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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHNATHAN CORNIELUS WHITE,** **Defendant and Appellant.**	**A128317** **(Contra Costa County Super. Ct. No. 05-090939-0)**

Defendant Johnathan Cornielus White appeals from his conviction for possession of cocaine base for sale (Health & Saf. Code, § 11351.5). He contends the evidence underlying the conviction should have been suppressed because the police lacked probable cause to arrest him and used excessive force in effectuating the arrest. He contends his counsel was ineffective in failing to request that the trial court suppress the evidence. We affirm.[1]

PROCEDURAL BACKGROUND

In October 2008, defendant was charged by complaint with possession of cocaine base for sale (Health & Saf. Code, § 11351.5).[2] The complaint alleged as enhancements (§ 11370.2, subd. (a)) that defendant had four prior convictions for violation of section

[1] By separate order of this same date, defendant's petition for habeas corpus (A130362) raising the same ineffective assistance of counsel claim is denied.

[2] All further undesignated section references are to the Health and Safety Code.

11351.5. After the magistrate denied defendant's motion to suppress evidence under Penal Code section 1538.5, the prosecution filed an information restating the charge and allegations in the complaint. A jury found defendant guilty of the charged offense and the trial court found the prior conviction allegations to be true. The court sentenced defendant to seven years in prison.

FACTUAL BACKGROUND[3]

On June 18, 2008, about 4:30 p.m., defendant was under observation by three undercover officers. The officers had received information that there was someone selling drugs at a house on Nevin Avenue, and they observed defendant standing in the driveway of the house. The house was in a neighborhood known for crime and drug sales.

A car pulled up and parked across the street from the house and two men exited and approached defendant. They each handed defendant small unidentifiable objects and defendant walked down the driveway and out of view. Shortly thereafter, defendant returned and handed each of the men a small object, and the men left. Defendant repeated similar transactions three more times in the next 30 minutes. During one transaction, the officers were able to identify the object given to defendant as money.

Based on those observations, one of the officers, Richmond Police Detective Mario Chesney, believed defendant was selling drugs. He believed that defendant's trips down the driveway indicated he had a "stash" from which he was retrieving the drugs he was selling to the people who approached the house. Chesney contacted Richmond Police Officer Albert Walle, described defendant, and told Walle that he believed defendant was selling drugs based on Chesney's "several observations" of defendant.

Walle and another officer arrived at the Nevin Avenue house five minutes later in a marked vehicle and dressed in uniform. Walle saw defendant, who matched the

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3 This factual summary is based on the evidence adduced at the preliminary hearing, which provided the factual basis for defendant's motion to suppress before the magistrate and would have provided the basis for any request that the trial court suppress the evidence.

description given by Chesney, sitting in a recliner in the driveway of the house. The officers' arrival interrupted a transaction between defendant and two men on bicycles, who rode away when the officers arrived. Walle exited the patrol car approximately 20 feet away from defendant and began to approach him. Defendant looked toward Walle, stood up, and walked toward the front door of the house. Walle yelled for defendant to stop and began running toward defendant. Defendant did not stop and instead opened the front door.

Walle could not catch up to defendant before defendant entered the house. Walle was worried that, if defendant entered the house, Walle would have to enter the house to effectuate the arrest, rather than "safely" arresting defendant outside. Walle did not know if there were other people or weapons in the house, and he was concerned that defendant was nearly twice his size. In order to halt defendant's progress into the house, Walle discharged his Taser at defendant. The Taser caused defendant to fall onto a sofa inside the house and drop a plastic bag that had been in his hand. Defendant also threw another bag across the room.

After arresting defendant, the police discovered the plastic bags contained a number of smaller bags of suspected cocaine base. The police found $327 in defendant's pants and, in the driveway where defendant had gone during the transactions, a grocery bag containing empty baggies, latex gloves, and mail with defendant's name on it.

DISCUSSION

Defendant contends the evidence underlying his convictions should have been suppressed because the police lacked probable cause to arrest him and used excessive force in effectuating the arrest. Because defendant failed to request that the trial court suppress the evidence, he has forfeited the issue on appeal. (See *People v. Lilienthal* (1978) 22 Cal.3d 891, 896 (*Lilienthal*) ["it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its

attention"].)[4] Nevertheless, defendant argues that defense counsel was ineffective in failing to ask the trial court to suppress the evidence. The contention is without merit.

A defendant's right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 15 of the California Constitution. There is no "substantive difference between" the federal and the state constitutional right to effective assistance of counsel. (*People v. Doolin* (2009) 45 Cal.4th 390, 421.) "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) "Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [Citation.]" (*Id.* at p. 93.) Because defendant has not shown that the police lacked probable cause to arrest him or that the police used excessive force in effectuating the arrest, defendant has not made a prima facie showing that counsel's performance was deficient in failing to request that the trial court suppress the evidence, or that he suffered any prejudice as a result of counsel's failure to do so. (*People v. Bennett* (1998) 17 Cal.4th 373, 384 (*Bennett*) [no ineffective assistance of counsel in failing to raise issue in motion to suppress where argument lacked merit].)

