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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARY O'CALLAGHAN,

Defendant and Appellant.

B265928

(Los Angeles County  
Super. Ct. No. BA417095)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed.

Michele A. Douglass, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, and Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Mary O’Callaghan (defendant) of assault by a public officer for her use of excessive force in arresting a person who died minutes later. On appeal, defendant argues that (1) her trial counsel was constitutionally ineffective for not moving to exclude evidence of the arrestee’s subsequent death, (2) there was insufficient evidence of *excessive* force, and (3) the trial court abused its discretion in treating this wobbler offense as a felony rather than a misdemeanor. We conclude that these arguments are without merit, and affirm.

## **FACTS AND PROCEDURAL BACKGROUND**

### **I. Facts**

In July 2012, defendant was an officer of the Los Angeles Police Department. In the early morning hours of July 22, she and her partner were dispatched to assist with the arrest and transport of Alesia Thomas (Thomas). Thomas was six feet one inch tall, weighed 228 pounds, was exceptionally strong, and appeared to be under the influence of a central nervous system stimulant due to her enlarged pupils, heavy breathing, fidgeting, sweating and somewhat incoherent demeanor.

Three other officers and one reserve officer were at the scene when defendant and her partner arrived. By that time, Thomas was already in handcuffs, with her hands behind her back. Defendant and her partner supplied one of the other officers with a “hobble restraint device” to bind Thomas’s ankles together; although Thomas ignored that officer’s directive to keep her feet still, he managed to apply the device.

The officers then attempted to place Thomas in the back of a patrol car. Three of the officers carried Thomas to the rear passenger side of the car. Defendant went around to the driver’s side to lift and pull Thomas into the back seat; this did not work. Defendant had instructed Thomas to “push [her]self in,” but she

did not; instead, Thomas remarked, “I can’t move,” and “I can’t breathe.”

Another officer then took defendant’s place and was able to pull Thomas onto the rear seat of the patrol car. However, after the officers closed the rear passenger side door, Thomas kicked against the door with her feet, and was able to push her head and upper body out of the still-open driver’s side door.

Defendant then opened the passenger side door to readjust the hobble device, warning Thomas, “Knock it off, or I’ll fucking cunt punt your ass.” When Thomas tried to sit up and push her feet out of the open passenger’s side door, defendant told her to “put your fucking legs in” and then shoved her by the neck back into the car. Defendant further warned, “You better put your legs in or you’re going to get fucking crushed.” When Thomas did not comply, stating, “I can’t,” defendant braced herself with one hand on the open door frame and the other on the roof of the patrol car, and proceeded to kick Thomas three times in her lower abdomen, saying “Get the fuck in there” as she did so. Immediately thereafter, another officer whistled and pointed to the video camera that was recording what was happening inside the patrol car.

Defendant then again directed Thomas to lift her feet back, but she did not, repeating, “I can’t.” Then another officer attempted to pull Thomas into the back seat from the driver’s seat. As he did so, defendant kicked or shoved her foot three or four times into Thomas’s genital area and upper legs. Defendant told Thomas to scoot back, but Thomas again said, “I can’t” and sat up. When she did, defendant kicked her repeatedly in the genital area. Thomas cried out in pain. At that point, another officer told defendant, “stop,” “knock it off,” or “that’s enough.”

By that time, the officers were able to close both car doors with Thomas in the back seat. Defendant then remarked, “What is she on?”

Within minutes, however, two of the other officers noticed that Thomas did not appear to be breathing. An ambulance was summoned, and Thomas was transported to a hospital. She was pronounced dead within 10 minutes after the ambulance left the scene. The coroner fixed her cause of death as “acute cocaine intoxication with agitated behavior need[ing] restraint,” but was unable to state definitively “how much her struggle with law enforcement officers by resisting arrest contributed to her demise.” The People’s medical expert, an emergency room physician, noted that Thomas’s behavior and statements in the patrol car were consistent with cardiac impairment, but could also be viewed, to the “untrained eye,” as defiance or a failure to comply.

