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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESSE ALAN TUCKER, Defendant and Appellant.	B276128 (Los Angeles County Super. Ct. No. PA082930)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Reversed in part, affirmed in part and remanded with directions.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesse Alan Tucker was convicted of assault upon a police officer, resisting an executive officer, driving a stolen vehicle, and other crimes. He contends the judgment of conviction must be reversed for a new trial due to the improper exclusion of evidence; in addition, he contends there was sentencing error. We reject these contentions, with the exception of the sentencing error. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

RELEVANT PROCEDURAL BACKGROUND

In May 2016, an amended information was filed, charging appellant in count 1 with assault with a deadly weapon upon a police officer (Pen. Code, § 245, subd. (c)); in count 2, with resisting an executive officer (Pen. Code, § 69); in counts 3 and 10, with driving or taking a vehicle without consent after a prior conviction (Pen. Code, § 666.5; Veh. Code, § 10851); in count 9, with assault with a deadly weapon (Pen. Code, 245, subd. (a)(1)); in count 11, with misdemeanor vandalism (Pen. Code, § 594, subd. (a)); and in count 12, with evading a police officer (Veh. Code, § 2800.2, subd. (a)). Accompanying the counts were allegations that appellant had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Additionally, accompanying count 2 was an allegation that appellant personally used a dangerous weapon, namely, a vehicle (Pen. Code, § 12022, subd. (b)(1)). Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty as charged in counts 1 through 3 and 10 through 12, and found true the deadly weapon allegation accompanying count 2. The jury found appellant not guilty of the offense charged in count 9. After appellant admitted the truth of the prior prison term allegations, the trial court imposed an aggregate sentence of eight years and eight months, including a one-year enhancement on count 1 predicated on one of appellant's prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court imposed and stayed an additional one-year enhancement on count 1 on the basis of the other prior prison term.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

1. *Counts 10 Through 12*

In January 2015, Cary Beckwith owned a black Chevrolet Impala. On January 20, Beckwith drove his car to the school where he worked as custodian. Later, after becoming aware that his car keys were missing from his office, he discovered that his car was no longer in the school parking lot, and phoned the Los Angeles County Sheriff's Department.

On January 27, at approximately 10:00 a.m., Los Angeles County Sheriff's Department Deputy Sheriffs Robert Tunnell and Allen Asis were on patrol in the William S. Hart Park in separate marked police vehicles. After receiving a call regarding an unauthorized car within the park, Tunnell

and Asis saw an black Impala and followed it. Because the car was driving recklessly, Tunnell and Asis activated their sirens and flashing lights. The Impala veered around and passed Tunnell, who saw that appellant was its driver. When the car entered an enclosed area within the park, Tunnell halted at the area's entrance, expecting that appellant would stop and try to flee on foot. Instead, appellant drove through a chain link gate blocking an exit and left the park.

On January 28, Chris Kaub entered his apartment building parking lot, noticed a damaged black Impala in an assigned stall usually occupied by another car, and called the Los Angeles County Sheriff's Department. After making that call, he saw appellant walking toward the Impala. When Kaub asked whether appellant owned the Impala, he replied, "No." Appellant then ran to the car and drove away quickly.

A few days later, Beckwith's car was found in a towing yard approximately three miles from the school where it had been taken. The car was damaged, and its license plates were missing.

2. *Counts 1 Through 3*

In February 2015, Hector Rodriquez and Salvador Nunez worked for Lestra Landscaping. On February 2, they were assigned to perform landscaping services at a restaurant. They drove to the restaurant in a white Ford F-150 truck owned by Lestra Landscaping, parked, and left the

truck's keys inside the truck. The truck had an active GPS location tracking device, and also contained landscaping tools, including a weed eater.

As Rodriguez worked, he saw appellant seated at a restaurant table. Appellant left the table, entered the truck, and drove away. Rodriquez and Nunez notified their employer, who determined the truck's location through the GPS tracking device and provided that information to the Los Angeles County Sheriff's Department.

Los Angeles County Sheriff's Department Deputy Sheriff Allen Hodge testified that on February 2, he was in uniform and on patrol in a marked police vehicle when he responded to a call regarding the location of the missing truck. As he drove toward the location, he travelled along a dead-end street, and discovered that the truck's identified location placed it in an area beyond the end of the street. Hodge parked in the middle of the narrow street -- which was ten feet wide -- and called for assistance. Due to a retaining wall alongside the street, Hodge's patrol car blocked the street. While waiting inside the patrol car, Hodge saw David Oldham walking near him holding a weed eater. Because Oldham's clothing fit the description of the thief and the stolen vehicle was a gardening truck, Hodge left his patrol car and stood near the driver's door. From that position, Hodge pointed his gun at Oldham and ordered him to lie down on the ground.

