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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS RAY COX,

Defendant and Appellant.

B232769

(Los Angeles County)  
Super. Ct. No. MA050995)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Kathleen Blanchard, Judge. Affirmed as modified.

Mona D. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Thomas R. Cox appeals his conviction following a jury trial of one count of driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)), one count of driving with a blood alcohol concentration of 0.08 percent or higher (Veh. Code, § 23152, subd. (b)), and one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).<sup>1</sup> Cox raises the following arguments on appeal: (1) the evidence was insufficient to support the assault with a deadly weapon conviction; (2) the prosecution misstated an essential element of the assault charge in its closing argument; (3) the trial court erred in admitting evidence of a defense witness's prior misdemeanor conduct while refusing to modify the jury instructions to address the prosecution witnesses' criminal conduct in this case; (4) the trial court abused its discretion in denying Cox's request for a continuance to retain private counsel; (5) the trial court may have erred in determining there was no discoverable material in the arresting officer's personnel file; and (6) there was cumulative error. We modify the judgment to correct a sentencing error, but otherwise affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. The Prosecution's Evidence**

On the afternoon of November 12, 2010, Cox drove his motor home into an alley. His friend, Michael Menter, was in the front passenger seat. A group consisting of Brad Braverman, Mark Hammerquist, Gabriel Gelaude, Elizabeth Venegas, and Venegas's young son were in the backyard of Braverman's home. The yard faced the alley where both Venegas and Gelaude had parked their vehicles. Upon seeing the motor home approaching, the group walked toward the alley to determine whether any of their vehicles needed to be moved.

When the group arrived in the alley, they observed the front left side of the motor home collide with the rear right side of Venegas's car. After the initial impact, Cox came to a stop, fumbled with the gear shift, and then continued driving forward into Venegas's

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Penal Code.

car. It appeared that Cox attempted to shift to the reverse gear approximately three to four times, but he failed to do so each time. Instead, the motor home continued slowly moving forward, further compressing Venegas's bumper and pushing her car forward four to six feet. The group repeatedly yelled at Cox that he was hitting Venegas's car and needed to go in reverse. Cox's full attention was focused on trying to shift the gears into reverse, but he continued to move the motor home in a forward direction. After a few minutes of struggling with the gear shift, Cox was able to find the reverse gear and separate his vehicle from Venegas's car. Gelaude immediately called "911."

Venegas walked to the front of the motor home and stood one to two feet in front of the vehicle near the driver's side. The motor home began to inch forward toward her as she yelled at Cox that the police were coming and he needed to stop. Instead of stopping, however, Cox continued moving the motor home slowly toward Venegas. Cox and Venegas were facing each other and making eye contact as his vehicle approached her body. The motor home then bumped against Venegas's torso and legs and pushed her slightly backward. Venegas sustained a bruise to her knee from the impact, but did not seek any medical treatment for her injury.

After travelling forward a few more feet, the motor home came to a stop. The passenger in the front seat exited the vehicle, threw his hands up, and backed away from the scene. Hammerquist approached the driver's side of the motor home, opened the driver's door, and turned off the ignition. He then took the keys to the motor home and told Cox to stay in his vehicle and that the police were on their way. Cox refused to remain in the motor home, however, and had a verbal exchange with Venegas and Hammerquist upon exiting his vehicle. Cox's breath smelled of alcohol, his speech was slurred, and he had difficulty standing on his own. Cox was also agitated, yelling at Venegas and Hammerquist that they were going to be arrested and that he was leaving.

Cox began walking away from the alley. Venegas and Hammerquist repeatedly told Cox that he needed to wait for the police, but Cox said that he did not do anything wrong and did not need to remain at the scene. Venegas grabbed Cox's arm to prevent him from leaving and he responded by trying to punch her with his fists. Hammerquist

quickly intervened, pushing Cox to the ground and telling him to stay down and wait for the police. When Cox resisted and stood up, Hammerquist grabbed Cox a second time and held him in a chokehold. As the two men struggled on the ground, Cox's son arrived on the scene and helped to free Cox from Hammerquist's grasp. Cox then began walking back toward the alley. Gelaude was standing in the alley with his cane as he spoke to the "911" operator. When Cox tried to take Gelaude's cane from him, Gelaude hit Cox with the cane on the back of his head. As Cox continued walking down the alley, Venegas again grabbed Cox's arm and he swung his fists at her. At that point, Hammerquist threw Cox to the ground, straddled his chest, and held his arms with both hands until law enforcement officers arrived.

