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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
MICHAEL LEWELLING,
Defendant and Appellant.

A154942

(San Francisco County
Super. Ct. No. C1102417)

This is the second appeal by defendant Michael Lewelling, one of three deputy sheriffs assigned to provide security at the emergency department of San Francisco General Hospital, a department with a diverse and unpredictable, if not chaotic, patient population. Requested by the nursing staff to remove a problem patient, defendant engaged the patient to escort him from the department, an engagement that resulted in Lewelling being charged with five felony violations, including of Penal Code section 149[1], assault by a public officer, and section 245, assault by force likely to cause great bodily injury. Defendant was acquitted on four of the five felonies, but found guilty of violating section 149, and also found guilty of a misdemeanor violation of section 240, a lesser included offense of section 245. The People dismissed the misdemeanor at sentencing, where defendant was sentenced on the section 149 conviction.

Defendant appealed, and in a published opinion we reversed, concluding that the jury instructions were inaccurate and misleading. (*People v. Lewelling* (2017)

[1] Further statutory references are to the Penal Code.

16 Cal.App.5th 276 (*Lewelling I*)). Following remand, the People moved to reinstate the misdemeanor section 240 conviction, which the trial court granted over defendant's objection. Defendant now appeals that misdemeanor conviction, asserting that the jury instructions on that were confusing, confusion exacerbated by the court's responses to the jury's questions. We agree and once again we reverse.

Background

We set forth the pertinent facts at length in *Lewelling I*, much of which we quote here. Thus:

"The Setting

"Zuckerberg San Francisco General Hospital is a renowned safety net hospital, particularly well known for its emergency department. That department has a diverse and unpredictable patient population, much of it consisting of the homeless, the mentally ill, and those suffering from substance abuse problems. The chaotic population can make the emergency department a dangerous place: staff have been strangled, sexually assaulted, punched, kicked, and spit upon. Abuse by patients, both physical and verbal, is a daily, sometimes hourly, occurrence. As a result, patient behavior is tracked in a database provided by the State Department of Public Health, so staff can communicate with others to alert them of potentially violent or abusive patients.

"This has also resulted in the development of protocols and procedures to protect staff and patients. For example, patients without pending business in the emergency department are not permitted to loiter. People who are sleeping or lingering in the waiting area in the early morning hours without medical necessity are asked to leave. And once they are screened and cleared for discharge, verbally abusive or physically threatening patients are removed.

"The emergency department is overseen by armed deputies from the San Francisco Sheriff's Department, who are on the premises 24 hours a day to provide security. During the midnight shift, three officers are on duty, one at a podium just outside the department waiting area, another at a post behind the security doors to the department, and a third on foot patrol around the campus. There is also a dispatcher who

monitors security cameras throughout the facility, one of which is pointed at the emergency department waiting room.

"According to hospital training and protocols, emergency room nurses are required to rely on the deputies when a disruptive or potentially violent patient is observed. And if requested, the deputies assist the staff with handling potentially violent patients, escorting them out of the emergency department once they are medically cleared. In short, the deputies rely on the staff to decide who should be removed, and the staff rely on the deputies to step in when alerted to a potentially dangerous patient. Generally speaking, on a nightly basis several people are escorted off campus for verbally or physically abusing the staff or other patients.

"On November 3, 2014, the sheriff's deputy on duty at the podium was defendant Michael R. Lewelling.

"Fernando Guanill Arrives at the Emergency Department

"At 3:27 a.m. on that date, Fernando Guanill walked in through the main emergency department entrance. Guanill was 60 years old, about five feet seven inches tall, and weighed approximately 140 pounds. He was on disability and received social security income due to a disability with his left leg. He was homeless, and had been for approximately three and a half-years. Guanill had a 9:00 a.m. appointment at an orthopedic trauma unit, but decided to go to the hospital early in the hope he could get some pain medication before the appointment. He was in extreme pain—10 out of 10.

