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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEPHAN LOMANI, Defendant and Appellant.	B286188 (Los Angeles County Super. Ct. No. TA143528)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura R. Walton, Judge. Affirmed in part, reversed in part, and remanded with instructions.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Stephan Lomani appeals the judgment entered following a jury trial in which he was convicted of two felony counts of using force or violence to resist police officers who were performing their duties (Pen. Code, § 69);[1] one felony count of battery causing injury to a police officer engaged in the performance of her duties (§ 243, subd. (c)(2)); and one misdemeanor count of resisting a police officer in the discharge of his duty (§ 148, subd. (a)(1)). The trial court imposed an aggregate sentence of three years in county jail.

Lomani was arrested following a lengthy struggle involving at least six sheriff deputies. The struggle occurred after Lomani refused to comply with the deputies' instructions and attempted to flee.

Lomani asserts two grounds for reversal. First, Lomani claims that the evidence is insufficient to sustain his convictions because the deputies used excessive force in responding to his conduct and therefore were not engaged in the lawful performance of their duties while arresting him. Second, Lomani argues that the trial court erred in failing to instruct sua sponte on the lesser included offenses of simple assault and simple battery. (§§ 240; 241, subd. (a); 242; 243, subd. (a).)[2]

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[1] Subsequent undesignated statutory references are to the Penal Code.

[2] After briefing was complete, this court advised the parties pursuant to Government Code section 68081 that it was considering the issue of whether the trial court should have instructed on simple assault and simple battery as lesser included offenses, and invited supplemental letter briefs on the issue. In his supplemental brief Lomani argued that the trial

We reject Lomani's sufficiency of the evidence argument, but agree that the trial court should have instructed on the lesser included offenses of simple assault and simple battery. From the evidence, a reasonable jury could have found that the deputies used reasonable force while attempting to subdue Lomani and take him into custody. However, a reasonable jury could also have found that the deputies used unreasonable force *and* that Lomani used unreasonable force in responding to the deputies' actions. The absence of jury instructions on simple assault and simple battery left the jury without any option to convict Lomani in the event of such a finding. On this record, there is a reasonable possibility that the absence of such an option affected the outcome on three of the charged counts.[3]

We therefore reverse and remand for a new trial or, in the alternative, for resentencing on count 4 and on the lesser included offenses of simple assault and simple battery in the event the prosecution elects not to pursue the charged felony counts on counts 2, 3, and 5.

FACTUAL BACKGROUND

1. *The Prosecution's Evidence*

At about 12:30 a.m. on November 9, 2016, deputy Bryant responded to a call about suspicious persons in a vehicle in the

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court had a sua sponte duty to instruct on simple assault and simple battery and that its failure to do so was reversible error.

[3] As explained below, the absence of the lesser included offense instructions did not affect the outcome on count 4, for which the jury found the lesser included offense of resisting the deputies in violation of section 148, subdivision (a)(1).

City of Lynwood. When he arrived at the scene, he saw a Jaguar pulling forward and backward several times in a parking structure. Bryant consulted with another deputy, Mejia, who had also responded to the scene. Because of the unusual driving, the two decided to approach the vehicle to investigate. Bryant approached on the driver's side and Mejia approached on the passenger side.

As they approached, Bryant saw a man lying in the back seat of the car. Bryant identified himself to the driver (Lomani) as a deputy sheriff and asked to see Lomani's hands.

Lomani initially complied, placing his hands on the steering wheel, but then began moving them around as Bryant spoke. Bryant saw that Lomani's pupils were dilated and, although it was a cool night, he was sweating. Bryant decided to detain him.

Bryant tried to open the driver's side door, but it was locked. Bryant instructed Lomani to open the door and get out of the car. Lomani initially hesitated, but eventually unlocked the driver's door. However, after doing so, he moved to the passenger side of the vehicle and held down the lock to the passenger door. In response to Bryant's repeated requests that Lomani open the door, Lomani said "fuck you."

Eventually Lomani unlocked the passenger door and then jumped back over the center console to the driver's side. Bryant reached in to grab him, but had difficulty keeping a grip because the car door was close to the wall of the parking structure. Lomani pushed the car door against Bryant and broke free. Lomani then reached across the front seat toward the glove compartment. Bryant told him not to open the compartment, but Lomani did so anyway. Mejia drew his Taser and fired it at Lomani. The Taser appeared to have no effect.

