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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ALLEN BARNHART,

Defendant and Appellant.

G049082

(Super. Ct. No. 11WF2614)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance F. Jensen, Judge. Affirmed in part with directions and remanded for further proceedings.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General Julie L. Garland, Assistant Attorney General, Charles Ragland and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Robert Allen Barnhart of two counts of felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); all statutory citations are to the Penal Code unless noted), and misdemeanor battery (§ 242). Barnhart contends the trial court committed reversible error by admitting evidence he committed spousal abuse in 1994 and battery in 2010 to prove the current charges (see Evid. Code, §§ 1101, 352). He also argues only one conviction of assault with a deadly weapon was permissible on the facts of the case, Vehicle Code section 13351.5 violated his constitutional rights to a jury trial and due process because it authorized the trial court to make factual findings triggering permanent revocation of his driver's license by the Department of Motor Vehicles (DMV), and the court erred by purporting to permanently revoke Barnhart's license. For the reasons expressed below, we affirm in part, direct modifications to the Court's minutes, and remand for further proceedings.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On Saturday morning November 5, 2011, Jesse Ochoa, driving a 1995 Isuzu SUV, ran into the back of Barnhart's new Dodge pickup truck on Bloomfield Street in Cypress while looking down at his girlfriend's cell phone for directions.

According to Ochoa, who possessed neither a driver's license nor insurance, Barnhart got out of his truck and took a few steps toward the SUV. Barnhart "looked really mad" and yelled, "You wrecked my fucking car. I'm going to fucking kill you." Ochoa "panicked, . . . got scared, . . . [and] took off." Ochoa testified Barnhart pursued him at 45 to 50 miles per hour, bumped his vehicle from behind "pretty hard" during the chase. Later, Barnhart lightly bumped or pushed Ochoa's car when Ochoa

turned right into a gas station at the corner of Bloomfield and Ball Road. Ochoa fled from the gas station and proceeded east onto Ball. Ochoa testified Barnhart may have bumped him one more time, then sped past him in the number one lane and executed what Ochoa described as a PIT (precision immobilization technique) maneuver, striking the front driver's side of the SUV, causing it to spin 180 degrees and face oncoming traffic. The SUV stalled and began coasting. Barnhart made a U-turn and maneuvered in front of Ochoa, who then broadsided Barnhart's truck.

Barnhart got out of his truck, "screaming and yelling" that Ochoa had "wrecked" his new truck and threatened to kill him. Barnhart put his hands through the window, and grabbed or punched at Ochoa's chest area. Barnhart opened the car door and pulled Ochoa out, ripping his shirt. Bystanders intervened to protect Ochoa by getting "on top of" Barnhart until he calmed down.

The prosecutor played a cell phone video capturing part of the encounter. According to a transcript, Barnhart stated "I'm going to beat you up buddy." He screamed the "[s]on of a bitch hit my truck" and "tried to fucking leave the scene" and he "want[ed] him fucking arrested . . . ." He also warned, "[t]hat dead son of a bitch. That mother fucker he's going to fucking pay." Ochoa explained to one of the bystanders, "I hit him and I tried to talk to him and he started going crazy on me."

Barnhart told the investigating officer at the scene he wanted Ochoa arrested, claiming Ochoa fled after rear-ending Barnhart's truck. Barnhart denied saying or yelling anything at Ochoa. He claimed he merely pursued Ochoa, and tried to pull his truck in front of the SUV to stop it. Barnhart denied a collision occurred, claiming Ochoa made a U-turn, and drove west in the eastbound lane, while Barnhart claimed he made a U-turn and pursued Ochoa in the correct lane of travel. When they reached the

intersection, Barnhart pulled his truck in front of the SUV “[t]o try and barricade” Ochoa “from traveling any further.” When Ochoa broadsided him, Barnhart got out of his truck, and pulled Ochoa out of the SUV. He denied threatening Ochoa at any point, and denied intentionally trying to crash into him. The officer, however, found damage on Barnhart’s truck consistent with Barnhart executing a PIT maneuver.

