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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. IGNACIO LOMBARD GARCIA, Defendant and Appellant.	B252426 (Los Angeles County Super. Ct. No. VA125811)

APPEAL from a judgment of the Superior Court of Los Angeles County. Brian F. Gasdia, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

In a 12-count information, appellant Ignacio Lombard Garcia was charged with 10 counts of aggravated sexual assault of a child under the age of 14 (Pen. Code, § 269, subd. (a)(1))[1] (counts 1-10) and two counts of forcible rape (§ 261, subd. (a)(2)) (counts 11 & 12). All counts named the same victim, appellant's stepdaughter V. On counts 1, 2 and 3, the jury found appellant guilty of the lesser included offense of simple assault (§ 240), a misdemeanor, and found him not guilty of all 12 counts as charged. The trial court sentenced appellant to serve three consecutive sentences of 180 days in county jail. Appellant was given 832 days of presentence custody credit, which meant that his sentence amounted to time served.

Appellant contends that (1) his convictions are time-barred, (2) there was instructional error, and (3) insufficient evidence supports his convictions. We disagree and affirm.

FACTS

Prosecution Case

At the time of trial, V. was 18 and had just completed high school. Thirty-seven-year-old appellant was her stepfather. He came into her life when she was around six years old while staying in Mexico on vacation with her mother, T.G.

V. testified about two forms of abuse by appellant—physical beatings and sexual acts. First, she testified that when no one was around, appellant would "hit" and "punch[]" her in the stomach and face, most often when they were alone in the car. Appellant would tell her to put her hands behind her head and would punch her in the stomach with his fist, as punishment for misbehaving. This happened two to three times a week. About 10 to 15 times while still in Mexico, appellant punched her so hard in the stomach that she was "knocked out," waking up about five minutes later. V. never told anyone. Appellant would also hit her in the face, using the back of his hand. He would hit her in the face and the stomach in the same car trip. She cried every time he hit her.

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

No marks were ever left, except one time he "busted" her lip and she had to use an ice pack, but her mother was out of town.

V. also testified that while her family was still living in Mexico, appellant began touching her sexually. He would come up behind her and touch her chest over her clothes. Sometimes he would punch her if she resisted.

When V. was eight years old in the third grade, her family moved to her maternal grandparents' house in Whittier, California, where they lived for about six months. Appellant did not touch her in a sexual manner during this time because there was usually someone else around. However, he continued to physically beat her in the car, by hitting her in the face and punching her in the stomach, two to three times a week.

The family moved to La Mirada when V. was nine years old turning 10 and in the fifth grade. Her mother had just given birth to V.'s second brother. V. had her own bedroom and appellant began touching her sexually. He would come into her room at night, make her come down from her bunk bed, pull her pajama pants down forcefully, bend her over a purple chair holding her neck down, and put his penis into her vagina. Appellant did this two to three times a week. V. cried every time from the pain. Appellant would hit her on her side if she tried to resist or made too much noise. Appellant would hit her "[a]lmost every time" he sexually abused her. She did not notice any bleeding. Sometimes appellant would open the door while she was showering and touch her breasts. Appellant also continued to hit her in the car while they lived in La Mirada.

The family moved to Murrieta when V. was turning 12 and about to finish seventh grade. V. had her own room with a regular bed. Appellant would come into her room at night, get in bed with her, pull her pajama pants down, and insert his penis into her vagina. He did this two or three times a week. If she made too much noise trying to squirm away, appellant would hit her on the side of her face. Twice appellant took her into the garage and raped her while bending her over a couch. Appellant still hit her in Murrieta. Once he hit her in the house in front of her brother leaving a mark on her cheek. Her mother noticed and argued with appellant about it.

V. testified that both the sexual abuse and the physical abuse that was "not related to the sexual abuse" stopped in September or October 2010, when appellant and her mother started having marital problems and V. got a boyfriend, Jacob L. ("Jake"). In July 2011, V. told Jake over the phone that appellant sexually abused her. The following morning, on August 1, 2011, Jake told V.'s mother, who asked her if it was true. V. said yes, but did not provide details. V. never told anyone before, including her mother, because she was afraid appellant would hurt her family. She had seen appellant hit her mother two or three times and had called 911 in 2008 when appellant hit and grabbed her mother. V.'s mother immediately took her to the police station on August 1, 2011, and V. was interviewed by detectives. She admitted on the stand that she had lied to detectives when she said that she and Jake had not had sex.

