Filed 9/26/17 P. v. Catalan CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LUIS RUBEN CATALAN, Defendant and Appellant.	B263360 (Los Angeles County Super. Ct. Nos. VA136273 and TA129868)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph R. Porras, Judge. Modified and affirmed with directions.

John J. Uribe, 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, Stephanie A. Miyoshi and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Luis Ruben Catalan appeals the judgment entered in Los Angeles County Superior Court case number VA136273 following a jury trial in which he was convicted of unlawful driving/taking of a vehicle (Veh. Code, § 10851, subd. (a); count 1); felony evading an officer with willful disregard (Veh. Code, § 2800.2, subd. (a); count 2); misdemeanor resisting, obstructing, or delaying a peace officer (Pen. Code,[1] § 148, subd. (a)(1); count 3); and two felony counts of resisting an executive officer (§ 69; counts 4 and 5). Following appellant's admission of a prior vehicle theft conviction, the trial court found the prior conviction allegation to be true.[2] The trial court sentenced appellant to a total of 6 years 4 months in state prison.[3]

---

[1] Undesignated statutory references are to the Penal Code.

[2] The prior vehicle theft conviction arose out of Los Angeles County Superior Court case number TA129868, which was the subject of a probation revocation hearing held in conjunction with the instant case. After finding appellant in violation of probation in case number TA129868, the trial court sentenced him to the upper term of 3 years to run concurrently with the sentence imposed in the present case.

[3] The sentence consisted of the upper term of 4 years as the base term on count 1, plus 1 year for the prior conviction (Pen. Code, § 667.5, subd. (b)); a consecutive term of 8 months (one-third the midterm) on count 2; a concurrent term of 365 days in county jail on count 3; a consecutive term of 8 months (one-third the midterm) on count 4; and a concurrent term of 8 months (one-third the midterm) on count 5.

Appellant contends: (1) the trial court erred in denying his *Batson/Wheeler* [4] motion; (2) because substantial evidence does not support the felony conviction for resisting an executive officer in count 4 (§ 69), that conviction should be reduced to the lesser included offense of resisting a peace officer in violation of section 148; and (3) the trial court's incorrect oral instructions require reversal of the convictions on counts 3, 4, and 5. We disagree and affirm the judgment of conviction. However, we conclude that the trial court improperly imposed concurrent sentences on counts 3 and 5 in violation of section 654. We therefore modify the judgment to stay imposition of sentence on those counts.

FACTUAL BACKGROUND

On July 31, 2015, following a recent spate of commercial truck thefts in Riverside County, John Whitworth, an investigator with the Riverside County District Attorney's office, met with Mark Donahue, a theft investigator for the Swift Transportation Company, for the purpose of obtaining one of the company's big rig trucks to use as "bait." Donahue provided a white 2015 freight liner big rig, equipped with a Qualcomm GPS/communication computer system and keyboard for use by the driver. Additional GPS tracking transmitters were affixed to the truck before it was parked and left at a location where many of the truck thefts had occurred.

On August 2, 2014, about 10:40 p.m., Whitworth received information that the truck was moving. After Donahue confirmed that no one had received permission to move it, Whitworth

---

[4] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

located the truck about 30 miles from where it had been parked, traveling westbound on the 91 freeway near the Tustin Avenue off-ramp in Orange County. Whitworth called the California Highway Patrol (CHP) for assistance, and set out to intercept and follow the truck. Donahue joined in the pursuit.

Around 11:50 p.m., CHP Officer Greg Makel and his partner, Officer Emily Youngblood, were patrolling the 91 freeway in a marked black and white patrol vehicle when they received a radio broadcast about a stolen white freight liner big rig without a trailer. They spotted the truck on the freeway and pursued, along with other CHP officers James Final, his partner Officer Caravalo, and Sergeant Tannon Brown. Officer Makel positioned his patrol car to the left rear of the truck, activated his emergency lights and siren, and, using the loudspeaker, ordered the driver of the big rig to exit the freeway. The truck started to exit, but suddenly veered to the left and reentered the flow of traffic in the number 4 lane of the freeway. Officer Makel ordered the vehicle to exit the freeway several more times.