Barnhart testified he got out of the truck intending to exchange insurance information, but Ochoa smirked or smiled, backed up, and sped away. Barnhart pursued Ochoa to get his license plate number. He tried to call 911 but his cell phone was dead. Barnhart claimed he never got closer than two and a half car lengths to Ochoa, and denied executing the PIT maneuver or striking Ochoa’s car.

Barnhart claimed Ochoa slammed on his brakes as Barnhart pursued him. Barnhart passed him and pulled over across the bike lane at an angle and about two car lengths ahead of Ochoa. Ochoa then attempted to pass Barnhart between the truck and the curb at about eight miles per hour, but hit the front of Barnhart’s truck, knocking out the right front headlight.

After the final collision, Barnhart left his truck with hands upraised, dumbfounded Ochoa had run into him, and asked Ochoa “What the hell is your problem?” He was a “little angrier than” before, but not “[f]laming mad.” Ochoa looked at him, then at his girlfriend, put the car into park and reached for the key to start the SUV, which had stalled. Barnhart opened the door, grabbed Ochoa’s shirt sleeve, slightly pulled on it, and told him to “get out of the car and get on the ground.” He did not punch Ochoa, and he intended only to detain him until the police arrived. Concerning his statements on the cell phone video, Barnhart stated, “I don’t believe I ever said that” and “[m]aybe the transcript is transcribed wrong.” But he claimed he was not

“threatening” Ochoa, but merely trying to explain to the bystanders who “linebacker tackled” him why he was attempting to detain Ochoa.

Numerous disinterested witnesses testified and generally supported Ochoa’s version that Barnhart collided with Ochoa while executing a PIT maneuver. Each side presented the testimony of a traffic reconstruction expert. The experts disagreed whether the evidence, including information derived from the truck’s airbag control module (its “black box” or data recorder), supported Ochoa’s or Barnhart’s version of the incident.

The amended information charged Barnhart with two felony counts of assault with a deadly weapon (the truck) against Ochoa, and one count of misdemeanor battery. The prosecutor informed the jury the first assault occurred when Barnhart executed the PIT-like maneuver, and the second occurred when he barricaded the SUV at the intersection. The battery occurred when Barnhart ripped Ochoa’s shirt during the altercation after the final collision.

Following a trial in July 2013, the jury convicted Barnhart as charged. In September 2013, the court suspended imposition of sentence and placed Barnhart on probation on various terms and conditions, including a jail term.

## II

### DISCUSSION

#### *A. Admissibility of Uncharged Misconduct Evidence*

Barnhart contends the trial court abused its discretion by admitting evidence he committed spousal abuse in 1994 and battery in 2010. The Attorney General responds Barnhart’s uncharged acts were admissible to impeach Barnhart’s testimony,

and the underlying facts of the 2010 battery were admissible under Evidence Code section 1101, subdivision (b) (section 1101(b)). We conclude the trial court erred, but it is not reasonably probable Barnhart would have received a more favorable result had the error not occurred.

1. *Background*

After Barnhart advised the court he intended to testify, the prosecutor asked to admit evidence concerning Barnhart’s 1994 misdemeanor conviction for inflicting spousal abuse (§ 273.5), and a 2010 misdemeanor conviction for battery (§ 242). The prosecutor argued section 273.5 was a crime of moral turpitude, admissible to impeach Barnhart’s testimony. She also argued the prior acts were admissible under section 1101 (b) “with regard to intent.” The prosecutor further noted Barnhart requested instructions concerning the right to make a citizen’s arrest, and she asserted Barnhart’s conduct during the charged incident was “motivated by anger as opposed to some sort of lawful performance of a citizen’s arrest.” She stated the prior acts showed “defendant has some extreme anger management issues; that this – the pattern goes to establish the actual intent of his conduct on date of violation on this case.”

