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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VAL CLEVENGER, Defendant and Appellant.	D075614 (Super. Ct. No. SCN393787)

APPEAL from a judgment of the Superior Court of San Diego County, Brad A. Weinreb, Judge. Affirmed in part; reversed in part; remanded for resentencing.

Aurora E. Bewicke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos, Kathryn A. Kirschbaum and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Val Clevenger guilty of one count of making a criminal threat (Pen. Code, § 422)[1] (count 1). Clevenger admitted having suffered a prison prior (§ 667.5).

The trial court sentenced Clevenger to three years in prison, consisting of the midterm of two years on the underlying criminal threat charge (§ 422) (count 1), and a one-year consecutive term for the prison prior enhancement (§ 667.5).

On appeal, Clevenger contends that he is entitled to reversal of the judgment because defense counsel rendered ineffective assistance in addressing evidence that Clevenger had suffered a prior conviction. Clevenger also contends that reversal is required due to the People's failure to timely disclose the victim's prior conviction and arrest history. In addition, Clevenger claims that the trial court erred in instructing the jury with respect to consciousness of guilt based on flight. Clevenger also seeks reversal of the judgment pursuant to the cumulative error doctrine. With respect to his sentence, Clevenger argues that this court should strike the one-year prison prior enhancement due to a change in the law. Finally, Clevenger claims that the trial court entered an unauthorized postconviction protective order pursuant to section 136.2.

We reject all of Clevenger's claims insofar as they pertain to the underlying criminal threat conviction. We agree with Clevenger that the one-year prison prior must

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

be stricken in light of a change in the law and that the postconviction protective order must be stricken as unauthorized.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's evidence*

On a night in November 2018, at approximately 7:20, the victim, a supervisor at a grocery store, was leaning against her car in the store's parking lot while on a break, playing a game on her cell phone. Overhead lights illuminated the lot.

Clevenger came out of the store and sat at a picnic table. The victim recognized Clevenger as someone whom she had seen "[h]undreds" of times before. The victim ordinarily saw Clevenger standing at the entrance to the parking lot of the grocery store "with a sign asking for money."

According to the victim, Clevenger approached the victim and told her that he was "going to knife" her. The victim stated that when Clevenger noticed her cell phone, he yelled, "[Y]eah, call 911. I'm going to effing stab you, bitch." The victim was frightened by Clevenger's threats.

A concerned customer, as well as a grocery store clerk and her boyfriend, intervened, and escorted the victim back to the grocery store.

Within minutes, the victim called 911. The victim provided a description of Clevenger to the dispatcher and stated that Clevenger was presently located near an ATM in the parking lot.

A deputy arrived at the grocery store and spoke with the victim. Another deputy detained Clevenger approximately 0.4 miles from the grocery store. The deputy who had spoken with the victim transported her to Clevenger's location. Once there, the victim identified Clevenger as the man who had threatened her. The victim was "[a]bsolutely positive" in her identification.

B. *The defense*

Clevenger testified. He acknowledged having previously been convicted of a felony. Clevenger stated that he regularly solicited money in the grocery parking lot where the incident occurred. Clevenger also acknowledged having walked through the parking lot on the night of the incident. However, he denied having threatened the victim.

Clevenger explained that when police officers detained him on the night of the incident, he thought that he was being arrested for public intoxication.

III.

DISCUSSION

A. *Clevenger is not entitled to reversal of the judgment on the ground that defense counsel rendered ineffective assistance in addressing evidence that Clevenger had suffered a prior conviction*

Clevenger claims that he is entitled to reversal of the judgment because his counsel provided ineffective assistance in addressing evidence that Clevenger had suffered a prior conviction. Specifically, Clevenger claims that defense counsel failed to object to the trial court's mischaracterization of the evidence, repeated the trial court's

mischaracterization of the evidence, and failed to request an appropriate limiting instruction pertaining to the jury's consideration of the evidence.

1. *Factual and procedural background*

a. *The People's motion to admit evidence pertaining to Clevenger's prior conviction, for impeachment purposes*

i. The People's motion in limine

Prior to the trial, the People filed a motion in limine to permit the prosecution to introduce evidence of Clevenger's 2017 conviction in case No. SCN378527 for assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)) for impeachment purposes, if Clevenger were to testify at trial. In their motion, the People argued that assault with force likely to produce great bodily injury is a crime of moral turpitude (citing *People v. Elwell* (1988) 206 Cal.App.3d 171, 177 (*Elwell*)), and contended that the conviction was admissible under the four-factor test for determining the admissibility of such evidence established in *People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*).[2]

ii. *Hearing on the admissibility of evidence of the prior conviction*

The trial court held a hearing on the People's motion. At the hearing, defense counsel argued, "I don't know that there's any case law that has held that a simple assault or assault with force likely to produce great bodily injury is a crime involving moral turpitude, so I don't think this falls as an impeachable offense."

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[2] (See pt. III.A.2, *post*, for a discussion of *Elwell* and *Beagle*).

The prosecutor responded that the Court of Appeal held in *Elwell*, *supra*, 206 Cal.App.3d at page 177 that assault by means of force likely to produce great bodily injury is a crime of moral turpitude.

After the court indicated that it agreed with the prosecutor, defense counsel requested that, if the court were going to allow evidence of the conviction, the court "sanitize" the conviction and not permit any "of the facts of the (a)(4) [to] come in." Defense counsel explained, "[I]t [should] be sanitized to be just a felony conviction that affects his credibility, not a felony conviction involving violence."

After the prosecutor reaffirmed her request that she be permitted to offer evidence that Clevenger had suffered a conviction for assault with force likely to cause great bodily injury, defense counsel stated that the title of the offense for which Clevenger was convicted was itself prejudicial, "in that it infers violence." Defense counsel argued further that "if the law is allowing this for the purposes of credibility, then that's what [the jury] should be directed to, not to shroud them with this cloud of being a violent person and he's convicted violence [*sic*] in the past." The court ruled as follows:

> "[F]or purposes of the impeachment, the People [will] be allowed to impeach the defendant with the fact that he suffered a prior conviction for assault by means of force likely to produce great bodily injury. That was the conviction for which he suffered, and they're entitled to impeach him with that conviction."

