

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARKEL ANTHONY BARERRA,

Defendant and Appellant.

B292303

Los Angeles County
Super. Ct. No. MA073817

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed.

Kelly A. Woodruff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Paul M. Roadarmel, Jr., David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Markel Anthony Barerra guilty of two counts of resisting an officer by force or violence, and the trial court sentenced him to concurrent six-year terms under the Three Strikes law. Barerra appeals, and we affirm.

BACKGROUND

An information charged Barerra with two counts of resisting an executive officer by threats and violence under Penal Code section 69,¹ and alleged he had a prior serious or violent felony conviction under the Three Strikes law (§ 667, subds. (b)-(j)) and two prior prison terms (§ 667.5, subd. (b)).

At trial, Los Angeles County Sheriff's Deputy Ronald Sneed testified he and his partner, Deputy Andrew Delarosa, were on duty and in uniform at 2:30 p.m. on May 14, 2018, in their marked black and white sheriff's vehicle. Near 10th Place and Avenue Q-5 in Palmdale, Deputy Sneed saw Barerra about 30 feet ahead of the patrol car, walking down the street and flicking glowing ashes from his cigarette onto the sidewalk, which violated California Vehicle Code section 23111 ("No person in any vehicle and no pedestrian shall throw or discharge from or upon any road or highway or adjoining area, public or private, any lighted or nonlighted cigarette, cigar, match, or any flaming or glowing substance."). Deputy Sneed decided to warn or cite Barerra. He and Deputy Delarosa got out of the patrol car and approached Barerra, who stopped to talk. They began a casual conversation from about five feet away, asking Barerra how he was doing and requesting identification. Barerra said he had no identification on him, and gave his name ("Marquez Barerra") and his birthdate.

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

Deputy Delarosa returned to the patrol car to run Barerra's name through the computer to see whether he had warrants, and Deputy Sneed stayed on the sidewalk chatting with Barerra about his family. Deputy Delarosa got out of the patrol car and said "1015," a radio code the deputies used to communicate to each other, but not to the public or anyone standing there, that a name came back with arrest warrants. Deputy Sneed "told [Barerra] to put his hand[s] behind his back so he could be handcuffed, so he could be arrested." Barerra "became aggressive and assaultive," said "no," and backed away. Deputy Sneed reached and grabbed Barerra's wrists, trying to put his left arm behind his back.

Barerra tensed his body and said he wasn't going to go along with the program, resisting the effort to handcuff him. In Deputy Sneed's training and experience, tensing up meant a suspect might run away or fight. He grabbed Barerra's left arm and put it behind his back. Barerra yanked his arm away and swung his elbow close to Deputy Sneed's face, but did not hit him. Barerra tried to run, but Deputy Sneed grasped his left arm again and put it behind his back. Deputy Delarosa grabbed Barerra's right arm and put it behind his back. The two deputies escorted Barerra to the patrol car and bent him forward at the waist over the back of the car to hold him steady for handcuffing, telling him to comply. Barerra continued to resist by tensing his muscles and pulling his arms toward the front of his body. He broke free of Deputy Delarosa's grasp, flailed his right arm in the air, and began to shout.

Deputy Sneed described the sheriff department's "use of force chart." A "compliant" suspect would put his arms behind his back so the deputies could handcuff him. A "resistant"

suspect would say he did not want to go to jail and might tense up a little bit when the deputies put his arms behind his back, but for the most part he would go along, and the deputies would be able to handcuff him by using a control hold if necessary. Barerra was an “assaultive high risk” suspect who might assault the deputies or the public. Deputy Sneed had used a control hold at the beginning, and the two deputies had tried another control hold to move Barerra to the patrol car and keep him in place, but they could not handcuff him. When Barerra broke free and flailed his arm, Deputy Sneed feared Barerra would hit him, and he and Deputy Delarosa let go. Deputy Delarosa called for backup. After warning Barerra twice that he would tase him if he continued to fight, Deputy Sneed tased him.

Barerra fell to the ground and rolled over onto his stomach, with his hands underneath his body. The deputies continued to order him to put his hands behind his back, but he did not comply. After about 20 seconds, Deputy Delarosa stood over Barerra to pull his arms behind his body to handcuff him, but Barerra tried to stand. Because he had been so uncompliant, the deputies had not been able to do a pat-down search. Deputy Sneed thought Barerra might be reaching for something in his waistband, where his experience taught him suspects concealed guns or knives.