Lomani pushed his way out of the driver's side and started running away from the car. Two more deputies, including Garcia, had responded to the scene. Lomani ran toward Garcia in an aggressive manner. Garcia struck him two or three times in his arm with her flashlight as he approached. Lomani pushed past her.

Mejia pursued Lomani, who turned and hit Mejia. Lomani then either fell or Mejia brought him to the ground.

Despite commands to stop fighting, Lomani continued to resist the deputies while he was on the ground by kicking and punching. Bryant and Garcia repeatedly struck him and attempted to gain control of his legs. Garcia struck Lomani 15 to 20 times during the struggle, including on the head with her flashlight while she was aiming for his back.

More deputies arrived on the scene, including deputy Spinks. Spinks fired his Taser, which accidentally struck Bryant as well as Lomani. Although Bryant was temporarily paralyzed, the Taser seemed to have no effect on Lomani. Spinks also hit Lomani four or five times in the face. However, Spinks did not "see a reaction or a slowing of his attack."

At some point in the struggle, Lomani kicked Garcia in the left knee and shin. Garcia was on crutches for five months as a result of the injury.

Eventually the deputies were able to get handcuffs on Lomani. After several attempts, they were also successful in placing a "hobble" on his legs to restrain them. Even with the handcuffs and hobble Lomani continued to struggle. The deputies were finally able to secure Lomani in a "total appendage restraint procedure" (TARP), which connected Lomani's handcuffs to the hobble on his feet. Lomani continued to struggle even with

the TARP but was no longer a threat. The deputies took Lomani into custody.

Later that day, while Lomani was in the hospital, deputy Ruiz made a video recording of Lomani's injuries in connection with his investigation of the deputies' use of force. The video was played for the jury.

2. *Trial and Verdict*

Lomani was charged in a five-count information. Counts 1 through 4 separately charged Lomani with violating section 69 by using force or violence to resist deputies Bryant, Mejia, Garcia, and Spinks, respectively. Count 5 charged Lomani with a battery on deputy Garcia causing an injury in violation of section 243, subdivision (c)(2).

At trial, Bryant, Garcia, Spinks, and Ruiz testified for the prosecution. The defense did not put on any evidence.

The jury convicted Lomani of violating section 69 with respect to deputies Mejia and Garcia under counts 2 and 3. The jury also convicted Lomani of the charged offense of battery with injury on a police officer (§ 243, subd. (c)(2)) on count 5. On count 4, the jury found Lomani guilty of the lesser included offense of resisting Spinks in violation of section 148, subdivision (a)(1).

The jury failed to reach a verdict on count 1 concerning Bryant. The jury also failed to reach a verdict on an alleged enhancement for great bodily injury under section 12022.7, subdivision (a).

DISCUSSION

1. *Standard of Review*

In considering a challenge to the sufficiency of the evidence, an appellate court must " 'review the entire record in the light most favorable to the judgment to determine whether it contains

substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Avila* (2009) 46 Cal.4th 680, 701 (*Avila*), quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27 (*Lindberg*).) In conducting such a review, the court " 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Avila,* at p. 701, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*Lindberg,* at p. 27.)

We review independently whether the trial court improperly failed to instruct on lesser included offenses. (*People v. Nelson* (2016) 1 Cal.5th 513, 538.)

2. *The Evidence Is Sufficient to Support the Verdicts*

Each of the statutes under which Lomani was convicted requires proof that the deputies were performing their duties when Lomani engaged in the charged conduct. (See § 69, subd. (a); § 243, subd. (c)(2); § 148, subd. (a)(1); *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894–895 (*Yount*); *People v. White* (1980) 101 Cal.App.3d 161, 166–167 (*White*); *People v. Brown* (2016) 245 Cal.App.4th 140, 151 (*Brown*).) A police officer who uses excessive force in making an arrest is not acting lawfully and therefore is not performing his or her duties. (See *People v. Sibrian* (2016) 3 Cal.App.5th 127, 133 (*Sibrian*); *People v. Olguin* (1981) 119 Cal.App.3d 39, 45–46.) Thus, Lomani is not guilty of the offenses on which he was convicted if he committed those offenses while resisting *unreasonable* force by the deputies.

Lomani argues that no reasonable jury could have concluded that the deputies used reasonable force in subduing and arresting him. The Attorney General disagrees, but also

argues that we need not consider whether *all* of the deputies' conduct was reasonable, because Lomani resisted the officers before they began striking him while he was on the ground. Citing *Yount, supra,* 43 Cal.4th 885, the Attorney General argues that Lomani was guilty of the charged offenses as soon as he resisted the deputies' initial use of reasonable force to detain him, even if the deputies later used excessive force to subdue him and take him into custody.

