IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
	) No. S201186
Plaintiff and Respondent,	)
	) 2 Crim. B223181
v.	)
	)
DEWONE T. SMITH,	) Los Angeles County
	) Case No. BA337647
Defendant and Appellant.	)
	)

APPELLANT'S OPENING BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the County of
Los Angeles

Honorable Jose I. Sandoval, Judge

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ISSUE PRESENTED FOR REVIEW

Should the trial court have instructed the jury, as requested, on misdemeanor resisting a peace officer (Pen. Code, [1] § 148, subd. (a)(1)), as a lesser included offense of resisting an executive officer in the lawful performance of his duty (§ 69)?

INTRODUCTION

Appellant was convicted, among others, of two counts of a violation of section 69. He requested a jury instruction on the lesser included offense of misdemeanor resisting a peace officer, in violation of section 148, subdivision (a)(1). The trial court agreed the instruction would be appropriate in some cases, but not in the instant situation.

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

The Court of Appeal found that section 148, subdivision (a)(1) was not a lesser included offense of section 69, and that, regardless, the trial court committed no reversible error, because the evidence did not support guilt on the lesser offense. (*People v. Smith* (2012) 203 Cal.App.4th 1051, 1057-1059.) The appellate court's ruling was erroneous.

Section 69 can be violated in two ways, each constituting a separate offense. Where the offense is one of resisting by force or violence (second type offense), as was here in count 2, section 148, subdivision (a)(1) is a lesser included offense. While there is seemingly a currently a split of authority on the issue, those appellate courts that have taken a contrary position reached their conclusions based on an attempt to deter type of offense only (first type offense). Therefore, their analysis was incomplete and incorrect, as was that of the appellate court here.

Although the lesser included offense instruction should have been given as to both counts 2 and 5, the error was arguably harmless as to count 5, because there was substantial evidence that appellant both attempted to deter the deputies and used actual and *unlawful* force. Count 2, on the other hand, was solely based on appellant's use of force, in response to *excessive force* utilized by the deputies. Therefore, not giving the instruction was not harmless, but reversible error.

STATEMENT OF THE CASE

The prosecution charged appellant with possession of a weapon in jail (§ 4502, subd. (a); count 1), attempted deterring and resisting an executive officer (§ 69, subd. (a); counts 2, 5), and battery by gassing (§ 243.9, subd. (a); counts 3, 4, 6), with four prior strikes (§§ 667, subds. (b)-(i), 1170.12, subd. (a)). (1 C.T. pp. 71-75.) The six counts were based on four separate incidents.

Following a jury trial, appellant was convicted on all counts. (1 C.T. pp. 175-183; 4 R.T. pp. 2102-2104.) In a bifurcated trial, the court found that the prior convictions were qualifying strikes under the Three Strikes Law and denied appellant's *Romero*[2] motion to dismiss them. (1 C.T. p. 90; 2 C.T. pp. 374, 376; 2 R.T. pp. 981-984; 3 R.T. pp. 1202-1203; 4 R.T. pp. 2701-2704, 3001-3003.)

Accordingly, the court ordered appellant to serve 6 consecutive prison terms of 25 years to life as to each count, totaling 150 years to life. (2 C.T. pp. 376-381; 4 R.T. pp. 3010-3011.) On February 24, 2012, the Court of Appeal vacated appellant's sentence and remanded for resentencing, and otherwise affirmed the judgment. (*People v. Smith* (2012) 203 Cal.App.4th 1051, 1054, 1070.) On May 9, 2012, this Court granted review, limited to the issue described above.

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[2] *People v. Superior Court (Romero)* (1966) 13 Cal.4th 497.

STATEMENT OF FACTS[3]

April 21, 2008 Incident (Count 2)

On April 21, 2008, Los Angeles County Sheriff's Deputy Deloy Baker was assigned to module 1700 and 1750 at Men's Central Jail, as a prowl and security deputy for hundreds of inmates. (2 R.T. pp. 974-976; 3 R.T. p. 1232.) This had been his first and only assignment for the past three years. (2 R.T. p. 975.) Module 1700 housed high security or high profile individuals, known as "K10" inmates. (2 R.T. pp. 977, 979.)

The facility was in the process of declassifying appellant from K10 to general population. (2 R.T. pp. 978-979; 3 R.T. pp. 1233-1236.) The classification was done to ensure that inmates were properly housed for safety purposes. (2 R.T. p. 978.) Consistent with set procedures, Deputies Baker, Adolph Esqueda, Moreno, Farino, Rowland, and Lim began escorting appellant and 6 to 8 other declassified inmates, one by one, to the main open area in front of the control booth, at the entrance of the full module. (2 R.T. pp. 985-986, 988; 3 R.T. pp. 1204, 1233, 1237-1238, 1265, 1267-1268, 1270.) The inmates formed a line on the right side of the hallway, and the deputies stood on the opposite side and behind the inmates. (2 R.T. pp. 987-988.)

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[3] The Statement of Facts describes the two incidents that gave rise to counts 2 and 5 only, as they are relevant to this review.

The personal property of the inmates was placed in large bags in the center of the corridor. (2 R.T. p. 987; 3 R.T. p. 1205.) The deputies removed the inmates' handcuffs and instructed them to face the wall and to not speak, so their property could be searched without jeopardizing officer safety. (2 R.T. p. 986; 3 R.T. pp. 1207-1210, 1233-1234, 1237, 1268-1269.) The inmates were approximately 2 feet apart, and the bags containing their property were about 3 feet behind them. (3 R.T. pp. 1204-1205, 1237.) One deputy began conducting the search, while the others monitored the inmates. (3 R.T. pp. 1206-1207, 1237-1239.)

Appellant was somewhere toward the middle of the row. (3 R.T. p. 1206.) Once his handcuffs were taken off, appellant began turning to his left and looking in the direction of Baker and the other deputies. (3 R.T. pp. 1208, 1269.) He expressed concerned for his personal belongings, as he repeatedly asked the deputies not to lose his important legal documents. (3 R.T. pp. 1208, 1210, 1236, 1238, 1277.) Baker instructed appellant not to speak and to continue facing the wall, while appellant continued to turn from the wall and look in the deputies' direction. (3 R.T. pp. 1208-1211, 1239-1240, 1269, 1271.)

Following Baker's third instruction, appellant, once again, turned around and said, "don't lose any of my fucking paperwork." (3 R.T. pp. 1210, 1239-1240.) That is when Baker decided to move toward appellant.