"Guanill had been seeing Dr. Yee-Bun Benjamin Lui at the Chinatown Public Health Center as his primary care physician for some two and a half-years. During that time, Guanill had various encounters with the staff at the health center, and Dr. Lui had Guanill sign a behavior contract under which Guanill agreed not to use demeaning language, insulting terms, or foul language when speaking to staff. Guanill also agreed to a pain contract, under which only Dr. Lui could prescribe narcotics to him, and using opiates outside of what Dr. Lui prescribed would be a violation of the contract. Guanill took pain medication such as Percocet, Naproxen, and Nortriptyline, for which he got prescriptions once a month. He also tried to manage his pain with alcohol, often with bad

results. As Guanill himself put it, this affected the way he interacted with other people: Usually when under the influence he became louder; and when the pain got really bad he automatically raised his voice. [Fn. omitted.]

"Tim Coyle was working the examination room as a triage nurse. Coyle asked Guanill if he needed to see a doctor. Guanill responded, in a verbally abusive manner, that he was checking in for his appointment, though reluctant to give Coyle any information about it. Coyle checked Guanill's chart and noted that his appointment was later that morning. He also noted that Guanill's chart contained numerous behavioral alerts, including aggressiveness, assaultive behavior, and narcotic-seeking behavior, and that he had a pain contract.

"Coyle tried to encourage Guanill to attend his appointment instead of being admitted to the emergency department, explaining that Guanill did not need to check in. Guanill responded he wanted a prescription for Oxycodone. Coyle told Guanill emergency doctors did not treat chronic pain by writing prescriptions, and advised Guanill to see his doctor at his appointment later in the day, additionally reminding Guanill that he had a pain contract.

"While it appeared to Coyle that Guanill was at the emergency department to acquire opiates, Coyle nevertheless medically screened Guanill, and asked if there were any changes in the condition of his wound. This question made Guanill even more agitated and angry, to the point Coyle felt threatened by Guanill's behavior, as he became tense and started cursing and calling Coyle profane names. Coyle asked Guanill to take a seat in the waiting room. There, Guanill continued being abusive and uncooperative and cursing under his breath.

"Coyle told nurse Laura Bandura that he had examined Guanill, informing her about Guanill's aggressive and hostile behavior, and advising that she should not triage Guanill by herself and not bring him behind the closed doors of the triage.

"Shortly thereafter, Guanill was called by the registration staff and asked to sign some forms that were part of the admission process. Agitated and upset, Guanill continued to interact negatively with the staff, acting disruptively, walking back and

forth, and talking very loudly, continuing in this fashion for several minutes. Guanill was registered, after which he sat down and was quiet for a few minutes, but soon started talking out loud, ranting, raving, and waving his cane. Eventually, Guanill went back to the waiting area and fell asleep on a bench.

"Coyle spoke to nurses Bandura and Valarie Bochenek about Guanill's abusive behavior, after which Bochenek went to observe Guanill, who appeared to be asleep.

"Defendant Intervenes

"The three nurses collectively decided to follow department policy and have Guanill escorted out of the waiting room. Bochenek went to defendant and told him Guanill was being abusive towards Coyle and the registration staff, and needed to be escorted out of the waiting room for safety reasons.

"Defendant approached Guanill, who was still sleeping in the same position. No one else was in the waiting room at the time. Defendant approached Guanill from behind, and stood on his right side in a 'bladed stance,' such that his gun was as far as possible from Guanill. Defendant tried to wake Guanill verbally, without success. He then woke him by tapping him on his right shoulder. Defendant told Guanill he had to leave and come back later, pointing to the exits.

"Coyle, testifying for the People, heard something that drew his attention, and described what he saw when he looked over: 'Mr. Guanill was seated with his back on the chair, kind of turned to the side, with his hand on his cane. And Deputy Lewelling was in front of him and trying to take the cane away, or his hand was on the cane, too.' " (*Lewelling I*, *supra*, 16 Cal.App.5th at pp. 279–282.)

