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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ARSENIY DUBNYAKOV, Defendant and Appellant.	B287071 (Los Angeles County Super. Ct. No. LA082859)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Affirmed.

Leonard J. Klaif, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Arseniy Dubnyakov appeals from the judgment entered following his conviction by jury of resisting an officer, driving under the influence of alcohol, and fleeing a pursuing officer. Appellant challenges his sentence under Penal Code section 654. [1] He argues that the charges of resisting an officer and driving under the influence were based on the same conduct, and therefore the trial court should have stayed the sentence on one of those counts. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Procedural Background*

The Los Angeles County District Attorney (the People) charged appellant in an amended information with the following counts: resisting an executive officer (Pen. Code, § 69; count one); driving under the influence of alcohol (DUI) within ten years of three other DUI offenses (Veh. Code, §§ 23152, subd. (a) and 23550; count two); assault upon a peace officer (§ 245, subd.(c); count three); and fleeing a pursuing peace officer's motor vehicle, a misdemeanor (Veh. Code, § 2800.1, subd.(a); count four). The information further alleged as to count two that appellant refused to submit to a chemical test and drove a vehicle 30 or more miles per hour over the speed limit (Veh. Code, §§ 23612, 23103).[2]

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[1]All further statutory references herein are to the Penal Code unless otherwise indicated.

[2]The information also alleged as to counts one and two that appellant served a prior prison term (§ 667.5, subd.(b)). The People subsequently dismissed that allegation.

At the conclusion of trial, the jury found defendant guilty of resisting an officer (count one), driving under the influence (count two), and fleeing a pursuing peace officer's vehicle (count four). The jury further found true the allegation in count two that appellant refused to submit to a chemical test. The jury was unable to reach a verdict on the assault charge in count three and on the count two allegation regarding appellant's speed. Appellant admitted his prior DUI convictions.

The trial court sentenced appellant to the upper term of three years on count two as the base count, a consecutive term of eight months (one-third the mid-term) on count one, and a consecutive term of 364 days on count four. The court stayed the sentence on count four pursuant to section 654. Appellant timely appealed.

B. *Prosecution Case*

Officer Michael Neuner of the California Highway Patrol (CHP) testified that he was on patrol on January 25, 2016, in uniform and in a marked CHP vehicle. Around 2:00 a.m., he and his partner were conducting a routine traffic stop in North Hollywood. As he was talking to the driver he had stopped, he heard another vehicle and saw a white BMW M3 approaching. As it passed, the driver of the BMW revved the engine loudly and then accelerated. Neuner and his partner left the other driver and pursued the BMW. Neuner estimated the BMW reached speeds up to 90 miles per hour in a 35 miles-per-hour zone.

After about 1.75 miles, they observed the BMW turn into the driveway of an apartment complex and stop at the closed gate. The officers activated their lights and siren, then pulled over and got out to approach the BMW. Neuner testified that he could not see into the BMW because the back window was tinted.

He approached the passenger side of the BMW with his weapon drawn, "due to the extreme nature of the stop." The passenger-side window was down, allowing Neuner to see the driver, whom he described as a white male about 30 years old, with dark hair and a fair complexion, wearing a dark blue camouflage patterned shirt. Neuner identified the BMW driver as appellant at trial.

Neuner leaned into the BMW's passenger window and told appellant to either stop or turn off the car. Appellant stared straight ahead; then, as soon as the gate opened, he drove into the complex. As the BMW moved forward, Neuner's left arm was still inside the car. As a result, he was dragged alongside the car and the car hit his left side. He was able to move to the right to avoid hitting the gate and was not injured. Neuner then returned to his patrol car and he and his partner pursued the BMW.[3] They found the abandoned car in a parking structure in the apartment complex. Neuner searched the vehicle and found an employment authorization card with appellant's name and photograph. He also found the vehicle's registration; the BMW was registered to appellant and Monica Sanchez.

After searching the BMW, the officers spoke to the security guard at the complex gate, who told them which unit appellant lived in. The officers went to the apartment unit, but no one was there.

Other CHP officers arrived as backup on the scene. Officer Jeffrey Royal testified that Neuner showed him appellant's photo from his identification card. Royal was outside the complex completing the paperwork to tow the BMW when he saw a man talking on a cell phone about 40 to 50 feet away and watching

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[3]The entire incident was recorded on video surveillance by the CHP vehicle's camera. This video was played for the jury.

what Royal was doing. Royal recognized the man as the suspect from his photo; at trial, Royal identified the man as appellant. Royal and another officer started walking toward appellant, who began to run. One of the officers found appellant a short time later, lying face down nearby in some tall grass.

After appellant was detained, Neuner identified him as the driver of the BMW. Neuner also testified that he immediately detected a moderate odor of alcohol from appellant's breath and body, and noticed appellant's eyes were watery and a little bit red. Appellant also tripped over a small bush. Neuner opined that appellant's appearance and actions, including speeding and failing to stop, were consistent with being under the influence of alcohol.