(3 R.T. p. 1210.) He placed his hand on appellant, grabbed his left wrists with his left hand, placed his right hand on the center of his back and told him to face the wall. (3 R.T. pp. 1211-1212, 1240-1241, 1271-1272.) He then brought appellant's left hand behind his back in order to handcuff him. (3 R.T. p. 1212.)

After a few seconds, appellant became tense. (3 R.T. p. 1212.) He was breathing heavily, and his hands were clinching up. (3 R.T. pp. 1212, 1241.) Baker ordered appellant to place both of his hands behind his back, so that he could handcuff him. (3 R.T. p. 1212.) Appellant spun to his left, attempting to face Baker. (3 R.T. pp. 1212, 1272.) Baker "swung around and took [appellant] down." (3 R.T. pp. 1212, 1272, 1283.)

Baker had received training and had previous experience in restraining inmates and "taking someone to the ground." (3 R.T. pp. 1213, 1239.) Given that appellant was being uncooperative and becoming tense, Baker felt there was a possibility of an attack on himself and the deputy searching him. (3 R.T. p. 1213.) Therefore, he felt the best course of action was to handcuff appellant by taking him down to the ground. This was also generally done to reduce inmates' ability to draw weapons or injure others. (3 R.T. pp. 1213-1214.)

While Baker was attempting to take appellant down, he lost his footing due to appellant's size and fell to the ground along with appellant.

(3 R.T. pp. 1212, 1242, 1273.) Baker was 6'2" tall and weighed approximately 235 lbs. (3 R.T. p. 1242.) Appellant was not as tall as Baker was, but according to Baker, he was "thicker." (3 R.T. pp. 1242-1243.)

Appellant quickly jumped back up while Baker was still on his hands and knees, and struck Baker twice with his left hand on the right side of his face. (3 R.T. pp. 1214-1215, 1239, 1272-1273, 1283-1284.) He struck the deputy once in the ear, which affected his sense of balance and made his eyesight blurry, and once in the jaw. (3 R.T. pp. 1215-1216.) Baker described it as "a full force hit." (3 R.T. p. 1215.)

Eventually, Baker was able to stand up, and with the assistance of the other deputies, he wrestled appellant to the ground. (3 R.T. pp. 1216, 1243, 1273.) Appellant was thrashing his body from side to side, trying to break free and shouting "get the fuck off me, mother fuckers." (3 R.T. pp. 1216, 1243, 1278, 1284.) Baker continued to punch appellant in the face with his left hand, while attempting to hold him down with his right hand and telling him to stop fighting. (3 R.T. pp. 1216, 1256, 1259.) Esquedo also struck appellant in the midsection and told him, along with the other deputies, to stop fighting. (3 R.T. pp. 1273-1274, 1283-1284.) Deputy Lim then applied pepper spray several times into appellant's eyes. (3 R.T. pp. 1244, 1278, 1285.)

Appellant continued to kick and punch, attempting to stand up. (3 R.T. pp. 1216-1217, 1243, 1245-1248, 1254, 1256-1257, 1263-1264, 1279.) He was also screaming and complaining of pain to his face, ankle and head. (3 R.T. pp. 1246-1247, 1254.) In his report, Baker noted swelling over both eyes on appellant's face, although he testified that this was the result of being punched in the face, rather than the pepper spray. (3 R.T. pp. 1255-1256.)

Baker could not tell whether the kicking and punching was the result of the pepper spray, although both Baker and Esquedo admitted that kicking and trying to grab one's face was one of the usual reactions to the spray which was very painful. (3 R.T. pp. 1244-1253, 1257, 1260, 1263, 1278-1279, 1285.) In fact, the pepper spray caused some of the deputies to cough. (3 R.T. pp. 1260, 1263.)

After about 30 seconds to a minute, the deputies were able to subdue and handcuff appellant. (3 R.T. pp. 1216-1217, 1241, 1243, 1275-1276, 1279, 1285-1286, 1289, 1292.) In his original report, Baker wrote that appellant was still shouting out profanities. (3 R.T. pp. 1276, 1287-1289.) Later, at the request of the prosecuting attorney, he generated a supplemental report, specifying the precise words used by appellant, who had stated, "Fuck you Baker, I knocked your ass out, I got you." (3 R.T. pp. 1275-1277, 1289, 1291-1292.) Once handcuffed, appellant was escorted

about 8 feet away to a shower cell, then, taken to the medical clinic for treatment. (3 R.T. pp. 1231-1232.)

Baker testified that the decision to engage in the fight was made in a matter of seconds and was based on his training and experience. (3 R.T. pp. 1217-1218.) There was the danger of the other inmates joining in the fight or grabbing the deputies' keys to the control booth, which would have compromised the security of the jail. (3 R.T. pp. 1218-1220.) There was also the concern for the safety of the other deputies, who would have been outnumbered by the hundreds of inmates. (3 R.T. p. 1220.) He testified that the policy of the Sheriff's Department was to apply more force than that used by the inmate, in order to take control of the situation and to prevent injuries and limit altercations. (3 R.T. pp. 1261-1262.)

September 11, 2008 (Count 3-5)

Mark Tadrous had been a Los Angeles County Sheriff's Deputy for 3 years. (2 R.T. pp. 621-622, 644.) During that entire time, he had been assigned to the Twin Towers jail facility, which housed roughly 3,000 to 4,000 inmates on a daily basis. (2 R.T. pp. 637, 644-646.) Tadrous had received training in the use of nonlethal weapons and had prior experience as a member of an emergency response team ("ERT") at the jail. (2 R.T. pp. 645-646, 650, 659.)

Deputy Monty Gudino had been with the Sheriff's Department for 9 years. (3 R.T. pp. 1515-1516, 1573.) He had been assigned to Twin Towers the entire time, and was currently assigned to the training unit. (3 R.T. pp. 1516-1517, 1573.) Part of his training and experience included the proper use of force to overcome an inmate's resistance in the four distinct situations known as "cooperative," "resistive," "assaultive or high risk" and "deadly force." (3 R.T. p. 1516-1517.)

During the cooperative stage, a deputy would typically engage in a conversation with the inmate. (3 R.T. p. 1517.) He could also place his hands on the inmate, so long as no force was applied. Resistive occurred where a request was made or a command was issued, and the inmate refused. (3 R.T. p. 1518.) A deputy would then have several options, including using a firm grip, pepper or deep freeze spray, handcuffs and some other type of defensive tactics. (3 R.T. pp. 1518-1519.)

