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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN LEE BETTENCOURT, Defendant and Appellant.	2d. Crim. No. B263865 (Super. Ct. No. 1432097) (Santa Barbara County)

Benjamin Lee Bettencourt appeals after a jury convicted him of driving under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a)) and driving with a blood alcohol content of 0.08 percent or more causing injury (*id.*, subd. (b)). The jury also found true allegations as to both counts that appellant personally inflicted great bodily injury

(GBI) (Pen. Code,[1] § 12022.7, subd. (a)). The trial court sentenced him to five years in state prison. Appellant contends (1) he was improperly charged with and convicted of violating Vehicle Code section 23153 instead of the greater offense of vehicular manslaughter while intoxicated (§ 191.5, subd. (b)); (2) the prosecutor committed prejudicial misconduct by delaying essential discovery; and (3) the trial judge violated his due process rights by recessing the trial for a prescheduled vacation.[2] We affirm.

STATEMENT OF FACTS

On the afternoon of November 24, 2012, appellant, Douglas Goodlin, and victim Jennifer Park had drinks together at a bar in Buellton. Appellant, a paraplegic, drove himself to the bar in his specially-equipped van. He subsequently drove Goodlin and Park to a restaurant, where they ate dinner and continued drinking.

At about 9:15 p.m., appellant and Clark left the restaurant in appellant's van and Goodlin walked back to his nearby hotel. Less than two miles from the restaurant, appellant's van veered off the road and collided with a tree. The impact demolished the front passenger side of the van, where Clark was sitting.

Deputy Sheriff Joseph Parker responded to the scene of the collision. He positioned his patrol vehicle to protect the

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

[2] Appellant also filed a petition for writ of habeas corpus alleging ineffective assistance of counsel. We summarily deny the petition in a separate order.

scene and activated the vehicle's COBAN system.[3] California Highway Patrol Officer Clifford Powers also arrived at the scene shortly after the collision. Emergency personnel were already at the scene. Officer Powers contacted appellant, who was still in the driver's seat of the van. Appellant told the officer he was driving Clark home from the restaurant when she leaned over to kiss him. Appellant turned to look at her and believed he may have inadvertently turned the steering wheel. He felt the van's right-ride tires travel onto the shoulder but was unable to steer back onto the roadway.

Officer Powers continued to speak with appellant after he was removed from the van. Appellant smelled of alcohol, his eyes were red and watery, and his speech was slow and lethargic. The officer asked appellant if he was diabetic. Appellant replied that he was not and said he was not taking insulin. He also informed the officer he was paraplegic but said he had no current injuries.

Officer Powers conducted several field sobriety tests and appellant showed impairment on each of them. A preliminary alcohol screening (PAS) test conducted at 9:36 p.m. displayed a blood alcohol level of .126 percent, while another PAS test conducted at 9:40 p.m. displayed a level of .129 percent.

The police searched appellant's van and found a partially consumed 375-milliliter bottle of whiskey in the center console area between the driver and front passenger seat. There was also an open can of beer behind the driver and front passenger seat.

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[3] COBAN is an audio and visual system that automatically records events occurring when the patrol vehicle lights are activated. An officer can manually turn on the COBAN system.

Appellant was arrested and transported to the hospital. He submitted to a blood test at 10:55 p.m. and was found to have a blood alcohol level of .088 percent. After waiving his *Miranda*[4] rights, he reiterated what he had told Officer Powers earlier that night at the scene of the accident.

Clark was transported to the hospital by helicopter. A blood test revealed that she had a blood alcohol level of .20 percent. Her injuries included a dislocated femur, significant head trauma and bruising, and lacerations on her face, hands, and chest. A CT scan showed severe injuries to her brain.

DISCUSSION

The Charges

Appellant contends he was improperly charged with and convicted of violating Vehicle Code section 23153 because his victim Clark had died a result of her injuries. He claims he could thus only be charged with and convicted of vehicular manslaughter while intoxicated in violation of section 191.5, subdivision (b) (hereinafter section 191.5(b)). We disagree.

Appellant was originally charged with violating Vehicle Code section 23153, subdivisions (a) (driving under the influence of alcohol causing injury) and (b) (driving with a blood alcohol content of 0.08 percent or more causing injury), with attendant GBI allegations. Following Clark's death on December 3, 2012, the prosecution filed a first amended complaint adding a count for gross vehicular manslaughter while intoxicated, in violation of subdivision (a) of section 191.5. Just prior to the preliminary hearing, the prosecution amended the complaint again by eliminating the manslaughter charge.

