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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SCOTTY DUANE WILSON, Defendant and Appellant.	B277666 (Los Angeles County Super. Ct. No. MA067136)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard and Charles A. Chung, Judges. Affirmed in part and reversed in part.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Scotty Duane Wilson, an inmate serving a state prison term of 18 years to life at the Lancaster Prison Facility, was convicted of resisting an executive officer with force or violence and two counts of battery by a prisoner after he refused to follow the orders of a correctional officer and resisted efforts to restrain him. Wilson contends on appeal the trial court erroneously allowed the prosecutor to impeach two inmates who testified in his defense with their decades-old convictions; there was insufficient evidence to support his conviction for resisting an executive officer; or, in the alternative, the trial court erred by failing to instruct on the lesser included offense of resisting without force or violence. We affirm Wilson's convictions on the battery counts but conditionally reverse his conviction for resisting an executive officer with force or violence.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Incident*

a. *The People's case*

On the afternoon of March 4, 2015 Wilson was standing outside his newly assigned cell when an alarm sounded in the prison yard. Prison rules required inmates to lie on the floor when an alarm sounded and remain there until the alarm was cleared. Wilson, who had a cast on one leg and was on crutches, did not lie on the floor and instead leaned against a cell door. Correctional Officer Mary Rodriguez, returning from the yard, was directed to find out why Wilson had failed to lie down as required. According to Rodriguez, when she asked Wilson for his identification card, he swung his crutches toward her and said, "Fuck you, bitch. I ain't giving you shit." Rodriguez ordered Wilson to stop as he began to walk away, but he ignored her.

Perceiving a possible threat, Rodriguez called for assistance from other officers.

Officer Guillermo Hernandez was the first officer to respond to Officer Rodriguez's alert. Although Wilson initially placed his left hand behind his back to be handcuffed, he swung his crutches again, hitting Rodriguez's left hand with the right crutch and narrowly missing Hernandez with the left. Hernandez grabbed Wilson by the shirtfront to force him to the floor; but Wilson, a larger man, swiped his arm against Hernandez's neck, causing them both to tumble to the floor. Hernandez was trapped under Wilson's chest. Several other responding officers attempted to pull Hernandez out from under Wilson, while Rodriguez and others (including Officers Chris Ellwart and Allen Robles) attempted to restrain Wilson. After the officers succeeded in pulling Hernandez away, Wilson continued to resist forcefully, holding on to the crutches beneath him on the floor. During the struggle Wilson was struck several times with the blunt end of a baton and kicked in the torso. The crutches were eventually prised from Wilson's grip, bending them in the process, and Wilson's arms were secured behind his back. He was also placed in leg restraints.

b. *The defense evidence*

Wilson did not testify. Van Roy Crooms, an inmate who watched the incident from his cell, testified Wilson had just been assigned to the cellblock and refused to enter his new cell because it was already occupied by a man of a different race.[1] According

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[1] The record does not reveal whether Wilson's refusal to enter the cell was based on his personal objection or his understanding of prison policy.

to Crooms, when Officer Rodriguez approached Wilson, he tried to explain that he could not enter the cell. Rodriguez refused to listen, and Wilson turned to walk away. Rodriguez followed him and told him to get on the floor. When Wilson told her he could not get down because of his injured leg, Rodriguez sounded an alarm for assistance. In response to the alarm five or six officers rushed in, grabbed Wilson and forced him to the floor. Crooms did not see Wilson swing his crutches, strike Rodriguez's hand with his crutch or kick any officers. Crooms saw one of the officers who tackled Wilson hit him in the face. Over Wilson's objection, the prosecutor was permitted to cross-examine Crooms about his 1995 convictions for carjacking, robbery, battery on a peace officer and false personation.

Alonzo Blackwell, another inmate who witnessed the incident through his cell door, testified he saw an officer questioning Wilson. As Wilson and the officer talked, at least five officers rushed in and took Wilson down. Blackwell did not see Wilson swing his crutches or hit any officers, but he saw the officers "rough-housing" Wilson after the takedown. On cross-examination Blackwell was asked about his 1982 convictions for murder, attempted murder, rape and robbery.

