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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD RICKY SALCEDO, Defendant and Appellant.	B235416 (Los Angeles County Super. Ct. No. NA085055)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed in part and reversed in part.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals his convictions for one count of evading an officer (Veh. Code, § 2800.2, subd. (a)), two counts of resisting an officer (Pen. Code, § 69), one count of driving under the influence (Veh. Code, § 23152, subd. (a)), one count of driving with blood alcohol in excess of .08 percent (Veh. Code, § 23152, subd. (b)), with a further finding that defendant's blood alcohol exceeded .15 percent; and two counts (counts 14 and 15) of assault with a deadly weapon on an peace officer (Pen. Code, § 245, subd. (c)). He contends his convictions must be reversed because the trial court orally augmented CALJIC No. 2.90 on reasonable doubt, creating structural error; further, he contends that the trial court failed to instruct on simple assault and that insufficient evidence supports his convictions on those counts. We reverse defendant's convictions for assault with a deadly weapon on a peace office for instructional error and insufficiency of the evidence, and otherwise affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Prosecution Case

On February 7, 2010, at about 5:00 a.m., Long Beach Police Officer Alfredo Chairez was on duty in a marked black and white Ford Crown Victoria police car. The car had the city seal on the door and overhead lights. Officer Chairez had inspected the lights and siren before his shift began, and confirmed that all the lights, siren, and public address system on the vehicle were working. Officer Chairez wore a blue police uniform with "Long Beach Police" patches on both arms, his badge, and a belt.

As Officer Chairez drove north in Long Beach on Atlantic near South Street, he noticed a white Toyota pickup make a right turn from 59th Street to go north on Atlantic, which is two lanes in either direction. When the truck made the turn, it was going "pretty fast," and was not able to safely make the turn, so it turned very wide and ended up in the southbound lane of Atlantic Avenue. There was no traffic at the time, nor were there any pedestrians.

Officer Chairez followed the vehicle to the intersection of Atlantic and Artesia where the light was red for northbound traffic; by this time, he had activated his lights (a

forward facing red light) and siren. He knew they were working because he could hear the siren and see the lights reflected in nearby buildings. At this time, he was near Houghton Park-Jordan High School. The truck continued northbound on Atlantic, and swerved from the number one lane into the number two lane. When the truck stopped for the red light at Artesia, Officer Chairez activated his public address system and told the driver to pull over to the right after the light turned green. At this time, Officer Chairez changed his lights to a different position to get rid of the siren, but he still maintained the forward-facing red light in order to use his public address system instead of the siren. Officer Chairez believed he had the lights on long enough for defendant to see them.

After the light turned green, the truck continued northbound on Atlantic but did not stop. Officer Chairez notified dispatch that he was in pursuit because the driver of the truck was failing to yield to the police car's lights and sirens. The truck continued to swerve from lane to lane, going halfway into the next lane, which is a violation of the Vehicle Code. Although the truck was not swerving like a snake, it could not hold its position. The truck had slowed to about 40 miles an hour.

At this time, another marked police unit responded and both police cars pursued the truck northbound on Atlantic. When the truck got to Imperial, it made a turn to go eastbound on Imperial, and then turned right again and got on the south 710 freeway on-ramp. The truck was going "pretty fast." Once the truck got onto the ramp, the driver lost control of the vehicle and it hit an electrical box on the right side of the ramp. The truck took the electrical box "head-on" and "pretty much destroyed it." The box exploded and there were pieces all over. The truck did not make the turn and ended up on the embankment of the ramp.

Officer Chairez stopped his vehicle and got out and approached the truck. He could not get a good view inside the truck because the windows were tinted and there were some shrubs on the ramp. He positioned himself off to the front side of the truck so he could see the driver through the windshield. Several other officers had arrived. All of the cars except one were black-and-white police cars. Officer Chairez could not recall if

the officers in the unmarked car were in uniform. The windows on the truck were up. Officer Jeremy Reno was next to Officer Chairez, and Officer Chairez looked in the truck from about 20 feet or so, and saw defendant. Defendant's face was bloody. The officers yelled at defendant with commands to exit the vehicle, but defendant did not comply. Defendant was looking straight at Officer Chairez.