The deputies ordered Barerra to stay on the ground, but he continued to rise. Deputy Sneed pressed the trigger on his taser to shock Barerra again, but he still managed to stand up. The deputies tackled him to the ground because he was about to run away, and their control holds and the taser had not worked. They followed sheriff’s department policy when they used the taser and the takedown.

When Barerra was on the ground with the deputies on top of him, he continued to flail his arms and kick, while the deputies commanded him to stop fighting. Believing he could not get hold of Barerra's arms or legs, Deputy Sneed punched him three or four times in the face. Within seconds, backup deputies arrived and ran over to pull Barerra down and handcuff him, putting a "hobble" on him (tying his legs together), so he could no longer kick. Barerra was taken into custody. Deputy Sneed did not see or talk to him afterward and did not see whether he was injured.

Deputy Sneed had a swollen right thumb and abrasions on his pinkie finger and his left knee. He was not sure how he got the injuries.

Deputy Delarosa testified he asked Barerra from the patrol car what was going on, and Barerra answered: " 'Nothing. Heading home.' " Noticing he was flicking cigarette ashes onto the sidewalk, Deputy Delarosa got out of the car to talk to Barerra, and then returned to the car to run his name. Barerra had multiple warrants, and Deputy Delarosa used the "1015" code to advise Deputy Sneed they were going to arrest Barerra. Deputy Sneed went "hands-on" with Barerra, grabbing Barerra's left arm while telling him to put his hands behind his back so the deputies could handcuff him. As Deputy Sneed grabbed his left arm, Barerra threw his elbow up toward Deputy Sneed's face. Deputy Sneed grabbed Barerra's left arm again to regain control, and Deputy Delarosa walked quickly to Barerra's right side and grabbed his right arm. The deputies escorted him to the back of the patrol car, commanding Barerra to stop fighting and to put his arms behind his back.

Barerra continued to tense up and did not put his hands behind his back, moving his body left and right. Barerra broke

Deputy Delarosa's grip and "rip[ped] upwards," so Deputy Delarosa radioed for additional units. Deputy Sneed warned Barerra he would tase him if he did not cooperate, but he kept moving his body back and forth. Deputy Sneed tased him.

Barerra fell on his stomach and Deputy Delarosa put his knee in Barerra's back, telling him to give up and put his arms behind him. Barerra's arms were underneath him. The deputies couldn't do a pat-down search, and Deputy Delarosa thought he was hiding something, perhaps a weapon (which often were hidden in a waistband). While Deputy Delarosa tried to get Barerra's arms out from underneath him, Deputy Sneed warned him he would tase him again, and when Barerra continued to thrash side to side, he tased him a second time. The second tase did not work, and Barerra stood up and attempted to run. The deputies tackled him onto the sidewalk adjacent to the patrol car. Barerra was still thrashing from side to side with his arms underneath him. Deputy Delarosa punched the right side of Barerra's face three or four times, as allowed by department policy if a suspect might be armed.

Deputy Delarosa had abrasions on his left forehead and his left knee. His pants were ripped when he and Deputy Sneed tackled Barerra.

In his defense, Barerra testified he was walking down the street on his way home, smoking a cigarette, when he nodded at a passing police car. One deputy asked if he could talk to him and Barerra said yes. The car pulled over and the deputies got out to talk to him.

Standing on either side of him, the deputies asked Barerra where he was coming from and where he was going. He told them he was heading home from buying a pack of cigarettes at

the store. They asked for identification. He told them he didn't have any, and gave them his correct name and birthdate. Deputy Delarosa walked back to the car, and Barerra "was just waiting for my name to come back clear so I could go home." Deputy Delarosa gave Deputy Sneed a code Barerra didn't know, and then Deputy Sneed grabbed Barerra's arm and at the same time told Barerra to put his hands behind his back. As a natural reflex, Barerra asked, "Hey, what's going on?" Deputy Sneed did not respond, holding Barerra's arm behind his back.

Deputy Delarosa came over and took Barerra's other arm. The deputies led him to the patrol car, each holding an arm behind his back and guiding him by his elbows. Barerra asked if they were arresting him, and the deputies told him nothing was wrong, they just wanted to search him. Then the deputies slammed him onto the back of the police car, with his arms behind his back. He struggled and asked them why they were so aggressive. They tried to search him, going into his pockets. He was nervous, his body was "crazy" and "tensed up," and he was hysterical: "I never came and got, you know, beaten by the police before." Deputy Sneed let go of him, and Barerra saw he was holding a taser. Deputy Sneed kept telling him to comply. Barerra said he was complying, he just wanted to know what was going on. Then Deputy Sneed tased him, and he fell straight to the ground. When it wore off he rolled onto his stomach. Deputy Delarosa put his knee on Barerra's back, trying to grab his right arm and telling him to get off his arms, but he couldn't because he was pinned to the ground. Deputy Sneed came over, got his foot tangled in the taser wires, and grabbed Barerra's other arm. They pulled him to his feet, and he collapsed back down. They

fell with him, punching the sides of his face. Other deputies tied his legs.

