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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
BERNADETT GASSETT,
Defendant and Appellant.

A130288

**(Contra Costa County
Super. Ct. No. 51005644)**

Seventy-three-year-old Roger Duncan was fatally struck by a hit-and-run driver while crossing the street. After turning herself in to the police more than two years later, appellant Bernadett Gassett was tried before a jury and convicted of leaving the scene of the accident that resulted Duncan’s death, in violation of Vehicle Code section 20001, subdivisions (a) & (b)(2).¹ The court sentenced appellant to prison for the three-year middle term, but suspended the execution of that sentence and placed her on felony probation.

¹ Vehicle Code section 20001 provides in relevant part, “(a) The driver of a vehicle involved in an accident resulting in injury to a person, other than himself or herself, or in the death of a person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004. [¶] (b) [¶] (2) If the accident described in subdivision (a) results in death or permanent, serious injury, a person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years or in a county jail for not less than 90 days. . . .”

Appellant argues that the judgment must be reversed because: (1) the trial court should have allowed her to present evidence that Duncan's blood alcohol level was .07 percent at the time of the accident and that he had suffered a heart attack during the week before his death, which would have tended to show he was bent over when he was hit by appellant's car and that she did not know she had hit him; (2) the prosecutor committed misconduct by asking the jury to speculate as to certain facts concerning appellant's possible return to the scene shortly after the collision; and (3) the court should have granted a mistrial based on the prosecution's evidence of an injury to Duncan's bladder that was not mentioned in the autopsy report. We affirm.

FACTS

At about 7:30 p.m. on April 12, 2007, Duncan left a market on the corner of Market Street and 19th Street in San Pablo. He walked outside with his purchase and was hit by a car.

Bonnie Pelayo was driving westbound on Market Street, following a silver car that she estimated to be traveling at 35 miles per hour. As they approached the intersection of 19th Street, Pelayo saw Duncan lying in the road and realized the car in front of her had hit him. Pelayo stopped within about five feet of hitting Duncan herself and got out of the car, while the car that had hit him continued down Market Street and turned onto a cross street. Pelayo signed a police statement indicating that the car in front of her had swerved to the left like it was trying to go around something, and when she looked to her right she saw a man lying on the ground.

Jose Rueda was driving along Market Street in the opposite direction. He slowed down to a near stop at the intersection of 19th because Duncan was crossing the street in the crosswalk. As Rueda was slowing down, he noticed a silver car coming "very fast" (more than 45 miles per hour) toward the intersection. The right front part of the car hit Duncan, who rolled and hit the passenger side mirror, knocking it off the car. The car stopped for a few seconds before quickly driving away, and Rueda saw two people inside, though he could not tell their gender.

Rueda stopped to help and began directing traffic because some of the vehicles that were passing by were coming too close to Duncan, who was lying on the ground. Police and emergency personnel arrived within a few minutes. Several motorists paused and asked Rueda about Duncan's condition, including two people in a silver car that was missing a passenger side mirror. The male passenger asked Rueda whether the man was dead and whether anyone had a license plate number. Rueda responded that all they had was the mirror, and the silver car quickly drove away. Rueda, who is fluent in Spanish, believed the man spoke to him in Spanish, though he was not sure of this when he testified at trial.

Duncan was transported to the hospital, where he died a few days later. An autopsy was performed by Dr. Ogan, a forensic pathologist, who determined the cause of death to be "multiple blunt impact trauma with skull, vertebral, rib, and lower extremity fractures . . . due to motor vehicle collision, automobile versus pedestrian." Dr. Ogan noted bruising and a laceration on the forehead, bruising on the left knee and calf, a fractured left ankle, a fractured rib, a skull fracture, bruising on the temple and scalp, a neck fracture, and fractures on the anterior orbital ridge (the shelf that is over the eyes). He concluded that Duncan's left foot had been planted at the time of impact, and that it was possible the skull fracture was the result of hitting a side view mirror on a car. However, the initial point of impact with the car was Duncan's left knee, not his head.

Officer Matecki of the San Pablo Police Department was trained in traffic accident reconstruction and investigated the accident that led to Duncan's death. He determined that the mirror found at the scene came from a Dodge Neon, and estimated that the car had been traveling less than 30 to 35 miles per hour at the time of impact. Although Matecki did not have a lot of information during the early stages of the investigation, he initially concluded that Duncan had been bent over or kneeling at the time of impact, and that he was struck by the car's passenger side mirror. After he had reviewed the autopsy report and heard Rueda's complete version of events at the preliminary hearing, Matecki concluded that Duncan had not been bent over at the time of impact.

