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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO BORGES,

Defendant and Appellant.

B290215

(Los Angeles County  
Super. Ct. No. LA086161)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Gregory A. Dohi, Judge. Affirmed.

Thomas T. Ono, 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, Senior Assistant  
Attorney General, Michael C. Keller, Deputy Attorney General,  
for Plaintiff and Respondent.

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A jury convicted Alejandro Borges of inflicting corporal injury on a spouse or cohabitant and forcible oral copulation, both felonies, and violating a protective order, a misdemeanor. On appeal Borges contends the court erred in denying his request to continue the trial to allow him to dismiss his private counsel and retain new counsel. He also contends the court erred in failing to instruct the jury on intimate partner battery and simple assault, lesser included offenses of inflicting corporal injury on a spouse or cohabitant. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Information*

An information filed November 6, 2017 charged Borges with infliction of corporal injury on a spouse or cohabitant resulting in a traumatic condition (Pen. Code, § 273.5, subd. (a)),<sup>1</sup> violation of a protective order (§ 273.6, subd. (a)) and forcible oral copulation (former § 288a, subd. (c)(2)(A)).<sup>2</sup> The information specially alleged with respect to the corporal injury offense that Borges had personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). The information also specially alleged Borges had suffered a prior conviction for a serious felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i),

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<sup>1</sup> Statutory references are to this code.

<sup>2</sup> Former section 288a, subdivision (c)(2)(A), was renumbered as section 287, subdivision (c)(2)(A), effective January 1, 2019. (Stats. 2018, ch. 423, § 49.)

1170.12) and section 667, subdivision (a). Borges pleaded not guilty and denied the special allegations.

## *2. The Trial*

Borges's wife, M.B., testified at trial. In addition to describing three prior uncharged instances of domestic violence in February and April 2017 when Borges beat her with his fists, kicked her in her ribs and threw a can of soda at her head, M.B. testified about the charged incident, which occurred on May 25, 2017: While in the family car after dropping the children off at school, Borges repeatedly hit his wife with his open hands, his closed fists and the base of a screwdriver; he also burned her with a lighter and plunged his car key into her hand. When they returned home, M.B. fled to the safety of a bathroom. Borges followed and held a knife over her head. M.B. pleaded with her husband to leave her alone. Borges responded by throwing a laptop computer charger at her. The object hit her in the head, causing significant bleeding. Borges left the bathroom.

When M.B. emerged from the bathroom naked sometime later, Borges demanded that she perform oral sex on him. M.B. refused, but ultimately acquiesced when Borges threatened the beating would become more severe unless she complied. Afterward, Borges left the house to pick up the children. Bleeding from her head, M.B. fled to the house next door, where she called the 911 emergency number. M.B. suffered multiple contusions to her body and her face and a laceration to the head that required sutures.

In addition to M.B., several other witnesses testified for the prosecution, including the physicians who treated M.B., the investigating officer who interviewed her at the hospital the day

of the attack and an expert witness who opined on the effects of battered intimate partner syndrome.

Borges testified in his own defense. He admitted throwing a can of soda that had hit his wife's head in April 2017, but insisted his target had been the wall, not her. He denied the other uncharged incidents had occurred. As to the events on May 25, 2017, Borges denied hitting, punching or otherwise battering M.B. with a screwdriver, a key, a lighter or his open hands or fists. He claimed that, when they returned home after taking the children to school, M.B. left to take a bath. He came into the bathroom, and they argued. During the argument, M.B. threw a laptop charger at him but missed hitting him. He picked up the charger and threw it back at her, striking her in the head. Borges claimed he did not see much bleeding.

Borges explained he walked out right after throwing the charger at his wife because he was angry and needed space. He speculated his wife's bruises had occurred when he grabbed her by the elbows after she had become combative with him. Other injuries, he believed, were self-inflicted. He denied engaging in any sexual conduct with M.B. that day, let alone forcing her to perform oral sex on him.<sup>3</sup>

### *3. Jury Instructions, Verdict and Sentence*

The court instructed the jury on the elements of each of the charged offenses. In addition, because the prosecution had presented evidence of more than one act to support the offense of inflicting corporal injury on a spouse, the court gave an unanimity instruction with respect to that offense. The court

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<sup>3</sup> Borges admitted during trial he had suffered a prior conviction in 2004 for residential burglary.

refused Borges's request to instruct the jury on simple spousal battery and simple assault, lesser included offenses of infliction of corporal injury on a spouse, finding neither instruction was supported by the evidence.