Nobody ever told him he had arrest warrants, that they were arresting him because he had warrants, or that it was a crime to flick ashes on the sidewalk. Barerra knew he had been convicted of residential burglary in 2009, commercial burglary in 2010 and 2015, receiving stolen property in 2013, and battery on someone he was married to, dated, or lived with, in 2014. He asked more than once why he was being arrested, but they never told him why they were handcuffing him. He thought they were getting ready to attack him.

On cross-examination, Barerra repeated he did not know the deputies were trying to arrest or handcuff him. He had been arrested several times, but the police always told him he was under arrest, never just “ ‘put your hands behind your back.’ ” He thought the deputies would search him and let him go, and he did not know he had warrants. If he had known, he would have complied. He did not resist when Deputy Sneed put his arm behind his back. As a reflex, he reacted by jerking his left arm forward and asking what was going on. On redirect, Barerra repeated he would have complied if the deputies had told him what they were doing.

The jury found Barerra guilty of both counts of resisting arrest by force or violence in violation of section 69. Barerra admitted two prior convictions for burglary (§ 459) in a bifurcated proceeding.

The trial court sentenced Barerra to concurrent six-year terms on each count under section 667, subdivision (e)(1) (the maximum three-year term, doubled under the Three Strikes law).

The court struck Barerra's two prior prison terms for the purpose of the one-year sentence enhancement under section 1385.

DISCUSSION

1. ***Substantial evidence supports the conclusion the deputies were lawfully performing their duties for the purpose of section 841***

Barerra argues that despite his outstanding warrants, the deputies acted unlawfully when they tried to arrest him, so we must reverse his convictions as a matter of law. We conclude substantial evidence supports a conclusion that the deputies acted lawfully, keeping in mind we must consider the entire record in the light most favorable to the jury's guilty verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Section 69, subdivision (a), states: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment." A defendant can violate section 69 in two ways: first, by attempting 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. (*People v. Smith* (2013) 57 Cal.4th 232, 240.) Barerra was tried for the second way of violating section 69, which expressly requires the defendant resist the officer with force or violence, and also requires the officer to be engaged in the *lawful* performance of his duties at

the time the defendant resists. (*Smith*, at p. 241; *In re Manuel G.* (1997) 16 Cal.4th 805, 810.)

Barerra argues the deputies acted unlawfully because they did not tell him they intended to arrest him. Section 841 requires an arresting officer to “inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it,” and the officer “must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.” If the deputies violated section 841, they were not engaged in the lawful performance of their duties, and Barerra did not violate section 69. (*Allen v. McCoy* (1933) 135 Cal.App. 500, 508 (*Allen*)). At the close of the prosecution’s case, Barerra moved for a judgment of acquittal because the deputies “did not advise him that they were going to arrest him or why.” The trial court stated section 841 required the deputies to inform Barerra of their intention to arrest him, but “the circumstances can clearly indicate the intention to arrest” where, as here, the deputies told Barerra to put his hands behind his back, and the outstanding arrest warrants were valid. The court denied the motion.

Barerra testified he knew Deputies Sneed and Delarosa were deputies. This satisfies the requirement that the defendant “know that the person whom he or she is resisting is an executive officer” with the authority to arrest him. (*People v. Atkins* (2019) 31 Cal.App.5th 963, 974.)

The first open question is whether sufficient evidence supports a conclusion Barerra had notice of the deputies’ intention to arrest him. “Notice of intention to make an arrest may be indicated from the circumstances and it is not necessarily a requirement that notice of such intention be given by express

statement before taking the person into actual or potential custody.” (*Lowry v. Standard Oil Co.* (1942) 54 Cal. App. 2d 782, 791; *Ward v. United States* (9th Cir. 1963) 316 F.2d 113, 118 [“No express statement of intent is required.”].)

The circumstances indicate that Barerra had notice. In *Allen*, the defendant argued the arresting officer violated section 841 in part because he did not tell him he intended to arrest him. But the officer said, “‘Throw up your hands, we are officers,’” and the court of appeal found that was sufficient evidence of the officer’s authority and of an intention to make an arrest. (*Allen, supra*, 135 Cal. App. at p. 508.) In *People v. Rios* (1956) 46 Cal.2d 297, 298, the deputy told the defendant, “‘[Y]ou are busted now,’” which our Supreme Court concluded complied with section 841, because “the expression ‘busted’ is commonly used to indicate an arrest.”

