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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TEWOLDE HAILESLASSIE,

Defendant and Appellant.

H040403

(Santa Clara County

Super. Ct. No. C1197151)

A jury found defendant Tewolde Hailesslassie guilty of attempted voluntary manslaughter; torture; three counts of aggravated assault; criminal threats; violation of a protective order; witness intimidation; and spousal battery. The jury also found allegations that defendant used a deadly weapon and personally inflicted great body injury to be true. The trial court sentenced defendant to life in prison with the possibility of parole consecutive to nine years eight months.

Defendant raises two claims on appeal. First, he contends the trial court erred by failing to instruct the jury on the lesser included offense of attempted torture. Second, defendant contends the court erred in answering a jury question about the legal definition of torture. Finding no prejudicial error, we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offenses*

Defendant was born in Ethiopia in 1970. He emigrated to the United States in 1991 and became a licensed vocational nurse. In 2001, defendant married the victim, F.W., in an arranged marriage in Ethiopia. F.W. emigrated to the United States in 2002. At the time of the offenses, defendant and F.W. had three young children.

The prosecution charged defendant in connection with two domestic violence attacks on F.W. Counts One through Seven concerned an attack on January 8, 2011, while F.W. was pregnant. The prosecution alleged that defendant, over a period of about two hours, stabbed F.W. with a knife, strangled her, tied her up, struck her with a mop handle, shaved her head, and burned her feet with a soldering iron. Counts Eight and Nine concerned an earlier incident on October 1, 2010, in which defendant struck F.W. on the side of the head with his hand.

1. *Testimony and Statements of F.W.*

At trial, F.W. testified as follows.¹ Defendant first became violent toward F.W. in December 2007. He came home late one night and could not get into their home. He rang the doorbell, but nobody heard him. When F.W. eventually answered the door, defendant was angry and accused her of having a boyfriend there. He threw a shoe at F.W. and struck the couple's son on the face with an open hand. F.W. called the police, who arrested defendant.

a. *The October 1, 2010 Incident*

The next violent incident occurred on October 1, 2010. At the time, the couple was living in San José, but defendant wanted to move to Las Vegas. F.W. opposed the move, and defendant became angry with her. He demanded that she bring her paycheck to him, but she failed to do so, whereupon defendant became angrier. While F.W. was in

¹ F.W. testified through a Tigrinya interpreter. All quotes are taken from the English translation.

the bedroom with the door closed, defendant kicked through the door and slapped her on the left side of the face. F.W. testified, "I felt like a [*sic*] iron hit my face. I heard this ting sound." She testified she was still having difficulty hearing out of her left ear. After slapping her, defendant demanded her money, pushed her into another room, and kicked her in the back. He grabbed her cell phone, broke it in two, and threw it away.

Defendant angrily threatened to kill F.W. After defendant was arrested for this incident, a court issued a peaceful contact order.

Defendant remained in custody for several days after this incident. F.W. did not see him again until defendant returned home a week later, on October 8. F.W. told him she wanted to remain separated and told him not to touch her, but defendant raped her while she physically resisted. F.W. testified that she became pregnant from this incident. She further testified that she informed defendant in December 2010 she was pregnant, whereupon defendant was angry and surprised. She also believed he subsequently saw a document with positive pregnancy test results.

b. *The January 8, 2011 Incident*

In January 2011, the couple was living at a house on Piercy Road in San José. On the morning of January 8, defendant returned from church. F.W. testified that defendant was then supposed stay at home with the children while she went to work. But she overheard defendant call his brother to tell him that he (defendant) was going to bring the children to his brother's house. At that point, defendant left with the children, bringing along their backpacks and an Xbox gaming machine. F.W. testified it was unusual for them to bring these items. Within five minutes, defendant returned home alone. When F.W. asked him where the children were, he said they were in the car, but she could see they were not there.

Defendant began acting strangely. While F.W. was cleaning the bathroom, defendant was walking back and forth between the kitchen and the master bedroom. He had an unusual expression on his face. He smiled at F.W., but not as if he was happy to

see her. She could tell “there was something going on” but she continued cleaning the bathroom.