After a recess, the trial court stated that it had reconsidered it's ruling. The court stated in relevant part:

> "I think, in balancing the admissibility of the impeachment for conviction purposes and the [Evidence Code section] 352 issue, I do think that it's more appropriate if the [d]efense wishes to introduce

> the evidence. I'm satisfied that if the [d]efense does so in their examination, that merely indicating that he was convicted of a felony conviction involving moral turpitude is sufficient for impeachment purposes without getting into further detail. And I'm happy to instruct the jury at that time that moral turpitude essentially is an act of dishonesty, if either counsel wishes me to do that."

The court subsequently clarified that, if the defense did not introduce evidence of the felony conviction on direct examination, the prosecutor would still be limited to offering evidence that Clevenger had suffered a "felony conviction for moral turpitude purposes."[3]

b. *Introduction of evidence pertaining to Clevenger's prior conviction*

During defense counsel's direct examination of Clevenger, the following exchange occurred:

> "[Defense counsel:] Now, Mr. Clevenger, you've been convicted of a felony before; is that correct?
>
> "[Clevenger:] Yes.
>
> "[Defense counsel:] Okay. Now, this is kind of legalese, but that felony is considered a felony involving moral turpitude, which means it's considered an act of dishonesty. So you -- earlier you swore to tell the truth. Are you going to tell us the truth this morning?
>
> "[Clevenger:] Yes."

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3 The court also made clear that, if Clevenger were to deny having suffered such a conviction, the People would be entitled to impeach him by asking specifically whether he had been convicted of the crime of assault with force likely to produce great bodily injury.

During cross-examination, Clevenger admitted that he had suffered a conviction in 2017 for a felony involving moral turpitude.

c. *The trial court's jury instruction pertaining to the jury's evaluation of witness testimony*

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 226 concerning its evaluation of witness testimony. The court instructed the jury that it could consider "anything that reasonably tends to prove or disprove the truth or accuracy of that testimony," and provided the jury with a lengthy list of factors that the jury could consider in evaluating each witness's testimony.[4] Among the enumerated factors that the court provided was, "Has the witness been convicted of a felony?"

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4 The court instructed the jury as follows:

> "In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are how well could the witness see, hear or otherwise perceive the things about which the witness testified? How well was the witness able to remember and describe what happened? What was the witness's behavior while testifying? Did the witness understand the questions and answer them directly? Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case or a personal interest in how the case is decided? What was the witness's attitude about the case or about testifying? Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? How reasonable is the testimony when you consider all of the other evidence in the case? *Has the witness been convicted of a felony?* If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or if you think the witness lied about some things but told the truth about others, you may simply accept that part which you think is true and ignore the rest. Do not automatically reject testimony just because of inconsistencies or conflicts.

d. *The prosecutor's closing argument*

During the prosecutor's rebuttal closing argument, the prosecutor stated, "You as the jury get to test the credibility of all the witnesses and evidence in this case." The prosecutor referred the jury to CALCRIM No. 226 concerning the jury's evaluation of witness testimony and argued in relevant part:

> "Mr. Clevenger has suffered a 2017 felony conviction. And that was not presented to you to show you, oh, he's a bad person; don't believe him. That is not why that was brought up by the Defense and myself. It's because that particular conviction is one that involves moral turpitude. And the Defense actually clarified that for us. It's a crime that involves dishonesty. And there's a reason why that evidence was actually presented to you as a juror in this case because you get to consider that, the fact that he suffered that type of conviction that shows -- that involves dishonesty because it's something for you to consider in whether or not you believe all or only some or none of what he had to say this morning."

2. *Governing law and standard of review*

a. Ineffective assistance of counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 689 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217 (*Ledesma*).) With respect to prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional

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> Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently."

errors, the result of the proceeding would have been different." (*Strickland*, *supra*, at p. 694.)

"It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

"[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*Ledesma*, *supra*, 43 Cal.3d at p. 218.) We review trial counsel's performance with deferential scrutiny, indulging a strong presumption it falls within the wide range of reasonable professional assistance, recognizing the many choices attorneys make in handling cases and the danger of second-guessing a trial attorney's decisions. (*People v. Maury* (2003) 30 Cal.4th 342, 389 (*Maury*); *Strickland*, *supra*, 466 U.S. at pp. 687–688, 694.)

b. Substantive law pertaining to the admissibility of a prior conviction for impeachment purposes

In *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*) [lead opn. of Kaus, J.], the Supreme Court concluded that "a witness' prior conviction should only be admissible for impeachment if the least adjudicated elements of the conviction necessarily involve

moral turpitude." (*Id.* at p. 317.) In explaining the nature of crimes that involve moral turpitude so as to be admissible for impeachment purposes, the *Castro* court stated:

> "Obviously it is easier to infer that a witness is lying if the felony of which he has been convicted involves dishonesty as a necessary element than when it merely indicates a 'bad character' and 'general readiness to do evil.' Nevertheless, it is undeniable that a witness' moral depravity of any kind has some 'tendency in reason' (Evid. Code, § 210) to shake one's confidence in his honesty." (*Id.* at p. 315.)

Even if a prior conviction involves moral turpitude, the *Castro* court held that such a conviction remains subject to a trial court's discretion to exclude the evidence pursuant to Evidence Code section 352. (*Castro*, *supra*, 38 Cal.3d at p. 317.)

The *Castro* court also reaffirmed that, in considering whether to admit evidence of a prior conviction for impeachment purposes, a trial court should consider the so-called *Beagle* factors, "namely, (1) whether the prior conviction reflects on honesty and integrity; (2) whether it is near or remote in time; (3) whether it was suffered for the same or substantially similar conduct for which the witness-accused is on trial; and, (4) finally, what effect admission would have on the defendant's decision to testify." (*Castro*, *supra*, 38 Cal.3d at p. 307, citing *Beagle*, *supra*, 6 Cal.3d 441, and *Gordon v. United States* (D.C. Cir. 1967) 383 F.2d 936, 940–941.)