After the abuse was reported, criminalist Kristina Fritz examined several areas in the Murrieta house. She identified three possible semen stains—two in the carpeting of V.'s bedroom and one on the bathroom door. The criminalist also identified one possible semen stain on the box spring and one possible stain on the bed skirt. The parties stipulated that no semen stains were located on the purple chair.

Criminalist Luis Olmos determined that both samples from the carpeting contained sperm cells consistent with two donors, with the major contributor being appellant. He explained: "The DNA profile from the sperm fraction matches the profile from Ignacio Garcia." The random probability of this profile occurring in the population was one in 62.3 quadrillion. The sample found on the bathroom door did not match appellant's profile. No semen was found on the bed skirt and appellant was excluded as a contributor to the semen found on the box spring.

Defense Case

Dr. Steven Gabaeff practiced emergency medicine for 25 years, including sexual assault examinations prior to the time that nurses began conducting these examinations. Dr. Gabaeff, who did not physically examine V., would expect a 10-year-old subjected to intercourse with an adult man to suffer massive bleeding, vaginal ripping with significant scarring requiring surgery and considerable time for healing, extreme pain, and

permanent damage to the hymen. Dr. Gabaeff reviewed the results of a physical examination of V. performed on September 8, 2012, which indicated that she had normal appearing genitalia and an intact hymen. This was completely inconsistent with hundreds of acts of reported sexual abuse. Dr. Gabaeff also testified that if a child between ages 8 to 15 were struck in the belly two to three times a week with force by an adult man, Dr. Gabaeff would expect to find significant injuries, including ruptured intestines, bruises, broken bones, and difficulty eating. It was not plausible that such beatings could occur without any signs of injury. If a child were hit hard enough to be knocked out, the odds of people around the child not noticing would be virtually zero.

On August 1, 2011, Murrieta Police Detective Kelly Sik interviewed V., who reported that appellant inappropriately touched her while they lived in Mexico. While the detective did not recall V. talking about being punched in the stomach while they lived in Mexico, a videotape of the conversation revealed that V. did discuss physical abuse in Mexico. V. told the detective that fondling occurred when they moved to Whittier. V. also discussed a single occasion when she was punched in the stomach. V. told the detective that the rapes began in 2004 and occurred about 20 times in Whittier and 15 to 20 times between 2005 and 2012 in Murrieta. The detective formed the impression that the majority of the rapes occurred on the purple chair in V.'s room.

Several of appellant's friends testified that he appeared to be a good father and that V. appeared to be happy and unafraid of him. Appellant's neighbor testified that V.'s mother had an affair with a married man, and that V. seemed happy and unafraid of appellant. A 16-year-old neighbor never heard V. say anything derogatory, mean, or angry about appellant.

In January 2012, while appellant and V.'s mother were going through a divorce, appellant filed papers asking for half the house, child support, and visitation. V.'s mother requested a restraining order, citing V.'s allegations. A permanent restraining order was denied.

Appellant testified on his own behalf. He married V.'s mother in 2001. He denied assaulting V. physically or sexually. While V. described being assaulted by appellant

while he was driving her to school, appellant stated that he rarely, if ever, drove V. to school because of the hours he worked. On cross-examination, appellant stated that his semen was found in V.'s bedroom because he had intercourse with her mother in that room.

Prosecution Rebuttal

The forensic nurse who performed a gynecological examination on V. on September 8, 2012, concluded that it was a healthy, normal adolescent examination; she did not see any sign of massive trauma to V.'s genitals. However, in a non-acute examination, it is rare to find injuries to the genitalia.

When a social worker was investigating a claim of domestic abuse by appellant against V.'s mother in August 2008, and interviewed V. privately at her school, V. denied being physically or sexually abused by appellant.

