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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD LEON WILSON, Defendant and Appellant.	G035837 (Super. Ct. No. 04CF0703) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. (Retired judge of the Orange Super. Ct., assigned by the Chief Justice pursuant to Cal. Const., art. VI, § 6.) Affirmed.

Harvey L. Goldhammer, under appointment of the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Alleging insufficient evidence and sentencing error, Richard Wilson challenges his convictions for assault and forcibly resisting arrest. We find his arguments unpersuasive and affirm the judgment.

* * *

Early one morning, Tustin Police Officer Sean Quinn and officer trainee John Frahm noticed a Toyota 4Runner parked in a red zone with its hazard lights flashing. Quinn ran a records check and discovered the vehicle had been reported stolen. Hoping to catch the thief, he parked his patrol car in an alley and walked with Frahm to an area from which they could conduct surveillance. They were joined by officers Chupp and Howard, who laid spike strips under the 4Runner's wheels. A short time later, Wilson exited a nearby apartment and headed toward the 4Runner. As he began to enter the vehicle, the officers ran up and confronted him.

With their guns drawn, they identified themselves as police officers and ordered Wilson to put up his hands. Wilson looked at the officers but did not comply. Instead, he got in the driver's seat and closed the door. The officers then formed a containment line parallel to the 4Runner. Quinn was near the front of the vehicle, standing next to a truck that was parked in front of the 4Runner; Chupp was to the right of him, toward the front of Wilson's window; Frahm was next in line, facing Wilson's window; and Howard stood toward the rear of the 4Runner.

Wilson started the engine, reversed rapidly and stopped momentarily. He then cranked the steering wheel to the left and accelerated so fast the tires squealed and smoke poured out of the vehicle's back end. Frahm and Howard moved to their right, staying parallel with the driver's side door. However, Quinn and Chupp were directly in Wilson's path. As the 4Runner was coming at them, they ducked out of the way and fired five shots at the vehicle. Wilson then drove over the very spot where they had been standing just moments earlier. He was going about 20 miles per hour and missed the officers by only a couple of feet. Continuing down the street, he

abandoned the vehicle about a block away and escaped. He was arrested a few months later.

The defense sought to prove Wilson never intended to hit the officers and was merely trying to get away from them when they opened fire. It also tried to establish Wilson never really came that close to hitting the officers. As to that issue, Frahm testified on cross-examination that Quinn and Chupp were off to the side of the 4Runner as Wilson made his getaway. That was also the opinion of forensic scientists Jon Souw and Thomas Matsudaira. Based on their examination of the bullet holes that were found in the 4Runner, they believed Quinn and Chupp were not standing in Wilson's path when they fired their guns. However, Souw and Matsudaira failed to take into consideration the movement of the shooters or the 4Runner, factors which they admitted could very well have changed their opinion about where the officers were located.

The defense also argued the fact the officers' shell casings were found between 66 and 89 feet from where they allegedly fired their weapons. Again, this evidence was offered to discredit the officers' testimony that Wilson nearly ran them over. However, Matsudaira acknowledged that shell casings can travel a considerable distance after they hit the ground, depending on such factors as the angle of the gun, the grip and movement of the shooter, and the nature of the ground surface, which in this case was asphalt.

The jury convicted Wilson of assaulting Quinn and Chupp with a deadly weapon and resisting or deterring them in the performance of their duties. The jury also convicted Wilson of unlawfully taking the 4Runner. The court sentenced him to the upper term of five years for the assault on Quinn and a combined consecutive term of two years on the other counts.

I

Wilson argues there was insufficient evidence to support his convictions for assaulting and resisting the officers. We disagree.

"When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the verdict, drawing all inferences that reasonably support it, and determine whether it contains substantial evidence — that is, evidence which is reasonable, credible, and of solid value — from which a trier of fact could rationally find the defendant guilty beyond a reasonable doubt. [Citations.] In making this determination, we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses. [Citation.] Moreover, because it is the jury, not the reviewing court, that must be convinced of the defendant's guilt beyond a reasonable doubt, we are bound to sustain a conviction that is supported by only circumstantial evidence, even if that evidence is also reasonably susceptible of an interpretation that suggests innocence. [Citation.]" (*People v. Little* (2004) 115 Cal.App.4th 766, 771; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) In challenging his convictions for that offense, Wilson claims he did not intend to exert force on the officers, but simply wanted to make a safe getaway without causing them any harm. Even if that were true, however, it would not help his cause because assault "does not require a specific intent to injure the victim." (*People v. Williams* (2001) 26 Cal.4th 799, 788.) Even "a defendant who honestly believes that his act was not likely to result in a battery is . . . guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id*. at p. 788, fn. 3.)

Wilson undoubtedly knew of the officers' presence when he made his getaway at the scene. As he was getting into the 4Runner, the officers identified themselves and ordered him to put up his hands. He then looked at the officers, backed up the 4Runner and accelerated the vehicle very rapidly in their direction. According to the officers, they were forced to duck out of the way and barely managed to avoid being hit. Wilson then drove over the very spot they had been standing moments earlier. On these facts, even if Wilson was simply trying to get away from, and not harm, the officers, the jury was entitled to find his actions would probably and directly result in the application of physical force against the officers.

Wilson reminds us he presented evidence indicating the officers were not in harm's way when he made his escape. However, as we noted in the statement of facts, this evidence was not beyond reproach. In fact, the forensic witnesses Wilson presented admitted they did not take into account certain relevant factors in drawing their conclusions from the evidence, such as the movement of the officers and the movement of the 4Runner. This provided the jury a reasonable basis to discredit their testimony.

The broader point is that the jury heard the testimony supporting Wilson's defense and obviously decided the case against him based on the relative strength of the prosecution's witnesses. We are not at liberty to second-guess the jury's decision to believe the officers' testimony over the testimony put forth by the defense. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Suffice it to say, there is substantial evidence Wilson's actions would probably and directly result in physical force against the officers. The presence of some evidence to the contrary does not compel reversal of his convictions for assault.

Wilson's convictions for resisting or deterring the officers are also supported by substantial evidence. Penal Code section 69 provides, "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" guilty of a crime. While the statute does not define "force," the term "implies the exertion of physical strength or the operation of circumstances that permit no alternative to compliance." (American Heritage Dict. (2d college ed. 1982) p. 523; cf. *People v. Modiri* (2006) 39 Cal.4th 481, 494 [relying on dictionary definition of force in analyzing elements of great bodily injury enhancement].)

Wilson did not actually make physical contact with Quinn and Chupp. However, the officers had no real alternative but to comply with Wilson's unspoken demand to get out the way when he drove the 4Runner toward them. Their only other option was to hold their ground and risk serious injury or death, which was surely not a viable choice. That being the case, we find Wilson's conduct constituted forcible resistance to the officers' performance of their duties in violation of Penal Code section 69.

II

Relying on *Blakely v. Washington* (2004) 542 U.S. 296, Wilson argues the trial court's decision to sentence him to upper and consecutive prison terms violated his Sixth Amendment right to a jury trial. He recognizes the California Supreme Court rejected this argument in *People v. Black* (2005) 35 Cal.4th 1238, and that we are bound by this decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He simply wants to preserve the issue for further review in the event the federal courts disagree with *Black*. That day may come (see *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.] cert. granted *sub nom. Cunningham v. California*, Feb. 21, 2006, No. 05-6551, __ U.S. __, on the issue of whether *Blakely* applies to California's sentencing law), but until it does, we are powerless to grant Wilson relief.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O’LEARY, J.

IKOLA, J.