analysis to this case, we note the Legislature’s treatment of both “assault” and “battery” is analogous to its treatment of “theft.” Just as the Legislature defined the crime of “theft” and then simply distinguished among the different types of “theft” in statutes that followed, it also defined both “assault” and “battery” in stand-alone statutes (§§ 240 and 242), and then relied on subsequent statutes to address various punishments to be meted out for *those two crimes*, depending upon circumstances. Indeed, as Oliver points out, both §§ 241(c) and 243(b) are part of statutes explicitly identified by title as “[p]unishment” statutes. And more important than

titles is the fact that *the substance* of both section 241 and section 243 address punishment specifically, beginning with subdivision (a) of each setting forth the base punishment to be imposed in cases of assault or battery, respectively. There is nothing in either statute suggesting the Legislature might have intended to combine *the prescription of punishment* for the previously defined crime of “assault” or “battery” in its first subdivision, with *the creation* of a raft of legally distinct crimes in subsequent subdivisions. We conclude it did not.

Consequently, the crimes which formed the basis of counts 3 and 4 alleged against Oliver are properly characterized as “assault” and “battery” for purposes of a lesser included offense analysis, rather than “assault in violation of section 241(c)” or “battery in violation of section 243(b).” And because assault is a lesser included offense to battery, the court below erred by refusing to strike that assault count.

Finally, even if we did accept the Attorney General’s argument that §§ 241(c) and 243(b) established legally distinct crimes from assault and battery, we would nonetheless conclude the court erred by failing to strike count 3 as a lesser included offense to count 4. Neither of these two subdivisions specifies *just one* added factual element which alters the existing crime of assault or battery into something else; instead, each provides an array of independent *options*, any of which would presumably be sufficient to alter the existing crime into something new. Thus, assuming we agreed that any change in the factual elements of a crime necessarily creates a distinct crime for purposes of a lesser included offense analysis, we would conclude § 241(c) actually describes *12* different crimes – one for each potential victim identified in that subdivision – while § 243(b) actually describes *14* different crimes. These listed crimes would include “assault . . . against the person of a peace officer” and “battery . . . against the person of a peace officer.” (§§ 241(c) and 243(b).) And because the former crime would qualify as a lesser included offense of the latter, we would still conclude the court erred by sustaining both of those counts alleged against Oliver here.

2. *Oliver's Pitchess Motion*

Oliver's second contention on appeal is that this court should independently review a sealed record of documents produced in response to his *Pitchess* motion, to determine whether the trial court abused its discretion in concluding those documents contained no discoverable evidence relating to two of the officers who arrested him. The Attorney General concurs that an independent review is appropriate.

We have conducted that review and find no abuse of the trial court's discretion.

DISPOSITION

The judgment is reversed and the case is remanded with directions to strike count 3 of the petition and reenter judgment reflecting that only counts 1, 2 and 4 of the petition are sustained.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.