DISCUSSION

I. Appellant Has Forfeited His Challenge Regarding the Statute of Limitations

In counts 1, 2 and 3, appellant was charged with the felony of aggravated sexual assault of a child (§ 269, subd. (a)(1)), during the two-year period from May 29, 2004, through May 28, 2006, in the United States. The incidents of sexual abuse were not reported to the police until August 1, 2011. As to these counts, the jury convicted appellant of misdemeanor simple assault (§ 240), as a lesser included offense of the charged felonies. The statute of limitations on these misdemeanors is "one year after commission of the offense." (§ 802, subd. (a).) Appellant contends that these convictions are time-barred and must be dismissed. The People counter that appellant has forfeited his right to complain because he requested the jury be instructed on the lesser included offense.

A. Relevant Background

After both parties rested, during a discussion regarding jury instructions, the following exchange took place:

"[THE COURT]: Is there, in the list of mandatory jury instructions dealing with [section] 269(a) as a sexual assault of a child, one of the—is simple assault required?

"[PROSECUTOR]: I don't believe that it's required. The reason being is that even though it is a lesser included, it is a misdemeanor, and the charges in this case fall outside the statute of limitations. So unless that's something specifically requested by the defense, it would not otherwise be an issue presented to the jury.

"[DEFENSE COUNSEL]: The defense is going to request it out of the modicum of caution, Your Honor.

"[THE COURT]: On [section] 269(a), the court's required to give [CALCRIM Nos.] 1000 and the 1123 as requested. That's the elements of the offense. Intent is general intent which is part of the instructions, the agreed-upon instructions. The third requirement is that assault is a lesser included offense and that [CALCRIM No.] 915 does need to be given. [¶] I don't think I can avoid giving it. The danger, of course, is then you get into the whole victim of the backhanding and all the hitting and not the rape. I guess they could.

"[PROSECUTOR]: I'm not—if the defense has made the request, and the defense has, I don't believe that there is anything else I would be able to say to that.

"[THE COURT]: Okay.

"[PROSECUTOR]: It's at the defense's request.

"[THE COURT]: Can—

"[DEFENSE COUNSEL]: And, Your Honor, since it's sua sponte, I don't want to be criticized for not asking for it.

"[THE COURT]: It does appear to be sua sponte. So whether you were asking for it or not, I think I have to give it.

"[DEFENSE COUNSEL]: Okay.

"[THE COURT]: I think I have to give the elements, I have to give the general intent, and [section] 240 is a lesser included. [¶] So the CALCRIM [No.] 915, so the court would—will print that up and make whatever deletions that are agreeable with counsel.

"[PROSECUTOR]: And I'm not objecting to any sua sponte instructions in case there is any confusion on that.

"[THE COURT]: Understood. Okay."

B. Analysis

A defendant can generally assert the statute of limitations at any time. (*People v. Williams* (1999) 21 Cal.4th 335, 337–338 (*Williams*).) As the California Supreme Court has explained, "a defendant may not inadvertently forfeit the statute of limitations and be convicted of a time-barred charged offense." (*Id.* at p. 338.) This same rule applies where the defendant is convicted of a time-barred lesser included offense. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1089–1090.)

However, "a defendant forfeits the right to complain on appeal of conviction of a time-barred lesser included offense where the charged offense was not time-barred and the defendant either requested or acquiesced in the giving of instructions on the lesser offense. In other words, a defendant must raise the issue in the trial court in order to preserve it for appeal. . . . This rule of forfeiture does not detract from the advice of the Supreme Court in *Cowan* [*v. Superior Court* (1996) 14 Cal.4th 367 (*Cowan*)] and *Williams* that trial courts and prosecutors should, whenever instructions on lesser included offenses are considered, determine whether there may be a problem with the statute of limitations and, if so, elicit a waiver of the statute as a condition of giving the instruction. [Citations.]" (*People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1150 (*Stanfill*).)

Here, the defense both requested and acquiesced in the giving of the lesser included assault instruction. Immediately after the prosecutor informed the trial court that the lesser offenses "fall outside the statute of limitations," defense counsel specifically requested the instruction, and then did so again later. When the prosecutor stated more than once that the instruction was being given at the defense's request, defense counsel did not correct him. And when the trial court stated that it felt it had a sua sponte duty to give the instruction, regardless of whether the defense requested it, defense counsel merely responded, "Okay," without objecting that a trial court has no sua sponte duty to instruct on a time-barred offense. (*Cowan, supra,* 14 Cal.4th at p. 376.)

Accordingly, we reject appellant's argument that he cannot be deemed to have requested or acquiesced in the giving of the instruction on the time-barred lesser assault offense.

