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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILIP BANUELOS,

Defendant and Appellant.

B268869

(Los Angeles County
Super. Ct. No. VA136897)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Brian F. Gasdia, Judge. Affirmed.

James R. Bostwick, Jr., 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr.
and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Philip Banuelos was convicted of resisting a police officer in the lawful performance of his duty. (Pen. Code, § 148, subd. (a)(1).) He argues there was insufficient evidence that the arresting officer acted in the lawful performance of his duties because he was unlawfully detained at the time of the scuffle. We disagree and affirm.

FACTS

Background

On September 2, 2014, Los Angeles County Sheriff's Department Sergeant Luis Hernandez received a 911 call reporting that a Hispanic man wearing a purple shirt was dealing drugs on Telegraph Road in Whittier. Sergeant Hernandez responded to the call and drove to the location in a patrol vehicle.

When Sergeant Hernandez arrived, he identified Banuelos, who was wearing a purple T-shirt and shorts, and noticed him looking into an ivy bush next to the sidewalk. Sergeant Hernandez got out of the car and started walking over to Banuelos. When Banuelos saw Sergeant Hernandez approaching, he started walking away from the ivy "a little bit faster than normal." Sergeant Hernandez noticed that Banuelos's face was blank and that he was "sweating profusely." Sergeant Hernandez approached Banuelos and asked if he was okay, and Banuelos replied, "Yeah, yeah, I'm okay."

Sergeant Hernandez could not determine whether Banuelos was carrying any weapons because Banuelos's shirt covered his waistband, so Sergeant Hernandez asked Banuelos if he could check him for weapons. Banuelos responded by turning his back to the officer, facing the patrol car, putting his hands behind his back, and replying, "No, No. I'm okay. Go ahead." Sergeant Hernandez asked Banuelos again if he had any weapons, Banuelos said he did not and then started mumbling to himself. Sergeant Hernandez considered this to be an abnormal response and reached for his handcuffs to ensure his safety while he assessed the situation.

When Banuelos noticed Hernandez reach for his handcuffs, Banuelos pulled away. Banuelos made a fist with his right hand and tried to punch Sergeant Hernandez, but he managed to avoid it. Sergeant Hernandez then punched Banuelos in the face. After

recovering his balance, Banuelos began “throwing fists” at Sergeant Hernandez. Sergeant Hernandez radioed for help and repeatedly requested for Banuelos to desist, but Banuelos continued “swinging wildly” and repeatedly hit Sergeant Hernandez in the face and stomach. Sergeant Hernandez then grabbed Banuelos around the neck with his left arm, and the struggle caused both men to fall. Sergeant Hernandez landed on his right shoulder and knee, dislocating his shoulder in the fall. Banuelos landed on top of Sergeant Hernandez and continued hitting him in the midsection until two sheriff’s department volunteers noticed the struggle and intervened. The volunteers restrained Banuelos until another deputy arrived and put Banuelos in handcuffs.

Fire Department paramedics treated Banuelos’s injuries and photographed him with a black eye. Sergeant Hernandez received treatment at a hospital, where medical examiners determined that he suffered severe injuries, including a dislocated right shoulder, a chipped rotator cuff, and a torn labrum.

The Trial

The People filed an information charging Banuelos with resisting an executive officer (count 1; Pen. Code, § 69)¹ and resisting a peace officer (count 2; § 148, subd. (a)(1)). The information also alleged that Banuelos inflicted great bodily injury on the officer within the meaning of section 12022.7, subdivision (a). Banuelos pleaded not guilty and denied the special allegation. The People eventually moved to dismiss count two, and the court granted the motion.

The case was tried to a jury, and the prosecution presented evidence establishing the facts summarized above. The defense presented three witnesses. Ana Baragan testified that she saw Sergeant Hernandez leave his vehicle and yell at Banuelos to stop walking. After Banuelos refused to stop, Baragan claimed that Sergeant Hernandez pushed Banuelos to his knees and attempted to handcuff him. She testified that other officers arrived and took control of the scene, but she never saw Banuelos hit Sergeant Hernandez or any of the officers hit Banuelos.

¹ All further section references are to the Penal Code unless otherwise specified.

David Nova claimed that he was walking to a nearby store when Sergeant Hernandez drove past him. Nova saw Sergeant Hernandez grab Banuelos's arm and tell him to put his hands against the fence. When Sergeant Hernandez reached for Banuelos's hand, Nova claims that Banuelos "jerked back" and seemed frightened. Nova claimed that Sergeant Hernandez then began punching Banuelos repeatedly in the face. Nova testified he thought Sergeant Hernandez threw 20 to 25 punches, but when he gave his initial statement to police, he estimated it was eight to nine punches. Nova testified that Banuelos never punched Sergeant Hernandez back. Nova also testified that Sergeant Hernandez kicked Banuelos repeatedly while he was on the ground until tripping over him and landing on top of him.

