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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. CHARLES LARRY WILSON, JR., Defendant and Appellant.	B267061 (Los Angeles County Super. Ct. No. YA092427)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Reversed.

Jamie Lee Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Charles Larry Wilson, Jr. appeals from a judgment of conviction entered after a jury found him guilty on two counts of resisting an executive officer (Pen. Code, § 69).[1] The trial court found true the allegations defendant suffered a prior serious or violent felony conviction (§§ 667, subds. (b)-(i), 1170.12) and served five prior prison terms (§ 667.5, subd. (b)). It sentenced Wilson to five years and four months in state prison on the convictions plus an additional five years for the five prior prison terms.

On appeal, Wilson claims instructional error and that there is insufficient evidence to support two of the prior prison term enhancements. We agree that the omission of an instruction on a lesser included offense was erroneous and the error was prejudicial, so we reverse both convictions. The sentencing issue is therefore moot.

FACTS

A. *Prosecution*

At about 11:10 p.m. on May 14, 2015, Los Angeles County Sheriff's Deputies Branden Williams and Alfred Lio were on patrol near Western Avenue and Imperial Highway, a high crime area. They saw a car driving at a high rate of speed with its headlights off, and they pulled the car over.

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

Deputy Williams approached the driver, who said he was on parole with search conditions. Deputy Williams had him get out of the car, patted him down for weapons, and placed him in the back seat of the patrol car prior to conducting a search of the car.

Deputy Lio approached Wilson, who was in the passenger seat, and had him get out of the car. Wilson was wearing a bulky jacket and baggy pants. The deputies escorted him back to the patrol car, where Deputy Lio used his left hand to hold Wilson's hands behind his back and used his right hand to conduct a pat-down search. Deputy Williams asked Wilson his name, how he knew the driver, and where the two were coming from.

Deputy Lio felt an object in Wilson's pocket or waistband and paused. Wilson "immediately and violently pulled away from Deputy Lio, turned to his left, struck Deputy Lio in the chest with his left elbow," and attempted to run. The deputies tried to grab Wilson's arms, and he began swinging his arms violently, trying to keep the deputies from grabbing him. The deputies told him to stop fighting and put his hands behind his back, but he did not comply. All three fell to the sidewalk, where Wilson lay face down, with his hands under his body. The deputies tried to pull his hands out from underneath his body and instructed him to stop fighting and give them his hands, but he refused to comply. Eventually, Deputy Williams sprayed Wilson in the face with pepper spray, and the deputies were able to pull his hands behind his back and handcuff him.

A subsequent search of Wilson's person yielded a plastic bag containing a single, large piece of rock cocaine, roughly half the size of a baseball.[2]

B. *Defense*

Wilson represented himself and testified in his defense. He admitted he is a long-time drug user who has committed a number of theft-related offenses in the past, but he insisted he has never sold drugs. He claimed he had been clean and sober since 2012 but relapsed in 2015 and was living on the street.

Wilson admitted that he was "drunk" and "high" on the night of the incident, so his recollection of events was somewhat impaired. He testified that during the pat-down search, when Deputy Lio put his hand down Wilson's pants, Wilson was afraid the deputy was going to plant drugs on him, because that had happened to him several times in the past. He ran in order to prevent that from happening. But when he ran, the deputies "jumped on" him and pepper-sprayed him. He testified that the drugs found on him were in fact planted by the deputies.

Wilson adamantly denied that he used any force or violence against the deputies. He denied that his elbow made contact with Deputy Lio's chest. ("No, that didn't happen.") When asked whether he even touched Deputy Lio, he answered, "No, I never

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[2] The jury deadlocked on the charge of possession of cocaine for sale (Health & Saf. Code, § 11351.5). Two jurors believed Wilson was guilty of possession for sale, but the other 10 jurors believed he was guilty of only simple possession. The trial court declared a mistrial as to that count, the prosecution declined to retry it, and the court dismissed it in furtherance of justice pursuant to section 1385.

touched no police. No. The way they killing people out there on the street, why would I assault a officer? He got a gun, a Taser, and – no." When asked whether there "was a struggle" between him and the deputies, he answered, "Me trying to run, that's the struggle." He insisted he "didn't fight with them at all." When asked whether he "voluntarily [gave his] hands to the police," he testified, "I couldn't. They was laying—both of them was laying on my body." He testified that he heard the deputies tell him to "stop fighting," and he told them, "I'm not fighting."

