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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHANIEL M. KOCH,

Defendant and Appellant.

A130907

(San Francisco City & County
Super. Ct. No. 00210776)

Defendant Nathaniel Koch was convicted of battery on a peace officer and resisting arrest after he brawled with five police officers. Defendant contends the trial court erred when it elected not to instruct the jury on the lesser included offense of simple battery. While we agree a battery instruction should have been given, we conclude the omission was harmless and affirm the convictions.

I. BACKGROUND

Defendant was charged in a first amended information, filed March 18, 2010, with attempted mayhem (Pen. Code,¹ §§ 203, 664), two counts of battery on a peace officer (§ 243, subd. (c)(2)), and five counts of resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)). The two battery counts were based on separate injuries to the same officer, a gouged eye and a bite to the arm, and each of the resisting arrest counts involved a different police officer. The information also alleged defendant had served a prison term within the five prior years. (§ 667.5, subd. (b).)

¹ All statutory references are to the Penal Code.

The charges resulted from the attempts of five police officers to subdue defendant after a confrontation turned violent. According to the testimony of one of the officers, he and a partner, riding in their patrol car, approached defendant, who was standing on the sidewalk, after receiving a report he had been engaged in a public argument. When defendant responded belligerently, the officers stepped out of their car. As they questioned him, he first became unresponsive and then agitated after one of the officers unholstered his pepper spray. At this point, two additional officers arrived. Shortly thereafter, defendant “lunged off the sidewalk” toward the officers, resulting in an extended and violent struggle to subdue defendant, during which he severely gouged an eye and bit the wrist of one of the officers.

Defendant testified that, immediately upon arriving, the officers told him to “leave now.” Defendant was upset by a confrontation that had just ended, during which a woman had assaulted him, dumped his artwork and art supplies from a bag onto the ground, and walked off with the bag. His possessions still strewn about, defendant told the officers he was “just trying to grab my stuff so I could leave.” The officers twice repeated the instruction, the second time telling defendant to “Get the fuck out of here now.” Defendant repeated, this time profanely, that he was trying to leave. The second patrol car then arrived, and all four officers left their cars. The first two officers began to advance on defendant, while the others walked behind him. One of the officers removed his pepper spray container. When defendant bent over to begin collecting his possessions to leave, one of the officers shouted that he was “charging,” and the four officers collapsed on him.

As they went down in a heap, one of the officers “got his finger in my eye and held my head down and sprayed me [with pepper spray] about five inches from my face,” blinding defendant. Further, defendant was wholly unable to breathe from the weight of the four officers on his body, and he began to panic from fear. When an officer’s arm came across his face in the course of the scrum, he bit it. As defendant explained, “I thought that I probably was going to die because I couldn’t breathe for so long. [¶] . . . [¶] I just wanted [the arm] off of my mouth and my nose so I could try to get a breath.”

Defendant was not aware of poking the officer's eye and said it would have been unintentional.

The trial court declined to instruct the jury on the lesser included offense of simple battery. When the prosecutor originally requested the instruction, defense counsel responded, "Is there any evidence in this trial that [the officer] wasn't injured with enough of an injury he needed medical attention? . . . I can't credibly argue that it's a misdemeanor. If—if it happened as a battery, it's a felony battery." The prosecutor withdrew his request, explaining, "As long as . . . counsel is not arguing it, I don't think there would be a need for the lesser." The trial court agreed.

Prior to submission to the jury, the court acquitted defendant of one of the counts of resisting an officer. The jury acquitted defendant of attempted mayhem, but he was convicted of one count of battery on an officer, based on biting the officer's wrist, and the four remaining counts of resisting arrest. The court declared a mistrial as to the other battery count, based on the eye-gouging, when the jury was unable to reach a verdict on that charge.

II. DISCUSSION

Defendant contends the trial court's failure to deliver an instruction on the lesser included offense of battery was reversible error and his attorney's consent to the omission of the instruction constituted ineffective assistance of counsel. He also asks us to review the trial court's ruling on his *Pitchess*² motion.