Eventually, the big rig exited the 91 freeway with several CHP cars in pursuit. Traveling in excess of the speed limit, the truck ran one red light at the bottom of the exit ramp and another at an intersection before proceeding back onto the freeway. The big rig exited and reentered the freeway two more times, running through red lights and intersections without slowing and driving in the opposing lanes of traffic. The officers continued to pursue the big rig as it merged onto the northbound 710 freeway. Officer Makel positioned his patrol car 20 to 25 feet from the left rear of the truck. Officer Youngblood then shone the patrol car's spotlight into the left outside mirror of the big rig, enabling both officers to clearly see and identify appellant as the driver of the stolen truck. They broadcast his description to CHP dispatch and

the other CHP officers in pursuit. At one point during the chase, appellant intentionally swerved the truck to the left in an attempt to strike Officer Makel's patrol vehicle.

After the truck finally exited the freeway it came to an abrupt stop on the sidewalk in front of an apartment complex in the City of Alhambra. Appellant exited the truck and ran into the apartment complex. Officers Final and Makel chased appellant through one courtyard before he disappeared in a second courtyard. Just after they lost sight of him the officers heard a wrought iron door slam shut. They searched the courtyard and found fresh footprints with the shoe brand imprint "ADIO" or "ADO" running through the garden bed in front of apartment N.

Officer Makel knocked on the door to apartment N and identified himself to the woman who answered. As they entered the apartment, Sergeant Brown and Officers Makel, Final, and Youngblood saw appellant walk out of a bedroom and sit on the living room couch. He was wearing sweatpants with no shirt and appeared to be sweating. Officer Final and Sergeant Brown recovered muddy shoes and blue jeans from the bedroom from which appellant had emerged. The shoes had the same "ADIO" logo on the tread as the imprint left in the garden bed, and the jeans matched the clothing Officer Final had observed appellant wearing during the foot chase.

Officer Makel identified appellant as the driver of the truck who had run from the officers and advised appellant he was under arrest for driving the stolen big rig. But appellant refused to stand when ordered to get up to be taken into custody. When Officer Makel grabbed appellant's left arm to pull him off the couch, appellant pulled it back forcefully causing the officer to let go. As Sergeant Brown and Officers Makel and Final tried to

take hold of his arms to pull him off the couch, appellant began to thrash violently, moving his upper torso back and forth, swinging his arms in a violent manner, and kicking his legs. The officers finally managed to pull appellant off the couch and tried to take control of his wrists. Officer Final swept appellant's legs out from under him, forcing appellant to the floor on his stomach, but appellant continued to resist by putting his arms under his body against the floor. Appellant continued to struggle, but eventually the officers were able to handcuff him and take him into custody.

DISCUSSION

I. *Batson/Wheeler*

Appellant contends that reversal is required because the prosecutor's stated reasons for excusing Prospective Juror No. (PJN) 5617 were pretextual, and the trial court failed to conduct a sincere and reasoned analysis of the prosecutor's reasons for excusing that juror. We disagree.

A. *Relevant background*

Following the prosecution's first six peremptory challenges, the defense brought a *Batson/Wheeler* motion on the ground that the prosecutor had improperly excused five or six Hispanic women from the jury.[5] The trial court found a prima facie case of discrimination as to the prosecution's first five peremptory challenges (PJN's 7029, 5617, 0905, 4894, and 7360), stating that, although it could not be certain, those women did appear to be "Hispanic." While expressing doubt that the sixth juror excused

---

[5] The prosecutor used her peremptory challenges to excuse (1) PJN 7029, (2) PJN 5617, (3) PJN 0905, (4) 4894, (5) PJN 7360, and (6) PJN 7779. Appellant challenges only the prosecutor's explanation for excusing PJN 5617 as pretextual.

(PJN 7779) was Hispanic, the trial court nevertheless ordered the prosecutor to state her reasons for that peremptory challenge as well.

The prosecutor conceded that PJN 5617 is Hispanic, and stated that she had noted the juror watches "novellas." She explained, "Although it is funny, and I know that a lot of us do, I just didn't care for that fact." The prosecutor observed that PJN 5617 "was super extra peppy" and "spoke with a very child-like voice." She added that she had noticed two other prospective jurors had raised their shoulders when PJN 5617 was speaking, "as if they were annoyed by the way she spoke or how peppy she was when she was giving the court information." The district attorney also remarked on the juror's dress and demeanor, explaining that she appeared to be trying to come across as young and seemed overly dramatic. The trial court noted that although some people who are not Hispanic or do not speak Spanish watch telenovelas, "it is consistent with Spanish television, and [PJN 5617] did speak with an accent commonly associated with the Spanish language."

