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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GUADALUPE RODRIQUEZ,<br><br>Defendant and Appellant. | B279620<br><br>(Los Angeles County Super. Ct. No. MA067952) |

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

Julie Jakubik, 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, Scott A. Taryle, Supervising Deputy Attorney General, Timothy L. O'Hair, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Guadalupe Rodriquez of felony vandalism (Pen. Code, § 594, subd. (a)[1] (count 1)), and resisting an executive officer (§ 69 (count 2)). The trial court found she had a prior strike conviction. Defendant challenges the sufficiency of the evidence on both counts to convict and faults the trial court for (1) failing to give a sua sponte instruction on the lesser included offense of resisting a public or peace officer (§ 148, subd. (a)(1)) and (2) denying her *Romero*[2] motion. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Jay's Liquor Store (Jay's) had a large front window protected by security bars. The store generally closed at 10:00 p.m.

On February 9, 2016, at about 11:15 p.m., Michael Cheek and Liliana Rivera, working in an adjacent building, heard the sound of breaking glass. They went outside to investigate and encountered defendant standing near Jay's. Cheek, noticing the broken window, asked defendant why she broke the glass. Cheek recalled defendant responded, "I didn't break it. I just tapped it." Rivera testified defendant said, "I just tapped it, and it broke." Defendant then started screaming at Cheek and Rivera and became "a little belligerent." Rivera called the police.

Los Angeles County Sheriff's Deputy Michael Courtial, in uniform, arrived in a marked police vehicle. Deputy Courtial remained in his car and asked defendant to approach. She was

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1 All statutory references are to the Penal Code.

2 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

approximately six to eight feet from the patrol vehicle, put her hands out, and responded, "Who the hell are you?"

Based on defendant's confrontational demeanor, Deputy Courtial stepped out of his vehicle, identified himself as a deputy sheriff, and grabbed her wrists. Defendant was screaming, "these [expletives] said I broke the window, I only tapped the glass." Deputy Courtial unsuccessfully tried to calm defendant.

Deputy Courtial handcuffed defendant and walked her toward the backseat of his vehicle by placing his right hand on her left bicep. Defendant advised Deputy Courtial she needed to use the restroom. Deputy Courtial responded, "[L]et's figure [out] what's going on out here, and we can take care of that." Deputy Courtial, still holding defendant's arm, then walked her to the front of the vehicle and asked her to sit on the "push bars" in front of the car's grill. At that point, defendant "forcibly pulled from [him], causing [him] to lose [his] grip." The deputy estimated the amount of force defendant used to pull away from him as "probably . . . [what] it takes to open a two liter bottle of soda when it's fresh."

After defendant broke away from Deputy Courtial's hold, he applied a "rear arm control" hold—a type of a "pain compliance." Because Deputy Courtial used force to keep defendant still, he called for a field sergeant to come to the scene.

While Deputy Courtial was waiting for the sergeant to arrive, defendant "kept pushing back" by "forcibly leaning back and kind of rock[ing] back to break free of [the] hold." Deputy Courtial arrested defendant after the sergeant arrived.

At some point after Deputy Courtial arrived, Jay's security alarm sounded. Jay's paid approximately $995 for a new window.

Defendant presented no evidence at trial. The jury convicted her of felony vandalism and resisting an executive officer. The trial court found defendant had a prior strike conviction. Defendant was sentenced to state prison for a term of five years and four months: the two-year middle term for felony vandalism, doubled for the prior strike conviction, and a consecutive 16-month term for the resisting an executive officer.

The trial court awarded defendant custody credits, and ordered her to pay various fees, fines and penalties. Defendant filed a timely notice of appeal.

## DISCUSSION

### I. Substantial Evidence

Defendant challenges the sufficiency of the evidence to support felony convictions for breaking the window and using force or violence to resist Deputy Courtial. We review the record for evidence that is "reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Clark* (2011) 52 Cal.4th 856, 942-943 (*Clark*), internal quotation marks omitted.) We do not resolve credibility issues or evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 (*Young*).)

#### *A. Vandalism Conviction—Breaking the Window*

Late at night, witnesses Cheek and Rivera heard glass breaking. They walked outside and saw a large, broken window and defendant. No one else was there. When asked why she

broke the glass, defendant responded, "I just tapped it, and it broke." No more was required to convict defendant of vandalism.

In closing argument, defense counsel suggested the delay before Jay's alarm sounded supported the inference that someone inside the liquor store broke the window and escaped out the store's back door. To the extent the argument presented an evidentiary conflict, we do not resolve it. (*Young*, *supra*, 34 Cal.4th at p. 1181.) Our inquiry is limited to whether sufficient evidence supports the finding the jury did make. On this record, it does. (*Clark, supra,* 52 Cal.4th at pp. 942-943.)

### *B. Resisting an Executive Officer Conviction—Force or Violence*

Defendant was charged with a violation of section 69: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable . . . by imprisonment[, fine, or both]." Section 69 "is designed to protect police officers against violent interference with performance of their duties." (*People v. Martin* (2005) 133 Cal.App.4th 776, 782; see also *People v. Campbell* (2015) 233 Cal.App.4th 148, 160 [a defendant who attempts "with "threats or violence to deter an officer from performing his or her duties [or who resists] an officer by force or violence" is guilty of violating section 69].) Section 69 may be violated when a defendant attempts to deter a police officer or actually resists the officer. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984.)