I. *Probable Cause*

Defendant contends the police lacked probable cause to arrest him. The People argue the police had probable cause to arrest defendant for possession of a controlled substance (§ 11350, subd. (a)) and for possession of a controlled substance for sale (§ 11351). Defendant's contention that the police lacked such probable cause requires

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[4] Defendant filed a motion to suppress before the magistrate, but did not seek review of the magistrate's ruling under Penal Code section 995 or renew the motion to suppress before the trial court. (See *Lilienthal, supra,* 22 Cal.3d at p. 896.)

little discussion.[5] " 'Probable cause exists when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime.' " (*People v. Thompson* (2006) 38 Cal.4th 811, 818 (*Thompson*).) In this case, the officers observed defendant engage in five transactions that could be construed only as drug sales, he did so in a neighborhood known for drug dealing, and he fled upon the approach of the police. (See *People v. Mims* (1992) 9 Cal.App.4th 1244, 1248-1249 [probable cause existed where police observed transaction involving apparent exchange of baggie for currency in high crime area and the defendant attempted to gain access to residence to evade police]; *People v. Maltz* (1971) 14 Cal.App.3d 381, 392 ["the officers observed defendant engage in two apparent exchanges in the same area within approximately 40 minutes and they observed him return several times to the vicinity of the yard of the property"]; see also *People v. Limon* (1993) 17 Cal.App.4th 524, 532-533 (*Limon*) ["Here there was more than an apparent exchange. Before and after the exchange defendant walked over and reached into an apparent hiding place. This conduct suggested drug sales."].)

All of the cases cited by defendant are easily distinguished; among other things, none of the cases involved multiple suspicious transactions combined with attempted evasion of the police. (*Cunha v. Superior Court* (1970) 2 Cal.3d 352, 357 [single transaction in narcotics trafficking area]; *People v. Knisely* (1976) 64 Cal.App.3d 110, 114-115 [same].)

The police had probable cause to arrest defendant.

II. *Excessive Force*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ." (U.S. Const., 4th Amend.) "Allegations of excessive force are examined under the Fourth Amendment's prohibition on unreasonable seizures. [Citations.]" (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d

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[5] Because we conclude the police had probable cause to arrest defendant for narcotics offenses, we need not and do not consider whether they also had probable cause to arrest him for resisting a police officer (§ 148).

805, 823 (*Bryan*).) We ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." (*Graham v. Connor* (1989) 490 U.S. 386, 397 (*Graham*).) We must balance " ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake." (*Id.* at p. 396; see also *Scott v. Harris* (2007) 550 U.S. 372, 383.) "Stated another way, we must 'balance the amount of force applied against the need for that force.' [Citation.]" (*Bryan*, at pp. 823-824; see also *Mattos v. Agarano* (9th Cir. 2010) 590 F.3d 1082, 1086 (*Mattos*).

Tasers employed in dart mode constitute an " 'intermediate or medium, though not insignificant, quantum of force.' [Citations]." (*Bryan*, *supra*, 630 F.3d at p. 826.) Although Tasers are a nonlethal use of force, they "may result in serious injuries when intense pain and loss of muscle control cause a sudden and uncontrolled fall." (*Id.* at p. 825.) Although defendant in this case apparently suffered no lasting physical injury from being stunned with a Taser,[6] this does not diminish the fact that it was a significant intrusion on his Fourth Amendment interests. As the *Mattos* court concluded, "the Taser stun was a serious intrusion into the core of the interests protected by the Fourth Amendment: the right to be 'secure in [our] persons.' [Citation.]" (*Mattos*, *supra*, 590 F.3d at p. 1087.)

On the other hand, the People demonstrated a substantial interest in the use of force in this case. Under *Graham*, we evaluate the government's interest by examining three core factors, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham*, *supra*, 490 U.S. at p. 396; see also *Bryan*, *supra*, 630 F.3d at p. 826.) Examining these factors, and any other relevant circumstances, we " 'determine objectively "the amount of force that is necessary in a particular situation." ' [Citation.]" (*Bryan*, at p. 826.)

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6 The stun caused defendant to fall onto a couch; there was no evidence of any additional effects.

The police had probable cause to arrest defendant for possession of a controlled substance for sale (§ 11351). That was a serious crime. In addition to the obvious social costs of defendant's alleged drug dealing (including five alleged drug sales in roughly 30 minutes), felonies are by definition crimes "deemed serious by the state." (*Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964; cf. *Bryan*, *supra*, 630 F.3d at p. 828 ["Traffic violations generally will not support the use of a significant level of force."]; *Mattos*, *supra*, 590 F.3d at p. 1087 [defendant's conduct in obstructing the officers from arresting her husband was not a serious crime].) Defendant contends that we should only consider his misdemeanor offense of resisting a police officer (Pen. Code, § 148), because Walle testified that he intended to arrest defendant for that offense. However, the reason Walle sought to detain defendant in the first place was because Chesney told him defendant had been observed dealing drugs; even if Walle subjectively intended to arrest defendant for the misdemeanor, defendant's alleged felony offenses are relevant in assessing the objective reasonableness of the use of force. Defendant cites no authority to the contrary.

