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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JERMAINE JACKSON,

Defendant and Appellant.

B277034

(Los Angeles County
Super. Ct. No. BA405690)

APPEAL from an order granting probation of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Vacated and reversed and remanded with directions.

Nasatir, Hirsch, Podberesky & Khero and Vicki I. Podberesky 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 Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

At trial, the jury found defendant Jermaine Jackson guilty of three counts of misdemeanor simple assault (Pen. Code, § 240; counts 1, 4, 5),¹ which is a lesser included offense of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), a felony, charged in counts 1 and 4, and of assault by a public officer (§ 149), a felony, charged in count 5 of the amended information.² The trial court suspended imposition of sentence and placed defendant on probation for one year and ordered as a condition of probation that he attend 12 classes of “anger management counseling level 1,” subject to approval by the probation office. Defendant appeals from the order placing him on formal probation. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087–1088.)

Defendant contends his convictions for misdemeanor simple assault in counts 1, 4, and 5 must be reversed, because they are barred by the applicable statute of limitations; he did not expressly waive the bar of the statute of limitations; and he neither sought nor acquiesced in the jury instructions for such lesser included offenses which were given sua sponte by the trial

¹ All further section references are to the Penal Code.

² In addition to counts 1, 4, and 5, the amended information also charged defendant in counts 2 and 8 with assault by a public officer (§ 149); in counts 3, 6, and 9 with filing a false report (§ 118.1); and in count 7 with assault by means of force likely to inflict great bodily injury (§ 245, subd. (a)(4)). The jury acquitted defendant as to the above felony offenses charged in counts 1 through 9 and the lesser included charges of simple assault, a misdemeanor, in counts 7 and 8, in which Jonathan Murray was the alleged victim.

court. The People concede reversal is appropriate based on the bar of the statute of limitations. As discussed below, we agree.

BACKGROUND

As relevant here, in a felony complaint filed December 13, 2012, defendant was charged with committing an assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), a felony, on Cesar Campana “[o]n or about December 31, 2009” (count 1) and on Derek Griscavage “[o]n or about December 25, 2010” (count 4) and with committing an assault by a public officer (§ 149), a felony, on Griscavage “[o]n or about December 25, 2010” (count 5). The first amended information filed July 29, 2014, carried forward these same charges.

1. *Prosecution evidence*³

We recount the evidence pursuant to the usual standard of review. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) On December 31, 2009, and December 25, 2010, defendant was a Los Angeles County Sheriff’s deputy.

On December 31, 2009, defendant was working in the lock-up of the Compton courthouse. He walked inmate Campana from a Compton courthouse interview room to the lock-up area. As they approached the cell, Campana planted his feet and refused to move as defendant tried to move him toward the cell. Campana did not want to be “locked up in a dark space.” Campana head-butted defendant, and defendant and another deputy, Alissa Mills, forced Campana to the ground. Defendant struck Campana on his ribs and stomach and kicked him in the head. Deputy Mills, who attempted to assist defendant, testified

³ We omit a detailed statement of the facts underlying the convictions because it is unnecessary to our determination of the legal issues presented on appeal.

she did not see anything that would warrant defendant's use of force, nor did she feel she was in danger, because Campana was face-down and his hands were cuffed. Campana was not trying to fight anyone. Campana, who was bruised and had head lacerations, was taken to the hospital.

On December 25, 2010, defendant was working at Twin Towers Correctional Facility. During a security check, when defendant was not in the area, Griscavage, also known as Derek Archambeau, refused to kneel or take a seat, which was required for safety reasons. Cynthia Esparza, a Twin Towers custody assistant, and Deputy Karen Cring contacted defendant for assistance in handling Griscavage, whom they described as uncooperative and disruptive.

Defendant suggested a search of Griscavage and his cell. Defendant placed Griscavage, who had been playing dominoes in the dayroom, against a glass door or window for a pat down search and ordered him to interlace his fingers behind his back. After Griscavage separated his feet, defendant kicked them apart wider than necessary and began to search him. Griscavage appeared angry.