An assaultive situation was essentially a fight, permitting the use of nonlethal weapons. (3 R.T. p. 1520.) One example was pepper spray, which produced a number of physical reactions, including grabbing one's face and kicking, and the impact could last for hours. (3 R.T. pp. 1520-1522, 1573, 1575-1582.) It was not always effective, and to subdue an inmate, the person would need to be sprayed directly in the face at a close range. (3 R.T. pp. 1574, 1578, 1583, 1596.) Other examples were Taser, a multi-

launcher 40-millimeter which shot out OC spray, and stinger rounds which ejected rubber balls, all designed to disable the target. (3 R.T. pp. 1519-1520, 1522, 1524-1526, 1583-1584, 1594, 1596.)

On September 11, 2008, at approximately 7 a.m., Tadrous and Gudino were both on duty when, as part of an ERT, they were called to module 141, specifically to handcuff and detain appellant who was refusing to return to his cell and was required to appear in court. (2 R.T. pp. 622-625, 644, 650, 653, 659; 3 R.T. pp. 1528-1531.) Module 141 housed K10 inmates who were kept away from others for being violent and dangerous. (2 R.T. pp. 631, 637-638, 646-648; 3 R.T. pp. 1531, 1537.)

These inmates were not permitted to have any physical interaction with one another, and a solid wall was built in between the pods. (2 R.T. pp. 632, 638; 3 R.T. p. 1534.) They were fed through an open slot tray, and only one person at a time was allowed to step outside the cell to retrieve his food. (2 R.T. pp. 651-653, 666-667; 3 R.T. pp. 1552-1553.) There was also a control tower with tinted windows for monitoring the unit. (2 R.T. pp. 632, 648-649; 3 R.T. p. 1533.)

The deputies met in the ERT room, where they put on their protective gears and received their respective assignments. (2 R.T. p. 627; 3 R.T. pp. 1529-1530.) Gudino, along with several others were assigned to the 40-millimeter launcher, while Tardrous and another deputy were

assigned to shield. (2 R.T. pp. 625, 627, 660; 3 R.T. pp. 1529-1530, 1538, 1594.) Sergeant Chafen began briefing the deputies as to the situation. (2 R.T. pp. 625-626, 628-629, 653-654; 3 R.T. pp. 1529-1530.)

Appellant was standing outside his cell and yelling. (2 R.T. p. 627.) He was complaining that the deputies had been "playing games" with him, and he was refusing to go to court. (1 C.T. pp. 15-152; 2 R.T. p. 627.) Chafen was telling appellant that if he did not cooperate, the deputies would enter his cell, detain and handcuff him and "take [him] down to the hole." (1 C.T. p. 153; 2 R.T. pp. 627-628.) The "hole" was a single man cell with a bed, toilet and a sink, where inmates who had violated prison rules were placed. (2 R.T. pp. 655-656.) Deputy Arroyo was videotaping the exchange between the two.[4] (1 C.T. p. 153; 2 R.T. p. 628; 3 R.T. pp. 1529-1530.)

Eventually, Chafen advised appellant that if he did not go back inside, the deputies would use force against him. (1 C.T. p. 153.) Appellant yelled for the deputies to "come and get" him, stating, "But one thing you have to know – I'm going to be physical. I'm not going to – Somebody's going to get hurt. I'm not playin." (1 C.T. p. 153; 2 R.T. p. 630.) Tadrous and a few other deputies then grabbed their shields and lined up at the door.

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[4] The videotape and the transcript were marked as People's Exhibits 1 and 2, respectively, and the tape was played twice for the jury. (1 C.T. p. 108; 2 R.T. pp. 633-636; 3 R.T. pp. 1567-1572.) Both exhibits were admitted into evidence. (3 R.T. p. 1634.)

(2 R.T. pp. 625, 627, 629.) The shield was a 4-foot plastic piece with two handles on it, with the sole purpose of guarding against any object an inmate might throw at the deputies. (2 R.T. p. 625.)

Appellant was standing next to a table. (2 R.T. p. 629.) There was also a mattress in the cell, and one or two disposable plastic bowls on the table. (1 C.T. p. 154; 2 R.T. pp. 629, 657-659; 3 R.T. p. 1539.) Chafen advised the deputies of possible gassing, which was not an unusual occurrence at the jail. (2 R.T. pp. 658, 666; 3 R.T. p. 1539.) Tadrous also believed that the bowls might contain feces, although he could not see the contents from where he was standing. (2 R.T. p. 658.)

As Tadrous and the other deputies began moving toward appellant with their shields, appellant threw one of the bowls toward them, and the contents landed on the left sleeve of Tadrous's uniform, as well as his left arm and around the elbow, which were uncovered. (1 C.T. pp. 153-156; 2 R.T. pp. 638-639, 656, 658, 660-661, 664; 4 R.T. pp. 1815-1816.) It "smelled very bad," and Tadrous believed this was feces mixed with some type of brown yellowish liquid, possibly urine. (1 C.T. pp. 153-156; 2 R.T. pp. 639, 666.)

The contents also landed on Gudino, and in particular, on his right leg, chest area and arm. (3 R.T. pp. 1540-1541.) Gudino was not wearing forearm protection, and the feces touched his skin, specifically his forearm

and elbow, and part of his triceps. (3 R.T. p. 1541.) Later, as he was removing his uniform, he saw that the feces had leaked through his uniform and on his skin. This was the right hand part of his pants. (3 R.T. pp. 1572, 1586.) He also noticed fecal matter on his protective gear. (3 R.T. pp. 1591-1592.)

At this time, Gudino fired his 40-millimeter, which bounced off the mattress and did not strike appellant. (1 C.T. p. 155; 2 R.T. p. 640; 3 R.T. pp. 1541-1543, 1594.) He then fired a second time, but his weapon failed. (2 R.T. pp. 639-640; 3 R.T. pp. 1543, 1594-1595.) Next, the deputies used Taser, which, once again, did not strike appellant. (3 R.T. p. 1543.) Eventually, Gudino successfully fired another shot, which caused appellant to fall down on the ground. (1 C.T. pp. 154-156; 2 R.T. pp. 638-641, 661-662; 3 R.T. pp. 1544, 1570-1571, 1595.) Thereafter, appellant was handcuffed within three minutes. (1 C.T. p. 155; 2 R.T. pp. 661-662.)