Lewelling I also noted testimony from various police officers and medical personnel concerning Guanill, including this: "San Francisco Police Officer Jesse Heredia described Guanill as a habitual drunk, constantly belligerent, and very combative. Guanill had thrown an alcoholic beverage container at him, had attacked Heredia's partner, and had resisted arrest and verbally abused officers while they tried to restrain him. San Francisco Police Officer Christopher Ritter arrested Guanill for drinking in a public place and threatening police officers with a knife. American Medical

Response paramedic Kenneth Deroque testified that when he and his partner responded to a call in North Beach, Guanill was aggressive and abusive, and spit on Deroque. Another emergency medical technician (EMT) who treated Guanill for the injuries to his face testified that Guanill was verbally abusive, and threw a bloody gauze that the EMTs were using to clean his wounds." (*Lewelling I*, *supra*, 16 Cal.App.5th at p. 280 fn. 2.)

The Proceedings Below

The Charges

By information filed in May 2015, defendant was charged with five felonies: Count 1–assault by a public officer (§ 149); count 2–filing a false or forged instrument (§ 115, subd. (a)); count 3–perjury (§ 118, subd. (a)); count 4–filing a false report (§ 118.1); and count 5–assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4)).

The Trial

Jury trial was held in July 2015, before a retired Superior Court judge sitting by assignment, the Honorable Ellen Chaitin. Following closing argument, the trial court gave the substantive jury instructions pertinent here, discussed in detail below. The court then gave the concluding instructions, and sent the jury to deliberate, providing it with written versions of the instructions and verdict forms.

Jury deliberations began on the afternoon of July 30. On August 3, the third day of deliberations, the jury sent the court this question: "Can you clarify what Section 240 is? It seems like a discrepancy with the code listed on Count 1 (Section 149)."

The next day, August 4, the court delivered this four paragraph answer:

"Simple assault, Penal Code section 240, is referenced in two counts: Counts 1 and 5. It is also referenced on page 31 in your instruction on Assault on a Peace Officer.

"As to Assault on a Peace Officer, as described on page 31, the assault does not require an actual touching.

"Simple Assault, jury instruction number 915, page 25, defines assault in the jury instruction on page 24, Count 1 Assault by a Public Officer (Penal Code section 149). You also need to consider jury instruction number 2670, pages 26–27, Lawful

Performance of a Peace Officer. These three instructions should be read together. Simple Assault is an element of the offense as charged in Count 1, not a lesser included offense.

"Simple Assault, jury instruction 915, page 40, is a lesser included offense of Count 5, Assault with Force Likely to Produce Great Bodily Injury, pages 36–37."

Later on August 4, the jury sent another question to the court. This one asked: "To clarify, should this read 'Section 240' or 'Section 149' as it says on page 24 of the Instructions?" The court's brief response said "The verdict form is correct."

The jury returned its verdicts on the afternoon of August 4. The jury acquitted defendant on four of the felony charges, including on counts 2 through 4, the false report and perjury charges, and on count 5, the felony assault section 245 charge. The jury found defendant guilty of count 1, violation of section 149, and also guilty of a misdemeanor violation of section 240, which the jury had been instructed was a lesser included offense of section 245, the felony assault charge in count 5.

Defendant filed a new trial motion attacking both convictions. The trial court denied the motion without reaching the merits, concluding that defendant had forfeited the arguments.[2]

Defendant also filed a sentencing memorandum requesting that the trial court dismiss the misdemeanor assault section 240 conviction as a lesser included of the section 149 conviction. The People's reply conceded the section 240 conviction should be dismissed as a lesser of "Count 1," going on to refer to the section 240 as a "lesser of both counts."