Officer Matecki believed that Duncan had been crossing the street at an obtuse angle and was not completely inside the crosswalk. The car that hit him made a swerving motion and Duncan received a glancing blow to the left knee from the front passenger side of the car. This caused him to spin around and roll down the side of the car, with his right arm coming into contact with the fender area and the side mirror catching him under the throat area. This version of events was consistent with Duncan's broken ankle, as that was an injury that would occur if he planted that foot as a pivot point to avoid the car.

On August 31, 2009, more than two years after the accident, appellant walked into the San Pablo Police Department and admitted she had been driving the silver Neon that struck and killed Duncan. She explained that she was on her way home and was traveling the speed limit when she saw an older man standing in or near the crosswalk. When she drove by she heard a loud sound like something had hit her car, but she turned around and didn't see anything. Appellant said that the following day she noticed the passenger side mirror on her car was broken and she got scared. A friend who was no longer "here" fixed the mirror for her; she did not answer the officer's question as to whether that friend was her boyfriend. Earlier in the interview she had said her boyfriend was a painter and had since been deported. Appellant had seen flyers in the neighborhood asking for information about the accident, but some people who used to be her friends told her she would be stupid if she turned herself in. She maintained that nobody was with her in the car at the time of the accident.

DISCUSSION

I.

Evidence of Victim's Blood Alcohol Level and Possible Heart Attack

Appellant argues that that the trial court should have allowed her to present evidence that Duncan had a blood alcohol level of .07 at the time of the accident and that he had recently suffered a heart attack. She contends this evidence was relevant because it would tend to show that Duncan was bent over in the street when he was first struck by appellant's car. This, in turn, would lend credence to the defense position that appellant

did not know she had been in an accident when she left the scene.² We are not persuaded.

A. Trial Court's Ruling and Evidence Presented

Before the trial began, the prosecution filed a motion in limine seeking to exclude evidence of Duncan's blood alcohol level as irrelevant, given that the Vehicle Code imposes a duty to stop at the scene of an accident regardless of its cause. At the hearing on the motion, defense counsel argued the blood alcohol evidence was admissible because Officer Matecki, who would testify as the prosecution's expert in accident reconstruction, had originally opined that Duncan was bent over at the time of the accident. Defense counsel argued that Duncan's blood alcohol level could explain why he was bent over and would lend credence to Matecki's original opinion about how the accident occurred. The trial court ruled that the blood alcohol evidence was likely to create bias against Duncan and was inadmissible under Evidence Code section 352.³

During trial, defense counsel advised the court that she intended to elicit testimony from Officer Matecki that in forming his first opinion about how the accident occurred, he had relied on information that Duncan had been experiencing dizzy spells and had suffered a recent heart attack. The court indicated it would allow cross-examination on those subjects, which would tend to explain why Duncan might have been bent over at the time of the accident. Later, the court revisited the issue and ruled that Matecki would not be allowed to testify about a possible heart attack suffered by Duncan at the time of the accident, because there would be no competent medical evidence on that subject. The court also reiterated that it would not allow testimony about Duncan's blood alcohol level

² As an element of the charged offense, the prosecution was required to prove that appellant knew she was in an accident involving an injured person. Such knowledge may be actual or constructive. (*People v. Harbert* (2009) 170 Cal.App.4th 42, 53; *People v. Nordberg* (2010) 189 Cal.App.4th 1228, 1237-1238.)

³ Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

because that evidence would be unduly prejudicial and, additionally, a .07 blood alcohol content was not likely to cause someone to bend over.

During his testimony, Officer Matecki acknowledged that he had originally believed Duncan was either bent over or on his knees at the time of impact, and that his face was hit by the car's passenger side mirror. He explained that he later revised his opinion and now believed Duncan was struck by the passenger side front fender of the car and that he bent over after this initial impact and was hit by the mirror. Matecki testified that there was a small puddle of vomit at the scene and identified a photograph showing the same. He acknowledged having seen witness statements indicating that Duncan suffered from dizzy spells.

