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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EDDIE MANDELL MARTIN, Defendant and Appellant.	B230257 (Los Angeles County Super. Ct. No. BA 353828)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Sunnie L. Daniels, 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, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Eddie Mandell Martin of one count of resisting an executive officer (Pen. Code, § 69; count 1)[1] and one count of resisting a peace officer, causing serious bodily injury (§ 148.10, subd. (a); count 2). At the sentencing hearing the trial court sentenced appellant to a total aggregate term of five years in prison. Appellant raises the following contentions: (1) We should examine the record of the in camera *Pitchess*[2] hearing and determine whether there were any errors in the *Pitchess* process; (2) the trial court erred when it failed to instruct the jury on an element of the offense charged in count 2, which violated appellant's federal constitutional right to due process; and (3) the trial court erred when it failed to instruct the jury with CALJIC No. 9.29, which violated appellant's federal constitutional right to due process. We affirm.

STATEMENT OF FACTS

1. Prosecution Evidence

On February 10, 2009, at approximately 4:30 a.m., Los Angeles County Sheriff's Deputy Binh Van Du was working in the staging area outside the control booth of the sixth floor of "Tower 1" of the Twin Towers Correctional Facility, a lockdown facility, in Los Angeles. The sixth floor of Tower 1 is divided into six pie-shaped "pods," referred to as pods A through F. Each pod has two tiers of individual cells and an open staging area where inmates eat meals, receive medication, or prepare to go to court. There is a control booth in front of the staging area in each pod and it allows sheriff deputies to remotely open all of the cell doors in each pod. The cells can also be opened manually with a key located on the sheriff deputies' belts.

That day, February 10, 2009, Deputy Van Du was in the staging area of D pod preparing passes for the approximately 30 to 40 inmates who had court appearances. There was a second deputy in D pod and a third one inside the control booth. At the time Deputy Van Du was preparing the inmates for court, he was by himself calling

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

out the inmates who had their court date who were neither shackled nor inside their cells. At this time appellant was inside his cell. Because appellant had not been electronically released from his cell like the other inmates who had and were freely roaming around, Deputy Van Du correctly assumed that appellant did not have court that day. According to Deputy Van Du's testimony, appellant was kicking and screaming against the glass door wanting to be let out while also verbally abusing Deputy Van Du by stating multiple times that he was going to come "out and kick [his] ass." Deputy Van Du verified with the booth officer and informed appellant that he did not have a court date that day and should remain in his cell. Appellant nonetheless repeatedly yelled that he was going to come out of his cell and hurt Deputy Van Du. The deputy ignored the threats because they are common and he did not view them as an immediate threat because appellant was behind closed doors. Eventually the screaming, yelling, and banging on the glass door attracted the other inmates' attention as they all stopped what they were doing to look and listen to appellant. At this point Deputy Van Du told appellant to calm down and be quiet so that he could prepare the other inmates who had court appearances.

After unsuccessfully trying to calm appellant down, Deputy Van Du returned to his duties only to find appellant out of his cell and standing within half a foot of him. Deputy Van Du had not received the customary verbal warning that appellant's cell door had opened and was surprised to find appellant out of his cell. Appellant then threatened Deputy Van Du and stated, "[N]ow what are you going to do? I am going to kick your ass." At this point, appellant charged at him and struck Deputy Van Du on the left shoulder with his fist. Deputy Van Du engaged appellant in order to protect himself and struck him in the face three to five times. Appellant fought back and struck Deputy Van Du in the shoulder, upper torso, upper body, and head. Deputy Van Du verbally commanded appellant to stop fighting and put his hands behind his back so the deputy could handcuff him but appellant refused to comply with Deputy Van Du's orders. Eventually Deputy Van Du wrestled appellant to the ground after instructing him to go down to the ground four or five times to no avail.

As Deputy Van Du struggled to control appellant, who was flailing and punching, he placed a disturbance call on his hand held radio and Deputy Jose Ramirez arrived at the scene and assisted Deputy Van Du in handcuffing appellant. Even after the deputies had successfully handcuffed appellant on the ground, appellant kept resisting and kicking at the deputies, striking Deputy Van Du on his legs and chin. Deputy Van Du then punched appellant three or four times in the facial and upper torso area to get him to comply with the deputies' orders to stop squirming and kicking.

