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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC RADFORD,

Defendant and Appellant.

B276633

(Los Angeles County  
Super. Ct. No. NA103545)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura Laesecke, Judge. Affirmed.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Eric Radford was charged and convicted of one count of felony resisting an executive officer in the performance of his or her duty in violation of Penal Code<sup>1</sup> section 69. On appeal, Radford argues the trial court erred in failing to instruct the jury on the lesser included offense of misdemeanor resisting a peace officer in the discharge of his or her duty in violation of section 148, subdivision (a)(1). Radford also asserts the trial court may have erred in ordering the disclosure of material from the arresting officers' personnel files. We affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. Evidence At Trial**

On February 6, 2016, at approximately 1:45 a.m., officers from the Long Beach Police Department responded to a report of a loud disturbance near 11300 Walnut Avenue in Long Beach, California. Officer Eric Thai was the first officer to arrive on the scene. He saw Radford standing in an alley and yelling at an unidentified woman as if he wanted to fight. Officer Thai detained Radford near the front of his patrol car and conducted a pat-down search for weapons. As Radford was being detained, Officer Douglas Donnenfield arrived on the scene to assist Officer Thai. Both officers observed that Radford smelled of alcohol.

After initially providing a false name, Radford told the officers his true name and indicated that he had outstanding warrants. Radford also warned the officers that, if they checked his name for warrants, he would run. While Officer Thai stayed

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Penal Code.

with Radford, Officer Donnenfield conducted a warrant check with Radford's true name and confirmed he had an active felony warrant. Officer Donnenfield then walked behind Radford so that he could arrest him. In response, Radford shifted away from the officer and said, "I told you I was going to run." Radford also began jumping up and down while flexing his arms and chest. Both officers instructed Radford not to run, but he refused to comply and ran into the alley. Officer Donnenfield followed Radford and repeatedly yelled at him to stop. Radford continued running until he tripped over a bicycle in the alley and fell to the ground.

As Radford lay in a prone position on the ground, Officer Donnenfield approached and ordered him to stay down. Radford did not comply and began pushing himself off the ground with both hands. Fearing for his safety, Officer Donnenfield struck Radford on the right shoulder with his baton and repeated his command to stay on the ground. When Radford ignored that command and kept pushing himself off the ground, Officer Donnenfield struck him with the baton a second time. Radford continued to rise, however, and made it to his feet. In response, Officer Donnenfield took a step back to create distance between them. As soon as Radford was on his feet, he "charged" at Officer Donnenfield, running with his "arms outstretched" toward the officer's face or upper body. Officer Thai, who had been following on foot, saw Radford make a swinging motion toward Officer Donnenfield with his arms. In response to Radford's actions, Officer Donnenfield swung the baton at him a third time. As Officer Donnenfield was "mid swing," he felt "light contact" to his face. Officer Donnenfield continued to swing the baton, striking Radford in his outstretched arm and then his face.

Upon being struck a third time, Radford fell to the ground. At that point, Officer Thai reached the area where Radford had fallen and assisted Officer Donnenfield in handcuffing him. The officers then called for paramedics because they observed that Radford was bleeding from his forehead. While waiting for the paramedics to arrive, Radford was belligerent and repeatedly called the officers derogatory names. Radford later was transported to the hospital where he was treated for a laceration to his forehead. Following Radford's arrest, Officer Donnenfield noticed an abrasion on his right chin, which he did not have prior to his contact with Radford.

## **II. Verdict and Sentencing**

The jury found Radford guilty as charged of one count of resisting an executive officer in the performance of his or her duty in violation of section 69. Following the denial of Radford's motion for a new trial, the trial court sentenced him to two years in state prison.

## **DISCUSSION**

### **I. Failure to Instruct on Misdemeanor Resisting Arrest**

Radford argues the trial court prejudicially erred in failing to instruct the jury on the lesser included offense of misdemeanor resisting arrest in violation of section 148, subdivision (a)(1). In particular, Radford asserts there was substantial evidence to support a finding that his conduct toward Officer Donnenfield constituted willful resistance, delay, or obstruction as defined by section 148, subdivision (a)(1), but did not involve the use of force or violence as required by section 69.

## **A. Relevant Background**

In an amended information, the Los Angeles County District Attorney charged Radford with one felony count of resisting an executive officer in violation of section 69. As to that count, it specifically was alleged that Radford “did unlawfully attempt by means of threats and violence to deter and prevent Douglas Donnenfield, 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.”