The trial court commented that the jury venire had a large number of people with Spanish surnames and/or who appeared to be Hispanic, noting that there were five women with Hispanic surnames in seats 1 through 12, two men with Hispanic surnames in seats 13 and 17, and the defense had excused three prospective jurors who seemed to have Hispanic last names, one of whom was a woman. The prosecutor also pointed out that the majority of this particular jury venire consisted of women. The trial court then concluded it was "not finding any *Wheeler* violation based upon the race neutral reasons and gender neutral reasons given by the prosecution" as to the excluded prospective jurors.

B. *The trial court did not err in denying the defense* Batson/Wheeler *motion*

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson, supra*, 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler, supra*, 22 Cal.3d at pp. 276–277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) Indeed, exclusion of even one prospective juror for discriminatory reasons is prohibited under *Batson/Wheeler* and constitutes structural error requiring reversal. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez)*; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

"The familiar *Batson/Wheeler* inquiry consists of three distinct steps. The opponent of the peremptory strike must first make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. If a prima facie case of discrimination has been established, the burden shifts to the proponent of the strike to justify it by offering nondiscriminatory reasons. If a valid nondiscriminatory reason has been offered, the trial court must then decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 42; *Lenix*, *supra*, 44 Cal.4th at p. 612.)

This case concerns both the second and third steps of the *Batson/Wheeler* inquiry; that is, whether the prosecutor offered a valid nondiscriminatory reason for excluding PJN 5617, a Hispanic woman, from the jury, and whether the trial court correctly determined that the prosecutor had not engaged in

purposeful discrimination in exercising that peremptory challenge. At the second step of the inquiry, "the issue is the facial validity of the prosecutor's explanation." (*Hernandez v. New York* (1991) 500 U.S. 352, 360 (plur. opn.) (*Hernandez*).) The prosecutor meets this burden by providing a " ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' " (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) In this context, a neutral justification is one " 'based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " (*People v. Melendez* (2016) 2 Cal.5th 1, 17 (*Melendez*), quoting *Hernandez*, *supra*, 500 U.S. at p. 360; *Gutierrez*, *supra*, 2 Cal.5th at p. 1158.)

Appellant asserts that the prosecutor's reason for excusing PJN 5617—because she watches telenovelas—was not race neutral, but rather "appears to be a proxy for racial discrimination based on that juror being Hispanic." He further characterizes the other reasons given by the prosecutor—that the juror spoke in a childlike voice, seemed to dress to make herself look younger than she was, and the dramatic motion she made when she sat down—as pretexts for gender discrimination. After all, appellant declares, "appellant cannot conceive of" such reasons justifying the exclusion of a non-Hispanic or male juror. But appellant's inability to imagine the prosecutor's reasons as being race or gender neutral does not make those reasons discriminatory per se. To the contrary, the prosecutor's reasons for excusing this juror—the type of television programs she watches, her childlike voice and demeanor, and her apparent effect on other jurors—were facially legitimate and sufficiently

specific to meet the prosecutor's burden in the second step of the *Batson/Wheeler* analysis.

Moreover, even a prosecutor's explanation for a peremptory challenge which results in the disproportionate exclusion of members of a particular group does not preclude the proffered reason being race neutral. Rather, as *Hernandez* and our Supreme Court in *Melendez* explained, while this circumstance may be relevant to the third step of the *Batson/Wheeler* inquiry as to whether the reasons were sincere and not merely pretextual, it is not determinative at the second stage of the *Batson/Wheeler* analysis. (*Hernandez*, *supra*, 500 U.S. at pp. 363–364; *Melendez*, *supra*, 2 Cal.5th at pp. 17–18.)

In the third step in the *Batson/Wheeler* analysis, the trial court must decide whether the prosecutor has engaged in purposeful discrimination. In order to prevail at this stage, the defense must show it was " ' "more likely than not that the challenge was improperly motivated." ' " (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) The trial court's finding on discriminatory intent is " 'a pure issue of fact' " to which we apply a substantial evidence analysis. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339; *People v. Hamilton* (2009) 45 Cal.4th 863, 900.) And because the issue comes down to the credibility of the prosecutor's race- or gender-neutral explanation, we accord great deference to the trial court's evaluation of " 'whether the prosecutor's demeanor belies a discriminatory intent' " as well as " 'whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.' " (*Lenix*, *supra*, 44 Cal.4th at p. 614; *Snyder v. Louisiana* (2008) 552 U.S. 472, 477 ["[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous"].) "As a reviewing court, we presume the advocate uses peremptory

challenges in a constitutional manner, and defer to the trial court's ability 'to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' " (*Lenix, supra*, 44 Cal.4th at p. 626.)