Barnhart objected the evidence was inadmissible under section 1101(b) and section 352. He argued the section 273.5 violation was too remote and the circumstances underlying the battery incident were too dissimilar to the charged offenses, noting the battery violation “alleged that [Barnhart’s] angry with some other driver and throws a part of a cup of coffee on the driver.”<sup>1</sup>

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<sup>1</sup> The parties did not describe for the court the specific facts underlying Barnhart’s battery conviction. A more detailed recitation of the facts of the 2010 incident appears in the probation report. The probation officer reported sheriff’s records reflected the female victim stated she was stopped at a red light when Barnhart, in a vehicle next to

The trial court permitted the prosecutor to refer to the two offenses “for purposes of impeachment as to whether or not he has been previously convicted of those two offenses.” The court also admitted the battery incidents under section 1101, explaining, “It would appear that based on the theory that [the defense is] proffering, . . . a theory of lawful citizen arrest, that it would appear that intent would be a relevant issue for the jury to determine in regards to whether or not it was a lawful citizen’s arrest, as well as all the other elements that would fall within that defense.”

On direct examination, defense counsel elicited that in 1994 Barnhart had an argument with his wife, and in 2010 he threw a cup of coffee on the driver of another vehicle. Based on the uncharged prior incidents, the prosecutor persistently cross-examined Barnhart on whether he was “off-the-handle-angry” on the current occasion and whether he had an “anger management problem.” Barnhart denied he had an anger management problem and denied battering his wife or being angry on that occasion, stating he pleaded guilty to disturbing the peace. He conceded he was upset when he threw the coffee at the other motorist. To prevent the prosecutor from introducing documentary evidence, Barnhart stipulated he pleaded guilty to violating section 273.5 in September 1994.

After both sides rested, the trial court and the parties discussed jury instructions out of the jury’s presence. The trial court conceded it was “struggling . . . to figure out” how to instruct on the evidence of Barnhart’s other offenses under CALCRIM No. 375. The prosecutor suggested the jury could consider the 1101(b) evidence on the

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hers, asked if she was talking on her cell phone. She said she was, and Barnhart replied “It’s black bitches like you that makes the world the way it is.” He then threw a cup of coffee, hitting her left arm, and drove away. Barnhart admitted to the probation officer in the current case he threw a cup of “two-hour-old coffee” at the woman after she yelled at him. He denied it was a hate crime, and pleaded no contest to the battery charge.

issue of “whether or not the defendant acted with the mental state of anger at the time of the present offense.” The court proposed not giving 1101(b) instructions and limiting the evidence to impeachment, but the prosecutor informed the court the battery offense was not a crime of moral turpitude and therefore not admissible for impeachment.

The trial court ultimately instructed the jury it could consider the uncharged offenses in deciding whether Barnhart acted with the requisite intent.<sup>2</sup> The court also instructed the jury it could consider the spousal abuse offense in evaluating Barnhart’s credibility.<sup>3</sup>

During closing argument, the prosecutor argued Barnhart “responded to the striking of his vehicle with only what can be called road rage” and told the jury to use the prior incidents to “look at his pattern of anger” or “history of anger” to prove his conduct in the current case and disprove he was acting to effect a citizen’s arrest.

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<sup>2</sup> The court instructed, “The People presented evidence that the defendant committed the offenses of domestic battery with corporal injury and simple battery that were not charged in this case. [¶] . . . If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent required to prove the offenses charged . . . . [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not consider this evidence for any other purpose, except for the limited purpose of determining the defendant’s credibility. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charges alleged . . . .”

<sup>3</sup> The court later instructed the jury, “If you find that a witness has committed a crime, to wit: domestic battery with corporal injury, a violation of Penal Code section 273.5, you may consider that fact only in evaluating the credibility of that witness’ testimony. The fact the witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness’ credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.”

