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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN EUGENE CLARK, Defendant and Appellant.	B285928 (Los Angeles County Super. Ct. No. MA068401)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed.

Lise M. Breakey, 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, Paul M. Roadarmel, Jr. and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Stephen Eugene Clark (defendant) appeals from the judgment entered upon his conviction of multiple felonies including attempted murder, aggravated assault, burglary, and torture. He contends that the sentence imposed on the burglary conviction must be stayed; that the facts underlying the determination of whether or not to stay the burglary sentence should have been made by the jury; that the trial court erred in failing to give an instruction on battery with serious bodily injury as a lesser included offense of torture; and that the conviction of assault by means of force likely to produce great bodily injury must be stricken as a lesser included offense of torture. Finding no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

Defendant was charged with eight felonies, alleged to have been committed against his wife on April 1, 2016, as follows: corporal injury to a spouse, in violation of Penal Code section 273.5, subdivision (a) (count 1)[1]; attempted murder, committed willfully, deliberately, and with premeditation, in violation of sections 664 and 187, subdivision (a) (count 2); assault with a deadly weapon, in violation of section 245, subdivision (a)(1) (count 3); assault by means of force likely to produce great bodily injury, in violation of section 245, subdivision (a)(4) (count 4); criminal threats, in violation of section 422, subdivision (a) (count 5); assault with intent to commit a felony, in violation of section 220, subdivision (a)(1) (count 6); first degree burglary of an inhabited dwelling, in violation of section 459 (count 7); and torture, in violation of section 206 (count 8). The amended information included the following special allegations: as to

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

counts 1, 2, and 3, that defendant personally inflicted great bodily injury on the victim under circumstances involving domestic violence, within the meaning of section 12022.7, subdivision (e); as to count 5, that defendant personally used a deadly weapon, a knife, within the meaning of section 12022, subdivision (b)(1); and that defendant suffered a prior felony conviction for which he did not remain free of prison custody for five years prior to the commission of the current offenses.

A jury found defendant guilty as charged, and found true all special allegations except that of great bodily injury in count 3 (assault with a deadly weapon), which had been dismissed on the prosecutor's motion prior to jury instruction. On October 24, 2017, the trial court sentenced defendant to a total prison term of 19 years 8 months, with two consecutive terms of life in prison with the possibility of parole.[2] The court also imposed mandatory fines and fees, issued a protective order, granted a total of 486 days of presentence custody credit, and ordered victim restitution in an amount to be determined.

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[2] Defendant was sentenced as follows: attempted murder, life in prison with a minimum parole eligibility of seven years, plus a consecutive term of five years pursuant to section 12022.7, subdivision (e), and one year pursuant to section 667.5 (count 2); torture, a consecutive life term with a minimum parole eligibility of seven years (count 8); burglary, a consecutive high term of six years in prison (count 7); corporal injury of a spouse, the middle term of three years, plus five years under section 12022.7, subdivision (e), imposed and stayed pursuant to section 654 (count 1); assault with a deadly weapon, a consecutive one-third the middle term of one year (count 3); assault by means of force likely to produce great bodily injury, the middle term of three years, imposed and stayed pursuant to section 654 (count 4); criminal threats, a consecutive one-third the middle term of eight months (count 5); and assault with intent to commit rape, a consecutive high term of six years (count 6).

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Latoya Clark (Latoya)[3] testified that soon after she and defendant were married in September 2015, they began to have problems. Defendant, a truck driver, was away from home for periods of time, and when he returned, he would often stay out drinking. In late October 2015, Latoya packed defendant's belongings, put them in the garage, and turned him out. However, they continued to communicate. Occasionally he would come to her residence with his children, and sometimes he spent the night. In February 2016, after defendant had come to her home intoxicated and she later saw his car at the home of a former girlfriend, Latoya changed the locks on her residence. After that, defendant lived for awhile with family in Texas, but continued to call Latoya. During the week before April 1, 2016, defendant called more than once. Latoya took the calls, but because he had been calling too often, she told him that she was not going to answer every time, while assuring him they were still friends. The night before April 1, defendant called several times, saying he felt weird, like something was going on, that he had to call his mom, and he rambled on about their relationship.