The officers were using a "lethal cover," which meant that if the police were going to take someone into custody, certain officers will have the person at gunpoint in case there was a need to use lethal force. The other officers will put handcuffs on the suspect. Officer Chairez and Officer Reno were acting as lethal cover.

Defendant was revving the truck and the tires were spinning. The area was muddy and the truck was not able to move, but was sliding from side to side about four feet in either direction. The truck continued to fishtail in this fashion for several minutes, during which time the officers were attempting to get defendant to exit the vehicle. The truck fishtailed so that the front was facing the officers, but it did not hit any of them. Several other officers approached the truck, walking up to the driver's side window, and ordered defendant out of the vehicle, but he did not comply. They tried to open the door, and told defendant to "[g]et your hands up." Officer Chairez wanted to see defendant's hands to make sure defendant did not have a weapon.

Defendant started punching at the officers through the window with his right hand. One of the officers deployed his taser. Defendant continued to punch at the officers because, to Officer Chairez, the taser did not appear to affect defendant. Officer Chairez ran around to the right side of the truck and was able to open the door and ordered defendant out of the truck, but defendant refused. Officer Chairez wanted defendant out of the truck so he could place defendant in handcuffs. Defendant reached in the back portion of the truck, and Officer Reno deployed his taser. Officers Chairez and Reno grabbed defendant and pulled him out of the truck through the passenger side. During this time, defendant continued to hit at the officers. Defendant said several times, "Fuck you. I'm gonna kill you guys." Defendant pulled himself into a push-up position, and

because Officer Chairez believed defendant was going to fight with him, struck defendant three times with his baton. The baton had no effect on defendant. Defendant rolled over on his left side and began kicking at the officers, and Officer Chairez struck defendant two times on his right forearm with his baton. It took four or five officers to get defendant in handcuffs. They had to force defendant's arms behind his back to handcuff him because he was not complying.

Officer Chairez noticed that defendant's eyes were bloodshot and watery, and defendant smelled of alcohol. Officer Chairez had pursued defendant because he believed defendant was too impaired to be driving a vehicle.

Officer Jeremy Reno, was in uniform and a marked patrol vehicle, had assured himself that the lights on his police car (alternating red and blue with a solid red light on the front of the light bar) were functional. The solid red light is six inches long and slightly less than two inches tall. He was near Houghton Park when he heard what sounded like a vehicle accelerating and revving. Officer Reno heard the sirens of a police vehicle activate and he saw a white Toyota Tacoma pickup truck drive past him going north on Atlantic followed by a marked Long Beach police vehicle with its light and siren activated. It was dark outside and easy to see the lights.

Officer Reno drove out of the park and followed northbound on Atlantic to assist Officer Chairez. The vehicle stopped in the number two lane of northbound Atlantic at Artesia. He heard Officer Chairez on the public address system of his car ordering the vehicle to pull over to the right when the light turned green. Once the light turned green, the vehicle did not pull over and continued northbound on Atlantic. Officer Chairez made a radio call stating he was in pursuit of the vehicle because he believed the driver was impaired. At that time, Officer Reno activated his entire light bar and siren. He continued with Officer Chairez in pursuit of the truck, which was swerving between lanes going approximately 40 to 45 miles per hour. As the vehicle reached Imperial, it turned east on Imperial and then immediately south on the on-ramp for the southbound 710

freeway. The trip from Houghton Park to the freeway on-ramp took about five to seven minutes.

As the truck turned onto the on-ramp, it looked to Officer Reno like the driver lost control and started to swerve back and forth on the ramp. The vehicle struck either an electrical box or a signal control box, dislodged the box, and continued down a 10 foot tall embankment into the mud on the side of the ramp. The embankment is a slight grade where a vehicle could drive up or down. Officer Chairez had already gotten out of his police car and approached the truck. The truck was in a wooded area so it was difficult to see from where the officers were. They both took a position outside the driver's side window of the vehicle. After the assisting officers arrived on the scene, Officer Reno and Officer Chairez maintained a "lethal cover" position. They told defendant to get out of the truck, and Officer Reno made eye contact with defendant. Defendant kept depressing the accelerator of the truck and the tires were spinning in the mud. The rear end of the truck swung up the embankment and back down. At times, the front of the truck was pointed at the two officers. They did not follow the truck down the embankment when they first arrived because it was only the two of them, and they did not know if the driver was armed.