Several officers from the Los Angeles County Sheriff's Department responded to the scene. Upon his arrival, Deputy Sheriff Ryan Davis observed Hammerquist straddling Cox and holding him to the ground as Cox kicked and flailed his arms. After Hammerquist stood up, Cox continued to be combative toward Deputy Davis. When Cox refused to follow an order to get on his stomach, Deputy Davis forced Cox onto his stomach, which likely caused Cox to scrape his face on the cement. Upon handcuffing Cox, Deputy Davis observed that he smelled of alcohol, had glassy eyes, and was staggering. Cox's passenger in the motor home told Deputy Davis at the scene that he and Cox had been drinking all day at a nearby bar, that he saw Cox hit Venegas with his vehicle, and that Venegas would have been run over if she had not moved out of the way.

Sergeant Justin Diez responded to the scene to investigate Deputy Davis's use of force against Cox. At that time, Cox had blood on his face and complained of neck and back pain. During a videotaped interview with Sergeant Diez, Cox admitted that he was driving his motor home down the alley when he bumped into a car. Cox also admitted that he had been drinking beer and vodka 45 minutes before the accident and had taken prescription Vicodin and Valium earlier that morning. Cox denied that Deputy Davis used any force against him or caused any of his injuries. Rather, Cox stated that a man pulled him from his vehicle immediately after the accident and then tackled and beat Cox when he tried to run away.

Deputy Sheriff Amos Cisneros conducted a DUI investigation at the scene. While speaking with Cox, Deputy Cisneros noticed that his breath smelled of alcohol, his speech was slurred, and his eyes were very red. Cox also had difficulty standing and walking on his own. Cox admitted to Deputy Cisneros that he had been drinking alcohol at a local bar prior to the accident and had taken prescription Vicodin and Valium. Cox further admitted that he knew he was drunk and should not have been driving at the time. Cox refused to submit to a series of field sobriety tests, but agreed to a preliminary alcohol screening test which showed a blood alcohol concentration of 0.187 percent. Following his arrest for driving under the influence of alcohol, Cox submitted to a chemical breath test at the sheriff's station which showed a blood alcohol concentration of 0.16 percent.

## **II. The Defense Evidence**

Michael Menter, the person in the front passenger seat of the motor home, testified on Cox's behalf. According to Menter, Cox was driving the motor home slowly down the alley and trying to maneuver his vehicle between a parked car and a telephone pole. Cox did not have any difficulty shifting the gears. Shortly after Cox bumped the parked car with his vehicle, a man opened the driver's door of the motor home, turned off the engine, and pulled Cox from the driver's seat. He then slammed Cox to the ground and began punching Cox in his body and head. As the man hit Cox with his fists, another man poked at Cox with a cane. While Cox was on the ground, a woman threw herself in front of the motor home, hitting it with her body and yelling "go ahead" and "hit me." The motor home never made contact with the woman's body as Cox was driving, and Cox never tried to hit anyone as he was being beaten. Menter denied that he and Cox had been drinking any alcohol that day.

Cox's son, Johnny Cox, also testified on his behalf. Johnny Cox was standing one block away when he observed the motor home slowly enter the alley. After the vehicle stopped, he saw a woman and a man run into the alley screaming at Cox. The man pulled Cox from the motor home and began hitting him with his fists. As the man held Cox to

the ground in a chokehold, the woman struck Cox in the face with her keys. Another man also appeared and repeatedly hit Cox on the back of his head with a cane. Johnny Cox intervened to protect his father and was able to separate Cox from the people who were assaulting him. He never saw his father attempt to hit anyone during the altercation. He also never saw the motor home make contact with the woman's body while Cox was driving. After the motor home came to a stop, the woman angrily hit the front of the vehicle with her chest and hands as she yelled "why don't you hit me." Following the altercation, Johnny Cox left the area to call for help. When he returned, the sheriff's deputies had arrived and his father was sitting in a police car.

## **DISCUSSION**

### **I. Sufficiency of the Evidence on the Assault with a Deadly Weapon Conviction**

Cox first challenges the sufficiency of the evidence supporting his conviction for assault with a deadly weapon. He specifically contends that the evidence was insufficient to establish that he acted with criminal intent when the vehicle that he was driving bumped Venegas. We conclude that the assault with a deadly weapon conviction was supported by substantial evidence.

