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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. KATIE LYNN HAWN, Defendant and Appellant.	2d Crim. No. B281423 (Super. Ct. No. 16F-02391) (San Luis Obispo County)

Katie Lynn Hawn was convicted by jury of battery with injury on a police officer (Pen. Code, § 243, subd. (c)(2))[1] and two counts of resisting an executive officer (§ 69). The trial court granted probation with 150 days county jail. She appeals, contending that the trial court committed instructional error. We affirm.

Facts

On March 12, 2016, Cason Cargill, a guide at Hearst Castle, saw appellant standing in a restricted area before the

[1] All statutory references are to the Penal Code.

evening tour. Appellant was carrying a shoulder bag with oranges. Cargill identified himself and asked why she was there. Appellant said she was a docent and had volunteered to do the evening Living History tour. Concerned that appellant was in a restricted area and not wearing an ID badge, Cargill called dispatch.

Appellant smelled of alcohol, was extremely agitated, and brushed past Cargill to a flight of stairs that led to the bus pick up area. Appellant told Cargill to "fuck [him]self" and that she was "just going to leave." Holland Skye Keith, who worked security, arrived to assist Cargill and radioed for a "badge" (i.e., a law enforcement officer). Appellant said "'I don't have to show you anything. Who the fuck are you?'"

Ron DeLuca, a State Parks firefighter/security officer, responded to the call and tried to calm appellant down. Appellant was upset and hyper-ventilating. DeLuca told her to take deep breaths and relax. Appellant was carrying a metal cup and two shoulder bags that contained oranges. DeLuca knew that docents were not permitted in the area and no one was allowed to pick fruit at a state park facility.

Guide Supervisor Susan Mowry and State Parks Ranger Jared Meichtry also responded to the call. Appellant said "'I just want to be left alone,'" and walked up some steps and stumbled. Meichtry asked if she had been drinking. Appellant responded, "'Fuck you. I have not been drinking.'" "'Have you been drinking?'" Appellant sat down, frantically looked in her bags, and ordered DeLuca and Meichtry to "'Get your crotches out of my face.'" Appellant tried to stand up and fell. Appellant denied that she had been doing drugs and crawled up the stairs, kicking at DeLuca and Meichtry. Meichtry advised appellant that she

was under arrest and escorted her down the stairs, holding her left arm and DeLuca holding her right arm. Appellant struggled and tried to headbutt Meichtry twice.

. After Meichtry handcuffed appellant, he realized that appellant still had a shoulder bag slung across her chest. Meichtry unlocked the left handcuff while DeLuca attempted to lift the shoulder bag over appellant's head. As soon as DeLuca touched the bag strap, appellant screamed "'Rape'" and "'Get the fuck off my handbag. You're not taking my handbag.'"

DeLuca said "'We got to get this bag off of you'" and touched the bag again. Appellant screamed "'You're choking me. You're choking me. You're not taking my bag.'" She then tried to kick Meichtry. As Meichtry tried to relock the handcuffs, appellant leaned forward and bit DeLuca on the arm through three layers of clothing. DeLuca did not pull away because if he did, appellant "would have fallen and hurt herself, so I endured the bite." Appellant continued to bite down a good 30 seconds.

Appellant was transported to Meichtry's office in a four-door truck that had a wire mesh and Plexiglas barrier. During the drive, appellant slipped her feet through the handcuffs and removed the seatbelt. Two deputies and a second park ranger helped Meichtry handcuff appellant and remove the shoulder bag. The officers found a bottle of Vodka that was three-quarters full in the bag. Appellant blurted out, "'All I did was bite a guy for grabbing me.'" Appellant waived her *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) and was asked if she bit a police officer. Appellant replied, "'Yes, because I had to bite into a man, a stranger wearing blue.'"