Officer Reno saw another officer attempt to open the driver's side door of the truck, but it was locked. The officer repeatedly told defendant to unlock the truck, but defendant continued to depress the accelerator. The truck continued to fishtail. Officer Reno saw another officer approach the truck once it stopped moving and broke the driver's side window. Officer Reno heard defendant yelling, "'[f]uck you'" and defendant was swinging at the officers.

Officer Reno moved toward the truck and saw that defendant moved toward the passenger side of the truck. He was concerned that there were no officers on that side of the truck and that defendant would try to escape. Officer Reno moved near the passenger side of the truck and saw that the window was open so he unlocked the truck and ordered defendant out. Defendant did not comply. Defendant punched and swung at the officers

that were outside the driver's side window of the truck and Officer Reno, fearful that defendant would injure them, used his taser on defendant, hitting him in the right side of the chest for a five-second cycle. Defendant continued to swing at the officers and refused to obey Officer Reno. Officer Reno initiated a second five-second cycle on his taser. Defendant fell to the side, and Officer Reno was able to grab him and pull him out of the truck and lower defendant to the ground. The taser cycle ended and defendant was "right back to punching and kicking." Officer Reno set defendant on his stomach, and when the taser cycle ended, defendant placed both hands on the ground and pushed himself off the ground. Officer Reno ordered defendant to stop resisting, but defendant, who was sitting, kicked and swung and spun around as he tried to kick and hit the officers. Officer Reno tried another taser round, but his taser was not working. Defendant was surrounded and yelling, "'[f]uck you[,] I'm gonna kill you'" as he swung and kicked at the officers. Officer Reno tasered defendant, and the officers were able to get defendant in handcuffs.

Officer Reno could smell a strong odor of alcohol on defendant and in the truck.

California Highway Patrol Officer Jeremy Tietz, with his partner John Gray, responded to the scene, wearing their tan California Highway Patrol uniforms. Officer Tietz observed that the electrical box was in a ditch near the fence on Imperial Highway in the mud. The box was 40 or 50 feet from its foundation, to which it had been bolted. Officer Tietz also examined the damage to the vehicle, a Toyota pickup, that was on scene when he arrived. Officer Gray believed that defendant, for unknown reasons, steered his vehicle off the roadway, hit the utility box, and came to rest on the grassy, muddy shoulder. Officer Gray observed that the roadway was dry, there were no visual obstructions, and the on-ramp had a recommended speed limit of 30 miles per hour.

Long Beach Police Officer Brent Woods assisted in the arrest of defendant. Officer Woods was in full uniform driving a black-and-white marked police car. When he arrived at the scene, defendant's truck was on the embankment and "basically crashed." He saw that other officers had the driver at gunpoint, but the driver was still

attempting to escape, although the truck was down the embankment and stuck in the mud. The truck was fishtailing, and the officers had to move to get out of its way.

Officer Woods formed a team with three other officers to get the driver out of the car. When they got to the truck, music was blaring but defendant refused to get out of the truck on the officers' command. Officer Woods assumed defendant could not hear them because of the loud music.

Defendant swore at the officers and told them he was going to kill them several times. Defendant made a movement toward the glove box, and Officer Woods tased him in the back for a five-second cycle. Defendant began to swing wildly and to punch and kick at the officers as they tried to open the driver's side door. The officers were unable to get the door open to reach in and turn off the ignition, so a second group of officers went to the passenger side and opened the door and pulled defendant out. Officer Woods went to the passenger side to assist the other officers. It took five or six officers to finally get defendant in handcuffs.

Officer Woods believed defendant was under the influence of alcohol because the truck smelled strongly of alcohol, and defendant had slurred speech and poor coordination. When defendant swung at the officers, he was swinging wildly.