Following the incident appellant had a small laceration above his nose and swelling to his left temple and the right side of his forehead. He attempted to decline medical attention. X-rays were taken of appellant's head, which showed that he had not suffered any fractures. Deputy Van Du suffered a fracture in his right hand and had surgery on it as a result.

Due to Deputy Van Du's hand injury, he was unable to write and therefore dictated what had happened to Deputy Jorge Balares, who wrote it down as Deputy Van Du's written statement. Although Deputy Van Du told Deputy Balares that appellant had thrown the first punch, Deputy Van Du was not sure whether the punch had struck his body.

After the incident Sergeant Victor Zavala conducted a customary use of force investigation and interviewed Deputy Van Du and the other deputies about what had happened. Deputy Van Du told Sergeant Zavala that he was surprised that appellant had emerged from his cell and feared for his safety because of the threats appellant was making toward Deputy Van Du. Deputy Van Du further said that appellant was going to hurt him, so he struck appellant out of fear for his own safety. He did not tell Sergeant Zavala that appellant had thrown the first punch. Sergeant Zavala, after interviewing Deputy Van Du, appellant, and two other inmates, concluded that Deputy Van Du's use of force was reasonable.

2. Defense Evidence

On the day of the incident, February 10, 2009, John Guzman was in custody at the Twin Towers facility as a result of his guilty plea to felony counts of residential burglary, grand theft, and receiving stolen property. Guzman was out of his cell eating breakfast when he saw appellant coming out of his pod asking for his medication. Appellant was told to go back in and responded, "I will go back in when you give me my medication." Appellant then told a "big ass Korean"[3] deputy something in Japanese that Guzman did not understand. The deputy did not respond to appellant and after appellant stated, "Oh, I guess you don't speak that," the deputy left and returned with a taser gun. The deputy ordered appellant to get on the ground and appellant complied. After the deputies had handcuffed appellant, the Korean deputy started to strike him in the face using his fists, elbows, and knees. During this assault by Deputy Van Du appellant was constantly apologizing to him.

Following the incident, deputies interviewed Guzman as to what he saw and he testified that he never saw appellant take a swing at the Korean deputy. The jury saw a videotape of Guzman's interview with the deputies in which he told them that he was waiting to go to court when appellant "came loud running out, he's like making fun of the Asian deputy. . . . [¶] . . . [¶] . . . He was talking in Japanese and said like, 'hey you' and in Japanese whatever and then you know he told him to go get the taser uh, they pointed at him tell him to totally get on the ground, got him [on] the ground, handcuffed him, started kicking him and I was only tripping on that but then he started [unintelligible] and like mean hit on the face too, you know."

Eventually appellant was picked up and taken away by other deputies. At trial Guzman stated that his initial description that appellant had come "running out" was a little exaggerated, and what he meant was that appellant had come outside of his cell.

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[3] Although Guzman did not remember Deputy Van Du by name, his reference to the "Korean" deputy is to Deputy Van Du.

3. Prosecution Rebuttal Evidence

Deputy Van Du was not armed with a taser that day. Deputy Ramirez saw Deputy Van Du punch appellant two times and testified that he did not see Deputy Van Du continuously punch appellant after appellant had been handcuffed.

DISCUSSION

1. Pitchess *Motion*

Appellant filed a *Pitchess* motion on August 6, 2009, seeking any discoverable information contained in Deputy Van Du's and Deputy Ramirez's personnel files. On September 3, 2009, the trial court granted the motion, and after conducting the in camera inspection, found no discoverable information. Appellant asks us to assess whether the trial court complied with the *Pitchess* procedures delineated in *People v. Mooc* (2001) 26 Cal.4th 1216 and whether the court properly concluded there was no relevant and discoverable information. Appellant also asks us to ensure that the custodian of records who appeared at the in camera hearing was properly sworn in prior to testifying.