Because appellant bit DeLuca and drew blood, appellant was transported to Sierra Vista Hospital to be tested for

communicable diseases. On the drive over, appellant urinated in Meichtry's truck, kicked the side rear window, and banged her head against the Plexiglas divider. At the hospital, appellant screamed, lunged, and snapped at Meichtry, the nurses, and the doctor.

Self-Defense

Appellant contends the trial court erred in not sua sponte instructing on self-defense. Appellant claimed that she "instinctively and protectively" bit DeLuca when he tried to lift the shoulder bag over her head. The trial court declined to instruct on self-defense because "[t]here's no evidence of it." Appellant's trial counsel responded:

"Well, the argument that the defense would make is that it was a struggle that she was defending herself in, so . . .

"THE COURT: That's not self-defense.

"MR. ALLEN [defense counsel]: Right. Granted --

"THE COURT: . . . [I]f the actions by the peace officers were wrongful, th[en] she has the right to resist, but that's not self defense.

"MR. ALLEN: Right."

"A trial court's duty to instruct, sua sponte, on particular defenses arises '"only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 424.) Appellant's trial counsel conceded that self-defense did not apply, and for good reason. The evidence was uncontroverted that appellant went on an unprovoked rampage and tried to kick and headbutt the officers before biting DeLuca. DeLuca and Meichtry responded in a non-

violent fashion and took pains to ensure that appellant did not fall and hurt herself. "It is not error to refuse a request for instructions on self-defense when there is no evidence from which it can be inferred that the defendant feared great bodily harm or death at the hands of the victim . . . . [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 718, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 (*Breverman*).)

In *People v. White* (1980) 101 Cal.App.3d 161 (*White*), defendant assaulted multiple arresting officers, struggled with the officers, and bit an officer after he administered a carotid restraint (a "sleeper" hold) on him. (*Id.* at p. 165.) The jury convicted defendant of assault with a deadly weapon on a peace officer and resisting arrest. On appeal, defendant argued that the jury was correctly instructed on an officer's right to use reasonable force to effect an arrest, but the instructions failed to explain the relationship between excessive force in making the arrest and defendant's right of self-defense. (*Id.* at p. 166.) The Court of Appeal concluded that the instructions were incomplete and did not address the issue of defendant's right to defend herself against an officer's use of excessive force. (*Id.* at p. 168.)

Unlike *White*, there is no evidence that the officers used excessive force to make the arrest or that appellant reasonably believed she was in imminent danger of suffering bodily injury. In *White*, the trial court was aware of defendant's reliance on self-defense as it related to the use of excessive force. (*White*, *supra*, 101 Cal.App.3d at p. 168.) Here, defense counsel disavowed any claim of self-defense. Instead, counsel argued that appellant did not know DeLuca was an officer because he was wearing his badge under his sweatshirt. *White* is distinguishable because the trial court gave former CALJIC No. 9.55 on the officer's use of

reasonable force in making an arrest and defendant's duty to submit. (*Id.* at p. 166 & fn. 2.) The instruction was incomplete. "Once the use of excessive force by the officers became an issue, it was necessary to explain further that where an officer uses unreasonable or excessive force in making an arrest, the person arrested has the right to use reasonable force to protect himself." (*Id.* at p. 168.)

Here the instructions fully instructed on how and when an arrestee may use reasonable force to protect himself or herself. The trial court gave CALJIC No. 9.26 which stated: "[I]t is the duty of the person [being arrested] to refrain from using force or any weapon to resist the arrest or detention unless unreasonable or excessive force is being used to make the arrest or detention. [¶] However, if you find that the peace officer used unreasonable or excessive force in making the arrest or detention, the person being arrested or detained has no duty to refrain from using reasonable force to defend herself against the use of excessive force." In a second instruction, the trial court instructed "[i]f an officer does use unreasonable or excessive force . . . , the person being arrested [or] detained may lawfully use reasonable force to protect himself." (CALJIC No. 9.28.)

