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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS MORENO CORTEZ,

Defendant and Appellant.

A134864

(San Mateo County  
Super. Ct. No. SC074178A)

While driving with a blood alcohol content of more than two—and quite possibly three—times the legal limit, defendant Carlos Cortez caused a car accident that seriously injured two people in the car he hit. After a bench trial resulted in defendant’s conviction on felony drunk driving and hit and run charges, the court sentenced him to seven years, four months in prison, comprised of a one-year, four-month base term and two consecutive three-year enhancements. Defendant presents three legal challenges to his sentence, all contending that the enhancements were wrongfully imposed. Consistent with existing legal authority, we conclude to the contrary. We thus affirm.

**BACKGROUND**

On August 8, 2011, at approximately 11:40 p.m., Joanna Cheung and her brother Christopher were in Joanna’s car heading north on Highway 101 near the San Francisco International Airport on their way home from dinner. Defendant was also traveling north on Highway 101, driving at a high rate of speed and weaving in and out of traffic. As described by a witness who estimated defendant’s speed to be 90 miles per hour, he “was driving real fast, going real fast, cutting people off in and out of traffic in the slow to the

right lanes.” As defendant came up behind the Cheungs, he clipped the left rear of their car, causing it to veer sharply to the left, hit the center divide, and flip over multiple times, finally coming to rest on the driver’s side. Christopher was able to get himself out of the car, while a bystander helped extricate Joanna, who was in severe pain. She suffered spinal and rib fractures, lung contusions, and swelling to her face. Christopher suffered broken ribs and a deep gash on his elbow that required surgery.

Despite striking the Cheungs’ car and sending it careening into the center divide, defendant did not stop, instead continuing north on Highway 101 until damage to his own car forced him to pull over about a quarter mile past the accident. A witness to the accident followed defendant up the road, and when he spotted defendant’s car on the shoulder, he wrote down the license plate number and reported it to the California Highway Patrol.

Two California Highway Patrol officers were responding to the initial report of the accident when they heard a subsequent report that the suspect vehicle was possibly parked on the right hand shoulder about a quarter mile past the accident site. They drove north until they came upon defendant’s car, which had damage to the front right bumper, the front axle, and one of the tires, which was “shredded,” “pretty much gone.”

One officer approached the car and asked defendant, who was seated in the driver’s seat, if everything was okay. Through the open window, the officer could smell alcohol coming from the car. As the officer spoke to defendant, he conducted a “quick . . . horizontal gaze nystagmus test,”<sup>1</sup> the results of which suggested that defendant was under the influence of alcohol.

When defendant got out of his car, he had an unsteady gait. He told the officers that his wife had been driving the car but they got a flat tire so she pulled over to the shoulder and walked to the nearest service station. Although defendant was cooperative,

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<sup>1</sup> A horizontal gaze nystagmus test is a field sobriety test that looks for involuntary jerking of the eyes.

his speech was slow and slurred, he had trouble balancing, his eyes were red and watery, and he emitted a strong odor of alcohol.

Using defendant's cell phone, one of the officers called defendant's wife, who was at the restaurant where she worked, waiting for defendant to pick her up. She denied that she had been driving the car.

After the officers performed additional field sobriety tests, they placed defendant under arrest and transported him to Redwood City County Jail. A blood draw at 1:40 a.m. confirmed a blood alcohol content of 0.19 percent. A criminalist estimated that at the time of the accident (approximately two hours before the blood draw), defendant's blood alcohol content would have been 0.26 percent and that he would have had to have consumed approximately 12 beers or their equivalent to reach that level.

A bench trial commenced on December 12, 2011, and evidence was presented over the course of two days, with closing arguments on December 15.

At the conclusion of trial, the court found defendant guilty of one count of felony driving under the influence of alcohol causing bodily injury (count I; Veh. Code, § 23153, subd. (a)); one count of felony driving with a blood alcohol content of 0.08 percent or more causing bodily injury (count II; Veh. Code, § 23153, subd. (b)); and one count of felony hit and run resulting in injury (count III; Veh. Code, § 20001, subd. (a)). The court also found true five special allegations pertaining to count II, namely that defendant: (1) caused injury to multiple victims (Veh. Code, § 23558); (2) inflicted great bodily injury on Joanna and Christopher (Pen. Code, § 12022.7, subd. (a)<sup>2</sup>); (3) committed a serious felony (Pen. Code, § 1192.7, subd. (c)(8)); and (4) committed a violent felony (Pen. Code, § 667.5, subd. (c)(8)).