In *People v. Robinson* (2011) 199 Cal.App.4th 707, the Court of Appeal summarized the admissibility of prior convictions for impeachment purposes under *Castro* as follows:

> "Evidence of a prior conviction is admissible in a criminal case, subject to the limitations of Evidence Code section 352, so long as the conviction involves moral turpitude. [Footnote and citation

> omitted.] Moral turpitude is not limited to dishonesty, but extends to crimes that involve other sorts of moral depravity and a ' "readiness to do evil," ' such as child molestation and crimes of violence, torture, or brutality. [Citation.] Whether a particular offense involves moral turpitude must be determined based on the statutory elements of the crime. The court may not consider the specific facts giving rise to the conviction but must conclude that each element of the crime, including the minimum statutory elements, involves moral turpitude. [Citation.] *Castro* requires 'that from the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude.' [Citation.] This aspect of the holding in *Castro* has come to be referred to as the 'least adjudicated elements test.' " (*Id.* at p. 712.)

In *Elwell*, *supra*, 206 Cal.App.3d 171, the Court of Appeal concluded that assault with force likely to produce great bodily injury is a crime of moral turpitude. In reaching this conclusion, the *Elwell* court noted "[t]he [*Castro*] court defined moral turpitude in terms of a 'readiness to do evil.' " (*Id.* at p. 175.) After examining the least adjudicated elements of the offense of assault with force likely to produce great bodily injury, and emphasizing that the offense requires proof that a person "unlawfully attempt[ed] to injure another by means of force likely to produce great bodily injury," (*id.* at p. 177) the *Elwell* court concluded that the "trial court properly found the assault by means of force likely to produce great bodily injury to be a crime of moral turpitude." (*Ibid.*)

3. *Application*

As noted in part III.A.1.a.ii, *ante*, during the hearing on the People's motion in limine, the trial court stated that it would be willing to instruct the jury that "moral turpitude [is] essentially . . . an act of dishonesty." Clevenger claims that defense counsel rendered ineffective assistance by failing to object to the trial court's mischaracterization of his prior conviction, arguing that counsel "should have, instead, requested that the

felony be described only, for example, as a felony that may *affect* the jury's credibility assessment." We are not persuaded. There is little difference between the trial court's shorthand description of moral turpitude as being "essentially . . . an act of dishonesty," and the phrasing that Clevenger contends his counsel should have requested, i.e., that he had suffered a conviction that might "*affect* the jury's credibility assessment."

In addition, if defense counsel had objected to the trial court's proffered shorthand characterization of the meaning of moral turpitude, the trial court might well have provided far more damaging instructions to the jury. For example, looking to *Elwell*, the trial court might have instructed the jury that Clevenger had suffered a conviction that reflected his "readiness to do evil." (See *Elwell*, *supra*, 206 Cal.App.3d at p. 175 ["[t]he [*Castro*] court defined moral turpitude in terms of a 'readiness to do evil' "].)[5] Or, perhaps the trial court might have instructed that Clevenger had suffered a conviction that tended to demonstrate his "willingness to lie." (See *People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24, italics added ["any criminal act or other misconduct involving

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[5] We also reject Clevenger's contention that defense counsel demonstrated that she was "not aware of the applicable law" because counsel argued, "I don't know that there's any case law that has held that a simple assault or assault with force likely to produce great bodily injury is a crime involving moral turpitude, so I don't think this falls as an impeachable offense." While the People had cited *Elwell* in their briefing, defense counsel's rhetorical contention that there was limited case law supporting the People's position does not establish ineffective assistance. That is particularly true given that, after the Court cited *Elwell* in ruling against defense counsel's position, defense counsel successfully requested that the court "sanitize" the prior conviction so as not to permit any of the facts of the prior conviction to be admitted. Defense counsel also demonstrated her awareness of the relevant law by convincing the court to exclude the title of the offense for which Clevenger was convicted by arguing that the jury should not learn that Clevenger had suffered "a felony conviction involving violence."

moral turpitude *suggests a willingness to lie* and is not necessarily irrelevant or inadmissible for impeachment purposes"].) Thus, we reject Clevenger's contention that defense counsel's failure to object to the trial court's shorthand description of moral turpitude as involving "essentially . . . an act of dishonesty," and counsel's failure to proffer an alternative definition fell below "the wide range of reasonable professional assistance" that constitutes effective assistance. (*Maury*, *supra*, 30 Cal.4th at p. 389.)

For similar reasons, we reject Clevenger's contention that counsel rendered ineffective assistance by referring to the prior conviction as involving "an act of dishonesty." As noted in part III.A.1.a.ii, *ante*, in examining Clevenger about his prior conviction, defense counsel stated, "[T]his is kind of legalese, but that felony is considered a felony involving moral turpitude, which means it's considered an act of dishonesty." By adopting the trial court's formulation of moral turpitude, defense counsel might have staved off the possibility that the court would provide a more damaging characterization of the concept. In addition, by suggesting to the jury that the prior conviction was for a felony "*involving*" moral turpitude, which was "*legalese*," and meant that it was "*considered* an act of dishonesty," defense counsel appropriately attempted to minimize, to the extent possible, the probative value of the impeachment evidence. (Italics added.)

Further, by suggesting to the jury that Clevenger's prior conviction was for an offense that was "considered an act of dishonesty," defense counsel minimized the risk that the jury would speculate that the conviction was for something potentially even more damaging to its assessment of Clevenger's guilt. While Clevenger is correct that the trial

court had already ruled that the specific name of the prior offense could not be introduced in evidence,[6] defense counsel had to consider the possibility that the jury might nevertheless speculate that the prior conviction involved violence or threats, both of which were in fact the case.

Finally, we reject Clevenger's contention that defense counsel provided ineffective assistance in failing to request a limiting instruction. Numerous courts have rejected similar ineffective assistance claims where the record is silent as to why trial counsel failed to request the limiting instruction, reasoning that " '[a] reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide.' " (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053, boldface omitted; see also *People v. Hinton* (2006) 37 Cal.4th 839, 878 ["Defendant also complains that counsel's failure to request a limiting instruction concerning his prior murder conviction demonstrated ineffective assistance, but counsel may have deemed it unwise to call further attention to it"]; *People v. Bonilla* (1985) 168 Cal.App.3d 201, 206 ["The record does not show why [a limiting instruction on the use of a prior conviction] was not requested. It may well be that trial counsel did not want such an instruction, believing that it would emphasize the prior conviction. Since the record is silent on counsel's reasoning and a satisfactory explanation exists for not

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6 However, the trial court had also shown a willingness to reconsider its rulings on this very issue, and thus, defense counsel could have reasonably considered the possibility that the trial court would return to its original ruling permitting the introduction of the violent nature of the prior offense.

making the request, the case must be affirmed on appeal"].) The same result pertains in this case.

