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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANGEL NUNEZ, Defendant and Appellant.	B260034 (Los Angeles County Super. Ct. No. TA133490)

APPEAL from the judgment of the Superior Court of Los Angeles, Allen J. Webster, Judge. Affirmed.

Hancock and Spears, Alan E. Spears, 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., Supervising Deputy Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Jose Angel Nunez guilty of resisting an executive officer (Pen. Code, § 69, subd. (a), [count 1]).[1] In a bifurcated proceeding, the trial court found true the allegation that defendant had suffered a prior conviction for a serious and/or violent felony under the three strikes law.[2] (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d).) The court sentenced defendant to four years in state prison, consisting of the middle term of two years for the offense of resisting an executive officer (§ 69), doubled pursuant to the three strikes law.

Defendant contends the trial court erred by failing to sua sponte instruct the jury with CALCRIM No. 2651 (attempting to deter an executive officer) and overruling his objection to bracketed language in CALCRIM Nos. 2652 (resisting an executive officer) and 2670 (lawful performance: peace officer), and that the prosecutor committed misconduct in closing argument. He also requests that we independently review the in camera hearing of the personnel records of Los Angeles County Sheriff's Deputy Nicholas Vallozzi pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

We affirm the judgment.

FACTS

Prosecution Evidence

On May 25, 2014, Deputy Vallozzi received a call to respond to a laundry room of an apartment building in Lynnwood. Upon entry to the laundry room, Deputy Vallozzi

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[1] All future references are to the Penal Code, unless stated otherwise.

[2] The court dismissed the allegation that defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b).

saw feet protruding from behind a stacked washer and dryer combination. Deputy Vallozzi identified himself as a law enforcement officer and drew his firearm. Defendant was sitting down behind the washer and dryer. Defendant was sweating profusely and making quick jerky movements with his head and eyes. Deputy Vallozzi believed defendant was under the influence of something and ordered defendant to put his hands up. Defendant stood up and initially complied. When Deputy Vallozzi ordered defendant to turn around, defendant threw a glass pipe at the deputy, which hit his chest and shattered, causing some of the glass pieces to bounce onto the deputy's face. As Deputy Vallozzi holstered his gun, defendant punched him in the chest. Deputy Vallozzi moved towards defendant, who hit him in the chest a second time. Deputy Vallozzi grabbed defendant's wrists, pushed him into the wall, and told him to lie down. Defendant refused. Deputy Vallozzi radioed he was involved in a fight. Defendant continued to move away from Deputy Vallozzi, violently moving from side to side. The two scuffled as they hit the washer and dryer and moved around the laundry room. Deputy Vallozzi held onto defendant's wrists, but at one point defendant grabbed the deputy's belt. Throughout the struggle, defendant ignored Deputy Vallozzi's repeated commands to lie on the ground and stop fighting.

Deputy Carolina Roman arrived and observed that Deputy Vallozzi did not have control of defendant. She asked Deputy Vallozzi if she should use her Taser. Deputy Vallozzi told her that defendant had grabbed his belt and that she should tase him. Deputy Roman warned defendant and then tased him after he failed to comply. Defendant immediately lost his grip on Deputy Vallozzi and fell to the ground, lying face down. Deputy Roman observed defendant moving his legs as if he were trying to get up. Deputy Vallozzi waited a few seconds to give defendant an opportunity to comply, and then instructed defendant to put his hands behind his back. Defendant refused to do so and kept his hands underneath his body. Deputy Vallozzi punched defendant twice in the face. Defendant said, "Okay. You got me," and put his hands behind his back. The deputies handcuffed defendant and escorted him to a patrol car.

Defense Evidence

Timothy Williams, Jr. testified as a police "use of force" expert. Based on his review of the police reports, he concluded that the force Deputy Roman applied with the Taser was reasonable. However, he concluded that it was objectively unreasonable and excessive for Deputy Vallozzi to punch defendant in the face.

DISCUSSION

Attempting to Deter Instruction

Defendant contends that the trial court erred by failing to sua sponte instruct the jury with CALCRIM No. 2651, the pattern instruction applicable to a charge of attempting to deter an executive officer, thereby allowing the jury to find him guilty without properly considering whether he had the requisite specific intent. His contention lacks merit.

Relevant Law

Section 69[3] "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." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814 (*Manuel G.*).) The two means of violating section 69 have been referred to as "attempting

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[3] Section 69 provides that: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, *or* who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment [in the state prison], or in a county jail not exceeding one year, or by both such fine and imprisonment." (Italics added.)

to deter" and "actually resisting an officer," and have different elements. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530 (*Lopez*).)