A. *Omission of the Battery Instruction*

The Attorney General does not dispute simple battery is a lesser included offense of the charged offense of battery upon a peace officer. She argues, however, it was unnecessary to give the instruction because there was no substantial evidence to support simple battery, the omission was not prejudicial to defendant, and defendant is precluded from raising the issue because the omission was invited error.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

We review the trial court’s instructional decision de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

1. *The Duty to Instruct on Lesser Included Offenses*

“ ‘California law has long provided that even absent a request, and over any party’s objection, a trial court must instruct a criminal jury on any lesser offense “necessarily included” in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.’ [Citation.] The sua sponte duty to instruct is designed to protect not only a defendant’s ‘ “constitutional right to have the jury determine every material issue presented by the evidence” ’ but also “ ‘the broader interest of safeguarding the jury’s function of ascertaining the truth.’ ” ’ [Citation.] The duty extends to every lesser included offense supported by substantial evidence; it is *not* satisfied ‘when the court instructs [solely] on the theory of that offense most consistent with the evidence and the line of defense pursued at trial.’ [Citation.] [¶] . . . The scope of the sua sponte duty to instruct is determined from the charges and facts alleged in the accusatory pleading: ‘[T]he rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented in *the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither “harsher [n]or more lenient than the evidence merits.” ’ ” (*People v. Anderson* (2006) 141 Cal.App.4th 430, 442–443.)

2. *Substantial Evidence*

As noted, the trial court’s sua sponte duty to instruct exists as to a particular lesser included offense only “if there is substantial evidence that only the lesser crime was committed.” (*People v. Birks* (1998) 19 Cal.4th 108, 112.) Stated another way, the duty

exists “ ‘when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Accordingly, the trial court erred in failing to deliver the instruction if substantial evidence existed from which the jury could have concluded defendant committed battery but did not commit felony battery on a peace officer.

The decision of the court and the parties not to include an instruction on simple battery was based on the belief that if a battery occurred, it was a battery on a peace officer, since the only evidence of a battery by defendant arose in the course of his struggle with the five police officers and the injuries alleged were serious.³

As defendant argues, the analysis is not so simple. Since *People v. Curtis* (1969) 70 Cal.2d 347 (*Curtis*), the Supreme Court has held a battery occurring in the course of an arrest lacking probable cause does not constitute a violation of section 243, reasoning that an officer making an unlawful arrest is not acting in the performance of his or her duties for purposes of the statute.⁴ (*Curtis*, at pp. 355–356.) As a result, a battery upon an officer that occurs in the course of an arrest unsupported by probable cause is a simple battery, not a felony under section 243. (*Curtis*, at pp. 355–356.) Further, *Curtis* held that the subject of an arrest may use reasonable force to defend against an officer’s use of unreasonable force, whether or not the arrest is otherwise lawful. The use of reasonable

³ Contrary to the apparent assumption of both the prosecutor and defense counsel, section 243, subdivision (c)(2) does not require a “serious” injury to the officer. Battery on an officer engaged in the performance of his or her official duties—that is, “any willful and unlawful use of force or violence upon [the officer]” (§ 242)—is enough, regardless of the severity of the consequences. The parties may have confused subdivision (c) of section 243, with section 243, subdivision (d), which does require serious injury.

⁴ In *People v. Gonzalez* (1990) 51 Cal.3d 1179, the Supreme Court disapproved dictum in footnote 4 of *Curtis* suggesting an officer executing a warrant unsupported by probable cause is acting outside the scope of official duty. (*People v. Gonzalez*, at pp. 1218–1221.) The court, however, did not modify the holding of *Curtis*, relating to arrests unsupported by probable cause. (*People v. Gonzalez*, at p. 1220 [“it is pertinent to inquire whether the *officer’s* judgment that led to violence was correct or incorrect”].)

force by a defendant in such circumstances is therefore not a crime at all. (*Id.* at pp. 357, 359; see also *People v. Adams* (2004) 124 Cal.App.4th 1486, 1494–1495.) In *People v. Castain* (1981) 122 Cal.App.3d 138, the court held the use of *excessive* force by the subject of an arrest in response to excessive force by the arresting officer, while a crime, is simple battery, not a felony under section 243. (*People v. Castain*, at p. 145.)