As defendant walked behind Griscavage and escorted him through the indoor recreation area, Griscavage kicked a metal door open, moving backwards into defendant. In order to avoid falling, using Griscavage's body as a ram, defendant "powered forward" through the doorway. Griscavage threw his elbow into defendant, and defendant then punched Griscavage in the face. Griscavage fell to the floor unconscious.

The People's expert testified at trial about the policy of the Sheriff's department regarding the use of force and about

defendant's use of force in the Campana and Griscavage incidents.

2. Defense evidence

Defendant testified in his own defense. He described both incidents in detail and explained why his actions were reasonable. With respect to the incident involving Campana, defendant believed his use of force was reasonable and necessary to protect the security and safety of the lockup facility of the courthouse. Subsequently, he was advised his use of force had been within the department's policy.

With regard to the Griscavage incident, he explained the actions he took were necessary to protect himself from Griscavage's attack. Defendant believed his use of force was reasonable, and he was not disciplined for his use of force in this instance.

DISCUSSION

1. Applicable Legal Principles

Simple assault (§ 240) is a lesser included offense of assault with force likely to inflict great bodily injury (§ 245, subd. (a)(4)), a felony, charged in counts 1 and 4. (*People v. Yeats* (1977) 66 Cal.App.3d 874, 879.) Simple assault also is a lesser included offense of assault by a public officer (§ 149), which was the charge in count 5.

Simple assault (§ 240), a misdemeanor, has a one-year statute of limitations. (§ 802; see also, *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1143 (*Stanfill*)). The statute of limitations applicable to the charged greater offenses is of no import. "The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the

limitation of time applicable to the greater offense.” (§ 805, subd. (b).)

The bar of the statute of limitations is not a matter of fundamental subject matter jurisdiction. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 374 [a “defendant should be able to waive the statute of limitations”].) Nonetheless, a defendant cannot through *inadvertence* forfeit the bar of the statute of limitations. Absent an express waiver, a defendant may raise this bar “‘at any time,’” e.g., for the first time on appeal. (*People v. Williams* (1999) 21 Cal.4th 335, 337–338.) On the other hand, the right of a defendant to challenge on appeal a conviction of a time-barred lesser included offense is forfeited in the situation “where the charged offense was *not* time-barred and the defendant either requested or acquiesced in the giving of instructions on the lesser offense.” (*Stanfill, supra*, 76 Cal.App.4th at p. 1150, italics added; cf. *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1089–1090.)

2. Bar of Statute of Limitations Mandates Reversal and Dismissal

As the parties point out: The Campana incident occurred on December 31, 2009; the Griscavage incident occurred on December 25, 2010; but the felony complaint was not filed until December 13, 2012, which is a date beyond the applicable one-year statute of limitations period.

The parties also agree the trial court had no duty to instruct on a time-barred lesser included offense. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283.) Further, defendant did not seek instruction on simple assault as a lesser included offense. During a discussion of jury instructions, the trial court, sua sponte, proposed instructing on simple assault as a lesser

included offense. Defense counsel objected: “We don’t want it, Your Honor.” When the court persisted, defense counsel responded, “Just so it’s clear, we’re not requesting a lesser.”

The trial court then instructed on simple assault, over defendant’s objection. Defendant contends his counsel’s resistance to instruction on simple assault as a lesser included offense reflects he “neither requested the [instruction on the] lesser included offense nor acquiesced to it.” The People concede defendant “did not request or acquiesce in the instructions on simple assault” and that “[h]is convictions for assault must therefore be reversed.” Based on our review of the record, we accept the People’s concession.

DISPOSITION

The order placing defendant on probation is reversed, and the matter is remanded to the trial court with directions to vacate defendant's convictions for misdemeanor simple assault in counts 1, 4, and 5 and dismiss the charges.

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EDMON, P. J.

We concur:

LAVIN, J.

STONE, J.*

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