According to Deputy Hodge, immediately after Oldham complied, the missing truck, driven by appellant, appeared

in the street in front of Hodge's patrol car. Because appellant was driving directly toward the patrol car, Hodge moved backward toward the trunk of his vehicle. While Hodge stood on the driver's side of the patrol car, the truck hit the front of the car, on the driver's side near the light. When Hodge directed appellant to stop and put his hands up, appellant ignored him and backed up.

Deputy Hodge further testified that a large bush blocked his view of the truck after it backed away. In order to see where the truck had gone, Hodge moved to what he characterized as a "kind of exposed" location in front of the patrol car. Hodge discovered that appellant had backed the truck up to a wall or fence approximately 50 feet away at the end of the street. When Hodge directed appellant to stop what he was doing and put his hands up, appellant ignored the orders and accelerated directly toward Hodge.

Deputy Hodge further testified that because appellant appeared to be trying to run him down in order to get away, he moved out of the truck's path and fired a shot at appellant, which entered the truck's passenger window and exited through the driver's side window, without hitting appellant. According to Hodge, he shot at appellant because he knew from his training that "shooting at the vehicle itself wasn't going to do anything." After the truck passed Hodge, it crashed into the patrol car and the adjacent retaining wall. Appellant then left the truck through the driver's door and fled on foot. After appellant ran away, Hodge saw Oldham throw away a baggie later determined to contain

narcotics and a pipe. When Hodge asked who was driving the truck, Oldham replied, "Jesse."

Oldham testified that in February 2015, he was living in a camp located in a ravine behind some residences. On February 2, appellant -- whom Oldham described as his "buddy" -- drove in a white truck to the area where Oldham lived and gave him a weed whacker from the truck. As Oldham walked back to his camp, a deputy sheriff drove up, pointed a gun at him, and ordered him to put his hands up. Oldham then saw the white truck, driven by appellant, coming toward him. Oldham believed that appellant was "frightened" and was "just trying to get out of there." Appellant's truck hit the patrol car, reversed, slammed into a gate, and then drove forward again toward the patrol car. After passing close to the deputy and Oldham, who was on the ground pursuant to the deputy's order, the truck hit the patrol car a second time and "got caught up on the bricks."

When cross-examined, Oldham stated that he saw the deputy sheriff fire his gun once at appellant after the truck had stopped. According to Oldham, the bullet entered "the back window of the windshield." He also testified that he did not see appellant run from the truck. He acknowledged throwing away a bag of narcotics.

B. *Defense Evidence*

Jose Terrones, a William S. Hart Park worker, testified that on January 27, 2015, he saw a black vehicle in the park, but made no identification of its driver when later shown a

photographic "six-pack" line up. He also did not identify appellant as the driver at trial.

Salvador Nunez testified that he identified a man other than appellant as the potential thief when shown a photographic "six-pack" lineup. According to Nunez, he told the investigating officers that he was uncertain of his identification because he saw the thief for a very short period of time.

Mitchell Eisen, a psychologist, testified regarding factors that affect the memories of eyewitnesses. According to Eisen, a witness's ability to identify an individual is diminished by suggestive conditions, delays in making the identification, stress, trauma, and other circumstances. Eisen also testified that the manner in which photographic six-pack lineups are presented to witnesses may reduce their reliability.

DISCUSSION

Appellant's challenges target the judgment solely with respect to his convictions on counts 1 through 3, which arise from the events on February 2, 2015. Appellant contends the trial court denied his rights to due process and to present a defense by excluding testimony from his expert and limiting cross-examination of Oldham. Appellant also contends the trial court erred in sentencing him on count 1 by staying -- rather than striking -- an enhancement for a prior prison term. For the reasons discussed below, we

reject his contentions, with the exception of his challenge relating to the prior prison term enhancement.

A. *Exclusion of Expert Witness Testimony*

Appellant contends the trial court improperly barred testimony from defense expert Timothy T. Williams, Jr., that Deputy Hodge contravened police procedures during the February 2 incident. The trial court sustained objections to the proposed testimony under Evidence Code sections 351 and 352, concluding that it was irrelevant to the charges against appellant relating to the February 2 incident.

1. *Governing Principles*

The trial court's determinations of relevance under Evidence Code section 351 are reviewed for abuse of discretion (*Spolter v. Four-Wheel Brake Serv. Co.* (1950) 99 Cal.App.2d 690, 699), as are its determinations under Evidence Code section 352 regarding whether "the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124). That discretion permits the court to bar expert testimony that is irrelevant or confusing to the jury. (*People v. Manning* (2008) 165 Cal.App.4th 870, 879.) Absent an abuse of discretion, the exclusion of evidence under sections 351 and 352 ordinarily contravenes no constitutional rights, including due process rights. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1249; *People v. Riccardi* (2012) 54 Cal.4th 758, 808-809 (*Riccardi*),

abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216).