Appellant was placed on a gurney and taken to the clinic for medical treatment. (1 C.T. pp. 155-156; 2 R.T. p. 663.) He continued to state that this would happen again and made incoherent statements. (1 C.T. pp. 155-157.) After appellant was subdued, Gudino experienced nausea as a result of the smell of the feces, and began coughing and gagging and eventually vomited. (3 R.T. pp. 1545, 1572, 1585.) He proceeded to the locker room, where he took a 45-minute shower. (3 R.T. pp. 1546, 1585.)

ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DECLINED TO INSTRUCT ON SECTION 148, SUBDIVISION (A)(1), AS A LESSER INCLUDED OFFENSE OF SECTION 69, IN COUNT 2

The trial court declined to instruct on section 148, as the lesser included offense of resisting with force, in violation of section 69, as charged in count 2. This was reversible error, because there was substantial evidence from which the jury could have inferred that appellant had resisted the deputies, albeit with lawful force and in response to excessive force applied by the deputies.

A. Relevant Proceedings

During trial, the court recognized its potential sua sponte duty to instruct on the lesser included offense of section 148, subdivision (a)(1), with respect to both counts 2 and 5. (3 R.T. pp. 1299-1300, 1507, 1511-1513, 1636-1641.) The prosecution took the position that section 148 was not a lesser included offense of section 69, while appellant requested that the instruction be given. (1 C.T. pp. 137-149; 3 R.T. p. 1300; 4 R.T. pp. 1801-1802.)

Ultimately, the court declined to include the instruction, in either count 2 or 5, finding that there was not "substantial evidence" to warrant this. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877.) At sentencing, the

court acknowledged that, in appropriate cases, section 148, subdivision (a)(1), could be a lesser included offense of section 69. (4 R.T. p. 3003.)

Nevertheless, the court opined that, based on the facts of the case, it had properly refused to give the instruction in both counts. (4 R.T. pp. 3003-3004.) The court cited *People v. Breverman* (1998) 19 Cal.4th 142, and later, *People v. Carrasco* (2008) 163 Cal.App.4th 978, in support of its conclusion. (4 R.T. pp. 1808, 3003-3004.)

B. General Principles

Courts have recognized a general obligation on the part of trial courts, even in the absence of a request, to instruct the jury on "general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case." (*People v. Carter* (2003) 30 Cal.4th 1166, 1219; citing *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Trial courts must instruct the jury on defense theories that are "supported by substantial evidence." (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.)

A defendant is not entitled to an instruction on a lesser related offense where the prosecution objects. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) However, a sua sponte duty to instruct, even absent a request and over the objections of the parties, arises with respect to lesser offenses necessarily included in the charged crime, where there is "substantial

evidence" that the defendant is guilty of the lesser. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826; *People v. Kraft* (2000) 23 Cal.4th 978, 1063.)

A refusal or failure to give such instruction violates the Sixth and Fourteenth Amendment rights to adequate instructions on the theory of the defense, the Sixth Amendment right to a jury trial, and the Due Process Clause. (U.S. Const., amends. V, VI, XIV; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *United States v. Unruh* (9th Cir. 1988) 855 F.2d 1363, 1372; *People v. Birks*, *supra*, 19 Cal.4th at p. 119; *People v. Sedeno* (1974) 10 Cal.3d 703, 720.)

Substantial evidence has been defined as evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*People v. Hughes* (2002) 27 Cal.4th 287, 365-367; *People v. Mendoza* (2000) 24 Cal.4th 130, 174.) A lesser necessarily included offense, in turn, has been characterized as follows:

> [In] California, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations omitted.]

(*People v. Birks*, *supra*, 19 Cal.4th at p. 117; see also *People v. Sanchez* (2001) 24 Cal.4th 983, 988.)

The erroneous failure to instruct on a lesser included offense generally is subject to the harmless error standard set forth in *People v.*

Watson (1956) 46 Cal.2d 818, 836-837. (*People v. Breverman, supra*, 19 Cal.4th at pp. 177-178.) Reversal is required "only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *People v. Ledesma* (2006) 39 Cal.4th 641, 716.)

C. Section 148, subdivision (a)(1) as the Lesser Included Offense of Section 69

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 punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

This statute may be violated in two ways—first, "by threats or violence to deter or prevent an officer from performing a duty imposed by law;" and second, by "resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) The former is called "attempting to deter," and the latter or second type is known as "actually resisting an officer." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530; see *People v. Lacefield* (2007) 157 Cal.App.4th 249, 255.)

These two types of offenses under section 69 each have different elements. (*In re Manuel G., supra,* 16 Cal.4th at p. 814.) The first one includes "a threat, unaccompanied by any physical force," and an attempt to deter an immediate or future performance of a duty. (*Id.* at p. 817.) The second type involves the use of "force or violence" against an officer who is lawfully engaged in the performance of his or her duty at the time of the resistance. (*Id.* at pp. 815-816.)

Section 148(a)(1) states, in pertinent part: "(a)(1) Every person who willfully resists, delays, or obstructs any ... peace officer ... in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

Much like the *second type* of offense in section 69, section 148, subdivision (a)(1), includes the elements of an officer's present performance of duty, as well as resistance. (*People v. Lacefield, supra,* 157 Cal.App.4th at pp. 256-257.) Where the two differ is the requirement in section 69 that the resistance be carried out by "force or violence," whereas section 148, subdivision (a)(1), can be violated without force. (*Id.* at p. 257.)

Several appellate courts have considered whether section 148, subdivision (a)(1), is the lesser included offense of section 69 and reached varying conclusions. (See *People v. Lacefield*, *supra*, 157 Cal.App.4th at pp. 257, 258, fn. 4, 259, fn. 5 [declaring section 148, subdivision (a)(1), the lesser included of the second type of offense in section 69, based on the statutory elements test]; but see *People v. Lopez*, *supra*, 129 Cal.App.4th at pp. 1532-1533 [finding that section 148, subdivision (a)(1), was not a lesser included, but a lesser related offense of section 69]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 24, disapproved on another ground in *People* v. *Reed* (2006) 38 Cal.4th 1224, 1228 [holding that section 148, subdivision (a)(1), was not the lesser included offense of section 69 under either the statutory elements or accusatory pleading tests].)

