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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.

ERIC ANTHONY BANFORD,

Defendant and Appellant.

A140446

(San Mateo County
Super. Ct. No. SC76389)

Defendant and appellant Eric Anthony Banford (appellant) appeals following a jury verdict convicting him of second degree murder and three other offenses arising from a traffic collision in which he killed a motorcyclist while attempting to evade the police. He contends the trial court erred in instructing the jury on second degree murder, in responding to a jury question, and in admitting evidence of a report of a possible burglary that preceded the police chase. Respondent contends the court erred in staying punishment on two of the offenses under Penal Code section 654.¹ We affirm.

PROCEDURAL BACKGROUND

In June 2013, the District Attorney for the County of San Mateo filed an amended information charging appellant with the second degree murder of Danny Dixon (§ 187, subd. (a); count one);² vehicular manslaughter (§ 192, subd. (c)(1); count two); evasion of

¹ All undesignated statutory references are to the Penal Code.

² The information did not specify that the murder was in the second degree, but it did not allege any of the circumstances that would make the killing first degree murder (§ 189).

a peace officer resulting in death (Veh. Code, § 2800.3; count three); and hit and run from an accident resulting in death (Veh. Code, § 20001, subd. (b)(2); count four). The information further alleged that counts one and two were serious and violent felonies (§§ 1192.7, subd. (c)(1), 667.5, subd. (c)(1)), and that appellant had sustained various prior felony convictions, two of which were strikes and serious felonies (§§ 1170.12, subd. (c)(2), 667, subd. (a)), and had served six prior prison terms (§ 667.5, subd. (b)).

In July 2013, a jury found appellant guilty as charged. The trial court found true all of the prior conviction and prison term allegations. The court sentenced appellant to a term of 45 years to life on count one, imposed two terms of five years each for two prior serious felonies, and imposed four terms of one year each for four prior prison terms. The court imposed and stayed, pursuant to section 654, additional terms on counts two, three, and four. The total unstayed term was 59 years to life.

FACTUAL BACKGROUND

The evidence at trial showed that, in attempting to evade the police, appellant drove a car against oncoming traffic on University Avenue and killed a motorcyclist. On appeal we view the record in the light most favorable to the jury's verdict, and our factual summary reflects that standard of review. (*People v. Jackio* (2015) 236 Cal.App.4th 445, 448.)

The Prosecution's Evidence

Eric Hoyt testified that, on the night of September 27, 2011, he and Danny Bobba spent time buying and using cocaine. At two points in the evening, Bobba drove them in a Land Rover to an address in East Palo Alto to buy cocaine. On the first occasion, they met appellant at the house and gave him a ride to another location. On the second occasion, they again met appellant at the house, and appellant again joined Hoyt and Bobba in the Land Rover. Appellant drove the car, and they all smoked crack cocaine. After driving around for hours, they parked at a location in East Palo Alto and appellant exited the vehicle to talk to two women on a corner. Thereafter, a police car pulled up

and shined a spotlight on them; appellant entered the car and drove off.³ Appellant smoked crack cocaine while driving away from the police. Eventually, appellant turned into oncoming traffic on University Avenue. Appellant swerved to avoid oncoming cars while Hoyt and Bobba yelled at appellant to stop the car. The Land Rover collided with a motorcycle that was coming towards them on University Avenue, crossing Bay Street.

Former East Palo Alto police officer Patrick Dolan testified that, at about 5:15 a.m. on September 28, 2011, he and other officers were dispatched to an address on Runnymede Street to investigate a possible burglary. A resident reported she thought someone had tried to break into her house. She said she heard someone try to enter her gate and climb her fence, and she said she saw two people get into a dark van and leave the area. The officers found no suspects around the house, so they decided to canvass the area in their patrol cars. Officer Dolan saw appellant standing with two women on a street corner about 250 to 300 yards away from the Runnymede house. The officer recognized appellant from previous contacts and knew appellant was on probation or parole. Another officer shined a spotlight on appellant. That officer testified appellant exhibited signs of usage of cocaine base, including sweatiness and licking his lips.

Appellant crossed the street and got into a Land Rover and took off without his headlights on. Officer Dolan and two other officers followed in three separate cars; two had their emergency lights activated. Appellant ran two stop signs and ran a red light in turning left on University Avenue. University Avenue at that location has two lanes in each direction with a median in the center; appellant turned into the wrong lane and drove eastbound against traffic moving westbound. Appellant accelerated to 70 miles per hour and Officer Dolan stopped his pursuit because of the danger. The officer saw appellant's car hit a truck and a motorcycle, and then continue down Bay Street.