In view of these principles, our focus is on whether the trial court abused its discretion in ruling that the proposed expert testimony had no material bearing on the charges in counts 1 through 3. We therefore examine the elements of those charges.

Assault with a deadly weapon upon a police officer, as alleged in count 1, is a general intent crime, like other forms of assault.[1] (See *People v. Chance* (2008) 44 Cal.4th 1164, 1169.) The nature of the requisite general intent arises from the relationship between the offenses of assault and battery. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) "Assault . . . lies on a definitional . . . continuum of conduct that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault." (*Id.* at p. 216.) In view of that relationship, "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either

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[1] Subdivision (c) of Penal Code section 245 provides: "Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer . . . , and who knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties, when the peace officer . . . is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years."

from its own character or that of its natural and probable consequences.' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 785, 787-788 (*Williams*).) Accordingly, to establish the requisite mental state for assault, the prosecution need only show that the defendant engaged in "an intentional act" and had "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." (*Id.* at p. 790.)

Additionally, the assault charged in count 1 involved a special requirement, namely, that the victim be a police officer "engaged in the performance of his or her duties." Due to that requirement, a defendant cannot be convicted of the offense alleged in count 1 unless the officer was acting lawfully at the time. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 (*Gonzalez*).) Unlawful conduct by an officer includes the use of excessive force to make an arrest (*People v. Soto* (1969) 276 Cal.App.2d 81, 85), as well as violations of law attributable to the exercise of the officer's judgment (see *Gonzalez*, *supra*, at p. 1220). The rule in question "flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in 'duties,' for purposes of an offense defined in such terms, if the officer's conduct is unlawful." (*Gonzalez*, *supra*, at p. 1217.)

The offense of resisting an executive officer, as submitted to the jury in count 2, is also a general intent crime. (*People v. Rasmussen* (2010) 189 Cal.App.4th 1411,

1420 (*Rasmussen*).)[2] To establish that offense, the prosecution was obliged to show that appellant had "actual knowledge . . . that the person being resisted [was] an executive officer and that the officer [was] engaged in the performance of his . . . duty" (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 237), but not that appellant specifically intended to interfere with the performance of that duty

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[2] Subdivision (a) of Penal Code section 69 provides that "[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his of her duty" commits an offense punishable as a felony or misdemeanor. Under the statute, the term "'executive officer'" includes police officers. (*In re Manuel G.* (1997) 16 Cal.4th 805, 818-819 (*Manuel G.*).)

Although Penal Code section 69, subdivision (a), permits the offense to be asserted as a specific intent crime or a general intent crime, the offense charged in count 2 was submitted to the jury only as a general intent crime. Under the statute, the offense may be committed in two distinct ways, namely, by attempting to deter an officer, and by actually resisting an officer. (*Rasmussen*, *supra*, 189 Cal.App.4th at p. 1418.) When committed the first way, the offense is a specific intent crime; when committed the second way, it is a general intent crime. (*Id.* at pp. 1420-1421.) Here, the amended information alleged both versions of the offense, but the jury was instructed solely regarding the second manner of committing the offense. Accordingly, appellant was convicted of actually resisting an executive officer. (*Id.* at pp. 1418-1421.)

(*Rasmussen*, *supra*, at pp. 1419-1420). Furthermore, as with count 1, the prosecution was obliged to show that the officer was acting lawfully at the time. (*Manuel G.*, *supra*, 16 Cal.4th at p. 818.)

In contrast with the offenses relating to counts 1 and 2, the offense charged in count 3 under Vehicle Code section 10851 is a specific intent crime. To establish that offense, the prosecution was obliged to show that appellant "drove or took a vehicle belonging to another person, without the person's consent," and with "the specific intent to permanently or temporarily deprive the owner of title or possession." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574 (*O'Dell*).)[3]

Appellant's contention also implicates the principles governing the admission of expert testimony. ""'Generally, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .'"" [Citations.] "However, . . . [e]xpert testimony will be excluded ""when it would add *nothing at all* to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men [and

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[3] The offense in count 3 also relied on Penal Code section 666.5, which provides that when a defendant has a prior conviction for enumerated offenses, the defendant's violation of Vehicle Code section 10851 is punishable as a felony or a misdemeanor. That aspect of count 3 was adjudicated by the trial court after the jury returned its verdicts.

women] of ordinary education could reach a conclusion as intelligently as the witness.""" [Citation.]" (*People v. Brown* (2016) 245 Cal.App.4th 140, 157 (*Brown*).)