In assessing the sufficiency of the evidence to support a conviction, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict - i.e., 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.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears "that upon no

hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The elements of assault with a deadly weapon are as follows: (1) the defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; (2) the defendant did the act willfully; (3) the defendant was aware of facts that would lead a reasonable person to realize that his or her act would result in the application of force to a person; and (4) the defendant had the present ability to apply such force with the deadly weapon. (§§ 240, 245, subd. (a)(1); CALJIC Nos. 9.00, 9.02.) Assault is a general intent crime. (*People v. Williams* (2001) 26 Cal.4th 779, 788 (*Williams*); *People v. Colantuono* (1994) 7 Cal.4th 206, 215-216 (*Colantuono*).) As the California Supreme Court has made clear, “assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*Williams, supra*, at p. 790.) “The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm. [Citation.]” (*Colantuono, supra*, at p. 218, fn. omitted.)

“As used in section 245, subdivision (a)(1), a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) “[A]ny operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon.” (*People v. Wright* (2002) 100 Cal.App.4th 703, 706 [substantial evidence supported assault with a deadly weapon conviction where defendant drove his vehicle close to individuals with whom he had contentious relations]; see also *People v. Golde* (2008) 163 Cal.App.4th 101, 110 [substantial evidence supported assault with a deadly weapon conviction where “defendant drove the car toward the victim and repositioned the car toward the victim as

she tried to move out of its way”]; *People v. Russell* (2005) 129 Cal.App.4th 776, 778 [substantial evidence supported assault with a deadly weapon conviction where defendant “intentionally push[ed] another person into the path of an oncoming vehicle”].)

Cox asserts that the evidence failed to establish that he intended to apply physical force against Venegas when the front of his motor home made contact with her body. In support of this argument, Cox points out that the prosecution witnesses consistently testified that, at the time of the incident, he was driving the motor home very slowly, struggling with the gears, and trying to shift the gears into reverse as his vehicle moved forward. Cox reasons that the evidence may have shown that he acted negligently or even recklessly in driving while intoxicated, but it did not support a finding that he intended to hit Venegas with his vehicle. This argument is unavailing.

It is true that the prosecution witnesses testified that Cox was driving his vehicle very slowly and struggling to shift to the reverse gear as the front of his motor home repeatedly struck Venegas’s car. However, Venegas specifically testified that when she stepped one to two feet in front of the motor home and yelled at Cox to stop, she and Cox were directly facing each other and making eye contact. Venegas further stated that as she stood in front of the motor home and continued to yell at Cox in a loud voice, he “tried to accelerate into” her. Hammerquist likewise testified that while Venegas was standing directly in front of the motor home and yelling at Cox to stop, the vehicle “began inching forward toward her” and eventually made contact with Venegas’s body “to the point where she was knocked off balance and nearly fell backward.” Hammerquist also stated that, after the motor home hit Venegas, it continued moving forward another two and a half feet before finally coming to a stop.

Given this testimony, the jury reasonably could have inferred that Cox was aware that Venegas was standing directly in front of his motor home and that if he continued moving his vehicle in a forward direction instead of stopping, “a battery would directly, naturally and probably result from his conduct.” (*Williams, supra*, 26 Cal.4th at p. 788.) The fact that Venegas placed herself in a potentially dangerous situation by standing in front of the motor home did not preclude a finding of guilt so long as Cox had knowledge



that Venegas was in the path of his vehicle when he chose to continue driving forward. Likewise, the fact that Cox was visibly intoxicated and driving very slowly did not show that he lacked the necessary intent. Voluntary intoxication is not a defense to the crime of assault. (*Ibid.*) Even if the motor home was moving at a slow rate of speed, the jury reasonably could have concluded that the act of driving a large vehicle directly at another person is an act that by “its nature will probably and directly result in the application of physical force against another.” (*Id.* at p. 790.)