Based on these authorities, defendant would have been guilty only of simple battery, notwithstanding his commission of battery on a police officer, if either (1) the police lacked probable cause to arrest him or (2) they used excessive force in arresting him *and* he responded with excessive force. If substantial evidence existed to support a finding of either set of circumstances, the trial court erred in failing to give an instruction on battery.

Defendant argues substantial evidence of both circumstances was present. First, the jury could have found his arrest lacked probable cause because the police grabbed him before he made any threatening move.⁵ Second, even if the arrest was supported by probable cause, the jury could have found the police used excessive force in subduing defendant and his eye-gouging and biting constituted the use of excessive force in return.

The Attorney General does not respond to the first argument. As to the second, she contends defendant's biting was a reasonable response to the circumstances as he described them in his testimony, given "the imminent threat of suffocation." As a result, defendant was either guilty of a violation of section 243, if the officers' conduct was reasonable, or not guilty of any crime, if the officers' use of force was excessive.

Even under defendant's account of the confrontation, we find no substantial evidence to support a finding of lack of probable cause. Because defendant's movement toward the police occurred in the context of his admittedly hostile conduct, the officers had *probable cause* to believe he was committing assault, regardless of whether he had

⁵ Defendant's account of the initiation of contact was supported in part by the testimony of another witness, who said defendant was grabbed by the officers when he stepped off the curb and reached down to gather his possessions, before he made any move toward them.

actually committed the crime. (See, e.g., *People v. Williams* (2001) 26 Cal.4th 779, 785–786.)

However, we agree with defendant substantial evidence existed to support a finding he used excessive force in response to excessive force. Contrary to the Attorney General’s argument, the issue of the reasonableness of defendant’s response to the arrest was for the jury. (*Curtis, supra*, 70 Cal.2d at p. 359.) We cannot say as a matter of law his reaction was reasonable. Accordingly, the trial court erred in failing to give an instruction on simple battery.

3. Prejudice

Despite the trial court’s error, the failure to give a lesser included offense instruction does not require reversal unless it was prejudicial. In general, a defendant must demonstrate it is “reasonably probable” the jury would have returned a different, more favorable verdict if the omitted instruction had been given. (*People v. Prince* (2007) 40 Cal.4th 1179, 1267.) “ ‘[A] “probability” in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.’ ” (*People v. Soojian* (2010) 190 Cal.App.4th 491, 519.) That said, “ ‘[e]rror 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.’ ” (*People v. Lancaster* (2007) 41 Cal.4th 50, 85.) We agree with the Attorney General that the jury’s guilty verdict demonstrates it found the arrest lawful and accomplished without excessive force.

In explaining the elements of battery on a police officer, the court properly instructed the jury that an officer is not lawfully performing his or her duties when he or she makes an unlawful arrest or uses unreasonable or excessive force in making the arrest. The court further told the jury the prosecution was required to prove lawful performance of duty beyond a reasonable doubt and instructed the jury to acquit

defendant of battery on a peace officer if the prosecution failed to carry this burden.⁶ Accordingly, under the court's express instructions the jury was required to find beyond a reasonable doubt the officers were not using excessive force in order to convict defendant of battery on an officer. The jury's guilty verdict on that charge necessarily means that it found no excessive force by the officers. The failure to give a simple battery instruction was therefore harmless, since, as discussed above, simple battery was a possible lesser included offense only if the jury found excessive force by the officers.