In *People v. Belmares*, *supra*, 106 Cal.App.4th at p. 22, two deputies struggled to restrain the defendant, who had struck a man in the head. Eventually, they pepper-sprayed him, took him to the ground and handcuffed him. (*Ibid.*) The defendant was convicted of assault with a deadly weapon, deterring an executive officer from performing a lawful duty in violation of section 69, and resisting a peace officer in violation of section 148, subdivision (a)(1). (*Ibid.*)

On appeal, the defendant argued, in part, that he should not be punished twice for both deterring and resisting an officer. (*Ibid.*) The Fifth

District examined the elements of both sections 148 and 69, and concluded that the former was not a lesser included offense of the latter. (Id. at pp. 23-24.) More specifically, the court ruled as follows:

> Analysis of the statutory elements of the two offenses shows resisting requires commission of the crime at the time of a peace officer's discharge or attempted discharge of a duty of his or her office or employment. (§ 148, subd. (a)(1).) ¶ Deterring, on the other hand, has disjunctive temporal elements, one of which is congruent with, the other of which is inconsistent with, the temporal element of resisting. (§ 69.) "[T]he plain language of the statute encompasses attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future." ([*In Re Manuel G.*, *supra*, 16 Cal.4th at p. 817].) ¶ By the statutory elements test, then, we hold resisting is not a lesser included offense of deterring since one can deter an officer's duty in the future (§ 69) without resisting the officer's discharge or attempted discharge of a duty at that time (§ 148, subd. (a)(1)). [Citation omitted.]

(*People v. Belmares*, *supra*, 106 Cal.App.4th at p. 24.)

The court reached the same conclusion under the pleadings test. (*Id.* at p. 26.) The charging document alleged the violation of section 69 in disjunctive. (*Id.* at pp. 24-25.) The court opined there were "noteworthy differences" between deterring (§ 69) which used the words "deter" and "prevent," and resisting (§ 148) which included "delay" and "obstruct." (*Id.* at pp. 25-26.) The court's interpretation was that the two statutes were intended to address different conduct, respectively; thus, section 148 was not a lesser included offense of section 69. (*Id.* at p. 26.)

In *People v. Lopez*, *supra*, 129 Cal.App.4th at pp. 1514, 1517-1518, when the police responded to a loud noise call, the defendant began swearing and challenged the officer to a fight. The officer decided to place the defendant under arrest for challenging him to a fight and threatening him. (*Id.* at p. 1518.) Several additional officers arrived to assist with the arrest, and after the defendant physically resisted their attempts, they eventually subdued him. (*Ibid.*)

The defendant was convicted of violating section 69 for his actions prior to his arrest, as well as misdemeanor disturbing the peace, battery on a peace officer, and a violation of section 148 for resisting arrest. (*Id.* at pp. 1515, 1532.) On appeal, one of the issues was the trial court's refusal to instruct on sections 148, subdivision (a)(1) and 415, as the lesser included offenses of section 69. (*Id.* at p. 1532.)

In rejecting the defendant's position that the failure to instruction on section 148, subdivision (a)(1) was error, the Sixth District ruled as follows:

> We agree with [*People v. Belmares*, *supra*, 106 Cal.App.4th 19] that section 148 is not a lesser included offense of section 69, because section 69 can involve a present attempt to deter an officer's future duty. (*Belmares*, *supra*, at pp. 24-26.) We see no conflict between *Belmares* and *People v. Esquibel* (1992) 3 Cal.App.4th 850 [5 Cal. Rptr. 2d 47]. We understand *Esquibel* to have assumed without deciding that section 148 is a lesser included offense of section 69. (*Esquibel*, *supra*, at pp. 854-855.) In any event, to the extent there is a conflict in these opinions, this court has characterized section 148 as a

> lesser related offense. ([*People v. McKenzie* (1995) 34 Cal.App.4th 1256, 1279-1280].)

(*People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1532.) The fact that the accusatory pleading alleged both attempting to deter and resisting by force did not alter the court's conclusion. (*Id.* at pp. 1532-1533.)

In *People v. Lacefield*, *supra*, 157 Cal.App.4th at pp. 257-259, Division Eight of the Second District criticized the holding in *Belmares* and *Lopez*, pointing out that those courts had failed to take into account the second type of offense in section 69 in deciding the issue. Division Eight explained that, in both cases, the courts had erroneously focused on the element of attempting to deter the officer's immediate performance of a duty or a future one, without discussing the second type of offense involving actual resistance with force. (*People v. Lacefield*, *supra*, 157 Cal.App.4th at pp. 257-259, citing *People v. Belmares*, *supra*, 106 Cal.App.4th at p. 24, and *People v. Lopez*, *supra*, 129 Cal.App.4th at pp. 1532-1533.)

The court noted that while the accusatory pleading had alleged both types of offenses, the prosecution had proceeded on the second type offense involving actual force. (*Id.* at pp. 255-256.) Having determined that section 148, subdivision (a)(1), was a lesser included of the second type offense in section 69, under the statutory elements test, the court then decided whether there was substantial evidence to have warranted the lesser included offense

instruction. (*People v. Lacefield, supra*, 157 Cal.App.4th at pp. 259-261.) In doing so, the court summarized the testimony of the various officers and percipient witnesses offered by both sides. (*Id.* at pp. 260-261.)

Several officers had responded to a disturbance call outside a bar and decided to close down the bar due to overcrowding. (*Id.* at p. 252.) According to one sergeant, the defendant ignored commands to stop and kept walking toward him, at which time, he placed his hands on the defendant's chest, who then slapped his arm away and continued to move toward the sergeant. (*Id.* at p. 260.) The sergeant testified that this led to a physical altercation, and eventually, he took the defendant down. (*Ibid.*)

Two officers corroborated the sergeant's testimony, while another officer did not observe any aggressive behavior by the defendant. (*Ibid.*) The defense witnesses, on the other hand, contradicted the sergeant's version of the incident, testifying that the defendant did not exhibit any assaultive behavior and merely casually approached the sergeant, who pushed him to the ground. (*Id.* at p. 261.)