For these reasons, Cox’s reliance on *People v. Cotton* (1980) 113 Cal.App.3d 294 and *People v. Jones* (1981) 123 Cal.App.3d 83 – two cases where the appellate court reversed an assault with a deadly weapon conviction – is misplaced. In both *Cotton* and *Jones*, the defendant struck an occupied vehicle while being pursued by the police during a high speed chase. Although each defendant was extremely reckless, the evidence did not support an inference that the defendant had deliberately collided with the struck vehicle. (*People v. Cotton, supra*, at pp. 301-302; *People v. Jones, supra*, at pp. 96-97). Here, in contrast, the evidence was sufficient to establish that Cox knew that Venegas was standing directly in the path of his motor home as she yelled at him to stop and that Cox nevertheless continued driving his vehicle forward as it made contact with Venegas’s body. Such an awareness of Venegas’s presence in the path of a large moving vehicle was sufficient to show a mens rea beyond that of mere reckless driving.

## **II. Alleged Prosecutorial Misstatement of the Law in Closing Argument**

Cox next contends that the prosecution argued its case to the jury on a legally incorrect theory which constitutes reversible error under *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*) and *People v. Green* (1980) 27 Cal.3d 1 (*Green*), overruled on other grounds in *People v. Hall* (1986) 41 Cal. 3d 826, 834, fn. 3. In particular, Cox claims that the prosecution misrepresented to the jury in its closing argument that he could be convicted of assault with a deadly weapon based solely on evidence that he was intentionally driving his vehicle at the time it made contact with Venegas. We disagree.

In his initial closing argument, the prosecutor informed the jury that, because assault was a general intent crime, “all I need to show is that [Cox] intended to drive the car forward. That’s it, that he was doing the act intentionally and willfully, okay. I do not have to show that he intended to injure, that he intended to assault in any way, that he simply intended to move that car forward with Ms. Venegas standing in front of it. That’s all I have to show.” In his closing argument, defense counsel told the jury that, to find Cox guilty of assault, the prosecutor “has to prove that [Cox] intentionally moved the vehicle forward, okay. Now, as I explained to you at the beginning, you know, accidents happen. You . . . heard the testimony that he was struggling with the gears, that vehicle was moving slowly. That goes to show you that he’s moving the vehicle by accident into Ms. Venegas.”

In his rebuttal closing argument, the prosecutor stated as follows: “[Defense counsel] talked about the fact that the defendant made a mistake, that he didn’t mean to drive forward, things like that. Well, I want to ask you this: Obviously, all I have to show is if he intended to move that car. We have people yelling at him, telling him to stop. He’s got to hear that. Even Mr. Menter’s telling him to stop. We have Ms. Venegas in front of the vehicle, you know, yelling and screaming at him, looking right at him, okay. And [defense counsel] wants you to believe the defendant just was staring at the gears or didn’t know, had no idea. Well, let’s take a look at some of the things that he was aware of.” After describing some of Cox’s deliberate actions during the incident, the prosecutor went on to state as follows: “But [defense counsel] is going to say [Cox] wasn’t aware of the screaming lady in front of his hood pounding on his hood or, I guess, standing right back from his hood on the telephone yelling, ‘stop.’ That he didn’t see. That’s not reasonable because we know what he was able to do with all of these actions he did right after the fact and some during the act in itself trying to get the car unstuck. So I think the assault is clearly satisfied based on that. He intended to move that car forward. He wanted her to get out of the way, bump her, scare her, something like that. That is an assault with a vehicle.”

Seizing on the statement in the prosecutor’s closing argument that “all I have to show is if he intended to move that car,” Cox argues that the prosecution advanced an erroneous legal theory to support the assault with a deadly weapon charge, which requires reversal under *Guiron* and *Green*. In both *Guiron* and *Green*, the California Supreme Court held that “[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.” (*Guiron*, *supra*, 4 Cal.4th at p. 1122, quoting *Green*, *supra*, 27 Cal.3d at p. 69.) However, in *People v. Morales* (2001) 25 Cal.4th 34, 48 (*Morales*), the Supreme Court clarified that it would “be an incorrect reading of precedent” to conclude that “because the closing argument is part of the presentation of the state’s case, error may arise solely from improper remarks made therein.”

As the *Morales* court explained, in both *Guiron* and *Green*, “the court presented the state’s case to the jury on an erroneous legal theory,” either by giving deficient instructions or by allowing the case to proceed on insufficient evidence. (*Morales*, *supra*, 25 Cal.4th at p. 43.) On the other hand, where “[t]he prosecutor arguably misstated some law” in the summation to the jury, “such an error would merely amount to prosecutorial misconduct [citation] during argument, rather than trial and resolution of the case on an improper legal basis.” (*Ibid.*) Moreover, “[w]hen a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court’s attention by a timely objection. Otherwise no claim is preserved for appeal. [Citation.]” (*Id.* at pp. 43-44.)