Officer Jonathan Lucero responded to the scene and saw defendant's truck on the embankment, stuck in the mud. Defendant was revving his engine and attempting to flee. The vehicle swayed from left to right. Officer Lucero observed that Officer Woods's taser had no effect on defendant. When Officer Lucero, who was on the driver's side of the truck, saw defendant reach for the glove box, he believed defendant was going to grab a weapon. Officer Lucero jabbed defendant with the tip of his baton several times in the arm and ordered defendant out of the truck. Defendant began to yell over and over, "Fuck you. I'm going to kill you." Defendant's fists were coming out of the truck, and Officer Lucero had to back up to avoid being hit. Officer Lucero went around to the passenger side of the truck and jabbed defendant with the tip of his baton in the lower left leg. Defendant was attempting to hit the other officers, so Officer Lucero jabbed

defendant again with his baton. After Officer Lucero struck defendant again with the baton, defendant gave up and the officers were able to take defendant into custody.

Hope Martinez lived in Lynwood near the on-ramp to the 710 Freeway. Shortly after 5:00 a.m. on February 7, 2010, she was in bed asleep with her husband when she heard a commotion. She looked out the window and saw blue lights on the police cars. She heard someone tell the person in the vehicle to turn off the ignition at least four times. The driver kept on pressing the gas and refused to turn off the ignition. She could not see the vehicle because it was dark, but she could hear that the tires in the vehicle were stuck. She believed the police cars were black and white, and the officers were wearing brown uniforms.

Jessica Sholl-Garza, a registered nurse, took a blood sample from defendant at the hospital.

Gregory Gossage, a criminalist with the Long Beach Police Department tested defendant's blood sample for alcohol and found it was .18 percent two hours after defendant's arrest. To reach such a blood alcohol concentration, a 220 pound male would need to drink nine servings of alcohol, or a six-pack and a half of beer. Based on defendant's conduct, Gossage believed defendant was impaired, and not capable of operating a motor vehicle safely.

2. Defense Case

Jesse Martinez, Hope Martinez's husband, looked out the window and saw what looked like a vehicle that had hit the tree in the ditch by the on-ramp. He did not see the police cars but he heard them telling the person in the vehicle to turn the vehicle off. The vehicle was in reverse, he heard the wheels spinning, and he heard one officer say, "'Be careful. He still has it in reverse.'" He could not see the vehicle because it was too dark. He did not see the driver get out of the car. He heard the police repeatedly say, "Get out of the way. He's trying to get out of the ditch."

Bernard Heimos works for McCormick Ambulance. On February 7, 2010, the ambulance company he picked up defendant at about 5:28 a.m. and took him to the hospital.

3. Information; Jury Verdict; Sentence

Defendant was charged in an information filed May 12, 2010, with seven counts arising out of the incident, as follows: (1) one count of evading an officer (Veh. Code, § 2800.2, subd. (a)) (count 1); (2) four counts of making a criminal threat (Pen. Code, § 422) (counts 2, 3, 4, and 7), and (3) two counts of resisting an executive officer (Pen. Code, § 69) (counts 5 and 6). It was further alleged as to all counts that defendant suffered five prior convictions dating from 1982 and 1990 of a serious or violent felony pursuant to Penal Code section 1170.12, subdivision (a)–(d).

On November 19, 2010, a first amended information was filed, charging defendant with two additional offenses, as follows: (1) one count of driving under the influence (Veh. Code, § 23152, subd. (a), a misdemeanor) (count 12), and (2) one count of driving with a blood alcohol level of .08 percent or higher (Veh. Code, § 23152, subd. (b), a misdemeanor) (count 13).

On February 8, 2011, a second amended information was filed, charging defendant with two additional offenses, as follows: (1) one count of assault with a deadly weapon with an automobile on Officer Chairez (Pen. Code, § 245, subd. (a)(1)) (count 14), and (2) one count of assault with a deadly weapon, an automobile on Officer Reno (Pen. Code, § 245, subd. (a)(1)) (count 15). The allegation on these counts was amended on the second day of trial to charge violations of Penal Code section 245, subdivision (c).

Prior to trial, four of defendant's five prior allegations were stricken on the prosecution's motion, and the trial court struck the remaining prior allegation.

The jury convicted defendant on counts 1, 5, 6, 12, 13, 14 and 15. The court sentenced defendant to state prison for four years four months and to a county jail term of one year, to run consecutively.

DISCUSSION

I. CALJIC NO. 2.90

Defendant argues that the court instructed the jury on the prosecution's burden of proof with CALJIC No. 2.90, but in doing so, orally commented on the instruction and prejudicially misled the jury on the meaning of reasonable doubt and lowered the burden of proof. Respondent contends that the trial court's remarks were a correct statement of the law and could not have confused the jury.