In evaluating the credibility of the prosecutor's explanation, *Hernandez* cautioned that "[a] court addressing this issue must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.' " (*Hernandez*, *supra*, 500 U.S. at pp. 359–360.) The high court continued: " ' "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' " (*Id.* at p. 360.)

Finally, "[t]he prosecutor's ' "justification need not support a challenge for *cause*, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.' [Citation.] 'The proper focus of a *Batson*/*Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective reasonableness of those reasons. . . . All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 975.)

In the instant case, we conclude that, if true, the prosecutor's impressions regarding PJN 5716's voice, immaturity, and demeanor, as well as other jurors' reactions to her, amply justified the exclusion of the juror on nondiscriminatory grounds. And in light of the deference we must accord the trial court's credibility determination, we find no error in the trial court's acceptance of those reasons.

Appellant further contends that, because the prosecutor's reasons for excusing PJN 5617 were "inherently implausible" and facially discriminatory, the trial court erred in failing to conduct a more thorough examination of the prosecutor's explanation. We disagree. It bears repeating that the prosecutor's explanation for excusing this juror—the type of television programs she watches, her childlike voice and demeanor, and her apparent effect on other jurors—was based on facially legitimate factors other than the mere fact that the juror appeared to be a Hispanic woman.

As our Supreme Court has declared, "[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 901.) In fact, the trial court is not required to make any inquiry at all. (*People v. Watson* (2008) 43 Cal.4th 652, 670.) "This is particularly true where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (*Reynoso*, at p. 919.)

Here, contrary to appellant's contention, the trial court did not simply "rubber stamp" the proffered reasons, but, even though under no compulsion to do so, engaged the prosecutor in a

discussion of her reasons for exercising each of her peremptory challenges. The court stated its own observations regarding PJN 5617 and the jury venire as a whole before specifically concluding that the prosecutor's justifications for excusing the prospective jurors were nondiscriminatory. Because the trial court's determination of appellant's *Batson/Wheeler* motion in this case turned on its evaluation of the prosecutor's credibility, we will defer to the court's findings and uphold its ruling. (See *People v. Fuentes* (1991) 54 Cal.3d 707, 714, quoting *Batson*, *supra*, 476 U.S. at p. 98, fn. 21.)

II. The Felony Conviction on Count 4 for Resisting an Executive Officer Is Supported by Substantial Evidence

Appellant asserts that the prosecution failed to establish the force or violence element of resisting an executive officer under section 69 as alleged in count 4. He thus contends that, because the felony conviction on count 4 for resisting an executive officer lacked substantial evidentiary support, his conviction on that count must be reduced to the lesser included offense of misdemeanor resisting in violation of section 148. We disagree.

The offense of resisting an executive officer in violation of section 69, subdivision (a) is accomplished by the use of force or violence to knowingly resist an executive officer in the performance of his or her duty. As to this count, the trial court instructed the jury: "To prove that the defendant is guilty of this crime, the People must prove that one, *the defendant unlawfully used force or violence to resist [an] executive officer*; [¶] two, when the defendant acted, the officer was performing his lawful duty; [¶] and three, when the defendant acted, he knew the executive officer was performing his duty."

Resisting in violation of section 148, subdivision (a)(1), on the other hand, lacks the element of force or violence, and occurs when a person willfully resists, delays, or obstructs any peace officer in the attempt to discharge any duty of his or her employment. Appellant was charged in count 3 with resisting under section 148, subdivision (a)(1), and the trial court instructed the jury: "The People allege that the defendant resisted or obstructed or delayed Officer Makel by doing the following: failed to exit the freeway, run—ran away from the police, failed to stand up, resisted when the officer tried to arrest him and placed his hands under his body."

The record here squarely contradicts appellant's contention that the evidence failed to establish the force or violence element of resisting an executive officer charged in count 4. While appellant initially resisted, obstructed and delayed apprehension and arrest without the use of force or violence, there was abundant evidence that appellant subsequently resorted to force or violence in resisting the officers' attempt to take him into custody as charged in count 4. During the struggle with officers in the apartment, appellant "forcefully" pulled his arm out of Officer Makel's grasp and violently thrashed and flailed, moving his upper torso from side to side, swinging his arms in a violent manner, and kicking his legs. This evidence plainly belies appellant's claim that the prosecution failed to prove beyond a reasonable doubt the element of force or violence required to establish a violation of section 69, and we therefore conclude that substantial evidence supports appellant's conviction on count 4.