## **II. Procedural Background**

The People charged defendant with a single count of felony assault by a public officer (Pen. Code, § 149).<sup>1</sup>

Defendant went to trial. The parties stipulated to Thomas’s cause of death. Defendant called an expert witness to opine that her use of force was not excessive, and thus that she did not commit an unlawful assault. The jury returned a guilty verdict.

The trial court imposed an upper term sentence of three years of jail, requiring her to serve 16 months with the remaining 20 months to be suspended so she could be placed on mandatory supervision. In imposing this sentence, the court rejected defendant’s request to have the offense reduced to a misdemeanor.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

Defendant filed this timely appeal.

## **DISCUSSION**

### **I. Ineffective Assistance of Counsel**

Defendant argues that her trial counsel was constitutionally ineffective because he did not move to exclude all evidence of Thomas's death and medical distress.

To establish that trial counsel was constitutionally ineffective, a defendant must show that (1) counsel's performance was "deficient" because it ""fell below an objective standard of reasonableness . . . under prevailing professional norms""; and (2) but for that deficient performance, there is a "reasonable probability . . . the outcome of the proceeding would have been different." (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.)

Defendant has not demonstrated that her counsel's performance was deficient for two reasons. First, counsel does not act unreasonably by foregoing meritless objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834.) Defendant asserts that her counsel acted unreasonably by not objecting to evidence of Thomas's medical distress and her subsequent death as irrelevant and more prejudicial than probative under Evidence Code section 352. But those objections would likely have been overruled.

Evidence is relevant as long as it has "*any* tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) To convict an officer of felony assault, the People must prove that the assault was "without lawful necessity." (§ 149.) Because police officers "may use reasonable force to effect [an] arrest, to prevent escape or to overcome resistance" (§ 835a; *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272-1273), an assault is "without lawful

necessity” only if the officer uses unreasonable force. The reasonableness of force is “objective[ly] . . . viewed from the vantage of a reasonable officer on the scene,” (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343 (*Martinez*)) and turns on “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [she] is actively resisting arrest or attempting to evade arrest by flight” (*Graham v. Connor* (1989) 490 U.S. 386, 396 (*Graham*); see also *Allgoewer v. City of Tracy* (2012) 207 Cal.App.4th 755, 762). Whether Thomas was actually in medical distress at the time defendant was using force is relevant to show whether Thomas was capable of posing a threat to the officers or was actively resisting arrest. It is especially relevant where, as here, Thomas’s appearance and statements—such as “I can’t breathe,” and “I can’t move”—would have put a reasonable officer on the scene on notice that Thomas was suffering from some medical condition affecting her ability to pose a threat or to resist arrest; indeed, defendant herself asked, “What is she on?” Thomas’s death just minutes later is relevant to show the severity of her medical condition in that time frame, and thus her inability to resist and the lack of necessity of any great force to overcome that resistance. Even if “[s]tanding alone[,] the[se] inference[s] may have been weak, . . . that does not make the evidence irrelevant.” (*People v. Farnam* (2002) 28 Cal.4th 107, 156-157, quoting *People v. Freeman* (1994) 8 Cal.4th 450, 491.)

The probative value of Thomas’s medical condition and subsequent death was also not substantially outweighed by the danger of undue prejudice. (Evid. Code, § 352.) The chief prejudice to arise from admitting evidence of Thomas’s death is the danger that the jury might hold defendant responsible for it. However, the trial was conducted in such a way to eliminate that

danger: Defendant was not charged with any homicide offense, the parties stipulated that the cause of death came primarily from “acute cocaine intoxication,” and the court repeatedly instructed the jury that defendant was *not* responsible for Thomas’s death and that they must not punish her for the death or otherwise let their sympathy affect their deliberations.