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

In holding appellant to answer, the court rejected defense counsel's assertion that the prosecution was required to charge appellant with Clark's death under section 191.5. The court reasoned that "the power . . . to charge specific crimes . . . lies within the discretion of the District Attorney's Office." Appellant's section 995 motion to dismiss on the same grounds was also denied.

The court did not err in concluding that the prosecutor properly exercised its discretion in charging appellant with violating Vehicle Code section 23153, rather than section 191.5(b). In arguing to the contrary, appellant relies on the *Williamson*[5] rule, as set forth in *People v. Jenkins* (1980) 28 Cal.3d 494 (*Jenkins*). *Jenkins* states "[t]he fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific statute alone to apply." (*Id.* at p. 505; see also *People v. Gilbert* (1969) 1 Cal.3d 475, 479-481 (*Gilbert*) [recognizing same].) Appellant reasons that section191.5(b) is more specific because it applies when the victim has died, while Vehicle Code section 23153 applies when the victim suffers any type of injury.

The Supreme Court, however, subsequently expanded on the *Williamson* rule as stated in *Jenkins* and *Gilbert*. The court recognized that both cases "merely stand for the proposition that when the Legislature has enacted a specific statute addressing a specific matter, and has prescribed a sanction therefor, the People may not prosecute under a general statute that covers the same conduct, *but which prescribes a more severe penalty*, unless a legislative intent to permit such

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[5] *In re Williamson* (1954) 43 Cal.2d 651 (*Williamson*).

alternative prosecution clearly appears. [Citation & fn. omitted.] *Gilbert* and *Jenkins* do not purport to limit the People's discretion to prosecute under a general statute that provides a sanction *less severe* than that called for under a specific statute." (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250 (*Mitchell*).)

Vehicle Code section 23153, the "general" statute, actually provides for a less severe punishment than the more "specific" section 191.5(b). (See § 191.5, subd. (c)(2) [§ 191.5(b) "is punishable by imprisonment in a county jail for not more than one year or by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or four years"]; Veh. Code, § 23554 [first violation of Veh. Code, § 23153 is punished by imprisonment in the state prison for 16 months or two or three years (§ 18), "or in a county jail for not less than 90 days nor more than one year"].)[6]

Because in this case the "specific" statute has a potentially greater penalty than the "general" statute, the doctrine appellant seeks to invoke here does not apply. (*Mitchell*, *supra*, 49 Cal.3d. at p. 1250.) Under the circumstances, we are bound to heed the admonition "that a prosecutor generally has the discretion to charge a defendant with a 'more general' lesser offense even when there is a 'more specific' greater offense that

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[6] Vehicle Code section 23153 with an attendant three-year GBI enhancement results in a potentially more severe punishment than a violation of section 191.5(b). Appellant makes clear, however, that he "is not challenging the propriety of attaching a [GBI] enhancement to a charge of driving under the influence of alcohol and causing injury in violation of Veh. C. § 23153." In any event, there is no authority to support a conclusion that the "special over the general rule" applies to a substantive offense coupled with an enhancement.

might embrace the facts of the case. . . . Although the Legislature presumably would have the power to specify that an individual who commits particular contemptuous conduct must be prosecuted under a particular statute or not at all, there would have to be a clear indication of such legislative intent before it would be appropriate to construe a statute . . . to preclude a prosecutor from exercising his traditional discretion to charge a defendant with a less serious offense which the facts also support. [Citation.]" (*Id.* at p. 1251.)[7]

Appellant asserts that the Legislature's intent to foreclose his prosecution under the Vehicle Code is reflected in *People v. Wilkoff* (1985) 38 Cal.3d 345 (*Wilkoff*), which states: "While the moral culpability of a drunk driver who causes death and a drunk driver under the same circumstances who merely causes injury may be the same, the Legislature has chosen to draw a line at this point by defining one crime in terms of an act of violence against the person ('unlawful killing') and placing it in the Penal Code, while defining the other in terms of an act of driving and placing it in the Vehicle Code. The Legislature has made this line even more clear through recent amendments to the drunk driving and manslaughter statutes. Effective January 1, 1984, an intoxicated driver who kills another person is no longer chargeable with that death under the Vehicle Code, but

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[7] Appellant also notes that we previously relied on *Jenkins* in concluding that Vehicle Code section 23153 is a lesser included offense of section 191.5. (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1149.) That portion of our opinion is dicta. In any event, our opinion did not contemplate the clarification of *Jenkins* as set forth in *Mitchell*.

may only be charged under the manslaughter statutes of the Penal Code. [Citations.]" (*Id.* at pp. 350, 355, fn. 6.)