A. Factual Background

The jury was given a printed version of CALJIC No. 2.90 as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] guilt is satisfactorily shown, [he] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

After closing argument, the trial court orally instructed the jury. The court commented on the prosecution's burden of proof, and advised the jury that, "A defendant in a criminal action—I've told you this a couple [of] times before—is presumed innocent until the contrary is proved, unless the contrary is proved.[**1**] In case of a reasonable doubt whether guilt is satisfactorily shown, the defendant gets a verdict of not guilty. So that presumption places upon the People the burden of proving guilt beyond a reasonable

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1 The court instructed the jury with CALJIC No. 2.01, which admonishes that any circumstantial evidence necessary to establish guilt must be proved beyond a reasonable doubt; with CALJIC No. 2.60 that no inference of guilt may be drawn from the fact a defendant in a criminal action declines to testify; and with CALJIC No. 2.61 that a defendant may rely on the state of the evidence and the failure of the People to prove their case beyond a reasonable doubt.

doubt. [¶] It's defined as follows: It's not a mere possible doubt. *It's not that high a standard, but it's a high standard*. It's that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition they cannot say they feel an abiding conviction, a lasting conviction, of the truth of the charge. That's proof beyond a reasonable doubt."[2] (Italics added.) Defendant did not object to the trial court's comment.

With respect to all instructions, the trial court told the jury, "And I will tell you now, this copy [of the instructions] that I'm reading from goes into the jury room in case, just in case, you may want to look up something. I'm not saying you have to. If you listen to me now, you may have a pretty good idea on what the law is, but that's up to you. That's why it goes in there. And the pages are numbered in case somebody makes reference to a line or a paragraph."

B. Analysis

Defendant argues that the court's embellishment of the reasonable doubt instruction with the phrase "It's not that high a standard, but it's a high standard" lessened the burden of proof because the phrase is not part of the standard instruction and gave the impression the standard was "watered down"; further, the court conveyed to the jury it was not necessary to consult the written instructions, and therefore the rule that where there is a conflict in written and oral instructions, the written instructions govern does not apply. We disagree.

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a

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[2] The trial court also advised the jury, "this copy [of CALJIC No. 2.90] I'm reading from goes to the jury room in case, just in case, you want to look up something."

whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' [Citation.]" (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The CALJIC No. 2.90 instruction given here has been accepted as constitutional by both the California and the United States Supreme Courts. (*Nebraska*, at p. 14; *People v. Freeman* (1994) 8 Cal.4th 450, 503.) Where a discrepancy exists in the written instructions and oral instructions, we give precedence to the written instructions. (*People v. Mills* (2010) 48 Cal.4th 158, 201.)

We find no error here because although the court stated the standard was "not that high," immediately after it did so, it repeated the substance of reasonable doubt according to the law: "It's that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition they cannot say they feel an abiding conviction, a lasting conviction, of the truth of the charge." Further, the court reiterated that the reasonable doubt standard was a "high standard."

Therefore, *People v. Johnson* (2004) 119 Cal.App.4th 976 and *People v. Johnson* (2004) 115 Cal.App.4th 1169, upon which defendant relies, are distinguishable. In both of those cases, the appellate court found error because the judge, in attempting to explain reasonable doubt, compared the deliberative process with everyday decision making, such as whether to choose a restaurant, plan a vacation, or buy a car. (*People v. Johnson*, *supra*, 115 Cal.App.4th at pp. 1171–1172; *People v. Johnson*, *supra*, 119 Cal.App.4th at pp. 979–986.) In *People v. Johnson*, *supra*, 119 Cal.App.4th 976, the court in a lengthy process questioned jurors about their decisions to have children or their decision to go to college, and asked how certain they were about the decision; in reversing, the appellate court relied on *People v. Brannon* (1873) 47 Cal. 96, 97, where the court held that equating proof beyond a reasonable doubt with everyday decision making lowered the burden to a preponderance of the evidence. (*People v. Johnson*, *supra*, 119 Cal.App.4th at p. 985.) Further, in *People v. Johnson*, *supra*, 115 Cal.App.4th at p. 1171, the court of appeal found that the trial court erred in telling jurors that "we all have a possible doubt

we will be here tomorrow" but we nevertheless take vacations and get on airplanes because "'we have a belief beyond a reasonable doubt that we will be here tomorrow'" and by using commonplace decisions to explain the reasonable doubt standard, lowered the standard of proof.