In this case, Cox did not object to the prosecutor’s alleged misstatement of law in the trial court. Even if Cox had made a timely objection, however, we conclude that the prosecutor did not misrepresent the essential elements of the assault charge to the jury. The prosecutor’s statement that “all I have to show is if he intended to move that car” must be viewed in context. When the argument is considered as a whole, it is clear that the prosecutor was attempting to refute the defense theory that Cox did not intend to hit Venegas with his motor home and that the forward movement of his vehicle at the time of

impact was a mere accident. The prosecutor was not suggesting that Cox could be found guilty of assault simply because he intended to move his car. Rather, the prosecutor was arguing that Cox could be found guilty because he intended to move his car in a forward direction with the knowledge that Venegas was standing directly in front of it. When the prosecutor's statement is read in context rather than in isolation, there is no reasonable likelihood that the jury would have construed the statement in an objectionable manner.

### **III. Admission of Evidence and Jury Instruction on Prior Misdemeanor Conduct**

During the trial testimony of defense witness Johnny Cox, the trial court allowed evidence of six of Johnny Cox's seven prior misdemeanor convictions to be admitted for purposes of impeachment. On appeal, Cox raises several arguments regarding the admission of such impeachment evidence and the related instructions to the jury. We conclude that none of Cox's arguments has merit.

First, Cox claims that the prosecution violated its statutory discovery obligations by failing to disclose Johnny Cox's misdemeanor convictions until his direct testimony had begun. Under section 1054.1, the prosecution must disclose to the defense the following information: (a) the names and addresses of persons the prosecutor intends to call as witnesses at trial; (b) the statements of all defendants; (c) all relevant real evidence seized or obtained as a part of the investigation of the offenses charged; (d) the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial; (e) any exculpatory evidence; and (f) all relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial. However, nothing in the plain language of the statute requires the prosecution to disclose the existence of any misdemeanor conduct or conviction of a witness that the defense intends to call to testify. (See *People v. Tillis* (1998) 18 Cal.4th 284, 291 [no discovery violation where prosecution failed to disclose prior drug arrest of defense witness because "the undisclosed impeachment information fell outside the scope of the discovery statute"]; *People v. Wilson* (2005) 36 Cal.4th 309, 333 [no discovery violation where prosecution did not disclose investigative report on

defense witness because defendant “fail[ed] to show how the prosecution violated section 1054.1’s discovery obligations by not disclosing information on a witness the defense intended to present”].) The prosecution’s late disclosure of Johnny Cox’s misdemeanor convictions therefore did not violate section 1054.1.

Second, Cox contends that the trial court erred in admitting the evidence of Johnny Cox’s prior misdemeanor conduct because not all of the offenses constituted crimes of moral turpitude. Under *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297 (*Wheeler*), evidence of past misdemeanor conduct involving moral turpitude is admissible to impeach a witness in a criminal proceeding subject to the trial court’s discretion. “Crimes of moral turpitude” generally fall into two groups – “crimes in which dishonesty is an element” and “crimes that indicate a ““general readiness to do evil,”” from which a willingness to lie can be inferred. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28; see also *People v. Castro* (1985) 38 Cal.3d 301, 315.) Because a misdemeanor generally is “a less forceful indicator of immoral character or dishonesty than is a felony” and may involve “problems of problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present,” a trial court “should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.” (*Wheeler, supra*, at pp. 296-297.) While the admissibility of evidence of prior misconduct is subject to the trial court’s discretion, “whether an offense constitutes a crime of moral turpitude is a question of law.” (*People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556.)

The six misdemeanor convictions that the trial court determined could be used to impeach Johnny Cox were (1) inflicting corporal injury on a spouse or cohabitant, (2) resisting a peace officer, (3) stalking, (4) disobeying a court order, (5) giving false identification to a peace officer, and (6) hit-and-run driving. Some of Johnny Cox’s prior misdemeanors have been held to be crimes of moral turpitude, including inflicting corporal injury on a spouse and giving false information to a peace officer. (See *Donley v. Davi* (2009) 180 Cal.App.4th 447, 459-460 [misdemeanor corporal injury on spouse]; *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1080-1081 [misdemeanor corporal