Banuelos testified on his own behalf. Banuelos stated that he took prescribed medication for paranoid schizophrenia and bipolar disorder on the morning of the incident. Banuelos remembered Sergeant Hernandez approaching him, asking him if he was okay, and asking if he could search him for weapons. Banuelos testified that Sergeant Hernandez tried to put handcuffs on him and he jerked back, but he did not believe he punched Hernandez in the ensuing "scuffle" even though Sergeant Hernandez punched him. Banuelos claimed that the injuries he sustained did not come from the fracas. Instead, he claimed his medication caused his eye to swell and a rash caused the broken skin on his knees.

A jury found Banuelos not guilty of resisting an executive officer (count 1; § 69), but convicted him for the lesser offense of resisting a peace officer (§ 148, subd. (a)(1)). The trial court suspended imposition sentence and placed Banuelos on 24 months summary probation. The trial court imposed various fines and fees, and awarded Banuelos three days of presentence custody credit.

Banuelos timely appealed.

DISCUSSION

Banuelos contends the evidence is insufficient to show that Sergeant Hernandez acted in the lawful performance of his duties because his detention was unlawful. We disagree.

When an appellant challenges the sufficiency of evidence supporting a jury's verdict, the reviewing court examines whether there was substantial evidence, considered as a whole, to permit a reasonable trier of fact to find the defendant guilty of the charged crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; see also *People v. Smith* (2014) 60 Cal.4th 603, 617; *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The reviewing court's standard for determining what is "substantial evidence" is whether the evidence is "credible and of solid value." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Even one witness's testimony can be sufficient evidence to sustain a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181, citing *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

The reviewing court's responsibility is to presume every fact that the trier of fact could reasonably have deduced from the evidence in support of the judgment. (*People v. Hajek* (2014) 58 Cal.4th 1144, 1197; see also *People v. Lewis* (1990) 50 Cal.3d 262, 277; *People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Staten* (2000) 24 Cal.4th 434, 460.) A reviewing court will not reverse a judgment for insufficient evidence unless "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Hughes* (2002) 27 Cal.4th 287, 370.)

Resisting a peace officer requires proof that "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." [Citation.] (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894-895.)

The question here is whether the encounter with Banuelos was constitutional, thus demonstrating Sergeant Hernandez was lawfully performing his duties when Banuelos resisted him. We find he was. To explain, we start with a brief discussion of the law regarding consensual encounters and temporary detentions.

If an encounter is consensual, it requires no justification. (*People v. Brown* (2015) 61 Cal.4th 968, 974 (*Brown*).) A consensual encounter occurs when an officer approaches a person in a public place, asks the person if they are willing to answer questions, and the person voluntarily answers. (*Ibid.*)

A detention, however, does require justification to be lawful. “[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]” (*People v. Loewen* (1983) 35 Cal.3d 117, 123, quoting *In re Tony C.* (1978) 21 Cal.3d 888, 893.) “[A]n officer is not lawfully performing [his] duties when [h]e detains an individual without reasonable suspicion or arrests an individual without probable cause.” [Citation.]” (*In re Chase C.* (2015) 243 Cal.App.4th 107, 114, italics omitted.)

In this case, Sergeant Hernandez initially approached Banuelos and asked him if he was “okay.” This question Banuelos voluntarily answered. This rings of a consensual encounter. However, that consensual encounter grew into a detention. At a minimum, the detention occurred when Sergeant Hernandez attempted to handcuff Banuelos to pat him down for weapons. But even if a detention occurred earlier, as Banuelos contends, there was justification for it. The circumstances here include a report of the sale of drugs, the Sergeant’s quick response to the location, the fact that Banuelos matched the description, and that his actions appeared unusual to a trained law enforcement officer.

Specifically, Sergeant Hernandez had twenty-nine years of experience as a peace officer. When he arrived at the scene to investigate the report that a Hispanic man was selling drugs in the area, he saw Banuelos, who matched the description. The *Brown* court, relying on the United States Supreme Court decision in *Navarette v. California* (2014) ___ U.S. ___ [188 L.Ed 2d 680; 134 S.Ct. 1683, 1687] found a 911 call sufficiently reliable to support a detention based on the caller’s personal knowledge which lends significant support to the tip’s reliability, a contemporaneous report, and the use of the 911 emergency system. (*Brown, supra*, 61 Cal.4th at pp. 983-984.) Here Sergeant Hernandez reported to the location of a report of drug sales as soon as the dispatch was sent out. Sergeant Hernandez indicated he was responding to a “call,” the inference being it was made to police via 911 or directly to the police station. These facts indicated activity relating to the crime of drug sales were taking place.

