Filed 4/4/17 P. v. Escobedo CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR CRISTOS ESCOBEDO, Defendant and Appellant.	B275708 (Los Angeles County Super. Ct. No. KA109749)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Salvador Cristos Escobedo of assault with a deadly weapon other than a firearm upon a peace officer. (Pen. Code, § 245, subd. (c).)[1] Escobedo admitted a prior strike conviction, prior serious felony conviction, and prior conviction with a prison term. (§§ 667, subds. (b)-(j); 1170.12, subd. (b); 667, subd. (a)(1); 667.5, subd. (b).) The trial court struck Escobedo's strike, and sentenced him to a total of eight years in state prison comprised of a three-year low term for the assault, plus five years for a prior serious felony conviction. On appeal, Escobedo contends the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of assault on a peace officer. (§ 241, subd. (c).) We affirm the judgment.

FACTS

Background

On May 18, 2015, Los Angeles County Sheriff's Department Deputy Mario Garcia was dispatched to Rush Street in South El Monte in response to a call that a vehicle had been burglarized. Upon arrival, Deputy Garcia contacted the victim, who told him that her rear car window had been smashed in while she was getting food at a nearby restaurant. Someone inside the restaurant told the victim that a man wearing a checkered shirt was seen carrying some items and walking away from the victim's car towards a dumpster area of the parking lot.

Deputy Garcia walked over to the dumpster area and checked to see if anyone was inside that area. There were two sections to the dumpster area, divided by a cinderblock wall that

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[1] All further section references are to the Penal Code unless otherwise specified.

was attached to the building. Deputy Garcia walked over to the back area where a part of the cinderblock wall was missing, which gave access to the second dumpster area where he saw Escobedo sitting on a sofa, wearing a blue-reddish checkered shirt. Deputy Garcia announced he was investigating a burglary and asked Escobedo to come out and speak with him. In response to Deputy Garcia's request, Escobedo yelled profanities and said he did not have to come out. Deputy Garcia saw that Escobedo was holding a "shiny silver object in his hand" that caused him to believe Escobedo was possibly armed with a handgun. Deputy Garcia raised his gun and told Escobedo to drop the object he was holding, get up, and show him his hands. Escobedo did not comply and ignored Deputy Garcia's repeated commands. After about a minute of silence, Escobedo looked at Deputy Garcia and stated, "Things are going to get really bad for you right now." Deputy Garcia requested backup after Escobedo made that statement to him.

Deputy Matthew Thomas was one of the deputies who responded to the location as backup. When Deputy Thomas arrived, he climbed up a fence so he could see down inside near the dumpster, in order to get a better view of the area. Deputy Thomas testified that from his vantage point, he saw Escobedo holding a "metal wood stapler" in his right hand, had his left hand clenched. He then drew his right hand back when he "stood up quickly, [and] started aggressing towards Deputy Garcia." He further testified that Escobedo "drew his hand back as if he was trying to strike Deputy Garcia with the staple gun."

Deputy Thomas employed his taser and fired one taser cartridge toward Escobedo's back. The taser initially had an effect and caused Escobedo to lose balance and fall back in a

seated position, however, one of the taser darts lost contact with Escobedo, which caused the taser to become ineffective so Escobedo "immediately got back up." Escobedo did not drop the staple gun and still had it in his right hand. He immediately got back up after being tased, so Deputy Milano sprayed him with pepper spray and he was taken into custody thereafter.

The Criminal Proceedings

In April 2016, the Los Angeles County District Attorney filed an amended information charging Escobedo with one count of assault with a deadly weapon other than a firearm on a peace officer. (§ 245, subd. (c).) The case was tried to a jury, at which time the prosecution presented evidence establishing the facts summarized above. Escobedo did not testify. The parties stipulated that Escobedo's mother, Sandra Marquez, would have testified that her son had been living in the dumpster area for a few months. The case was submitted to the jury with instructions on assault with a deadly weapon (§ 245, subd. (a)(1)), as a lesser included offense of assault with a deadly weapon on a peace officer (§ 245, subd. (c)), and simple assault (§ 240) as a lesser included offense of assault with a deadly weapon. The court did not instruct the jury on assault on a peace officer (§ 241, subd. (c)).