injury on spouse]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1521-1522 [giving false name to peace officer]; *People v. Steele* (2000) 83 Cal.App.4th 212, 221-222 [giving false information to peace officer].) While we are unaware of any published cases that have considered whether the other misdemeanor offenses committed by Johnny Cox involve moral turpitude, both felony resisting a peace officer and felony hit-and-run driving have been held to be crimes of moral turpitude which may be used for impeachment. (See *People v. Bautista* (1990) 217 Cal.App.3d 1, 6-7 [felony hit-and-run driving]; *People v. Williams* (1999) 72 Cal.App.4th 1460, 1464-1465 [felony resisting a peace officer].) For purposes of this appeal, however, we need not decide whether each of Johnny Cox's prior misdemeanors constituted a crime of moral turpitude. Even if we assume that the trial court erred in admitting evidence of all six offenses, any such error was harmless because it is not reasonably probable that Cox would have obtained a more favorable verdict had some of the misdemeanor evidence been excluded.

Johnny Cox primarily testified about the physical altercation that occurred once Cox was outside his vehicle. According to his testimony, Johnny Cox was standing a block away when Cox tried to maneuver the motor home through the alley, and from that vantage point, he was unable to see whether Cox was struggling with the gears. Johnny Cox was 200 feet away when Venegas stepped in front of the motor home, and he did not see the vehicle make any contact with Venegas while Cox was driving it. While Johnny Cox's version of events contradicted that of the prosecution witnesses, his testimony did not provide any direct support for the defense theory that the motor home accidentally bumped Venegas as Cox was trying to shift into reverse. Additionally, apart from a single statement that the jury could consider Johnny Cox's prior conduct, the prosecution did not mention any of his misdemeanor convictions in its closing argument, but rather challenged his credibility based on his relationship with Cox and inconsistent actions during the incident. Under the circumstances, any error in admitting evidence of other misdemeanor conduct was harmless.

Third, Cox asserts that the trial court erred in refusing his request to modify the jury instructions to include the prosecution witnesses among those whose credibility

could be impeached by their misdemeanor conduct in this case.<sup>2</sup> Cox argues that the evidence at trial showed that the prosecution witnesses engaged in criminal conduct when they physically assaulted him, and thus, their testimony should have been treated in an equivalent manner to Johnny Cox's testimony in the instructions to the jury. This claim likewise fails.

None of the prosecution witnesses was charged with or convicted of any crime in connection with this case. Even if their actions during the physical altercation with Cox could be construed as misdemeanor conduct, a simple assault or battery is not a crime of moral turpitude that may be admitted for impeachment purposes under *Wheeler*. (*People v. Lopez, supra*, 129 Cal.App.4th at p. 1522; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381-1382.) Given that no other evidence of misdemeanor conduct by the prosecution witnesses was offered at trial, there was no basis for such an instruction.

#### **IV. Denial of Request for Continuance to Retain Private Counsel**

Cox also challenges the trial court's denial of his request for a continuance to substitute a privately retained attorney for appointed counsel. He claims that the trial court failed to conduct a sufficient inquiry into his reasons for seeking a substitution of counsel and that its refusal to grant a continuance without such inquiry deprived him of his constitutional right to counsel of his own choosing. We conclude that the trial court acted within its discretion in denying Cox's request for a continuance.

Cox was arraigned and an information was filed on December 14, 2010. On February 2, 2011, Cox's appointed counsel announced that the defense was ready for trial. The court trailed the case to February 8, 2011 (day 56 of 60), and asked Cox if he

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<sup>2</sup> The trial court instructed the jury with the following version of CALJIC No. 2.23.1: "Evidence showing that a witness Johnny Cox engaged in past criminal conduct amounting to a misdemeanor may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness."

would waive his right to a speedy trial on two traffic ticket matters. Cox agreed, noting that he wanted additional time because he was hiring an attorney. However, Cox did not ask for a continuance of the instant case at that time. On February 8, 2011, after both parties announced their readiness for trial, Cox requested a five-week continuance to retain private counsel. Cox advised the trial court that his sons had spoken with an attorney, but he would not be able to see her until March 15, 2011. The trial court denied the request for a continuance as untimely, explaining that Cox had waited until the “eve of trial” to seek a substitution of counsel and that his retention of a private attorney “was speculative at best.”