At trial, the jury was instructed on the elements of a violation of section 69 with CALJIC No. 7.50. That instruction stated that, in order to prove a violation of section 69, “each of the following elements must be proved: [¶] 1. A person knowingly and unlawfully resisted an executive officer in the performance of his or her duty; and [¶] 2. The resistance was accomplished by means of force or violence.” The jury also was instructed on the definition of force or violence with CALJIC No. 16.141. That instruction stated that “the words ‘force’ and ‘violence’ are synonymous and mean any unlawful application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest unlawful touching, if done in an insolent, rude, or an angry manner, is sufficient.” The trial court did not instruct the jury on section 148, subdivision (a)(1) as a lesser included offense of section 69, nor is there any indication in the record that Radford requested such instruction.

During its deliberations, the jury submitted the following question to the trial court: “Does approaching the officer with

arms outstretched constitute violence or otherwise fulfill condition 2 of PC 69?” In response, the court advised the jury to review CALJIC No. 16.141. The court also told the jury that it would permit the parties to briefly reargue the issue later that afternoon, and that the jury could continue deliberating in the meantime. A short time later, the jury informed the court it was “withdrawing [its] question about condition 2 of Penal Code section 69.” The court accordingly did not allow any further argument on that issue. The jury returned its verdict on the same day, finding Radford guilty as charged of violating section 69.

## **B. Relevant Law**

In a criminal case, the trial court must instruct the jury on the general principles of law that are relevant to the issues raised by the evidence and are necessary for the jury’s understanding of the case. (*People v. Burney* (2009) 47 Cal.4th 203, 246.) “[I]t is the ‘court’s duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) “Conversely, even on request, the court ‘has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction’ [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) Substantial evidence “is not merely ‘any evidence ... no matter how weak’ [citation], but rather “‘evidence from which a jury composed of reasonable [persons] could ... conclude[ ]’” that the lesser offense, but not the greater, was committed. [Citations.]” (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see *People v. Burney*,

*supra*, at p. 250 [“[t]o justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury . . . could conclude that the facts underlying the particular instruction exist”].) “On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

Section 69, which defines the crime of resisting an executive officer, provides, in relevant part: “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 pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.” (§ 69, subd. (a).)<sup>2</sup> Section 148, subdivision (a)(1), which defines the crime of misdemeanor resisting a peace officer, states as follows: “Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000),

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<sup>2</sup> A violation of section 69 is a “wobbler” offense in that it can be charged as a felony, but the trial court retains discretion to treat it as misdemeanor at the time of sentencing. (See *People v. Park* (2013) 56 Cal.4th 782, 789; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.). In this case, Radford was charged with a felony violation of section 69.

or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.” (§ 148, subd. (a)(1).)

In *People v. Smith* (2013) 57 Cal.4th 232 (*Smith*), the California Supreme Court held that a violation of section 148, subdivision (a)(1) can be a lesser included offense of a violation of section 69, depending upon how the crime is charged in the accusatory pleading. The Court explained that section 69 “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.” [Citation.]” (*Id.* at p. 240.) The Court noted that “[s]ection 148(a)(1) . . . is clearly different from the first way of violating section 69.” (*Id.* at p. 241.) However, “[a] person who violates section 69 in the second way—by ‘knowingly resist[ing], by the use of force or violence, such officer, in the performance of his duty’—also necessarily violates section 148(a)(1) by ‘willfully resist[ing] . . . any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment.’ [Citation.]” (*Ibid.*)

The Supreme Court in *Smith* concluded that, because the amended information alleged that the “defendant violated section 69 not only in the first way but also in the second way by forcibly resisting an officer[,] . . . section 148(a)(1) was a necessarily included lesser offense of section 69 as alleged in the amended information.” (*Smith, supra*, 57 Cal.4th at p. 243.) The Court further concluded, however, that the trial court did not err in failing to instruct the jury on that lesser included offense because the evidence showed “[d]efendant was either guilty or not guilty of resisting the executive officers by the use of force or violence



in violation of section 69,” and “[t]here was no evidence that defendant committed only the lesser offense of resisting the officers without the use of force or violence in violation of section 148(a)(1).” (*Id.* at p. 245.) As the Court explained, “a trial court is not required to instruct the jury on a necessarily included lesser offense “when there is no evidence that the offense was less than that charged.” [Citation.]” (*Ibid.*)