Suddenly defendant appeared in the door of the bathroom, blocking her exit. He had an angry expression on his face, scaring F.W. Defendant asked her why she did not go to church and whether she was waiting for her boyfriend. Defendant began choking F.W. and said, “Where are you going to go. Today is the last day.” F.W. testified she lost consciousness at that point.

F.W. then found herself in another room, where defendant gained access to a knife. He pointed the blade of the knife at her neck, just above her collarbone. She testified defendant did this three times, and she described his use of the knife as “trying to poke me.” She tried to move away from the knife. She then tried to grab the knife by the handle, but he moved the knife, and the blade cut her left hand. F.W. began bleeding. Defendant said, “You are being proud,” “[w]hen the priest calls you, you don’t pick up,” “[y]ou take my kids everywhere,” and “[w]hy do you drive me crazy?”

Defendant put some toilet paper or cloth on F.W.’s hand. She tried to get away, but he pushed her into the bedroom. She told defendant that if he killed her, he would be killing two people. Defendant responded, “Oh, you are pregnant. Who did you get pregnant with? Who is it from?” She responded, “you call other people and I will tell you in front of them.”

In the bedroom, defendant tied F.W.’s hands and feet with plastic zip ties, and he tied her feet to a dresser with a rope. Defendant pushed her head from side to side as if he was trying to break her neck. He asked her, “Where is the money? Where did you put the money? Where did you put the gold?” Hoping for a chance to escape, she told him she had buried the gold outside. He went outside, but returned because he could not find anything. Defendant struck F.W.’s shoulder with a mop handle several times. He went outside again multiple times, returning to ask exactly where she had hid the money. F.W. asked him for water, but he told her, “You don’t need water. You are going to die.”

F.W. testified that defendant used something like “a screwdriver that plugs into an . . . outlet” in an attempt to burn her feet. This left black marks on her feet. When asked how she felt during the attack with the soldering iron, she testified, “When he touched me, I thought it was going to pierce from one end to another.” Defendant made multiple attempts to burn her. He left to plug the iron back into an outlet, and later returned with it. F.W. testified she thought she was going to die, and she begged defendant to stop.

At some point, defendant untied or cut the ties on F.W.’s hands and retied her hands behind her back. The tightness of the ties on her hands and feet caused her pain and left marks on her wrists. Defendant pushed her down to the floor and went into another room to use the computer. F.W. lay on the floor and breathed slowly to make defendant think she was dying. Defendant checked on her several times, and then covered her mouth with duct tape. F.W. tried to scream, but having been choked earlier, she was unable to scream. Defendant then partially shaved her head and told her she looked ugly.

At some point during this period, F.W. vomited. The cut on her hand continued to bleed. Defendant took portions of her clothing, tore them up, and put them in a plastic basket. The last time defendant entered the room to check on her, he told her, “You will die very soon.”

Soon thereafter, F.W. heard defendant starting his car. As he left, he took her identification and ATM cards, her phone, some jewelry, and the childrens’ social security cards. By moving her lips back and forth, F.W. was able to push the tape off her mouth. She was also able to grab a pair of scissors on the floor with her hands. She cut the rope tied to her feet and escaped outside with her hands still tied. She attracted the attention of a neighbor, who called police. F.W. estimated the entire episode lasted from around noon to shortly after 2:00 p.m.

F.W. testified that, at the time of trial, she still suffered pain in her hand and she was unable to close it fully. She had difficulty speaking and hearing her own voice due to problems with her throat. She suffered a scar on her shoulder from another knife wound apparently inflicted during the attack. She also suffered pain in her hip and difficulty with her vision.

c. Prior Statements and Testimony

Police recorded an interview with F.W. at the hospital shortly after the January 8, 2011 incident. Portions of the audio of the interview were played for the jury.² In the interview, F.W. told police she did not know how defendant knew she was pregnant on January 8 because she had not told him. She further stated that she knew defendant was the father, but when he demanded to know who the father was, she told him, “I don’t know. I’ll find out.”