We also reject appellant's contention (articulated for the first time in his reply brief) that the trial court committed prejudicial error in failing to instruct sua sponte on the lesser included offense under section 148 in connection with count 4.

Our Supreme Court has long held that "[a] trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense." (*People v. Simon* (2016) 1 Cal.5th 98, 132.) While a trial court errs in failing "to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence," a trial court has no such duty " ' "when there is no evidence that the offense was less than that charged." ' " (*People v. Smith* (2013) 57 Cal.4th 232, 240, 245 (*Smith*); *People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Here, appellant correctly asserts that, under the accusatory pleading test, the section 148, subdivision (a)(1) violation was necessarily included in the section 69 violation alleged in count 4. But that conclusion does not end the analysis, for, as appellant acknowledges, a trial court is under no compulsion to instruct on a necessarily included offense when the evidence establishes that, if guilty, the defendant is guilty not just of the lesser offense, but of the greater as well. (*Smith*, *supra*, 57 Cal.4th at p. 245.)

Such is the case here. Contrary to appellant's assertion, his resistance to the officers' efforts to take him into custody was not limited to refusing to stand up, going limp, and pinning his arms under his body out of the officers' reach. Rather, the evidence showed that appellant used force in extricating himself from Officer Makel's grasp and violence to swing his arms and kick his legs to resist arrest. In the absence of any evidence that appellant committed only the lesser offense of resisting the officers without force or violence, the trial court was under no duty to instruct on the lesser offense in count 4.

III. The Trial Court's Instructions on Counts 3, 4, and 5 Do Not Warrant Reversal

Appellant contends that the jury heard incorrect oral instructions, and there is no evidence the jury even read, much less relied on the correct written instructions.[6] Appellant thus maintains that the trial court's incorrect oral instructions deprived him of his federal constitutional rights to due process and to be convicted only upon proof beyond a reasonable doubt of every element of the offense. We disagree. Contrary to appellant's assertion, it appears the jury did receive correct written instructions, and we conclude that the trial court's mistaken oral instructions did not result in reversible error.

A. *Relevant background*

Instructing the jury on counts 4 and 5, the trial court read CALCRIM No. 2652, the standard instruction pertaining to section 69, resisting an executive officer in the performance of duty. Next, the trial court gave CALCRIM No. 2656, the standard instruction on misdemeanor resisting charged in count 3. But partway into the reading of that instruction, the court deviated from the standard instruction by adding references to counts 4 and 5.[7] After the prosecutor brought the mistake to the

---

[6] The appellate record in this case does not contain the court's written jury instructions, nor did the superior court provide them in response to this court's orders to augment the record on June 17 and August 16, 2016.

[7] The court instructed: "To prove that the defendant is guilty of [the crime charged in count 3, resisting, obstructing or delaying a peace officer in the performance or attempted performance of his duties in violation of Penal Code section 148,

court's attention, the trial court declared: "Okay. So what I'm gonna do—this is only as to count 3. So I'm just going to strike, um, that entire instruction. I'm going to read it over. Okay?" The trial court then read CALCRIM No. 2656 in its entirety without deviation.

The court later misspoke in reading CALCRIM No. 2670, the standard instruction pertaining to a peace officer's lawful performance of duty: "The People have the burden of proving beyond a reasonable doubt that officers Makel and Final were lawfully performing their duties as peace officers. *If the People have* ***not*** *met this burden,* ***you must find the defendant guilty*** *of counts 3, 4 and 5*."[8] (Italics and boldface added.) The court concluded the instructions by reading CALCRIM No. 3515: "Each of the counts charged in this case is a separate crime. You must

---

subsection (a)], the People must prove that Officer Makel in count 4 and Officer Final in count 5 is a peace officer lawfully performing, attempting to perform his duties as a peace officer; the defendant willfully resisted or obstructed or delayed Officer Makel in count 4 in the performance or attempted performance of those duties; and Officer Final in count 5 and 3 when the defendant acted, he knew or reasonably should have known that Officer Makel was a peace officer performing or attempting to perform his duties in count 4 and Officer Final in count 5."