Attempting to deter may involve either an officer's immediate or future performance of a duty. (*Manual G., supra*, 16 Cal.4th at pp. 814, 817.) "The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made." (*Id.* at p. 815.) Attempting to deter requires a specific intent to interfere with the executive officer's performance of duties. (*People v. Rasmussen* (2010) 189 Cal.App.4th 1411, 1418-1420 (*Rasmussen*).)

To commit the crime of actually resisting an executive officer under section 69, the resistance must include force or violence, and the officer must be lawfully engaged in the performance of duty at the time of the defendant's resistance. (*Manuel G., supra*, 16 Cal.4th at p. 816.) The actually resisting prong of section 69 is a general intent offense. (*Rasmussen, supra*, 189 Cal.App.4th at pp. 1418-1420.)

Proceedings

The information followed the typical practice of charging a single count of violating section 69 with the statutory language, which encompasses both prongs of the statute. At trial, the prosecutor pursued conviction on the actually resisting prong. In her opening statement, the prosecutor stated that "[t]he evidence will show . . . [defendant] resisted an executive officer in the performance of his duties." She did not mention the attempting to deter prong of section 69. Throughout closing argument and rebuttal the prosecutor consistently argued for liability on a resisting theory. She began her closing argument by stating, "Penal Code section 69 is my burden to prove that the defendant resisted the executive officer in the performance of his duties." She proceeded to go through the three elements of resisting an executive officer, without mentioning attempting to deter or its elements. The prosecutor ended her closing statement by

requesting that the jury: "Use [its] common sense and find the defendant guilty of resisting an executive officer." Defense counsel also set forth the elements for resisting an executive officer, and discussed the facts with respect to those elements without mentioning attempting to deter. The prosecutor only discussed resisting an executive officer in rebuttal.

The jury was instructed with CALCRIM No. 2652, the pattern instruction for resisting an executive officer in the performance of that officer's duty, which requires that: (1) the defendant unlawfully used force or violence to resist an officer, (2) when the defendant acted, the officer was performing his or her lawful duty, and (3) when the defendant acted, he or she knew the executive officer was performing his or her duty. The jury was also instructed on the lesser included offense of resisting, obstructing, or delaying a peace officer in violation of section 148 (CALCRIM No. 2656), and on general intent (CALCRIM No. 250). The court did not instruct the jury regarding attempting to deter an executive officer, as described in CALCRIM No. 2651. Trial counsel did not request that the jury be instructed on attempting to deter an executive officer as defined in CALCRIM No. 2651.

In the course of deliberations, the jury submitted the following question to the court: "Please clarify the legal difference between delaying an arrest and resisting an arrest. What constitutes delaying an arrest?" The court referred the jury to CALCRIM Nos. 2652 (resisting an executive officer), 2656 (resisting a peace officer), and 2670 (lawful performance: peace officer).

The jury returned a verdict of guilty. The verdict form stated that the jury found defendant "guilty of the crime of RESISTING AN EXECUTIVE OFFICER, in violation of Penal Code 69, a Felony, as charged in Count 1 of the Information, who did unlawfully attempt by means of threats and violence to deter and prevent VALLOZZI, who was then and there an executive officer, from performing a duty imposed on such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his duty . . . ." Defense counsel did not object to the verdict form, and defendant does not challenge its propriety on appeal.

Discussion

Defendant contends that the court had a sua sponte duty to instruct the jury with CALCRIM No. 2651, because the evidence could support an attempting to deter theory of liability, and because the information charged defendant under both prongs of the statute.[4] He points to the jury's question regarding the difference between the terms "delaying" and "resisting" as evidence that it considered both prongs of section 69 as different possible bases for the conviction. He asserts that the trial court's failure to instruct on the element requiring specific intent allowed the jury to find him guilty of attempting to deter an officer on the basis of general intent, in the absence of proper instructions.

Although he acknowledges defense counsel did not object to the trial court's omission of CALCRIM No. 2651, defendant argues he did not forfeit the issue on appeal because it is preserved under section 1259, which permits an appellate court to review any claim of instructional error that affects a defendant's substantial rights, regardless of whether the defendant objected to the alleged error in the trial court. (§ 1259 ["The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Alternatively, he contends the issue is preserved because trial counsel was ineffective for failing to request that CALCRIM No. 2651 be given. Setting aside our doubts that the issue was preserved, we find no merit to the substance of defendant's contention.