The two other pursuing officers gave materially similar accounts of the chase and collision. Officer Clay Warford testified that, after the collision with the motorcycle,

³ Hoyt testified at trial he did not see the driver's face, but he previously told a police detective the driver was appellant. Appellant concedes he was the driver.

appellant exited the car and started running. Warford chased appellant, who eventually stopped and surrendered.

An autopsy surgeon testified that the motorcyclist, Danny Dixon, sustained multiple blunt injuries that caused his death.

A search of the Land Rover uncovered .01 gram net of cocaine base, appellant appeared intoxicated to the officer who transported him to the police station, appellant admitted to a nurse that he had been using cocaine the day of the accident, and appellant admitted in a phone call he made from jail that he was “on a little bit of everything” at the time of the collision. However, samples of appellant’s blood and urine were not drawn and field sobriety tests were not conducted.

The prosecution presented evidence regarding two prior convictions sustained by appellant that involved driving under the influence of alcohol. When appellant entered his plea in the second case, he signed a statement that he understood the danger of driving under the influence of alcohol or drugs and if a person is killed as a result of his driving under the influence he could be charged with murder.

The Defense Case

The resident who called 911 the night of September 28, 2011 testified regarding what she and her parents heard and saw before she called the police.

An expert on the effects of cocaine testified that cocaine in “moderate doses” can improve “psychomotor performance” and “cognitive skills.” He opined in response to a hypothetical that in circumstances such as those in the present case the effect of the cocaine consumed would be mild but the effect of adrenaline from the chase could be substantial.

DISCUSSION

I. *The Trial Court Did Not Err in Rejecting Appellant’s Proposed Instructions*

“Murder is the unlawful killing of a human being with malice aforethought and requires express or implied malice. (§§ 187, subd. (a); 188.) Implied malice may be proven by circumstantial evidence and has both a physical and mental component.

[Citation.] The physical component is satisfied by the performance of an act, the natural

consequences of which are dangerous to life. [Citation.] The mental component is established where the defendant knows that his conduct endangers the life of another and acts with conscious disregard for life.” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1425 (*McNally*); see *People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Appellant contends the trial court erred in rejecting four jury instructions proposed by him that purported to expand on the explanation of implied malice in the standard instruction. “[A] trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].” (*People v. Moon* (2005) 37 Cal.4th 1, 30 (*Moon*)). Under that standard, the trial court did not err.

A. *CALCRIM No. 520*

The trial court instructed the jury regarding malice aforethought using the language of CALCRIM No. 520, as follows:

“The defendant is charged in Count 1 with murder in violation of Penal Code section 187.

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant committed an act that caused the death of another person;

“AND

“2. When the defendant acted, he had a state of mind called malice aforethought.

“There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

“The defendant acted with express malice if he unlawfully intended to kill. Express malice does not apply in this case.

“The defendant acted with implied malice if:

“1. He intentionally committed an act;

“2. The natural and probable consequences of the act were dangerous to human life;

“3. At the time he acted, he knew his act was dangerous to human life;

“AND

“4. He deliberately acted with conscious disregard for human life.

“Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

“An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. The death of another person must be foreseeable in order to be the natural and probable consequence of the Defendant’s act.

“If you find the defendant guilty of murder, it is murder of the second degree.”

B. *Appellant’s Proposed Instructions*

As noted above, one of the requirements for a finding of implied malice described in CALCRIM 520 is that “[t]he natural and probable consequences of the [defendant’s] act were dangerous to human life.” Appellant requested below, in proposed instruction one, that the jury be further instructed on that point as follows: “or, phrased in a different way, there was a probability that the act would result in death and [it was done] with a base antisocial motive and a wanton disregard for human life.” The trial court did not err in rejecting that instruction. In *People v. Nieto Benitez* (1992) 4 Cal.4th 91 (*Nieto Benitez*), the California Supreme Court explained that the wanton disregard formulation is simply an alternative to the natural and probable consequences formulation, and the two are “substantively similar” and “actually articulate[] one and the same standard.” (*Id.* at p. 104.) Accordingly, appellant’s request that that wanton disregard language be given was duplicative, because the natural and probable consequences language sufficiently covered the point. Moreover, the Supreme Court concluded in *People v. Dellinger* (1989) 49 Cal.3d 1212 (*Dellinger*), that the “better practice . . . is to charge juries solely in the straightforward language of the ‘conscious disregard for human life’

definition of implied malice.” (*Id.* at p. 1221; accord *Nieto Benitez*, at p. 104.) This is because the term “ ‘wanton’ ” is an “obscure phraseology” and “there remains the possibility that many laypersons will be unfamiliar with its meaning.” (*Dellinger*, at p. 1221; accord *Nieto Benitez*, at p. 104.) Thus, appellant’s request that the jury be instructed with the additional language was not only duplicative, but it also created the potential for confusing the jury. The trial court did not err in denying the request.

