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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH LAURENCE HART,

Defendant and Appellant.

E056834

(Super.Ct.No. FVI1102119)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret, Judge. Affirmed in part; reversed in part with directions.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Barry Carlton, and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ralph Lawrence Hart called his girlfriend at work and accused her of cheating on him. He claimed she “pocket dialed” him while she was with another man. When she arrived home, defendant was waiting for her. He grabbed her by the neck and slammed her against the wall. He told her that he could kill her with his bare hands and that he had killed before.

Defendant was convicted of making terrorist threats, and the misdemeanor offenses of domestic battery and assault. Defendant now contends on appeal as follows:

1. The trial court erred when it instructed the jury that Penal Code section 243, subdivision (e),¹ battery on a cohabitant, was a lesser included offense of the greater offense of violating section 273.5, subdivision (a), corporal injury to a spouse or cohabitant.
2. He could not be convicted of simple assault and misdemeanor domestic battery because simple assault is a lesser included offense of battery.
3. The sentence on his conviction of misdemeanor battery on a cohabitant should have been stayed pursuant to section 654.

We agree that defendant’s conviction of simple assault should be reversed. We also agree that section 654 barred the imposition of a consecutive sentence on his misdemeanor domestic battery conviction. We otherwise affirm the judgment in its entirety.

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

I

PROCEDURAL BACKGROUND

Defendant, who represented himself, was convicted by a San Bernardino County jury of making criminal threats (§ 422; count 1). In addition, he was convicted of the lesser offenses of misdemeanor domestic battery (§ 243, subd. (e)(1); count 2), and simple assault (§ 240; count 3). The jury found him not guilty of a charge of false imprisonment by violence (§ 236; count 4). After waiving his right to a jury trial, defendant admitted that he had suffered one prior serious and violent felony conviction (§§ 667, subds. (a) & (b)-(i), 1170.12, subds. (a)-(d)).

Defendant was sentenced to four years on count 1, pursuant to the three strikes law, plus an additional five years for the prior serious felony conviction, for a total of nine years to be served in state prison. In addition, the trial court imposed 365 days in county jail for both counts 2 and 3, with credit for time served, finding that he had completed the sentence for those counts.

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

In 2011, Sueann Daughton lived on Cuyama Road in San Bernardino County. She was employed as an elementary school librarian. Daughton met defendant in the summer of 2010 and they began dating in December 2010. Defendant stayed at her house as much as possible and kept items at her house. Daughton loved defendant. Defendant told Daughton that he had previously been in prison for committing murder and that he

was on parole. Daughton believed that defendant had changed and was not afraid of him. Daughton had injured her neck in 1997 and was in constant pain from the chronic injury. Defendant was aware of her injury.

On September 9, 2011, Daughton and defendant communicated during the day by telephone and through text messages. Defendant was upset with Daughton because she went to a football game the day before to see some of her former students and had come home late. Defendant averred that Daughton had “pocket dialed” his phone and it had gone to voicemail. It recorded her having a conversation with another man who he insisted was her lover.

When Daughton arrived home, he accused her of being with another man. She asked him to play the phone message for her, but he refused. He then asked her for \$40 to pay for the gas he had put in her car. Daughton told him she did not owe him the money because he also used her car. Daughton started to walk away but defendant grabbed the back of her neck. He said to her, “Bitch, do you realize how much work I’ve done around this house?” She told him to stop because he was hurting her.

Defendant turned her around, picked her up by her neck and slammed her into the wall several times. He pressed her against the wall which broke the plastic hair clip that was in her hair. Defendant said to her, “I’ve killed for less than this.” Defendant put his hands around her neck and choked her. He told her, “I’m a mother fucking murderer. I have a taste for blood I could kill you right now. Your life is in my hands.”

Daughton responded, “Oh Jesus, help me.” Defendant told her, “Don’t pray now, God is not here.”

Daughton clawed at defendant's hands, trying to remove them from her neck. She thought if she did not fight him he was going to kill her. Defendant was not acting like himself. Daughton closed her eyes and prayed. She then hugged him, trying to get him to stop. Daughton told him that she had \$30 for him. She was able to get free. She put the money on the couch and went to her car.

Daughton drove to a nearby house that belonged to Wayne and Tanya Archuleta. She knocked on the door but no one answered the door. She sat down on a chair on the front porch and cried.