Accordingly, we conclude that Clevenger is not entitled to reversal of the judgment on the ground that defense counsel rendered ineffective assistance through the manner in which counsel addressed evidence that Clevenger had suffered a prior conviction.

B. *Clevenger is not entitled to reversal of the judgment due to the People's belated disclosure of the victim's arrest and conviction history*

Clevenger claims that he is entitled to reversal of the judgment due to the People's belated disclosure of the victim's arrest and conviction history. Specifically, he claims that the People's discovery violation violated his right to due process under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the trial court erred in denying defense counsel's motion for a mistrial premised on the late disclosure, and defense counsel provided ineffective assistance related to the discovery issue.

1. *Factual and procedural background*

After the prosecution began its direct examination of the victim, during a morning recess, defense counsel moved for a mistrial. Defense counsel explained that she had just learned that the People had inadvertently failed to provide the defense with discovery concerning the victim's arrest and conviction history.

The arrest history consisted of the following: (1) a 1988 arrest for inflicting corporal injury upon a spouse or cohabitant (§ 273.5, subd. (a)); (2) a 1992 arrest for the same (§ 273.5, subd. (a)); (3) a 1993 arrest for the same (§ 273.5, subd. (a)); (4) a 1994

arrest for three Health and Safety Code violations related to controlled substances (Health & Saf. Code, §§ 11379, 11377, 11550); (5) a 1999 arrest for felony child endangerment (§ 273a, subd. (a)) and two Health and Safety Code violations related to controlled substances (Health & Saf. Code, §§ 11378, 11377); (6) a 2001 arrest for battery on a spouse or cohabitant (§ 243, subd. (e)(1)); and (7) a 2002 arrest for four more Health and Safety Code violations related to controlled substances. (Health & Saf. Code, §§ 11378, 11377, 11550, 11364).

While the victim had a number of prior arrests, she had suffered only a single felony conviction, on the 1999 felony child endangerment charge. (§ 273a, subd. (a).)

Defense counsel suggested that a mistrial was necessary because "[a]t issue in this trial is the credibility of [the victim]," and the defense needed the opportunity to "look into these convictions."[7] Defense counsel stated that she had not yet had the opportunity to determine whether the conviction for felony child endangerment was for an offense manifesting moral turpitude.[8] Defense counsel added that the victim's arrest record for drug sales and usage supported the need for a mistrial, arguing:

> "The whole strategy of this case for me was that she may have -- that it was an eyewitness error. But now knowing that there is drug use in her past, possibly sales, there's potential witnesses that I need to locate that would testify as to her credibility and character for

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7 As noted in the text, the victim's criminal history contained a *single* conviction, not "convictions," as defense counsel stated.

8 As discussed in part III.A.2.b, *ante*, in *Castro*, *supra*, 38 Cal.3d 301, the Supreme Court concluded that "a witness' prior conviction should only be admissible for impeachment if the least adjudicated elements of the conviction necessarily involve moral turpitude." (*Id.* at p. 317.)

> honesty. So I think that the Defense would be significantly disadvantaged at this point when we are -- not only did we not make it part of our trial strategy; we didn't *voir dire* on it. I think it's too late at this point for me to just say okay, well, it's -- you know, if there is one moral turpitude, then she can be impeached by that when I know nothing of the underlying facts or haven't had an opportunity to look into her past at all. Again, I was operating under the assumption that she did not have a criminal record and that her, at least, veracity or honesty was not going to be an issue. I didn't argue that she would have any motive to lie whatsoever. My whole strategy up until this point has been only that it was an eyewitness error."

In response, the prosecutor argued:

> "I would just reiterate the fact that even if these convictions were before the Court to determine whether or not they would come in to impeach [the victim], again, only one of them is an actual felony conviction, which I believe if it's a felony she would be impeached by that felony conviction. With regard to the other arrest history that did not result in a conviction, again, those date back to the late '80s, and most early being in early 2000. So[,] given the age of those arrests that weren't even convictions, I'm not quite sure that they would actually be admissible when weighing the *Beagle* factors for determining whether they are moral turpitude impeachment."

After taking a recess and hearing further argument, the trial court denied the mistrial motion. In denying the motion, the court reasoned in part:

> "[T]he [section] 1054[9] discovery violation is intertwined with the due process issue, and prior misdemeanor conduct may or may not be admissible. I obviously have some concerns about the tenor of the prior history as it now raises the specter of credibility of the witness, slash, victim is even more important than it was under the normal sense of manner in which the case was proceeding. I understand from the Defense perspective that the Defense theory wasn't necessarily challenging the credibility of the witness inasmuch as it was challenging the witness's ability to identify the

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9 Section 1054 et seq. governs discovery in criminal cases. Section 1054.7 generally requires discovery to be disclosed "at least 30 days prior to the trial."

> defendant as the perpetrator independent of the fact that there were other witnesses who presumably -- at least one other witness who presumably will testify as to observing their interactions. So I'm mindful of the fact that this is information that should have been provided to the Defense and wasn't. And the question becomes what the remedy is.
>
> "The Court is going to deny the mistrial motion. In denying the motion the Court recognizes that the Defense should have had this information prior to trial. However, I will allow the parties to brief the issue as to whether or not the conviction is a conviction of a crime of moral turpitude and whether or not the *Beagle* factors would allow for the impeachment of this individual for this crime that was committed in 1999.
>
> "Of course, the other non-conviction misdemeanor related conduct is something that can be explored during the lunch hour. . . . You have additional information at your disposal now with respect to her criminal history. . . . I want to give the Defense every opportunity and the People the opportunity to investigate the felony conviction impeachment issue but also investigate what other information might be forthcoming or necessary in order to provide the appropriate cross-examination of this witness, slash, victim prior to the beginning of the cross-examination. If you think that we need to bring the jury back a little bit later, again, I'm happy to accommodate that. . . .
>
> "I don't necessarily think by virtue of the fact that there may have been drug-related arrest[s] of this individual, I don't think it's reasonably probable that the manner in which you selected this jury or the opening statement that you provided would have been materially different. I don't think there is reasonable probability that had you had this information that it would have impacted or changed the selection process or the opening statements. And at this point in time you haven't even begun cross-examining any of the People's witnesses at this time. So[,] for those reasons the request for mistrial is denied at this point in time."