Appellant further requested, in proposed instruction two, that the jury be instructed, “The distinction between ‘conscious disregard for life’ and ‘conscious indifference to the consequences’ is subtle but nevertheless logical. Phrased in everyday language, the state of mind of a person who acts with conscious disregard for life is, ‘I know my conduct is dangerous to others, but I don’t care if someone is hurt or killed.’ The state of mind of the person who acts with conscious indifference[] to the consequences is simply, ‘I don’t care what happens.’ It makes sense to hold the former more culpable than the latter, since only the former is actually aware of the risk created.” The proposed instruction is based on essentially identical language in *People v. Olivas* (1985) 172 Cal.App.3d 984, 987–988. Although the proposed instruction appears to be an accurate statement of the law, the concepts therein are adequately covered by CALCRIM No. 520, particularly the requirement of a showing that appellant “deliberately acted with conscious disregard for human life.” (See *Moon, supra*, 37 Cal.4th at p. 31 [trial court did not err in refusing proposed instruction, even though instruction was a correct statement of law based on a Supreme Court decision, where concept was covered by instruction given].) Appellant fails to explain how CALCRIM No. 520, which specifically references disregard for *life*, permitted the jury to convict him based on mere indifference to the consequences. The trial court did not err in declining the proposed instruction.

Appellant requested in proposed instruction four that the jury be instructed, “In addition, implied malice requires a base antisocial motive and is shown when the defendant does an act intentionally and deliberately that involves a high degree of probability that it will result in death.” The “base antisocial motive” and “a high degree

of probability” phrases are part of the alternate formulation that the California Supreme Court concluded was “substantively similar” to the natural and probable consequences formulation contained in CALCRIM No. 520. (*Nieto Benitez, supra*, 4 Cal.4th at pp. 103–104; *Watson, supra*, 30 Cal.3d at p. 300.) Furthermore, the phrase “intentionally and deliberately” in the proposed instruction is covered by CALCRIM No. 520, which also requires findings that defendant acted “intentionally” and “deliberately.”

Accordingly, the trial court properly rejected proposed instruction four as duplicative.

Finally, appellant requested, in proposed instruction six, that the jury be instructed, “Malice involves an element of viciousness – an extreme indifference to human life. It is when a defendant, free from any mental impairment and not acting in the heat of passion or an adequate provocation, makes a voluntary choice to commit a person-endangering act.” That language is from a comment to CALJIC No. 8.11, which cites *People v. Summers* (1983) 147 Cal.App.3d 180, 184. However, the instruction was duplicative and potentially confusing. The concepts of “viciousness” and “extreme indifference to human life” are covered by CALCRIM No. 520, which required the jury to find appellant intentionally committed an act that was naturally and probably dangerous with conscious disregard for human life. Moreover, *Summers* preceded a 1995 legislative amendment precluding use of evidence of voluntary intoxication to negate implied malice. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114; see also *McNally, supra*, 236 Cal.App.4th at pp. 1431–1432 [“Voluntary intoxication does not negate implied malice.”].) It is likely the proposed instruction would have confused the jurors as to whether the evidence of defendant’s cocaine use precluded a finding of implied malice. Appellant does not argue there was evidence of any other mental impairment to support the instruction. (See § 28.)

Accordingly, as demonstrated above, the trial court properly rejected all of appellant’s proposed instructions because they were duplicative, created the potential for confusing the jury, or both. (*Moon, supra*, 37 Cal.4th at p. 30.)⁴

⁴ Appellant also argues CALCRIM No. 520 itself is “internally inconsistent” because it “recites that one of the four factors to establish the state of mind of a defendant for murder is that ‘he deliberately acted with conscious disregard for human life.’ In the very

II. *The Trial Court Did Not Abuse Its Discretion in Responding to The Jury’s Question*

In the afternoon of the second day of deliberations, the jury foreperson sent a note to the trial court asking, “Is their [sic] a legal definition for ‘deliberately acted with conscious disregard’? If so, can we have it? . . . or any of the pieces: ‘deliberately’, ‘conscious disregard’.” After an in chambers discussion, the court responded by writing the jury: “No. Please review jury instructions 200, 252 and 520.”