The court thereafter sentenced defendant on the section 149 felony conviction, dismissing the section 240 conviction as a lesser included offense, but not of the felony assault section 245 charge that had triggered the instruction in the first place. Rather, the

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[2] In *Lewelling I* we observed that the forfeiture ruling was perplexing, as the District Attorney had not made a forfeiture argument, and in fact had asserted the court should address the issue. And, we added, section 1259 provides that we can review an instruction given "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

court concluded that a violation of section 240 in the case of a police officer is a lesser included offense of section 149.

Lewelling I

In October 2017 we published *Lewelling I*, reversing defendant's section 149 conviction on the basis that the jury instructions were inaccurate and misleading. We also observed that it was a close case and, moreover, in light of defendant having been acquitted on the three counts involving false statements and perjury, there was reason to believe the jurors concluded Guanill did threaten defendant with his cane and with physical violence. (16 Cal.App.5th. at pp. 299–300).)

Post-Remand Proceedings

Following remand, the District Attorney moved to reinstate the misdemeanor section 240 conviction. Defendant opposed it. As Judge Chaitin was no longer sitting on assignment, the motion ultimately came on for hearing before a different judge, the Honorable Tracie Brown. Judge Brown heard extensive argument, indeed on two occasions, the second of which provided a transcript of 68 pages. At the conclusion of the second hearing, Judge Brown ordered reinstatement on two grounds, the first of which was estoppel, in light of defendant's argument that the section 240 conviction was a lesser of section 149.

We note here that Judge Brown's ruling was against the background it was anticipated that defendant would be filing a motion for a new trial. And in this light Judge Brown made various comments in the course of the lengthy argument indicating her concern there might well be problems with the instructions at issue here. Thus, for example, she acknowledged that the simple assault instruction that is at the heart of this appeal was given *twice*, in different and conflicting forms, going on to note that the jury was "confused" about the simple assault charge, as it made clear with its questions in the midst of deliberations.

Before the matter came on for sentencing, the District Attorney dismissed the felony section 149 charge, and Judge Brown sentenced defendant on the misdemeanor, again noting the anticipated new trial motion, and once again her concern about the

instructions. As she described the situation: "I think that previously what I was intending to do was proceed in a kind of two-stage approach: One would be the procedural issue of reinstating the 240 and then I would get to the secondary issue on a new trial motion, the substantive issue as to whether that 240 could stand in light of what I think I indicated were problems with the jury instruction that may have infected the Count 5 instruction as well."

Defendant did not make the new trial motion, but filed a notice of appeal.

DISCUSSION

The Instructions, Compounded by the Court's Responses to the Jury Questions, Were Confusing—and Prejudicial Error

The Instructions

As noted, the conviction before us is for misdemeanor assault, which the trial court instructed the jury was a lesser included offense of count 5, assault with intent to commit great bodily injury.[3] The trial court referred to assault numerous times in the instructions it orally gave the jury, which instructions were set forth in the 44 pages of written instructions the court allowed the jury to take into the jury room. It was as follows:

The first time the court mentioned assault was in the context of its instruction about section 149: "A police officer acting under color of authority and without lawful necessity who assaults or beats any person is guilty of a crime." And the written instruction relating to section 149 is captioned "Assault by a Public Officer (Pen. Code, § 149)."

A few moments later, the court instructed that "Assault is defined in another instruction."

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[3] The origin of this instruction is not apparent in the record, but a declaration filed by defendant's counsel testified that his review revealed that neither the District Attorney nor defendant's counsel proposed an instruction regarding the elements of section 240, nor did either side request one. Thus, counsel said, he "concluded, and can assert on information and belief that the trial court concluded it had a sua sponte duty to instruct the jury on Penal Code [section] 240 as a lesser included offence of the Penal Code [section] 245 charge."

The court thereafter provided the elements of assault on the first of four occasions, and when the court first instructed on the elements of simple assault in its opening instruction, there was no requirement of "unreasonable force." The written instruction is labeled "915. Simple Assault." As Judge Brown would later note, the written instruction with that heading appears *twice*, in slightly different forms, in the written instructions the jury had for their deliberations.