In response, the defense request that the matter be continued until the following morning. Defense counsel argued in part:

> "Your Honor, I need to investigate this. . . . I'm concerned about my ability to properly defend . . . . I'm honestly scared for Mr. Clevenger that I am being ineffective because there's this whole history that I didn't even look into because I did not know anything about it. Now I need to know are there witnesses that now I need to subpoena and bring in to talk about the credibility of a victim that is on the stand now. I need this time, you know, every minute to locate witnesses and to have my investigators look into the prior conviction."

The court granted the defense's request to continue the trial to the following morning.

When court reconvened, the trial court held a hearing outside the presence of the jury on the discovery issue. At the hearing, defense counsel stated the following:

> "Your Honor, I appreciate the break that the Court gave me. I was definitely in a panic at learning the information on a break yesterday, so I appreciate the Court giving me the opportunity. . . . [T]he case that I found stated that the 273(a) is not a crime involving moral turpitude. So I'm not seeking to introduce that. As to the arrests, I don't have enough information. I think [the prosecutor] tried to obtain some of the police reports; but because of the short notice, we don't have all the arrests, so I couldn't do a thorough analysis on those. But I know they are arrests, not convictions, and they are quite dated. So[,] I think I'm comfortable proceeding without introducing [the victim's] priors."[10]

The victim then resumed her testimony. On cross-examination, defense counsel challenged the accuracy of the victim's identification of Clevenger, but did not challenge her character for truthfulness.

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10 That same day, the People filed a motion to exclude evidence of the victim's prior arrests and convictions. The trial court did not rule on the motion, given defense counsel's statement that she did not intend to seek to admit the evidence.

2. *Clevenger is not entitled to reversal of the judgment under* Brady

Clevenger claims that the late disclosure of the victim's arrest and conviction history violated his right to due process under *Brady*, and requires reversal of the judgment.

a. *Governing law and standard of review*

In *People v. Lewis* (2015) 240 Cal.App.4th 257, the Court of Appeal summarized the relevant law governing a *Brady* claim:

> "Under *Brady*, the prosecution violates a defendant's federal due process rights when it suppresses evidence material to the defendant's guilt or punishment, regardless of the good faith belief of the prosecution. (*Brady*, *supra*, 373 U.S. at p. 87.) Prosecutors have a duty to disclose 'material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation].' [Citation.] There are three elements to a *Brady* violation: (1) the state withholds evidence, either willfully or inadvertently, (2) the evidence at issue is favorable to the defendant, either because it is exculpatory or impeaching, and (3) the evidence is material. [Citation.] As to the last element, '[e]vidence is material if there is a reasonable probability its disclosure would have altered the trial result.' [Citation.] Put another way, the defendant must show that 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation.] 'Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review.' " (*Id.* at p. 263.)

In assessing a *Brady* claim, "[c]onclusions of law or of mixed questions of law and fact . . . are subject to independent review." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

b. *Application*

We assume for purposes of this opinion that Clevenger has demonstrated the first two elements of his *Brady* claim—that the People withheld evidence that was favorable to the defense. However, for the following reasons, we conclude that Clevenger has not established the third required element of his *Brady* claim, i.e., that the withheld evidence was material.

" ' "In general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime,' [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citations]." ' " (*People v. Pettie* (2017) 16 Cal.App.5th 23, 73 (*Pettie*).) Neither circumstance is true in this case.

The victim did not supply the only evidence linking Clevenger to the crime. On the contrary, as described in part II, *ante*, a second witness, the grocery store clerk, identified Clevenger at trial and testified that she witnessed the incident giving rise to the charged offense. The clerk stated that, during the events in question, she was seated in a car near the victim's car.[11] Clevenger got "very close" to the victim's car and yelled at the victim. According to the clerk, Clevenger's actions caused the witness to feel "really unsafe" for the victim. The clerk and her boyfriend decided to leave the car in which they were seated to provide assistance to the victim.

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11 The witness testified that the victim was near the victim's car.

In addition, we cannot conclude that the withheld evidence would have undermined a critical element of the prosecution's case, since Clevenger has not established that any of the withheld evidence was admissible. The victim's single conviction was remote in time and was not a crime of moral turpitude; the conviction was thus inadmissible to impeach her. (See *People v. Sanders* (1992) 10 Cal.App.4th 1268, 1272–1275 [because felony child endangerment is not a crime of moral turpitude, the trial court "erred in allowing impeachment through evidence of [defendant's] prior conviction for child endangerment"].) Further, Clevenger has not established the admissibility of evidence that the victim had previously been arrested. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 609 ["[g]enerally, evidence of mere arrests that do not result in convictions is inadmissible . . . . [¶] . . . evidence of [defendant's] prior arrests that did not result in convictions was inadmissible either as proof of guilt or for impeachment"].) Because Clevenger has not demonstrated that the jury would have learned of any of the belatedly disclosed evidence, it is clear that he also has not established that the evidence would have " ' "undermined a critical element of the prosecution's case." ' " (*Pettie*, *supra*, 16 Cal.App.5th at p. 73; compare with *Smith v. Cain* (2012) 565 U.S. 73, 76 (*Smith*) [reversing for *Brady* error where "undisclosed statements," that "directly contradict[ed]," the witness's testimony left the reviewing court to "speculate about which of [the witness's] contradictory declarations *the jury* would have believed" (italics added)].)[12]

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12 Clevenger relies heavily on *Smith* in his opening brief.

Accordingly, we conclude that Clevenger has not demonstrated that the withheld evidence was material and thus, has failed to establish a required element of his *Brady* claim.