DISCUSSION

Wilson was charged with violating section 69, resisting an executive officer. He contends the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of resisting a public officer in violation of section 148, subdivision (a)(1) (section 148(a)(1)). We agree that omission of the instruction was error, and on this record we cannot conclude that the error was harmless. We accordingly must reverse the convictions.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]" (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) "That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged

offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "[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. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118, fn. omitted.)

There are two ways of committing a violation of section 69. "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.) To violate section 69 in the first way, the defendant need not use force or violence (threats are sufficient), and the defendant's conduct may deter or prevent the officer from performing a duty in the future. (*Id.* at pp. 814, 817.) To violate the statute in the second way, the defendant must use force or violence, and the officer must be engaged in the performance of his or her duties at the time of the offense. (*Id.* at p. 815.)

Under section 148(a)(1), "[e]very person who willfully resists, delays, or obstructs" an officer "in the discharge or attempt to discharge" an official duty commits a violation of the statute. Section 148(a)(1) resembles and differs from each of the ways of violating section 69. For a violation of section 148(a)(1), force or violence is not required (like the first way of violating section 69 but unlike the second way). But a violation of section 148(a)(1) requires that the officer be engaged in the

performance of his or her duties at the time of the offense (like the second way of violating section 69 but unlike the first way).

Thus, anyone who violates section 69 in the second way also necessarily violates section 148(a)(1). (*People v. Smith* (2013) 57 Cal.4th 232, 241.) The only difference is that violating section 69 in the second way requires the use of force or violence, but violating section 148(a)(1) does not. But a person who violates section 69 in the first way by threatening an officer in order to deter the officer from performing a duty *in the future* "does not necessarily willfully resist that officer in the discharge or attempt to discharge his or her duty under section 148(a)(1)." (*Smith*, at p. 241.)

Because one can violate section 69 in the first way without violating section 148(a)(1), "section 148(a)(1) is not a lesser included offense of section 69 based on the statutory elements of each offense." (*People v. Smith*, *supra*, 57 Cal.4th at p. 241.) If the accusatory pleading charges the defendant with violating section 69 in the second way or in both ways, however, then section 148(a)(1) is a necessarily included lesser offense. (*Smith*, at p. 242.)

Here, the information charged the defendant with violating section 69 in both ways, alleging that he "did unlawfully attempt by means of threats and violence to deter and prevent [each deputy], 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." Accordingly, the trial court was required to instruct on the lesser included offense of violating section 148(a)(1) if the record contained substantial evidence that Wilson committed that offense without also

violating section 69. Because Wilson was not charged with deterring future performance of official duties, the issue is whether there was evidence that he resisted, delayed, or obstructed the deputies in the performance of their duties but did so without using force, violence, or threat. (*People v. Smith*, *supra*, 57 Cal.4th at p. 241.)

Wilson's testimony constitutes substantial evidence that he violated section 148(a)(1) without violating section 69. If his account of the incident is true, then he resisted, delayed, or obstructed the deputies in the discharge of their official duties but did so without the use of force, violence, or threat. According to Wilson, he merely ran away from the deputies, did not otherwise struggle with them, and did not strike or even attempt to strike them. There is also no evidence that he threatened either of them. The trial court therefore erred by failing to instruct the jury on the lesser included offense of violating section 148(a)(1).

Wilson argues that the error is of federal constitutional magnitude, and that we must therefore review it for prejudice under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], and reverse unless we determine it was harmless beyond a reasonable doubt. The California Supreme Court has held to the contrary. We review the prejudicial effect of erroneous failure to instruct on a lesser included offense under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 178 ["in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*"].) We accordingly will

reverse only if we determine that it is reasonably probable that Wilson would have obtained a more favorable result had the error not occurred. (*Ibid.*)

On this record, we cannot conclude that the error was harmless. There was nothing inherently implausible or unbelievable about Wilson's version of events. It is reasonably probable that at least one juror would have believed him (except, perhaps, his claim that the rock cocaine had been planted) and voted to convict him under section 148(a)(1) but not section 69 in the absence of the instructional error. (See *People v. Walker* (2015) 237 Cal.App.4th 111, 118.)

Accordingly, we reverse both of Wilson's convictions for violation of section 69. Wilson's argument concerning his sentence is therefore moot.

DISPOSITION

The convictions are reversed, and the matter is remanded for further proceedings consistent with this opinion.

MENETREZ, J.*

We concur:

PERLUSS, P. J. SEGAL, 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.