In concluding that there was substantial evidence to support a violation of section 148, subdivision (a)(1), thus, warranting the instruction, the court held:

> The jurors were entitled to accept or reject all of the testimony, or a portion of the testimony, of any of the above witnesses. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 328 [], disapproved on another ground in *People v. Barton*

> (1995) 12 Cal.4th 186, 201 []. They might have believed part of what the officers said and part of what the defense witnesses said. They therefore might have found that appellant acted unlawfully, by arguing with Sargent and refusing to disburse, but he did not use force unlawfully because his use of force was a response to Sargent's unlawful use of force.

(*People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 261.) The court also specifically noted that the jury might have found that the defendant's words "went beyond verbal criticism, into the realm of interference with duty." (*Ibid.*, citing e.g., *People v. Robles* (1996) 48 Cal.App.4th Supp. 1, 6.)

Finally, given the varying testimony and versions of the encounter, the court found that the evidence of guilt was not overwhelming, and that the prejudice resulting from the failure to instruct on section 148, subdivision (a)(1), was not harmless. (*People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 262, citing *People* v. *Watson*, *supra*, 46 Cal.3d at p. 836.) As such, the court ruled that the defendant would have obtained a more favorable outcome had the jury received the instruction. (*People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 262.)

To that end, the People argued that since the court instructed on the meaning of unlawful force with CALCRIM No. 2670, "it necessarily found that [the defendant] unlawfully used force or violence." (*People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 262.) The court disagreed and observed as follows:

> In our view, the error was prejudicial because the jury was given no alternative other than a not guilty verdict if it believed that appellant's initial resistance was unlawful, but there was no unlawful use of force. The absence of an instruction on section 148(a)(1) forced "an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other." [Citation omitted.] "[N]either party has a greater interest than the other in gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground ...." [Citation omitted.] The pleadings and evidence here suggested a middle ground, a conviction for section 148(a)(1), but the jury was not given that option.

(*Id.*, quoting *People v. Birks*, *supra*, 19 Cal.4th at pp. 119, 127.)

Subsequently, in *People v. Carrasco*, *supra*, 163 Cal.App.4th at p. 984, Division Eight reaffirmed its prior ruling that section 148, subdivision (a)(1), was a lesser included of the second type offense in section 69. However, the court found no error in not including the instruction, because there was not substantial evidence that the statute had been violated. (*Id.* at pp. 984-986.)

The court explained:

> The People's witnesses testified appellant was knowingly and unlawfully resisting both Deputy Macias and Detective McGuffin through the use of force or violence. Appellant had to be physically taken to the ground by Detective McGuffin because he refused to comply with Deputy Macias's repeated orders to remove his hand from his duffle bag. Appellant failed to comply with several officers' repeated orders to relax and Macias's orders to "stop resisting." He continued to struggle with Macias and McGuffin, as well as several other officers. Macias attempted to control appellant's torso, while three other detectives attempted to control appellant's arms. Appellant placed his hands and arms underneath his body,

> was "yelling, kicking, [and] cussing," and said he would "kick [the officers'] ass[es]." Appellant continued to squirm and refused to give his right hand to Macias. Appellant did not comply until after Lieutenant Rothans administered the use of pepper spray. There was no contrary evidence disputing the officer's description of the struggle on the floor. Hence, the jury would have had no rational basis to conclude appellant wrestled with the officers, for which they convicted him of resisting or delaying an officer, but the struggle did not involve force or violence; accordingly, the trial court properly instructed the jury by not instructing it with section 148, subdivision (a) as a lesser included offense.

(*Id.* at pp. 985-986.)

D. Analysis

The trial court properly noted that section 148, subdivision (a)(1) was a lesser included offense of section 69. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877, 3003-3004.) This was consistent with the holding in *People v. Lacefield, supra,* 157 Cal.App.4th at pp. 259-261.[5] The Court of Appeal disagreed, and relying, instead, on *Belmares* and *Lopez*, it concluded that "[l]ooking at the statute as a whole," section 148 was not a lesser included offense of section 69, under the second theory of resisting with force. (*People v. Smith, supra,* 203 Cal.App.4th at pp. 1057-1059.)

The Court of Appeal opined that *Lacefield* had not cited any authority for applying the statutory elements test "to just half of the statute." (*Id.* at p. 1058.) First, the absence of any such authority did not

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[5] On appeal, respondent did not dispute that section 148, subdivision (a)(1) was a lesser included offense of section 69, but only that the instruction was not warranted in this case based on the evidence. (RB, pp. 7-10.)

invalidate the conclusion reached in *Lacefield*. That is how precedents are set. Second, *Lacefield* did not simply apply the test to "half of the statute." Since section 69 criminalizes conduct under two separate theories, *Lacefield* properly focused its analysis on the second type offense of forcible resistance. (*People v. Lacefield*, *supra*, 157 Cal.App.4th at pp. 257-261.)

In re Manuel G., *supra*, 16 Cal.4th 805, is instructive. There, when explaining the two separate ways which section 69 could be violated, this Court noted, "Because the minor is accused only of attempting by threats to deter or prevent an officer from performing a duty imposed by law, we are concerned here only with the first type of *offense* under section 69." (*Id.* at p. 814, emphasis added.) It appears that this Court viewed each of the two separate theories of culpability under the statute, as a separate "offense." (*Ibid.*)

As relevant here, this Court has also defined a lesser necessarily included offense as follows:

> [A] lesser offense is necessarily included in a greater *offense* if either the statutory elements of the greater *offense*, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations omitted.]

(*People v. Birks*, *supra*, 19 Cal.4th at p. 117, emphasis added.)

Reading *Manuel G.* and *Birks* together, whether section 148, subdivision (a)(1) is a lesser included offense of section 69, depends on which "type of offense" is alleged and presented to the jury under section 69. The Court of Appeal's analysis contradicts and/or ignores the distinction this Court has drawn between the two offenses under section 69, with each offense deserving a distinct analysis in terms of what constitutes a lesser included offense.

More importantly, *Lopez* and *Belmares* were wrongly decided. First, the court in *People v. Lopez, supra*, 129 Cal.App.4th at p. 1532, did not offer an original discussion on the issue, but simply reiterated the holding in *Belmares*. As the court in *Lacefiled* noted, *Belmares* did not observe the distinction drawn between the two types of offenses under section 69, and mainly focused on the deterrence element of the first type offense. (*People v. Blemares, supra*, 106 Cal.App.4th at pp. 24-26; *In re Manuel G., supra*, 16 Cal.4th at p. 814.)

