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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAMON ALANIZ, Defendant and Appellant.	B227426 (Los Angeles County Super. Ct. No. BA356121)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne G. Edgerton, Judge. Affirmed.

Ava R. Stralla, under appointment of the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Ramon Alaniz appeals from his convictions for assault on a peace officer and resisting arrest, contending no evidence supported the finding that the peace officers in question were acting within the scope of their duties when he assaulted them and resisted arrest, and the trial court permitted an expert witness to give an improper opinion. We affirm.

BACKGROUND

On May 3, 2009, Los Angeles Police Department Officers Greg Ibanez and Jake Brodsky responded to a dispatch reporting that numerous men and women were fighting at 326 North Avenue 66 in Los Angeles. When they arrived at the address, the officers saw defendant Ramon Alaniz in the front yard, with broken glass and empty beer bottles strewn about. When asked if everything was all right, defendant, who appeared very agitated, said, "Fuck you. You have the wrong address. Get away from here." When the officers attempted to question him further, he walked into the house and slammed the door.

The officers heard the sound of things being thrown in the house, shouting, and the sound of someone attempting to calm defendant. It appeared to them that a fight was going on inside. They knocked on the door. Defendant's mother answered the door, appearing frightened. When asked if anybody was hurt inside, she said she did not know, but that defendant had been "acting crazy" for about an hour and a half. She asked the officers to come in and try to calm him down.

Once the officers were inside the house, defendant went into a hallway and shut the door behind him, yelling at the officers, "Do not come in. Get out of here." To his mother, he said, "Don't let them in. Don't let them in." The officers asked defendant's mother if there was anything wrong with defendant and whether he was taking any medication. She responded that she did not know what was wrong with him but he was not on medication. She also told the officers that her other son was somewhere in the house, pointing to the area where defendant had gone. When asked if there were weapons in the house, she only shrugged. As this conversation went on, the officers heard the sound of yelling and items being thrown behind the closed door.

The officers entered the house further and saw defendant's father sitting on a couch in the living room. He told them to control defendant, as he was sick and tired of putting up with him. The officers instructed defendant's parents to remain in the living room while they attempted to talk to appellant through the closed door. Access to the door was partially blocked by items piled up on both sides, creating only about a 30-inch open space.

The officers told defendant through the door that they were not there to arrest him, they merely wanted to talk to him and find out if anyone was hurt. Defendant responded by telling them to get out of the house. He said the last time he had contact with the police, someone had put a chip in his head, and it was not going to happen again, and "they" had taken his daughter and given her a forced hysterectomy. He became more agitated and more profane, and was ultimately unintelligible.

When Officer Ibanez opened the door, Officer Brodsky could see defendant, but the right half of his body was obscured by the door jamb. The officers asked him to turn around and put his hands behind his back, but he refused, his face and muscles tensing as he continued to shout at the officers. Defendant raised his hands in a fighting position and said, "You want me, come get me." He then lunged forward. Brodsky fired a taser, knocking defendant backwards, but when the officers approached, defendant got up while reaching for an 18-inch machete.

Defendant swung the machete at Officer Ibanez three times. Officer Brodsky, blocked by Ibanez, could do nothing. Ibanez backed away until he came up against a wall, then shot defendant.

Defendant was arrested, handcuffed, searched, and transported to the hospital. The search revealed that defendant had two knives in addition to the machete.

Defendant was convicted by a jury of two counts of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c))[1] and two counts of resisting a peace officer. (§ 148, subd. (a)(1)). He was sentenced to a total term of five years and four

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[1] Undesignated statutory references will be to the Penal Code.

months in prison and awarded 601 days of presentence custody credits, including 72 days good conduct credits.

DISCUSSION

On appeal, defendant contends the officers used excessive force against him. Because an essential element of both offenses of which he was convicted—assault on a peace officer and resisting arrest—is that at the time of the offense the officer must have been engaged in the performance of his duties, and because use of excessive force is not within the legal scope of an officer's duty, the evidence was insufficient to establish guilt. Defendant also contends the trial court erred in permitting an expert witness to give an opinion as to guilt.

A. Sufficiency of the Evidence

Section 245, subdivision (c) makes it unlawful to assault a peace officer with a deadly weapon when the officer is "engaged in the performance of his or her duties." Section 148, subdivision (a)(1), makes it unlawful to resist an officer "in the discharge or attempt to discharge any duty of his or her office." "An essential element of both offenses is the officer at the time of the arrest must be engaged in the performance of his duties." (*People v. White* (1980) 101 Cal.App.3d 161, 166.) If the arrest is unlawful, a defendant can be convicted only of a lesser included assault offense, i.e., section 245, subdivision (a)(1) (assault with a deadly weapon on a person other than a police officer in the performance of his duties), and cannot be convicted of resisting arrest. (*People v. Curtis* (1969) 70 Cal.2d 347, 354-356, 357, fn. 9.)