2. *Trial Proceedings*

a. *The charges*

An information filed on November 25, 2015 charged Wilson with two counts of assault by a life prisoner (Pen. Code, § 4500;[2] counts 1 (Rodriguez) and 2 (Hernandez)); battery on a nonconfined person by a prisoner (§ 4501.5; count 3 (Robles)); and

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[2] Statutory references are to this code unless otherwise stated.

resisting an executive officer (§ 69; counts 4-6). It was specially alleged as to each count that Wilson had suffered two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(j); 1170.12, subds. (a)-(d)) and had served a prior prison term for a felony (§ 667.5, subd. (b)). Wilson pleaded not guilty and denied the special allegations.

On February 18, 2016 the trial court conducted a review of officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and ordered the disclosure of certain materials subject to a protective order.

On April 28, 2016 the trial court dismissed both counts of assault by a life prisoner (counts 1 and 2) pursuant to section 995. The People filed an amended information on July 25, 2016 adding two counts of battery on a nonconfined person by a prisoner (counts 7 (Rodriguez) and 8 (Hernandez)), including the same special allegations. Wilson pleaded not guilty to all counts and denied the special allegations.

b. *Conviction and sentencing*

At the close of the People's case the trial court granted the People's motion to dismiss one of the counts of battery on a nonconfined person by a prisoner (count 3 (Robles)). The jury convicted Wilson on the remaining two counts of battery on a nonconfined person by a prisoner (counts 7 (Rodriguez) and 8 (Hernandez)) and one count of resisting an executive officer (count 4 (Ellwart)). The jury found him not guilty on the remaining two counts of resisting an executive officer (counts 5 and 6).

A bifurcated trial was held on the prior convictions. The People were unable to proceed on one of the prior qualifying

strike convictions (a 1984 juvenile court adjudication for robbery), which was dismissed under section 1382. Wilson admitted the other prior strike allegation (a 1993 murder conviction), as well as the prior felony prison term allegation.

The court sentenced Wilson to an aggregate determinate state prison term of 11 years, consisting of the upper term of four years for the battery on Officer Rodriguez (count 7), doubled to eight years under the three strikes law, plus an additional one year under section 667.5, subdivision (b), to be served consecutively to the sentence he was then serving; one year (one-third the middle term of three years) for the battery on Officer Hernandez (count 8), doubled to two years under the three strikes law, to be served consecutively to count 7; and one year for the remaining conviction of resisting an executive officer (count 4), doubled to two years under the three strikes law but stayed under section 654.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion by Admitting the Prior Conviction Impeachment Evidence*

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.] [¶] '[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.' [Citations.] When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity,

whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. [Citations.] . . . '[C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.' [Citation.] [¶] Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*People v. Clark* (2011) 52 Cal.4th 856, 931-932 (*Clark*); accord, *People v. Edwards* (2013) 57 Cal.4th 658, 722.)

Wilson contends the judgment should be reversed because the trial court abused its discretion by admitting evidence of Crooms's and Blackwell's prior convictions. Addressing Crooms's prior convictions, the court excluded a 1989 conviction as too remote, but, while acknowledging the remoteness of the 1995 crimes as well, stated, "the fact that he has been incarcerated that entire time [since the 1995 convictions], the case law is clear there is somewhat of a tolling of time. It's not as if someone [has been] crime-free on the outside for that time." Turning to the issue of moral turpitude, the court stated it would allow the People to introduce only those 1995 convictions qualifying as crimes of moral turpitude. The court applied the same reasoning to Blackwell's 1982 convictions: "I believe all of those priors (murder, attempted murder, robbery and rape) are crimes of moral turpitude. And again, to the extent they are remote, the fact that he's still serving prison time on them, . . . [vitiates] that remoteness."

Wilson argues that, when the evidence is offered to impeach a witness, rather than a defendant, the court should consider only the first two *Clark* factors, that is, whether the prior conviction "reflects on the witness's honesty or veracity" or is "near or remote in time." (*Clark, supra,* 52 Cal.4th at p. 931.)[3] Conceding that virtually all of the offenses qualified as crimes of moral turpitude, he asserts the principal issue here was the remoteness of Crooms's 1995 convictions (more than 20 years before the 2016 trial) and Blackwell's 1982 convictions (34 years before the trial).