Here, defendant was prosecuted for knowingly resisting Deputy Courtial by the use of force or violence. Deputy Courtial

testified defendant pulled her arm from his grasp with the level of force "it takes to open a two liter bottle of soda when it's fresh." This evidence was uncontradicted. And on the verdict form for this count, the jurors indicated they "all agree[d] that the verdict [was] based on: [¶] defendant pulling her arm away from the deputy."[3]

Defendant cites *People v. Smith* (2013) 57 Cal.4th 232 (*Smith*) and *People v. Bernal* (2013) 222 Cal.App.4th 512 to support her assertion that the force she used was insufficient to constitute a violation of section 69. The force the defendants used in those cases was unquestionably greater than the force defendant used against Deputy Courtial. Neither of those cases, however, addresses the minimum level of force necessary for a section 69 conviction. The deputy's testimony that defendant used force to pull her arm away from him was sufficient to support her conviction of violating section 69. We do not re-weigh the evidence. (*Young*, *supra*, 34 Cal.4th at p. 1181.)

## II. Sua Sponte Duty to Instruct on Lesser Included Offense

Section 148, subdivision (a)(1)[4] (misdemeanor offense of resisting a police officer) is a necessarily included lesser offense of section 69 when the allegation is, as it was here, that the defendant resisted a police officer by force or violence. (*Smith, supra,* 57 Cal.4th at pp. 236, 241.) Defendant accordingly asserts

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[3] The jury did not find the second option, "defendant leaning her upper back against the deputy" to be true.

[4] "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty . . . " is guilty of a misdemeanor. (§ 148, subd. (a)(1).)

the trial court erred in failing to instruct sua sponte on section 148, subdivision (a)(1).

A trial court must instruct sua sponte on a lesser included, uncharged offense whenever "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 (*Simon*); see also *People v. Brothers* (2015) 236 Cal.App.4th 24, 29 ["The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater"].) An instruction on a lesser included offense is required "when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) In determining whether the trial court had a sua sponte duty to instruct on the necessarily included offense, we review the record de novo. (*Simon, supra,* 1 Cal.5th at p. 133.)

Defendant asserts there was a question as to whether the element of force necessary for a conviction based on her knowingly resisting the officer in the performance of his duty was present. But defendant's argument, both in the trial court and on appeal, is not so much directed to the use of force as it is to whether she was knowingly or willfully resisting. In this court, for example, defendant suggests she might have been expressing her "frustration because she had to use the restroom." The deputy's uncontradicted testimony was that defendant pulled out of his grasp as he was holding her arm. That maneuver required

force. There was no error in failing sua sponte to give the misdemeanor resisting instruction.

Even were we to conclude the court erred, the error would be harmless. Defendant must show "a reasonable probability that the lack of a [misdemeanor resisting] instruction affected the outcome." (*People v. Sakarias* (2000) 22 Cal.4th 596, 621.) She cannot do so. As discussed, defendant made the forceful movement to pull her arm away from the deputy. There was no evidence that defendant escaped the deputy's grasp inadvertently or without pulling free. (*Ibid.*)

Defendant's due process claim falls with our finding that any error in failing to instruct sua sponte was harmless. "When 'state standards alone have been violated, the State is free . . . to apply its own state harmless-error rule to such errors of state law.' (*Cooper v. California* (1967) 386 U.S. 58, 62 . . . .) We therefore determine that federal law has no effect on the appropriate standard of California appellate review when, in a noncapital case, the defendant challenges his otherwise valid conviction of a charged offense on grounds the trial court failed *in its sua sponte duty* under California law to provide instructions, correct and complete, on all lesser included offenses, including all theories thereof, which enjoyed substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 172-173.)

## III. *Romero* Motion

### *A. Trial Court Proceedings*

As noted above, the trial court found defendant suffered a prior strike conviction for a violation of section 422, subdivision (a), criminal threats. Before sentencing, defense counsel filed a *Romero* motion seeking to dismiss defendant's prior strike,

contending defendant was outside the spirit of the Three Strikes law because the current offense was minor in nature; she behaved appropriately during trial, even though she suffers from a mental illness; and she would still receive a lengthy sentence even if the *Romero* motion were granted. The prosecutor opposed the motion and argued defendant was "exactly the sort of person to whom the Three Strikes law was designed to apply" because of her criminal history, which included her probationary status at the time the current crime was committed.

The trial court recited a number of factors and denied the motion. The current crime was committed approximately one year after defendant's prior strike conviction, for which defendant served a 144-day sentence and was then placed on probation. The current offense was similar to the prior strike conviction, for making criminal threats. Defendant's criminal history was lengthy. While she had no convictions between 1999 and 2009, since then defendant had been convicted of misdemeanor vandalism in 2009, misdemeanor resisting an executive officer in 2011, felony vandalism in 2013, and criminal threats in 2014. The trial court considered defendant's mental health issues as a mitigating factor, but not sufficient to overcome the presumption that the prior strike conviction be considered in imposing sentence for the current offense.

*B. Analysis*

In *People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*), the Supreme Court explained, "the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law

creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*Id.* at p. 378.)

In ruling on a *Romero* motion, the trial court considers whether the defendant falls outside the "spirit" of the Three Strikes sentencing scheme. The trial court looks to "the nature and circumstances of [defendant's criminal history], and the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) It is not necessary for the trial court to state reasons for declining to strike a prior serious or violent felony conviction. (*Carmony*, *supra*, 33 Cal.4th at p. 375.)

Here, however, the trial court did explain its rationale. Defendant is a career criminal, and the circumstances must be "extraordinary" for a career criminal to be deemed as falling outside the spirit of the Three Strikes sentencing scheme. (*Carmony*, *supra*, 33 Cal.4th at p. 378.) We find no extraordinary circumstances here to take defendant outside the spirit of the Three Strikes law. The decision not to strike defendant's prior criminal threats conviction was well within the trial court's discretion.

## DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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