"[I]t is a public offense for a peace officer to use unreasonable and excessive force in effecting an arrest [citation]. Therefore, a person who uses reasonable force to protect himself or others against the use of unreasonable excessive force in making an arrest is not guilty of any crime [citation]." (*People v. Soto* (1969) 276 Cal.App.2d 81, 85.) Subdivision (c) of section 245 and subdivision (a)(1) of section 148 thus have no application when the arresting officer unlawfully employs or threatens deadly force. (See *People v. Curtis*, *supra*, 70 Cal.2d at p. 357, fn. 9.)

In short, to convict defendant of the charged crimes the jury was required to find the officers used only reasonable force when arresting him.

Defendant contends the evidence was insufficient to show the officers used reasonable force. Specifically, he suggests the officers should not have used a taser on him, but should instead have retreated and waited for backup.

We review a claim of "insufficient evidence by examining the entire record in the light most favorable to the judgment below. [Citation.] We review to determine if substantial evidence exists for a reasonable trier of fact to find the counts against the [defendant] true beyond a reasonable doubt. [Citation.] Substantial evidence must be reasonable, credible, and of solid value. [Citation.] We also presume the existence of every fact the [jury] could reasonably deduce from the evidence . . . ." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.)

At trial, the officers testified defendant's mother had told them defendant's brother was somewhere in the house, waving while she did so toward the area into which defendant had retreated. She appeared frightened, had only shrugged when asked whether there were weapons in the house, and had invited the officers into the house and asked them to calm her son. Defendant's father also asked the officers to deal with defendant.

Los Angeles County Sheriff's Deputy Cory Silverman of the Sheriff's Academy's Field Operations Training Unit testified that under circumstances similar to those encountered by the officers, retreat is not an option first because the officers have a duty to ensure the safety of other people in the house, and second because retreat could have been hazardous, given defendant's level of agitation, the narrowness of the hallway, and the clutter. Further, the officers testified that they had no room to swing their batons effectively and that use of pepper spray would have been problematic because it is effective only 80 percent of the time and often does not work on mentally disturbed individuals. Also, given the confines of the hallway, the officers would themselves have been affected by the spray.

This evidence amply supported the jury's conclusion that the officer's use of a taser was reasonable.

B. Admission of the Expert's Testimony

During direct examination of Deputy Silverman, the prosecution's expert witness, the prosecutor posed a hypothetical situation similar to the facts of the present case and asked Silverman to opine whether in that situation the use of a taser would be reasonable. Silverman testified that it would be. Defendant contends the prosecutor's hypothetical strayed so far into the facts of the case that Silverman's opinion pertained specifically to defendant's guilt. We disagree.

During examination of Deputy Silverman, the prosecutor stated, "[J]ust so the jury has all this in mind, I'd like to just pose a series of facts that I'd like the deputy to assume before I start asking him opinion questions." In response to defense counsel's objection to the prosecutor's use of the word "facts," the trial court instructed the jury that the expert could express an opinion only as to hypothetical facts. The prosecutor then posed a thinly veiled hypothetical situation very close to the facts of the present case. In doing so, he twice referred to the hypothetical subject as the "defendant," upon which the court interjected, "We're treating all this as a hypothetical, correct?" The prosecutor answered, "Yes."

Further on, the prosecutor said, "Now, since you've reviewed the facts in this case—" upon which defense counsel again objected. The court interjected again, "You need to frame it as a hypothetical." The prosecutor said, "That's fine." He then posed further hypothetical situations similar to the facts of the present case.

The court ultimately instructed the jury with CALCRIM No. 332, which provides in pertinent part, "A witness was allowed to testify as an expert and to give an opinion. You must consider the opinion, but you are not required to accept it as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. . . . You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable,

unreasonable, or unsupported by the evidence. [¶] An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

"A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant. [Citations.] . . . [T]he reason for employing this rule is not because guilt is the 'ultimate issue of fact' to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. [Citation.] Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.)

"[A]n expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 [hypothetical questions based on facts of case permissible and expert can be asked if actions are gang-related activity done for benefit of the gang].) But the expert cannot exceed the permissible scope of expert testimony simply because he or she is responding to a hypothetical question.

Even if there had been an objection, the testimony would have been admissible. Deputy Silverman was asked to opine on the use of a taser under circumstances similar to those of the present case. Although the prosecutor twice made improper reference to defendant when posing the question, the court interceded both times, reminding the jury that the situation to which Silverman's opinion pertained was hypothetical. The hypothetical did not impermissibly elicit Silverman's opinion of defendant's guilt.

Moreover, we assume the jury followed the trial court's instruction to give proper weight to Silverman's opinion. (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73-74.)

C. Sentencing Credits

Defendant contends he was entitled to 242 days of conduct credit pursuant to section 4019 rather than the 72 days he was awarded pursuant to section 2933.1. The augmented record reflects that the trial court modified the judgment on May 27, 2011 to grant defendant 242 days conduct credit. The issue is therefore moot.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.