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[4] CALCRIM No. 2651 states that the defendant is charged with trying to prevent or deter an executive officer from performing that officer's duty, and that the elements of the offense are: (1) the defendant willfully and unlawfully used violence or a threat of violence to try to prevent or deter an executive officer from performing the officer's lawful duty; and (2) when the defendant acted, he or she intended to prevent or deter the executive officer from performing the officer's lawful duty.

The prosecutor was not obligated to try the case on the alternate statutory theories set forth in the information as defendant suggests. The prosecution has discretion to seek conviction on whatever theory of the case it deems appropriate. (*People v. Peyton* (2014) 229 Cal.App.4th 1063, 1075) ["'whether or not to prosecute, and what charges to file . . . generally rests entirely in [the prosecutor's] discretion'"].) The two means of violating section 69 have different elements, including different mental state requirements. (*Rasmussen*, *supra*, 189 Cal.App.4th at pp. 1418-1420.) "When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way. (*In re Bushman* (1970) 1 Cal.3d 767, 775, disapproved on other grounds by *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.)" (*Lopez*, *supra*, 129 Cal.App.4th at pp. 1532-1533.) Here, the prosecutor did not seek conviction on the basis of an attempting to deter theory, as was clear from her opening statement, closing argument, and requested instructions. It was within her discretion to proceed solely on the theory that defendant actually resisted the deputy.

Because the trial court had no duty to instruct on attempting to deter, defendant's substantial rights were not affected, and defense counsel did not render ineffective assistance (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel"]).

There is no merit to defendant's argument that the jury's question indicated it was attempting to distinguish between "*deterring*" and "resisting" an executive officer, when it expressed confusion about the difference between "*delaying*" and "resisting." The jury was not required to determine whether defendant "delayed" an executive officer in violation of section 69. The issue of delaying a peace officer arose only in connection with the lesser included offense of section 148. We presume that it understood its charge. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212 ["We presume jurors 'generally understand and follow instructions'"].) The jury's question related to the precise definitions of specific terms. There is no reasonable likelihood that it questioned the meaning of "delaying" if it was confused as to the meaning of "deterring," particularly in

light of the fact that it had to determine whether defendant "delayed" a peace officer in violation of the lesser included offense. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237 (*Campos*) [no instructional error where there was no reasonable likelihood that jurors misunderstood or misapplied the instruction given].)

Lawful Duties of Peace Officer Instruction

Defendant contends that bracketed language in CALCRIM Nos. 2652 (resisting an executive officer in violation of section 69) and 2656 (resisting, obstructing, or delaying a peace officer in violation of section 148) contains an incomplete and inaccurate statement of the law, requiring reversal. We disagree.

Relevant Law

We review de novo the question of whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).) "An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*Campos*, *supra*, 156 Cal.App.4th at p. 1237.) "'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ramos*, *supra*, at p. 1088.)

Proceedings

The prosecutor submitted a packet of proposed instructions including CALCRIM No. 2652, which sets forth the elements of resisting an executive officer. The instruction contains the bracketed language: "The duties of (a/an) <*insert title of officer specified in* Pen. Code, § 830 et seq.> include <*insert job duties*>." (CALCRIM No. 2652.) With the prosecutor's requested insertion, the instruction read: "The duties of a Los Angeles County Deputy Sheriff include but are not limited to investigating crimes, and arresting and detaining people who have committed crimes."

In a hearing held outside the presence of the jury, defense counsel requested that the court also give CALCRIM No. 2656, which describes the elements of the lesser included offense of delaying a peace officer in violation of section 148, subdivision (a). The court granted defense counsel's request. It then discussed with counsel the bracketed language in CALCRIM No. 2656, which was identical to the bracketed language of CALCRIM No. 2652:

"[Prosecutor]: . . . I think we need the duties of a peace officer include.

"The Court: Yeah. I agree.

"[Prosecutor]: Arresting and detaining people committing crimes.

"[Defense counsel]: Arresting and detaining people that's period.

"[Prosecutor]: Investigating crimes that is why they're there.

"[Defense counsel]: Investigating. I don't -- you see my problem. They're investigating alleged crimes.

"The Court: Let's see -- hold on.

"[Defense counsel]: Suspected of criminal, actually, I think I would be okay with.

"The Court: So how [are] we going to fill in the blank for the duties of a peace officer include.

"[Prosecutor]: I did it for [section] 69 already. I put --

"The Court: What jury instruction is that?