Subdivision (b) of Evidence Code section 801 further requires that expert opinion must be "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." Under this provision, expert testimony may be founded in some circumstances on material that is not admitted into evidence, and on evidence that is ordinarily inadmissible, such as hearsay. (*People v. Sanchez* (2016) 63 Cal.4th 665, 676-678, 685-688.) However, "the trial court may exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172 (*Pollock*), quoting *People v. Montiel* (1993) 5 Cal.4th 877, 919, overruled on another ground in *Sanchez*, *supra*, at p. 686, fn. 13.)

2. *Underlying Proceedings*

Prior to trial, the prosecutor asserted a motion in limine to exclude testimony from police practices expert Williams, arguing that any such testimony was irrelevant to the offenses charged in counts 1 through 3. Defense counsel responded that Williams had not formed an opinion because he was still "reviewing all the paperwork," and the court deferred its ruling on the motion.

At trial, Deputy Hodge and Oldham testified that appellant hit Hodge's patrol car twice, but differed regarding when Hodge fired at appellant. Hodge stated that after he detained Oldham using his gun, appellant drove the truck into the front of Hodge's patrol car, striking the side where Hodge stood. When appellant backed up out of Hodge's view, Hodge moved in front of the patrol car in order to see appellant's truck. Appellant then drove directly at Hodge, who moved out of the way of the truck and fired a shot at appellant before the truck hit the patrol car and a retaining wall. Oldham provided a similar account of appellant's conduct, stating that after a deputy sheriff detained him with a gun, appellant's truck hit the patrol car, reversed, and drove again toward the patrol car, hitting it. Oldham maintained, however, that Hodge fired his gun only after the truck "stopped," that is, collided for the second time with the patrol car.

After the prosecution completed its case-in-chief, appellant's counsel announced his intention to call Williams as a witness. When the prosecution objected on the grounds of relevance and Evidence Code section 352, the trial court requested an offer of proof. Counsel stated that Williams would testify that Deputy Hodge "should have been on the other side of the [patrol] vehicle instead of placing himself in a position where he possibly could get harmed," and that rather than firing his gun, he should have "contained the area in an attempt to locate the suspect." Counsel argued that Williams's testimony supported appellant's central

defense -- namely, that "at no time did he try to drive at" Hodge -- because it showed that Hodge "put himself there." Furthermore, pointing to Oldham's testimony, counsel argued that Williams's testimony showed that Hodge improperly shot at appellant after the truck "had come to a complete stop . . . ."

The trial court stated that the proposed testimony appeared to be irrelevant to the charge of assault on a police officer as alleged in count 1, remarking that whether Deputy Hodge "should have been there or not" was immaterial to the elements of the offense. The court further observed that although testimony from a police practices expert might have some relevance to whether "the lawful performance of . . . duty" element of resisting an executive officer as charged in count 2, there was no evidence that Hodge acted unlawfully in detaining Oldham. The court nonetheless deferred ruling on the proposed testimony until appellant presented his other witnesses.

Later, when defense counsel again sought leave to call Williams as a witness, the trial court stated: "[T]he problem is [that] the firing of the round occurs after the facts that might support an assault or a resisting. Whether [Deputy Hodge] should have fired the round . . . doesn't make a difference to ['] lawful performance['] or what happened 15 seconds, 10 seconds prior." Counsel argued that Williams's testimony was necessary to establish certain facts disclosed in police reports, including that appellant escaped from the crashed truck through a passenger door. The trial court

replied that although an expert may rely on a police report for some purposes, "he can't just read from the report."

At defense counsel's request, the trial court agreed to hear Williams's proposed testimony (Evid. Code section 402). Williams stated that according to the policies and procedures of Los Angeles County Sheriff's Department, deputy sheriffs should get out of the line of a moving vehicle. Williams opined that after the truck first hit the patrol car, Deputy Hodge should have retreated behind the patrol car, rather than move to the front of the car, despite the fact that from the rear of the patrol car Hodge could not see where the truck had backed up.

After hearing Williams's proposed testimony, the trial court ruled that it was inadmissible, stating: "Whether the deputy should have been there . . . or was in violation of any policy doesn't make a difference. The only question for the jury to decide is whether it was assault or not. So if he should have been standing somewhere else to be in compliance with police practices or policy really doesn't matter."

3. *Analysis*

We see no error in the trial court's ruling. Before the trial court, appellant's primary contention was that Williams's proposed testimony would enable him to show that he drove toward Deputy Hodge only because Hodge had moved in front of his patrol vehicle, in contravention of police procedures. The court concluded that the proposed

testimony was irrelevant, reasoning that in view of the other evidence, Hodge's act of moving in front of the patrol car had no bearing on whether appellant committed the charged crimes, regardless of whether that act, or Hodge's subsequent act of shooting at appellant, complied with police procedures. For the reasons discussed below, we agree.