The jury convicted Escobedo of assault with a deadly weapon upon a peace officer, as charged. Escobedo thereafter admitted suffering a prior strike conviction, a prior serious felony conviction, and a prior conviction with a prison term. (§§ 667, subds. (b)-(j); 1170.12, subd. (b); 667, subd. (a)(1); 667.5, subd. (b).) The trial sentenced Escobedo in the manner set forth earlier in this opinion. The court ordered Escobedo to pay a variety of ordinary fines and fees not questioned on appeal.

Escobedo filed a timely notice of appeal.

DISCUSSION

I. The Trial Court Was Not Required to Instruct on the Lesser Included Offense of Assault on a Peace Officer

Escobedo contends the trial court erred in failing to instruct sua sponte on the lesser included offense of assault on a peace officer without a deadly weapon, and that the instructional error was prejudicial. He argues the real question for the jury was whether the staple gun was as a deadly weapon. Further, since a staple gun is not inherently a deadly weapon, the prosecution had to prove the he intended to use it to inflict great bodily injury or death, and the evidence does not show this because he was tased and fell down before it was clear how he intended to use the staple gun. We are not persuaded.

The Law Governing Instructions on Lesser Included Offenses

A trial court has a sua sponte duty to instruct on a lesser offense necessarily included in a charged offense when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) This duty exists whether or not the defense requests instructions on a lesser included offense, and even over a defense objection. (*People v. Breverman* (1998) 19 Cal.4th 142, 153 (*Breverman*); *People v. Barton* (1995) 12 Cal.4th 186, 195.) "Conversely, even on request, a trial judge has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008, italics omitted.) "[T]he existence of 'any evidence, no matter how

weak' will not justify instructions on a lesser included offense . . . ." (*Breverman, supra*, at p. 162, italics omitted.) Evidence is substantial for this purpose if it could cause a jury composed of reasonable persons to conclude that the defendant committed the lesser, but not the greater, offense. (*Ibid.*) The corollary rule is that a trial court is not required to "instruct sua sponte on the panoply of all possible lesser included offenses," but only when there is substantial evidence in support of a particular lesser included offense. (*People v. Huggins* (2006) 38 Cal.4th 175, 215.)

We apply a de novo standard of review to a claim that the trial court failed to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) Error in failing to give lesser included instructions where required is reviewed under the harmless error standard articulated by *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Breverman, supra*, 19 Cal.4th at p. 165.)

The Trial Setting

During a discussion of the jury instructions, Escobedo's trial counsel requested that the court instruct the jury on simple assault (§ 240) rather than assault on a peace officer (§ 241, subd. (c)), stating she would "rather go [with] simple assault." Pursuant counsel's request, the court instructed the jury on assault with a deadly weapon (not on a peace officer) as a lesser offense to assault with a deadly weapon on a peace officer, and simple assault as a lesser offense to assault with a deadly weapon. The court did not instruct on assault on a peace officer.

The trial court instructed the jury on the charge of assault with a deadly weapon on a peace officer as follows: "Now to prove that the defendant is guilty of this crime the People must

prove the following: (1) the defendant did an act with a deadly weapon other than a firearm, that by its nature would directly and probably result in the application of force to a person; (2) the defendant did that act willfully; (3) when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone; (4) when the defendant acted he had the present ability to apply force with a deadly weapon other than a firearm to a person; (5) when the defendant acted, the person assaulted was lawfully performing his duties as a peace officer; and (6) when the defendant acted he knew or reasonably should have known that the person assaulted was a peace officer who was performing his duties."

There was no Instructional Error

First, Escobedo forfeited his claim of instructional error because his trial counsel deliberately requested to exclude the instruction on simple assault on a peace officer. Escobedo's trial counsel requested that the court instruct the jury on simple assault rather than assault on a peace officer, stating she would "rather go [with] simple assault." Thereafter, the court stated it would not instruct on assault on a peace officer.

We agree with respondent that Escobedo's challenge of the jury instruction is barred by the doctrine of invited error, which "applies when a defendant, for tactical reasons, makes a request acceded to by the trial court and claims on appeal that the court erred in granting the request. [Citations.]" (*People v. Russell* (2010) 50 Cal.4th 1228, 1250.) In particular, when defense counsel makes a conscious and deliberate tactical choice to request or omit a particular instruction, defendant may not complain of error on appeal. (*People v. Wader* (1993) 5 Cal.4th

610, 657-658.) Here, Escobedo's counsel made clear the request was to exclude the jury instruction he argues on appeal should have been given. When asked by the court if she wanted the section 241, subdivision (c) (assault on a peace officer), or section 240 (simple assault) instruction, defense counsel made a deliberate and tactical choice by responding that she would "rather go simple assault." Counsel's tactical reason is clear – he went with the offense with the lesser penal consequences.