In light of the amendments to which the Supreme Court referred,[8] we do not read the comment in *Wilkoff* as foreclosing prosecution under the Vehicle Code when a victim dies. Instead, the court was simply noting that the reference to driving while intoxicated and causing death was now listed as a manslaughter crime in the Penal Code. Accordingly, the court's statement that an intoxicated driver was no longer chargeable "with that death" under the Vehicle Code (*Wilkoff*, 38 Cal.3d at pp. 350, 355, fn. 6) does not mean that such a driver whose conduct caused a death could, for that reason, no longer be charged with driving while intoxicated and causing injury. Rather, it means that to be charged with the *death*, the defendant would have to be charged under the Penal Code. Appellant was not so charged here.

Appellant claims that the decision to charge him under Vehicle Code section 23153 instead of section 191.5(b) also violates his right to equal protection. We disagree. The United States Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. [Citations.] Whether to prosecute and what charge to file or bring before a grand jury are decisions that

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[8] The court was apparently referring to the removal of the word "death" from Vehicle Code section 23153, leaving in only the reference to causing "injury," and the addition of the offense of vehicular manslaughter while intoxicated to the Penal Code. (See *Wilkoff*, *supra*, 38 Cal.3d at pp. 350, 355, fn. 6, citing Stats. 1983, ch. 937, § 1, amending Veh. Code, § 23153 and § 192.)

generally rest in the prosecutor's discretion. [Citations.]" (*United States v. Batchelder* (1979) 442 U.S. 114, 123-124.) Moreover, "[t]he prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. [Citations.] Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. [Citations.]" (*Id.* at p. 125.)

Appellant does not address *United States v. Batchelder*. In any event, we reject his suggestion that all drunk drivers whose victims die of their injuries are similarly situated for purposes of equal protection. Clark suffered traumatic injuries and lingered for several days prior to her death. Under these circumstances, the prosecution could reasonably decide to charge appellant under the Vehicle Code rather than the Penal Code.

Alleged Prosecutorial Misconduct

Appellant contends the prosecutor committed prejudicial misconduct by failing to disclose the COBAN video recording from Deputy Parker's patrol vehicle prior to trial. He claims the court erred in denying his motion for a mistrial on that ground and in refusing his proffered instruction on the issue. We conclude otherwise.

"'A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the

defendant's right to a fair trial." [Citation.]'" (*People v. Clark* (2011) 52 Cal.4th 856, 960.) If the misconduct does not attain that level, it may be error under state law, but '"'only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." [Citation.] . . . [Citation.]'" (*People v. Linton* (2013) 56 Cal.4th 1146, 1205.) The denial of a motion for a mistrial based on prosecutorial misconduct is reviewed for an abuse of discretion. (See *People v. Williams* (1997) 16 Cal.4th 153, 190.)

During trial, the defense learned that the prosecution had failed to produce a copy of the COBAN video recording from Deputy Parker's vehicle. A copy of the video was immediately provided to the defense. Appellant moved for a mistrial, claiming that the discovery violation constituted prosecutorial misconduct. The prosecutor responded that the failure to timely disclose the video was inadvertent and offered that he was also unaware of its existence.

The court recognized there was no *Brady*[9] violation because the video was actually produced at trial. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 281-282.) Although the court was "sicken[ed]" by the late disclosure and reprimanded the prosecutor, it determined that mistrial was unwarranted and accordingly denied appellant's motion.

The defense subsequently recalled Officer Powers, played the video, and cross-examined the officer concerning its contents. After viewing the video, Officer Powers acknowledged that his prior testimony was inaccurate in two respects. Namely, the officer previously testified that the field sobriety tests were

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[9] *Brady v. Maryland* (1967) 373 U.S. 83.

conducted on one side of the road, while the video reflected that they were conducted on the other. The officer also previously testified that no one else was present when the tests were conducted, yet the video showed someone was standing behind appellant while the tests were conducted.