We begin with the offense charged in count 3 under Vehicle Code section 10851. Although the trial court did not expressly examine that offense, it falls within the court's rationale for excluding the proposed testimony. According to the prosecution's evidence, by the time Deputy Sheriff Hodge first became aware of appellant's presence -- that is, when appellant first hit the patrol car -- appellant had already committed that offense, as appellant was then driving the truck without the owner's consent, and had clearly manifested an intent to deprive the owner "of title or possession." (*O'Dell*, *supra,* 153 Cal.App.4th at p. 1574.) Williams's proposed testimony regarding the propriety of Hodge's later conduct thus cannot be regarded as relevant to count 3.

The proposed testimony also was irrelevant to count 1, the charge of assault upon a police officer. Deputy Hodge's position in front of the patrol car had no material bearing on whether appellant formed the state of mind required for the offense. Because assault requires neither a specific intent to injure nor a subjective awareness of the risk that a battery might occur, the existence of the requisite mental state does not hinge on the defendant's own subjective assessment of

the likelihood of a battery. (*Williams*, *supra*, 26 Cal.4th at pp. 782-783, 788.) Thus, "a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 797, fn. 3.)

Here, the prosecution's evidence showed that appellant had the requisite state of mind when he drove toward Deputy Hodge as he stood in front of the patrol car, regardless of whether appellant intended to hit Hodge or believed he could escape arrest by maneuvering around him. Hodge testified that after backing up the truck, appellant drove directly at him along a narrow road. Williams's proposed testimony was thus not relevant to whether appellant had the state of mind necessary for assault upon a police officer.

Nor was the proposed testimony relevant to any issue relating to whether Deputy Hodge was engaged in the lawful performance of his duties when appellant drove directly at him. Generally, a violation of law rendering an officer's conduct unlawful requires the use of excessive force (*Brown*, *supra*, 245 Cal.App.4th at p. 157) or an infringement of individual rights attributable to the officer's judgment (*Gonzalez*, *supra*, 51 Cal.3d at p. 1220). Hodge's act of positioning himself in front of the patrol car -- though perhaps hazardous to Hodge -- was not unlawful, as it neither applied excessive force to appellant nor violated his rights. Furthermore, Hodge's position in front of the patrol

car did not justify or negate appellant's assaultive conduct -- viz., his act of driving directly toward Hodge -- because in the absence of the use of excessive force by an officer, "a person may not use force to resist any arrest, lawful or unlawful . . . ." (*People v. Curtis* (1969) 70 Cal.2d 347, 357, disapproved on another ground in *Gonzalez*, *supra*, at pp. 1222.)

For similar reasons, the proposed testimony was irrelevant to the charge of resisting an executive officer in count 2. According to the prosecution's evidence, appellant collided with the patrol car and disregarded Deputy Hodge's orders before Hodge moved in front of the patrol car; shortly afterward, when Hodge took up that position, appellant again disregarded Hodge's orders to stop and put up his arms, and instead drove toward Hodge. The prosecution's evidence thus showed that appellant resisted Hodge before he shot at appellant, and -- as explained above -- the proposed testimony did not suggest that Hodge's conduct was unlawful prior to that shooting. Accordingly, the trial court correctly concluded that the proposed testimony was irrelevant to the crimes arising from the February 2 incident.

The trial court also did not err in rejecting appellant's alternative ground for seeking admission of the proposed testimony, namely, that it would establish certain facts regarding the February 2 incident shown in the police reports, including that appellant escaped from the crashed truck through the passenger door. As police reports are

hearsay (*People v. Baeske* (1976) 58 Cal.App.3d 775, 780), the court properly excluded the proposed testimony insofar as it was offered to prove such facts. (*Pollock*, *supra*, 32 Cal.4th at pp. 1172-1173 [trial court properly excluded expert testimony reflecting defendant's hearsay statements to expert regarding defendant's drug use].)

Appellant contends that the proposed testimony was improperly excluded because it would have permitted appellant to impeach Deputy Hodge. Appellant's principal argument is that because an officer's firearm use is a serious matter, the proposed testimony established a potential motive for Hodge to fabricate an assault. The crux of the argument is that in order to avoid discipline imposed in an internal investigation, Hodge might have "cover[ed] for" his improper decision to move to the front of the patrol car by asserting -- falsely -- that after taking up that position, he was compelled to shoot because appellant drove directly toward him.