On February 29, 2012, the court sentenced defendant to seven years, four months in state prison, comprised of the 16-month low term on count II, a concurrent 16-month

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<sup>2</sup> Penal Code sections 12022.7 and 1192.7 were amended operative January 1, 2012. (Stats. 2010, ch. 711, § 5 (Sen. Bill No. 1080); Stats. 2010, ch. 178, § 73 (Sen. Bill No. 115).) All references here are to the provisions operative at the time of the defendant's offense.

term on count III, and two consecutive, three-year terms for the Penal Code section 12022.7, subdivision (a) enhancements. The court also imposed but stayed a 16-month term on count I and a one-year Vehicle Code section 23558 enhancement.

This timely appeal followed.

## **DISCUSSION**

### **Penal Code Section 12022.7 and the Standard of Review**

Defendant's three arguments challenge the applicability of Penal Code section 12022.7, subdivision (a) (section 12022.7), the provision pursuant to which the court imposed the two three-year enhancements. It states: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." Because defendant presents only legal challenges to the imposition of these enhancements, we review his arguments de novo. (*People v. Jones* (2001) 25 Cal.4th 98, 103.) Applying such a standard, we conclude defendant's arguments all lack merit.

### **Defendant Inflicted Great Bodily Injury During the Commission of a Felony**

In his first argument, defendant contends that the section 12022.7 enhancements were erroneously imposed because he did not inflict the great bodily injury "in the commission of a felony."<sup>3</sup> This argument is based on Vehicle Code sections 23152 and 23153. The former makes it a misdemeanor to operate a vehicle while under the influence of alcohol or with a blood alcohol content of 0.08 percent or higher. (Veh. Code, § 23152, subds. (a), (b).) Under the latter it is a felony "for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." (Veh. Code, § 23153, subd. (b).) In other words, bodily injury

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<sup>3</sup> Defendant does not dispute the court's finding that he inflicted great bodily injury on both of the Cheungs, only that he did so in the commission of a felony.

elevates the offense from a misdemeanor to a felony. (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 350 (*Wilkoff*) [“Injury to another person is, in fact, the basis upon which the offense of drunk driving is enhanced to a felony.”].) Based on this statutory scheme, defendant submits that he caused the bodily injury during the commission of a misdemeanor, which bodily injury subsequently elevated the offense to a felony. As such, the section 12022.7 enhancements should not have been imposed because the provision requires the infliction of bodily injury during the commission of a felony. As defendant concedes, this same argument was made in *People v. Guzman* (2000) 77 Cal.App.4th 761 (*Guzman*). The Fifth District rejected the argument. So do we.

Guzman was driving with a blood alcohol content of 0.10 percent when he made an unsafe turn in front of another vehicle, causing a collision that injured his passenger. (*Guzman, supra*, 77 Cal.App.4th at pp. 762-763.) Following a court trial, defendant Guzman, like defendant here, was found guilty of two felony offenses: driving under the influence of alcohol and causing bodily injury to another person (Veh. Code, § 23153, subd. (a)), and driving with a 0.08 percent blood-alcohol level or more and causing bodily injury. (*Id.*, subd. (b).) The court further found that defendant, again like defendant here, had personally inflicted great bodily injury on the accident victim within the meaning of section 12022.7. (*Guzman, supra*, 77 Cal.App.4th at pp. 762-763.)

On appeal, defendant argued that section 12022.7 was inapplicable because he inflicted the injuries during the commission of a misdemeanor, not a felony. As he reasoned, felony driving under the influence required that the driver cause bodily injury to another. Until he caused such injuries, he was only committing a misdemeanor. The injuries then elevated the offense to a felony. (*Guzman, supra*, 77 Cal.App.4th at p. 765.) The court rejected this argument, concluding that the fact that the victim suffered bodily injury rendered the offense a felony. (*Ibid.*) We agree with *Guzman* that due to the infliction of bodily injuries the offense was a felony at the time defendant committed it. In other words, the offense of felony drunk driving is completed upon the infliction of the bodily injuries.

In attempting to persuade us that *Guzman* was wrongly decided, defendant directs our attention to *Wilkoff, supra*, 38 Cal.3d 345. In language defendant relies on here, the *Wilkoff* court observed: “[T]he act prohibited by [Vehicle Code] section 23153 is defined in terms of an act of driving: the driving of a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle. The actus reus of the offense does not include causing bodily injury. Rather, where bodily injury *proximately results* from the prohibited act, the offense is elevated from a misdemeanor to a felony.” (*Id.* at p. 352.) This, according to defendant, suggests the drunk driving offense was a misdemeanor when he committed it. *Wilkoff*, however, is inapposite.