**C. The Trial Court Did Not Err in Failing to  
Instruct the Jury on Misdemeanor Resisting  
Arrest In Violation of Section 148(a)(1)**

In this case, the amended information alleged that Radford violated section 69 in that he “did unlawfully attempt by means of threats and violence to deter and prevent Douglas Donnenfield . . . 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] duty.” Because Radford was charged with violating section 69 in both ways, he contends the trial court had a sua sponte duty to instruct the jury on misdemeanor resisting arrest under section 148, subdivision (a)(1) as a necessarily included lesser offense of section 69. The Attorney General does not dispute that section 148, subdivision (a)(1) was a lesser included offense of section 69 as alleged in the amended information. The Attorney General asserts, however, the trial court was not required to instruct the jury on this lesser included offense because there was no substantial evidence that Radford violated section 148, subdivision (a)(1) without also violating section 69.

Based on our review of the record, we conclude the trial court did not err in failing to instruct the jury on misdemeanor resisting arrest because there was no substantial evidence that

Radford only committed the lesser offense of resisting Officer Donnenfield in the discharge of his duties. Contrary to Radford's characterization on appeal, the evidence did not merely show that he resisted arrest by running from the officers, disobeying Officer Donnenfield's commands to remain on the ground, and then approaching Officer Donnenfield with his arms outstretched. Officer Donnenfield also testified that, as Radford was charging toward him with both arms outstretched, he felt contact to his face. Officer Donnenfield later observed that he had abrasion on his chin, which he testified occurred when Radford charged at him and he responded by striking Radford's arm with the baton. Officer Thai similarly testified that he saw Radford quickly get up and charge at Officer Donnenfield while making a swinging motion with both arms. Therefore, based on the officers' uncontroverted testimony, Radford forcibly resisted arrest when he charged at Officer Donnenfield and made contact with the officer's face, causing an abrasion. Given this record, no reasonable jury could have found that Radford violated section 148, subdivision (a)(1) in resisting Officer Donnenfield, but did not violate section 69. (*Smith, supra*, 57 Cal.4th at p. 245 [trial court was not required to instruct on section 148, subdivision (a)(1) where evidence established that defendant "physically resisted the guards and was subdued only after the deputies used Tasers and foam and rubber projectiles"]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 986 [trial court properly refused to instruct jury on section 148, subdivision (a)(1) where officers' undisputed testimony showed defendant "had to be physically taken to the ground" and "continued to struggle with [the officers]" until he was subdued with pepper spray].)

Radford nevertheless argues that the jury reasonably could have concluded that he did not use force or violence, but merely approached Officer Donnenfield with outstretched arms as the officer was ordering him to remain on the ground. In support of this argument, Radford notes that the jury specifically asked the trial court during its deliberations whether “approaching the officer with arms outstretched constitute[s] violence or otherwise fulfill[s] condition 2 of PC 69?” However, the mere fact of this inquiry does not mean the jury disbelieved Officer Donnenfield’s testimony that Radford caused the abrasion to his face as he was attempting to arrest him. The jury simply may have been inquiring whether the element of force or violence could be proven by the evidence that Radford made physical contact with Officer Donnenfield’s face when he approached the officer with his arms outstretched. Notably, after the trial court directed the jury to the instruction defining the terms “force” and “violence” as including “[t]he slightest unlawful touching,” the jury withdrew its question. It then found Radford guilty of felony resisting arrest in violation of section 69.

Because there was no contrary evidence disputing the officers’ testimony about Radford’s conduct, the jury would have had no reasonable basis to conclude that Radford resisted Officer Donnenfield’s efforts to arrest him, but did not do so by means of force or violence. Accordingly, the trial court was not required to instruct the jury on the lesser included offense of misdemeanor resisting arrest in violation of section 148, subdivision (a)(1).

## **II. *Pitchess* Review**

Prior to trial, Radford made a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) for a review of

the personnel files of Officer Donnenfield and Officer Thai. The trial court granted the motion with respect to alleged acts of falsifying police reports, excessive force, and perjury. After reviewing the records over several in camera hearings, the trial court ordered the disclosure of certain materials as to Officer Donnenfield and Officer Thai. On appeal, Radford has requested that we conduct an independent review of the sealed record to determine whether any discoverable material from the officers' personnel files was withheld. We have reviewed the sealed record of the in camera proceedings, and conclude the trial court properly exercised its discretion in ordering the disclosure of *Pitchess* material. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

### DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

BENSINGER, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.