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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DENNIS RANDOLPH SILVA, Defendant and Appellant.	2d Crim. No. B187449 (Super. Ct. No. 1140399) (Santa Barbara County)

Dennis Randolph Silva appeals from the judgment after a jury convicted him of aggravated assault on a peace officer (Pen. Code, § 245, subd. (c))[1] and resisting arrest by force or violence (§ 69). The jury found that appellant had suffered a prior strike conviction (§ 667, subds. (d)(1) – (e)(1)) and returned a true finding on two prior prison term enhancements (§ 667.5, subd. (b)).

The trial court sentenced appellant to 12 years state prison and ordered him to pay $9,600 in restitution and parole fines (§§ 1202.4, subd. (b); 1202.45). Appellant was also ordered to pay $72,884.69 victim restitution to the injured officer and the officer's employer, City of Santa Barbara (City). (§ 1202.4, subd. (f).) We strike that portion of the sentence ordering appellant to pay $72,884.69 victim

[1] All statutory references are to the Penal Code unless otherwise stated.

restitution to City and affirm the judgment as modified. (*People v. Birkett* (1999) 21 Cal.4th 226, 245.)

Facts and Procedural History

On the evening of June 28, 2004, Santa Barbara Police Officers John Weninger and Corina Terrence responded to a 911 hang up call originating from Frank Aiello's apartment. The officers questioned appellant and Aiello outside the apartment. Appellant denied making the call, but on further questioning, admitted calling 911 and hanging up.

The officers determined that appellant was on parole and, as a condition of parole, not to have contact with Aiello. Appellant was also subject to a restraining order prohibiting contact with Aiello. Appellant's parole officer, Armando Perez, directed the officers to arrest appellant for violating parole.

Officer Weninger asked appellant to stand up and put his hands behind his back. Appellant jumped out of the chair and screamed, "Fuck No. Fuck you. I'm not going back."

Appellant jerked his arm away from the officer, back peddled towards the kitchen, and reached under his T-shirt towards his waistband. Officer Weninger believed he was reaching for a weapon and struck appellant in the head with his forearm. Appellant grabbed a steel floor lamp, swung it, and hit Officer Weninger. During the melee, appellant broke the lamp and attempted to stab the officer in the face.

Officer Weninger wrestled appellant to the floor. Appellant kicked and thrashed about, reached for the officer's handgun, and threatened to kill him with a large piece of broken glass.

Officer Terrence hit appellant in the legs with a baton and called for backup. A third officer, Sergeant Kim Fryslie, pepper sprayed appellant. The officers handcuffed appellant and used a nylon restraint device to hobble appellant's legs before removing him from the apartment.

Officer Weninger suffered a torn rotator cuff, neck and knee injuries, a double hernia, and torn tendons and ligaments. The injuries were substantial. Officer Weninger was off work for a year, underwent surgery, and received physical therapy and pain treatments.

At trial, appellant claimed that the officers used excessive force. Appellant denied that he inflicted great bodily injury on Officer Weninger because the officer had a history of pre-existing injuries.

Defective Verdict Form

Appellant argues that the trial court erred in sentencing him for aggravated assault on a police officer. (§ 245, subd. (c).) The trial imposed a five year upper term for violation of section 245, subdivision (c), as charged in the amended information. The verdict form, however, stated that appellant was guilty of violating section 245, *subdivision (a)(1)* which governs aggravated assaults on non-officers and provides for an upper term sentence of four years.[2]

Appellant did not object to the verdict form or object at sentencing. Having waived the issue, he is precluded from arguing on appeal that the verdict is defective. (*People v. Toro* (1989) 47 Cal.3d 966, 976, fn. 6; *People v. Webster* (1991) 54 Cal.3d 411, 446-447; *People v. Jones* (1997) 58 Cal.App.4th 693, 715.)

Assuming the issue was not waived, " ' "[t]echnical defects in a verdict [form] may be disregarded if the jury's intent to convict of a specific offense within the charges is unmistakably clear, and the accused's substantive rights suffered no

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[2] The verdict form states: "We, the jury in the above-entitled case, hereby find defendant, DENNIS RANDOLPH SILVA, GUILTY of the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY, in violation of Penal Code Section 245,(a)(1) *as charged in Count 1 of the Information*, a felony." (Emphasis added.)

The verdict form has a "Not True" finding "that during the commission of the crime of Assault By Means of Force Likely to Produce Great Bodily Injury, the defendant personally inflicted great bodily injury on OFFICER JOHN WENINGER, within the meaning of Penal Code Section 12022.7(a)."

prejudice." [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The verdict should be read in light of the information, the plea entered, and the jury instructions. (*People v. Paul* (1998) 18 Cal.4th 698, 706-707; *People v. Jones*, *supra*,58 Cal.App.4th at p. 710.)