Any failure to instruct on self-defense is harmless where "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . .' [Citation.]" (*People v. Wright* (2006) 40 Cal.4th 81, 98.) Appellant tried to kick and headbutt the officers before biting DeLuca on the arm. Where the

defendant is lawfully arrested and resists arrest, "'[t]he subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. . . .' [Citations.]" (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899; see § 835a [officer may use reasonable force to effect the arrest, to prevent escape, or to overcome resistance].) California has eliminated the common-law defense of resistance to unlawful arrest and made it a crime to forcefully resist arrest regardless of whether the arrest is lawful or unlawful. (See § 834a [duty to refrain from resisting arrest]; *People v. Curtis* (1969) 70 Cal.2d 347, 357; *People v. Cannedy* (1969) 270 Cal.App.2d 669, 675.) The trial court correctly found that resisting arrest is not self-defense.

Instruction on Resisting an Officer

Violation of section 69 (counts 2 and 3) can be committed two different ways: attempting to *deter* a peace officer by threats or violence, or *resisting* an officer by the use of force or violence. (*People v. Smith* (2013) 57 Cal.4th 232, 240-241 (*Smith*).) Verbal resistance is not enough because section 69 requires that the resistance be accomplished by means of force or violence. (*Id.* at p. 241.)

Appellant argues that the jury was correctly instructed that attempting to deter a peace officer requires a finding that appellant used threats or violence, but complains that the force or violence element was redacted from the "resisting an officer" part of the instruction. The trial court gave a modified CALJIC No. 7.50 instruction[2] which stated: "Every person who willfully

[2] The prosecution requested that the word "unlawfully" in CALJIC No. 7.50 be redacted because "it might be construed as

attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, *or who knowingly resists*, *by the use of force or violence*, an executive officer in the performance of his or her duty, is guilty of a violation of Penal Code section 69, a crime. [¶] [¶] In order to prove this crime, each of the following elements must be proved: [¶] [1. A person willfully resisted or attempted to deter or prevent an executive officer from performing any duty imposed upon that officer by law; and [¶] 3. The attempt was accomplished *by means of any threat or violence*.]" (Italics added.)

The CALJIC No. 7.50 instruction, as modified, adequately informed the jury that the resistance prohibited by section 69 must be accomplished by appellant's use of force or violence. (See *People v. Holt* (1997) 15 Cal.4th 619, 677 [whether instructions are correct and adequate is determined by consideration of the entire charge to the jury].) In evaluating jury instructions, courts "do not engage in a technical parsing of [the] language of the instructions, but instead approach the instructions in the same way that the jury would - with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' [Citation.]" (*Johnson v. Texas* (1993) 509 U.S. 350, 368.)

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being connected to some kind of a self-defense claim, which I don't think is before the court in this case." Defense counsel agreed "there's no evidence of it." The trial court modified CALJIC No. 7.50 to read in pertinent part: "In order to prove this crime, each of the following elements must be proved: [¶] [1. A person willfully resisted or attempted to deter or prevent an executive officer from performing any duty imposed upon that officer by law; and [¶] 3. The attempt was accomplished by means of any threat or violence."

We reject the argument that the prosecution misstated the law on resisting an officer or the jury could have interpreted CALJIC No. 7.50 to mean it could convict based on appellant's verbal abuse of the officers.[3]

Lesser Offense of Resisting Arrest

Appellant argues that the trial court erred in not instructing that resisting arrest (§ 148, subd. (a)(1)) is a lesser included offense to section 69 which prohibits resisting an officer in the performance of his duties by the use of force or violence. (*Smith*, *supra*, 57 Cal.4th at pp. 244-245.) The failure to so instruct is reviewed for harmless error. (*Breverman*, *supra*, 19 Cal.4th at p. 178.) Appellant asserts that resisting arrest as defined by section 148, subdivision (a) is a lesser included offense where the defendant knowingly or willfully resists an officer without using force or violence. (See *Smith*, *supra*, at p. 245.) That, however, "does not end the analysis because a trial court is not required to instruct the jury on a necessarily included lesser offense "'when there is no evidence that the offense was less than that charged.'" [Citation.]" (*Ibid*.)