"The 'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of the officers or others.' [Citation.] 'A simple statement by an officer that he fears for his safety or the safety [of] others is not enough; there must be objective factors to justify such a concern.' [Citation.]" (*Bryan*, *supra*, 630 F.3d at p. 826.) In the present case, although defendant had not threatened the officers or brandished a weapon, at the time he was stunned by the Taser he was attempting to reach a location outside the view of the officers. Because there was probable cause to believe defendant was a drug dealer, and because drug dealers not uncommonly have access to firearms (*Limon*, *supra*, 17 Cal.App.4th at p. 535), Walle was reasonably concerned that defendant might access a firearm inside the house. Also, if defendant had not been stunned, the police would have had to enter the house to effectuate the arrest,[7] and Walle

[7] It would have been lawful for the officers to follow defendant into the house without a warrant. (*Thompson, supra,* 38 Cal.4th at pp. 817-818 ["The presumption of unreasonableness that attaches to a warrantless entry into the home 'can be overcome by

was reasonably concerned that an arrest in the house would present added and unpredictable dangers, either from defendant or others. Accordingly, Walle did have objectively reasonable concerns for his safety and the safety of the other officers at the time he stunned defendant. (See *Menuel v. City of Atlanta* (11th Cir. 1994) 25 F.3d 990, 995 [from the viewpoint of an officer confronting a dangerous suspect, "a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death"]; cf. *Bryan*, at pp. 826-827 [no "immediate threat" from suspect who was unarmed and standing still over 15 feet from officer].)

Finally, it is clear that defendant was actively resisting and trying to evade arrest by moving into the house. Defendant argues there is no evidence he was aware of the officer's attempt to detain him. But Walle testified that defendant saw him from 20 feet away and failed to respond to his yelled command to stop. Because defendant knew Walle desired to detain him, defendant had a duty to permit himself to be detained. (*In re Gregory S.* (1980) 112 Cal.App.3d 764, 778.) His failure to do so provided additional justification for the officer's use of force.

Although "officers are not required to use the least amount of force necessary" (*Mattos, supra,* 590 F.3d at pp. 1088-1089), it weighs in the government's favor in this case that there was no clear alternative available that would have effectuated defendant's arrest before he entered the house. Preventing entry of the house was necessary to avoid the possibility that defendant would destroy evidence and/or obtain a weapon. (See *United States v. Santana* (1976) 427 U.S. 38, 43 ["Once [the defendant] saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence."]; *Limon, supra*, 17 Cal.App.4th at p. 535 [" ' "[i]t is not unreasonable to assume that a dealer in narcotics might be armed' " "].)

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a showing of one of the few "specifically established and well-delineated exceptions" to the warrant requirement [citation], such as " 'hot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to prevent a suspect's escape . . . .' " [Citation.] . . . ' [Citation.]"].)

In *Graham*, the United States Supreme Court emphasized that courts must evaluate an officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.) The court also cautioned that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Id.* at p. 397; see also *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527-528.) With those directives in mind, we conclude the police had a sufficiently substantial interest to justify the use of an intermediate level of force against defendant, a suspected drug dealer who was attempting to evade or delay arrest by retreating into a house, which would have changed the dynamic of the situation in an unpredictable and potentially dangerous way. (Cf. *Bryan*, *supra*, 630 F.3d at p. 832 ["[T]he objective facts reveal a tense, but static, situation with [the officer] ready to respond to any developments while awaiting backup. [The defendant] was neither a flight risk, a dangerous felon, nor an immediate threat."]; *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1282 [the officer "could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating to his original position behind the roadblock"]; *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1443 ["[The defendant] was trapped in the scrapyard . . . . There was time for deliberation and consultation with superiors."].)[8]

Because the police had probable cause to arrest defendant and because the police did not use excessive force in effectuating the arrest, defendant has not demonstrated that he received ineffective assistance of counsel due to his counsel's failure to request that

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8 The People rely heavily on the decision in *Brooks v. City of Seattle* (9th Cir. 2010) 599 F.3d 1018, but the decision is being reheard en banc and it lacks precedential value in the Ninth Circuit. (*Brooks v. City of Seattle* (9th Cir. 2010) 623 F.3d 911 ["The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."].)

the trial court suppress the evidence against him. (*Bennett, supra*, 17 Cal.4th at pp. 383-384.)[9]

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

[9] Because we conclude the police did not use excessive force in effectuating the arrest of defendant, we need not and do not consider the People's contention that the evidence at issue would be admissible under the inevitable discovery doctrine.