The statutory scheme for *Pitchess* motions is contained in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7 and 832.8. (*People v. Mooc, supra*, 26 Cal.4th at p. 1226.) A defendant, in order to seek discovery from a peace officer's personnel records, must file a written motion that satisfies certain prerequisites and makes a preliminary showing of good cause. (*Ibid*.) If the trial court concludes that good cause has been established, the custodian of records brings "all documents 'potentially relevant' to the defendant's motion. [Citation.]" (*Ibid.*) The trial court shall then examine these documents in camera and, subject to certain statutory exceptions and limitations, shall disclose to the defendant "'such information [that] is relevant to the subject matter involved in the pending litigation.' [Citation.]" (*Ibid.*) "The trial court 'shall exclude from disclosure: [¶] (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought. [¶] (2) In any criminal proceeding the conclusions of any officer

investigating a complaint filed pursuant to Section 832.5 of the Penal Code. [¶] (3) Facts sought to be disclosed which are so remote as to make disclosure of little or no practical benefit.' [Citation.]" (*Id.* at pp. 1226-1227.)

Having independently reviewed the transcript of the *Pitchess* proceeding and the record the trial court submitted under seal, we conclude the court followed proper *Pitchess* procedures and did not erroneously withhold any documents. There was no error here.

2. Jury Instructions on Count 2 for Resisting a Peace Officer

a. The Trial Court Erred in Instructing the Jury on Count 2

When instructing the jury on the description of the offense charged in count 2 -- resisting a peace officer, causing serious bodily injury -- the trial court omitted that portion of the instruction that required the jury to find that "the detention and arrest was lawful and there existed probable cause or reasonable cause to detain." (§ 148.10, subd. (b)(2).) After the prosecution rested its case, defense counsel moved to dismiss the case under section 1118.1 on the ground that the prosecution failed to establish an essential element of the offense -- that the detention was lawful and there was probable cause to detain appellant. The trial court took the dismissal motion under review, noting that under CALCRIM No. 2655, to prove the defendant is guilty of violating section 148.10, the People must establish the lawfulness of the arrest. Eventually the court decided to instruct the jury with CALJIC No. 9.82, which places the lawful arrest portion of the instruction in brackets and states that portion "should be deleted if the incident arises out of [a] confrontation not involving an arrest or detention." The court concluded that because this incident occurred in a prison setting, the lawful arrest portion was not relevant, and it therefore omitted it from the jury instructions. Appellant contends that this omission precluded the jury from making an essential factual determination, which violated appellant's rights under the Fifth and Fourteenth Amendments to the United States Constitution. We agree that the court erred, but the error was not prejudicial.

"The independent or de novo standard of review is applicable in assessing whether [jury] instructions correctly state the law . . . ." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) This review of the adequacy of the instructions is based on whether the trial court "'fully and fairly instructed on the applicable law.'" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

While the trial court may modify proposed language so that jury instructions correctly cover the issues, it "bears a sua sponte duty to instruct the jury on the essential elements of an offense [citation], and '"on the general principles of law governing the case."'" (*People v. Bell* (2009) 179 Cal.App.4th 428, 434; see also *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.) The trial court must refrain from instructing the jury on any law that is not only irrelevant but may also confuse the jury or preclude it from making decisions on the relevant issues. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1172.)

In determining whether the lawfulness of the arrest was an essential element of the offense, "'[w]e begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.] If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we "'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" [Citations.]' [Citation.]" (*People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1530.)

The words of a statute must be construed in context and the subject matter must be harmonized to the best extent possible. (*People v. Cottle* (2006) 39 Cal.4th 246, 254.)

Here, the plain language of section 148.10 incorporates the lawfulness of the detention and arrest as an essential element of the offense. We need look no further.

Subdivision (a) of that section states that "[e]very person who willfully resists a peace officer in the discharge or attempt to discharge any duty of his or her office or employment and whose willful resistance proximately causes death or serious bodily injury to a peace officer shall be punished." Subdivision (b) then goes on to list the facts that "*shall* be found by the trier of fact." (Italics added.) Among those facts are (1) that the peace officer's action was reasonable, (2) that "the detention and arrest was lawful and there existed probable cause or reasonable cause to detain," and (3) that the person who resisted the officer knew or reasonably should have known that the other person was a peace officer performing his or her duties. Because the statute lists the lawfulness of the detention and arrest as a fact that the jury *must* find in order to find the defendant guilty, we are persuaded this is an element of the offense. The jury should have been instructed on the issue of the lawfulness of the detention and arrest, and the court erred in not doing so.