Remoteness, standing alone, however, is not a barrier to admissibility. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 ["[c]onvictions remote in time are not automatically inadmissible

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[3] While the remaining *Clark* factors—whether the prior conviction involves the same or similar conduct as the charged offense and what effect its admission would have on the defendant's decision to testify (*Clark, supra,* 52 Cal.4th at p. 931)—do not appear to apply in this case, the potential for undue prejudice to the defendant is an appropriate consideration in evaluating admissibility under Evidence Code section 352, which permits a court to exclude evidence if its probative value is substantially outweighed by the probability its admission will necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues or mislead the jury. The "prejudice" referred to in Evidence Code section 352, however, "'applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) If anything, the absence of any cognizable prejudice of this type flowing from the admission of evidence of the prior offenses committed by Crooms and Blackwell tilts the balance in favor of admissibility.

for impeachment purposes"]; *People v. Burns* (1987) 189 Cal.App.3d 734, 738 ["there may be no conviction that is per se too remote to be used for impeachment"].) Although the prior convictions were indeed remote (see *Burns*, at p. 738 [20-year-old conviction "certainly meets any reasonable threshold test of remoteness"]), the trial court properly considered remoteness in the context of the inmates' lengthy, continuing prison terms that dispelled the inference of rehabilitation. As the *Burns* court noted, the remoteness of a conviction "loses most of its impact" if the witness has served a lengthy prison sentence and has spent limited time out of prison. (*Burns,* at p. 738; see *People v. Beagle* (1972) 6 Cal.3d 441, 453 [a conviction from "long before" should generally be excluded on the ground of remoteness if followed by a legally blameless life]; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 812-813 [finding trial court abused its discretion by striking prior conviction for remoteness when defendant had led a continuous life of crime after the prior conviction].)

Wilson also argues admission of evidence of the prior convictions had minimal probative value in this case in light of the jury's knowledge Crooms and Blackwell were Wilson's fellow inmates. By the same token, however, the jury's knowledge that Crooms and Blackwell were serving lengthy prison sentences meant identification of their crimes resulted in minimal prejudice to Wilson. While another court might have exercised its discretion differently, this court did not abuse the broad discretion described in *Clark*.

Finally, Wilson contends one of Crooms's prior convictions—false personation of another in either his or her private or official capacity, a misdemeanor (§ 529)—did not

qualify as a crime of moral turpitude. He cites *Paulo v. Holder* (9th Cir. 2011) 669 F.3d 911, in which the court, without citing any authority, stated an immigrant's conviction under former section 529, subdivision (3), was not a crime of moral turpitude. (*Paulo*, at p. 913.) This decision is not binding on us. (See *People v. Bradley* (1969) 1 Cal.3d 80, 86.) Moreover, other decisions by the same court have distinguished between charges of false personation based upon the perpetrator's intent: If the intent is to defraud to obtain something tangible, the crime involves moral turpitude; if the only benefit sought is to impede law enforcement, the crime does not involve moral turpitude. (See *Blanco v. Mukasey* (9th Cir. 2008) 518 F.3d 714, 719 ["[a] crime involves fraudulent conduct, and thus is a crime involving moral turpitude, if intent to defraud is either 'explicit in the statutory definition' of the crime or 'implicit in the nature' of the crime"]; accord, *Rivera v. Lynch* (9th Cir. 2016) 816 F.3d 1064, 1075.)

In any event, Wilson did not object to admission of the false personation conviction on this ground, even after the court invited counsel to address the issue of moral turpitude. In addition, the record does not identify the circumstances of Crooms's conviction under section 529, thereby precluding any meaningful review of this belated contention. Accordingly, Wilson has forfeited this claim on appeal. (See Evid. Code, § 353, subd. (a); *People v. Foster* (2010) 50 Cal.4th 1301, 1342 [defendant forfeited claim of juror misconduct on appeal when he failed to respond to court's invitation to question jurors or object to their service]; *People v. Alexander* (2010) 49 Cal.4th 846, 912 [failure to object to introduction of character evidence forfeits claim evidence was improperly admitted].)