"[Prosecutor]: [CALCRIM No.] 2652.

"[Defense counsel]: I thought that was the stock language. I didn't realize that was an insert. I would object to how it's written.

"The Court: Hold on one second.

"[Prosecutor]: This is our [*sic*] and they're supposed to write it.

"[Defense counsel]: I didn't realize. That's terribly prejudicial and improper.

"The Court: There is no jury instruction you could ever read, [defense counsel], that is not prejudicial to the defendant.

"[Defense counsel]: Correct. But this one says what is written I thought this was the stock instruction. I apologize. As it's written now is arresting and detaining people who have committed crimes.

"The Court: Hold on. Where are we?

"[Defense counsel]: I'm looking at the People's proposed 2652.

* * *

"The Court: . . . So what are you objecting to in 2652?

"[Defense counsel]: Have committed crimes. My client has committed a crime or multiple crimes.

"The Court: Where are you looking?

"[Defense counsel]: I'm looking at the language that was inserted by the People. Begins with the duties.

"[Prosecutor]: Second to last paragraph.

"[Defense counsel]: Second to last paragraph.

"The Court: Okay. I would agree.

"[Prosecutor]: So how should we change it?

"The Court: Maybe suspected of committing crimes.

"[Defense counsel]: That's fine.

"[Prosecutor:] They're not allowed to arrest people that committed crimes?

"[Defense counsel]: They are.

"The Court: The duties include but are not limited to investigating crimes and arresting and detaining.

"[Defense counsel]: If someone has committed a crime they're also suspected of committing a crime.

"The Court: Let me back up. It seems their duties do include arresting people who might have committed crimes.

"[Defense counsel]: Right.

"The Court: They [*sic*] way I look at this it doesn't basically say this man committed a crime, but their duties include arresting people, what is the objection?

"[Defense counsel]: There is [*sic*] two. One, it implies that (a) he's committed a crime.

"Two, it implies that he's committed multiple crimes. Three, that --

"The Court: How do you read that?

"[Defense counsel]: What?

"The Court: How do you read all that?

"[Defense counsel]: Arresting people who have committed crimes plural.

"The Court: Isn't that what police officers do?

"[Defense counsel]: No. [Police] officers investigate criminal activities and at times they arrest people who are then subsequently charged and it's proven to have been a crime.

"The Court: No. You don't need all that for a jury instruction.

"[Defense counsel]: Right. I don't. All I would ask is -- arrest isn't an issue here. I would ask that they include but are not limited to investigating criminal activity and detaining and/or arresting people who are suspected to have been involved in criminal activity.

"[Prosecutor]: . . . I think it's a little bit ridiculous to say that officers don't arrest people.

"The Court: Anything further?

"[Defense counsel]: No, your honor.

"The Court: I'm going to deny your request. I am going to let this stand. I don't think this is -- I think this is what police officers do arrest people, who have committed

crimes.

"[Defense counsel]: Okay.

"The Court: I mean that is all they do.

"[Defense counsel]: I made my objection.

"The Court: Okay. And your objection is duly noted. Highly respected but denied."

In both CALCRIM Nos. 2652 and 2656, the jury was instructed: "The duties of a Los Angeles County Deputy Sheriff include but are not limited to investigating crimes, and arresting and detaining people who have committed crimes."

Discussion

Defendant contends that the bracketed language in CALCRIM Nos. 2652 and 2656 contains an incomplete and inaccurate statement of the deputy's duties, and implies that the deputy was engaged in investigating, detaining, and arresting him for committing one or more crimes. He asserts that the jury's note, which asked the court to differentiate between "delaying an arrest" and "resisting an arrest" showed that it believed defendant was being arrested for a crime. He argues that the instructions do not accurately reflect what the deputy was doing at the time he encountered defendant. We conclude that the instructions accurately reflect the law, and that it is highly unlikely that the jury misconstrued or misapplied them.

Investigating crimes and detaining and arresting people who have committed crimes are clearly included in a deputy's duties.[5] As given, the instructions specified that the duties of the deputy were not confined to these specific duties. It would be difficult, if not impossible, to list every duty that a deputy performs in the course of his or her employment. The instructions acknowledged this limitation and properly listed two of

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[5] The instructions state that "investigating crimes" is one of the duties of a deputy, not "investigating *people* who commit crimes," as defendant suggests.

the primary duties of a deputy, both of which were applicable in this case. First, Deputy Vallozzi was investigating in response to a radio call. Second, once he was attacked by defendant, he was in the process of making an arrest of a person who committed a crime. The instruction correctly stated the law and accurately described the duties of the deputy in this case.