With respect to defendant’s use of the soldering iron on her feet, F.W. told police, “It was not very hot but he put it on my feet.” When asked how it felt, she responded that it “[w]as warm but it didn’t not [*sic*] hurt.” Similarly, at the preliminary hearing she testified, “I guess it wasn’t really hot, it wasn’t—I was scared, but I don’t think it was hot enough.” When cross-examined at trial, she testified, “I did not feel anything on my feet. My body was not feeling anything. I was—when he—when I saw it, I was more afraid that when it touched me is what I meant.”

The police officer who interviewed F.W. testified to her description of the choking, among other things. The officer testified that she said she could not breathe or scream, but that she did not lose consciousness.

2. Other Evidence Relating to the January 8 Attack

The medical records of F.W.’s admission to the hospital state, among other things, that “[t]he patient complains of severe pain. No neck pain or loss of consciousness.”

² F.W. spoke with the police in English.

F.W. suffered a deep laceration on her left hand extending across her palm to the area between her thumb and index finger. According to her medical records, the underlying tendons were “separated 100%” and a digital nerve was damaged. She also suffered smaller lacerations on the thumb of her right hand and her left shoulder. Photographs of the couple’s residence showed large amounts of blood dripped and smeared on the floors in multiple areas of the house. Her pants were soaked in blood, and she suffered acute blood loss anemia and required a blood transfusion due to the lacerations.

Photographs of the soldering iron showed blood smeared on the handle and a black and red substance covering the metallic end of the iron. Photographs of the soles of F.W.’s feet showed several small black or dark red marks.

Police found ties, rope, duct tape, hair, and various bloody items in the master bedroom. A kitchen knife was found in a sock drawer. Another kitchen knife was found on a bookshelf in the living room. The latter knife appeared to have blood on it. Police found four suitcases and two computer bags in the living room. A store receipt showed one of the suitcases had recently been purchased. The suitcases were packed with defendant’s clothing and other personal items. In one of the suitcases, police found a satchel containing three envelopes. The three envelopes contained about \$19,400 in cash. One of the envelopes also contained a receipt from a credit union showing a withdrawal of \$6,500 on January 3, 2011. One of the computer bags contained a Sony laptop computer. In the other computer bag, police found, among other things, an envelope with \$10,009 in cash, some Ethiopian currency, personal identification papers, and passports for defendant and the children. A subsequent review of defendant’s bank records showed he withdrew a total of \$25,000 from a Wells Fargo account from January 3 to January 7, 2011.

One of the computer bags also contained an envelope marked “to Jerry” containing a two-page typewritten letter. The letter, dated January 8, 2011, was addressed to Gebrewahid, defendant’s brother. The letter stated, in part: “Today is the

sad day to all of us. I was fighting the devil for the past four years and I was winning then, but not today. I was fighting for my children and my family, myself and my reputation. I am so sorry. Gebrewahid, I can't take it anymore. She is driving me crazy and she continues trying to take away my kids. I'm trying to avoid any conversations with her but how many times she gets my nerves. I did a terrible mistake that I fall on her traps. And I cause unbearable pain to my mother and to all of you, my brothers. May the lord give all of you the strength and energy to cope with this disaster that cause upon this family. So I have to leave this country. You know that I can't stay here. One, I have peaceful restraining order, and the other is the Court itself and the other is I [beat] her to—almost to the death. Gebrewahid, I am not strong like you. But please help our mother to cope with this situation. I know it is going to be difficult for her and my brother. For me too. Gebrewahid, I do not know what to tell you about my children but I'm just going to leave it alone. My heart and my soul always will be with them as long as I live. I'm crying now but I will be fine. Please read this careful. Please do not tell my mother right away. If you can pick up the children on Monday and take them to house. Then you can report to the police on Monday after 2:00 p.m. Tell them you went to the house and it is locked and you knocked and no one answered. Please done [sic] panic. She is not dead, just tied up.” The letter also contained information about properties, mortgages, and financial accounts, among other things. A computer forensics expert for the prosecution testified the letter was created on the defendant's computer on January 5, 2011, three days before the attack.