The first amended information charged appellant with violation of section 245, subdivision (c), aggravated assault on a police officer, and alleged that appellant inflicted great bodily injury on Officer Weninger (§ 12022.7, subd. (a)). Appellant pleaded not guilty and denied the special allegation.

Before opening statements, the trial court read the charges to the jury and stated that appellant was charged in count 1 with "the crime of assault upon a peace officer, in violation of Penal Code Section 245(c)" and that appellant "did willfully, unlawfully, and personally commit an assault with a deadly weapon . . . upon the person of Santa Barbara Police Department Officer John Weninger . . . ."

At trial, appellant claimed that Officer Weninger used excessive force. Defense counsel argued: "What is disputed in this matter, as I'm sure you can tell by now, is whether or not the actions of my client, Dennis Silva, inflicted great bodily injury on Officer Weninger, [or] whether or not his preexisting injuries are the source of his claims of pain . . . ." Counsel argued that there was "[n]o debate" that appellant assaulted a peace office by means of force likely to produce great bodily injury. "Mr. Silva told you that. It's not being argued otherwise. [¶] A peace officer was engaged in the performance of his duties. Correct. No debate. Mr. Silva told you he knew they were police offices. Both John [Weninger] and Corina [Terrence], as he referred to them, engaged in the performance of [their] duties."

The jury was instructed on aggravated assault on a peace officer (§ 245, subd. (c)) and misdemeanor assault on a peace officer (§ 241, subd. (a)). (CALJIC 9.20, 16.100, 17.10) It received no instructions on aggravated assault on a non-officer (§ 245, subd. (a)(1)), nor did appellant request such an instruction. On review, the verdict is to be construed in light of the instructions given which clearly show that the

jury intended to convict for violation of section 245, subdivision (c), i.e., aggravated assault on a peace officer. (See e.g., *People v. Jones, supra,* 58 Cal.App.4th at pp. 710-711.)

After the jury returned the guilty verdict, it was polled. Each juror answered "Yes" when asked whether appellant was guilty on "Count 1, that's the charge of assault with force likely to produce great bodily injury on a police officer." The clerk recorded the verdict as follows: "As to Count 1, the jury finds Mr. Silva guilty as charged. This is their true verdict." (§ 1164, subd. (a).) "While it is the established custom in modern practice for the court to submit verdict forms to the jury, the oral declaration by the jurors unanimously endorsing a given result is the true 'return of the verdict' prior to the recording thereof." (*People v. Mestas* (1967) 253 Cal.App.2d 780, 786.)

Clerical errors in the verdict form, such as a mistaken reference to the wrong statute or subdivision, may be disregarded. (6 Witkin, Cal. Criminal Law (3rd ed. 2000) Criminal Judgment, § 71, p. 105.) Although the verdict form listed the wrong subdivision, it does not invalidate the conviction or sentence. "This [is] a textbook example of clerical error." (*People v. Trotter* (1992) 7 Cal.App.4th 363, 370.)

We conclude that the error in the verdict form is harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Reddick* (1959) 176 Cal.App.2d 806, 821.) "No particular form of verdict is required, so long as it clearly indicates the intention of the jury to find the defendant guilty of the offense with which he is charged. It is sufficient if it finds him guilty by reference to a specific count contained in the information (citations) . . . . " (*Ibid.*)

Appellant's assertion that the sentence is excessive and violates his due process rights is without merit. "A better result would not have been obtained had the clerical error in the verdict forms not been present, and accordingly, we find any error

to have been harmless. [Citation.]" (*People v. Trotter, supra*, 7 Cal.App.4th at pp. 370-371.)

Failure to Instruct - Aggravated Assault On Non-Officer

Appellant next contends that the trial court erred in not instructing on aggravated assault on a non-officer (§ 245, subd. (a)(1)). The trial court considered giving the instruction but found that it did not "fit with the facts of this case . . . . Mr. Silva's testimony clearly indicated that he was aware they were police officers, so I think it's agreed that those two lesser included offenses [i.e., aggravated assault and simple assault] should not be the subject of a lesser included instruction for the jury."

Defense counsel agreed. Appellant stated on the record that he understood and agreed with counsel. Having requested that the instructions not be given, appellant is precluded from arguing that the trial court committed prejudicial error. (*People v. Barton* (1995) 12 Cal.4th 186, 198.)