2. *Legal Analysis -- Prior Acts to Impeach*

Under the Evidence Code, the credibility of a witness may be attacked or supported by any party, including the party calling the witness. (Evid. Code, § 785.) Evidence of a character trait other than honesty or veracity, or their opposites, is not admissible to attack or support the credibility of a witness. (Evid. Code, § 786.) Evidence of specific instances of conduct relevant only as tending to prove a trait of character is inadmissible to attack or support the credibility of a witness. (Evid. Code, § 787.) Notwithstanding Evidence Code section 787, a party may attack the credibility of a witness by showing the witness has been convicted of a felony. (Evid. Code, § 788.)

The Supreme Court concluded Proposition 8 (Cal. Const. art. I, § 28, subd. (d)) abrogated in criminal cases statutory limitations other than Evidence Code section 352 on admission of evidence relevant to a witness' honesty or veracity. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1081.) In *People v. Wheeler* (1992) 4 Cal.4th 284, 295-298 (*Wheeler*), the Supreme Court held any criminal act or other misconduct involving moral turpitude suggests a willingness to lie and therefore is not necessarily irrelevant or inadmissible for impeachment purposes, but a misdemeanor *conviction* constitutes inadmissible hearsay. The Supreme Court explained a misdemeanor or other nonfelonious misconduct carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony. (*Id.* at p. 296; see Evid. Code, § 788 [authorizing prior felony convictions for impeachment].) Consequently trial courts have broad discretion to exclude impeachment evidence other than felony convictions where the evidence might involve undue time, confusion, or prejudice. "Moral turpitude" refers to a general "readiness to do evil" even if dishonesty is not necessarily involved. (*People v. Castro* (1985) 38 Cal.3d 301, 315.)

Here, neither the crime of misdemeanor battery nor the acts disclosed in the trial court involved moral turpitude. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522.)

The trial court in a pretrial ruling admitted the misdemeanor 2010 battery conviction to impeach Barnhart's testimony. The court, however, changed course when the prosecutor belatedly pointed out a conviction for misdemeanor battery was not a crime of moral turpitude and therefore the jury could not consider the conviction as impeachment evidence. Consequently, the court limited its instruction on witness credibility under CALCRIM No. 316 to the spousal abuse incident. The court, however, did not amend CALCRIM No. 375, which instructed the jury it could consider the uncharged misconduct evidence on the issue of intent, and also told the jury it could consider the 2010 battery "for the limited purpose of [determining] the defendant's credibility" The court erred in failing to omit this sentence from the instruction.

The Attorney General concedes the trial court erred in admitting Barnhart's misdemeanor battery conviction because it is not a crime of moral turpitude, but argues the underlying conduct was properly admitted as impeachment. Not so. As our Supreme Court instructed, "[T]he admissibility of any past *misconduct* for impeachment is limited at the outset by the relevance requirement of moral turpitude." (*People v. Clark* (2011) 52 Cal.4th 856, 931 (italics added).)

The trial court, however, did not abuse its discretion in admitting evidence of Barnhart's conduct underlying the 1994 spousal abuse incident to impeach his testimony under *Wheeler, supra*, 4 Cal.4th at p. 297, fn. 7 [a witness's prior conduct involving moral turpitude is admissible to impeach his or her credibility "whether or not it produced any conviction, felony or misdemeanor"]; *People v. Rodriguez* (1992)

5 Cal.App.4th 1398, 1402 [domestic violence under section 273.5 involves moral turpitude and admissible for impeachment purposes].)

3. *Legal Analysis -- Prior Acts Under Evidence Code Sections 1101 and 352*

Evidence that a defendant committed crimes other than those currently charged may not be admitted to prove the defendant's bad character or criminal disposition. (Evid. Code, § 1101, subd. (a).) Section 1101(b), however, provides in pertinent part that evidence of other crimes is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*) [evidence of uncharged acts is properly admitted whenever it tends logically, naturally, and by reasonable inference to establish any fact material for the People or to overcome any material matter introduced by the defense].)

"Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.'" (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2, original italics.) The uncharged crime or act must share "sufficiently similar" features to the charged crime "to support the inference that the defendant "probably harbor[ed] the same intent in each instance.'" (Id. at p. 402.)