Second, courts accord “great deference to counsel’s tactical decisions,” especially on direct appeal where “the record on appeal may not explain why counsel chose to act as he or she did.” In such situations, we may conclude there was ineffective assistance “only if there is affirmative evidence that counsel had “no rational tactical purpose” for an action or omission.” (*Mickel, supra*, 2 Cal.5th at p. 198, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 674 and *People v. Lucas* (1995) 12 Cal.4th 415, 437.) In this case, defense counsel’s decision not to object to the evidence of Thomas’s death enabled him to elicit evidence that the true cause of death was the “acute cocaine intoxication” as well as evidence that Thomas’s “agitated behavior needed restraint,” which supported the defense that defendant’s use of force was reasonably necessary.

Defendant resists this conclusion, arguing that because the reasonableness of force cannot be adjudged “with the 20/20 vision of hindsight” (*Graham, supra*, 490 U.S. at p. 396), it is categorically inappropriate to look at what happened *after* the use of force is over. However, it is well settled that the cause of a person’s subsequent death can be relevant to show the amount of force that was used prior to that death. (*People v. Cannady* (1972) 8 Cal.3d 379, 389, citing *People v. Berry* (1955) 44 Cal.2d 426, 431.) Along the same lines, Thomas’s death was relevant, as explained above, to show whether she was, in the time immediately prior to her death, capable of posing an immediate

threat or actively resisting arrest, which is relevant to show the necessity of defendant's use of force.

## **II. Sufficiency of the Evidence**

Defendant next argues that there was insufficient evidence that she used excessive force. In evaluating the sufficiency of the evidence, we ask whether there was enough evidence of solid value for a rational jury to find the defendant guilty beyond a reasonable doubt. (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 9.) In so doing, we view the record as a whole in the light most favorable to the verdict, drawing all reasonable inferences and resolving all credibility disputes in favor of that verdict. (*People v. Prunty* (2015) 62 Cal.4th 59, 89.)

As described above, whether an officer's use of force is reasonable is an "objective" inquiry examined from "the vantage of a reasonable officer on the scene," (*Martinez, supra*, 47 Cal.App.4th at p. 343) and looks to "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [she] is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra*, 490 U.S. at p. 396.) In this case, Thomas was being arrested for abandoning her two young children at a police station, being under the influence of narcotics and resisting police questioning and detention. These are not crimes of violence. Thomas also did not pose an immediate threat to defendant's safety. By the time defendant arrived, Thomas was already handcuffed and her ankles were hobbled soon thereafter.

Admittedly, the question was whether Thomas was "actively resisting arrest." On the one hand, Thomas was not complying with the officers' requests as they were trying to get her into the back seat of the patrol car. On the other hand, Thomas's resistance was mostly passive, as she peppered her



resistance with her explanations that she “can’t move” and “can’t breathe.” The record contains evidence that defendant was acting out of frustration because defendant groaned when Thomas refused to cooperate, and repeatedly cursed at her and made comments about Thomas’s weight by calling her a “fucking lard ass” and likening their attempts to get Thomas into the patrol car to “roping cattle.” There is also evidence that other officers believed that defendant’s conduct went too far. Because we may not reweigh the evidence in assessing its sufficiency (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890), and because there is substantial evidence to support the jury’s finding of the use of excessive force, its verdict must stand.

Defendant raises several arguments in response. She argues that police are entitled to use reasonable force (a point on which there is no dispute), and cites cases holding that an officer used excessive force when using far greater use of force than was present here. (See, e.g., *People v. Giles* (1945) 70 Cal.App.2d Supp. 872, 875 [choking]; *People v. Dukes* (1928) 90 Cal.App. 657, 659 [dragging person out of car, punching them twice, throwing them on the ground].) However, these cases do not purport to set the minimum for what constitutes excessive force, so they do not aid defendant. Defendant also argues that it is inappropriate to evaluate her use of force in hindsight. As explained above, doing so would be incorrect, but Thomas’s medical condition can lawfully be considered as bearing on defendant’s need to resort to the level of force she used. Defendant points to the testimony of her expert witness, who opined that defendant’s use of force was reasonable under the circumstances. However, juries are “free to reject even the uncontradicted testimony of an expert witness.” (*People v. Engstrom* (2011) 201 Cal.App.4th 174, 187.) Defendant lastly argues that the length of the jury’s deliberations indicates that this was a close case. Although that consideration can be