Appellant contends that the jury should have been instructed on aggravated assault (§ 245, subd. (a)(1)) because Officer Weninger used excessive force and was not acting in the performance of his duties. (See *People v. Castain* (1981) 122 Cal.App.3d 138, 145; *People v. Burres* (1980) 101 Cal.App.3d 341, 355.) A trial court must instruct on lesser included offenses where substantial evidence would support a determination that the crime was less than that charged and the defendant was guilty of the lesser rather than the greater offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Officer Weninger struck appellant with his forearm when appellant backed up into the kitchen and reached into his waistband. The officer believed appellant was reaching for a weapon, as did Officer Terrence who responded by drawing her weapon.

Appellant claims that Officer Weninger overreacted and should have ordered appellant to stop and put his hands on his head. Standing alone, that is not

evidence of excessive use of force. "Under Penal Code sections 835 and 835a, an officer may lawfully use only reasonable force to make an arrest or to overcome resistance." (*People v. Curtis* (1969) 70 Cal.2d 347, 356-357.)

Appellant's expert, Doctor Steven Gabaeff, testified that the officers did not use excessive force. Doctor Gabaeff stated that "the amount of force used was generally within the guidelines . . . to suppress a resisting arrestee. I mean, policemen are allowed to hit people . . . . [¶] Obviously, two-handed blows are going to hurt a heck of a lot more than one-handed blows, and there's a pretty broad spectrum in there, but I don't think we're seeing any injuries that clearly demarcate . . . or [cross] a line between normal force and brutalizing force. There were no broken bones. [Appellant] had some lacerations. All would seem consistent with what I would regard as proper police procedures in a situation like that."

Assuming, arguendo, that the trial court erred in not instructing on aggravated assault as a lesser offense, the alleged error was harmless. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) The factual question posed by the omitted instruction (i.e., whether the officers used excessive force) was revolved unfavorably to appellant when the jury returned a guilty verdict on count 2 for resisting an officer. (See, e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 97.) The jury was instructed that in order to convict on counts 1 and 2 the prosecution had the burden of proving that Officer Weninger was engaged in the performance of his duties and used reasonable force. (CALJIC 9.29.)[3] The conviction on counts 1 and 2 was based on an implied finding Officer Weninger did not use excessive force. (CALJIC 7.50, 9.23).)[4]

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[3] The CALJIC 9.29 instruction stated in pertinent part: "In a prosecution for violation of the charges contained in Counts 1 and 2 and the lesser offenses thereto, the People have the burden of proving beyond a reasonable doubt that the peace officer was engaged in the performance of his duties. [¶] A peace office is not engaged in the performance of his duties if he makes or attempts to make an unlawful arrest or

"Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

Upper Term Sentence

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 [159 L..Ed.2d 403] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), appellant contends the upper term sentence on counts 1 and 2 violates his Sixth Amendment rights because the sentence was based on aggravating factors not reflected in the jury verdict or admitted by appellant.[5] The Attorney General argues that appellant waived the error by not objecting at the sentencing hearing. We reject the argument because prior to sentencing, our state supreme court concluded that the imposition of an upper term sentence, as provided under California law, was constitutional and does not implicate a defendant's Sixth Amendment right to a jury trial. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) In light of *Black*, it would have

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detention or uses unreasonable or excessive force in making or attempting to make the arrest or detention."

[4] During jury deliberations, the trial court received the following note with respect to count 1: "There was no testimony to support the reason one juror is using to acquit the defendant, which is Officer Weninger used undo force which lead to a chain of events. Is this proper? The trial court referred the jury to CALJIC 1.00 which stated that the jury was to base its decision only on the evidence. The juror note does not support appellant's claim that the trial court had a sua sponte duty to instruct on aggravated assault of a non-officer.

[5] The trial court sentenced appellant to a five year upper term for aggravated assault on an officer (count 1; § 245, subd. (c)), doubled the term based on the prior strike conviction (§ 667, subd. (e)(1)), and added two one-year prior prison enhancements (§ 667.5, subd. (b)). On count 2 for resisting an officer (§ 69), the trial court imposed a three year upper term, doubled the sentence as a second strike, and ordered the sentence to run concurrent to the 12 year sentence on count 1.

been futile to object at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution. (*People v. Vera* (1997) 15 Cal.4th 269, 276-278; *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn.5)

In *Cunningham v. California* (2007) 549 U.S. ___, ___ [127 S.Ct. 856, 868] (*Cunningham*) the United States Supreme Court recently overruled *People v. Black*, *supra*, and held that held that California's determinate sentencing law violates *Appprendi's* bright-light rule: "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]"

Appellant's assertion that the sentence violates *Cunningham* is without merit. The trial court imposed upper term sentences based on six aggravating factors: (1) that the crimes involved great violence, (2) that appellant was armed with or used a weapon, (3) that appellant engaged in violent conduct and was a serious danger to society, (4) that appellant's prior convictions as an adult were numerous, (5) that appellant was on parole when he committed the offenses, and (5) that appellant's prior performance on probation and parole has been unsatisfactory.

