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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICKY J. SALINAS, Defendant and Appellant.	F049017 (Super. Ct. No. DF007337A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin and Stephen P. Gildner, Judges.

Burton R. Loehr, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Jibson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110 (former rule 976.1, this opinion is certified for publication with the exception of parts II, III, IV, and V of the Discussion.

INTRODUCTION

In *Crawford v. Washington* (2004) 541 U.S. 36, at p. 68, the United States Supreme Court held the admission of testimonial out-of-court statements is barred by the confrontation clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The defendant in this case challenges the admission of evidence that rocks seized from him contained methamphetamine. The evidence came in through the testimony of a supervising criminalist who reviewed the report of another laboratory employee, who did not testify. We hold that admission of this evidence does not violate the *Crawford* decision since the laboratory report is not testimonial; it was not offered as a substitute for live testimony; and the defendant had a full opportunity to cross-examine the supervising criminalist.

In the unpublished portion of this opinion, we conclude there were no instructional errors and that no additional records are relevant to defendant's excess force claims.

The judgment is affirmed.

PROCEDURAL HISTORY

Appellant Ricky J. Salinas was convicted by jury of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 1); two counts of felony resisting arrest (Pen. Code,[1] § 69, counts 2 & 3); battery on a peace officer causing injury (§ 243, subd. (c)(2), count 4); and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a), count 5). Salinas was sentenced to the middle term of two years on count 1, plus a consecutive term of eight months for each of counts 2 and 3 (one-third the mid-term) for a total term of three years and four months in state prison. The court stayed pursuant to section 654 a middle term of two years on count 4. A concurrent term of 90 days in county jail was imposed on count 5.

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[1]All further references are to the Penal Code unless otherwise noted.

FACTUAL HISTORY

In the early morning hours of April 6, 2005, Delano Police Officer Navarrette stopped Salinas because the bicycle Salinas was riding did not have proper lighting. Salinas responded in anger and accused the officer of harassing him. When Navarrette asked for identification, Salinas handed his identification to the officer, but let it fall to the ground. Navarrette told Salinas he was going to search for weapons and ordered Salinas to place his hands behind his back. Salinas refused and became more agitated. When Navarrette tried to control Salinas, Salinas attempted to pull away. A scuffle ensued with Navarrette ending up on top of Salinas. Salinas tried to roll over Navarrette, who called for back-up.

Officer Rutledge responded and assisted Navarrette in bringing Salinas under control. During the struggle, Salinas threatened both officers. At one point, he said he was going to "kick your ass." He was continuously combative. The officers tried to pull Salinas's arm behind his back to handcuff him. Pepper spray was applied but it did not subdue Salinas, who "violently struggled." Salinas attempted to hit Navarrette and tried to bite Rutledge on his left thigh. After being handcuffed, Salinas continued to yell and threaten the officers, spitting in Rutledge's face. Rutledge injured his neck, right shoulder, right wrist, lower back, and knees in the struggle. The injuries required medical treatment.

A plastic digital scale was found in Salinas's pocket. He was arrested and transported to jail. During the booking search, a plastic baggie, containing five rocks of methamphetamine, was found in Salinas's pocket. Blood tests confirmed that he was under the influence of amphetamines.

DISCUSSION[*]

I. Crawford v. Washington

At trial, the prosecution sought admission of a laboratory report prepared by retired criminalist Joe Fagundes during the course of his employment at the Kern County Regional Crime Laboratory. The report established that the five rocks in Salinas's pocket were methamphetamine. Fagundes did not testify. Instead, Gregory Laskowski, a supervising criminalist at the laboratory, testified providing the foundation for the laboratory report. The evidence was admitted over a defense objection that its admission violated *Crawford v. Washington*, *supra*, 511 U.S. 36 (*Crawford*). Under *Crawford*, the admission of testimonial out-of-court statements is barred by the confrontation clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Id*. at p. 68; U.S. Const., 6th Amend.)

On appeal, Salinas renews his objection under *Crawford*. He argues that this court's earlier decision in *People v. Parker* (1992) 8 Cal.App.4th 110 (*Parker*) must be reconsidered in light of *Crawford.* In *Parker*, we held that a laboratory report was admissible under the public records exception to the hearsay rule even when the actual employee who performed the laboratory tests was not available to testify. *Parker* held that, "[u]nder [Evidence Code] section 1280 a record may be admitted into evidence if it was made by and within the scope of duty of a public employee at or near the time of the act, condition, or event recorded and if the sources of information and the method and time of preparation were such as to indicate its trustworthiness. [Citations.] 'The trustworthiness requirement for this exception to the hearsay rule is established by a showing that the written report is based upon the observations of public employees who have a duty to observe the facts and report and record them correctly.' [Citation.]