Here, Deputy Sneed and Barerra both testified Deputy Sneed told Barerra to put his hands behind his back after Deputy Delarosa ran Barerra’s name through the computer and found the outstanding warrants, and both deputies repeated the command during the ensuing struggle. Telling Barerra to put his hands behind his back indicated the deputies’ intent to handcuff him and arrest him. Barrera admitted he had been arrested several times before, and he knew Deputy Delarosa was running his name to see if it came back clear. Nevertheless, he also testified that during his prior arrests nobody ever told him to put his hands behind his back, he did not know he had outstanding warrants because the deputies used the code, and the deputies told him they did not want to arrest him, but only to search him. Presented with two versions of what happened on the day of Barerra’s encounter with the deputies, a reasonable jury who

observed the witnesses, determined their credibility, and resolved the factual conflicts, could have disbelieved his defense. (*People v. Ambrose* (1962) 199 Cal.App.2d 846, 852; *People v. Johnson, supra*, 26 Cal.3d at p. 579.)

The second question is whether substantial evidence supports a conclusion that the deputies complied with section 841's requirement that they inform Barerra "of the cause of the arrest." "[S]uch notice must be given at the time or upon the occasion of the arrest, and not necessarily before taking the person into actual or potential custody. It is sufficient if such notice is given upon the occasion of the arrest, at the earliest reasonable opportunity.'" (*Allen, supra*, 135 Cal.App. at p. 509.)

Deputy Delarosa had just run Barerra's name through the computer, and after he gave Deputy Sneed the code, Deputy Sneed told Barerra to put his hands behind his back. When he said no and backed away, Deputy Sneed grabbed his wrists, and then his left arm after Barerra tensed up and said he would not cooperate. Because the arrest was initiated immediately after completion of the computer search, it was reasonably apparent that the search result was the cause of Barerra's arrest, and he was waiting to see if his name came back "clear." (*People v. Rios, supra*, 46 Cal.2d at p. 299.) Substantial evidence supports a conclusion that during the intense scuffle that followed, the deputies did not have a reasonable opportunity to inform Barerra that the cause of the arrest were his outstanding warrants.

The third question is whether substantial evidence supports a conclusion that Barerra did not ask the deputies what specific offenses caused them to attempt to arrest him. Section 841 also requires that officers "must, on request of the person he is arresting, inform the latter of the offense for which

he is being arrested.” “[T]he statute requires only that the arrestee be advised of the offense for which he is being arrested *if he so requests.*” (*Gomez v. Garcia* (1980) 112 Cal.App.3d 392, 397, italics added; *People v. Bevins* (1970) 6 Cal.App.3d 421, 427.)²

Barerra repeatedly testified that he did not know he was being arrested, thinking the deputies intended to search or beat him. Inconsistently, he also testified he asked why he was being arrested. But if Barerra did not think he was being arrested, he cannot have asked the deputies to identify the offenses that were the basis for his arrest. The evidence supported a conclusion that Barerra did not make such a specific request, and so section 841 did not require the deputies to inform Barerra about the specific offenses that were the bases for his outstanding warrants.

2. *Sustaining the prosecutor’s hearsay objection was not prejudicial error*

² We reject the People’s argument this requirement was excused because the deputies had reasonable cause to believe Barerra was “actually engaged in the commission of an offense.” (*Bevins*, at p. 427; *People v. Ruiz* (1961) 196 Cal.App.2d 695, 702.) The People contend Barerra was engaged in a violation of section 834a, which requires: “If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.” (The People wisely do not argue Barerra was engaged in the misdemeanor vehicle code violation for flicking ashes on the sidewalk.) We reject the implication that (in a different case) deputies could confront a person, initiate an arrest with no indication of their intention even when the person requests, and yet retrospectively comply with section 841 because the person then resists and violates section 834a.

Barerra argues the trial court abused its discretion when it sustained a hearsay objection during Deputy Sneed’s testimony on cross-examination. Asked whether he remembered Barerra saying anything, Deputy Sneed responded: “He shouted things, but I don’t recall exactly what he was saying.” Barerra’s counsel then asked: “Do you remember if he said, you know, ‘I didn’t do anything wrong. What are [you] doing?’ ” The court sustained the prosecutor’s hearsay objection, and Deputy Sneed did not answer.