A criminal defendant is entitled to effective assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) “The right to the effective assistance of counsel ‘encompasses the right to retain counsel of one’s own choosing. [Citations.]’ [Citation.]” (*People v. Courts* (1985) 37 Cal.3d 784, 789.) “Any limitations on the right to counsel of one’s choosing are carefully circumscribed.” (*Id.* at p. 790.) The right to privately retained counsel ““can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.’ [Citations.] The right to such counsel ‘must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.’ [Citation.]” (*Ibid.*)

Limitations on the right to continuances when linked to an assertion of the right to retained counsel are similarly circumscribed. (*People v. Courts, supra*, 37 Cal.3d. at p. 790.) Generally, the trial court has discretion whether to grant a continuance to permit a defendant to be represented by a privately retained attorney. (*Ibid*; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.) “A continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.]” (*People v. Courts, supra*, at pp. 790-791.) “In deciding whether the denial of a continuance was



so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, “particularly in the reasons presented to the trial judge at the time the request [was] denied.” [Citations.]” (*Id.* at p. 791.) ““The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,” and the court is within its discretion to deny a last-minute motion for continuance to secure new counsel. [Citation.]” (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 429.)

Here, the trial court properly balanced Cox’s right to counsel of his own choosing against the judicial obligation to assure the orderly administration of justice. Contrary to his contention, Cox was given an opportunity to address the court about his desire to replace his appointed counsel and his reasons for doing so. Apart from his personal preference for a privately retained attorney, Cox did not offer a specific reason for seeking a substitution of counsel and accompanying continuance at that time. Nor did he demonstrate that he acted diligently to retain a private attorney in a timely manner. Cox’s request for a continuance was made after both the prosecution and the defense announced that they were ready to proceed to trial that day. Although Cox indicated that he had a particular attorney in mind, he had not yet met her and would not do so for another five weeks. Given that Cox waited until the eve of trial to seek a substitution of counsel and would have required a five-week continuance to retain a private attorney, the trial court reasonably concluded that the request was not timely made. (See *People v. Keshishian, supra*, 162 Cal.App.4th at p. 429 [trial court properly “reject[ed] appellant’s last-minute attempt to discharge counsel and delay the start of trial” where request for substitution of counsel was made on day set for trial].) The trial court’s denial of Cox’s request for a continuance was neither an abuse of discretion nor a violation of his constitutional right to counsel.

## **V. Pitchess Review**

Prior to trial, Cox made a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 for a review of Deputy Cisneros’s personnel file to determine whether he had any complaints of misconduct. After granting the motion, the trial court reviewed the

records at an in camera hearing and determined that there was no discoverable material in Deputy Cisneros's personnel file. At Cox's request, we have reviewed the sealed record of the in camera proceedings. We conclude that the trial court properly exercised its discretion in finding that none of the records reviewed was relevant to Cox's case, and therefore, the disclosure of material from Deputy Cisneros's personnel file was not appropriate. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

## **VI. Cumulative Error**

Cox last contends that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Whether considered individually or for their cumulative effect, none of the errors alleged by Cox affected the process or accrued to his detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.) As our Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, Cox received a fair trial and has failed to show any cumulative error requiring reversal.

## **VII. Sentencing Error**

Although not addressed by either party, there is a sentencing error that must be corrected on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentence may be corrected at any time regardless of whether an objection was raised in the trial court or reviewing court].) On the assault with a deadly weapon count, the trial court sentenced Cox to the middle term of three years doubled to six years pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court also imposed a consecutive five-year enhancement for a prior serious felony conviction pursuant to section 667, subdivision (a) and a consecutive one-year enhancement for a prior prison term pursuant to section 667.5, subdivision (b). Both enhancements were predicated on Cox's 2006 conviction for vehicular manslaughter while intoxicated.

The trial court erred in imposing both a prior serious felony enhancement and a prior prison term enhancement based on the same prior offense. "[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which

is a section 667 enhancement, the greatest enhancement, but only that one, will apply.” (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [enhancements under §§ 667, subd. (a)(1) and 667.5, subd. (b) cannot be applied to same prior offense].) The court should have imposed and then stayed execution of the additional one-year term. (Cal. Rules of Court, rule 4.447; *People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn. 9.) Accordingly, the judgment must be modified to reflect a stay of execution of the one-year term imposed pursuant to section 667.5, subdivision (b).

### **DISPOSITION**

The judgment is modified to reflect a stay of execution of the one-year sentence enhancement imposed pursuant to section 667.5, subdivision (b). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

WOODS, Acting P. J.

SEGAL, J.\*

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