The jury convicted Borges on all counts and found the specially alleged weapon and great bodily injury enhancements true. In a bifurcated proceeding following Borges's waiver of his right to a jury trial on the prior conviction allegations, Borges admitted the truth of his prior serious felony conviction and moved to dismiss the qualifying strike conviction in furtherance of justice. The court denied Borges's request and sentenced him as a second strike offender to an aggregate term of 26 years in state prison.<sup>4</sup>

## DISCUSSION

### 1. *The Court Did Not Err in Denying Borges's Request for a Continuance To Retain New Counsel*

#### a. *Relevant proceedings*

The court informed Borges at his arraignment on November 6, 2017 that he had the statutory right to go to trial no later than January 25, 2018. Consulting all parties' calendars,

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<sup>4</sup> The court imposed the middle term of six years for forcible oral copulation, doubled under the three strikes law, plus five years for the prior serious felony conviction under section 667, subdivision (a). The court also imposed a full, consecutive upper term of four years for corporal injury on a spouse (§§ 273.5, subd. (a), 667.6, subd. (c)), plus an additional five-year term for the great bodily injury enhancement (§ 12022.7, subd. (e)). The court stayed the weapon enhancement on that charge pursuant to section 654 and imposed no time for the misdemeanor count.

the court inquired whether Borges would agree that trial could begin on January 11, 2018, or within 15 days of that date, plus a reasonable amount of extra time, no more than two weeks, if a prosecution witness were unavailable. Borges agreed.

On February 8, 2018, five days before the expiration of the extended statutory period and the day jury selection was scheduled to start, Borges informed the court he and his retained counsel, Paul Kelly, had communication problems; Borges had found a new lawyer, Diana Ivanova; and he wished to fire Kelly and retain Ivanova in the next couple days. The court asked Borges if Ivanova would be able to try the case in the next five days. Borges responded, "Probably not."

The People objected to Borges's request to discharge his counsel if it would require a continuance of the trial. The prosecutor explained the People's subpoenas had issued; critical witnesses, including the physicians who had treated Borges for her injuries, had arranged vacation dates based on trial commencing within the statutory period; and the investigating police detective was 23 weeks pregnant and planned to take an extended maternity leave beginning in June 2018. Kelly informed the court he was ready to proceed with trial as scheduled, but urged the court, in light of the seriousness of the charges, to grant Borges a continuance to allow him to retain counsel of his choice.

After advising the parties of its intent to contact Ivanova, the court, without objection, took a short recess to have its judicial assistant contact Ivanova directly and inquire about her ability to proceed to trial. Ivanova told the court Borges had not retained her; she was unaware of the timetable or the preparation required to defend him; and she would not be

prepared to go forward with the trial within the statutory period. After giving the parties the opportunity to speak with Ivanova, which they declined, the court denied Borges's request for a continuance to retain Ivanova as his new counsel. The court stated, "[T]here are a number of witnesses who have specifically set this time aside. Although it is February and the detective isn't planning to go out [on maternity leave] until June, once the detective does go out, it's going to be for a long period of time. We've had this—the case has been here for quite some time. Ms. Ivanova wouldn't be ready to try the case within the period, nor has she been retained yet. So, balancing Mr. Borges's right to choose his attorney against the orderly administration of justice, in this case, I simply cannot allow [Borges's retained counsel] to be substituted out."

b. *Governing law and standard of review*

The Sixth Amendment right to counsel of a defendant who does not require appointed counsel generally includes the ability to choose the attorney who will represent him or her. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144 [126 S.Ct. 2557, 165 L.Ed.2d 409].) This right includes the authority to discharge an attorney the defendant no longer wishes to retain (*People v. Verdugo* (2010) 50 Cal.4th 263, 310-311; *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*)), which may be exercised with or without cause. (See *Ortiz*, at p. 983 ["[t]he right to discharge retained counsel is based on "necessity in view of both the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust""]; *People v. Lopez* (2018) 22 Cal.App.5th 40, 46 [same]; see also *People v. Courts* (1985) 37 Cal.3d 784, 789-790 [[u]nderlying this right to retained counsel of one's choice "is the premise that

‘chosen representation is the preferred representation. Defendant’s confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected whenever feasible”].)