Accordingly, before evaluating all the evidence, we consider whether the record here could support conviction even if the deputies used unreasonable force at some point in attempting to control Lomani.

a. *Did Lomani unlawfully resist the deputies apart from the deputies' use of significant force?*

In *Yount,* our Supreme Court considered whether a plea of no contest to a charge of resisting officers under section 148, subdivision (a)(1) barred a later civil action against the officers for alleged civil rights violations and battery. (*Yount, supra,* 43 Cal.4th at pp. 888–889.) The plaintiff, Yount, violently resisted officers who were attempting to take him into custody. Yount continued to resist even after the officers succeeded in putting handcuffs and ankle restraints on him and pinning him to the ground. One of the officers intended to use a Taser to subdue him but mistakenly drew his firearm instead of his Taser and shot Yount in the buttock. (*Id.* at pp. 889–891.)

The court concluded that, under *Heck v. Humphrey* (1994) 512 U.S. 477 (*Heck*), Yount's no contest plea barred his subsequent civil rights claim under 42 United States Code section 1983 insofar as that claim challenged whether the arrest was lawful or whether the officers were entitled to use *any* force

against him. (*Yount, supra,* 43 Cal.4th at p. 898.) Such a claim would have necessarily implied the invalidity of his conviction, which is impermissible under *Heck*. Yount resisted a lawful arrest, so the officers were entitled to use reasonable force.

However, Yount's plea did not preclude his claim that the officer unreasonably used deadly force when he shot him. That was a factually separate event that did not " 'negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it.' " (*Yount*, *supra*, 43 Cal.4th at p. 899, quoting *Jones v. Marcum* (S.D. Ohio 2002) 197 F.Supp.2d 991, 1005, fn. 9 (*Jones*).)

Thus, *Yount* supports the conclusion that a suspect may be convicted of an offense for resisting or striking officers when the officers are using reasonable force to arrest him or her, even if the officers later use unreasonable force in responding to the suspect's resistance. (Accord, *People v. Williams* (Aug. 13, 2018, H044771) __ Cal.App.5th __ [2018 Cal.App. Lexis 713, **20–35] (*Williams*).) However, applying that principle to the record in this case requires a more nuanced analysis of the facts than the Attorney General suggests.

Lomani was convicted on four counts under three different statutes involving three deputies. Each of the deputies had a different role in the events. The evidence shows that the jury's verdict on at least two of the charged counts could not have been based on Lomani's original resistance, but must have been based on Lomani's subsequent conduct while he was on the ground engaging in a violent struggle with the deputies.

To convict on counts 2 and 3 under section 69, the jury must have found that Lomani resisted Garcia and Mejia with "force or violence." (§ 69, subd. (a).)[4] Lomani did not use any force against those deputies until after he had left the car.[5] He pushed against Garcia as he ran past, and then he swung at and hit Mejia. At that point, the jury might have found that Lomani had used sufficient "force or violence" in resisting Mejia and Garcia to be guilty under section 69 on counts 2 and 3. (§ 69, subd. (a).)

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[4] Thus, Lomani could not have been guilty under section 69 merely for refusing to comply with the deputies' directions while he was still in the car. In contrast, the defendant in *Williams* was properly convicted under section 148, subdivision (a)(1) (which does not require the use of force or violence) based upon the defendant's initial resistance even though the officers later allegedly used excessive force. (*Williams, supra,* __ Cal.App.4th at p. __ [2018 Cal.App. Lexis 713 at *34].)

[5] Bryant testified that Lomani pushed the car door open against him while Lomani was still in the car. Garcia said that she saw Lomani open the "driver's side door and it struck my partner deputy *Mejia* in his chest and pinned him between the wall and the vehicle." (Italics added.) However, her description of the events—including that Bryant, not Mejia, was located on the driver's side of the car—along with her subsequent testimony suggest that Garcia misspoke and intended to say that Lomani opened the car door against *Bryant*. The jury failed to reach a verdict on count 1 concerning Bryant, so Lomani's use of force in opening the car door against Bryant could not have established the "force or violence" element of the counts on which the jury convicted.