At the conclusion of the trial, the court instructed the jury on the issue of the video's late disclosure pursuant to CALCRIM No. 306.[10] The court refused appellant's proposed instruction on the ground it "has excess verbiage that I instructed [defense counsel] not to do [*sic*], but it's certainly argument that's going to be raised before the jury."[11]

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[10] The jury was instructed: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the prosecution failed to disclose: Deputy Parker's [COBAN] video. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

[11] Appellant's proffered instruction stated: "The People must disclose all relevant evidence to the Defense at least 30 days before trial. Failure to follow this rule denies the Defense the opportunity to produce all relevant evidence, to counter opposing evidence, to impeach prosecution witnesses, to present a complete defense[,] and to receive a fair trial. [¶] The prosecutor did not produce evidence of Deputy Parker's Coban Video of Mr. Bettencourt's SFSTs/FSTs until March 12, 2015, although the prosecutor had it in his possession, and knew of its existence for 844 days. Withholding this evidence violated Constitutional and statutory law, even without a defense request prior to trial. You are further instructed that the defense did specifically request

The court did not abuse its discretion in denying a mistrial. Appellant failed to demonstrate that the prosecutor's failure to timely produce the COBAN video rose to the level of misconduct. Nothing in the record supports his assertion that the evidence was deliberately or willfully withheld.

Although the discovery rules were violated,[12] the court sufficiently addressed the issue by giving CALCRIM No. 306. Appellant's proffered instruction was fatally argumentative and misstated the law. Moreover, counsel took full advantage of the violation in his cross-examination of Officer Powers and in closing argument. Accordingly, any error arising from the late disclosure of the COBAN video was harmless. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 [claims of prosecutorial misconduct are reviewed under the standard set forth in *People v.*

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this evidence in writing by name, at least 5 times over the course of two years during the pre-trial proceedings. [¶] You can take into consideration the actions of the prosecutor in willfully and unlawfully failing to disclose the Parker Video in deciding the case. You may infer from the prosecutor's willful and unlawful failure to obey the law that the untimely disclosed Parker video evidence is favorable to the accused. [¶] The weight to which you assign this disclosure violation, if any, is entirely up to the jury. However, the prosecutor's willful and unlawful nondisclosure of the Parker video can, by itself, raise a reasonable doubt as to all the charges against Mr. Bettencourt. In other words, on this fact alone, you can find Mr. Bettencourt Not Guilty of all charges."

[12] Section 1054.1, subdivision (c) provides that the prosecutor must disclose all relevant evidence that is either in his or her possession or that he or she knows to be in the possession of an investigating agency. As relevant here, all disclosures must be made at least 30 days prior to trial. (§ 1054.7.)

Watson (1956) 46 Cal.2d 818, 836, i.e., reversal is not required unless it is reasonably probable that the error contributed to the verdict; see also *People v. Verdugo*, *supra*, 50 Cal.4th at p. 280 [violations of section 1054.1's discovery rules are subject to the harmless error standard of review set forth in *Watson*].)

Midtrial Recess

Appellant contends his due process rights were violated when the trial was recessed to accommodate the trial judge's preplanned vacation. Appellant did not object to the recess below, however. On the contrary, defense counsel not only discouraged the judge from cancelling his vacation, but also insisted that the trial continue to its completion after the judge returned. Counsel even went so far as to state "[i]f we get to the point we have less than 12 jurors, the defense intends to object to a mistrial and to ask the jury of less than 12 to decide the case." Accordingly, appellant's claim that the recess was improper is barred by the doctrines of forfeiture and invited error. (*People v. Bolden* (2002) 29 Cal.4th 515, 561-562 [forfeiture]; *People v. Hughes* (2002) 27 Cal.4th 287, 345 [invited error].)[13]

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[13] In appellant's motion for a new trial, defense counsel represented he had "requested that the court follow the procedure outlined in *Penal Code* § 1053, and hand the case off to another available Judge to finish the jury trial and the prosecution objected. The court sustained the prosecution's objection, over-ruling the defense suggestion/objection, and granted itself a 12 day continuance . . . without a showing of good cause." Neither the trial judge nor prosecutor recalled any such colloquy. Moreover, counsel's assertion is disingenuous in light of his subsequent insistence that the trial continue after the judge returned and his express objection to mistrial on that ground. Unfortunately, defense counsel's blatant misrepresentation of the

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

TANGEMAN, J.

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record (if not outright perjury) was but one of many questionable tactics he employed throughout the trial. Defense counsel was also relentlessly antagonistic toward the prosecutor, who all too often took the bait. At one point the court threatened both of them with sanctions and lamented, "I'm sick of this trial. I'm sick of both of you. . . . I'm sick of the preparedness of the DA's office. I'm sick of the attitude of [defense counsel] Genis. And it's time to come to an end and bring this trial to a conclusion. [¶] Now knock it off. You have really, both of you, . . . tried my patience."

Rogelio R. Flores, Judge
Superior Court County of Santa Barbara

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Xavier Becerra, Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.