“ ‘When a jury asks a question after retiring for deliberation, “[s]ection 1138^{5]} imposes upon the court a duty to provide the jury with information the jury desires on points of law.” ’ [Citation.] But ‘[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information.’ ” (*People v. Eid* (2010) 187 Cal.App.4th 859, 881–882.) “Indeed, comments diverging from the standard [instructions] are often risky.” (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The trial court’s obligation is to “consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely

next sentence, the instruction recites that malice aforethought is a mental state that ‘does not require deliberation or the passage of any particular period of time.’ (Emphasis supplied.)” We disagree that juxtaposition created a probability the jury believed it could convict defendant without finding he acted deliberately; one can act “deliberately” even without engaging in “deliberation.” (See *In re Thomas C.* (1986) 183 Cal.App.3d 786, 796 [“The use of the term ‘deliberate intention’ for malice aforethought, as required in second degree murder, is not synonymous with the term ‘deliberate,’ as used in defining first degree murder.”].) We presume the jury would know the difference between a deliberate act and deliberation. (*People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1246 [“we presume jurors are intelligent and capable of understanding instructions”].)

⁵ Section 1138 provides: “After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.”

reiterate the instructions already given.” (*Ibid.*, emphasis omitted.) “We review for an abuse of discretion any [alleged] error under section 1138.” (*Eid*, at p. 882.)

In the present case, the trial court did not abuse its discretion in directing the jury to review CALCRIM Nos. 200, 252, and 520.⁶ Among other things, CALCRIM No. 200 states, “Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.” As relevant, CALCRIM No. 252 informed the jury that the charge of second degree murder requires proof of a “specific intent and mental state.” And CALCRIM No. 520 describes in detail the “state of mind required for murder,” including the concept of implied malice and the requirement of proof that defendant “deliberately acted with conscious disregard for human life.” The instruction also clarified that, although the jury needed to find that appellant acted “deliberately,” the mental state of malice aforethought “does not require deliberation or the passage of any particular period of time.” As explained previously (part I, *ante*), the definition of implied malice in CALCRIM No. 520 is full and complete, and the supplemental instructions proposed by appellant below (prior to the jury’s question) were duplicative and potentially confusing.⁷

There are other legally accurate responses the trial court could have given in the present case that arguably would have provided marginally more information to the jury. For example, the trial court could have informed the jury that “Conscious disregard in the context of implied malice essentially means indifference to a subjectively understood danger to life.” (*People v. Brown* (2001) 91 Cal.App.4th 256, 270.) However, that does

⁶ Respondent argues appellant failed to preserve this issue for appeal because there is no record of appellant objecting to the trial court’s response. (See *People v. Rogers* (2006) 39 Cal.4th 826, 877 [“counsel’s acquiescence in the trial court’s response forfeits the claim of error on appeal”].) Because the court did not abuse its discretion, we need not and do not address respondent’s forfeiture argument.

⁷ On appeal, appellant suggests the jury should have been instructed with the definition of “deliberate” used in the context of the first degree murder requirement of “deliberation.” (See CALCRIM No. 521; *People v. Pearson* (2013) 56 Cal.4th 393, 440.) Because proof of deliberation was *not* required to show implied malice, it is likely appellant’s suggested definition would have confused the jury.

not mean the trial court here abused its discretion. The phrase “deliberately acted with conscious disregard” is “straightforward” (*Dellinger, supra*, 49 Cal.3d at p. 1221; *Nieto Benitez, supra*, 4 Cal.4th at p. 104), and appellant does not suggest its legal meaning in the context of CALCRIM No. 520 differs from its everyday meaning. Although determination whether a given set of facts shows a defendant “deliberately acted with conscious disregard” may be difficult, that does not mean the phrase itself requires any additional explanation. Appellant cites no portion of the record demonstrating the jury continued to express any confusion after the trial court directed it to review CALCRIM Nos. 200, 252, and 520. The trial court did not abuse its discretion.

III. *The Trial Court Did Not Abuse Its Discretion In Admitting Evidence of a Possible Burglary*

The trial court granted, over appellant’s objection, respondent’s pre-trial motion that it be permitted to introduce testimony at trial regarding a report of a possible attempted burglary that led to the police attempting to contact appellant and his subsequent flight. At trial, police officers Dolan and Warford testified that, before encountering appellant in the early morning on September 28, 2011, they and other officers responded to a dispatch of a possible burglary on Runnymede Street in East Palo Alto. The resident said she heard someone trying to enter a gate and climb a fence, and two subjects of an undetermined race got into a dark van and left. The officers found no evidence of a break-in. In canvassing the neighborhood, Officer Dolan saw appellant standing on a corner with two women. Dolan testified he recognized appellant from previous contacts, and he knew appellant was on parole or probation. As the officers approached, appellant fled in the Land Rover. Officer Dolan testified appellant’s flight led him to believe appellant was involved in what happened on Runnymede Street. At the request of appellant, the trial court admonished the jury that the testimony of officers Dolan and Warford was being offered for the purpose of explaining the officers’ actions and not for the truth of the information received from the resident.