The court provided the elements of assault a second time in its instruction relating to assault on a police officer. The written instruction appears at CT 404. That instruction contained the usual elements of simple assault—which the jurors had already received, and indeed would receive twice more before the court concluded—plus the requirements that "when the person acted, he had the present ability to apply force to a person who was a peace officer"; that "when the person acted, the person assaulted was lawfully performing his duties as a peace officer"; and that "when the person acted, he knew or reasonably should have known that the person assaulted was a peace officer who was performing his duties."

The court instructed on assault for the third time when it gave the felony assault instruction under section 245, subdivision (a)(4), the offense charged in count 5. The court again set forth the essential elements of assault, but this time added the element that the defendant "had the present ability to apply force likely to produce great bodily injury . . . ." And for the first time, the court added the requirement that to convict defendant of assault, the jury would have to find that "defendant did not use reasonable force."[4]

Following that, the court then instructed the jury as to the "lesser," as follows:

"If all of you find that the defendant is not guilty of the greater charged crime—and in this case it is the 245(a) that I just read to you—you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that he is guilty of the lesser crime. The defendant may not be convicted of both the greater and lesser crime. Now I'll explain to you the crimes that fall within this instruction.

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[4] It is not clear how the "unreasonable force" element made its way into the instructions, especially as it is not an element of simple assault.

"Simple assault is a lesser crime of assault with force likely to cause great bodily injury charged in Count 5. It is up to you to decide the order in which you consider each crime and relevant evidence. But I can accept a verdict of guilty on a lesser crime only if you have found the defendant not guilty of the corresponding crime. Okay? [¶] So if you find him not guilty of the 245(a), Count 5, then you consider—you can consider finding him guilty of the lesser charge, simple assault, if there's evidence beyond a reasonable doubt. You don't need to. You can also find him not guilty of the 240. It's up to you."

For the next two pages the court gave some guidance about how to fill in the verdict forms, and concluded by providing, once again—now, for the fourth time—the elements of assault. This was it:

"[I]f all of you cannot agree whether the People have proved the defendant guilty of a lesser charged crime, inform me only that you cannot reach agreement on Count 5, and do not complete or sign any verdict form on Count 5. That sounds a little bit peculiar.

"MS. TUNG: Your Honor, I think it's if they can't reach an agreement on the greater or the lesser.

"THE COURT: Ah, I read it wrong. I'm getting tongue tired [*sic*]. In the charged crime, Count 5. Okay.

"If all of you cannot agree whether the People have proved that the defendant is guilty of the charged crime in Count 5, the 245(a), assault with great bodily injury, or the lesser crime, inform me only that you cannot reach an agreement on Count 5, and do not complete or sign any verdict form for Count 5. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

"Okay. Simple assault is a lesser charged Count 5. To prove that the defendant is guilty of the lesser charge, the People must prove that:

"One, the defendant did an act that by its nature would directly and probably result in the application of force to Fernando Guanill.

"Two, that the defendant did that act willfully.

“Three, 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 Fernando Guanill.

“And, four, when the defendant acted, he had the present ability to apply force to a person.

“Someone commits and act willfully when he or she does it willingly or on purpose. It’s not required that he or she intend to break the law, hurt someone, or gain any advantage.

“The term ‘application of force’ and ‘applied 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 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. In order to find the defendant guilty of the lesser crime to Count 5, you must find beyond a reasonable doubt that the defendant did not use reasonable force.”

Notably, the written version of this fourth version of the assault instruction has the same heading as the earlier written version: “915. Simple Assault”—which earlier version, as noted, did not require unreasonable use of force.