3. *The trial court did not abuse its discretion in denying Clevenger's motion for a mistrial*

Clevenger claims that the trial court abused its discretion in denying his motion for a mistrial.

a. *Governing law and standard of review*

In *People v. Harris* (2013) 57 Cal.4th 804, the Supreme Court explained that " ' "[a] motion for a mistrial should be granted when ' " 'a [defendant's] chances of receiving a fair trial have been irreparably damaged.' " ' " [Citation.] " . . . " ' " (*Id.* at p. 848.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . ." (*Ibid.*) An appellate court applies the abuse of discretion standard of review to any ruling on a motion for a mistrial. (*People v. Williams* (1997) 16 Cal.4th 153, 210.)

b. *Application*

The record indicates that the trial court carefully considered the discovery violation, taking the time to understand both the nature of the violation as well as its potential impact on the defense. From the prosecutor's and defense counsel's arguments, the court could have reasonably found that the victim's single conviction, and the arrests, were remote in time and would likely not be admissible. (Compare with *People v.*

Hughes (2020) 50 Cal.App.5th 257, 283 (*Hughes*) [trial court abused discretion in denying mistrial where "the prosecution surprised defense counsel with new technical evidence on the most critical factual question relating to [defendant's] guilt on three murder charges," during the trial].)[13] The decision in *Hughes* only underscores why the late production of evidence in this case did not mandate a mistrial, since, unlike in *Hughes*, the belatedly disclosed discovery neither pertained to "[t]he critical issue at trial," (*Hughes*, at p. 260) nor, as in *Hughes*, related to admissible evidence. (See *id*. at p. 278 [prosecutor failed to timely disclose expert witness's notes that "contained the calculations that served as the basis for [expert's] new testimony and diagrams on the critical causation issue at trial"].) The court also heard defense counsel's argument that the discovery violation had the potential to prejudice the defense because the late disclosure had prevented the defense from investigating the victim's prior conduct, and the defense's trial strategy may have been different, depending on the outcome of such investigation.

After taking a recess to consider its ruling on defendant's motion for a mistrial, the trial court denied the motion. However, the court determined that a short continuance was necessary to ensure that the defense would have time to assess the discovery. The court also explained its reasoning and permitted the parties to make arguments on the record and to submit written briefs. The manner by which the trial court considered its

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13 *Hughes* was decided after the parties completed their briefing in this case. Clevenger alerted us to the decision via a letter filed pursuant to California Rules of Court, rule 8.254.

ruling on the defense's mistrial motion reflects the court's careful exercise of its discretion.

Clevenger's most compelling contention in support of his argument that the trial court erred in denying his motion for a mistrial is that the late disclosure prevented the defense from investigating the conduct giving rise to the victim's criminal record. However, the trial court could have reasonably determined that, as the People argue on appeal, "it [was] highly unlikely that delving into a 20-year-old conviction or a 17-year-old arrest would have yielded any helpful information."[14]

We also reject Clevenger's argument that a mistrial was warranted under the reasoning of *Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, in which the Court of Appeal concluded that the trial court had abused its discretion in denying a mistrial after the jury learned of prejudicial, but inadmissible, information about the plaintiff concerning his immigration status. (*Id.* at p. 1214.) In concluding that the trial court had abused its discretion in denying the mistrial motion, the *Velasquez* court noted that "the trial court openly recognized the strong risk of prejudice inherent in evidence of

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[14] Defense counsel could have performed an investigation between the time the trial ended and the sentencing date and proffered evidence, if any, pertaining to the victim's remote conduct underlying her criminal record that might have been admissible at trial. (See § 1181(8) [permitting the granting of a new trial, "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have [been] discovered and produced at the trial"].) Clevenger did not, in fact, file a motion for new trial based on any postverdict investigation into the victim's conduct. Clevenger's speculation on appeal that the defense might have found some evidence and that that evidence would have been admissible does not demonstrate that the trial court abused its discretion in denying his motion for a mistrial.

[plaintiff's] immigration status." (*Ibid.*) Clevenger claims that this case is analogous because the trial court in this case, "at least partially, recognized the importance of the information withheld." The trial court's acknowledgement of concerns about how the late discovery might have impacted the defense does not establish that the court abused its discretion in denying a motion for mistrial based on the lateness of the disclosure of the victim's criminal record.

Clevenger's claim that the trial court "reasoned that the discovery was only 'material' if the convictions and/or arrests were, themselves admissible," and thereby made an "error of law," is similarly unpersuasive. (Quoting *People v. Yates* (2018) 25 Cal.App.5th 474, 485.) The trial court made no such statement. Further, the court heard defense counsel's argument regarding how the late disclosure had hampered the defense's ability to investigate the conduct underlying the victim's criminal record. However, the trial court ultimately ruled that this possibility did not warrant granting a mistrial. Under the circumstances of this case, this determination did not amount to an abuse of discretion.

Accordingly, we conclude that the trial court did not abuse its discretion in denying Clevenger's motion for a mistrial.

4. *Clevenger is not entitled to reversal of the judgment due to ineffective assistance of counsel related to the belated discovery issue*

Clevenger claims that defense counsel's deficient advocacy related to the belated discovery amounted to ineffective assistance. Specifically, Clevenger contends that counsel should have conducted a thorough background check of the victim prior to the

trial; should have more forcefully and more effectively argued for a mistrial, including filing a written motion; and should not have agreed to proceed with the case "absent a thorough analysis or investigation into the non-conviction, misdemeanor arrests."

As discussed in part III.A.2, *ante*, to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms *and* that the deficient performance was prejudicial. (*Strickland*, *supra*, 466 U.S. at p. 689; *Ledesma*, *supra*, 43 Cal.3d at pp. 216–217.)

Without suggesting that defense counsel's performance was deficient, we conclude that Clevenger's claim fails for lack of a demonstration of prejudice. (See *Strickland*, *supra*, 466 U.S. at p. 697 ["a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"].) Clevenger has not shown that if defense counsel had undertaken any of the steps that Clevenger contends on appeal were warranted, there is a reasonable probability that such actions would have led to a different result. In support of this conclusion, we observe that the victim's criminal history was remote, and that an investigation into her past was unlikely to produce impeachment evidence that, even if admissible, would have caused the jury to have a significantly different assessment of the victim's credibility. This is particularly true given the corroborating witness's testimony, which was extremely inculpatory as to Clevenger's actions on the day in question.