B. *Analysis*

Appellant argues that the trial court should have allowed her counsel to elicit evidence about Duncan's blood alcohol level and the possibility he was suffering a heart attack at the time of the accident, because this would have supported the defense theory that Duncan was bent over when he was hit. We review rulings regarding the admissibility of evidence, including rulings under Evidence Code section 352, for abuse of discretion, and will reverse only when the trial court has "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373.)

The trial court did not abuse its discretion when it concluded that evidence of Duncan's .07 blood alcohol level would be more prejudicial than probative. According to defense counsel, the evidence tended to show Duncan was bent over when he was hit by appellant's car. But nothing in the defense offer of proof suggested that his blood alcohol level, which was below the legal limit for driving under the influence (see Veh. Code, § 23152), would actually impair someone's coordination to the extent that it would cause them to bend over. (See *People v. Stitely* (2005) 35 Cal.4th 514, 549-550 [court properly excluded evidence of rape-murder victim's .26 percent blood alcohol level where no evidence was offered to show how her intoxication affected her judgment on the night she was killed or made her more likely to have consented to intercourse].)

Absent such evidence, the relevance of Duncan's blood alcohol level was minimal at best, and the trial court reasonably concluded that it did not outweigh the potential for prejudice and confusion of the issues.

Nor did the court err when it excluded evidence that Duncan might have suffered a heart attack within a week of the collision. Defense counsel sought to introduce this evidence through its cross-examination of Officer Matecki, but Matecki was not qualified to offer a medical opinion that appellant was having a heart attack when he was hit, or to testify that he would have bent over as a result. As an expert in accident reconstruction, Matecki could say that Duncan had likely been in a particular position when he was hit, but he was not qualified to testify about possible medical reasons for that position.

In any event, it is not reasonably probable that appellant would have obtained a different result if the evidence of Duncan's blood alcohol level or possible heart attack had been presented to the jury. (*People v. Page* (2008) 44 Cal.4th 1, 41-42.) Defense counsel urged the jury to accept Detective Matecki's original opinion that Duncan was bent over before impact because this made it more likely that appellant did not know she had hit him. People do not ordinarily bend over while crossing a road, so counsel wanted to offer an explanation as to why Duncan might have done so in this case, though the reason itself would not affect appellant's criminal culpability. Defense counsel elicited evidence that Duncan suffered from dizzy spells and that a puddle of vomit was found in the road. Both circumstances explained why Duncan might have been bent over, and evidence of additional possible reasons was not necessary to counter the common sense assumption that Duncan would have been standing up while crossing the road. The court's exclusion of the challenged evidence was not prejudicial.

We also reject appellant's argument that the court's ruling deprived him of his rights under the federal Constitution.⁴ The exclusion of defense evidence on a minor or subsidiary point does not interfere with the right to due process. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103; *People v. Bautista* (2008) 163 Cal.App.4th 762, 783.) And,

⁴ We reject the People's claim that this issue was not preserved on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 436-438.)

although an order limiting the cross-examination of witnesses may in some cases deprive a defendant of his right to confront the witnesses against him (*Davis v. Alaska* (1974) 415 U.S. 308, 318), “ ‘ “not every restriction of a defendant’s desired method of cross-examination is a constitutional violation” ’ ” (*People v. Elliott* (2012) 53 Cal.4th 535, 579). In light of the evidence providing a plausible reason that Duncan might have been bent over in the road (dizziness, nausea), testimony about Duncan’s .07 blood alcohol content and possible heart attack, unaccompanied by any competent expert testimony to show those circumstances would have led to his bending over at the time of impact, was marginally relevant at best. No constitutional violation appears on this record.

II.

Prosecutorial Misconduct

Appellant argues that her conviction must be reversed because the prosecutor committed misconduct during closing argument. We disagree.

“A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such unfairness as to make the resulting conviction a denial of due process. [Citation.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.] [¶] [W]e do not reverse a defendant’s conviction because of prosecutorial misconduct unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct.” (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1352-1353 (*Ellison*).)

Appellant’s claim of prosecutorial misconduct arises in the following context: Appellant told police during her interview that she was alone at the time of the accident. Rueda testified that he saw two people in the car that struck Duncan, and that after he stopped to help, a passenger in a car with a missing side mirror asked him whether the pedestrian had been killed and whether anyone had taken down a license plate number. During closing argument, the prosecutor advanced the theory that the car with the missing side mirror was appellant’s car and that her boyfriend was the passenger who

spoke to Rueda. This was relevant to prove the knowledge element of Vehicle Code section 20001, as it tended to show appellant knew she had hit somebody.