April 1, 2016, was a Friday. Although Latoya was usually off work on Fridays, she worked overtime until approximately 5:00 p.m. that day. When she got home, she poured herself a drink, and two male friends came over to visit. After one of the men left, Latoya had consensual sex with the other man, who left the home sometime later. Defendant had called Latoya earlier in the day, and after the second man left, he called again saying he

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[3] Since the victim and defendant share the same last name we will refer to the former by her first name, meaning no disrespect.

wanted to come home and though he had some money saved, he needed $189 for bus fare from Texas to California. When Latoya replied, "Okay. Keep up the good work. You're almost there," he said, "You fucking bitch," and hung up. Later, when Latoya opened her sliding patio door to let her dog into the back yard, she failed to lock the door before leaving the room. When she went to let the dog back in, she heard barking, and saw defendant come running in through the sliding door, yelling, "You didn't think that I can get back. You thought that I wasn't here," and other things. He then punched her twice in the face, held her head, and threw it into the upright mirror on the wall of the bedroom.

Latoya next remembered waking up on the floor, dazed, while defendant repeatedly punched her in the face as he laughed. Defendant asked how long she had been seeing and fucking "him." He kept repeating his questions while punching and kicking her. Defendant then dragged Latoya into the living room by her hair, while punching her face, causing her to have trouble breathing and seeing. Though Latoya tried to fight back, her arms felt heavy and seemed not to work. She also tried to get up, believing that if she stayed on the ground he would just keep punching and kicking her.

Defendant took a glass vase from a table, broke it over Latoya's head, and after she dropped to the floor and curled up, begging him to stop, he threw the console table over her head. He then threw a lamp, which broke against the back of her head. Next, defendant punched her in the chest, and continually kicked her in both her chest and face as she lay on the floor. Defendant laughed and then took her into the kitchen, where she prayed out loud, "God, don't let me die like this. Please save me." Defendant told her that no one was coming to save her, not God, nobody. He then threw her against the stove.

Latoya saw defendant walk toward the garage, and thought she then passed out for awhile. When she again became aware, she was on the floor, and observed defendant take a large bottle of hot sauce and throw its contents directly into her face and eyes, and then hit her over the head with the bottle. The hot sauce caused burning on her lips, the back of her head, and neck, as well as blinding her and causing excruciating pain in her eyes. As Latoya begged him to stop, defendant kept laughing. After she wiped her eyes, she saw defendant grab a butcher knife and say, "And don't fucken look at the knife either." While holding the knife, defendant said he would kill her, put the knife to her neck saying that he was going to fuck her like the whore that she was. He told her to take off her pants, and repeated a couple times that he would kill her. She felt the knife pressing against her neck.

Latoya thought she was going to die. She could not think straight, and every part of her body was hurting, and defendant kept punching and kicking her. Due to the pain and her fear that defendant would kill her, Latoya told him she would do whatever he wanted, but she needed water. In response defendant got a glass, put water in it, and threw the water in her face, laughing. He then threw the glass, which hit her in the head. Latoya again begged for water, and as defendant reached for another glass, she ran out the back door, screaming. As she ran, she heard the garage door open, and thinking he was coming to kill her, she did not go to the nearest neighbor's house, but went a few doors down. She did not see where defendant went.

At the neighbor's house a woman came to the door and Latoya reported that "My husband just tried to kill me. I don't want to come in. Can you call the police?" When lights came on, Latoya noticed that somehow, both her pants and underwear had come off, though she did not know where or when that happened.

Fearing defendant was in the area, Latoya asked her neighbor to turn off the lights, and crawled under a bench on the porch. When a man drove up and approached them, she asked whether there was a white car in her garage. When he said no, she thought defendant was no longer at her home. Latoya then said, "I don't want to get you guys in trouble," and went back to her house until the police arrived and she was taken to hospital.