3. *Defendant's Arrest*

The police could not find defendant for several days after the attack. On January 12, 2011, police saw defendant's van parked on a street about a mile away from the couple's residence on Piercy Road. The police subsequently went to the residence and entered it to search for defendant. They found defendant hidden in a bedroom closet,

hiding under a pile of laundry. Defendant was holding a knife and bleeding profusely from a self-inflicted “gaping wound” across his throat.

4. Defendant’s Testimony

Defendant testified at trial as follows. He and F.W. began having marital problems around 2007. In December 2007, he came home late and could not get into their house. He rang the doorbell many times, but nobody would let him in. After he eventually entered the house, the couple “exchanged words” and he became angry. He threw his shoe onto the floor, but he did not throw it at F.W. or hit her with it. The police arrested him in connection with the incident, but he was never convicted of domestic violence. Instead, he was convicted of disturbing the peace.

The couple separated for some time but reunited in June 2010. As a condition of reunification, they agreed to move out of San José. After visiting Las Vegas and San Diego, defendant quit his job in anticipation of moving to Las Vegas. His last day was October 1, 2010. F. W. agreed with the decision to move.

a. The October 1, 2010 Incident

On October 1, 2010, defendant got into an argument with F.W. over the rent. He asked her for \$350, but she did not have the money. He became angry and kicked a hole in a bedroom door. Defendant denied that he had hit F.W. When she tried to call the police, defendant told her, “[P]lease don’t call, why are you calling, nothing happened.” Defendant denied breaking her phone. He testified that the phone had been broken earlier that day. The police arrested defendant and took him to jail. He did not return home immediately because there was a restraining order in effect until October 8.

On October 8, the couple appeared in court and modified the order to a peaceful contact order at F.W.’s request. Defendant returned home that day, but the police served him with a no contact order from a family court, so he left to stay with his mother. Defendant denied that he had sex with F.W. at any point during that time. Defendant did

not return home until October 27, at which time the couple had no physical contact. They then moved to the house on Piercy Road so they could have separate bedrooms.

b. *The January 8, 2011 Incident*

On January 8, 2011, defendant had a job interview scheduled at 2:00 p.m. F.W. was scheduled to go to work at that time. Defendant took their children to his mother's house and returned home around 1:20 or 1:30 p.m. When he asked F.W. why she had not taken the children to church that morning, she told him she was tired. Defendant felt disappointed. F.W. then told defendant she had been pregnant for three months. Defendant testified he had not been aware of that beforehand. He then realized the baby must have been conceived in the previous October, and he "got a little suspicious I guess." He asked her if he was the father, and she replied, "I don't know. I have to find out." Defendant became angry.

F.W. went into the kitchen, and defendant followed her, angrily demanding to know who she had been sleeping with. As she was combing her hair, he grabbed the comb and threw it away. He grabbed her by the shoulder and again demanded to know who she had been with. She then saw a knife nearby. They both ran to the knife and grabbed it at the same time. They struggled for about a half minute, and defendant pulled the knife out of her hand. F.W. was cut during the struggle.

As F.W. began to bleed, defendant set her down, took the t-shirt she was wearing, and tried to tie it around her wrist to stop the bleeding. He tried to apply another piece of clothing to the wound, but she attempted to get away from him. He grabbed her in the kitchen and tried to put the clothing on her wound, but it was getting too saturated, so he took her into his bedroom. He was trying to find more clothing to put on the wound as a bandage. He did not call 911 because he was scared of going to jail. He thought he could "calm her down and clean up, maybe try to minimize [the] situation." He began cutting up more pieces of clothing to try to bandage her hand. F.W. was just sitting there, and they both were crying. Eventually he was able to stop the bleeding.

Defendant admitted that he shaved F.W.'s head. When asked why he did so, he responded, "I don't know. I just lost my mind." He admitted that he tried to "make her a mess."