Citing the jury's inability to reach a verdict on the other battery on a peace officer charge, based on the eye-gouging, and an ambiguity in the instructions, defendant argues it was conceivable the jury convicted him on the second battery charge after finding he used excessive force in response to excessive force by the officers. The ambiguity was the failure of the court to instruct the jury on the legal consequences of a defendant's use of excessive force in response to excessive force by officers. As discussed above, the initial paragraph of the instruction on lawful performance of an officer's duty required the jury, without qualification, to acquit defendant if it found the officers used excessive force. A subsequent paragraph of the same instruction, however, stated a person could use "reasonable force to defend himself or herself" if the officers used excessive force. The instruction did not explain what the jury was to do if it found defendant had used unreasonable force in these circumstances. The jury was therefore left with no directions if it concluded defendant responded to excessive force with excessive force of his own.

Notwithstanding this lack of clarity, we see no basis for concluding it was reasonably probable the jury convicted defendant of battery on an officer after finding he used excessive force in response to excessive force by the officers. For the jury to have

⁶ The court's instruction read: "The People have the burden of proving beyond a reasonable doubt that [each officer] was lawfully performing his duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of Battery With Injury On A Peace Officer . . . [and resisting arrest]. [¶] A peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention."

done so would have been a clear violation of the court's unqualified instruction to acquit on this charge if it found the prosecution failed to prove the officers used reasonable force. In addition, a note sent by the jury during deliberations, cited by defendant, suggests the jury had provisionally concluded defendant acted in self-defense.⁷ Because the court's self-defense instruction was unequivocal in requiring the use of reasonable force by defendant, stating, "If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense," this provisional finding of self-defense suggests the jury believed defendant had reacted with reasonable force. Given these circumstances, we find no reasonable chance the jury would have reached a more favorable verdict had it been instructed on simple battery. (*People v. Soojian, supra*, 190 Cal.App.4th at p. 519.)

By the same reasoning, any error based on a lack of probable cause for defendant's arrest was similarly harmless. The court's instruction on the elements of battery on a police officer required the jury to find the arrest lawful, which was defined as requiring probable cause. The jury's conviction on that count therefore necessarily depended upon a finding the arrest was made with probable cause.

Because we find no prejudice, it is unnecessary for us to address the Attorney General's claim of invited error.

B. *Remaining Contentions*

Defendant also claims the trial court erred in instructing on self-defense, arguing self-defense was relevant only if the battery instruction was given. We decline to address the propriety of the self-defense instruction because any error was not prejudicial to defendant. As explained above, the jury's conviction for battery on a peace officer necessarily required a finding the police officers were acting with reasonable force, negating any claim of lawful self-defense.

⁷ The note asked, in relevant part, "If we think [the battery on a peace officer charges] don't hold due to self-defense, can we still find him guilty of [resisting arrest]?"

Defendant further contends his attorney failed to provide effective assistance when he consented to the omission of the instruction on simple battery. Because, for the reasons stated above, there is no reasonable probability such an instruction would have resulted in an outcome more favorable to defendant, we need not address the merits of this claim. Any ineffective assistance was harmless. (See *In re Crew* (2011) 52 Cal.4th 126, 150 [“If a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel’s performance was deficient”].)

Finally, prior to trial defendant filed a *Pitchess* motion, seeking materials from the personnel files of the officers that were potentially relevant to his claim of misconduct. (*Pitchess, supra*, 11 Cal.3d 531.) After reviewing the officers’ files in camera, the trial court issued a ruling with respect to disclosure of documents. Defendant has asked us to review the transcript of the *Pitchess* hearing and the materials considered by the trial court in camera to determine whether it followed the proper procedures, as set forth in *People v. Mooc* (2001) 26 Cal.4th 1216. We have reviewed the sealed transcript of the in camera hearing and the documents considered by the trial court. We conclude the trial court followed proper procedures, and we find no error in the court’s rulings.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.