Still, the right to discharge retained counsel is not absolute. (*People v. Maciel* (2013) 57 Cal.4th 482, 512; *People v. Verdugo*, *supra*, 50 Cal.4th at p. 311; *Ortiz*, *supra*, 51 Cal.3d at p. 983.) “[T]he ‘fair opportunity’ to secure counsel of choice provided by the Sixth Amendment ‘is necessarily [limited by] the countervailing state interest against which [this] right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of “assembling the witnesses, lawyers, and jurors at the same place at the same time.”’” (*Ortiz*, at pp. 983-984; accord, *People v. Lopez*, *supra*, 22 Cal.App.5th at p. 47.) Thus, the trial court has the discretion to deny a motion to discharge retained counsel when discharge will result in “significant prejudice to the defendant [citation], or if it is not timely, i.e., if it will result in disruption of the orderly processes of justice.” (*Maciel*, at p. 512, internal quotation marks omitted; accord, *Verdugo*, at p. 311; *Ortiz*, at p. 983.)

We review a trial court’s denial of a request to discharge counsel to retain new counsel, when such a request also necessitates a continuance of the trial, for abuse of discretion. (*Ortiz*, *supra*, 51 Cal.3d at p. 984.) The trial court “must exercise its discretion reasonably: ‘a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.’” (*Ibid.*; see *People v. Courts*, *supra*, 37 Cal.3d at p. 791 [trial courts should accommodate requests for continuances to allow the



defendant to discharge and substitute retained counsel “to the fullest extent consistent with effective judicial administration”].)

c. *The court did not abuse its discretion in denying Borges’s request for a continuance to retain new counsel*

Borges contends the court acted myopically and arbitrarily in denying his request for a continuance to allow him to discharge Kelly and retain Ivanova. Borges insists the request, his first and made before jury selection began, could have been granted without disrupting the orderly administration of justice. For instance, he argues, the court could have granted a limited continuance, to March, April or early May 2018, which would have accommodated the vacation schedules of the prosecution’s physician witnesses while ensuring the estimated one-week trial could conclude well before the investigating officer’s maternity leave, scheduled for June 2018.

Borges’s suggestion for a continuance to March, April or early May 2018 is certainly reasonable on its face. However, that proposal was not made to the trial court, nor was there any indication Ivanova, even if ultimately retained, was available and could have been prepared to defend Borges on that schedule. Moreover, while it may have been possible for Ivanova to review the case file over the following few days and report back to the court with an estimate of the time she would require to be prepared to go to trial, neither Ivanova nor Borges’s counsel advanced that option; and there is no evidence in the record to indicate it was a viable alternative. The only information the court had before it in considering Borges’s request, made on the first day of jury selection, was that Ivanova had not actually been retained; there was no guarantee she would be retained; even if she were retained, Ivanova was not prepared to go to trial as

scheduled; and there was no estimate as to when Ivanova would be able to go to trial. Meanwhile, the more time that elapsed before trial, the greater the risk the People would lose a critical witness, the investigating officer.

After contacting Ivanova and acquiring as much information from her as possible, and giving counsel the opportunity to question Ivanova, the court carefully balanced Borges's right to counsel of his choice with the disruption to trial that granting Borges's request would create. On this record, the court's ruling denying Borges's request for an indefinite continuance for the purpose of potentially retaining new counsel was not an abuse of discretion. (See *People v. Keshishian* (2008) 162 Cal.App.4th 425, 429 [no abuse of discretion when trial court denied appellant's last-minute attempt to discharge counsel on date set for trial for purpose of retaining new counsel]; *People v. Turner* (1992) 7 Cal.App.4th 913, 919 ["[D]efendant sought to replace his attorney on the day of trial. This meant that the request could not be granted without causing a significant disruption, i.e., a continuance with the attendant further inconvenience to witnesses and other participants," fn. omitted]; *People v. Lau* (1986) 177 Cal.App.3d 473, 479 [The motion for substitution of counsel "was made literally the moment jury selection was to begin. As evidenced by the court's comments . . . the timeliness, or lack thereof, of the request properly concerned the court"]; cf. *People v. Lopez, supra*, 22 Cal.App.5th at p. 49 [reversing court's ruling denying defendant's unopposed request, made one week before trial, for a continuance to discharge his retained counsel and retain new counsel, because trial court failed to balance interests at issue; "the only inquiry the trial court made was into how long Hammond [(Lopez's retained

counsel)] had represented Lopez . . . and it did not explicitly weigh any concerns about the case’s progress against Lopez’s right to discharge his retained attorney”].)