Defendant testified that he was concerned F.W.'s wound would get infected. Because he was scared to call the police, he decided to keep her in the house and handle the situation himself. He claimed that he planned to call the police later. He admitted that he tied her hands and feet. He did not want her to leave because he did not want the police involved. He went to Walgreens to get a roll of gauze for a bandage, but did not find any gauze there. On his way back to the house, he saw police behind him, so he let them pass and did not return to the house.

Defendant admitted leaving F.W. tied up at the house, but he testified he did not think she would bleed to death because no major veins or arteries had been cut. He denied choking her, and he testified that he never saw her lose consciousness. He denied hitting her with a mop handle, and he denied putting duct tape over her mouth. He denied threatening to kill F.W. or telling her she would die. He denied burning her feet with a soldering iron. He claimed he had purchased the soldering iron for various household tasks such as ironing the curtains, fixing plastic cracks, or sealing frayed rope ends. He claimed he had purchased the black plastic ties two months earlier to fix a fence.

Defendant admitted he had written the letter to his brother. He testified that he had written it earlier in the preceding week. He admitted that, at the time he wrote the letter, he was planning to beat F.W., tie her up, and leave for Mexico. He testified, however, that he had changed his mind later that night.

Defendant testified that he tried to commit suicide by cutting his own throat because he felt guilty and ashamed for everything he had done. He admitted that he did not cut his throat until he saw the police at his house, which "forced [him] to make the decision." He felt "[v]ery bad" and "[t]errible" about what had happened.

5. *Edith Dooley*

Edith Dooley, a registered nurse, testified for the defense as an expert in the area of injuries and wounds. Dooley opined that a person who suffered the lacerations suffered by F.W. would not be in danger of bleeding to death. Based on photographs of the lacerations, Dooley testified that it appeared the blood had clotted and no major artery or vein had been cut. She further testified that nothing in the medical records indicated the wounds were life threatening.

6. *Michelle Jorden*

Michelle Jorden, an assistant medical examiner, testified for the prosecution in rebuttal as an expert in the area of strangulation. Jorden testified that strangulation causes a lack of oxygen to the brain through decreased blood flow. The mechanism is usually occlusion of the blood vessels on the sides of the neck—the jugular vein and the carotid artery. Jorden testified that it takes 4.4 pounds of pressure to occlude the jugular vein and 11 pounds of pressure to occlude the carotid artery. It takes 33 pounds of pressure to occlude the trachea and about 66 pounds of pressure to occlude the vertebral arteries. A victim of strangulation may lose consciousness in 10 to 20 seconds. If the strangulation continues, the victim can suffer cardiac arrhythmias within about 45 seconds. The victim can also suffer internal injuries such as swelling, causing a sore throat or difficulty swallowing.

B. *Procedural Background*

In August 2011, the prosecution charged defendant in the first amended information (the operative charging document) with: Count One—Attempted murder (Pen. Code, §§ 187, 664³); Count Two—Torture (§ 206); Counts Three and Four—Assault with a deadly weapon (§ 245, subd. (a)(1)); Count Five—Assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); Count Six—Criminal

³ Subsequent undesigned statutory references are to the Penal Code.

threats (§ 422); Count Seven—Violation of a protective order (§ 273.6, subd. (a)); Count Eight—Attempting to dissuade a victim or a witness from reporting a crime (§ 136.1, subd. (b)(1)); and Count Nine—Battery on a spouse (§§ 242, 243, subd. (e)). As to Count One, the information alleged defendant used a deadly and dangerous weapon—a knife—in the attempted commission of the offense. (§ 12022, subd. (b)(1).) As to Counts One, Three, and Five, the information alleged defendant personally inflicted great bodily injury on the victim under circumstances involving domestic violence. (§ 12022.7, subd. (e).)

The case proceeded to a bench trial in May 2012, but the court granted a mistrial based on misconduct by the victim’s interpreter. In August 2013, the case proceeded to jury trial. On Count One, the jury acquitted defendant of attempted murder but found him guilty of the lesser included offense of attempted voluntary manslaughter. The jury also found defendant guilty on all remaining counts and found all allegations to be true.