Turning to the question of whether Sergeant Hernandez had a reasonable suspicion that Banuelos was involved in drug sales, we find this question also answered in the affirmative. When Sergeant Hernandez first saw Banuelos he was looking in a bush, a place where drugs could have been hidden. As Sergeant Hernandez approached Banuelos, he quickly began walking away. When Sergeant Hernandez asked Banuelos if he was “okay,” he had a blank stare on his face, and was sweating profusely. He testified that Banuelos “wasn’t acting normal” and that he “didn’t know if he had some type of medical condition that was [causing] his blank stare and his sweating profusely or [if he was] under the influence of drugs.” Sergeant Hernandez testified that, in his experience with narcotics investigations, drug users often carry weapons. When he noticed that Banuelos’s shirt covered the waistband of his shorts, he “wanted to make sure for [his] safety [that he] wasn’t putting [himself] in that position where [Banuelos] might use a weapon on [him,]” so he searched Banuelos, after he consented to being patted down. Sergeant Hernandez reached for his handcuffs after Banuelos began mumbling because he felt that Banuelos was either “all drugged up or . . . something [was] wrong with” him. It was at this point that the fight took place. Given these circumstances, we find there

was sufficient evidence that Sergeant Hernandez was lawfully performing his duties at the time of the fight, as the detention was wholly appropriate.

To rebut this conclusion, Banuelos contends he was detained when Sergeant Hernandez began questioning him on the street, not when Sergeant Hernandez reached for his handcuffs. Banuelos contends that no reasonable person would believe that he had a choice to leave when an officer pulls up to his location in a patrol car, approaches him in uniform, and begins questioning him. His claim that he was detained at the initial encounter with Sergeant Hernandez is not persuasive. The United States Supreme Court has held “a seizure does not occur simply because a police officer approaches an individual and asks a few questions.” (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) These types of “consensual encounters present no constitutional concerns and do not require justification.” (*Brown, supra*, 61 Cal.4th at p. 974.) Even Banuelos concedes that Sergeant Hernandez’s questions “had nothing to do with a criminal investigation.” Further, Sergeant Hernandez did not flash the patrol car lights at Banuelos, did not demand Banuelos’s compliance with any request, nor did he draw his gun or otherwise threaten force if Banuelos refused. Hernandez merely asked Banuelos if he was okay and whether he could check him for weapons. This does not rise to the level of a detention.

Banuelos next asserts that the detention was unlawful because Sergeant Hernandez lacked the “specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that [he] may be involved in criminal activity.” Banuelos argues that since the officer did not testify to seeing another individual interacting with him or that he saw anything in Banuelos’ possession that resembled drugs, Sergeant Hernandez did not have “reasonable suspicion” to assume he was involved in drug activity. Our analysis above demonstrates this argument does not hold water. Although Banuelos rightly concedes that an anonymous tip can be used as evidence to form the basis for a reasonable suspicion, he contends that it should not be considered dispositive. He directs us to *People v. Dolly* (2007) 40 Cal.4th 458, 464 (*Dolly*), which established that police can use anonymous tips if they can verify important information in it. However, Banuelos argues that the *Dolly* case indicates the

police may only use tips if the alleged crime is an immediate threat to public safety and the tipster has provided a “firsthand contemporaneous description of the crime as well as an accurate and complete description of the perpetrator and his location.” (*Id.* at pp. 468-469.) Banuelos argues that the tipster in this case gave only a vague description to the police and that selling drugs is not an immediate threat to public safety. We are not persuaded.

Contrary to Banuelos’ contention, the present case is analogous to *Dolly*. In *Dolly*, an anonymous informant called 911 to report that a light-skinned African American male had just threatened to shoot him. The informant indicated that the defendant could be found in a black Nissan Maxima at a particular location. (*Dolly, supra*, at p. 462.) When the police responded to the call, they found the situation as the caller described and arrested a man who matched a description of the perpetrator. (*Ibid.*) The *Dolly* court found use of the tip was appropriate. Similarly, here, the tipster reported that a male Hispanic was dealing drugs and informed police the person who allegedly sold the drugs could be found wearing a purple shirt at a particular location. The description in the *Dolly* case is no more descriptive than the one in this case, and Banuelos’ argument that the description of him is too vague to form a basis for reasonable suspicion is not persuasive.

In addition, Sergeant Hernandez did not arrest Banuelos based on an anonymous tip call alone. Instead, Sergeant Hernandez detained Banuelos also because of the fact that Banuelos matched the description the tipster provided, acted suspicious around the ivy, walked away quickly upon the sergeant’s approach, had a blank stare and was profusely sweating.

Finally, Banuelos argues that the testimony from his defense witnesses should be evidence that his detention was unlawful and overturn his conviction. Banuelos’s witnesses accuse Sergeant Hernandez of initiating the struggle with Banuelos by grabbing his arm and ordering him to put his hands against the fence. In essence, Banuelos is asking us to impermissibly reweigh the evidence. We declined the invitation. ““[I]t is the exclusive province of the trial judge or *jury* to determine the credibility of a

witness and the truth of falsity of the facts on which that determination depends.”””
(*People v. White, supra*, 230 Cal.App.4th at p. 315, fn. 13, italics added.) The jury,
weighing the evidence, found Hernandez’s testimony to be more credible than that of
Banuelos and his witnesses. This is a determination we cannot overrule; we “““[can]not
substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]”
[Citation.]”” (*Ibid.*)

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.