In our view, the exclusion of the proposed testimony did not deny appellant a material opportunity to challenge Deputy Hodge's credibility, insofar as appellant relied on this theory. Williams did not offer to testify that there was an internal investigation or that Hodge faced discipline for his decision to move to the front of the patrol car. Furthermore, nothing in the proposed testimony suggested that Hodge might reasonably have expected to mitigate the discipline imposed for that decision -- if improper -- by fabricating a reason for his subsequent gun use in the front

of the patrol car. Simply put, Hodge could not reasonably have believed that he might excuse his violation of a police policy by making up a rationale for discharging his gun, as that was the act the policy was designed to prevent.

Appellant also contends the trial court's ruling precluded him from impeaching Deputy Hodge regarding several other matters. At trial, Hodge testified that when he decided to shoot at the approaching truck, his training prompted him to aim at appellant, rather than the truck. Hodge stated: ". . . [B]ecause you go through training on shooting at moving vehicles and how effective it is, and in that situation the training popped out of my head. So I know that shooting at the vehicle itself wasn't going to do anything. So I basically fired a round at him . . . to get his foot off the accelerator and allow me to go behind the vehicle." Hodge also stated that he fired his gun as the truck approached him -- in contrast to Oldham, who stated that Hodge fired his gun after the truck had stopped -- and that appellant fled from the truck through the driver's door. Appellant argues that the proposed testimony would have "informed the jury that Hodge did not follow proper procedures with respect to handling a moving vehicle," assisted the jury in resolving the conflict in the evidence regarding the time of the shooting, and cast doubt upon Hodge's testimony that appellant left the truck through the driver's door.

We reject appellant's contention, as the proposed testimony cannot be regarded as having significant

impeachment value regarding these matters. The proposed testimony did not directly challenge any testimony from Hodge regarding his training. Hodge never attributed his decision to move in front of the patrol car to his training; rather, he acknowledged that he was "kind of exposed" in front of the patrol car, and ascribed to his training only his decision to aim his gun at appellant, rather than at the truck. Similarly, the proposed testimony did not challenge Hodge's testimony as to when he shot at appellant. Furthermore, for the reasons discussed above, the proposed testimony was inadmissible to establish facts contained in the police reports, including how appellant left the truck. In sum, the trial court did not abuse its discretion in excluding Williams's proposed testimony.

B. *Cross-Examination of Oldham*

Appellant contends the trial court improperly limited his cross-examination of Oldham regarding his arrest shortly before trial for possessing a driver's license and credit card belonging to another person. He maintains that the ruling impaired his defense and ability to impeach Oldham. We reject his contention.

1. *Governing Principles*

Under Evidence Code section 352, the trial court has broad discretion to control the cross-examination of witnesses (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 118) and the presentation of impeachment evidence (*Riccardi*,

supra, 54 Cal.4th at pp. 808-809). Generally, subject to that discretion, a witness may be impeached with evidence that he or she committed uncharged crimes of moral turpitude, a category that includes crimes manifesting dishonesty (*People v. Bautista* (1990) 217 Cal.App.3d 1, 5). (*People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-92.) When that impeachment evidence is elicited during cross-examination of the witness, the proponent of the evidence must have a good faith basis for asking the question. (See *People v. Pearson* (2013) 56 Cal.4th 393, 433-434 (*Pearson*); *People v. Steele* (2000) 83 Cal.App.4th 212, 223.) In addition, to determine the credibility of a witness, the trier of fact may consider the witness's biases and motives in testifying, and veracity with respect to collateral factual matters. (Evid. Code, § 780, subds. (f), (i).) Under Evidence Code section 352, the trial court has the discretion to admit or exclude evidence offered for impeachment with respect to those subjects. (*Pearson*, *supra*, at p. 455; *People v. Capistrano* (2014) 59 Cal.4th 830, 866 (*Capistrano*).)

2. *Underlying Proceedings*

Prior to Oldham's testimony, the prosecutor informed the trial court that he intended to call Oldham in order to corroborate Deputy Hodge's testimony regarding the February 2 incident. Responding to the court's inquiries, defense counsel stated that he planned to ask Oldham whether he stole the truck and traded it for the narcotics that Hodge discovered. When Oldham's advisory counsel

announced Oldham's intention to assert his privilege against self-incrimination, the prosecutor stated that he would seek immunity for Oldham's testimony.

Oldham's advisory counsel also informed the trial court that Oldham recently had been arrested for fraud involving a check or credit card, and that an action against him was to be filed. Advisory counsel described the action as involving "misdemeanor conduct amounting to a crime of moral turpitude." The court advised defense counsel that it would permit no cross-examination regarding that arrest unless counsel had witnesses or reports to support a factual basis for the questions. The court further ruled that it would permit Oldham to be impeached with a 2011 misdemeanor conviction for possession of a deadly weapon.