Hearsay is an out-of-court statement made by someone other than the witness, offered to prove the truth of its content. (*People v. Sanchez* (2016) 63 Cal.4th 665, 674.) The statement Barerra’s counsel asked Sneed to confirm was not offered to prove its truth (that Barerra had not done anything wrong), but to prove that Barerra had asked the deputies what they were doing. The statement was not hearsay, and sustaining the objection was an abuse of discretion. (*People v. Caro* (2019) 7 Cal.5th 463, 503.) But the error was harmless, because Barerra later testified that he asked Deputy Sneed what was going on, a general question similar to asking the deputies what they were doing. Given Barerra’s subsequent testimony, no possible prejudice arose from the court’s earlier ruling. (*Id.* at p. 506.)

3. *Substantial evidence supports a conclusion the deputies did not use excessive force*

Barerra argues his arrest was not lawful, and his conviction must be reversed, because the deputies used excessive force. We conclude substantial evidence supports a conclusion that the deputies did not use excessive force.

“[W]hen an officer uses excessive force in making an arrest or detention, the officer is not engaged in the lawful performance

of his or her duties.” (*People v. Williams* (2018) 26 Cal.App.5th 71, 73.) But “[i]f a defendant delays, obstructs, or resists an officer who is engaged in the lawful performance of his or her duties” *at the time the defendant resists*, the defendant may be found guilty, “even if the officer uses excessive force subsequent to the completed violation.” (*Ibid.*)

“The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, not by the 20/20 vision of hindsight. The inquiry is an objective one: Was the officer’s action objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation? [Citation.] It is a pure question of fact whether a police officer used reasonable force in detaining a defendant, so reviewing courts determine if there is sufficient evidence in the record for a reasonable trier of fact to conclude that the force used in effectuating a detention was reasonable.” (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 989.) “‘[T]he direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.’” (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 578.) If the jury believed that testimony, we cannot substitute our own evaluation of its credibility, unless it is physically impossible for the testimony to be true, or “‘the falsity is apparent without resorting to inferences or deductions.’” (*Ibid.*)

Barerra argues Deputy Sneed used excessive force when he grabbed Barerra’s left arm “without warning and when Barerra would have no reason to understand what was happening,” and he did not actively resist until after the deputies applied this force (grabbing) to him without warning or notice he was being

arrested. He also argues the deputies' subsequent uses of force (tasing and tackling) were unreasonable and excessive.

Here, the jury could have believed Deputy Sneed's testimony that after he learned of the outstanding warrants, he told Barerra to put his hands behind his back so he could arrest him. Barerra refused and backed away, and when Deputy Sneed grabbed his wrists he tensed his body and said he would not cooperate. At that point Deputy Sneed grabbed Barerra's arm, and he reacted by throwing his elbow up at Deputy Sneed's face. Grabbing hold of Barerra's arm after he backed away to avoid arrest was objectively reasonable in light of the circumstances, so Deputy Sneed was not using excessive force and was engaged in the lawful performance of his duties when Barerra threw his elbow at Deputy Sneed's face. Because that act of resistance occurred when Deputy Sneed was acting lawfully, Barerra could be convicted of violating section 69 even if the deputies later used excessive force after they took Barerra over to the patrol car. (*People v. Williams, supra*, 26 Cal.App.5th at p. 73.)

Barerra relies on *People v. Soto* (1969) 276 Cal.App.2d 81, but he quotes that case out of context. At Soto's trial for battery on a police officer, the jury heard two versions of an altercation between Soto and the officer at a party. The officer testified another guest, Carrasco, was arguing with his fists doubled up, and struck the officer when he put his hand on Carrasco's shoulder to arrest him. Soto testified Carrasco was not creating a disturbance, and the officer "manhandle[d]" Carrasco "without provocation or prior warning," and then advanced threateningly on Soto, who put his hand on the officer's chest. (*Id.* at p. 84.) Despite this conflicting evidence, the trial court failed to instruct on the use of excessive force in effecting an arrest, or on Soto's

right to defend himself and others against the use of excessive force. The court then compounded the error by stating in front of the jury that the officer's use of force against Carrasco had nothing to do with the defendant's behavior toward the officer. Because whether the arrest was lawful was a question of fact for the jury to decide, and Soto's testimony if believed supported a finding the officer "was not justified in grabbing Carrasco by the shoulder, without warning, for the purpose of placing him under arrest," the error in not instructing on excessive force was prejudicial. (*Id.* at pp. 86, 88.)