The prosecution must establish the other acts by a preponderance of the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1245, fn. 2.) We review a trial court’s ruling to admit other uncharged criminal acts under section 1101 for abuse of discretion because it essentially is a relevancy determination. (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

The Attorney General concedes the trial court did not possess sufficient information to determine whether Barnhart’s acts underlying the 1994 spousal abuse incident bore any similarity to the facts supporting the charged offenses. Without that evidence, neither the court nor the jury could determine whether the uncharged conduct was relevant on the issue of intent. We therefore agree the trial court erred in admitting evidence of the 1994 incident under section 1101(b).<sup>4</sup>

We also conclude the trial court erred in admitting evidence of Barnhart’s 2010 battery offense. As noted above, other crimes evidence is admissible “‘where the proof of defendant’s intent is ambiguous, as when he admits the acts and denies the necessary intent because of mistake or accident.’” (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) Here, there was nothing ambiguous about Barnhart’s actions. Based on the testimony of Ochoa and several unbiased witnesses, Barnhart harbored the general criminal intent necessary for an assault with a deadly weapon, namely, that he

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<sup>4</sup> The Attorney General states “As far as respondent is aware the prosecution did not file a trial brief nor did the defense file any written opposition to the introduction of this evidence. It would seem that an initial discussion of the contested evidence may have been held off the record as the court seemed familiar with the evidence at issue. The record itself is not very detailed about the underlying bases of the prior convictions as a result.” Because admission of evidence involving crimes other than those for which a defendant is being tried can have a “‘highly inflammatory and prejudicial effect’ on the trier of fact” and “admissibility of this type of evidence must be ‘scrutinized with great care’” (*People v. Thompson* (1980) 27 Cal.3d 303, 314, fns. omitted), the trial court should require the proponent to provide a factual basis for the evidence to enable the trial court to scrutinize the evidence with care and to facilitate appellate review.

intentionally committed an act knowing it would “probably and directly result in the application of physical force against another.” (*People v. Wright* (2002) 100 Cal.App.4th 703, 706.) The prosecution did not introduce evidence of Barnhart’s uncharged battery conduct during its case-in-chief, planning instead to cross-examine Barnhart on the issue. At this point, however, it was clear whatever marginal relevance the battery held was cumulative on the intent issue and should not have been admitted under Evidence Code section 352. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423 [“because the victim’s testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant’s intent, evidence of defendant’s uncharged similar offense would be merely cumulative on this issue” and therefore should have been excluded].) Moreover, Barnhart denied committing the charged acts underlying the two counts of assault with a deadly weapon: executing a PIT maneuver and angling his car so it would collide with the victim’s vehicle. Thus, the uncharged misconduct evidence was proffered and used by the prosecutor to show Barnhart acted angrily on prior occasions, and he acted in conformity with that trait on the current occasion. This constitutes an improper use of the uncharged misconduct evidence. (See 1 Imwinkelried, *Uncharged Misconduct Evidence* (rev. ed. 2013) § 4:1, p. 4-5.)

The erroneous admission of other crimes evidence, however, is harmless if it does not appear reasonably probable that without the error a result more favorable to the defendant would have been reached. (See *People v. Malone* (1988) 47 Cal.3d 1, 22 [error in admitting section 1101 evidence tested by *People v. Watson* (1956) 46 Cal.2d 818, 836 [“‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is

reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.”].)