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[*] See footnote, *ante*, page 1.

Whether the trustworthiness requirement has been met is a matter within the trial court's discretion. [Citation.]" (*Parker, supra,* 8 Cal.App.4th at p. 116.)

Salinas does not directly challenge the trustworthiness of the laboratory report. Instead, he contends the decision in *Parker* does not end the analysis because, under *Crawford,* the analysis shifts from whether the evidence is trustworthy to whether the evidence is testimonial requiring the right of confrontation. He argues that the laboratory records are testimonial under *Crawford* even though they might qualify as business records under *Parker* because they were prepared by government officials for the purpose of criminal litigation. Salinas admits that the *Crawford* opinion identifies business records and public records as examples of nontestimonial evidence, but argues that this characterization depends on a finding that the records were not prepared for litigation. (*Crawford, supra,* 541 U.S. at pp. 56 & 76 (maj. opn. & conc. opn. of Roberts. C. J.).)

We reject Salinas's argument for two reasons. First, we conclude that laboratory reports and other similar documentary evidence are not testimonial under *Crawford* because they are not being offered as a substitution for live testimony. Our conclusion is supported by a number of decisions reached by other courts. For example, in *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1410, a defendant in a probation revocation hearing challenged the admission of a laboratory report analyzing rock cocaine, a report prepared by the prosecution for trial. The *Johnson* court concluded that the report in question was not testimonial because it was "routine documentary evidence" that did not have as its source live testimony. (*Id.* at pp. 1412-1413.) "A laboratory report does not 'bear testimony,' or function as the equivalent of in-court testimony." (*Id.* at p. 1412.) Similarly, in *State v. Dedman* (2004) 136 N.M. 561 [102 P.3d 628], the court concluded that a blood alcohol report was nontestimonial under *Crawford,* even though prepared by a state laboratory technician for trial, because the testing process is routine, nonadversarial, and made to ensure an accurate measurement. (See also *People v. Arreola* (1994) 7 Cal.4th 1144, 1155-1158 [foundational evidence needed for admission

of documentary evidence is not testimonial under confrontation clause; decided pre-*Crawford*]; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066 [progress notes from community counseling program noting defendant had not attended any of 20 sessions was not testimonial evidence; decided pre-*Crawford*].)

We agree that *Crawford* issues cannot be circumvented by the admission of public records, such as police reports that contain testimonial statements given by those in formal police interrogations who might be witnesses at trial. (*Davis v. Washington* (2006) ___ U.S. ___ [126 S.Ct. 2266]; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225.) The type of documentary evidence in question here, however, does not contain witness statements. In this case, the report is admitted only to show recorded test results.

This leads to our second reason for rejecting Salinas's challenge under *Crawford.* We believe that, even if *Crawford* applies to the admission of routine documentary evidence, Salinas had a full opportunity to cross-examine Laskowski on the foundational showing made for the document. In our view, this meets the requirements of *Crawford*. Laskowski explained how samples are handled in the laboratory and how the tests are run. He described the reports and what they show. He testified that he reviewed this report as Fagundes's supervisor close in time to when it was prepared. If there had been problems with how the report was generated or how the testing was done, or if there were questions about methodology or acceptance of the testing procedures by the scientific community, Salinas had the chance to explore these areas through cross-examination of Laskowski. The record reveals that Laskowski was not asked any question that he was unable to answer. (See *United States v. Owens* (1988) 484 U.S. 554, 559-560 [confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination to whatever extent defendant wishes].)

It is highly unlikely that Fagundes, the criminalist who actually ran the test, would have testified any differently. Fagundes would most likely have been required to rely upon the document itself to recount the test results; it is highly unlikely that he would

have an independent recollection of the test performed on this particular sample. As a result, his testimony, like Laskowski's, would also have been limited to routine practice, work habits, and laboratory guidelines. (See *People v. Arreola, supra,* 7 Cal.4th at p. 1157 [testimony relating to admission of laboratory reports is foundational; often author cannot even recall from memory record's contents].) The prosecution relied upon the laboratory report as a chronicle of the laboratory testing results to establish the narcotic character of the rocks. If the testimony relied upon had been opinion testimony, such as Navarrette's expert opinion that Salinas was under the influence, then Salinas would have had the right to cross-examine about the basis of the opinion, any biases, etc. The report was not opinion evidence.