Here, the jury *was* instructed that if the deputies used unreasonable or excessive force in making or attempting to make an otherwise lawful arrest, and if Barerra used only reasonable force to protect himself, he was not guilty on either count or any lesser included offense. The jury found Barerra guilty, choosing to believe the deputies' testimony and finding the force used was not excessive. In addition, under either version of the facts, there was no question that the deputies were justified in arresting Barerra on his outstanding warrants. In *People v. Soto*, Soto testified the officer had no reason to manhandle or arrest Carrasco, yet the instructions did not allow the jury to choose between the conflicting versions of events. In this case (as we conclude below), the jury was properly instructed.

4. *The jury instructions did not violate Barerra's substantial rights*

Barerra argues the trial court misstated the law when it instructed the jury on the requirement that the deputies be engaged in making a lawful arrest. After the court discussed the instructions, Barerra's counsel stated he had reviewed them all, did not request additional instructions, and had no objections to

the instructions as proposed. Nevertheless, the trial court had a sua sponte duty to provide proper instructions on the elements of the offense and any defenses. (*People v. Lewelling* (2017) 16 Cal.App.5th 276, 295; *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) If an instructional error affects the defendant's substantial rights, the defendant does not forfeit the right to raise the error on appeal. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.)

Barerra first argues the instructions failed to tell the jury that to find he violated section 69 by resisting officers "in the performance of [their] dut[ies]," the jury must conclude the deputies were making a lawful arrest, instead including only the requirement the deputies have not used excessive force. But the instructions stated elsewhere: "A 'peace officer' is engaged in the performance of his duties if he is *making or attempting to make a lawful arrest* or using reasonable force to effectuate a *lawful arrest*." (Italics added.) Barerra argues the instructions then directed a verdict by stating a "lawful arrest may be made by a peace officer acting under a warrant of arrest," eliminating his defense that the arrest was not lawful because the deputies did not advise him of their intention to arrest him or the reason for the arrest. But a subsequent instruction stated that the officer must inform the suspect of the intention to arrest him and the cause of the arrest, informing the jury of the requirements of section 841.

Barerra contends the instructions on section 841 were improper, because the court modified the standard instruction (CALJIC No. 16.105) to add this language: "Such notice [of arrest] must be given at the time or upon the occasion of the arrest, and not necessarily before taking the person into actual or potential custody. It is sufficient if such notice is given upon

the occasion of the arrest or at the earliest opportunity.” He claims “strict compliance” is required. But the added language is virtually identical to *Allen, supra*, 135 Cal.App. at p. 509: “[S]uch notice must be given at the time or upon the occasion of the arrest, and not necessarily before taking the person into actual or potential custody. It is sufficient if such notice is given upon the occasion of the arrest, at the earliest reasonable opportunity.” The written instructions continued: “An express statement of intention to arrest is not required. Intention to arrest may be indicated by circumstances.” This is consistent with *Allen*, at p. 508; *Lowry v. Standard Oil Co., supra*, 54 Cal.App.2d at p. 791; and *People v. Rios, supra*, 46 Cal.2d at p. 298.

Barerra claims the court erred in giving this modified version of CALJIC No. 16.106: “Where a peace officer is making an arrest or a detention, and the person being arrested or detained has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested or detained by a peace officer, it is the duty of that person to refrain from using force or any weapon to resist the arrest or detention, unless unreasonable or excessive force is being used to make the arrest or detention.” This mirrors the language of section 834a: “If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.”

Barerra argues it was error to give this instruction, because section 69 requires the officer to be making a lawful arrest, and the instruction implied the jury could find him guilty even if the arrest was unlawful. *People v. Curtis* (1969) 70 Cal.2d 347, 355-

356, held section 834a applies to all arrests, lawful and unlawful, “but if the arrest is ultimately determined factually to be unlawful, the defendant can be validly convicted only of simple assault or battery.” This means “[t]he unlawfulness of an arrest is not a defense to assault or battery used to resist arrest.” (*People v. Richards* (2017) 18 Cal.App.5th 549, 564.) But the instruction did not stand alone. The jury was instructed that the arrest had to be lawful, and also that if the deputies used excessive force in making the arrest and Barerra used only reasonable force to protect himself, he was not guilty of the charged violations of section 69 *or any lesser offense*. Viewing all the instructions as a whole, we see no error.