Latoya's neighbor Crystal Guerra testified that when she heard her the doorbell ring that night, she opened her front door and saw a woman she did not recognize asking for help. The woman had no clothes on, and asked Guerra not to turn on the light. She was bloody, seemed scared, was crying, and said her husband was after her and had hurt her. As Guerra called 911, the woman left, saying she was going back for her dog.

When Los Angeles Sheriff's Deputy Kyle Dingman arrived a short while later, he saw Latoya through the open front door of her house, sitting on the floor of the hallway, propped against the wall and swaying back and forth. She was bloody, with a swollen eye, cracked lips, and blood pooling in her mouth. He spoke to her, but at first she was unable to answer and seemed to be going in and out of consciousness. She identified a phone found near front entry as belonging to the person who had assaulted her. Defendant was not found in the house or the surrounding area. After Latoya was taken to the hospital, Deputy Dingman checked the house for evidence, and found fresh blood below chairs in the living room and entryway, and at the bottom of the bathtub in the bathroom. He saw a knocked-over vase, flowers strewn on the hallway floor, and a broken lamp on the bed in the bedroom. In the kitchen, he found red spatter, later determined to be Tapatio Hot Sauce, on the counter and stove. A 12-inch bottle of Tapatio Hot Sauce was found on the floor. A butcher knife with a red substance on it was found in the garage.

Latoya testified that as a result of the beating, her eye was swollen shut, the right side of her was face disfigured, she had bruises on her back, chest, and arms, and stitches were required for her lip and forehead. She was treated by her doctor two or three times per week for several months, and during that time she had pain, vision problems, bad headaches, memory loss, and a swollen foot. She could not drive, which she needed to do for her work, and was thus unable work for five and half months. Latoya eventually moved and changed her name, workplace, and phone number.

Registered nurse Helen Withers performed a forensic exam of Latoya, taking swabs and photographs of her injuries. Withers testified at that time of the exam Latoya was leaning over in a wheelchair drooling; her eyes were swollen shut; her face and jaw were distorted; she appeared to have no neck because it was so swollen; and she could barely be heard.

Defense evidence

Sheriff's Department senior criminalist Sara Cohen-Hadria testified that she performed a DNA analysis of fluids recovered from Latoya. On some samples, defendant was excluded as a major contributor of DNA material, and on other samples, the results were inconclusive.

DISCUSSION

I. Multiple punishment

A. No violation of section 654

Defendant contends that the sentence imposed as to count 7, burglary, must be stayed pursuant to section 654.[4]

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[4] Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or

Under section 654, only one punishment is permitted for offenses that were merely the means of accomplishing or facilitating a single criminal objective. (*People v. Perez* (1979) 23 Cal.3d 545, 551; see, e.g., *Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334, 336.) "For example, the defendant in *Neal*, who attempted to murder a husband and wife by throwing gasoline into their bedroom and igniting it, could not be punished for both arson and attempted murder because his primary objective was to kill, and the arson was the means of accomplishing that objective and thus merely incidental to it." (*Perez, supra,* at p. 551.) However, "if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct. [Citations.]" (*Id.* at pp. 551-552, footnote omitted; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1212.) Thus, where defendant had both simultaneous and "similar but *consecutive* objectives" multiple punishment is permitted. (*Latimer*, at p. 1212; see, e.g., *People v. Harrison* (1989) 48 Cal.3d 321, 334-338 [consecutive]; *People v. Coleman* (1989) 48 Cal.3d 112, 162 [simultaneous].)

"Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance. [Citation.]" (*People v. Beamon* (1973) 8 Cal.3d 625, 636.) "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad

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omission be punished under more than one provision." (§ 654, subd. (a).)

latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see also *People v. Brents* (2012) 53 Cal.4th 599, 618.)

Burglary is the entry into a dwelling with the intent to commit larceny or any felony. (§ 459.) The trial court instructed the jury in relevant part that "[a] burglary was committed if the defendant entered with the intent to commit inflicting injury on a spouse, attempted murder, assault with a deadly weapon, assault by means likely to produce great bodily injury, criminal threats, assault with intent to commit spousal rape, and/or torture. The defendant does not need to have actually committed [the enumerated offenses] as long as he entered with the intent to do so. . . . You may not find the defendant guilty of burglary unless you all agree that he intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes he intended."