[8] The first paragraph of CALCRIM No. 2670 provides: "The People have the burden of proving beyond a reasonable doubt that _____ <*insert name, excluding title*> was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant **not guilty** of _____ <*insert name[s] of all offense[s] with lawful performance as an element*>." (Italics original, boldface added.)

consider each count separately and return a separate verdict form for each one."

B. *No prejudicial instructional error occurred*

A jury is presumed to understand and follow the trial court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) " 'This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 746; *Wilson*, at p. 803.) "Consequently, as long as the court provides accurate written instructions to the jury to use during deliberations, no prejudicial error occurs from deviations in the oral instructions." (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113.)

Appellant asserts that it does not appear that the jury received the court's written instructions in this case. To the contrary, the record not only indicates that the trial court informed the jury it would have the written instructions for reference during deliberations,[9] but it also reflects the court handed the written instructions to the bailiff for delivery to the jury at the start of deliberations. Moreover, during argument,

---

[9] In this regard, the court instructed the jury as follows:

"Members of the jury, I will now instruct you on the law that applies to this case. I will give you a copy of the instructions to use in the jury room. The instructions that you receive may be printed, typed or written by hand. Certain sections may have been crossed out or added. Disregard any deleted sections and do not try to guess what they might have been. Only consider my final version of the instructions in your deliberations."

both counsel encouraged the jury to review the written instructions as they applied to the facts and charges in the case.

Under these circumstances, we presume that if the jury had not received the written instructions, it would have so informed the court. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1133.) As the jury made no inquiry, we conclude that the jury was given the written instructions, and any errors in the court's oral instructions must be deemed harmless.[10] (*Ibid.*)

Appellant further contends that by applying CALCRIM No. 2670 to counts 3, 4, and 5, the instruction allowed the jury to convict on section 69 without finding the element of force or violence. The claim lacks merit. First, the trial court specifically instructed on force or violence as an element of counts 4 and 5. Moreover, that the officer was lawfully performing his duties as a peace officer was a common element shared by counts 3, 4, and 5, and CALCRIM No. 2670, by its own terms, applies to all offenses with lawful performance of duty as an element. That being so, there was no lessening of the prosecution's burden of proof by application of CALCRIM No. 2760 to the three counts requiring proof of that element.

IV. The Concurrent Sentences on Counts 3 and 5 Violate Section 654

Appellant contends that section 654 precluded separate punishment on counts 3 and 4 because both offenses were the means of accomplishing the single criminal objective of avoiding

---

[10] We must also presume correct written instructions in light of both parties' acceptance of the final packet of instructions without objection.

apprehension and arrest. We agree, and further conclude that the concurrent sentence on count 5 violated section 654 as well.

Section 654[11] bars separate punishment for multiple convictions arising out of a single act or a course of conduct motivated by a single criminal objective. (*People v. Corpening* (2016) 2 Cal.5th 307, 311; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective." (*Corpening*, at p. 311.) "Although the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law." (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

Respondent characterizes appellant's course of conduct underlying counts 3 and 4 as separate acts, "divisible in time," based on the passage of time between the foot chase and the confrontation in the apartment. However, "[i]t is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*Harrison*, *supra*, 48 Cal.3d at p. 335.) Here, there is simply no

---

[11] Section 654, subdivision (a) provides in relevant part: "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."

denying that appellant's singular intent and objective throughout his entire course of conduct was to avoid apprehension and arrest by police, and respondent fails to articulate any basis for concluding otherwise. Further, although counts 4 and 5 involved different victims—Officers Makel and Final—these officers were acting in concert to take appellant into custody, and appellant's use of force was directed at both simultaneously. That being the case, appellant could be punished only once for his conduct in resisting the officers in the performance of their duties, and section 654 precluded imposition of concurrent sentences on counts 3[12] and 5. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

---

[12] Ignoring section 654's mandate that a criminal act "shall be punished under the provision that provides for the longest potential term of imprisonment," appellant argues that the trial court should have stayed sentence on count 4. However, as between appellant's misdemeanor conviction in count 3 and his felony conviction in count 4, count 4 clearly carried the longer potential term of imprisonment. Accordingly, it is the sentence on count 3 which should be stayed under section 654.

DISPOSITION

The judgment is modified to stay the concurrent terms imposed on counts 3 and 5 pursuant to Penal Code section 654. The trial court is ordered to correct the minute order and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment to reflect this modification. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.