Barerra argues the instructions omitted the necessary element that he actually knew the deputies were acting lawfully. “[T]o establish defendant’s guilt under Penal Code section 69, the prosecution was required to prove, among other things, that when defendant resisted [the officer], [he] knew that he was dealing with a police officer and that he knew [the officer] was performing his duty.” (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 237.) The instructions, however, told the jury Barerra had to have “*knowingly* and unlawfully resisted an executive officer in the performance of his dut[ies].” (Italics added.) (See *People v. Carrasco* (2008) 163 Cal.App.4th 978, 985.)

“Actual knowledge . . . means a person is subjectively aware of the necessary facts. . . . [K]nowledge regarding whether the officers were performing their duty is relevant to deciding if [defendant] violated section 69. A subjective appreciation of that fact is an element of the offense.” (*In re A.L.* (2019) 38 Cal.App.5th 15, 21-22.) The instructions also explained: “The word ‘knowingly’ means with knowledge of the existence

of the facts in question. Knowledge of the unlawfulness of any act is not required. A requirement of knowledge does not mean that the act must be done with any specific intent.” These instructions correctly told the jury it was required to consider whether Barerra knew the officers were engaged in performing their duties, i.e., performing a lawful arrest. Barerra testified he did not know he had outstanding warrants or was being arrested. The jury was properly instructed it had to resolve that factual question.

The instructions as given did not violate Barerra’s substantial rights.

5. *Sufficient evidence established Barerra used force or violence*

Barerra argues insufficient evidence supported a finding that he used force or violence in resisting the deputies, because there was no evidence that he applied physical force to either one. Section 69, however, does “not require more than forceful resistance,” and does not “require that a defendant use any other force or violence on the person of the executive officer.” “[F]orce used by a defendant *in resisting* an officer’s attempt to restrain and arrest the defendant is sufficient to support a conviction.” (*People v. Bernal* (2013) 222 Cal.App.4th 512, 518, 519.)

In *People v. Bernal*, while the officer was holding one of the defendant’s hands, he pushed against the officer and tried to run, dragging the officer (who held onto his waist) down a bike trail, and he also swung his hips side to side to get out of the officer’s grasp: “[T]his forceful and violent conduct amply supported his conviction of violating section 69.” (*People v. Bernal, supra*, 222 Cal.App.4th at p. 520.) In *People v. Carrasco*, the officers testified they had to take defendant to the ground when he

refused to comply with repeated orders to take his hand out of his duffle bag. The defendant failed to comply when the officers ordered him to relax and stop resisting, placed his arms under his body, and yelled and kicked until one of the officers administered pepper spray. (*People v. Carrasco, supra*, 163 Cal.App.4th at pp. 985-986.) This “wrestl[ing]” with the officers satisfied section 69’s requirement of resistance by “force or violence.” (*Carrasco*, at p. 986.) Barerra cites *People v. Francis A.* (2019) 40 Cal.App.5th 399, but there the court concluded that no substantial evidence showed the minor committed battery against a police officer (§ 243), which requires a touching that is harmful and offensive. (*Francis A.*, at p. 405.)

Barerra yanked his arm away from Deputy Sneed’s grasp, threw his elbow close to the deputy’s face, tried to run, and resisted both deputies by pulling his arms away and flailing his right arm and shouting. He continued to resist after Deputy Sneed tased him following a warning, stood up when the deputies ordered him to stay down, and then flailed and kicked until backup deputies arrived. This was sufficient evidence that he resisted the deputies by force or violence.

6. *Barerra has not shown counsel was ineffective for failing to advocate for a lower sentence*

In a bifurcated proceeding, Barerra admitted he had served two prior prison terms, and admitted his prior strike for burglary, which required the court to double the base sentence for each of his two counts of conviction. Defense counsel did not provide a sentencing memorandum, or make a motion asking the court to strike the prior strike (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)). At sentencing, counsel requested the midterm: “He does have a significant record. This is not the

most egregious 69 and therefore, I would request that the court impose midterm.” The court imposed the high term (3 years) on count 1 and asked counsel if he wanted to be heard, and he replied, “No, your honor.” The court then sentenced Barerra to three years on each of the two counts, doubled under the Three Strikes law, to run concurrently.