Here, all of the disinterested witnesses undermined Barnhart’s credibility and established Barnhart committed the alleged acts. Thomas Ingram saw Barnhart chase Ochoa out of the gas station, pull alongside the SUV, ram into the SUV’s side, and push it into the curb. Ingram also saw Barnhart pull across the road in front of the SUV, causing the SUV to slam into his truck. Douglas Locke heard a thump or crash and saw the SUV do “a 180 [degree clockwise] spin.” After making the U-turn, the truck ran a red light and cut in front of the SUV, which broadsided the truck. Locke and his son saw Barnhart emerge from the truck and begin swinging Ochoa around “like he was a rag doll.” According to the Lockes, Barnhart was the aggressor and “it was a man in his . . . mid to late thirties beating up on a . . . looked like a child.” Barnhart, angry and swearing, repeatedly stated ““that was my new truck. He hit my new truck.”” Stacy Frezza, called as a *defense* witness, saw Barnhart overtake the SUV on Ball Road. Barnhart swerved at the SUV, then a second or two later, swerved again and Frezza heard a crash. The SUV drove slowly on the on the wrong side of the street. She saw Barnhart’s truck make a U-turn and go “really fast” into the left turn lane and heard another crash over there. As noted, the officer found damage on Barnhart’s truck consistent with Barnhart executing a PIT maneuver.

Thus, it is reasonably probable the jury would have found Barnhart committed the assaultive acts even if the court had excluded the uncharged misconduct evidence. There was no serious question Barnhart, if he committed the acts, possessed the general intent or mens rea for the charged offenses. As the trial court recognized, assault is a general intent crime and “is established upon proof the defendant willfully

committed an act that by its nature will probably and directly result in injury to another, i.e., a battery.” (*People v. Colantuono* (1994) 7 Cal.4th 206, 214; *People v. Rocha* (1971) 3 Cal.3d 893, 899; see also *People v. Williams* (2001) 26 Cal.4th 779, 784 [“assault requires actual knowledge of those facts sufficient to establish that the offending act by its nature would probably and directly result in physical force being applied to another.”].) There was no serious question Barnhart used more force than a reasonable person in the same situation would have believed necessary to detain Ochoa. It is not reasonably probable Barnhart would have received a more favorable result had the court excluded evidence of the 1994 and 2010 incidents.

#### B. *Multiple Convictions*

Barnhart also contends we must reverse one of the two assault convictions because the evidence showed a single assault improperly fragmented into multiple assault convictions, arguing “there was but a single assaultive episode albeit resulting in two separate impacts.” We do not find the argument persuasive.

Section 245, subdivisions (a)(1) and (4) penalizes “[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm . . . or by any means of force likely to produce great bodily injury. . . .” “[A]ssault” is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. (*Williams, supra*, 26 Cal.4th at p. 790.) Assault requires proof of an intentional act and knowledge that the act by its nature will probably and directly result in the application of physical force against another. (*Ibid.*; *People v. Wright* (2002) 100 Cal.App.4th 703, 706 [vehicle may be used as a deadly weapon].)

Here, substantial evidence showed Barnhart committed two intentional acts, the PIT maneuver and barricading, knowing his acts would probably and directly result in the application of physical force against Ochoa. The prosecution relied on these two acts to support the two charged assault offenses, and the jury convicted him of those two offenses.

Barnhart relies on *People v. Jefferson* (1954) 123 Cal.App.2d 219. There, the defendant assaulted a police officer with a butcher knife outside her house, and 10 minutes later assaulted a different officer with a pocket knife. The prosecution charged her with one count of assault with a deadly weapon. On appeal, the defendant argued the trial court erred when it denied her demand to have the prosecutor elect the act on which it based its charge (the butcher knife assault or pocket knife assault). The appellate court rejected her claim because the record did not clearly reflect she demanded an election, and the “the rule relied on by the appellant ‘has no application where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense.’” (*Jefferson, supra*, 123 Cal.App.2d at p. 221.)

*Jefferson* did not involve multiple counts (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered]), and the current case, unlike *Jefferson*, does not involve the prosecutor’s failure to elect the act that constituted the charged offense. But assuming the holding in *Jefferson* suggests Barnhart’s acts “were a part of the same incident, and they could not reasonably be held to constitute two separate offenses,” we disagree with that suggestion. (*Jefferson, supra*, 123 Cal.App.2d at p. 221.)