However, the events relating to Lomani's convictions under counts 4 and 5—concerning Lomani's resistance to Spinks and battery on Garcia, respectively—occurred later. Spinks did not become involved in the attempt to subdue Lomani until Lomani was already on the ground on his back struggling with the deputies. Lomani's kick that injured Garcia's leg also occurred during that struggle on the ground, while Garcia was attempting to gain control of Lomani's legs.[6] At that point, she had already kicked Lomani two or three times in the ribcage, struck him with her flashlight two or three times on the arm, and accidentally struck him several times on the head with her flashlight (while aiming for his back). Spinks had also used his Taser against Lomani while Lomani was on the ground and the deputies had successfully applied one handcuff.

The events concerning counts 4 and 5 therefore did not occur in an " 'isolated factual context[ ]' " separate from the deputies' use of significant force. (*Yount, supra,* 43 Cal.4th at p. 899, quoting *Jones*, *supra,* 197 F.Supp.2d at p. 1005, fn. 9.) Attempting to isolate the evidence underlying these counts from particular acts of alleged unreasonable force by the deputies would amount to "the kind of 'temporal hair-splitting' that California and other courts correctly refuse to perform." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 840, quoting

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[6] As mentioned, Lomani pushed Garcia as he was running past her after fleeing the car. While this touching might have been sufficient to establish the lesser included offense of battery on a police officer under section 243, subdivision (b), Lomani was convicted under section 243, subdivision (c)(2). That subdivision requires proof of injury. (See § 243, subd. (c)(1) and (2).)

Truong v. Orange County Sheriff's Dept. (2005) 129 Cal.App.4th 1423, 1429.)

Thus, contrary to the Attorney General's argument, we may not confine our review of the evidence just to the events surrounding Lomani's initial resistance. Lomani was also convicted for conduct that occurred while the deputies were using significant force against him.

b. *Did the deputies use excessive force?*

Under the deferential standard we employ in considering an appellate challenge to the sufficiency of the evidence, there is ample evidence in the record to support the conclusion that the deputies used reasonable force in response to Lomani's resistance. Police officers are entitled to use "reasonable force to effect [an] arrest or to prevent escape or to overcome resistance." (§ 835a.) An officer attempting to make an arrest "need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." (*Ibid.;* see also *Yount, supra,* 43 Cal.4th at p. 898 [officers were "justified in responding with reasonable force" to a suspect who was "kicking, spitting, and refusing to cooperate" while they attempted to subdue him].)

Whether an officer has used reasonable force in responding to a suspect who is resisting is "highly situational and fact specific." (See *Brown, supra,* 245 Cal.App.4th at p. 167 [expert testimony concerning officer's use of force in subduing a resisting suspect was improperly admitted where the jury was required "to apply its own independent sense of reasonableness, using whatever community norms jury members might bring to the issue"].) In *Graham v. Connor* (1989) 490 U.S. 386 (*Graham*), the

United States Supreme Court established a three-part test to identify the force that is reasonable under the Fourth Amendment. The relevant factors include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. (*Id.* at p. 396.) Reasonableness must be judged from the perspective of an officer in the field. (*Ibid.*; *Brown* at p. 167.) "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Graham*, at pp. 396–397.)

Under this standard, the jury acted reasonably in finding that the deputies' use of force was permissible.[7] The deputies used escalating, nonlethal force in attempting to control Lomani and in response to Lomani's continued violent resistance.

The deputies' first use of force occurred while Lomani was still in the car and was refusing to comply with the deputies'

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[7] We must presume the jury followed the trial court's instruction in this case that a "peace officer is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force in his or her duties." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.) That instruction, which was based on CALCRIM No. 2652, correctly described the legal principle discussed in cases such as *Sibrian, supra,* 3 Cal.App.5th 127. Because the jury convicted on counts involving conduct by Lomani that occurred concurrently with the deputies' challenged use of force, the jury must have found that the deputies did not use excessive force in apprehending and subduing Lomani.

requests. Mejia used his Taser against Lomani while Lomani was in the front seat, before Lomani had begun any violent resistance. However, the jury could reasonably have found that Mejia used his Taser because he thought that Lomani might be reaching for a gun. Bryant testified that, just before Mejia shot Lomani with his Taser, Lomani defied Bryant's commands and reached into the glove compartment of the car. Bryant believed that Lomani might be retrieving a weapon.[8]

Courts have held that use of a Taser or similar force against a "compliant, nonresistant suspect" is a clear violation of constitutional rights. (See *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 716–718 (*Mendoza*), and cases cited.) But use of a Taser can be a reasonable response to resistance that poses a threat. (See *id.* at pp. 715–716 [discussing cases].) Here, the evidence that Lomani was reaching for the glove compartment at the time Mejia fired his Taser supports the conclusion that Mejia's use of his Taser was reasonable.