Defendant argues that the jury instructions leave no doubt that the burglary conviction was based on an intent to commit one the enumerated crimes, and thus the jury found that defendant entered the house with one or all of these intents. Defendant asserts that the evidence demonstrates that there was no other reason or separate criminal intent for the burglary, and he concludes that there was thus no support for the trial court's implied finding of separate intent. Defendant relies on the rule stated in *People v. Islas* (2012) 210 Cal.App.4th 116, 130: "When a defendant is convicted of burglary and the intended felony

underlying the burglary, section 654 prohibits punishment for both crimes. [Citations.]"

The trial court's clear implication at sentencing was that it found the basis of the burglary conviction to be defendant's intent to assault his wife, as charged in counts 1 and 4.[5] The court recounted the evidence that defendant called the victim earlier in the day claiming he was in another state, as well as the circumstances suggesting that he was outside watching the victim, had seen her male friends leave, and was lying in wait for a time that she could be caught completely unaware. In addition to the facts cited by the court, and as defendant observes, the assault began immediately upon defendant's entry into the house, indicating that he entered with the intent to assault his wife.

After reciting the facts indicating defendant's intent upon entry, the trial court then sentenced him to the middle term of three years as to each of two assault charges, and stayed the sentences pursuant to section 654. Count 1 charged a violation of section 273.5, subdivision (a), which prescribes punishment of two, three, or four years, and count 4 charged a violation of section 245, subdivision (a)(4), which also carries a punishment of two, three, or four years. The punishment prescribed for burglary is two, four, or six years. (§ 461, subd. (a).) The court thus appropriately selected burglary as "the provision that provides for the longest potential term of imprisonment" and imposed but stayed the shorter terms for counts 1 and 4. (§ 654, subd. (a).) The trial court did not, as defendant contends, impose unstayed sentences for both the burglary and the intended felony underlying the burglary.

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[5] The court found the assault with a deadly weapon in count 3 to be a separate offense for purposes of section 654.

B. No Apprendi *violation*

Defendant contends that the trial court's factfinding for purposes of section 654 as discussed above, violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490; see also *Cunningham v. California* (2007) 549 U.S. 270, 281 (*Cunningham*); *Blakely v. Washington* (2004) 542 U.S. 296, 303.) He argues that the court was not authorized to impose any sentence for burglary without a jury finding regarding defendant's intent upon entering his wife's home.

Such a contention has been rejected by all California courts considering the issue, holding that *Apprendi*'s requirement that the jury make certain factual findings does not apply, as section 654 operates to *decrease*, not increase, the punishment for a crime. (*People v. Deegan* (2016) 247 Cal.App.4th 532, 546-550 (*Deegan*); *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1229-1230; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021-1022; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 266-270; *People v. Morelos* (2008) 168 Cal.App.4th 758, 770.) "'Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively "reduces" the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict.' [Citation.]" (*Solis*, at pp. 1021-1022, quoting *People v. Cleveland*, at p. 270.)

Defendant cites no contrary authority, but argues that his contention is supported by the following "bright line rule" of *Cunningham*, which defendant quotes at length, but which contains no language related to stayed or unstayed sentences, or to section 654.[6] However, two years after *Cunningham* the Supreme Court rejected an analogous *Apprendi* challenge in *Oregon v. Ice* (2009) 555 U.S. 160. There, as pointed out in *Deegan*, the court upheld an Oregon statute which provided that sentences were to run concurrently unless the *judge* found certain facts justifying consecutive sentences. The Oregon statute involved judicial factfinding similar to that involved in a determination under section 654, permitting consecutive sentences if multiple offenses did not "'arise from the same continuous and uninterrupted course of conduct.'" (*Oregon v. Ice*, *supra*, at p. 165; Or. Rev. Stat. § 137.123.) Due to such similarity to section 654's factfinding, and the California Supreme Court's observation that there is "'little practical difference between imposing concurrent sentences . . . and staying sentence,'" the court in *Deegan* concluded that "neither the California Supreme Court nor the United States Supreme Court would hold *Apprendi* applies to trial courts' findings of facts under section 654."