The last three aggravating factors were either by appellant or found to be true by the jury. Appellant testified that the offenses occurred three months after he was released from prison, that he was on parole, and that he was living with Frank Aiello in violation of a term and condition of his parole. On cross-examination, appellant admitted that he was convicted in 2001 of making terrorist threats and inflicting corporal injury on a cohabitant, both felonies. Appellant also admitted that he was convicted in 1994 of felony receiving stolen property, convicted of burglary in 1995, and convicted of felony petty theft in 1996.

The jury, in the second phase of trial, found that appellant had suffered a prior strike conviction and had served two prior terms.

These admissions and jury findings support the imposition of upper term sentences based on appellant's criminal recidivism and his failed attempt at parole. The rule of *Cunningham* does not apply to the use of prior convictions to increase the penalty for a crime. (*Id*., at p. __ [127 S.Ct. at p. 868]; see also *Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455]; *Blakely, supra,* 542 U.S. at p. 301 [159 L.Ed.2d at p. 412].)

Assuming, arguendo, that the trial court erred in relying on other aggravating factors, the error was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) __ U.S. ___, ___ [126 S.Ct. 2546, 2553] ["Failure to submit a sentencing factor to the jury . . . is not structural error" and is subject to harmless error rule]: *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) It is settled that only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) Here, the trial court relied on appellant's prior convictions and recidivism to impose the upper term, as permitted by *Cunningham* and *Blakely*. Even if we were to assume error under *Cunningham* based on the trial court's reference to other aggravating factors, the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 711].)

Direct Victim Restitution

Appellant finally argues that the trial court erred in ordering him to pay $72,844.60 restitution to Officer Weninger and City of Santa Barbara (City). (§ 1202.4, subd. (f).) Before sentencing, City sent a letter to the prosecutor requesting restitution for medical expenses and disability benefits paid to Officer Weninger. The letter, which included a summary of payments, was received at the sentencing hearing without objection.

Appellant claims that the letter is hearsay and fails to show that the medical expenses and disability payments are for injuries caused by appellant's

criminal conduct. Appellant, however, did not object to the letter or restitution order, thereby waiving any claim of insufficiency of the evidence. (*People v. Ricco* (1996) 42 Cal.App.4th 995, 1003; *People v. Foster* (1993) 14 Cal.App.4th 939, 944.)

Waiver aside, hearsay in the form of a computer generated list of medical expenses, is sufficient to support a restitution order. (See e.g., *People v. Hove* (1999) 76 Cal.App.4th 1266, 1274-1276.) City's letter states that "Officer John Weninger sustained injuries to his shoulder, hands, elbows, and a hernia while taking Mr. Silva into custody. The City must provide workers' compensation benefits to Officer Weninger as a result of the actions by Mr. Silva." Substantial evidence supports the order for $72,844.60 restitution.

Appellant argues, and the Attorney General agrees, that City is not a direct victim under the restitution statute. (§ 1202.4, subd. (f).)[6] In *People v. Birkett* (1999) 21 Cal.4th 226, our Supreme Court held that a defendant may not be ordered to pay restitution to an insurer who indemnifies a victim for injuries caused by the defendant. (*Id*., at p. 245, discussing former Gov. Code, § 13967 and Pen. Code § 1203.04]; see also *People v. Martinez* (2005) 36 Cal.4th 384, 394-395 [state entity that incurred costs cleaning up illegal drug lab not a direct victim].) The same principle applies where a city acts as an insurer and pay workers' compensation benefits to an officer injured by a defendant. (*People v. Franco* (1993) 19 Cal.App.4th 175, 184-185 [discussing former Gov. Code, § 13967, subd. (c)].)

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[6] When appellant was sentenced, section 1202.4, subdivision (f) provided in pertinent part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court."

The order awarding City of Santa Barbara $72,884.69 restitution is stricken. The trial court is directed to issue an amended abstract of judgment reflecting that appellant is ordered to pay $72,884.69 victim restitution to John Weninger. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Frank J. Ochoa, Judge

Superior Court County of Santa Barbara

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Lawrence M. Daniels, Supervising Deputy Attorneys General, Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.