The issue before the court in *Wilkoff* was “whether one instance of driving under the influence which causes injury to several persons is chargeable as one count of driving under the influence or as several.” (*Wilkoff, supra*, 38 Cal.3d at p. 347.) The court held that the offense is chargeable as only one count. (*Id.* at p. 349.) Nowhere did the court consider whether great bodily injuries inflicted by a drunk driver who violates a driving law are injuries that occurred during “the commission of a felony.” Thus, the court’s characterization of the actus reus of the offense of felony drunk driving was dictum and does not constitute binding precedent. (*People v. Valencia* (2011) 201 Cal.App.4th 922, 929.) And dictum aside, we do not read the *Wilkoff* court’s characterization of the actus reus of a Vehicle Code section 23153, subdivision (b) offense as proving defendant’s claim.

**Section 12022.7, Subdivision (g)’s Exclusion Did Not Apply Because Great Bodily Injury Was Not an Element of the Vehicle Code Section 23153, Subdivision (b) Offense**

In his second argument, defendant argues that section 12022.7’s enhancement did not apply because subdivision (g), which bars the imposition of the three-year enhancement under subdivision (a) where infliction of great bodily injury is an element of the offense, prohibited its application. Again, *Guzman* rejected this argument, as do we.

Defendant’s argument is fundamentally flawed because it erroneously equates Vehicle Code section 23153’s requirement of bodily injury with section 12022.7’s requirement of great bodily injury. As the *Guzman* court explained: “Section 12022.7 defines great bodily injury as ‘a significant or substantial physical injury.’ (§ 12022.7, subd. (e).)<sup>4</sup> . . . However the ‘bodily injury’ component of Vehicle Code section 23153 requires only ‘harm or hurt to the body.’” [Citation.] Thus, the injury was more severe than that required for the felony offense.” (*Guzman, supra*, 77 Cal.App.4th at p. 765.) As felony drunk driving can be committed with merely “harm or hurt to the body,” great bodily injury is not an element, and the court here properly imposed the section 12022.7 enhancements.

**Vehicle Code Section 23558 Is Not a Special Statute That Prevails Over Section 12022.7**

Defendant’s final attack on the two section 12022.7 enhancements contends they were wrongfully imposed because Vehicle Code section 23558,<sup>5</sup> a special statute that provides for a one-year enhancement for causing bodily injury to more than one victim, prevails over section 12022.7, a general statute. Once again defendant acknowledges that this argument had already been considered and rejected, this time by the Fourth Appellate District in *People v. Arndt* (1999) 76 Cal.App.4th 387 (*Arndt*), a case we consider dispositive.

The facts of *Arndt* were similar to this case. Defendant was convicted of felony driving under the influence, with findings that he inflicted great bodily injury on three victims and caused bodily injury to more than one victim. As pertinent here, he received two one-year enhancements for causing bodily injury to more than one victim, and two

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<sup>4</sup> The current version of section 12022.7 sets forth the definition of “great bodily injury” in subdivision (f).

<sup>5</sup> Vehicle Code section 23558 provides, in pertinent part: “A person who proximately caused bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code . . . , shall, upon a felony conviction, . . . receive an enhancement of one year in the state prison for each additional injured victim.”

three-year enhancements for the great bodily injury inflicted on two victims. (*Arndt, supra*, 76 Cal.App.4th at p. 392.)

On appeal, defendant argued that the enhancement for multiple victims (then codified at Vehicle Code section 23182) preempted the application of section 12022.7 because it was a special statute covering the same subject matter. (*Arndt, supra*, 76 Cal.App.4th at pp. 392-394.) The court rejected his contention, explaining:

“The doctrine which declares a special statute controls over a general statute has been applied to enhancements. [Citation.] But ‘[t]he rule does not apply. . . unless “each element of the ‘general’ statute corresponds to an element on the face of the ‘specific’ [sic] statute” or “it appears from the entire context that a violation of the ‘special’ statute will necessarily or commonly result in a violation of the ‘general’ statute.” [Citations.] [Citation.]

“Section 12022.7, subdivision (a) imposes a three-year enhancement on ‘[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission . . . of a felony . . .’ . . . Under section 23182, ‘[a]ny person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code or in violation of Section 191.5 or paragraph (3) of subdivision (c) of Section 192 of the Penal Code, shall upon a felony conviction, receive an enhancement of one year in the state prison for each additional injured victim. . . .’

“The elements of section 12022.7 do not correspond to section 23182. Section 12022.7 applies when a defendant inflicts ‘great bodily injury on any person other than an accomplice.’ (§ 12022.7, subd. (a).) Section 23182 applies where a defendant inflicts ‘bodily injury or death’ on ‘more than one victim,’ and the enhancement is imposed only for ‘each additional injured victim.’ Section 12022.7 defines great bodily injury as ‘a significant or substantial physical injury.’ (§ 12022.7, subd. (e).) Under Vehicle Code section 23153, ‘bodily injury’ requires only proof of ‘“harm or hurt to the body.”’ (*People v. Dakin* (1988) 200 Cal.App.3d 1026, 1035-1036 [two cuts on the forehead, a

severe headache and stiff neck]; see also *People v. Lares* (1968) 261 Cal.App.2d 657, 662 [acute back strain].)