Wayne arrived home. Daughton was crying so hard she could not initially tell him what had happened to her. She told Wayne that defendant tried to kill her. Tanya emerged from the house; she had not heard Daughton knock on the door. Daughton's neck was red.

After this incident, Daughton had stabbing pain in her neck and had a hard time moving her neck. She continued to be in constant pain. Pain medication did not help. She had the preexisting neck injury so defendant did not cause the injury, but he exacerbated the problem. Pain medication that she was using before this happened no longer was effective.

Daughton felt guilty that defendant had been put in jail for what happened. She still loved him. She spoke with him after the incident and expressed her love for him. Defendant told her to contact an attorney and recant what she said had happened to her. Defendant told her it was her fault that she contacted the police. He did not want her to talk to the prosecutor. Daughton received counseling and realized it was not her fault.

She had panic attacks since the incident. On one prior occasion, defendant had pushed her to the ground.

Daughton testified at defendant's parole hearing that his legal address was his parent's house but he was really living with her. She had no bruising on her neck after this incident. Daughton did not run to the nearest neighbor; she walked to her car and drove to the Archuleta's house. Daughton was aware that defendant had been accused of domestic violence two times before this incident with other women but he had been acquitted of those charges.

Tanya was at her home on September 9, when Daughton came over. Daughton was hysterically crying. She told Tanya that defendant tried to choke her because she would not give him money. Tanya observed that Daughton's neck was red.² Tanya eventually took Daughton to the hospital.

San Bernardino Sheriff's Deputy Christopher Lee Hancock responded to the Archuleta's house around 6:45 p.m. Daughton was crying and upset. Daughton told Deputy Hancock she and defendant had been arguing all day over the telephone. She arrived home at about 5:30 p.m. and they continued to argue over money. Defendant became enraged and grabbed her around the neck. He pushed her into the wall. Daughton said defendant threatened her by saying, "I will kill you. I can take your life with my hands right now." Daughton was in fear for her life. Daughton complained of severe neck pain. The redness on her neck appeared brighter in person.

² Tanya testified that the redness was darker than what appeared in photographs taken by the responding sheriff's deputy.

Deputy Hancock went back to Daughton's house. He found defendant sitting on the porch. Defendant smelled of alcohol. He was arrested. Daughton never told Deputy Hancock that defendant pushed her head against the wall three times and never said he choked her until she couldn't breathe. She never said she tried to claw his hands off her throat.

Telephone calls between defendant and Daughton while defendant was in jail after the incident were played for the jury. Defendant wanted her to recant and he encouraged her to seek her own counsel. He warned her not to talk about the details of the crime over the phone. Daughton missed a court appearance because he lied to her and told her it was cancelled. He told her not to call the prosecutor.

B. *Defense*

Defendant's friend, Harold Douglas, testified that he was at defendant's parole hearing and heard Daughton testify that she and defendant did not live together. Douglas knew they were living together.

Defendant testified on his own behalf. The night prior to this incident, Daughton came home late with no explanation. On September 9, she came home from work and saw that defendant had packed up his computer in a box. She thought he was leaving her. Defendant told her he needed some time away from her. Defendant described Daughton as a very "scary" person. He denied that he ever touched Daughton. Daughton told defendant she wanted to recant her story because it was not true.

III

SECTION 243, SUBDIVISION (e)(1)

(MISDEMEANOR BATTERY OF A COHABITANT)

AS A LESSER INCLUDED OFFENSE OF SECTION 273.5, SUBDIVISION (a)

(CORPORAL INJURY TO A SPOUSE)

Defendant contends that his conviction of section 243, subdivision (e)(1), misdemeanor battery of a cohabitant, should be reversed because it is a lesser related, rather than a lesser included offense, of corporal injury to a spouse pursuant to section 273.5. His objection to any lesser offense instructions being given to the jury precluded the trial court from instructing the jury on misdemeanor domestic battery.

A. *Additional Background*

The information charged defendant with a violation of section 273.5, subdivision (a), CORPORAL INJURY TO SPOUSE/COHABITANT/CHILD'S PARENT and was described as a willful and unlawful infliction of corporal injury resulting in a traumatic condition upon a person with whom he was cohabitating.