II. FAILURE TO INSTRUCT ON SIMPLE ASSAULT

Defendant contends the court erred in failing to instruct on the terms simple assault and aggravated assault and that the error requires reversal. Respondent concedes this argument on the trial court's failure to give CALJIC No. 9.00 on simple assault, but asserts that because of this concession, we need not consider whether the trial court was also required to give CALJIC No. 9.02 on the principles of aggravated assault. Further, respondent contends that because there was sufficient evidence to support conviction on those counts, the prosecution should be given an opportunity to retry those counts. We conclude the omission of the definition of these terms was prejudicial, and as discussed post, insufficient evidence supports defendant's convictions.

A. Factual Background

The trial court instructed the jury with assault with a deadly weapon on a peace officer (§ 245, subd. (c)) and gave the jury CALJIC No. 9.20.[3] However, CALJIC 9.20

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[3] The court instructed the jury as follows: "Defendant is accused in Counts 14 and 15 of having violated section 245[, subdivision] (c) of the Penal Code, a crime. [¶] Every person who commits an assault with a deadly weapon or an instrument other than a firearm or by means of force likely to produce great bodily injury upon the person of a peace officer or firefighter engaged in the performance of his duties and who knows or reasonably should know that such a person is a peace officer or and is engaged in the performance of [his] duties is guilty of the crime of violation of Penal Code section [245, subdivision (c).] [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person committed an assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury; [¶] 2. The person upon whom the assault was committed was a peace officer; [¶] 3. At the time of the assault, the peace officer was engaged in the performance of [his] duties; [¶] 4. The person who committed the assault knew or reasonably should have known that the other person was a peace officer; and [¶] 5. That person knew or reasonably should have known that the peace officer was engaged in the performance of [his] duties."

admonishes that both simple assault (§ 240) instructions pursuant to CALJIC No. 9.00[4] and aggravated assault (§ 245, subd. (a)(1)) instructions pursuant to CALJIC No. 9.02[5] must be given. (CALJIC No. 9.20.)

B. Analysis

The trial court must instruct on "general principles of law relevant to and governing the case." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) It is the trial court's duty to see that the jurors are adequately informed on the law governing all elements of the case to the extent necessary to enable them to perform their function. This duty is not always satisfied by a mere reading of wholly correct, requested instructions. (*People v. Morehead* (2011) 191 Cal.App.4th 765, 773.) The court must instruct on those terms that """have a 'technical meaning peculiar to the law.'""" (*People*

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[4] CALJIC No. 9.00 provides, "In order to prove an assault, each of the following elements must be proved: [¶] 1 A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person; [¶] 2 The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and [] 3 At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. [¶] The word "willfully" means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person. [¶] To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault]."

[5] CALJIC No. 9.02 provides in relevant part, "Every person who commits an assault upon the person of another [[with a deadly weapon or instrument, other than a firearm] [or] [by means of force likely to produce great bodily injury]] [[is guilty of a violation of section 245, subdivision [(a)(1)][(a)(4)]] of the Penal Code, a crime. [¶] [A "'deadly weapon'" is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.] [¶] ["'Great bodily injury'" refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm.] [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1 A person was assaulted; and [¶] 2 The assault was committed [with a deadly weapon or instrument, other than a firearm] [or] [by means of force likely to produce great bodily injury . . .]."

v. Miller (1999) 69 Cal.App.4th 190, 207.) But "'[n]o such duty is imposed when the terms "are commonly understood by those familiar with the English language."'" (*Ibid.*)

Here, both "simple assault" and "aggravated assault" have terms peculiar to the law. A "simple assault" is not a term of common meaning, and an instruction on its meaning must be given in all cases charging assault. (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403–404.) The omitted instruction on "simple assault" would have informed the jury that an assault is "'an unlawful attempt coupled with the present ability, to apply physical force upon the person of another . . . .'" (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1381.) The omitted instruction on aggravated assault would have informed the jury that an aggravated assault an assault where there is used either a deadly weapon or any means of force likely to produce great bodily injury. (*People v. Milward* (2011) 52 Cal.4th 580, 585.) Thus, as the instructions would have educated the jury, an aggravated assault is an assault that either uses a deadly weapon or force likely to produce great bodily injury.