relevant (e.g., *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452), it does not necessitate reversal of a conviction that is otherwise validly supported by substantial evidence (*In re Sassounian* (1995) 9 Cal.4th 535, 548-549, fn. 10).

### **III. Sentencing**

The crime of assault by a public officer is a “wobbler” offense that can be sentenced either as a felony or a misdemeanor. (§ 149.) For such a crime, the trial court has the “broad” discretion to declare the crime a misdemeanor, as pertinent here, by imposing a probationary or non-felony county jail sentence. (§ 17, subd. (b)(1); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) A trial court also has “broad discretion” whether to grant probation, although a court must consider a number of factors relating to the crime and to the defendant in exercising this discretion. (*People v. Welch* (1993) 5 Cal.4th 228, 233; Cal. Rules of Court, rule 4.414 [enumerating factors].) We accordingly review these decisions for an abuse of discretion. (*Alvarez*, at pp. 977-978.)

The trial court did not abuse its discretion in denying defendant probation and thereby allowing her offense to remain a felony. In assessing whether defendant was suitable for probation, the court enumerated the factors favoring probation (namely, her prior military service, lack of criminal record, and the fact that her felony conviction already hurts her standing in the community) and the factors weighing against probation (namely, her lack of remorse, that Thomas was “particularly vulnerable” due to medical distress, and that defendant “failed to accurately detect [Thomas’s] emergency medical needs”). “On balance,” the court concluded, the “considerations against probation along with the primary objectives of punishing the

defendant and deterring others from criminal conduct militate against a grant of probation.”

Defendant asserts that the trial court’s thoughtful and thorough analysis nevertheless amounts to an abuse of discretion for three reasons. First, she argues that the trial court’s reliance on her lack of remorse amounts to punishment for her exercise of her right to go to trial. Not only has this argument been rejected time and again (e.g., *People v. Leung* (1992) 5 Cal.App.4th 482, 507-508), but it is also inconsistent with the California Rules of Court that specifically list this consideration as relevant to the decision whether to grant or deny probation (Cal. Rules of Court, rule 4.414(b)(7); see generally Cal. Rules of Court, rule 4.423(b)(3) [acceptance of responsibility by entering plea is a valid mitigating circumstance in sentencing]).

Second, defendant contends that the use of force in this case was not excessive (according to her expert witness) or at least just barely excessive, and thus warranted a sentence of probation. The jury’s verdict forecloses the former part of this argument, and the standard of review we must apply—abuse of discretion—forecloses the latter part.

Lastly, defendant argues that the trial court was biased, and that its sentence was a product of improper motives such as seeing defendant as person “who could do no right,” sympathy for Thomas’s family, and a desire to pander to the “rolling cameras.” There is no evidence in the record to support any of these assertions. To the contrary, the transcript of the sentencing hearing reflects a trial court that carefully and judiciously weighed the pros and cons of a very difficult sentencing decision; the court’s reasoning process, which is set forth in full on the record, is the very antithesis of a rush to judgment or judicial bias. Contrary to what defendant implies, her disagreement with the trial court’s decision does not mean the court was biased.

(*People v. Guerra* (2006) 37 Cal4th 1067, 1112 [“a trial court’s numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias”].)

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.  
HOFFSTADT

We concur:

\_\_\_\_\_, Acting P. J.  
CHAVEZ

\_\_\_\_\_, J.\*  
GOODMAN

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