The trial court advised the parties that it was intending to instruct the jury with the lesser included offense of battery against a spouse, misdemeanor domestic battery (§ 243, subdivision (e)(1)), for the violation of section 273.5. Defendant objected to any lesser offense instructions being given. He wanted the jury to either find him guilty of the felony or nothing. The trial court noted that it was obligated to give the lesser offense instructions even if he objected. The prosecutor also objected to any lesser offense

instructions on misdemeanor offenses. The trial court felt that the evidence supported giving the lesser offense instructions.

The jury was instructed, in pertinent part, on the violation of section 273.5, subdivision (a), as to the relationship required as follows: “The term cohabitant means two unrelated persons living together for a substantial period of time resulting in some permanency of the relationship. The factors that may determine whether people are cohabitating include, but are not limited to, one, sexual relations between the parties while sharing the same residence. Two, sharing income or expenses. Three, joint use or ownership of property. Four, the parties holding themselves out as husband and wife or domestic partners. Five, the continuity of the relationship. Six, the length of the relationship.”

The jury was also instructed on the lesser offense of violating section 243, subdivision (e)(1). In the instruction, the jury was told as follows: “Two, Sue Daughton is the defendant’s present or former cohabitant or a person with whom the defendant currently has or previously had a dating relationship. . . . The term cohabitant is defined in another instruction. The term dating relationship means frequent, intimate, associations primarily characterized by affection or sexual involvement independent of financial considerations.” The jury was also instructed on simple battery, which did not require a finding of cohabitation.

B. *Analysis*

““It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the

evidence.” [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) “““That obligation has been held to include giving instructions on lesser included offenses 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.” [Citations.]” (*Ibid.*)

“An uncharged offense is included in a greater charged offense if *either* (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), *or* (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.]” (*People v. Parson* (2008) 44 Cal.4th 332, 349.) “Under the elements test, a court determines whether, as a matter of law, the statutory definition of the greater offense necessarily includes the lesser offense.” (*Ibid.*) “Under the accusatory pleading test, a court reviews the accusatory pleading to determine whether the facts actually alleged include all of the elements of the uncharged lesser offense; if it does, then the latter is necessarily included in the former.” (*Ibid.*) “[A] crime is a lesser offense necessarily included within a greater crime only if it is impossible to commit the greater crime without also committing the lesser.” (*People v. Milward* (2011) 52 Cal.4th 580, 586 (*Milward*).

In order to convict a defendant of a violation of section 273.5, subdivision (a), the prosecution must prove: 1) that the defendant willfully inflicted a physical injury on his cohabitant or former cohabitant; and 2) the injury inflicted by the defendant resulted in a traumatic condition. (§ 273.5, subd. (a); CALCRIM No. 840.) “[C]ohabiting’ under section 273.5 means an unrelated man and woman living together in a substantial

relationship — one manifested, minimally, by permanence and sexual or amorous intimacy.” (*People v. Holifield* (1988) 205 Cal.App.3d 993, 1000.)

To convict a defendant of a violation of section 243, subdivision (e)(1), the prosecution must prove that 1) the defendant willfully touched the victim in a harmful or offensive manner; and 2) the victim is the person with whom the defendant currently has, or previously had, a dating relationship. (CALCRIM No. 841) The term “dating relationship” means “frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement” (*Ibid.*; see also § 243, subd. (f)(10).)

Misdemeanor domestic battery on a person with whom one has or had a dating relationship under section 243, subdivision (e)(1) has been repeatedly found to be a lesser included offense to corporal injury to a cohabitant under section 273.5, subdivision (a). (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457; *People v. Jackson* (2000) 77 Cal.App.4th 574, 580.)

The statutory elements of corporal injury on a cohabitant include all the elements of the lesser offense, battery on a person in a dating relationship such that it is impossible to commit the greater without also committing the lesser. (*Milward, supra*, 52 Cal.4th at p. 586.) In other words, one cannot inflict corporal injury upon a cohabitant or former cohabitant, thereby causing a traumatic condition (§ 273.5, subd. (a)), without also harmfully touching a person with whom the defendant has, or previously had, a dating relationship (§ 243, subd. (e)(1)).

Defendant argues that section 243, subdivision (e)(1) provides for a dating relationship to qualify while section 273.5, subdivision (a) does not. Hence, under the elements test, section 243, subdivision (e)(1) is not a lesser offense. A person cannot cohabit with another person without having a substantial relationship. The statute defines cohabitation in a manner that is nearly identical to the dating relationship defined in section 243, subdivision (f)(10). Both are characterized by sexual involvement or intimacy. Thus, any person who is cohabitating with another under section 273.5 is necessarily engaged in a dating relationship with that person. There is no reasonable argument that the jury could find a defendant guilty of cohabitating but not also find the person is in a dating relationship.