2. *The Trial Court Erred by Failing To Instruct the Jury on the Lesser Included Offense of Misdemeanor Resisting Arrest Under Section 148, Subdivision (a)(1)*

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' 'That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239, citations omitted (*Smith*); see *People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.' '[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits."'" (*Smith,* at p. 239, citations omitted; accord, *People v. Campbell* (2015) 233 Cal.App.4th 148, 157.) "'[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that

the greater cannot be committed without also committing the lesser.'" (*Smith,* at p. 240; see *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) We review the record de novo to determine whether substantial evidence supported a given jury instruction. (*People v. Avila* (2009) 46 Cal.4th 680, 705, *People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

In this case, Wilson contends his conviction under section 69, subdivision (a), which imposes either felony or misdemeanor liability on one "who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty," should be reversed because the trial court erred in failing to instruct the jury with the lesser included offense under section 148, subdivision (a)(1), which imposes misdemeanor liability on one "who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . ."[4]

This precise issue was addressed by the Supreme Court in *Smith, supra,* 57 Cal.4th 232. In *Smith* the defendant was charged with two counts of deterring or resisting an executive officer in violation of section 69. As the Court explained,

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[4] A violation of section 69 is a "wobbler" offense in that a court has the discretion to sentence the crime as either a felony under section 1170, subdivision (h), or as a misdemeanor. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974; *People v. Tran* (2015) 242 Cal.App.4th 877, 885; *People v. Upsher* (2007) 155 Cal.App.4th 1311, 1320.) Wilson was charged with a felony violation of section 69.

section 69 can be violated in two separate ways. "'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.'" (*Smith*, at p. 240; accord, *In re Manuel G.* (1997) 16 Cal.4th 805, 814; *People v. Brown* (2016) 245 Cal.App.4th 140, 149.) The jury had found Smith guilty of violently and forcefully resisting the officers who arrested him, while explicitly rejecting the alternative of convicting him of attempting by threats or violence to deter or prevent an officer in the performance of his or her duty. (*Smith,* at p. 238.) On appeal Smith argued the trial court had a sua sponte duty to instruct the jury on resisting an officer under section 148, subdivision (a)(1), a lesser included offense of resisting by means of force or violence under section 69. The Supreme Court agreed, concluding "it is not possible to violate section 69 in this second way without also violating section 148(a)(1). Therefore, section 148(a)(1) was a necessarily included lesser offense of section 69 as alleged in the amended information." (*Smith,* at p. 243; see *People v. Campbell*, *supra*, 233 Cal.App.4th at p. 161.) However, the Court declined to find error in the trial court's failure to instruct under section 148, subdivision (a)(1), because the evidence did not support a possible verdict under that section. As the Court explained, "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.'" (*Smith,* at p. 245; accord, *People v. Breverman*, *supra*, 19 Cal.4th at p. 154.)

As in *Smith,* the amended information in this case charged Wilson with violating section 69 in both ways, although the case was tried only on the theory Wilson resisted with force and

violence the efforts of Officer Ellwart to pull his arms out from under him to restrain him. The jury found Wilson guilty based on this theory: Wilson "did knowingly resist, by the use of force or violence . . . an executive officer, in the performance of his duties . . . ." Unlike in *Smith*, however, the evidence at trial—specifically the testimony of Crooms and Blackwell—supported Wilson's contention he did not resist with force or violence. According to these witnesses, after Wilson walked away from Officer Rodriguez, he was forced to the ground by officers responding to Rodriguez's alert. Crooms and Blackwell each testified Wilson did not swing his crutches or strike at the officers. While they were unable to distinguish among specific officers involved in the incident, their testimony contradicts the People's evidence Wilson resisted with force and violence and supports the lesser included offense instruction for violation of section 148, subdivision (a)(1).[5]

The Attorney General argues, even if the court erred in failing to instruct as to the lesser included offense, any error was

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[5] The trial court instructed the jury with CALJIC No. 7.50. While it is not error to instruct juries under CALJIC (see, e.g., *People v. Thomas* (2007) 150 Cal.App.4th 461, 465), the trial court might have recognized the need to consider the lesser included offense instruction under section 148, subdivision (a)(1), had it used the revised CALCRIM instruction. CALCRIM provides separate instructions for each prong of section 69 (see CALCRIM No. 2651 [preventing or deterring executive officer from performance of duty]; CALCRIM No. 2652 [resisting executive officer in performance of duty]); and the latter instruction, which covers the offense of resisting with force or violence, advises that section 148, subdivision (a)(1), may be a lesser included offense.

harmless. We review the prejudicial effect of the erroneous failure to instruct on a lesser included offense under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 178 ["in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*"]; accord, *People v. Campbell, supra,* 233 Cal.App.4th at p. 165.) We will reverse a conviction only if we determine it is reasonably probable Wilson would have obtained a more favorable result had the error not occurred. (*Breverman,* at p. 178.)