We see no likelihood that the jury misapplied or misconstrued the words of the instructions. The relevant language in the instructions specifically describes a deputy's duties. It was the jury's duty to determine whether defendant committed the crime of resisting an officer. The jury was instructed to presume defendant's innocence. Nothing in the instruction directed the jury to speculate whether defendant committed a crime other than that charged in this case. Nor did the jury's question indicate that it believed defendant was guilty of an earlier crime. The question amounted to nothing more than the jury's understanding of the difference in wording between the elements of the charged and lesser included offenses of delaying arrest and resisting arrest. This question raises no suggestion that the jurors believed defendant was guilty of the crime for which he was being arrested or any other crime. Defendant's proposed instructions also included arrest among an officer's lawful duties. If presented with the language trial counsel proposed, the jury's question would have undoubtedly been the same.

Finally, the purported instructional error was harmless under any standard of review. Whether Deputy Vallozzi was arresting defendant for a crime or crimes that he committed was not at issue. The issue was whether Deputy Vallozzi used unreasonable or excessive force in performing his duties, rendering his actions unlawful. The jury was instructed with CALCRIM No. 2670 (lawful performance) regarding unreasonable or excessive use of force, which, if found, negate an element of the offense regardless of whether defendant is guilty of the crime for which he was detained or arrested. This was the only basis upon which the jury could have found that the deputy's performance was

unlawful.[6] Even if the jury believed that defendant committed one or more crimes, their duty was to determine whether Deputy Vallozzi used unreasonable or excessive force. The jury expressly found that he did not.

Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct by referring to the glass pipe he threw at the deputy as a "crack pipe or whatever it was" in rebuttal. Defendant alternately argues that the cumulative effect of the alleged instructional errors and the prosecutor's statement prejudiced him. We conclude that there was no misconduct, and that even assuming error, defendant was not prejudiced. Because defendant has failed to establish error on the basis of any of his claims, his cumulative error argument necessarily fails as well. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382 (*Bradford*) [no cumulative error if the challenged rulings were not erroneous].)

Relevant Law

"'"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct . . . Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] . . . When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" [Citation.]' [Citation.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335,

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[6] CALCIM No. 2670 contains bracketed language instructing on unlawful detention and arrest. This language was not included in the instructions to the jury. The lawfulness of the detention or arrest were not argued to the jury, and no facts were presented to indicate that the detention or arrest was unlawful.

427 (*Bryant*).)[7] We view the challenged instructions, "'[i]n the context of the whole argument and the instructions' [citation] . . . 'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citations.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

"Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. [Citation.]" (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564.) "Under traditional application of this state's harmless error rule, the test of prejudice is whether it is 'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant. [Citations.]' [Citation.]" (*People v. Bolton* (1979) 23 Cal.3d 208, 214 (*Bolton*).)

Proceedings

In a hearing prior to the admission of evidence, defense counsel moved to exclude any testimony of Deputy Vallozzi that defendant was under the influence of methamphetamine as irrelevant and prejudicial. The prosecutor responded: "I believe the officer, when he got there, saw the defendant, who was sweating profusely . . . acting in a jerky motion, shaking his head from left to right. So based on that the officer drew his gun and told him to come out." The court ruled, "Well, it seems to the court on the issue of [Evidence Code section] 402 I think the officer is entitled to testify as to his observations. But he cannot make any sort of diagnosis or express an opinion that it's methamphetamine as opposed to cocaine or pcp or medical marijuana."

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[7] Defendant does not argue that the prosecutor's remarks constituted misconduct under federal standards, but even if he did, the result would be the same.

Later in the hearing, defense counsel asked the prosecutor whether she planned to amend the complaint to include an under the influence charge. The following discussion took place:

"[Prosecutor]: There is no intention to ever amend it because we don't have any toxicology. And it was simply the observations. But I do intend to bring in the fact that he was under the influence of something based on the officer's observation, his training and experience. I'm not going to go into meth or pcp like the court said because we don't know.

"The Court: He can give testimony as to his observations but he can't express an opinion as to what the substance might have been.

"[Prosecutor]: He can say something. He thought he was under the influence of something.

"The Court: That's fine.

"[Defense Counsel]: I'm fine with that."