Our conclusion is reinforced by the law regarding the closely related misdemeanor offense defined in section 148, that of willfully resisting, delaying, or obstructing an officer. The main difference between section 148 and section 148.10 is that the former does not require the defendant's resistance to have proximately caused death or serious bodily injury. Our courts have held that "[i]n California, the lawfulness of an arrest is an *essential element* of the offense of resisting or obstructing a peace officer" under section 148. (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409, italics added.)

Respondent argues that section 148.10, subdivision (a) refers to resisting a peace officer in the performance of "any duty," and officers perform duties other than detentions and arrests. Respondent further argues that the only way to harmonize subdivision (a) with subdivision (b) of section 148.10 is to find that the lawfulness of the detention and arrest is not an essential element of the offense and is irrelevant in a situation that involves duties other than detentions and arrests. Consequently, respondent argues, the lawfulness of the detention and arrest should not be submitted to the jury in those circumstances when it is irrelevant, as in the present case.

Respondent's argument is unpersuasive. The lawfulness of the detention and arrest is only one fact that the jury must find under section 148.10, subdivision (b). Respondent does not contend that the other two facts -- the reasonableness of the peace officer's actions and the defendant's knowledge that the person he was resisting was a peace officer -- are optional findings. All three are delineated as facts that "shall" be found by the trier of fact. There is no basis in the statute to distinguish one factual finding from another -- they are all necessary. The more reasonable interpretation of the statute is that section 148.10, subdivision (b) merely narrows and further defines the offense.

b. Even Though the Trial Court Erred, the Error Was Not Prejudicial

We hold that the trial court's error in omitting the lawfulness element was harmless and does not require us to reverse. "A trial court's failure to instruct on all elements of an offense is a constitutional error 'subject to harmless error analysis under both the California and United States Constitutions.'" (*People v. Bell, supra*, 179 Cal.App.4th at p. 439.) Reversal is thus not required if the error is "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

An error may be harmless beyond a reasonable doubt if the evidence supporting the conviction was overwhelming or the jury was instructed on the omitted element under other, properly given instructions and made an implied finding on it. (*People v. Johnson* (1993) 6 Cal.4th 1, 45-46.)

"A detention occurs 'whenever a police officer accosts an individual and restrains his freedom to walk away . . . .'" (*People v. Aldridge* (1984) 35 Cal.3d 473, 477.) Furthermore, an arrest qualifies as a seizure under the Fourth Amendment, and a "seizure occurs when an officer restrains a person's liberty by force or show of authority." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1081; see also *Ashcroft v. al-Kidd* (2011) 131 S.Ct 2074, 2080.) For a detention to be reasonable under the Fourth Amendment, the detaining officer has to be able to point to "specific articulable facts that, considered in light of the totality of the circumstances, provide some objective

manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Although the case at bar did not involve a traditional detention and arrest situation because the defendant was already in custody at the time and was never free to leave, Deputy Van Du's restraint of appellant was nonetheless analogous to a traditional detention situation. The facts overwhelmingly demonstrate that Deputy Van Du's restraint of appellant was lawful, especially considering that "[t]he protections afforded by the Fourth Amendment to persons not incarcerated generally are not applied in the same manner to persons held in lawful detention by the government." (*People v. West* (1985) 170 Cal.App.3d 326, 329.) The prosecution's evidence established that appellant had threatened Deputy Van Du prior to the incident and had caused such a ruckus that the other inmates had stopped what they were doing to pay attention to appellant. When appellant stepped out of his cell and approached Deputy Van Du, he again threatened to hurt the deputy, and this time he was capable of doing so. He then charged at the deputy. In defense of himself, Deputy Van Du punched appellant and eventually physically restrained him. Moreover, many other inmates were not restrained in any way at the time of the incident and could have been incited by appellant's actions, posing an additional threat to the deputy. Deputy Van Du's actions were consistent with prison regulations, which dictate that an officer may physically restrain an inmate "[w]hen a person's history, present behavior, apparent emotional state, or other conditions present a reasonable likelihood that he or she may become violent or attempt to escape." (Cal. Code Regs., tit.15, § 3268.2, subd. (b)(2).) In this case, appellant's violent behavior constituted reasonable cause to restrain him. He was disruptive, threatening, and capable of executing his threats and hurting the deputy and/or other inmates. Presented with this set of facts, no reasonable jury would have concluded that any detention was unlawful.