Neuner tried to speak to appellant, but appellant repeatedly responded, "Ruski, Ruski, Ruski." Appellant also spoke in "long Russian sentences." Neuner contacted CHP dispatch, which provided a Russian translator by speakerphone. Neuner could not conduct most field sobriety tests because appellant was handcuffed. But, with the assistance of the translator, he did administer one test that did not require appellant to use his hands. Neuner opined that appellant's performance on that test was consistent with someone impaired due to alcohol and with a blood alcohol level above .08.

Appellant was arrested. After appellant was transported to the jail, Neuner advised him that he was required by law to submit to a chemical test to determine his blood alcohol level. Appellant refused the test, responding in Russian that he "did not drive" and did not do anything wrong.

Security guard Jesus Pineda was working in the apartment complex at the time. He testified that he was familiar with the

white BMW and had only seen appellant driving the car. That night, he heard the car coming, and recognized the sound of the exhaust, so he flipped the switch to open the gate. Then he heard the police sirens and flipped the switch to close the gate, but it was not able to close immediately. He could hear the commands from Officer Neuner to stop the vehicle and exit.

Two other officers testified they had interacted with appellant in 2012 and 2018. Both times, appellant spoke clearly in English.

C. *Defense Case*

Tyler Vela, the manager of the apartment complex, testified that the lease listed Monica Sanchez as the only resident.

DISCUSSION

Appellant argues that the counts for resisting an officer (count one) and DUI (count two) alleged a single course of conduct with a single objective, and therefore that the court should have stayed the sentence on count one under section 654. We disagree and affirm.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." It "precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The defendant's intent and objective, not the temporal proximity of his or her offenses, determine whether multiple offenses constitute an indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) A defendant who acts pursuant to a

single objective may be found to have harbored a single intent and therefore may be punished only once. (*Ibid.*) If, on the other hand, defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, disapproved on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896.)

But even if a course of conduct is "'directed to one objective,'" it may "'give rise to multiple violations and punishment'" if it is "divisible in time." (*People v. Deegan* (2016) 247 Cal.App.4th 532, 542, quoting *People v. Beamon, supra*, 8 Cal.3d at p. 639, fn. 11.) Where the defendant's acts are "temporally separated," they "afford the defendant opportunity to reflect and to renew his or her intent before committing the next [offense], thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; see also *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) We view the evidence in the light most favorable to the sentence and presume in support thereof the existence of every fact the trier of fact reasonably could deduce

from the evidence. (*Hutchins*, *supra*, 90 Cal.App.4th at pp. 1312-1313.)

Here, count one charged appellant with resisting an officer pursuant to section 69, subdivision (a), which applies to any person "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." The prosecutor argued at trial that appellant committed count one when he drove his car into the apartment complex with officer Neuner leaning into the window. In count two, appellant was charged with driving under the influence of alcohol, in violation of Vehicle Code section 23152, subdivision (a). As evidence that appellant was driving while impaired, the prosecutor cited appellant's unwise decisions—including revving his engine and speeding past CHP officers, driving more than 30 miles-per-hour above the speed limit, driving away from an officer with his gun drawn, and then leaving his car and fleeing on foot—as well as the physical signs of impairment appellant exhibited, the results of the sobriety test, and appellant's attempts to evade detection by refusing the chemical test and refusing to speak English.

The trial court found that count one was a "distinct and different act" from count two. Conversely, the court found that count four, fleeing a peace officer, had the same objective "to get away" as count one, resisting the officer. Accordingly, the trial court stayed the sentence for count four. We conclude that substantial evidence supports the trial court's finding that appellant's act of resisting a peace officer was distinct from his act of driving under the influence. The evidence supported the

finding that appellant's act in driving under the influence began well before any conduct taken to flee pursuing peace officers, and therefore that the intent for the two acts was different.

Appellant argues that section 654 is implicated here because the "acts underlying count one were also a part and parcel of the facts underlying count two." Appellant's reliance on *People v. Bas* (1987) 194 Cal.App.3d 878 and *People v. Hendrix* (2018) 20 Cal.App.5th 457 is unavailing. Both cases are concerned with the provision of section 654 prohibiting multiple *prosecutions* for the same act. (*Bas, supra*, 194 Cal.App.3d at p. 880; *Hendrix, supra*, 20 Cal.App.5th at pp. 460-461.) As the *Hendrix* court noted, while section 654, subdivision (a) "addresses both multiple punishment and multiple prosecution, these 'separate concerns have different purposes and different rules of prohibition.' (*People v. Valli* (2010) 187 Cal.App.4th 786, 794.)" (*Hendrix, supra*, 20 Cal.App.5th at p. 461.) The question for multiple prosecutions is whether "the People either know or reasonably should know that 'the same act or course of conduct play[ed] a significant part' in both offenses." (*Id*. at pp. 461–462.) Appellant cannot rely on this test here, where the issue is sentencing, rather than prosecution. Moreover, all of the sentencing cases appellant cites upheld the trial court's rejection of the applicability of section 654, and therefore do not assist him. (See *People v. McGuire* (1993) 14 Cal.App.4th 687; *People v. Houghton* (1963) 212 Cal.App.2d 864.)

Thus, the record supports the trial court's implied findings. There was sufficient evidence that appellant harbored different objectives in committing the DUI and then resisting officer Neuner. We therefore affirm.

DISPOSITION

The judgment is affirmed.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.