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[6] In the quoted passage, the Supreme Court stated that "'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," . . . and the judge exceeds his proper authority.' [Citations.]" (*Cunningham*, *supra*, 549 U.S. at page 283.)

(*Deegan, supra*, at pp. 549-550, quoting *People v. Jones* (2012) 54 Cal.4th 350, 353.) We agree with the very thorough analysis of this issue in *Deegan*, as well as its conclusion, and reject defendant's constitutional challenge.

II. Battery instruction was not required

Defendant contends that the trial court erred in failing to give an instruction on battery with serious bodily injury as a lesser included offense of torture.[7]

A trial court must instruct on all lesser *included* offenses that are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162-163.) Torture is the infliction of great bodily injury upon the person of another, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. (§ 206.) "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) "'[B]attery is not a lesser included offense of torture because torture can be committed without touching, force, or violence, which are required elements of battery. For example, torture exists not only where there is direct infliction of injury, but also where injury results from enforced deprivation, such as withholding food and water, causing starvation.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 684 (*Jennings*), italics omitted, quoting *People v. Lewis* (2004) 120 Cal.App.4th 882, 887 (*Lewis*).) A trial court is therefore not required to instruct the jury on battery as a lesser included offense of torture. (*Lewis*, at p. 888.)

Defendant contends that *Lewis* and *Jennings* were wrongly decided. He argues that torture cannot be committed without

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[7] The trial court refused defendant's requested instruction, and found aggravated battery to be a lesser-related, not a lesser included offense of torture.

also committing aggravated battery, because "the infliction of pain required for torture necessarily includes the commission of an act resulting in an unlawful touching of the victim, and since torture cannot be committed without also inflicting serious bodily injury." Defendant relies on Justice Armstrong's dissenting opinion in *People v. Jung* (1999) 71 Cal.App.4th 1036, 1043, as support for this argument, yet we found nothing there to support defendant's position. Moreover, the majority opinion acknowledged that "[s]ection 206 expressly eliminates the pain of the victim as an element of the offense." (*Id*. at p. 1042.)

It is unnecessary to agree or disagree here with defendant's claim that *Lewis* and *Jennings* were incorrectly decided, as we reach similar contentions in section III of this Discussion, *post*. Even assuming the trial court erred here, any such error was harmless. "'[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836].' [Citations.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) "'[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*Ibid*.)

Defendant contends that the jury could reasonably have found that the continuous beating followed by the application of hot sauce into the victim's wounds and eyes were prompted by anger, not revenge. He points to Latoya's testimony that defendant attacked her the instant he got into the house and repeatedly asked, "How long have you been fucking him? How long have you been seeing him?" Defendant also points to the prosecutor's closing argument in which it was observed that defendant had been throwing "every object he could get his hands on." Defendant then argues that the hot sauce was simply

another object in plain sight that he impulsively grabbed in anger.

Defendant was probably angry, but his words also indicate jealousy, and the circumstances demonstrate a vengeful motive, as defendant entered the house shortly after the departure of Latoya's male friend, demanding to know how long she had been having sex with him. The beating began immediately. If defendant was merely expressing his anger, the relentless beating coupled with defendant's laughter suggests that he was doing so in a sadistic fashion. Upon entering her house, defendant knocked Latoya's head against a mirror, and then *laughed* as he repeatedly punched her in the face. He dragged her by her hair into the living room, broke a lamp over her head, punched her, kicked her, and *laughed*. Defendant may have grabbed the hot sauce bottle simply because it was convenient, but he then proceeded to pour the contents of the bottle into Latoya's eyes and wounds. As she begged him to stop he *laughed*. When she begged for water for her eyes, defendant tormented her by filling a glass and then throwing the water at her face while he *laughed*.

It is difficult to conceive of more compelling evidence of defendant's purposeful sadism than such laughter while relentlessly inflicting pain on his victim. Indeed, it provided such overwhelming evidence of defendant's sadistic purpose that we conclude that there is no reasonable probability that the verdict would have been different if the jury had been instructed that it could find defendant guilty of battery with serious bodily injury as a lesser offense to that of torture.