Unlike other cases where the documentary evidence is admitted on a foundation laid by affidavit, by representation of a district attorney, or based on the document itself, here there is live in-court testimony that was subject to full cross-examination. In *People v. Rogers* (2004) 780 N.Y.S.2d 393, 396-397, the court found a *Crawford* violation when the trial court admitted a laboratory report ordered by state police to determine the defendant's blood alcohol level. The prosecution sought admission of the report as a business record solely on the basis that it was a document in the files of the state police. The blood sample had been sent to an outside laboratory for testing and the results were sent back to the state police and placed in the case file. At trial, no attempt was made to lay a foundation for the report, other than its presence in police files. No one from the laboratory testified and therefore, no cross-examination about methodology, chain-of-custody, result analysis, etc., was possible. In *People v. Johnson*, *supra*, 121 Cal.App.4th at page 1411, a police officer testified that the report was identified by case number and by Johnson's name and came from the crime laboratory that routinely tested narcotics for the Berkeley Police Department. No one from the laboratory testified. As we have explained, the facts in this case are distinguishable. For this reason, even if we

understood *Crawford* as requiring the right to cross-examine foundational testimony of documentary evidence, Salinas was afforded that right.

II. [*] ***Sufficiency of the evidence***

Salinas contends there is insufficient evidence to support the conviction on count 4, battery on a peace officer, a violation of section 243, subdivision (c)(2). Respondent counters that there is sufficient evidence for the jury to infer that Salinas's combative struggle was the proximate cause of Officer Rutledge's injuries.

A challenge on appeal to the sufficiency of the evidence is a formidable undertaking. Under the rules of appellate review, we would have to conclude that no rational jury could have reached the decision it did based on the evidence before it. In making our determination, we must evaluate the evidence in the light most favorable to the respondent and presume in support of the judgment every fact a jury could have reasonably deduced from the evidence. (See *People v. Gurule* (2002) 28 Cal.4th 557, 630; *People v. Rayford* (1994) 9 Cal.4th 1, 23.) It does not matter that the facts could have reasonably supported the opposite finding, i.e., Salinas's innocence. (*People v. Millwee* (1998) 18 Cal.4th 96, 132; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

The difference between the misdemeanor offense of battery (§ 242) and the felony offense of battery upon a peace officer (§ 243, subd. (c)(2)) is that a violation of section 243, subdivision (c)(2), includes not only the normal elements of battery, but adds the status of the victim as a peace officer and the infliction of injury. (§ 243, subd. (c)(2); *People v. Henderson* (1976) 58 Cal.App.3d 349, 358.) Salinas raises no issue related to the two additional elements found in section 243, subdivision (c)(2), the victim's status, or the existence of the injury. Instead, the challenge is to an element of simple battery—the nature of the force used. Salinas argues that there must be evidence that the force element for the battery was a volitional hit or kick.

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[*] See footnote, *ante*, page 1.

A battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) Salinas has cited no authority, and we have found none, that requires a direct strike or hit in order to prove the force element of simple battery. Salinas argues that because the only evidence of force is Salinas's resistance, i.e., his attempt to get away, there can be no reasonable inference that Salinas committed a volitional battery leading to injury. Salinas admits a second battery, when he spit in Rutledge's face; however, since no injury resulted, this battery cannot form the basis of a conviction on count 4.

We conclude the evidence is sufficient to support the conviction. Rutledge testified that when he first arrived, Salinas was struggling and combative. While the officers attempted to place Salinas in handcuffs by grabbing his arms, Salinas tried to bite Rutledge. Rutledge struggled with Salinas to force him into leg irons, testifying that Salinas "violently struggled against my attempts to place him into handcuffs." Given the evidence, a reasonable jury could infer that the struggle was itself an unlawful application of physical force against the peace officer. (See CALJIC No. 9.22 ["force" and "violence" are synonymous and mean the wrongful application of physical force against the person of another].) It bears repeating that battery is any willful and unlawful use of force or violence. Although an accidental touching is not enough, there is no requirement that the battery be a direct hit, kick, or strike. If a willful and unlawful use of force or violence is directed at a peace officer and results in injury, a violation of section 243, subdivision (c)(2), occurs.