Accordingly, we conclude that Clevenger is not entitled to reversal of the judgment due to ineffective assistance of counsel related to the belated discovery.

C. *There is substantial evidence in the record to support the trial court's consciousness of guilt / flight instruction*

Clevenger claims that the trial court erred in instructing the jury regarding its evaluation of evidence pertaining to a defendant's consciousness of guilt / flight. Specifically, Clevenger contends that there is not substantial evidence in the record to warrant the giving of the instruction.[15]

1. *Factual and procedural background*

a. The jury instruction conference

During a conference on jury instructions, the trial court asked the prosecutor whether the People intended to rely on evidence of Clevenger's flight from the scene of the crime to establish his consciousness of guilt. After the prosecutor responded in the affirmative, the court stated that it had a sua sponte obligation to deliver a flight

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[15] The People contend that Clevenger forfeited this claim by failing to raise it in the trial court. While the law is not entirely clear, the Supreme Court has twice rejected forfeiture arguments where a defendant argued for the first time on appeal that there was insufficient evidence to support a flight instruction. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1074, fn. 7 and *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12.) As the *Wallace* court stated:

> "The Attorney General contends this argument is forfeited because defendant failed to object at trial. Section 1259, however, permits appellate review of claims of instructional error affecting a defendant's substantial rights. [Citations.] Therefore, we may assess this claim on its merits." (*Wallace*, *supra*, at p. 1074, fn. 7.)

Accordingly, we consider Clevenger's claims on the merits.

instruction and asked the parties whether they had any comment. Both parties responded in the negative.

b. The trial court's flight instruction

The court instructed the jury pursuant to a modified version of CALCRIM No. 372 as follows:

> "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

2. *Governing law and standard of review*

When the prosecution relies on evidence of flight as tending to show guilt, section 1127c requires that the jury be instructed as to how to evaluate such evidence.[16]

In *People v. Bonilla* (2007) 41 Cal.4th 313, the Supreme Court outlined the law relevant in determining whether there is sufficient evidence to warrant a flight instruction:

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16 Section 1127c provides:

> "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.
>
> "No further instruction on the subject of flight need be given."

> " 'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." ' [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*Id.* at p. 328.)

On appeal, we determine whether there is substantial evidence in the record to support the giving of a flight instruction. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.)

3. *Application*

The People presented evidence that Clevenger approached the victim in a parking lot in front of a grocery store, while she was holding a cellular phone, and threatened to "knife [her]." In explaining what happened next, the victim stated, "[T]hen he saw I was holding my phone, and he said, yeah, call 911. I'm going to effing stab you, bitch." Bystanders helped the victim retreat to the doorway of the grocery store, where the victim called 911. As she was calling 911, the victim could see that Clevenger was still in the parking lot, near another business in the shopping center. According to the victim, after that, Clevenger left the parking lot. A sheriff's deputy responded to the grocery store. While contacting the victim, the deputy learned that another officer had arrested Clevenger "less than half a mile away" from the grocery store.

From this evidence, the jury could have reasonably found that, immediately after threatening the victim, Clevenger knew that the victim was summoning police and left

the area quickly. In light of this evidence, the jury could have further inferred that Clevenger left the scene in order to avoid arrest, thereby manifesting his consciousness of guilt.

Accordingly, we conclude that there is substantial evidence in the record to support the trial court's consciousness of guilt / flight instruction.

D. *Clevenger is not entitled to reversal pursuant to the cumulative error doctrine*

Clevenger contends that the cumulative effect of the errors that he alleges requires reversal. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) We have found no errors to cumulate. Accordingly, we conclude that the cumulative error doctrine does not require reversal of the judgment.

E. *The one-year prison prior enhancement (§ 667.5) must be stricken due to a change in the law and Clevenger must be resentenced*

In a supplemental brief, Clevenger argues that this court should strike the one-year prison prior due to a change in the law. The People concede that Clevenger is entitled to have the one one-year prison prior enhancement stricken, and they request that we strike the enhancement and remand the matter to the trial court with directions to resentence Clevenger to a sentence no longer than his original three-year sentence.

1. *Clevenger's original sentence*

As noted in part I, *ante*, the trial court sentenced Clevenger to three years in prison, consisting of the midterm of two years on the underlying criminal threat charge

(§ 422) (count 1), and a one-year consecutive term for the prison prior enhancement (§ 667.5).

2. *Senate Bill 136*

In *People v. Gastelum* (2020) 45 Cal.App.5th 757 (*Gastelum*), this court discussed Senate Bill No. 136 (Senate Bill 136), which amended section 667.5, subdivision (b):

> "Prior to this amendment, [section 667.5, subdivision (b)] provided for a one-year enhancement for each prior separate prison term, unless the defendant remained free from both prison custody and the commission of a new felony for a five-year period after discharge. [Citations.] After the amendment, 'a one-year prior prison term enhancement will only apply if a defendant served a prior prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b).' [Citations.] The amended statute became effective January 1, 2020." (*Id.* at p. 772.)

3. *Application*

The People concede that Senate Bill 136 applies retroactively to Clevenger and requires that we strike the one-year prison prior enhancement (§ 667.5). We agree. (See *Gastelum*, *supra*, 45 Cal.App.5th at p. 772 [applying Senate Bill 136 retroactively to strike a one-year prison prior enhancement].)

The People request that we strike the one-year prison prior enhancement, vacate Clevenger's sentence, and remand the matter to the trial court with directions to resentence Clevenger to a sentence no longer than his original three-year sentence. We agree that this is the proper remedy in this case. (See e.g., *People v. Burns* (1984) 158 Cal.App.3d 1178, 1184 ["On remand, the trial court is entitled to reconsider its entire sentencing scheme. [Citation.] However, in order to 'preclude vindictiveness and more

generally to avoid penalizing a defendant for pursuing a successful appeal' [citation], appellant may not be sentenced on remand to a term in excess of his original sentence"].)