After Lomani fled from the car Garcia struck him two to three times with her flashlight as he ran towards her. The jury could also rationally have found that this use of force was a

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[8] Garcia testified that she was standing behind Mejia and could see that the glove compartment was empty. Mejia did not testify. Thus, there was no direct evidence of what Mejia actually observed. Although the jury could have found that Mejia had the same view as Garcia and saw that the glove compartment was empty, the jury could also reasonably have inferred from Bryant's testimony that Mejia was concerned for his safety at the time he used his Taser against Lomani. Under the standard of review that we must employ in reviewing the sufficiency of the evidence, we accept the latter inference.

reasonable response to Lomani's conduct. Garcia testified that, before she struck Lomani, he was running toward her from the car in "an aggressive manner," and she feared for her safety.

Finally, the jury could reasonably have concluded that the deputies used permissible force in response to Lomani's continued violent resistance while on the ground. After Lomani fell or was tackled, he continued to fight the deputies by "twisting, kicking, punching, rapid punches, punching at anything." Lomani resisted despite numerous commands to stop. During the struggle he punched Garcia several times and attempted to kick her. The officers were unable to maintain a grip on Lomani due to his sweating. Lomani was able to roll over onto his stomach on top of his hands, which was concerning because the deputies did not know if he had a weapon there that he might be able to reach. Garcia used her flashlight, accidentally hitting Lomani in the head, only after she perceived that Lomani was preparing to "headbutt" her in the face.

After he was handcuffed and hobbled, Lomani continued to struggle. Lomani was not subdued until the deputies finally succeeded in placing him in the TARP. From his appearance and continued aggressive behavior even after the deputies had used Tasers and physical force against him, Lomani appeared to be under the influence of a central nervous system stimulant.

There is no question that the deputies repeatedly struck Lomani while he was on the ground, including with a flashlight, and used a Taser against him several times. Lomani's injuries from this use of force are apparent from the video recording that deputy Ruiz made while Lomani was in the hospital.

However, the jury was aware of Lomani's injuries and was entitled to view them in light of his conduct. The jury's verdict

was reasonable within the framework of the three *Graham* factors. (*Graham, supra,* 490 U.S. at p. 396.)

Although the first factor—the severity of the crime at issue—does not suggest the need for significant force here, the other two factors support the deputies' use of decisive force in the situation they confronted. The most important of the *Graham* factors is "whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza, supra,* 206 Cal.App.4th at p. 712.) Lomani posed such a threat, as shown by the injury that he inflicted on Garcia. And the evidence shows that Lomani actively resisted arrest until the deputies had physically subdued him and managed to place him in a full body restraint. The third factor therefore also supports the jury's finding that the deputies' use of force was reasonable.

Under the deferential standard of review that we must apply to Lomani's sufficiency of the evidence claim, we conclude that the evidence supports the jury's verdict on all four counts.

3. *The Trial Court's Failure to Instruct on Lesser Included Offenses Requires Reversal*

The conclusion that the evidence supports the verdict that the jury returned does not end our inquiry. More than one reasonable conclusion was possible from the evidence at trial. We must therefore consider whether the trial court should have instructed on the lesser included offenses of simple assault and simple battery.

The parties agree that, based upon the charging document in this case, simple assault and simple battery were lesser

included offenses of both of the charged offenses. (§ 243, subd. (c)(2); § 69, subd. (a).)[9] Although Lomani did not request instructions on those lesser included offenses and did not object to the jury instructions as given, the trial court had a sua sponte duty to instruct on all lesser included offenses that were supported by the evidence. (*People v. Smith* (2013) 57 Cal.4th 232, 239–240 (*Smith*).) Thus, the trial court erred in failing to instruct on simple assault and simple battery if those instructions were warranted by the evidence.

a. *The evidence supported instructions on simple assault and simple battery*

A lesser included offense instruction is necessary when " 'there is substantial evidence that only the lesser crime was committed.' " (*Smith*, *supra*, 57 Cal.4th at p. 239, quoting *People v. Birks* (1998) 19 Cal.4th 108, 112.) Substantial evidence in this context means evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Brown, supra,* 245 Cal.App.4th at p. 153.) A lesser included offense instruction in this circumstance avoids the possibility that the jury might be tempted to convict on a greater