Appellant complains that the prosecutor improperly invited the jury to speculate that paint receipts found in her car after she contacted the police supported the theory that her boyfriend was with her at the time of the accident. We agree that a prosecutor should not invite the jury to speculate about evidence not presented at trial (*People v. Yeoman* (2003) 31 Cal.4th 93, 149), but that line was not crossed in this case. The evidence showed that appellant's boyfriend was a painter and while the paint receipts found in her car did not themselves establish that he was with appellant on the day of the accident, they did support an inference that he had been in her car. Along with Rueda's testimony that there were two people in the car and statements by appellant during her interview that could be interpreted to mean her boyfriend was the person who repaired the passenger side mirror after the accident, the evidence of the receipts was an additional circumstance pointing to her boyfriend's presence at the time of the accident. "A prosecutor engages in misconduct by misstating facts or referring to facts not in evidence, but he or she enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom." (*Ellison, supra*, 196 Cal.App.4th at p. 1353.)

Appellant also argues that the prosecutor made a racist comment in suggesting that the passenger in the car with the missing mirror was appellant's boyfriend because he might have spoken in Spanish to Rueda. Again we disagree. Appellant told police that her boyfriend had been deported, suggesting that he was the citizen of another country and was not in this country legally. Though there was no direct evidence that appellant's boyfriend spoke Spanish, many undocumented workers living in California are from Spanish-speaking countries. The prosecutor was not claiming that Spanish speakers in this country are typically undocumented, as appellant suggests; rather, he was suggesting that as an undocumented worker, it was possible appellant's boyfriend could speak Spanish and was, therefore, the male passenger who spoke to Rueda.

III.

Denial of Motion for Mistrial

Appellant argues that the trial court should have declared a mistrial because Dr. Ogan, the pathologist who conducted the autopsy, testified about an injury to Duncan that was not disclosed in the autopsy report. We disagree.

Dr. Ogan testified at trial that Duncan had suffered a ruptured urinary bladder and that some kind of collision would have been necessary to cause that injury. Defense counsel later requested a mistrial or a continuance so she could secure an expert to evaluate the information about the ruptured bladder, which was not mentioned in the autopsy report. Though the trial court initially indicated that it would grant a mistrial, based on the prosecutor's insistence that the ruptured bladder was something that could be considered by the jury, it denied the motion after the prosecutor agreed that the court could instruct the jury to disregard the evidence.

The court then gave the jury the following instruction: "There was some reference made by . . . [the] forensic doctor, about the bladder and something about a bladder rupture situation. I am striking that evidence and ordering you to disregard it. It wasn't in the autopsy report. The parties of the case before the case came to trial didn't have a chance to do any investigation. We haven't enough evidence to make it relevant. In other words, we simply don't know where that would fit in. [¶] So, I'm going to order you to disregard anything about whether there was or wasn't a ruptured bladder. I think it was because we don't know if it exists – preexisted, after, we just don't know those things so we're going to disregard that."

Appellant complains that the testimony about the ruptured bladder suggested Duncan was struck directly in his abdomen, which would have detracted from her claim that she did not realize she had hit anyone when she drove away from the scene. She argues that the court should have granted the motion because the curative instruction could not "unring [the] bell."

A trial court should grant a motion for a mistrial only when a party's chance of receiving a fair trial has been " "irreparably damaged." ' ' (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) A motion for mistrial is directed to the sound discretion of the trial

court and should be granted in cases where the court has been “ ‘apprised of prejudice that it judges incurable by admonition or instruction.’ ” (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) “ ‘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.’ ” (*Id.* at p. 986.)

“Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction.” (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834.) Only in an exceptional case will we conclude that improperly admitted evidence was of such a character that its effect cannot be removed by an admonition. (See *People v. Seiterle* (1963) 59 Cal.2d 703, 710.) This is not that exceptional case. The evidence of the ruptured bladder was not inflammatory, especially in light of the other injuries suffered by Duncan. The court advised the jury that the testimony about the ruptured bladder was not only inadmissible, it was factually irrelevant because the cause of that injury had not been established. We have no reason to believe the jury did not follow the instruction to disregard the evidence, and the court did not abuse its discretion when it denied the motion for mistrial and instead gave a curative instruction.

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.