Furthermore, in *People v. Lopez, supra*, 129 Cal.App.4th at pp. 1514, 1517-1518, the defendant did not use actual force, but mainly attempted to deter the officer, who was attempting to speak with him to assess the nature of the loud noise complaint, by threatening and challenging him to a fight. In other words, the evidence supported a first type section 69 offense, which would explain the court's reliance on *Belmares*, and the discussion in

both cases, involving, *primarily*, if not *solely*, the deterrence element. (*People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1532; *People v. Belmares*, *supra*, 106 Cal.App.4th at pp. 23-26.)

In contrast, *much like here*, in *People v. Lacefield*, *supra*, 157 Cal.App.4th at pp. 255-256, 260, it was undisputed that the offense at issue was the second type involving use of actual force, since the defendant became physical when the officer attempted to contact him. Therefore, the Court of Appeal's rejection of the analysis in *Lacefield* was not sound, given the factual similarities between the two cases.

To the extent that the Court of Appeal also conducted a pleadings test to reach the same conclusion, this was error as well. (*People v. Smith*, *supra*, 203 Cal.App.4th at pp. 1058-1059.) The court found that the governing test was the statutory elements one, because the charging document had alleged both deterring and resisting types of offenses. (*Id.* at p. 1058.) Observing that the prosecution subsequently proceeded on the second type offense only, it then opined that "the determination of whether a lesser offense is necessarily included must be based on the statutory elements or accusatory pleading, not on events occurring during the trial." (*Ibid.*)

In support, the court cited *People v. Cheaves* (2003) 113 Cal.App.4th 445, which is inapposite. (*People v. Smith*, *supra*, 203 Cal.App.4th at pp.

1058-1059.) There, the issue was whether using 911 with intent to harass under section 653x was a lesser included offense of filing a false report, in violation of section 148.1, subdivision (c). (*People v. Cheaves*, *supra*, 113 Cal.App.4th at p. 453.) Having concluded that this was not the case under the statutory elements test, the court turned its attention to the pleadings:

> The accusatory pleading test dictates the same conclusion. Appellant was charged with maliciously informing a person, Lepre, that a bomb was placed in the Los Angeles Times building, knowing that the report was false. The accusatory pleading contained no indication that Lepre was a 911 operator whom appellant had informed by telephone, as required by section 653x. As noted, evidence revealed at trial does not enter into the determination of whether a lesser offense is included in a greater offense. (*People v. Ortega* [1998] 19 Cal.4th 686, 698.)

(*People v. Cheaves*, *supra*, 113 Cal.App.4th at p. 454.)

Here, both the charging document and the evidence deduced at trial included the second type section 69 offense. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877.) Thus, if anything, the accusatory pleadings test was also satisfied due to the clear description of the offense as resisting a peace officer in the course of his lawful duties, which is essentially a violation of section 148, subdivision (a)(1). (*People v. Cheaves*, *supra*, 113 Cal.App.4th at p. 454.) The sole question was whether this involved lawful force.

Finally, the Court of Appeal opined that even if section 148, subdivision (a)(1) was a lesser included offense, there was not substantial evidence to have justified giving the instruction. (*People v. Smith*, *supra*,

203 Cal.App.4th at p. 1059.) This was, in fact, the trial court's reasoning. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877, 3003-3004.) Appellant submits this was error.

The information alleged a violation of section 69 in count 2, based on both theories of attempted delaying of the deputies in the lawful performance of their duties, as well as actually resisting with force. (1 C.T. p. 72.) In the end, the prosecution proceeded under the second prong of actual use of force. [6] (1 C.T. pp. 170-171; 4 R.T. pp. 1802-1808, 1874-1875.) In its closing, the prosecutor argued that appellant continued to "caus[e] problems" by "refus[ing] to go along with the program" and used force by hitting Deputy Baker after he took him to the ground. (4 R.T. pp. 1838-1839.) He also suggested that all appellant "had to do" was to "lay on the ground and put his hands behind his back." (4 R.T. p. 1839.)

The defense pointed out that appellant was merely concerned about his legal paperwork and was not making "any aggressive moves" toward the deputy, but for simply refusing to follow commands, Baker "grabbed him" and "slammed him down to the ground." (4 R.T. pp. 1859-1860.)

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[6] Pursuant to CALCRIM No. 2652, the court instructed the jury that proof of guilt in both counts 2 and 5 required a finding that "[t]he defendant used force or violence to resist an executive officer." (1 C.T. p. 170; 4 R.T. p. 1874.) With respect to count 5 only, the court additionally instructed the jury that appellant must have "attempted to deter or prevent an executive officer... [] by means of a threat or violence." (1 C.T. p. 171; 4 R.T. p. 1875.)

This, appellant argued, was excessive and unreasonable force by the deputy, who was considerably larger in size than appellant was. (4 R.T. pp. 1860-1862.)

Baker testified that after having ordered appellant to face the wall, he eventually moved toward appellant, placed his hand on appellant, grabbed his left wrists with his left hand, placed his right hand on the center of his back and told him to face the wall. (3 R.T. pp. 1210-1212, 1240-1241, 1271-1272.) Baker was taller and heavier than appellant was. (3 R.T. pp. 1242-1243.)

Baker then handcuffed him, and as he felt that appellant was becoming "tense," he swung around and took him to the ground. (2 R.T. pp. 1212, 1241-1242, 1272-1273, 1283.) Once on the ground, appellant hit Baker, but shortly after, he was subdued by Baker and Esquedo who wrestled and repeatedly struck him in the midsection and by Lim who applied pepper spray into his eyes. (3 R.T. pp. 1214-1217, 1239, 1241, 1243, 1256, 1259, 1272-1276, 1278-1279, 1283-1286, 1289.)

As it follows, there was substantial evidence from which the jury could have found that given Baker's size, he could have simply handcuffed appellant. The jury could have, therefore, concluded that swinging around and slamming appellant to the ground was excessive and unreasonable force, and that in hitting Baker, appellant was responding to the deputy's

use of unlawful force. (*People v. Lacefield, supra*, 157 Cal.App.4th at p. 261.)