The trial court imposed an indeterminate term of life in prison with the possibility of parole consecutive to a determinate term of nine years eight months. Specifically, the court imposed a term of life on Count Two, consecutive to three years for attempted voluntary manslaughter, eight months for Count Eight, and six years for enhancements. The court also imposed concurrent terms for Counts Five (eight years), Six (two years), Seven (one year), and Nine (one year). Finally, the court imposed but stayed three-year terms for Counts Three and Four under section 654.

II. DISCUSSION

A. Lack of an Instruction on Attempted Torture

Defendant contends the trial court erred by failing to instruct the jury on the lesser included offense of attempted torture in connection with the January 8, 2011 attack. The Attorney General contends defendant forfeited the claim through the doctrine of invited error. Alternately, the Attorney General contends any error in failing to instruct on attempted torture was harmless. We conclude the lack of an instruction on attempted

torture was harmless because it is not reasonably probable the jury would have reached a more favorable outcome had that instruction been given.

1. *Legal Principles*

Section 206 defines torture as follows: “Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.” Section 12022.7 defines “great bodily injury” as “a significant or substantial physical injury.” (§ 12022.7, subd. (f).) This “standard contains no specific requirement that the victim suffer ‘permanent,’ ‘prolonged’ or ‘protracted’ disfigurement, impairment, or loss of bodily function.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750.)

“The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.” (§ 1159.) “[I]t is the ‘court’s duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) “Conversely, even on request, the court ‘has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction’ [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1215 (*Cole*)). Substantial evidence is evidence from which reasonable jurors could conclude the defendant committed the lesser offense, but not the greater. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.)

As a general matter, an attempt to commit a crime is a lesser included offense of the completed crime. “[T]here is no reason in the nature of things why a defendant may not be guilty of an attempt to commit a crime without being guilty of the crime attempted to be perpetrated. It is not disputed, nor could it well be disputed, that, as an abstract

proposition, every completed crime necessarily involves an attempt to commit it.” (*People v. Vanderbilt* (1926) 199 Cal. 461, 463; see also *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609 [“attempt is a lesser included offense of any completed crime”]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 506 [“every substantive criminal offense necessarily includes the attempt to commit it”].)

“We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ‘that is, evidence that a reasonable jury could find persuasive’ [citation], which, if accepted, ‘would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser*’ [citations].” (*Cole, supra*, 33 Cal.4th at p. 1218, italics in original.)

In his supplemental opening brief, defendant contends the failure to instruct on attempted torture constituted a federal due process error, requiring harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 21. But the authorities cited by defendant do not support this proposition. Instead, in a noncapital case, a trial court’s erroneous failure to fully instruct the jury on a lesser included offense is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818. “A conviction of the charged offense may be reversed in consequence of this form of error only if, ‘after an examination of the entire cause, including the evidence’ [citation], it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred [citation].” (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

2. *Forfeiture by Invited Error*

As an initial matter, we consider the Attorney General’s contention that defendant has forfeited his claim by invited error. The Attorney General points to defendant’s closing argument, in which counsel argued that the prosecution had failed to prove defendant committed torture. Specifically, counsel argued that the prosecution had failed

to show that defendant inflicted great bodily injury to F.W.'s feet with the soldering iron. Counsel acknowledged the severity of the laceration to F.W.'s hand, but he argued that defendant did not inflict that injury with torturous intent. As to F.W.'s loss of consciousness, counsel argued that the evidence did not prove loss of consciousness beyond a reasonable doubt. In summary, counsel contended that defendant was guilty of attempted torture at most, but that he had never been charged with attempted torture. He argued: "Now if [defendant] had been charged with attempt, attempt to torture, that would be a different question for you. That's not what he's charged with. Therefore there is the very least [*sic*], it's not proved. In fact, by their testimony it's not proved."