We also disagree with Salinas's contention that all of his actions "were directed at avoiding physical contact with the officers as he continued to pull away from them" and therefore could not be volitional acts of force against the officers. The record does not support this contention. Salinas may have wanted to get away from the officers and avoid arrest, but he did not limit his resistance to pulling away from them. Rutledge testified that during the struggle, Salinas attempted to strike Navarrette with clenched

fists. Rutledge also said that Salinas tried to bite him, baring his teeth and moving toward his upper thigh. These are not mere passive attempts to "pull away."

Given evidence of Salinas's continuous combative struggle to resist the officers' lawful efforts to restrain him, the jury could have reasonably concluded that Salinas applied willful force to Rutledge causing injury. As a result, the conviction on count 4 is supported by sufficient evidence.

III.[*] *Instructions for battery upon a peace officer*

Salinas contends that if we conclude the evidence is sufficient to support count 4, we must still reverse because the jury was not properly instructed on the force element of battery upon a peace officer. He argues that, although CALJIC No. 9.22[2] is sufficient in

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[*] See footnote, *ante*, page 1.

[2] CALJIC No. 9.22 as given reads: "Defendant is accused in Count 4 of having violated section 243, subdivision (c) of the Penal Code, a crime. [¶] Every person who willfully and unlawfully uses any force or violence [and inflicts injury] upon the person of a [peace officer] engaged in the performance of [his] duties, and who knows or reasonably should know that the other person is a [peace officer] and is engaged in the performance of [his] duties, is guilty of the crime of a violation of Penal Code section [243(c)], a crime. [¶] As used in this instruction, the words 'force' and 'violence' are synonymous and mean the wrongful application of physical force against the person of another. [¶] The term 'peace officer' includes a police officer, as that term has been defined for you, whether on or off duty. [¶] 'Injury' means any physical injury which requires professional medical treatment. It is the nature, extent and seriousness of the purported injury that is determinative—not whether the allegedly injured party sought medical treatment. [¶] In order to prove this crime, each of the following elements must be proved:

"1. A person willfully and unlawfully applied physical force against the person of a [peace officer];

"2. At that time the [peace officer] was engaged in the performance of [his] duties;

"3. The person who applied the physical force knew or reasonably should have known that the other person was: [¶] (a) a [peace officer]; [and] (b) engaged in the performance of [his] duties; and [Fn. contd.]

"4. Injury was inflicted on the Officer Ben Rutledge."

"most cases," it was not here because the trial court was required to instruct the jury "more precisely on the definition of battery." Salinas argues that the jury should have been told that an affirmative offensive act is required to prove a battery. He contends that the jury could have been confused by the instruction that a battery is committed with the slightest degree of touching[3] even though battery on a peace officer requires that the touching result in an injury requiring medical treatment. He points out that the problem was exacerbated because he was also charged with resisting a peace officer, and the instruction given for this offense contains similar language likely to lead the jury to conclude that the force or violence required for resisting arrest also satisfies the force or violence requirement for battery. Finally, in his reply brief, Salinas claims that the jury should have been instructed on the force element of battery so that it could "distinguish a battery from other forms of resistance, as not all resistance to an officer constitutes a battery."

To begin, we conclude that Salinas's claim is waived because he failed to seek a clarifying instruction. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012 [party may not complain on appeal that an instruction correct in law and responsive to evidence was too

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[3]The jury was also instructed on misdemeanor battery on a peace officer (CALJIC No. 16.101) as a lesser-included offense to resisting arrest, and simple battery (CALJIC No. 16.141). CALJIC No. 16.101 reads almost identically to CALJIC No. 9.22, except that it does not require injury, does not give a definition of "peace officer," and refers to section 243, subdivision (b), instead of subdivision (c)(2). CALJIC No. 16.141 reads, "As used in the foregoing instruction [CALJIC No. 16.101], the words 'force' and 'violence' are synonymous and mean any [unlawful] application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest [unlawful] touching, if done in an insolent, rude, or an angry manner, is sufficient. [¶] It is not necessary that the touching be done in actual anger or with actual malice; it is sufficient if it was unwarranted and unjustifiable. [¶] The touching essential to a battery may be a touching of the person, of the person's clothing, or of something attached to or closely connected with the person."