In *People v. Sedeno* (1974) 10 Cal.3d 703, our Supreme Court held that the failure to give an instruction is harmless error if "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*Id.*, at p. 721.) Here, nowhere else in the instructions was assault or aggravated assault defined for the jury. Thus, the jury was left without proper guidance on the meaning of technical legal terms, making it impossible for us to conclude that the omission of these terms was necessarily resolved under other instructions.

Thus, we must reverse the convictions on counts 14 and 15.

III. SUFFICIENCY OF EVIDENCE, ASSAULT WITH AN AUTOMOBILE

Defendant contends the evidence is insufficient to support his conviction on these two counts because (1) there was insufficient evidence he had the general intent to commit an assault because there was no evidence he was aware of facts that would lead a reasonable person to realize a battery would directly, naturally, and probably result from his conduct in attempting to flee in the truck, or its fishtailing motion; (2) there was

insufficient evidence he had a present ability to inflict injury on the officers because the evidence established the truck was stuck in the mud; and (3) there was insufficient evidence he knew or reasonably should have known that Officers Reno and Chairez were engaged in the performance of their duties because there was no evidence he saw their guns, that he heard them over the blare of the music, or that Officers Reno and Chairez were performing "lethal cover" as they stood over 20 feet away.

The Fifth and Sixth Amendments, which apply to the states through the Fourteenth Amendment, require the prosecution to prove all elements of a crime beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278 [113 S.Ct. 2078, 124 L.Ed.2d 182].) A conviction supported by insufficient evidence violates the Due Process Clause of the Fourteenth Amendment and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 316–317 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

In reviewing the sufficiency of evidence, the question we ask 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. We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. We review the record in the light most favorable to the prosecution to determine whether the challenged conviction is supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value . . . ." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[M]ere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Nor does a finding that "the circumstances also might reasonably be reconciled with a contrary finding . . . warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 528–529.) The reviewing court does not reweigh the evidence, evaluate the credibility of witnesses, or decide factual conflicts, as these are the province of the trier of fact. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367.)

Assuming a jury on retrial was correctly instructed, there is insufficient evidence to support defendant's conviction for assault upon the two police officers. An assault

requires a showing of a "'general intent to willfully commit an act the direct and natural and probable consequences of which if successfully completed would be the injury to another.'" (*People v. Wyatt* (2010) 48 Cal.4th 776, 780.) In addition, as the instruction (CALJIC No. 9.20) given provides, an assault upon a peace officer requires a showing that, among other things, in addition to the general intent to commit the crime, that the person who committed the assault knew or reasonably should have known that the other person was a peace officer engaged in the performance of his duties and that person knew or reasonably should have known that the peace officer was engaged in the performance of duties.

The evidence establishes defendant intended to attempt to escape from the pursuing officers and to move his truck off the embankment at all costs. However, there is no evidence that he intended to run Officers Chairez and Reno down with his truck. Although the evidence supports an inference that defendant knew he was being pursued by police officers—given his speed, rapid maneuvering, and attempt to turn onto the freeway—the evidence goes no further than establishing that after he hit the electrical box, defendant's truck was stuck in the mud and he was making a futile attempt to flee, causing the truck to fishtail four feet in either direction. Officers Chairez and Reno said defendant looked right at them, yet the evidence establishes they were standing off to the front side of the truck while providing lethal cover: At first after the truck stalled in the mud, both officers took a position outside the driver's side window; after he saw defendant reach for the glove box, Officer Reno moved near the passenger side of the truck; yet there was no evidence the officers were in the path of the truck. In addition, defendant's witness testified that he heard one of the officers admonish the other officers to use care because the truck was in reverse. Thus, the record does not establish whether defendant had the ability to complete a battery given that the evidence does not establish defendant was aiming the truck directly at the officers, that the truck was actually in drive, or that defendant had the ability to get it out of the mud given that the truck was stuck and fishtailing.

DISPOSITION

Defendant's convictions on counts 14 and 15 are reversed, and the matter is remanded for resentencing on the remaining counts. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.