2. *The Trial Court Did Not Err in Failing To Instruct the Jury on Simple Assault and Battery as Lesser Included Offenses of Inflicting Corporal Injury on a Spouse or Cohabitant*

The trial court in a criminal case has a duty to instruct the jury on all lesser included offenses if there is substantial evidence from which a jury could reasonably conclude the defendant committed the lesser uncharged offense, but not the greater. (*People v. Smith* (2013) 57 Cal.4th 232, 239; *People v. Rogers* (2006) 39 Cal.4th 826, 866-867.) This requirement “prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.” (*Smith*, at pp. 239-240.) However, “[t]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense.” (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) There must be evidence that a reasonable jury could find persuasive. (*Ibid.*; *People v. Barton* (1995) 12 Cal.4th 186, 201; see *People v. Breverman* (1998) 19 Cal.4th 142, 177 [in determining “whether evidence is ‘substantial’ in this context, a court determines only its bare legal sufficiency, not its weight” or witness credibility].)

Section 273.5 prohibits willful infliction of corporal injury on a spouse resulting in traumatic condition. “Traumatic condition” is defined expansively to mean “a condition of the body, such as a wound, or external or internal injury, . . . whether of a minor or serious nature, caused by a physical force.” (§ 273.5, subd. (d).) Simple assault (§ 240) and simple battery on

a spouse or intimate partner (§ 243, subd. (e)) are lesser included offenses of section 273.5. (See *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457 [spousal battery is lesser included offense of infliction of corporal injury on a spouse]; *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [both simple assault and battery are lesser included offenses of section 273.5].)

We review the trial court's failure to instruct on a lesser included offense de novo (see *People v. Licas* (2007) 41 Cal.4th 362, 367; *People v. Manriquez* (2005) 37 Cal.4th 547, 481), considering the evidence in the light most favorable to the defendant (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137).

Borges contends there was substantial evidence—his testimony that he did not hit, kick or otherwise apply physical force to M.B. on the date of the charged offense—to support a finding of simple assault or battery. However, if believed, that testimony would have compelled a verdict of not guilty; it would not support a conviction for battery or assault. Borges also admitted at trial that he threw the laptop charger at M.B., hitting her in the head and causing injury. Borges has cited no evidence from which the jury could have found he committed simple assault or battery, but not the greater offense of infliction of corporal injury on a spouse resulting in traumatic condition.

Relying on language in *People v. Jackson* (2000) 77 Cal.App.4th 574, 578 (*Jackson*) that section 273.5's requirement of "willful infliction" of a traumatic condition requires the injury result from "a direct application of force on the victim by the defendant," Borges asserts the undisputed evidence that he threw a charger at M.B.'s head was insufficient to support a conviction for "willful infliction" of corporal injury

because he did not directly inflict the head injury. At most, he argues, that evidence supported a conviction for simple battery; and the jury should have been so instructed as to that act of domestic violence.

*Jackson* does not stand for the strained interpretation of “willful infliction” Borges urges here. In *Jackson* the defendant pushed his girlfriend against a car. To avoid further harm, the victim moved, tripped over the curb and fell to the ground, suffering abrasions to her thigh and calf. (*Jackson, supra*, 77 Cal.App.4th at p. 576.) The defendant argued there was insufficient evidence he had “willfully inflicted” the traumatic condition. The court agreed. Distinguishing between willful infliction and proximate cause, the court concluded the defendant had not inflicted the victim’s injuries directly, even though her injuries were proximately caused by the battery. (*Id.* at p. 580.) The court found the undisputed evidence supported a conviction for the lesser included offense of intimate partner battery, but not the greater offense of infliction of corporal injury on a spouse or cohabitant. (*Ibid.*)

In contrast to the victim in *Jackson*, M.B. did not injure herself in an attempt to get away from Borges. Rather, if the jury unanimously agreed the act of throwing the charger caused the traumatic condition, the undisputed evidence established that Borges had directly inflicted that condition by throwing the charger at her head. The analysis in *Jackson* supports that conclusion. (See *Jackson, supra*, 77 Cal.App.4th at p. 580 [“[i]f the victim fell as a direct result of the blows inflicted by [the defendant], we would conclude that [the defendant] inflicted the corporal injury she suffered in the fall”].) The court did not err in

refusing to instruct the jury on the lesser included offenses of simple assault or battery.

**DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

FEUER, J.

STONE, J.\*

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\* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.