general or incomplete unless clarification is requested].) If Salinas believed the instructions were ambiguous or contradictory, he was required to object and request clarifying language. (*People v. Johnson* (1993) 6 Cal.4th 1, 53.) He did not object to the giving of CALJIC No. 9.22, even though given an opportunity to do so. Having waived the issue, Salinas may not argue for the first time on appeal that the instructions were confusing, misleading, or required further clarification. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

Even if the issue is not waived, we would still conclude there is no error. The instructions as a whole correctly state the elements of each offense, including an explanation of the type of force needed to commit a battery. (*People v. Bolin* (1998) 18 Cal.4th 297, 328 [absence of essential element in one instruction may be remedied by its presence in another, or by considering instructions as a whole].) We do not see any evidence that the jury was confused. As we have explained, the force required for a simple battery, and that required for a violation of section 243, subdivision (c)(2), is not different in degree. The difference between the two offenses is the addition of two elements—the status of the victim and the nature of the injury. (*People v. Henderson, supra,* 58 Cal.App.3d at p. 358.) The force necessary to commit a battery was defined in CALJIC No. 9.22 as the wrongful application of force against the person of another. This is the same degree of force required to commit a battery. Salinas has cited no authority for the position that the degree of force required for these two offenses is different. In fact, the degree of force is irrelevant; it is the injury resulting and the status of the victim that distinguish these two offenses. This difference was explained in the instructions given. A violation of section 243, subdivision (c)(2), requires that the forceful touching must result in injury; a simple battery requires only that the touching result in offense.

It is also unlikely that the jury was confused by the instructions given on the resisting counts. First, the instructions were identified as pertaining to the resisting counts. ("Defendant is accused in Counts 2 and 3 of having violated Section 69 of the Penal Code, a crime.") The instructions on the battery offenses were similarly identified. We will not assume the jury was confused absent evidence to the contrary. (*People v. Cantrell* (1992) 7 Cal.App.4th 523, 545.) Second, we have found no authority, and Salinas cites none, distinguishing the degree of force required for resisting arrest and for the battery offenses. The distinction between resisting arrest and battery is 1) the motive for the behavior (to resist or obstruct an officer's duties versus committing a battery while an officer is engaged in duties) and 2) the result (one requires injury, the other does not). (§ 243, subd. (c)(1) & (2); § 69.) Further, it is not uncommon for a single course of conduct to violate multiple criminal statutes. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1215 [defendant may be convicted of multiple offenses where course of conduct violates more than one statute, but court cannot impose multiple punishments].)

Since the instructions were correct, and there is no evidence the jury was confused, we reject Salinas's argument that the jury instructions somehow impaired his substantial rights.

IV. [*] ***Unanimity instruction***

Salinas contends that the trial court was obligated to give sua sponte a unanimity instruction because the evidence at trial proved multiple acts, any one of which could have formed the basis of the battery conviction. He claims there was testimony that he "continued to resist officers by squirming and otherwise trying to extricate himself from their grasp." He argues that any part of this struggle could have been the act that supplied the force or violence element of the offense. We conclude there is no error.

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[*] See footnote, *ante*, page 1.

A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses, but were instead charged as one. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1025.) The instruction is required only if the jurors could disagree over which act a defendant committed and still convict him of the crime charged. (*People v. Maury* (2003) 30 Cal.4th 342, 423.) The instruction is not required when the evidence shows a continuous course of conduct and the acts are so closely connected in time as to form part of a single transaction. (*Ibid.*)

Our review of the evidence reveals that Salinas's use of force against Rutledge was applied during a continuous course of conduct. If a defendant's acts are substantially identical, like here, a unanimity instruction is not necessary. (*People v. Champion* (1995) 9 Cal.4th 879, 932.)

V. [*] ***Pitchess review***

Salinas finally requests that we conduct an independent review of the materials presented to the trial court in response to Salinas's *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535). In it, he sought a review of the personnel records of Officers Navarrette and Rutledge for prior incidents involving excess force. (*People v. Mooc* (2000) 26 Cal.4th 1216, 1232.) At the *Pitchess* hearing, the trial court reviewed the personnel files of both officers, as well as a number of internal affairs files. Based on the court's review of these documents, it ordered that the names, addresses, and telephone numbers of witnesses connected to four internal affairs files be released to the defense. It appears from the appellate record that this information was provided to defense counsel.

We have received and reviewed these documents and conclude that the trial court did not abuse its discretion. There is nothing else in the personnel files which might be relevant to Salinas's case.

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[*] See footnote, *ante*, page 1.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Gomes, J.