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[9] Simple assault and simple battery are lesser included offenses of battery on a peace officer. (*People v. Colantuono* (1994) 7 Cal.4th 206, 216–217 [assault is a necessary element of a battery].) And where, as here, an information charges the two statutory methods of violating section 69 in the conjunctive (i.e., "by means of threats and violence" *and* resistance "by the use of force and violence"), simple assault and simple battery are also lesser included offenses of that offense under the "accusatory pleading test." (*Brown, supra,* 245 Cal.App.4th at p. 153.)

offense than the evidence warrants just to avoid an acquittal or, alternatively, that the jury might acquit even though the defendant is guilty of a lesser offense. (*People v. Eid* (2014) 59 Cal.4th 650, 657–658 (*Eid*).)

The evidence here supported instructions on simple assault and simple battery. As discussed above, the evidence supported the jury's implicit finding that the deputies used appropriate force in response to Lomani's resistance. However, the evidence also could have supported a finding that the deputies used excessive force at some point during the struggle to subdue Lomani, and that Lomani also used unreasonable force in response. (See *People v. Edwards* (1985) 39 Cal.3d 107, 114–115 & fn. 8 (*Edwards*) [involuntary manslaughter instruction should have been given where evidence could have supported a finding either that the defendant furnished heroin or merely aided and abetted heroin use].)

The evidence showed that at least six deputies were involved at various points in attempting to take Lomani into custody. Garcia alone struck Lomani 15 to 20 times, including multiple times with her flashlight on Lomani's back, arm, and shoulder and accidentally on his head. She also kicked Lomani three or four times in his ribcage while he was on his back. Bryant hit Lomani three to five times on his torso. Mejia kicked Lomani's leg and his shoulder or back area multiple times. Lomani was tased several times.

The deputy who prepared the video recording of Lomani's injuries testified that he did so in connection with his investigation of the deputies' use of force. The investigation began because of a report of an "inadvertent head strike" with an "impact weapon," i.e., Garcia's flashlight.

While the deputies used significant force, so did Lomani. As discussed above, Lomani continued to resist the officers throughout the struggle with his fists, feet, and head. He kicked Garcia hard enough to cause a long-term injury.

If the jury believed that Lomani used excessive force in response to unreasonable force by the deputies, it could not have convicted Lomani on either of the charged offenses. As discussed above, each of those offenses required proof that the deputies were engaged in the lawful performance of their duties. In contrast, Lomani could have been convicted of simple assault and/or simple battery even if the deputies used excessive force, so long as Lomani *also* used unreasonable force in resisting them. (See *Brown, supra,* 245 Cal.App.4th at pp. 154–155; *White, supra,* 101 Cal.App.3d at p. 168; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 (*Castain*).) In this situation it was error for the trial court to fail to instruct on simple battery and simple assault as lesser included offenses.

The court reached a similar conclusion in *Brown.* In that case, police officers observed the defendant (Brown), a 67-year-old man, riding a bicycle with no light and with headphones on. Brown fled when the officers instructed him to stop. The officers pursued, and ultimately arrested him after an altercation in a parking lot. The officers admitted that they struck Brown, but testified that he was aggressive and swung at them with a clenched fist. Brown claimed that he fell off of his bicycle and one of the officers then pinned him to the ground and slugged him without provocation. (*Brown, supra,* 245 Cal.App.4th at pp. 146–147.)

The appellate court held that the trial court should have instructed sua sponte on simple assault. The court explained that the jury might have believed Brown's testimony that the

officers used excessive force in apprehending him, and also believed the officers' testimony that Brown "repeatedly swung at them, striking both officers." (*Brown, supra,* 245 Cal.App.4th at p. 155.) The court reasoned that, "[i]f the jury concluded that Brown's reaction was unreasonable, that would have supported an assault conviction." (*Ibid.*) The trial court therefore erred in failing to instruct on assault as a lesser included offense. (*Ibid.*)

Similarly, here, a reasonable jury could have found that Lomani used excessive force in response to the deputies' use of unreasonable force. In that case, the jury could have found Lomani not guilty of the charged offenses, but nevertheless convicted Lomani of simple assault and/or simple battery.

The Attorney General argues that no instructions on simple assault or simple battery were warranted here because the jury must have found that Lomani had already committed his offenses before the deputies engaged in any excessive force. The Attorney General cites our Supreme Court's holding in *Yount* that a police officer's use of excessive force *after* a defendant has completed the offense of resisting a lawful arrest does not " 'negate the unlawfulness of the criminal defendant's attempt to resist' " the arrest. (*Yount, supra,* 43 Cal.4th at p. 899.)