The Attorney General relies on *People v. Barton* (1995) 12 Cal.4th 186 (*Barton*), for the proposition that counsel's closing argument constituted invited error. In *Barton*, the California Supreme Court acknowledged a line of cases holding "that a defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*Id.* at p. 198.) However, "[f]or the doctrine to apply, 'it must be clear from the record that defense counsel made an express objection to the relevant instructions.' " (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1234, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176.)

The Attorney General does not cite to anything in the record showing defendant objected to an attempted torture instruction or otherwise persuaded the court not to give it. Nor does the Attorney General cite any authority for the proposition that a defendant's closing argument may constitute invited error in the absence of an objection to the instruction. Accordingly, we conclude defendant has not forfeited this claim by invited error, and we will consider the merits of the claim.

3. *Any Failure to Instruct on Attempted Torture Was Harmless*

Defendant does not deny that he inflicted injuries on F.W. sufficient to constitute great bodily injury. Instead, he argues that any such injuries—e.g., the laceration to her left hand, or the loss of consciousness from choking her—were inflicted in the initial moments of the attack. Because the jury found defendant guilty of attempted voluntary manslaughter, defendant argues the jury must have concluded defendant was acting under heat of passion at this point in the attack. And because the jury must have found his ability to reason “was obscured or disturbed by passion” such that “he acted rashly and without deliberation and reflection,” defendant contends the jury would also have found he could not have harbored a torturous intent at that point. As to any injuries F.W. suffered later in the attack—e.g., the marks on her feet from the soldering iron—defendant contends the jury would have found they did not constitute great bodily injury.

Defendant cites no authority for the proposition that the state of mind necessary for heat of passion precludes a finding of torturous intent. Nor is heat of passion equivalent to the absence of any specific intent. Indeed, to find defendant guilty of attempted voluntary manslaughter, the jury had to find he intended to kill F.W. Nothing logically precluded the jury from finding that defendant simultaneously harbored the intent to inflict extreme pain on her for sadistic purposes. Furthermore, California law allows for logically inconsistent verdicts. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 405.)

It is true that defendant generally denied the allegations of intentional torture. He claimed he tied up F.W. only because he was afraid she would alert the police. He denied that he burned her with the soldering iron, and he denied other various acts of cruelty against her. But even assuming the record provided sufficient evidence to support attempted torture, it is not reasonably probable the jury would have acquitted him of the completed torture offense.

First, it is likely the jury considered defendant's actions during the initial moments of the attack—including the laceration to F.W.'s hand and the choking—to be part of the torture offense. But even under defendant's theory that he had not yet formed the intent to torture during the initial moments of the attack, his account of the subsequent injuries inflicted upon F.W. ignores one of the most significant injuries. After the initial lacerations caused by the knife, F.W. continued to suffer a substantial loss of blood—a serious physical injury that went beyond the laceration itself. This injury was evidenced by the copious amounts of blood in the photographs, F.W.'s blood-soaked pants, and her subsequent need for a blood transfusion at the hospital. F.W. lost this blood while defendant kept her captive, whereby he intentionally prevented her from seeking medical care to stop the bleeding—and during which time the evidence shows he displayed a torturous intent. As F.W. testified, she continued to suffer extreme pain and suffering at defendant's hands during the hours long captivity period. Defendant's repeated demands for money during this time frame clearly demonstrated an extortive intent. His use of the soldering iron in an attempt to inflict pain on F.W. further established his torturous intent. And defendant had no explanation for why he shaved F.W.'s head—an act that expressed his sadistic desire beyond any reasonable doubt.

While defendant claimed that he cut up F.W.'s clothes in an attempt to fashion bandages and stop the bleeding, the jury was not likely to credit this testimony. His claim that he was unable to locate a roll of gauze at a drug store was likewise not credible. He denied using the soldering iron on F.W., despite photographs showing the soldering iron caked with blood and F.W.'s feet with apparent burn marks. His explanation for why he purchased the soldering iron was also not credible. Given the inconsistencies in defendant's testimony, it is highly likely the jury rejected defendant's self-serving account of the attack.