In closing argument, defense counsel highlighted that Deputy Vallozzi testified inconsistently as to whether the glass pipe that defendant threw at him burst on his chest or broke after it hit the radio or badge he was wearing on his chest. The prosecutor responded to the argument in rebuttal: "[Deputy Vallozzi] couldn't tell you [where the pipe hit] for certain because at the same time he's reholstering his weapon he got a crack pipe or whatever it was thrown at him. He's being punched by the defendant. So how is that inconsistent. Both cracked in his upper chest and all those items he described are on his upper chest. So they're grasping at straws." Defense counsel objected to the reference to the glass pipe as a crack pipe on the basis of "the intent of counsel. That's improper."

The trial court immediately admonished the jury: "-- argument of counsel is not evidence. We've been sitting here for two or three days listening to the testimony. You have your notes."

The prosecutor then resumed argument, stating: "I'm sorry. It's a glass pipe. I don't know what he was doing in the laundry room of a place he didn't belong to with a glass pipe on the floor but that is what was thrown at Deputy Vallozi [*sic*]."

Discussion

Defendant contends that the prosecutor's statements were "clearly misconduct" because she made herself her own witness by testifying to facts outside the record, and violated the trial court's ruling that "the prosecution was not to introduce evidence of narcotics use."

The prosecutor's equivocal description of the glass pipe as a "crack pipe or whatever it was" falls short of constituting prosecutorial misconduct. The prosecutor was identifying the pipe. There was no insinuation the prosecutor knew something the jurors did not. Her words indicated that she did not know for certain what the glass pipe was, or what it was used for.

In arguing the prosecutor violated a ruling of the court, defendant mischaracterizes the trial court's ruling. The court prohibited Deputy Vallozzi from offering an opinion on which specific drug he thought defendant was using. Defendant never raised the issue of the glass pipe, or its possible uses. The prosecutor briefly identified the pipe and said that defendant had thrown it at the deputy; she did not state that defendant was using the pipe to ingest drugs or that it contained drugs. The trial court's ruling was not violated.

Ultimately, the test of whether the prosecutor has committed misconduct is """whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.""" (*Bryant, supra,* 60 Cal.4th at p. 427.) Here, it is highly unlikely that the jury was influenced by the prosecutor's description of the glass pipe. The prosecutor made a single, brief statement in the course of explaining why the deputy would not know exactly where the pipe had hit him. She did not argue that defendant was under the influence of crack cocaine. Her description of the pipe was not definitive. The court promptly and explicitly instructed the jury not to

view statements of counsel as evidence, admonishing jurors that they had heard the testimony and should rely on their own notes. The prosecutor immediately corrected her statement. "It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' [Citation.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.) In light of the trivial nature of the remark, the swift admonition, and thorough instruction, there is no reason to believe this was such an exceptional case. "[W]e presume that the jury would have followed the court's direction to disregard the offending action." (*People v. Osband* (1996) 13 Cal.4th 622, 718.)

Finally, it is not "'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant. [Citations.]'" (*Bolton*, *supra*, 23 Cal.3d at p. 214.) The evidence overwhelmingly suggested that defendant resisted Deputy Vallozzi. The deputy testified that defendant threw the glass pipe at him sending pieces of glass onto his face, punched the deputy twice, struggled with him vigorously, grabbed the deputy's belt, and kept his hands underneath his body to avoid being handcuffed even after he was tased. The deputy radioed for help because defendant was fighting with him. Deputy Roman responded to his request for backup. She testified that when she entered the laundry room, Deputy Vallozzi did not have control of defendant. She testified that after she tased defendant he kept his hands beneath him although he had been ordered to put them behind his back, and continued to move his legs as if he was trying to get away. The shattered glass pipe, which was admitted into evidence, corroborated Deputy Vallozzi's account of the events. The only conduct identified by the defense expert as unreasonable force occurred when defendant was struck in the face at the end of the incident, well after defendant had attacked the deputy and resisted to the point he had to be tased into submission. At that point, however, defendant had already engaged in all the conduct alleged to constitute resisting, and could not have been reacting to the deputy's use of force. Even absent the prosecutor's remarks, it is not reasonably probable that the jury would have rendered a verdict more favorable to defendant.

Because defendant has failed to establish error on the basis of any of his claims, his cumulative error argument also fails. (*Bradford*, *supra*, 15 Cal.4th at p. 1382.)

Pitchess Motion

Defendant requests that this court independently review the record of the in camera hearing held on his motion filed under *Pitchess*, *supra*, 11 Cal.3d 531. Having reviewed the record and conducted an independent review of the proceedings, we hold the trial court did not abuse its discretion in ruling on the *Pitchess* motion.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

BAKER, J.