Appellant kicked at, bit, and tried to headbutt the officers, all acts of force or violence. Appellant "was either guilty or not guilty of resisting the executive officers by the use of force or violence in violation of section 69. There was no evidence that [appellant] committed only the lesser offense of resisting the

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[3] Appellant claims the prosecution told the jury that verbal abuse is an element of the crime. The prosecution argued that the words spoken is evidence of intent to deter. "You look at attempt. How was it accomplished? Was it accomplished by threat? By violence? Please don't leave out the verbal abuse. . . . It counts. It counts as part of the delay."

officers without the use of force or violence in section 148(a)(1). [Citation.] Accordingly, the trial court was not required to instruct the jury on the necessarily included lesser offense of section 148(a)(1)." (*Smith, supra*, 57 Cal.4th at p. 245.) "[I]f appellant resisted the officers at all, [s]he did so forcefully, thereby ensuring that no reasonable jury could have concluded [s]he violated section 148, subdivision (a)(1) but not section 69." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 985.) But for the failure to instruct on section 148, subdivision (a), it is not reasonably probable that appellant would have obtained a more favorable result. (*Breverman*, *supra*, 19 Cal.4th at p. 165.)

Alleged Failure to Instruct on Misdemeanor Assault

Citing *People v. Brown* (2016) 245 Cal.App.4th 140 (*Brown*), appellant contends that the trial court erred in not sua sponte instructing on assault as a lesser included offense to section 69. In *Brown*, defendant was ordered to stop and fled on his bike. The officers tackled defendant, kneed him in the torso, and punched him in the head three times. (*Id.* at p. 147.) Defendant denied swinging at either officer but the officers stated that appellant was combative and swung at them with a clinched fist. (*Id.* at p. 146.) The Court of Appeal held that it was error not to instruct on assault as a lesser included offense because the jury could have concluded that defendant used excessive force or violence to resist in response to the officers' unreasonable force. (*Id.* at p. 155.) "[T]he jury could have, on the one hand, believed Brown's testimony that he did not resist the officers before he fell or was pushed off his bike and was then tackled and slugged by Officer Moody while face-down on the ground, unresisting and ready to surrender - a scenario that would have made the arrest unlawful due to excessive force. The jury could still, on the other

hand, have accepted the officer's testimony that Brown wheeled and repeatedly swung at them, striking both officers. If the jury concluded that Brown's reaction was unreasonable, that would have supported an assault conviction." (*Id.* at pp. 154-155.)

Unlike *Brown*, there is no evidence that the officers used unreasonable or excessive force. As DeLuca reached to take the shoulder bag, appellant screamed "'Rape'" and "'Get the fuck off my handbag. You're not taking my handbag.'" DeLuca said "'We got to get this bag off of you'" and touched the bag again. Appellant screamed "'You're choking me. You're choking me. You're not taking my bag'" and threw a kick at Meichtry. As Meichtry tried to get the handcuffs back on appellant, appellant leaned forward and bit DeLuca.

An instruction on a lesser included offense may not be given where there is no evidence that the offense (i.e., resisting an officer) was less than that charged. (*Brown*, *supra*, 245 Cal.App.4th at pp. 153-154; *People v. Campbell* (2015) 233 Cal.App.4th 148, 162.) The evidence here is overwhelming and clearly shows that appellant resisted the officers by force and violence.

Cumulative Error

Appellant finally argues that the cumulative effect of the alleged errors denied him a fair trial. "We have identified no errors. In the absence of error, there is nothing to cumulate." (*People v. Duff* (2014) 58 Cal.4th 527, 562.)

Disposition

The judgment is affirmed,
NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Hugh F. Mullin, III, Judge

Superior Court County of San Luis Obispo

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