In summary, because it is not reasonably probable defendant would have obtained a more favorable outcome had the jury been instructed on attempted torture, any failure to include that instruction was harmless.

B. The Trial Court's Response to a Jury Question Regarding Torture

Defendant contends the trial court erred by failing to give a full and accurate response to a jury question regarding the torture charge. The Attorney General contends defendant forfeited the challenge, and that the trial court's response was proper. We conclude defendant waived this claim by failing to object to the trial court's proposed response.

1. Procedural Background

During deliberations, the jury submitted a note asking, among other things, "Is the whole event (3 hrs) one from the torture perspective (is the knife potentially part of the torture)." After conferring with counsel in chambers, the trial court proposed the following response: "Torture can be committed as a single act or as a series of acts, i.e., a course of conduct over time[.] Course of conduct means two or more acts occurring over a period of time, however short, showing a continuity of purpose. Please refer to [CALCRIM No. 810] for the act and intent required to prove the crime of torture." The trial court then solicited the views of the parties to this proposed response.

The prosecution agreed to the instruction. Defense counsel stated, "No objection to what the Court wrote, the way the Court has written. My concern, I'm not sure it answers the question. Something we didn't raise specifically, but we did generally, is that the California definition of torture isn't the common definition for the purposes of a conviction. My concern is that they have asked specifically about the knife incident, whether the knife does not—should be part of it. And the Court has rightfully referred them to instruction number [810] which should answer their questions. I don't know if it's going to, but I don't object to this, what the Court is doing." The court then gave the proposed response to the jury.

2. *Defendant's Failure to Object*

The Attorney General contends defendant's acquiescence in the instruction forfeited any claim on appeal. We agree. Although defense counsel wondered aloud whether the trial court's response would answer the jury's question, counsel stated *twice* that he did not object to the proposed response. Counsel did not propose or request any alternative response on the record, and whatever concerns he expressed were so vague as to be unanswerable. Such acquiescence forfeits the claim on appeal. (*People v. Harris* (2008) 43 Cal.4th 1269, 1317 [defendant waived claim by specifically agreeing to trial court's handling of jury question]; *People v. Rogers* (2006) 39 Cal.4th 826, 877 [counsel's acquiescence to court's response to jury question forfeited claim on appeal].)

In any event, the trial court's response was proper. Defendant acknowledges that the crux of the court's response—that torture can be committed as a series of acts or a course of conduct over time—correctly states the law. (See *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1429 [just as spousal abuse can be committed by a course of conduct rather than a single act, so can torture].) But defendant contends the jury might have been confused about whether the course of conduct could have included the knife attack if defendant had not yet formed the intent to torture. He argues the failure to instruct the jury on this point was prejudicial because the jury's finding of heat of passion shows the jury did not believe he harbored the requisite intent at the time of the knife attack.

As explained in Section II.A. above, defendant's argument assumes too much. A finding of heat of passion is not necessarily inconsistent with the existence of a torturous intent. The jury may have found defendant had the intent to inflict severe pain on F.W. for sadistic purposes when he attacked her with the knife and choked her to the point of unconsciousness. Alternatively, the jury may have concluded defendant subsequently inflicted other forms of great bodily injury on her. Regardless, the trial court's original instruction based on CALCRIM No. 810 made clear the jury was required to find

defendant possessed the intent to torture at the same time he inflicted great bodily injury on the victim. The court first instructed jurors they were required to find that “[w]hen *inflicting the injury*, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion or for any sadistic purpose.” (Italics added.) Nothing in the court’s subsequent response—which reiterated the prior instruction—suggested or implied that the jury could find defendant committed torture if he did not harbor a torturous intent during the infliction of the injury. For these reasons, we conclude this claim is without merit.

Finally, defendant contends the cumulative impact of the asserted errors caused him prejudice. Because we do not find multiple errors, we need not consider potential cumulative prejudice.

III. DISPOSITION

The judgment is affirmed.

Márquez, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Mihara, J.

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