Accordingly, we strike the one-year prison prior enhancement (§ 667.5), vacate Clevenger's sentence, and remand the matter to the trial court with directions to resentence Clevenger to a sentence no longer than his original three-year sentence.[17]

F. *The trial court exceeded its authority in entering an unauthorized postconviction protective order pursuant to section 136.2*

Clevenger claims that the trial court exceeded its authority in entering an unauthorized postconviction protective order. We review Clevenger's claim de novo, since it raises a question of law. (See *People v. Race* (2017) 18 Cal.App.5th 211, 217 [reviewing de novo issue of whether trial court was authorized to issue order pursuant to section 136.2].)

1. *Governing law*

Section 136.2, subdivision (a)(1) provides in relevant part:

> "Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, a court *with jurisdiction over a criminal matter* may issue orders, including, but not limited to, the following:
>
> "[¶] . . . [¶]
>
> "(D) An order that a person described in this section shall have no communication whatsoever with a specified witness or a victim,

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[17] Clevenger also argued on appeal that the prison prior enhancement should be stricken because the record does not establish that he made a knowing and voluntary admission of the prison prior allegation. We need not address this contention, given our striking of the enhancement for the reasons stated in the text.

> except through an attorney under reasonable restrictions that the court may impose." (Italics added.)

As the People properly acknowledge, "[u]nder this statute, a trial court has jurisdiction to issue protective orders that apply during the pendency of a criminal matter *but has no authority to issue a protective order extending beyond the pronouncement of judgment*." (Citing *People v. Ponce* (2009) 173 Cal.App.4th 378, 383 (*Ponce*), italics added.)

Section 136.2, subdivision (i) provides that a trial court may issue a *postconviction* protective order in a case in which a defendant has been convicted of certain statutorily specified crimes.[18] It is undisputed that Clevenger was not convicted of any of the enumerated crimes.

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18 Section 136.2, subdivision (i) provides in relevant part:

> "(i)(1) When a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of subdivision (a) of Section 236.1, Section 261, 261.5, 262, subdivision (a) of Section 266h, or subdivision (a) of Section 266i, a violation of Section 186.22, or a crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a victim of the crime. . . .
>
> "(2) When a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of Section 261, 261.5, or 262, a violation of Section 186.22, or a crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a percipient witness to the crime if it can be established by clear and convincing evidence that the witness has been harassed . . . by the defendant."

2. *Factual and procedural background*

Prior to the trial, the trial court issued a protective order pursuant to section 136.2, ordering Clevenger not to have contact with the victim.

In the probation report, the probation officer stated that "[the victim] wants the defendant to stay away from the area . . . where she works and where the offense took place."

On the day of the sentencing hearing, the trial court terminated the pretrial protective order.

At sentencing, the prosecutor stated:

> "I did submit to the court, because there was a criminal protective order that was issued during the pendency of this case, a termination of that [criminal protective order], but I also am asking that the court also sign and put into effect another criminal protective order which after having read the report by probation where the victim . . . indicated that she desired to have some sort of stay away order in place, criminal protective order in place from this defendant."

In response the court stated, "With respect to the [P]eople's request to reissue . . . another criminal protective order, in light of the conviction, the court is inclined to do and will do so at this time and will sign the order that you provided to the court . . . ." Clevenger did not object.

That same day, the trial court entered a written form order (CR-161) entitled, "CRIMINAL PROTECTIVE ORDER—OTHER THAN DOMESTIC VIOLENCE." A box is checked next to the words, "ORDER UNDER PENAL CODE, § 136.2." The order restricted Clevenger from having contact with the victim for a period of three years.

3. *Application*

The trial court lacked authority under section 136.2 to issue a postconviction protective order. (*Ponce*, *supra*, 173 Cal.App.4th at p. 383.) Accordingly, the order must be stricken. (*Id.* at p. 386.)

We are not persuaded by the People's contention that Clevenger forfeited any objection to the order by failing to object to its issuance in the trial court. The *Ponce* court specifically considered that argument and rejected it, reasoning:

> "The Attorney General claims Ponce waived this issue by not raising it in the trial court. He is correct that this issue was not raised there. As a general rule, an appellant waives issues on appeal that he or she did not initially raise in the trial court. [Citation.] But there are exceptions to this rule for unauthorized sentences and sentencing decisions that are in excess of the trial court's jurisdiction. [Citation.] Because this case involves the jurisdictional validity of the trial court's decision to issue a three-year protective order during sentencing, we will consider Ponce's claim on the merits." (*Ponce*, *supra*, 173 Cal.App.4th at pp. 381–382.)

The People argue that *Ponce* was "incorrect and should not be followed on that point" because a trial court has "inherent authority to issue orders to protect trial participants when there is good cause to do so." This argument fails because the protective order that the trial court entered in this case expressly states that it was entered *pursuant to section 136.2*. The trial court lacked authority under section 136.2 to issue such a postconviction protective order, since that statute permits the issuance of a postconviction protective order only when the defendant has been convicted of certain specified crimes that are not applicable here. (*Ponce*, *supra*, 173 Cal.App.4th at p. 383.) We need not consider whether the trial court has inherent authority to issue a

postconviction order notwithstanding section 136.2, since, in this case, the trial court did not purport to exercise any such power and instead, expressly indicated that its order was issued pursuant to section 136.2.[19]

Accordingly, we conclude that the trial court exceeded its authority in entering an unauthorized postconviction protective order pursuant to section 136.2.

IV.

DISPOSITION

The conviction for making a criminal threat (§ 422) (count 1) is affirmed.

The one-year prison prior enhancement (§ 667.5) is stricken and Clevenger's sentence is vacated. The matter is remanded to the trial court with directions to resentence Clevenger to a sentence no longer than his original three-year sentence.

The protective order is stricken.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

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19 In *Ponce*, the Court of Appeal also rejected the People's argument that "the trial court did not issue the order under section 136.2." (*Ponce*, *supra*, 173 Cal.App.4th at p. 382.) Further, the *Ponce* court stated, "Even had the court relied on 'inherent judicial authority' to issue its order, the result would not change." (*Id.* at p. 384.)