III. No prohibited multiple convictions

Defendant contends that assault by means of force likely to produce great bodily injury is a lesser included offense of torture,

and that his conviction of the former offense must therefore be stricken.

"If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Cole* (1982) 31 Cal.3d 568, 582.) "'[O]nly a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1229 (*Reed*).) To determine whether one charged offense is necessarily included within another charged offense, we apply the "elements" test, under which "if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. (*Id*. at pp. 1227-1229.)

The jury found defendant guilty of assault by means of force likely to produce great bodily injury in violation of section 245, subdivision (a)(4), which is defined as an assault upon the person of another "by any means of force" likely to produce great bodily injury. The jury also found defendant guilty of torture, in violation of section 206. Neither the word "force" nor any synonym of the word is mentioned in section 206, which instead defines torture as the infliction of great bodily injury on the person of another, "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (§ 206; *Lewis, supra*, 120 Cal.App.4th at p. 888.)

Thus, as we discussed in the previous section, torture can be committed without force. "'For example, torture exists not only where there is direct infliction of injury, but also where injury results from enforced deprivation, such as withholding food and

water, causing starvation.' [Citation.]" (*Jennings, supra*, 50 Cal.4th at p. 684, italics omitted, quoting *Lewis, supra*, 120 Cal.App.4th at p. 887.) Defendant argues that *Lewis* is flawed because, as he reasons: "In the great majority of cases, it would be impossible to inflict great bodily injury, even via deprivation of food and water, without also using some degree of force." Defendant cites no examples, and regardless, we are not concerned with what evidence might be presented as to the means of torture in this or other cases, but instead must look only to the *statutory elements* of the offense. (See *Reed, supra*, 38 Cal.4th at pp. 1227-1229.)

Defendant relies on the following dictum in *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1043: "[A]n assault by means of force likely to produce great bodily injury is arguably an included offense within the crime of torture." Defendant's reliance on that case is not helpful, as the issue there was whether assault *with a deadly weapon* was a lesser included offense of torture, and the court conducted no analysis regarding assault by means of force likely to produce great bodily injury. (*Id*. at pp. 1038-1039, 1041-1045.)

Defendant also suggests that *Jennings* and *Lewis* are not persuasive, because they are not directly applicable to the issue of multiple convictions. Defendant prefers the definition of torture discussed in *People v. Barrera* (1993) 14 Cal.App.4th 1555, which also did not involve multiple convictions. Defendant suggests that the following statement in *Barrera* shows that force is an element of torture: "'Torture combines a specific state of mind with a particular type of *violent conduct* causing significant personal injury.'" (*Id*. at p. 1564, defendant's italics.) The discussion in *Barrera* was not intended to define any *statutory* element of torture, but rather to illustrate the court's conclusion that section 206 was not unconstitutionally vague. (*Barrera*, at

pp. 1563-1564.) To do so, the court discussed the *dictionary* definition which was judicially accepted at a time *prior to the enactment of section 206*,[8] as stated in two earlier judicial opinions. (*Barrera*, at pp. 1563-1564, citing, e.g., *People v. Heslen* (1945) 163 P.2d 21, 27, opinion vacated on rehearing by *People v. Heslen* (1946) 27 Cal.2d 520 and *People v. Tubby* (1949) 34 Cal.2d 72, 76-77.) There was no mention of violent conduct or force in the two opinions or in the preenactment dictionary definition of torture, quoted in *Barrera* as, "'"Act or process of inflicting severe pain, esp. as a punishment in order to extort confession, or in revenge." (Webster's New Int. Dict. (2d ed.).)'" (*Barrera, supra*, at p. 1563.) The *Barrera* opinion unnecessarily added the words "violent conduct" to its summary of the preenactment dictionary definition. Defendant's reliance on *Barrera* is thus unavailing.

We conclude that assault by means of force likely to produce great bodily injury is not a lesser included offense of torture, and the two convictions did not constitute prohibited multiple convictions.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

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[8] Section 206 was enacted by Proposition 115 in 1990.