On this record we cannot conclude the error was harmless. There was nothing inherently implausible or unbelievable about Crooms's and Blackwell's version of events, and "the jury showed a readiness to scrutinize the evidence, draw its own independent conclusions [regarding] culpability, and convict on lesser charges than the prosecutor requested." (*People v. Brown, supra,* 245 Cal.App.4th at p. 155 [finding failure to instruct on lesser included offense of assault not harmless error]; see *People v. Mullendore* (2014) 230 Cal.App.4th 848, 857 [doubts leading jury to convict defendant of lesser offense of one charge could have led to a similar result on another charge for which it was not given that option].) Here, the jury credited Rodriguez's and Hernandez's testimony they were struck by Wilson during the incident but acquitted him on two other counts of resisting officers with force or violence under section 69. (See *People v. Campbell*, *supra*, 233 Cal.App.4th at p. 167 ["while a jury's determination on a factual issue under other instructions is relevant to determining whether an instructional error is harmless, it does not *categorically* establish that the error was

harmless; the court must still determine whether, based on an examination of the entire record, it is reasonably probable that the error affected the outcome"].)

Plainly, this jury did not accept the People's evidence in all respects. As the First District concluded in *Brown*, "[t]he instructional error precluded the jury from deciding whether to credit the substantial evidence supporting [the defendant's] theory." (*People v. Brown*, *supra*, 245 Cal.App.4th at p. 156.) It is reasonably probable here, in the absence of instructional error, at least one juror would not have believed Wilson resisted the officers with force or violence and would have voted to convict him under section 148, subdivision (a)(1), rather than section 69. (See *People v. Walker* (2015) 237 Cal.App.4th 111, 118 [a hung jury is a more favorable result than a guilty verdict].) His conviction under section 69 must therefore be reversed.

3. *Substantial Evidence Supported Wilson's Conviction Under Section 69 for Resisting Arrest by Force or Violence*

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 57 L.Ed.2d 1].) To avoid placing a defendant in double jeopardy, a reviewing court that reverses a conviction due to legal error must assess the defendant's challenge to the sufficiency of the evidence to determine whether the defendant may be retried for some or all of the offenses. (See *People v. Morgan* (2007) 42 Cal.4th 593, 613; *People v. Hayes* (1990) 52 Cal.3d 577, 631.)

In evaluating Wilson's contention the evidence is insufficient to support his conviction for forcibly resisting an

officer under section 69, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626.)

For the same reasons we concluded the trial court erred in not instructing the jury with the lesser included offense of resisting under section 148, subdivision (a)(1), we conclude substantial evidence supported Wilson's conviction under

section 69. Although the evidence before the jury was in part contradictory, there was ample testimony supporting both versions of the events. Accordingly, Wilson is subject to retrial on the section 69 charge involving Officer Ellwart.

4. *The Trial Court Complied With Its Obligations Under Pitchess*

Prior to trial Wilson moved under Evidence Code section 1043 and *Pitchess v. Superior Court, supra,* 11 Cal.3d 531 for a review of the personnel records of several of the correctional officers involved in the incident. The trial court agreed to inspect the records to determine whether any of the officers identified had a history of misconduct relating to use of excessive force or violence, falsification of reports or acts of dishonesty. The court reviewed the requested records in camera and ordered certain materials turned over in discovery subject to a protective order limiting the use of the material.

At Wilson's request, which the Attorney General did not oppose, we have reviewed the sealed record of the in camera proceedings and conclude the trial court satisfied the minimum requirements in determining whether there was discoverable information. No abuse of discretion occurred. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

DISPOSITION

Wilson's conviction for resisting an executive officer with force or violence in violation of section 69 (count 4–Officer Ellwart) is reversed with the following directions: If the People do not retry Wilson for resisting an executive officer with force or violence pursuant to section 1382, subdivision (a)(2), within 60 days after the remittitur is filed in the trial court, or, if the People file a written election not to retry Wilson, the trial court is to proceed as if the remittitur modified the judgment to reflect a conviction for resisting an officer under section 148, subdivision (a)(1), rather than for resisting an executive officer with force or violence under section 69, subdivision (a), and resentence Wilson accordingly. The convictions on the other two counts are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

MENETREZ, J.*

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