Barerra argues counsel’s failure to file a formal request that the court dismiss his strike prior, and his failure to argue for a lesser sentence, constituted ineffective assistance. “[A] defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent.” (*People v. Scott* (1994) 9 Cal.4th 331, 351.) To establish that counsel was ineffective, Barerra must show his performance “fell below an objective standard of reasonableness” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

A trial court, on its own motion or on the prosecutor’s application, has the power to vacate or strike an allegation or finding under the Three Strikes law that a defendant has a prior serious and/or violent felony conviction, “in furtherance of justice” under section 1385, subdivision (a). (*People v. Carmony* (2004) 33 Cal.4th 367, 373-374; *Romero, supra*, 13 Cal.4th 497.) A defendant has no right to make such a motion, and the court has no obligation to make a ruling, but a defendant “does have the right to ‘invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the

defendant in support of his assertion that the dismissal would be in furtherance of justice.’” (*Carmony*, at p. 375.) The court may strike a strike prior if in the light of the current and prior convictions, and the details of the defendant’s background, character, and prospects, the defendant is outside the spirit of the Three Strikes law and should be treated as if he had not previously been convicted of a serious felony. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) If the defendant does not request dismissal under *Romero*, he forfeits the right to raise the issue on direct appeal. (*Carmony*, at pp. 375-376.)

Barerra argues that given his exposure to three years for each count, to be doubled under the Three Strikes law, there was no rational explanation for counsel’s failure to request dismissal of the prior strike. He also argues a felony conviction for resisting arrest “was already excessive under the circumstances,” so any reasonably competent counsel would have made the request, at least to preserve the issue for direct appeal.

The probation report listed Barerra’s criminal history of four felony and three misdemeanor convictions, and his four pending misdemeanor convictions for driving with a suspended license, one of which included a charge of drug possession. The report listed four factors in aggravation (Barerra’s prior convictions were numerous or of increasing seriousness; he served a prior prison term; he was on post-release community supervision when he committed the offense; and his prior performance on probation, supervision, or parole was unsatisfactory). Given this significant criminal history, competent counsel could reasonably have made a tactical decision that it was futile to file a formal *Romero* request to dismiss the prior strike.

At sentencing, the prosecutor told the court the trailing misdemeanors would be dismissed upon sentencing. Barerra's counsel requested the midterm despite his "significant record," because the offense was "not the most egregious" violation of section 69. The court noted that one of the listed aggravating factors was that Barerra had served a prior prison term, and stated in the interest of justice it would strike the two prior prison terms alleged in the information to avoid double-counting. The court then imposed concurrent sentences of the high term of three years as "the appropriate sentence under the circumstances," doubled to six years under the Three Strikes law, and struck the prior prison term allegations. The court granted the prosecutor's motion to dismiss the four pending misdemeanor cases.

Barerra argues his trial counsel was ineffective for not arguing mitigating circumstances including the "unusual facts" of the case, his prior strike was in 2010, and since his release from prison on another conviction in 2017, a year before the confrontation with the deputies, he had only been charged with driving with a suspended license and drug possession. He argues counsel should have objected to the trial court's imposition of the high term, should have challenged the aggravating circumstances, and should have submitted a sentencing memorandum to challenge the probation report and advocate that mitigating circumstances (such as the circumstances of the crime) justified the low term or midterm base sentence.

But counsel did request the midterm sentence, despite Barerra's significant criminal history, because the evidence showed his was "not the most egregious" violation of section 69. While this was perhaps a lukewarm argument, counsel did

advocate for a lower sentence based on the evidence at trial. We do not see any indication in the record that a more vigorous argument would have led to a reasonable probability that the court would have imposed a lower sentence. We conclude Barerra has not shown a reasonable probability counsel's actions at sentencing prejudiced him.

7. *Barerra is not entitled to remand for a hearing on his ability to pay fines and assessments*

The trial court imposed a \$500 restitution fine under section 1202.4, an \$80 court security operations assessment under section 1465.8 (\$40 per count), and a \$60 conviction assessment under Government Code section 70373 (\$30 per count). Barerra argues he is entitled to remand for a hearing concerning his ability to pay the fine and assessments, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

Barerra forfeited his challenge to the restitution fine. Section 1202.4, subdivision (d), allows a court to consider the defendant's ability to pay if the restitution fine is more than the minimum amount of \$300. (*People v. Avila* (2009) 46 Cal.4th 680, 729; § 1202.4, subds. (b)(1) & (d).) Barerra did not avail himself of this statutory remedy to challenge the court's imposition of the \$500 restitution fine. At the time of Barerra's 2018 sentencing hearing, before *Dueñas* was decided, it would not have been futile to object. (§ 1202.4, subds. (c) & (d); see also *Avila*, at p. 729.) When he failed to object that he lacked the ability to pay the \$500 restitution fine, Barerra forfeited his challenge to the fine and to the much lower court operations and conviction assessments. A defendant's ability to pay fines and fees is evaluated in light of his total financial obligations, which include the assessments imposed on Barerra under

section 1465.8 and Government Code section 70373. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531-1532.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.