“The conduct triggering the application of Vehicle Code section 23182 will not necessarily result in the application of . . . Penal Code [section] 12022.7. Section 23182 applies to vehicular or watercraft offenses involving driving while under the influence of alcohol or drugs that result in multiple injuries or deaths, including certain forms of manslaughter. (See Pen. Code, § 191.5, 192, subd. (c)(3).) Section 12022.7 applies to great bodily injury inflicted on any person other than an accomplice during a felony or attempted felony, but is expressly inapplicable in manslaughter cases. (§ 12022.7, subds. (a) & (f).)

“Defendant suggests that, since section 23182 was enacted after section 12022.7, it should be construed as an exception to the latter statute. But section 23182’s legislative history belies this argument. The Legislature enacted the statute in response to *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 which held the state may charge a drunk driver who injures several persons in a single car accident with only one count each of felony drunk driving and driving with an excessive blood-alcohol level resulting in injury. [Citation.] Thus, section 23182’s purpose is to increase the potential punishment available in certain cases where an alcohol or drug-impaired individual operating a vehicle or watercraft causes an accident which results in multiple injuries, not to limit the use of another otherwise applicable enhancement.” (*Arndt, supra*, 76 Cal.App.4th at pp. 392-394.)

In *People v. Weaver* (2007) 149 Cal.App.4th 1301 (*Weaver*)—a case defendant does not even acknowledge—the Fourth Appellate District also rejected a similar argument where the underlying offense was gross vehicular manslaughter while intoxicated. In an analysis even more detailed than that in *Arndt*, *Weaver* disagreed that a violation of Vehicle Code section 23558 (the special statute) will commonly result in a violation of section 12022.7, subdivision (a) (the general statute). It explained: “Vehicle Code section 23558 applies to a defendant who ‘proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of [Vehicle Code] Section 23153 of this code or in violation of Section 191.5 of, or paragraph (3) of

subdivision (c) of Section 192 of, the Penal Code.’ Accordingly, its provisions may apply to three separate offenses: (1) driving while intoxicated and proximately causing bodily injury (Veh. Code, § 23153); (2) gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)); and (3) vehicular manslaughter while intoxicated but without gross negligence (§ 192, subd. (c)(3)). Because Vehicle Code section 23558 can apply when the defendant drives while intoxicated and only *proximately* causes bodily injury, we cannot conclude Vehicle Code section 23558 will *commonly* result in a violation of section 12022.7, subdivision (a), which statute requires *personal* infliction of great *bodily* injury. Furthermore, our independent review of the appellate record shows it does not contain any empirical evidence proving that driving while intoxicated and proximately causing bodily injury also commonly results in personal infliction of great bodily injury. Although Weaver argues a section 191.5, subdivision (a) offense commonly results in personal infliction of great bodily injury, that offense is only one of the three offenses listed in Vehicle Code section 23558. [Citation.]

“In any event, we conclude the legislative intent of section 12022.7, subdivision (a) shows its greater three-year enhancement was intended to apply despite the potential availability of lesser enhancements. ‘A plain reading of . . . section 12022.7 indicates the Legislature intended it to be applied broadly.’ [Citation.] ‘[T]he Legislature may provide for increased punishment for an offense that has more serious consequences by, for instance, . . . adding enhancements . . . .’ [Citation.] The purpose of Vehicle Code section 23558 ‘is to increase the potential punishment available in certain cases where an alcohol- or drug-impaired individual operating a vehicle or watercraft causes an accident which results in multiple injuries, not *to limit the use of another otherwise applicable enhancement* [e.g., section 12022.7].’ [Citation.] We cannot conclude the Legislature intended only a one-year enhancement be imposed under Vehicle Code section 23558 when a defendant commits a section 191.5, subdivision (a) offense and personally inflicts great bodily injury (which conduct would otherwise result in imposition of a three-year enhancement under § 12022.7, subd. (a)). [Citation.]” (Weaver, *supra*, 149 Cal.App.4th at pp. 1326-1328.)

In light of the thorough analysis of the issue in both *Arndt* and *Weaver*, we feel no need to say more, except to observe that the recent case of *People v. Murphy* (2011) 52 Cal.4th 81, which defendant insists compels a different result, adds nothing new to the analysis.

Lastly, although not mentioned by defendant or the People, we note that the abstract of judgment contains a clerical error in that it reflects a two-year prison term on count II, rather than the one year, four month term imposed by the court. We thus order the abstract of judgment amended to correctly reflect the imposition of a one-year, four-month term on count II.

**DISPOSITION**

The abstract of judgment shall be amended to reflect a one-year, four-month term on count II. In all other regards, the judgment of conviction is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.