We disagree with the Attorney General's interpretation of the evidence. As discussed above, with respect to counts 4 and 5 concerning deputies Spinks and Garcia, Lomani must have engaged in the conduct underlying his conviction while he was on the ground and after the deputies had already used significant force against him. Even with respect to counts 2 and 3 (concerning Mejia and Garcia), the jury might have found that the deputies used unreasonable force before Lomani engaged in any forceful or violent resistance. For example, if the jury believed that Mejia could see the glove compartment was empty

at the time Lomani reached toward it, it might reasonably have concluded that Mejia's use of his Taser was unreasonable. Mejia used his Taser against Lomani while Lomani was still in the car and before he had used any force against Mejia or Garcia.

We also reject the Attorney General's argument that *Brown* is inconsistent with our Supreme Court's opinion in *Yount*. As discussed above, the holding in *Brown* addressed the possibility that the police used excessive force in making an arrest and the defendant responded with unreasonable force of his own. (*Brown, supra,* 245 Cal.App.4th at p. 155.) In that scenario, the defendant would not have completed the offense of violent or forceful resistance under section 69 *before* the police officers acted unlawfully—which was the situation the court addressed in *Yount*. (See *Yount, supra,* 43 Cal.3d at pp. 888–889.)[10]

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[10] The original slip opinion in *Brown* contained language stating that "the jury could also have concluded that Brown used force or violence to resist arrest *but that the officers nonetheless responded with unreasonable force*." (*Brown, supra,* Sl. Op. at p. 12, italics added.) That language also appears in the Westlaw version of the case, which the Attorney General cited. Although inconsistent with the *Brown* court's detailed description of its holding, that language suggests a temporal distinction between Brown's resistance and the police use of force in that case that would provide some superficial support for the Attorney General's argument. However, the official reported version of the *Brown* opinion states that: "the jury could also have concluded that Brown used excessive force or violence to resist arrest *only in response to the officers' unreasonable force*." (*Brown, supra,* 245 Cal.App.4th at p. 154, italics added.) We rely upon the opinion as

We similarly disagree with the Attorney General's argument that the decision in *Yount* is inconsistent with the courts' opinions in *Castain* and *White*. Those cases simply acknowledge the general principle that a defendant who resists a police officer's use of excessive force by using unreasonable force himself can be guilty of simple assault or battery but cannot be guilty of an offense that requires the officer to be engaged in the lawful performance of his or her duties. (*Castain, supra,* 122 Cal.App.3d at p. 145; *White, supra,* 101 Cal.App.3d at p. 168.) That principle is based on the statutory elements of the crimes. It does not contradict the court's explanation in *Yount* that a defendant who resists *lawful* police conduct can be convicted of an offense penalizing interference with peace officers who are performing their duties, even if the officers *later* act unlawfully in using excessive force.

Finally, the Attorney General asserts that the evidence did not support instructions on lesser included offenses here because the defense did not offer any evidence at trial. The Attorney General argues that an instruction on a lesser included offense is not warranted "merely because the jury might disbelieve part of the prosecution's evidence." That was not the basis for the lesser included offense instructions here. The instructions on simple assault and simple battery would not have addressed a hypothetical version of events contrary to the deputies' testimony. The deputies' testimony itself provided a sufficient basis for the

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published in the official reports. (See Cal. Rules of Court, rule 8.1105(b).)

jury to find Lomani guilty only of simple assault or simple battery, whether or not Lomani offered additional evidence.

b. *The trial court's error requires reversal*

In a noncapital case, prejudice from the failure to instruct on a lesser included offense is analyzed under the California harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Under that standard, reversal is not required unless " ' "an examination of the entire record establishes a reasonable probability that the error affected the outcome." ' " (*Brown, supra*, 245 Cal.App.4th at p. 155, quoting *People v. Campbell* (2015) 233 Cal.App.4th 148, 165.) In conducting that analysis, " 'it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence.' " (*Brown, supra,* 245 Cal.App.4th at p. 156, quoting *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) Otherwise, the purpose of the sua sponte rule would be undermined. (*Brown*, at p. 156.)

The Attorney General argues that any error was harmless because Lomani did not offer any evidence, and the jury therefore had no basis to support a finding that Lomani was guilty only of simple assault or simple battery. We reject that argument for the reasons discussed above.