Later, immediately before Oldham testified, the trial court told him that the prosecution had offered use immunity regarding his testimony. When Oldham rejected the offer, his advisory counsel observed that Oldham's testimony potentially encompassed the pending action against him. Defense counsel then stated that he planned to cross-examine Oldham regarding the circumstances of the action, as disclosed in the police report. According to that report, Oldham was arrested in late May 2016, more than 13 months after the incidents underlying the charges against appellant. The arrest occurred near the location of those incidents, and when arrested, Oldham had a driver's license and credit card belonging to another person, as well as some clothes similar to those worn by the person who took the

truck. Responding to the court's inquiry, defense counsel acknowledged that he had no evidence or witnesses to rebut a denial of misconduct by Oldham relating to the arrest.

Over objections from defense counsel and Oldham's advisory counsel, the trial court granted the prosecution's request that Oldham be afforded use immunity; the court also barred cross-examination regarding the pending action. The court stated: "Just the fact there's a police report filed is not proof of anything. So I'm not going to allow anyone to ask about any pending charges . . . . If you had some evidence of actual conduct of moral turpitude I would let you ask about that. . . . [A]lso the fact that there may be a pending charge against . . . Oldham, I think that weighs in favor of not allowing cross-examination on that issue since it is a collateral issue of impeachment only."

During the prosecutor's direct examination, Oldham acknowledged that he had an agreement that precluded him from "get[ting] in trouble for anything that happened on February 2," and that he had suffered a conviction in 2011 for possession of a dirk or dagger. When cross-examined, Oldham denied taking the truck.

3. *Analysis*

In our view, appellant has shown no error regarding the limitations imposed on the cross-examination of Oldham regarding what appeared to be an uncharged misdemeanor

crime of moral turpitude.[4] As nothing suggested that Oldham would admit any facts relating to that offense, the trial court acted well within its discretion in requiring -- at a minimum -- that appellant possess proof of the offense. (See *Capistrano*, *supra,* 59 Cal.4th at p. 867 [trial court properly required defendant to show good faith basis for cross-examining witness regarding drug sale activity by identifying potential evidence regarding that activity]; *Pearson*, *supra*, 56 Cal.4th 393 at pp. 454-456 [trial court properly denied defendant leave to cross-examine prosecution witness regarding fraud charges against witness that had been dismissed, as defendant offered no proof that the witness had committed fraud]; *People v. Sapp* (2003) 31 Cal.4th 240, 289-290 [trial court properly precluded defendant's cross-examination of prosecution witness regarding unproven fraud charges]; *People v. Stone* (1983) 139 Cal.App.3d 216, 224-225 [trial court properly limited defendant's cross-examination of police officers intended to show they falsely testified regarding their grounds for

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[4] At appellant's request, we have taken judicial notice of court records showing that the day before the trial court issued its evidentiary rulings regarding Oldham, he was charged with wrongful use of the identifying information of another person (Pen. Code, § 530.5, subd. (a)), which is punishable as a misdemeanor or a felony. However, as those records were not before the trial court, we do not review the evidentiary rulings in light of them. (*People v. Hamilton* (1986) 191 Cal.App.3d Supp.13, Supp. 21.)

search, as defendant's proffered evidence regarding testimony's falsity supported only speculation].)

The trial court also did not err in disallowing cross-examination on what it concluded was a collateral matter. Before the trial court, appellant argued that Oldham's testimony regarding the pending action was relevant to a specific defense theory, namely, that Oldham had stolen the Ford truck and the Impala. When asked to describe the proposed cross-examination, defense counsel replied that he intended to elicit that Oldham was arrested near the scene of the crimes charged against appellant, that Oldham possessed a driver's license and credit card belonging to another, and that his backpack contained clothes resembling those worn by the person who stole the truck and the Impala. However, Deputy Hodge had already testified that he detained Oldham because his clothing and appearance matched that of the truck thief, and the record otherwise contains no description of any clothing worn by the person seen driving the Impala. Furthermore, the trial court permitted Oldham to be impeached with a prior conviction for a crime of moral turpitude. The court thus reasonably concluded that the proposed cross-examination offered little or no additional evidence favorable to appellant.

Appellant contends the trial court's ruling improperly denied him an opportunity to cross-examine Oldham for another purpose, arguing that "evidence that Oldham had expected charges was relevant to show that [he] had a reason to curry favor with the prosecution and positively

identify the person it wanted him to as the driver of the truck." Generally, "the defense is entitled to elicit evidence that a witness is motivated by an expectation of leniency or immunity [citations], or that that he is on probation or parole," as "[s]uch evidence is obviously probative of bias or motive." (*People v. Dyer* (1988) 45 Cal.3d 26, 49-50 (*Dyer*); Evid. Code, § 780, (f).) However, because appellant did not assert this theory of relevance before the trial court, he has failed to preserve his contention of error. (See *Capistrano*, *supra*, 59 Cal.4th at p. 867.)