The Jury’s Questions

As mentioned above, on the third day of its lengthy deliberations the jury sent the court a question, asking “Can you clarify what Section 240 is? It seems like a discrepancy with the code listed on Count 1 (Section 149).” The question, as Judge Chaitin indicated, manifested the jury’s confusion, confusion hardly cleared up by the court’s lengthy response, quoted above and summarized here:

“Simple Assault, Penal Code section 240, is referenced in two counts: Counts 1 and 5. It is also referenced on page 31 in your instruction on Assault on a Peace Officer. [¶] As to Assault on a Peace Officer, as described on page 31, the assault does not

require an actual touching. [¶] Simple Assault, jury instruction number 915, page 25, defines assault in the jury instruction on page 24, Count 1 Assault by a Public Officer (Penal Code section 149). You also need to consider jury instruction number 2670, pages 26–27, Lawful Performance of a Peace Officer. These three instructions should be read together. Simple Assault is an element of the offense as charged in Count 1, not a lesser included offense. [¶] Simple Assault, jury instruction 915, page 40, is a lesser included offense of Count 5, Assault with Force Likely to Produce Great Bodily Injury, pages 36–37."

So, in its attempt to clear up the jurors' confusion, the court first referred the jury—indeed, twice—to page 31 of its instructions. But those instructions relate to assault *on* a police officer. Bad enough. Worse, they omit any requirement that to convict of assault—whether as charged, or as the lesser-included misdemeanor—the jurors would have to agree that defendant used unreasonable force.

The court then referred the jurors to the first of its two simple assault instructions, which appears on page 25 of the jurors' printed instructions, which printed form has no unreasonable force element. The court next directed the jurors to look at the "lawful performance" instruction at page 26-27 of the printed instructions. But that instruction contains none of the simple assault elements, and does nothing to clear up the jurors' confusion regarding how to apply the law relating to section 240.

The court then told the jurors that "Simple Assault is an element of the offense as charged in Count 1, not a lesser included offense," which proposition the court later contradicted when it dismissed the section 240 count. Finally, the court told the jurors that "Simple Assault, jury instruction 915, page 40, is a lesser included offense of Count 5, Assault with Force Likely to Produce Great Bodily Injury, pages 36-37." But if a juror were to look at page 40, he or she would find what appears to be a reprint of the instruction that appears on page 25, which the trial court had referred to moments earlier.

To recap in slightly different language, the court answered the jury's question by sending them to two versions of the same instruction, both with the identical heading: "915. Simple Assault." But they were not identical, differing perhaps most significantly

in that the first simple assault instruction contained no unreasonable force element, and the second did. And both would have confused the jurors by their intersection with the section 149 count captioned “Assault by a Public officer” and the various, and unexplained, references to the crime of assault on a police officer.

Having received the court’s answer, however unhelpful it was, the jurors then posed this question, apparently referring to the verdict forms for simple assault: “To clarify should this read ‘Section 240’ or ‘Section 149’ as it says on page 24 of the instructions,” which page is a reference to the section 149 instruction, or part of it, anyway. The court offered this short, and less than helpful, response: “The verdict form is correct.”

As Judge Brown noted, the jury was obviously confused, and the court’s response to the confusion hardly cleared it up. To the contrary, it made the confusion worse, by first, referring the jury back to the assault *on* a police officer instruction which contains no unreasonable force element—and has no application to section 240. The court then referred the jury to the first version of the simple assault instruction that also has no unreasonable force element. The court then referred the jurors to the lawful performance instruction, which has no instruction on assault at all. And then referred the jurors to two other assault instructions, one for the felony, and one for the lesser included offense, each of which contains the unreasonable force element.

The Conviction Must be Reversed

Section 1138 requires the court to provide the jury desired “information” on any point of law arising in the case, a section that “imposes a ‘mandatory’ duty to clear up any instructional confusion expressed by the jury.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) That duty was not met here. To the contrary, the jury’s confusion was only exacerbated by the court’s responses to the jurors’ questions. Having essentially been instructed four times on the meaning of assault, the jurors’ reference in their second question to the instruction on page 24—that is, to “Assault by a Public Officer (Pen. Code, § 149)”—indicates they had no idea which instruction they should rely on to decide the misdemeanor assault charge.