Appellant also complains that the trial court did not elicit from him an express waiver of the statute of limitations. While this would have been the better course, the *Stanfill* court explained: "Without a rule that acquiescence or failure to object acts as a forfeiture, the defendant may remain quiet about a limitations problem, avoid the ritual of formal waiver and then, as an ace up his sleeve, secure reversal on the theory that he never expressly waived. This is an unconscionable result that calls for a forfeiture rule." (*Stanfill, supra*, 76 Cal.App.4th at p. 1148.)

We therefore find no basis for dismissing the assault convictions based on appellant's contention that the convictions are time-barred.

II. No Instructional Error

Appellant contends the trial court committed two instances of instructional error: (1) there was no substantial evidence to support giving the instruction on the lesser included assault offense because the evidence supported only aggravated sexual assault convictions or no guilt at all, and (2) the trial court failed to clarify that the lesser assault offense could only be found within the actions leading to the charged sexual abuse, not the physical beatings that were separate and apart from the alleged sexual abuse. Because appellant has forfeited his right to raise these contentions, we do not reach the merits.

First, defense counsel specifically requested the instruction on the lesser included assault offense. A defendant may not take advantage of errors created by tactical decisions of defense counsel. The doctrine of invited error prevents a defendant from successfully appealing a conviction where counsel has intentionally requested action by a trial court that is later determined to be an error by the court. (*People v. Barton* (1995) 12 Cal.4th 186, 198 ["when the trial court accedes to the defendant's wishes, the defendant may not argue on appeal that in doing so the court committed prejudicial error, thus requiring a reversal of the conviction"]; *People v. Duncan* (1991) 53 Cal.3d 955, 969 ["But the doctrine of invited error will operate to preclude a defendant from gaining

reversal on appeal because of such an error made by the trial court at the defendant's behest"].)

Second, as appellant concedes, defense counsel did not request any clarifying instructions. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) Thus, even though the trial court noted that the jury could base an assault finding on the "backhanding and all the hitting and not the rape," defense counsel did not ask for instructions clarifying that the jury could not consider any physical beatings separate and apart from the sexual abuse.

III. Substantial Evidence Supports Appellant's Assault Convictions

Appellant contends there was insufficient evidence to support his assault convictions.

A defendant raising a claim that the evidence was insufficient to support his conviction bears a "massive burden" because this court's "role on appeal is a limited one." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Hoang* (2006) 145 Cal.App.4th 264, 275.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

There is no dispute that assault is a lesser included offense of aggravated sexual assault and rape.[2] Appellant argues that the prosecution's case rested entirely on V. and

[2] The jury was instructed on simple assault with CALCRIM No. 915 as follows:

that either the jury believed her testimony, in which case he would be guilty of the charged offenses of aggravated sexual assault and rape, or it did not believe her, in which case he would not be guilty at all. Appellant is mistaken. "The jury is the ultimate judge of credibility. The jury may find a witness is credible in some respects and not in others; it may believe parts of a witness's testimony without believing all of it." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1029.) "On appeal, we must accept that part of the testimony which supports the judgment." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

"As a lesser included offense to those the defendant is charged with in counts 1-12 is assault (in violation of Penal Code section 241(a)).

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;

"2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"[AND]

"4. When the defendant acted, he had the present ability to apply force to a person.

"Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

"The touching can be done indirectly by causing an object to touch the other person.

"The People are not required to prove that the defendant actually touched someone.

"The People are not required to prove that the defendant actually intended to use force against someone when he acted.

"No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was]."

V. testified that every time appellant raped her, he also hit her. She testified that appellant raped her two to three times a week for several years which, as the defense noted in closing argument, would amount to around 1,500 times. Given the lack of corroborating medical and DNA evidence, the jury could have believed that appellant assaulted V. but that she was either exaggerating what he did to her or there was simply not sufficient proof of the sexual nature of the assaults. "'[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357–358.)

The test on appeal is not whether the evidence of guilt is overwhelming, but whether, when viewed in the light most favorable to the judgment, the evidence is reasonable, credible, and of solid value. This is not a case where we feel compelled to conclude that under no hypothesis whatsoever is there substantial evidence to support the verdicts.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.*
FERNS

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