Furthermore, we would reject the contention had appellant not forfeited it. Absent circumstances suggesting that Oldham may have had an expectation of favorable treatment relating to the pending charge for his testimony, the trial court was permitted to bar cross-examination regarding the pending action. (See *Dyer*, *supra*, 45 Cal.3d at pp. 49-50; *People v. Bento* (1998) 65 Cal.App.4th 179, 194-195.) Although Oldham was in custody when called as a witness, nothing before us supports the existence of any such expectation. On the contrary, Oldham rejected an offer of use immunity for his testimony, refused to agree to testify, and provided testimony only under the threat of contempt of court.

The decisions upon which appellant relies are distinguishable. In *Alford v. United States* (1931) 282 U.S. 687, 689-693, the trial court summarily denied the defendant's request to cross-examine the main prosecution witness regarding the fact that he was held in custody by the

same agency that had arrested the defendant. The evident purpose of the request was to show that the witness's testimony was biased "because given under promise or expectation of immunity, or under the coercive effect of his detention by [police] officers . . . ." (*Id*. at p. 693.) The United States Supreme Court held that the ruling was erroneous. Here, in contrast, the jury was informed that Oldham's testimony was provided under an immunity agreement, and the record otherwise shows that he was an extremely reluctant witness, who sought to avoid testifying altogether. No credible argument was -- or could have been -- raised that Oldham expected favorable treatment from the prosecution.

In the remaining cases upon which appellant relies, the witness was on probation, or the witness's circumstances suggested another reason for providing testimony favorable to the prosecution. (*Davis v. Alaska* (1974) 415 U.S. 308, 309-311 [court improperly limited cross-examination of prosecution's main witness regarding his probation]; *People v. Adams* (1983) 149 Cal.App.3d 1190, 1192-1193 [same]; *People v. Espinoza* (1977) 73 Cal.App.3d 287, 291-292 [same]; *People v. Allen* (1978) 77 Cal.App.3d 924, 930-931 [court improperly limited cross-examination of juvenile witness who testified for prosecution and faced multiple burglary charges, some of which had been dismissed prior to trial, as the witness's circumstances raised the possibility he expected leniency for favorable testimony].) As explained above, no such circumstances were presented here. In sum,

the trial court did not abuse its discretion in limiting the cross-examination of Oldham.[5]

C. *Prior Prison Term Enhancement*

Appellant contends the trial court erred in staying -- rather than striking -- one of the two enhancements pleaded and proved under Penal Code section 667.5, subdivision (b). That statute provides: "[W]here the new offense is any felony for which a prison sentence . . . is imposed . . . , in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term . . . for any felony . . . ." Our Supreme Court has determined that once such a prison term has been established, "the trial court may not stay the one-year enhancement, which is mandatory unless stricken." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) In order to strike

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[5] We further conclude that any error in the ruling would have been harmless even under the stringent "beyond a reasonable doubt" standard for federal constitutional error articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, as the prosecution offered Oldham's testimony merely to corroborate aspects of Deputy Hodge's testimony. The testimony of Hodge established the charges of assault on a police officer and resisting an executive officer (counts 1 and 2), and the testimony of Hodge and Rodriquez established the offense of taking or driving a vehicle (count 3). In our view, there is no reasonable doubt that the jury would have returned the same verdicts had appellant been permitted to cross-examine Oldham in the requested manner.

the enhancement, the trial court must comply with Penal Code section 1385, subdivision (a), which requires that the court state its reason for that decision. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.)

Here, after finding both prior prison term allegations to be true, the trial court imposed only a single one-year enhancement, and stayed the other -- which related to a 2010 conviction for grand theft of a vehicle -- without stating its reason for that decision. The matter thus must be remanded to the trial court with directions to either impose the pertinent enhancement or strike it in accordance with Penal Code section 1385, subdivision (a). Respondent agrees.

On a related matter, the parties agree that the abstract of judgment incorrectly reflects that the trial court found more than two prior prison term allegations (Pen.Code, § 667.5, subd. (b)) to be true. The abstract of judgment must therefore be modified to eliminate that error.

DISPOSITION

The judgment is reversed solely with respect to the stayed one-year enhancement under subdivision (b) of Penal Code section 667.5, and the matter is remanded to the trial court with directions to impose the pertinent enhancement or strike it in accordance with subdivision (a) of Penal Code section 1385, to prepare an amended abstract of judgment accurately reflecting its disposition of the two enhancements under subdivision (b) of Penal Code section 667.5, and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.