Here, as in *Brown,* the jury "showed a readiness to scrutinize the evidence . . . and convict on lesser charges than the prosecutor requested." (*Brown, supra,* 245 Cal.App.4th at pp. 155–156.) The jury convicted Lomani on count 4 only on the lesser offense of violating section 148, subdivision (a)(1). The jury failed to reach a verdict on count 1 and on the alleged enhancement on count 5. As Lomani points out, the jury also deliberated for several days. The jurors asked a number of

questions and requested several read-backs of testimony, including a read-back of Bryant's testimony leading up to Lomani's approach to the glove compartment. As discussed above, the evidence concerning Lomani's reach toward the glove compartment was an important aspect of the events leading to the deputies' first use of force (i.e., Mejia's use of his Taser).

We therefore conclude there is a reasonable probability that the trial court's failure to instruct on the lesser included offenses of simple assault and simple battery affected the outcome on counts 2, 3, and 5. On each of those counts, the jury must have found that Lomani used force. If the jury had been given the option of convicting Lomani of simple assault or battery on those counts upon finding that Lomani's use of force was unreasonable, its verdict might well have been different.

A different analysis applies to count 4 concerning deputy Spinks. The jury convicted on that count only on the lesser included offense of a violation of section 148, subdivision (a). A violation of that section does not require proof that a defendant used force or violence in resisting peace officers. (§ 148, subd. (a)(1); *Brown, supra,* 245 Cal.App.4th at p. 151.) In contrast, conviction under section 69 required the jury to find that Lomani resisted the deputies "by the use of force or violence." (§ 69, subd. (a).) The jury's decision to convict under section 148 rather than section 69 on count 4 thus implies a finding that Lomani did not use any "force or violence" against Spinks. In this circumstance, the absence of an instruction that would have permitted conviction on a lesser offense for Lomani's use of *unreasonable* force or violence against Spinks did not affect the outcome.

4. *Conclusion*

The trial court's error in failing to instruct sua sponte on the lesser included offenses requires reversal on counts 2, 3, and

5. Because we find that the evidence was sufficient to support the jury's verdict on those counts, on remand the prosecution may retry those counts if it so chooses.

As an alternative to retrial, the prosecution may choose to accept resentencing on a lesser included offense on counts 2, 3, and 5. "When a greater offense must be reversed, but a lesser included offense could be affirmed, 'we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense.' " (*People v. Richards* (2017) 18 Cal.App.5th 549, 560–561, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 528; see also §§ 1181, subd. (6) & 1260; *Edwards, supra,* 39 Cal.3d at p. 118.)

Lomani can only be resentenced on one of the lesser included offenses under this procedure. That is so for two reasons. First, assault is necessarily included in battery, and a defendant may not be convicted on both a greater offense and a lesser included offense. (See *Eid, supra,* 59 Cal.4th at p. 656.) Second, there is no statutory authority permitting modification of a judgment to reflect convictions for *two* lesser included offenses. (*People v. Navarro* (2007) 40 Cal.4th 668, 680–681 (*Navarro*).)

Under the evidence and the instructions, the jury must have found that Lomani used force against Mejia and Garcia with respect to counts 2, 3, and 5. The prosecution may therefore choose to resentence Lomani on the more serious charge of simple battery for those counts. (Cf. *Navarro, supra,* 40 Cal.4th at p. 681

[permitting resentencing on the more serious of multiple lesser included offenses supported by the evidence].)[11]

DISPOSITION

The judgment is reversed. The jury's verdict on count 4 is affirmed. With respect to counts 2, 3, and 5, the case is remanded for further proceedings pursuant to the procedure outlined in *People v. Hayes* (2006) 142 Cal.App.4th 175, 184, and *Brown, supra,* 245 Cal.App.4th at page 173. If, after the filing of the remittitur in the trial court, the prosecution does not bring Lomani to retrial on counts 2, 3, and 5 within the time limit of section 1382, subdivision (a)(2), the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction on those counts of the lesser included offense of simple battery (§§ 242; 243, subd. (a)), and shall resentence Lomani accordingly.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J. HOFFSTADT, J.

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[11] In any event, there is little difference in the statutory penalties for simple assault and simple battery. Both are punishable by up to six months imprisonment; there is a difference only of $1,000 in the maximum fine that may be imposed. (See §§ 241, subd. (a); 243, subd. (a).)