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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS ALVA ADAMS,

Defendant and Appellant.

C067473

(Super. Ct. No.  
MC RD CRF090006037)

A jury found defendant Dennis Alva Adams not guilty of assault with intent to commit rape of an intoxicated person (count 1) or assault with intent to commit rape of an unconscious person (count 3), but guilty of the lesser included offense of misdemeanor assault (Pen. Code, § 240)<sup>1</sup> as to both counts. The jury also found defendant guilty of misdemeanor sexual battery (count 7) and not guilty of the remaining charges (counts 2,

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

4, and 6).<sup>2</sup> Defendant was placed on 36 months informal probation, ordered to serve 30 days in county jail, stayed pending appeal, and ordered to register as a sex offender pursuant to section 290.

Defendant appeals. In his opening brief, he contends, among other things, that his convictions for simple assault (counts 1 and 3) must be reversed because simple assault is a lesser included offense to misdemeanor sexual battery. With this court's permission, defendant filed a supplemental opening brief, contending his convictions--all misdemeanors--are barred by the applicable one-year statute of limitations set forth in section 802, subdivision (a), and must be dismissed. The People agree both that "the assault convictions are necessarily included lesser offenses to the sexual battery count," and that the complaint on its face indicates the sexual battery offense is time-barred. The People request that we "remand the matter back to the trial court for a hearing to determine whether [the sexual battery offense is] time-barred with orders to vacate the

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<sup>2</sup> A complaint filed August 28, 2009, charged defendant Dennis Alva Adams with rape of an intoxicated victim (§ 261, subd. (a)(3)), possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), and misdemeanor sexual battery (§ 243.4, subd. (e)(1)). Each of the crimes was alleged to have occurred on August 25, 2008. An information was later filed charging defendant with assault with intent to commit rape of an intoxicated person (count 1; §§ 220, 261, subd. (a)(3)), attempted rape of an intoxicated person (count 2; §§ 261, subd. (a)(3), 664), assault with intent to commit rape of an unconscious person (count 3; §§ 220, 261, subd. (a)(4)), attempt to commit rape of an unconscious person (count 4; §§ 261, subd. (a)(4), 664), sexual battery by restraint (count 5; § 243.4, subd. (a)), possession of a controlled substance (count 6; Health & Saf. Code, § 11350, subd. (a)), and misdemeanor sexual battery (count 7; § 243.4, subd. (e)(1)). The trial court dismissed count 5 (sexual battery by restraint) at the close of the prosecution's case for failure to introduce evidence of restraint, and the prosecution filed a second amended information deleting that charge.

judgment if time-barred by the statute of limitations, but otherwise to affirm the conviction for misdemeanor sexual battery . . . .”<sup>3</sup>

We shall reverse defendant’s convictions for simple assault (counts 1 and 3) because those convictions are necessarily included offenses of misdemeanor sexual battery. We also shall reverse defendant’s conviction for sexual battery because the complaint, on its face, indicates it is time-barred and shall remand the matter to the trial court for a determination as to whether the sexual battery offense is, in fact, time-barred. If it is determined that it is barred by the applicable statute of limitations, the trial court shall dismiss the action. If it is determined that it is not time-barred, the trial court shall reinstate the judgment, and defendant shall be free to renew the additional contentions related to the sexual battery conviction raised in his initial opening brief in an appeal from that judgment.<sup>4</sup>

## DISCUSSION

### I

#### Defendant’s Convictions for Simple Assault (Counts 1 and 3) Must Be Reversed

Defendant contends, and the People concede, that defendant’s convictions for simple assault (counts 1 and 3) must be reversed because simple assault is a lesser included offense of sexual battery (count 7). We agree and shall reverse defendant’s convictions on counts 1 and 3. (*People v. Alford* (1991) 235 Cal.App.3d 799, 805, fn. 6; *People v. Carapeli* (1988) 201 Cal.App.3d 589, 595.)

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<sup>3</sup> In their respondent’s brief, the People agree with defendant that his convictions for simple assault must be reversed because simple assault is a lesser included offense of sexual battery.

<sup>4</sup> Those contentions include: defendant’s sexual battery conviction is not supported by sufficient evidence; the requirement that he register as a sex offender violates his right to equal protection under the law; the trial court erred in instructing the jury; and the trial court erred in failing to award defendant any presentence custody credit.

II  
Defendant's Conviction for Sexual Battery Must Be  
Reversed and the Matter Remanded to the  
Trial Court for Further Proceedings

Defendant contends his conviction for misdemeanor sexual battery is barred by the applicable one-year statute of limitations, and thus, must be dismissed.

Defendant was initially arrested on the morning of August 25, 2008, and posted a bond with the superior court on August 27, 2008. On Monday, August 24, 2009, the prosecutor signed a complaint alleging that on August 25, 2008, defendant committed rape of an intoxicated person, committed misdemeanor sexual battery, and possessed hydrocodone. The complaint was not date-stamped filed with the Superior Court until August 28, 2009. Neither the complaint nor the information alleges any facts tolling the statute of limitation. The record contains a copy of an unsigned declaration in support of an arrest warrant dated August 24, 2009, which states that it is based on an attached copy of the complaint. Defendant was arraigned on the complaint on September 11, 2009.

With certain exceptions not applicable here, the prosecution for a misdemeanor must be commenced within one year after commission of the offense.<sup>5</sup> (§ 802, subd. (a).)

“[P]rosecution for an offense is commenced when any of the following occurs: [¶]  
(a) An indictment or information is filed. [¶] (b) A complaint is filed charging a

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<sup>5</sup> Defendant also asserts his convictions for simple assault likewise are time-barred. In doing so, he acknowledges that under the First Appellate District's holding in *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1150, he may have forfeited his right to complain on appeal of his convictions of such time-barred lesser-included offenses where the charged offenses (assault with intent to commit rape of an unconscious person and assault with intent to commit rape of an intoxicated person) were not time-barred and defendant did not object to the giving of instructions on the lesser included offense of simple assault. Because we conclude defendant's convictions for simple assault must be reversed for the reasons set forth above, we need not determine whether we should reject *Stanfill's* holding as urged by defendant or whether defendant forfeited his right to raise the statute of limitations defense as to those convictions on appeal.

misdemeanor or infraction. [¶] (c) The defendant is arraigned on a complaint that charges the defendant with a felony. [¶] (d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.” (§ 804.)

Where, as here, “the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing, or, if it is an appellate court, it should remand for a hearing.” (*People v. Williams* (1999) 21 Cal.4th 335, 341, fn. omitted.)

Here, the complaint filed on August 28, 2009, does not contain any allegation of facts tolling the statute of limitations. As the People point out, however, the record suggests that an arrest warrant may have been issued before the statute of limitations expired. As previously discussed, the issuance of an arrest warrant may constitute the commencement of a prosecution for purposes of the statute of limitations. (§§ 802, subd. (a), 804.)

Because the complaint, on its face, contains a charge for sexual assault that appears to be time-barred, and the record does not establish otherwise, we shall reverse defendant’s conviction on that offense, and remand the matter to the trial court for a hearing on whether the sexual battery offense is, in fact, timely. (*People v. Williams, supra*, 21 Cal.4th at p. 345.) If it is determined that the sexual battery offense is barred by the applicable statute of limitations, the trial court shall dismiss the action. If it is determined that it is not time-barred, the trial court shall reinstate the judgment as to count 7 (sexual battery) and defendant shall be free to renew the contentions related to that conviction raised in his initial opening brief in an appeal from that judgment.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion.

BLEASE, Acting P. J.

We concur:

HULL, J.

ROBIE, J.