Even under the defense's version of the facts, there was strong evidence that any detention was lawful. Appellant was supposed to be in his cell, and when appellant appeared out of his cell requesting his medication, Deputy Van Du first told

him to return to his cell and gave him an opportunity to do so. After appellant refused to obey the order, Deputy Van Du ordered him to the ground and handcuffed him.

Due to the overwhelming evidence that Deputy Van Du's restraint of appellant was lawful, the error of omitting the lawfulness of the detention and arrest element was harmless beyond a reasonable doubt.

3. The Failure to Instruct the Jury with CALJIC No. 9.29 Does Not Require Reversal

Appellant contends that the trial court committed prejudicial error when it failed to instruct the jury, sua sponte, with CALJIC No. 9.29. CALJIC No. 9.29 instructs that the People must prove beyond a reasonable doubt that the peace officer was engaged in his duties at the time of the incident, and that a peace officer is not engaged in his duties when he makes an unlawful detention or uses unreasonable or excessive force. The use notes state that when a "defendant is charged with a violation of § 245(b) or § 148, and the defense of unlawful arrest by reason of excessive force is presented, this instruction must be given." (CALJIC No. 9.29.) Appellant argues that because the defense presented evidence that appellant came out of his cell looking for his medication and was detained as a result, and because Deputy Van Du continued to strike appellant after he was handcuffed, the evidence of the deputy's unlawful actions and his unreasonable use of force warranted instructing the jury with CALJIC No. 9.29. We find appellant's argument unavailing.

In a criminal case, "a trial court has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) This includes the duty of the trial court to instruct on a defense "when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case." (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) For the evidence to be substantial it must be evidence "from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*People v. Blair* (2005) 36 Cal.4th 686, 745.) We

review de novo an alleged error in failing to instruct on a defense or general principles of law relevant to the issues. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

Assuming for the sake of argument that the trial court erred in failing to instruct with CALJIC No. 9.29, any error was harmless. Even under the "harmless beyond a reasonable doubt" *Chapman* standard, the failure to instruct was harmless because the jury addressed excessive force and the reasonableness of the deputy's actions under other, properly given jury instructions. (*Chapman*, *supra*, 386 U.S. at p. 24.)

The trial judge instructed the jury with a modified version of CALJIC No. 16.111, and both the prosecution and defense approved of the instruction before the court instructed the jury. The instruction stated, "A peace officer is not permitted to use unreasonable or excessive force in performing his custodial duties. [¶] If an officer does use unreasonable or excessive force in performing his custodial duties, the person who is the object of the officer's actions may lawfully use reasonable force to protect himself. [¶] Thus, if you [the jury] find that the officer used unreasonable or excessive force in performing his custodial duties, and that the defendant used only reasonable force to protect himself, the defendant is not guilty of the crime charged in Counts 1 and 2 or of any lesser included offense."

Furthermore, the court instructed the jury with CALJIC No. 2.90, which states in relevant part: "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." In regards to Deputy Van Du's actions, the court instructed the jury with CALJIC No. 16.103, which states: "A custodial officer is engaged in the performance of his duties if he is maintaining custody of a prisoner or performing tasks related to the operation of a local detention facility." Finally, two of the elements of CALJIC No. 9.82 instructed the jury to determine whether Deputy Van Du's actions were reasonable and whether he was engaged in the performance of his duties at the time of the incident. The instruction states in relevant part: "In order to prove this crime, each of the following

elements must be proved: [¶] . . . [¶] . . . [a]t the time the peace officer was engaged in the performance of his duties . . . [¶] . . . [¶] . . . [and] [t]he peace officer's action was reasonable based on the fact[s] or circumstances confronting the officer at the time."

Having been so instructed, the jury found appellant guilty of both charged offenses beyond a reasonable doubt. The jury thus necessarily concluded that Deputy Van Du was not using unreasonable or excessive force but was performing his duties during the incident and that his actions were reasonable. Any error was not prejudicial.

DISPOSITION

The judgment is affirmed.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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