Generally, under section 954 a defendant may suffer multiple convictions arising from the *same* act or course of conduct. (*People v. Correa* (2012) 54 Cal.4th 331,

336-337; *People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227; *People v. Thurman* (2007) 157 Cal.App.4th 36, 43.) “Unless one offense is necessarily included in the other . . . , multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct. . . .” (*People v. Benavides* (2005) 35 Cal.4th 69, 97.) “The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict . . . .” (§ 954.) Under section 954, a separate conviction is permissible for each *completed* crime (as determined by the statutory elements of the crime), even if the defendant had the same intent and objective in committing the multiple crimes and even if the defendant committed the crimes at or near the same time. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1474-1477 (*Johnson*)).) For example, in *Johnson*, the court held a defendant could properly be charged and convicted of multiple counts of spousal abuse under section 273.5 based on acts occurring during a single event where the victim suffered multiple injuries caused by distinct applications of force because the crime is complete upon the willful and direct application of physical force upon the victim resulting in injury. (*Ibid.*)

Here, each assault was complete after Barnhart intentionally acted with knowledge of facts sufficient to establish the act would probably and directly result in the application of physical force against Ochoa. The fact Barnhart’s multiple acts occurred during a single continuous vehicle pursuit and that Barnhart may have held the same intent and objective does not bar the multiple convictions.

Other cases cited by Barnhart, like *Jefferson*, involved different issues. (See *People v. Oppenheimer* (1909) 156 Cal. 733 [sufficient evidence supported the

defendant's conviction on a *single* count of assault with two weapons; court did not address whether multiple acts of violence can support multiple assault convictions].) Here, Barnhart was charged with and convicted of two discrete assaults, and substantial evidence supports both convictions. The fact two closely related attacks *can* be characterized as a single assault does not support the conclusion that two more separate and distinct attacks *must* be characterized as a single assault. (Cf. *People v. Salvato* (1991) 234 Cal.App.3d 872, 882 [addressing whether charged offense may be considered a continuing course-of-conduct crime in other contexts; "continuous conduct crime" is one where "the gravamen of the offense lay in the *cumulative result* of the acts, each of which alone *might* not be criminal" (Second italics added).])

C. *Vehicle Code section 13351.5*

Vehicle Code section 13351.5 (§ 13351.5) provides "(a) Upon receipt of a duly certified abstract of the record of any court showing that a person has been convicted of a felony for a violation of Section 245 of the Penal Code and that a vehicle was found by the court to constitute the deadly weapon or instrument used to commit that offense, the [Department of Motor Vehicles (DMV)] immediately shall revoke the privilege of that person to drive a motor vehicle. [(¶)] (b) The department shall not reinstate a privilege revoked under subdivision (a) under any circumstances. [(¶)] (c) Notwithstanding subdivision (b), the department shall terminate any revocation order issued under this section on or after January 1, 1995, for a misdemeanor conviction of violating Section 245 of the Penal Code."<sup>5</sup>

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<sup>5</sup> The information was captioned "ADW VEHICLE CVC 13351.5." The information expressly charged Barnhart with "assault upon the person of" Ochoa "with a deadly weapon and instrument, ADW vehicle." The verdict forms listed "ASSAULT WITH A DEADLY WEAPON" with no reference to a vehicle.

Barnhart argues section 13351.5 is facially unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 because it imposes “punishment in excess of the statutory maximum for the underlying offense” based on the trial court’s factual findings. (See also *Cunningham v. California* (2007) 549 U.S. 270 [any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be decided by a jury and proved beyond a reasonable doubt].) We disagree.

A section 13351.5 revocation is a mandatory civil consequence of sustaining a specific type of criminal conviction. (*In re Grayden N.* (1997) 55 Cal.App.4th 598, 604 (*Grayden N.*)) “Simply put, the . . . court is bound, under the statute, to report to the [DMV] the true finding [defendant] committed an assault with a deadly weapon in violation of Penal Code section 245, subdivision (a), and the true finding the weapon . . . used was a vehicle.” (*Grayden N., supra*, 55 Cal.App.4th at p. 604.) The courts have long classified driving as a privilege rather than a right, and a license revocation as a civil sanction. (*People v. Linares* (2003) 105 Cal.App.4th 1196, 1199; *Larsen v. Department of Motor Vehicles* (1995) 12 Cal.4th 278, 283 [DMV revocation is substantively distinct from any punishment a court may impose as a result of a criminal conviction; “In numerous instances under provisions of California law, a criminal conviction may give rise to a variety of collateral consequences”]; *Fearn v. Zolin* (1992) 9 Cal.App.4th 1756, 1762 [license suspension not among the punishments listed in section 15 and is not a penal sanction within the meaning of section 654].)