Second, assuming Escobedo's claim of instructional error is not forfeited, it fails on the merits. As we have noted, the trial court has an obligation to give instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present; it has no obligation to instruct on theories lacking substantial support in the evidence. Respondent does not quarrel with the proposition that assault on a peace officer is a lesser included offense of assault on a peace officer with a deadly weapon. Instead, he argues the trial court had no sua sponte duty to instruct on that lesser charge as there was insufficient evidence to support it. Specifically, the evidence showed that the nature of the staple gun and the manner in which it was used by Escobedo unequivocally demonstrated it was a deadly weapon. We agree.

"As used in section 245, subdivision (a)(1), 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.' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) "The Supreme Court has explained section 245 contemplates two categories of deadly weapons: In the first category are objects that are 'deadly weapons as a matter of law' such as dirks and blackjacks because 'the ordinary

use for which they are designed establishe[s] their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury.' [Citations.] For example, a bottle or a pencil, while not deadly per se, may be a deadly weapon within the meaning of section 245, subdivision (a)(1), when used in a manner capable of producing and likely to produce great bodily injury. [Citations.]" (*People v. Brown* (2012) 210 Cal.App.4th 1, 6-7.)

Section 12022.7, subdivision (f), defines " 'great bodily injury' " as "a significant or substantial physical injury." (§ 12022.7, subd. (f); *People v. Cross* (2008) 45 Cal.4th 58, 63; *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-1048; *People v. Escobar* (1992) 3 Cal.4th 740, 749-750.) To be considered significant or substantial, the injury need not cause permanent, prolonged, or protracted disfigurement, impairment, or loss of bodily function. (*Escobar*, *supra*, at p. 750.)

The nature of the staple gun demonstrated it was capable of, and likely to, inflict great bodily injury. Deputy Thomas testified he was familiar with the staple gun Escobedo used and that "it's a heavy, solid, metal object, that it's not like a regular staple gun you would have on your desk. [He testified] [i]t's heavy, has sharp edges, it's metal." Further, the manner in which the staple gun was used by Escobedo demonstrated it was a deadly weapon. The evidence showed Escobedo stood up quickly and started aggressing towards Deputy Garcia with the staple gun in his right hand as he "drew his hand back as if he was trying to strike Deputy Garcia with the staple gun." Escobedo did not drop the staple gun after being tased, and continued to hold it until he was subsequently subdued by pepper

spray. In addition, Escobedo made threatening statements indicating he intended to use the staple gun as a deadly weapon. Indeed, Escobedo looked directly at Deputy Garcia and stated, "Things are going to get really bad for you right now." Deputy Thomas testified that he used his taser because: "if someone were to be struck with [the staple gun], it definitely would cause bodily injury."

Given the uncontradicted evidence about the nature of the weapon and the means by which Escobedo used it, we conclude the trial court was not required to instruct the jury on the lesser offense of simple assault on a peace officer. There was no substantial evidence from which a jury composed of reasonable persons could conclude that Escobedo committed an assault on a peace officer but did not use a deadly weapon, which comprises the lesser offense about which he now complains.

In any event, were we to conclude the trial court erred in failing to instruct the jury on assault on a peace officer, we would find it harmless. The erroneous failure to instruct on a lesser included offense is harmless unless the record shows that it was reasonably probable that the defendant would have achieved a more favorable result had the error not occurred. (*Breverman, supra*, 19 Cal.4th at pp. 149, 178 [holding that the harmless error standard stated in *Watson* applies when analyzing prejudice resulting from a trial court's failure to instruct sua sponte on a lesser included offense].) "Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*Breverman,* at p. 177.)

As we have decided, there is strong evidence supporting the jury's finding that Escobedo used a deadly weapon during his encounter with Deputy Garcia. We see no reasonable probability the jury would have found Escobedo guilty of assault on a peace officer, but not assault with a deadly weapon on a peace officer. Had the jury found Escobedo did not use a deadly weapon in his assault, it was given the option of convicting him of simple assault. It did not.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.