Further, here, defendant never denied that he was cohabitating with Daughton or that they were just dating. In fact, he emphasized that she lied to his parole board that they were not cohabitating. Defendant claims that he was not put on notice that dating or engagement to the victim was an element of the felony offense. However, the prosecutor did not proceed on the theory that he and Daughton were only dating, but that they were cohabitating, an element of both section 243, subdivision (e)(1) and 273.5, subdivision (a), that was applied in this case.

The trial court properly instructed the jury that misdemeanor domestic battery on a person was a lesser included offense of corporal injury on a cohabitant.

IV

CONVICTION OF SIMPLE BATTERY AND SIMPLE ASSAULT

Defendant contends that he could not be convicted of both simple assault and misdemeanor domestic battery based on the same set of facts. Respondent agrees.

“The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct. [Citation.] ‘When the jury expressly finds defendant guilty of both the greater and lesser offense . . . the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed.’ [Citation.]” (*Milward, supra*, 52 Cal.4th at p. 589.)

The elements of assault are “an attempt to commit a battery coupled with the present ability to do so.” (*People v. Yeats* (1977) 66 Cal.App.3d 874, 878.) The elements of battery are a willful and unlawful use of force or violence upon the person of another. (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) Domestic battery is a simple battery upon a person with whom the defendant has a romantic relationship. (§ 243, subd. (e)(1).) A defendant who commits a battery has necessarily committed a simple assault, because a simple assault is “nothing more than an attempted battery.” (*People v. Fuller* (1975) 53 Cal.App.3d 417, 421.) Thus, convictions for both domestic battery and simple assault are improper. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

Here, defendant’s convictions of assault and domestic battery were based on the same facts that he put his hands around Daughton’s neck and held her against the wall. During closing argument, the prosecutor advised the jury that some of the evidence could apply to multiple counts. He stated, “choking incident can be the basis of both Count 2,

corporal injury to spouse, cohabitant, and Count 3 the assault with force likely to cause great bodily injury.” Defendant could not be convicted of both misdemeanor domestic battery and assault. We will order that his conviction for assault be reversed.

V

SECTION 654

Defendant contends that his sentence on the domestic battery conviction in count 2 should have been stayed as it constituted the same course of conduct as his making criminal threats conviction in count 1. As noted, *ante*, the trial court imposed a nine-year sentence on count 1. In addition, it ordered that he serve his sentence on the battery conviction in count 2 although he was given credit for the time he served.³

Under section 654, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The statute thus prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v.*

³ Defendant’s claim borders on frivolous in that he was given credit for time served and this has no impact on his sentence.

Latimer, supra, 5 Cal.4th at p. 1208.) On the other hand, “[i]f the evidence discloses that a defendant entertained multiple criminal objectives, which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct.” (*People v. Centers* (1999) 73 Cal.App.4th 84, 98 [Fourth Dist., Div. Two].)

Based on the facts in this case, we agree with defendant that the putting of his hands on Daughton’s throat and threatening her at the same time were part and parcel of the same intent and objective to instill sustained fear in her. He told her that he could kill her with his bare hands and that her life was in his hands. During closing argument, the prosecutor argued that defendant’s motive was “simply anger.” Further, in arguing that count 1 was not an attempted crime, he argued, “Well, here by choking her, telling her he’s going to kill her, he obviously took a direct step toward committing that crime and he intended to commit that crime.”

The People argue on appeal that defendant had a different intent and objective in choking her. They argue that in battering her, he was seeking to punish her for not giving him the \$40. However, the evidence does not support such a contention. Choking Daughton was the means to commit the criminal threats. There was no time for defendant to stop and reflect on the two crimes. Each crime was a means of committing the other offense and advanced the same objective: instilling fear in the victim.

As such, the sentence on the battery conviction should have been stayed pursuant to section 654.

VI

DISPOSITION

The judgment is modified to strike defendant's conviction of simple assault. In addition, his sentence on simple battery is stayed pursuant to section 654. The superior court clerk is directed to prepare a corrected minute order for the date of sentencing. No new abstract of judgment is necessary as the sentence on the misdemeanor domestic battery was not included on the judgment. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.