Defendant's opening brief sets out in detail, for some five pages, the trial court's instructions, describing them as the trial court's "four separate and conflicting assault instructions." The brief then devotes the next four pages to the jury's questions and the court's responses.

The Attorney General's Respondent's Brief hardly responds. Thus, for example, the Attorney General fails to acknowledge that the trial court gave four separate assault instructions, including instructions regarding assault on a police officer. And the Attorney General also fails to address the fact that, pages apart in its recitation of the law, the trial court gave two conflicting instructions, both of which were part of the written instructions the jury took into deliberations, on the very charge at issue here, simple assault. Indeed, the Attorney General even fails to acknowledge that the two identically-labelled "915. Simple Assault" instructions were different. In sum, the Attorney General's brief never quotes all of the instructions addressing "assault," saying only this: "As to count 5, the court instructed the jury with CALCRIM No. 875 on assault with force likely to produce great bodily injury in violation of section 245. [Citation.] The court next instructed with CALCRIM No. 3517 that if the jury decided that appellant was not guilty of that charge, they should consider whether he was guilty of the lesser included offense of simple assault. [Citation.] The court's final instruction on count 5 was the CALCRIM No. 915 definition of the crime of simple assault," which the Attorney General goes on to quote.

Then, following less than two pages of instruction-law boilerplate, the Attorney General asserts that "The instructions on the count 5 lesser included offense of simple assault were neither erroneous nor prejudicial." "The count 5 instructions the court gave on the lesser included offense of simple assault were correct instructions because they included all the elements of the offense. Section 240 provides 'An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' (§ 240.) All the elements were contained in the instruction the court gave." That is it.

In *Lewelling I* we criticized the Attorney General's brief, observing that it "does not meaningfully respond to defendant's primary argument, her fundamental contention being that *the instructions properly stated the elements of section 149*. Doing so, the Attorney General glosses over most of the instructions . . . ." (*Id*. at p. 294, italics added.) The same can be said of the Attorney General's position here, which not only glosses over defendant's arguments, it does not even mention the jury's questions to the court, or the court's confusing responses.

In *Lewelling I* we discussed the standard of review, holding that we agreed with defendant that reversal is required unless we conclude " 'beyond a reasonable doubt that the error did not contribute to the verdict.' " (*Id*. at p. 295.) But we went on, we would have reached the same result under the standard proposed by the Attorney General, that is, whether there is a " 'reasonable likelihood that the jury misunderstood and misapplied the instruction.' " (*Ibid*.) Then, after a discussion why the instructions were "misleading—if not downright wrong," we concluded that the instructional error there was reversible error. (*Id*. at pp. 296–300.) That conclusion applies equally here, and we repeat it:

"Numerous cases have held that giving instructions that are contradictory or so inconsistent to confuse the jury was reversible error. (See, e.g., *People v. Baker* (1954) 42 Cal.2d 550, 567 [instruction on insanity and presumption were ' "confused, contradictory, and ambiguous" ']; *People v. Dail* (1943) 22 Cal.2d 642, 653 [contradictory accomplice instructions; ' "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury" ']; *People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217–1218 [conflicting instructions on assault with deadly weapons].)

"The instructions here were at the least confusing, shown, for example, by the fact that the jurors twice asked specific questions that were at the heart of the issue.

"As Witkin describes it, 'Misstatement of the law concerning the elements of the offense or the defenses available to the accused is of course serious error. Reversal is usually grounded on a number of these misstatements, or on erroneous instructions

coupled with other errors, where the evidence is in substantial conflict.' However, following citation and distillation of numerous cases, the author goes on, 'Occasionally, in a close case, a single erroneous instruction on a vital element or defense is reversible error. [Citations.]' (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 748, p. 1166.) Such reversible error is present here.

"This, it cannot be gainsaid, was a close case, the jury deliberating for what appears to be the better part of four days.