Thus, the trial court’s compliance with section 13351.5 did not impose punishment and therefore the statutory sanction imposed here does not violate a defendant’s Sixth Amendment jury trial right under the *Apprendi* line of cases.

At sentencing, the trial court advised Barnhart “pursuant to Vehicle Code section 13351.5, your driver’s license will be revoked for your life. Okay. And that is because you received a conviction of a 245 when the weapon was a car. And so the Vehicle Code section indicates that your driving privilege will be revoked for the rest of your life.” The court’s minutes provide: “Driver’s license revoked permanently as to Count(s) (1) pursuant to Vehicle Code 13351.5.”

Because only the Department of Motor Vehicles has the statutory authority to revoke Barnhart’s license, the parties agree the trial court’s minutes must be modified to reflect the trial court found Barnhart used his vehicle as a deadly weapon or instrument used to commit the offense, and to delete the reference to license revocation.

#### D. *Probation Costs*

The parties agree section 1203.1b authorizes the court to order a defendant to pay for the cost of the probation *investigation and report*, as well as the cost of probation *supervision* if he has the ability to pay. The probation officer stated the department “conducted a financial evaluation and determined [Barnhart] has the ability to pay for the costs of probation, including the cost of this report in the amount of \$2,762.17. It is recommended he be ordered to pay for the costs of probation on a monthly basis until paid in full.”

The court orally stated Barnhart had “the ability to pay for the probation and sentencing report in the amount of \$2,762.17” and that he would work out with “probation how *that* [apparently referring to the \$2,762.17] is going to be paid for.” The court’s minutes from September 27, 2013 provide in relevant part: “Pay cost of probation or mandatory *supervision*, according to ability to pay, as directed by your

probation or mandatory supervision officer pursuant to Penal Code section 1203.1b.” A later entry provides, “Court finds, per the recommendation of the Probation and Sentencing report, defendant has the ability to pay the costs of the report in the amount of \$2762.17.”

It is unclear whether the court determined Barnhart had the ability to pay for the costs of the investigation report, *and* supervision, and if it did, whether it ordered him to do so. (See § 1203.1b, subd. (b)(2) [“if the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability”].) We note the court did not state reasons to depart from the probation officer’s determination. (§ 1203.1b, subdivision (b)(4) [“When the court determines that the defendant’s ability to pay is different from the determination of the probation officer, the court shall state on the record the reason for its order”].)

Rather than attempt to resolve this ambiguity on the current record, we will remand to the trial court to determine whether Barnhart should pay probation supervision costs. (See § 1203.1b, subd. (c) [court may hold additional hearings during the probationary period to review the defendant’s financial ability to pay the amount, and in the manner, as set by the probation officer, or as set by the court].)

### III

#### DISPOSITION

The court is directed to modify its September 27, 2013 minute order as follows: (1) delete the statement “Driver’s license revoked permanently as to count(s) (1) pursuant to Vehicle Code 13351.5;” (2) insert a statement that Barnhart was convicted of a felony violation of Penal Code section 245 and the trial court found a vehicle constituted the deadly weapon or instrument used to commit the offense; and (3) delete the statement “Pay cost of probation or mandatory supervision, according to ability to pay, as directed by your probation or mandatory supervision officer pursuant to Penal Code section 1203.1b.” The court is further directed to conduct a hearing under section 1203.1b to determine whether Barnhart should pay probation supervision costs. The court shall transmit a certified abstract of the record, as modified, to the DMV. As modified, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.