The jury could have also found that appellant's kicking and screaming while on the ground was the result of the pepper spray, not an attempt to resist. (3 R.T. pp. 1216-1217, 1243, 1244-1257, 1260, 1263-1264, 1278-1279, 1285.) Finally, the jury could have found that appellant's repeated refusal to face the wall constituted a verbal interference with the deputies' performance of lawful duties, but nothing more. (*Ibid.*)

If so, the jury could have, at most, convicted appellant of a violation of section 148, subdivision (a)(1), whereas, the absence of the instruction forced 'an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.' (*People v. Lacefield, supra*, 157 Cal.App.4th at p. 262, quoting *People v. Birks, supra*, 19 Cal.4th at pp. 119, 127.) Therefore, the error was not harmless and requires reversal. (*People v. Lacefield, supra*, 157 Cal.App.4th at p. 262.)

To further illustrate this point, the prosecution alleged and presented both theories of attempted delaying and resisting with force in count 5. (1 C.T. pp. 73, 170-172, 179; 4 R.T. pp. 1802-1808, 1874-1877, 1885-1886.) The first theory was put forth based on appellant's comments that if the deputies attempted to approach him, he would get "physical." (2 R.T. p. 630; 4 R.T. pp. 1836-1837.) According to the prosecution, appellant was

also guilty under the second prong, by throwing the bowl containing excrement, at the deputies. (2 R.T. pp. 638-639, 656, 658, 660-661, 664; 4 R.T. pp. 1837-1838.)

Based on the testimony and the videotape of the incident, arguably, there was not substantial evidence that appellant was using lawful force when throwing the bowl. (1 C.T. pp. 150-157; 2 R.T. pp. 633-636; 3 R.T. pp. 1567-1572, 1634.) As such, the court did not necessarily err in refusing to give the lesser included instruction in count 5. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877, 3003-3004.) The same cannot be said of count 2.

Unlike in *Carrasco*, appellant did not hit Baker when he attempted to handcuff him, but did so after Baker slammed him to the ground. (3 R.T. pp. 1215-1216.) Of course, the context of appellant's refusal to face the wall is also very important, as appellant was merely concerned about his legal documents. (3 R.T. pp. 1208, 1210, 1236, 1238, 1277.) Thereafter, appellant was repeatedly struck and eventually pepper sprayed. (3 R.T. pp. 1216-1217, 1239, 1241, 1243, 1256, 1259, 1272-1276, 1278-1279, 1283-1286, 1289.) The jury could have very well found that any resistance he displayed was in direct response to Baker's initial use of excessive force.

It is true that, pursuant to CALCRIM No. 2671, the court also instructed the jury that an officer using "unreasonable or excessive force" was not lawfully performing his duties, in which case, the defendant could

"lawfully use reasonable force" in self-defense. (1 C.T. p. 171; 4 R.T. pp. 1817-1820, 1876-1877.) However, this instruction was not and could not have been a substitute for one that directly informed the jury that appellant could, in the alternative, be convicted of section 148, subdivision (a)(1).

In *People v. Webster* (1991) 54 Cal.3d 411, 443, the defendant sought to have his robbery convictions reversed on the ground that the court failed to instruct, sua sponte, that if he formed the intent to steal only after the victim was killed, then, he was only guilty of the lesser included offense of theft. The trial court had instructed the jury on the lesser included offenses, but had provided no similar instruction on the issue of "after-formed intent." (*Id.* at pp. 443-444.)

This Court found the trial court had no sua sponte to give the "pinpoint" intent-related instruction. (*Id.* at pp. 443-444.) Finding that there was substantial evidence that the defendant was guilty of theft, not robbery, the court also ruled that the trial court had fulfilled its duty by instructing on the lesser included offense. (*Id.* at p. 443.) In a footnote, this Court then noted as follows:

> We have admonished that the jury should not be confronted with an "all or nothing" choice when it believes that the accused is guilty only of a lesser included offense. If given no opportunity to convict of the lesser offense, we reasoned, the jury may wrongly convict of the greater offense, even though it believes an element of that offense is missing, rather than acquit the defendant entirely. (See [*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352]; *People v. Wickersham* (1982) 32

> Cal.3d 307, 324-325 [].) That danger was eliminated here, since the jury was instructed to acquit or find a lesser included offense unless it believed beyond a reasonable doubt that all elements of robbery were present.

(*People v. Webster*, *supra*, 54 Cal.3d at p. 444, fn. 17.)

Unlike in *Webster*, here, appellant did not have a similar opportunity for a proper jury evaluation of his guilt or innocence in count 2, because the court declined to instruct on section 148, subdivision (a)(1). As discussed *ante*, a pages 33-36, the circumstances leading up to appellant's use of force were not simple and required a careful examination of whether appellant was within his right to verbally object to the deputy's requests and to subsequently defend himself in the manner that he did.

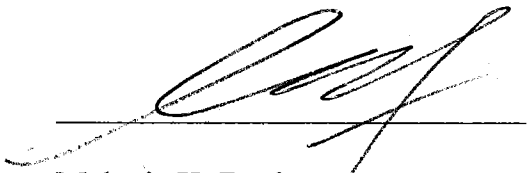
In the absence of the instruction, the jury was probably swayed to find appellant guilty, *especially*, in light of the fact that the jury also heard extensive testimony and watched a video of a similar and separate incident involving appellant's use of force against other deputies, as charged in count 5. (1 C.T. p. 108; 2 R.T. pp. 633-636; 3 R.T. pp. 1567-1572.) For these reasons, the failure to give an instruction on section 148, subdivision (a)(1) was reversible error. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 177-178; *Conde v. Henry*, *supra*, 198 F.3d at pp. 739-740.)

CONCLUSION

For the foregoing reasons, appellant urges this Court to find that section 148, subdivision (a)(1) is the lesser include offense of section 69, and that the failure to instruct the jury as such in count 2 was reversible error.

Dated: September 11, 2012

Respectfully submitted,



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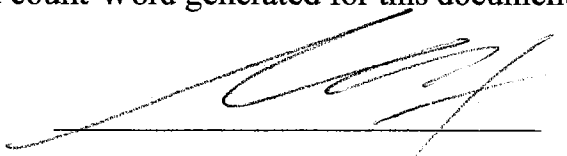
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for Dewone T. Smith, hereby certify that I prepared the foregoing Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 8,906, excluding the tables and cover.

This brief therefore complies with the rule which limits a computer-generated brief to 14,000 words. I certify that I prepared this document in Word, and that this is the word count Word generated for this document.



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PROOF OF SERVICE

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FOR DELIVERY TO:
Hon. Jose I. Sandoval, Judge

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2012, at Glendale, California.

MELANIE K. DORIAN