"That this was a close case is also shown by the fact that the jurors rejected the false reporting and perjury counts, which were based on the prosecution's theory that, contrary to the assertions in defendant's report, Guanill never threatened defendant with his cane or told defendant ' "I'll fuck you up if you touch me." ' In light of these acquittals, there is reason to believe the jurors concluded Guanill did threaten defendant with his cane and with physical violence." (*Lewelling I*, *supra*, 16 Cal.App.5th at 299–300.)

The Instruction Was Missing a Required Element

Defendant asserts that there was instructional error for a separate, and independent, reason, that in light of the evidence at the trial the simple assault instruction(s) was missing a required element: self-defense. We agree.

The CALCRIM instruction is 915, labeled "Simple Assault (Penal Code § 240)." It lists the four elements of the crime and then a possible element 5, which the instruction says to give when instructing on "self-defense or defense of another." And as to this, CALCRIM 915 has this "Instructional Duty" to the trial court: "If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense." (See generally *People v. Brooks* (2017) 3 Cal.5th 1, 73.)

As noted, Lewelling was charged with making false statements and perjury, as to which the district attorney told the jury that she wanted "to identify for you two false statements that are at issue. One is that Guanill then stated 'I'll fuck you up if you touch me.' The other is that Guanill had a wooden cane near him, which he reached for in an attempt to strike me with, meaning that Mr. Guanill attempted to strike Deputy Lewelling

with this cane." So, the district attorney argued that defendant's reports were false, at least on these items.

The jury found defendant "not guilty" on the three charges, indicating, as we said in *Lewelling I*, "there is reason to believe the jurors concluded Guanill did threaten defendant with his cane and with physical violence. Those facts further support both experts' conclusion that defendant's conduct after the initial detention was reasonable." (*Id*. at p. 300.) So, too, did the testimony from Sergeant Harry Lee, who was present when a nurse entered, saying "a deputy need[s] help out in the lobby because there was someone swinging a cane." And also that of Nurse Coyle, who remembered seeing "a flurry of activity at one point, and when I looked over, I could see that there was a struggle taking place [between Guanill and Lewelling.] . . . Mr. Guanill was seated with his back on the chair, kind of turned to the side, with his hand on his cane. And Deputy Lewelling was in front of him and trying to take the cane away, or his hand was on the cane, too."

The Attorney General's brief responds to defendant's "missing-element" argument with this assertion: "the video recording of the incident does not support a claim of self-defense or defense of another. [Citation.] Appellant is a large, strong, fit, young man, while the victim was a frail, small, old man. Appellant did not testify that he was acting in self-defense or in defense of another, and there is no objective evidence that he was doing so." Indeed—and despite the jury's not guilty verdict on the false report charges—on the next page of his brief the Attorney General asserts that "[T]he statement in appellant's report that the victim 'attempted to strike me with [his cane]' . . . was *quite clearly false* based on the video recording of the incident."

Passing over the fact that the Attorney General's assertion of facts has no record support, we are not impressed by an argument that essentially says that counsel has watched the video and concluded it does not support self-defense.[5]

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[5] In light of our conclusions, we need not include defendant's argument that Penal Code section 240 cannot logically be applied to police officers.

We close with the observation that at the end of his brief the Attorney General suggests that if we disagree with his argument that the simple assault conviction is not tainted by reversible instructional error, we can reverse that conviction and "order the count 1 conviction for violation of section 149 to be reinstated because the jury found that [defendant] did not use unreasonable force ([*People v.*] *Stewart* [(1976)] 16 Cal.3d [133,] 141." We are dumbfounded: Not only does *Stewart* have nothing to do with the situation here, we do not understand how we can reinstate a conviction we had reversed, not to mention, on a count dismissed by the People.

DISPOSITION

The judgment of conviction is reversed.

Richman, J.

We concur:

Kline, P. J.

Miller, J.

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