Appellant contends the trial court abused its discretion (*People v. Chism* (2014) 58 Cal.4th 1266, 1291) in admitting the evidence regarding the report of a possible burglary.

In her pre-trial motion, the prosecutor explained that she sought to introduce testimony about the incident to establish the officers were “lawful in their efforts to speak with the Defendant to find out if he was involved.” At trial, the court admitted the evidence to explain the actions of the officers. We agree the evidence had some relevance in that regard; without some evidence on that issue, there was a risk the jury would become distracted by speculation as to what led the officers to attempt to contact appellant. Appellant contends the testimony was prejudicial evidence of his uncharged conduct that did not meet the standards for admissibility in Evidence Code section 1101.⁸ He relies on the California Supreme Court’s observation that “evidence of uncharged misconduct ‘ ‘is so prejudicial that its admission requires extremely careful analysis’ ’ and to be admissible, such evidence ‘ ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.’ ’ ” (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)⁹

We disagree the testimony falls within the scope of Evidence Code section 1101, because it was not offered to show appellant’s “propensity to act in a certain way.” (*People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 406.) Furthermore, we disagree the challenged testimony was highly prejudicial, because it did not actually constitute evidence of other misconduct by appellant. The testimony established that officers responded to a report of a possible burglary, although they found no indication of

⁸ Evidence Code section 1101 reads, in relevant part, as follows: “(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act.” (Evid. Code, § 1101.)

⁹ 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.”

such. And, as appellant recognizes, the challenged testimony did not connect appellant to the incident in any significant way. Even if the testimony did create some association between appellant and the possible attempted burglary, it was not inflammatory—it was unclear from the testimony what took place, and the incident paled in comparison to the conduct for which appellant was charged. Thus, the prejudicial effect of the testimony was minimal. The trial court did not abuse its discretion in failing to exclude the testimony under Evidence Code section 352. (*People v. Nunez* (2014) 57 Cal.4th 1, 31.)

IV. *Substantial Evidence Supports The Trial Court's Ruling Under Section 654*

The trial court stayed the terms on counts two, three, and four pursuant to section 654. On appeal, respondent contends the trial court erred with respect to counts three and four. We disagree.

Section 654, subdivision (a) provides that “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The statute “prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant’s intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence.” (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525 (*Perry*).

Appellant was convicted of murder (count one), vehicular manslaughter (count two), evasion of a peace officer resulting in death (count three), and hit and run from an accident resulting in death (count four). Respondent agreed below that punishment on counts two through four should be stayed under section 654, but respondent now argues

the punishment on counts three and four should not have been stayed.¹⁰ As to count three, respondent points out that appellant's conduct also threatened the passengers in his car and other drivers on the road. Under the multiple victim exception to section 654, “ “even though a defendant entertains but a single principal objective during an indivisible course of conduct, he [or she] may be convicted and punished for each crime of violence committed against a different victim.” ’ ” (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.) For purposes of the exception, a crime of violence is “an act of violence against the person, that is, . . . an act of violence committed ‘with the intent to harm’ or ‘by means likely to cause harm’ to a person.” (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1089, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 343–344.) The charge under count three arguably qualifies as a crime of violence because the information alleged appellant killed Danny Dixon in the course of attempting to evade the police. (Veh. Code, § 2800.3; see *Hall*, at p. 1089 [court should consider any enhancement allegations in determining whether an offense is a crime of violence]; cf. *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163 [“felony evading, as defined by the Legislature, is not a crime of violence”].) However, Dixon was the *same alleged victim* as in count one, so the multiple victim exception does not apply.

Respondent also contends the trial court erred in staying punishment on the count four hit and run conviction (Veh. Code, § 20001, subd. (b)(2)), because “Appellant could have remained at the scene, but instead chose to flee. This evinced a separate intent to avoid the obligations the law imposes on him after causing the injury to the victim.” However, substantial evidence supports the trial court's finding that his failure to identify himself was pursuant to appellant's single “intent and objective” of evading the police (*Perry, supra*, 154 Cal.App.4th at p. 1525), which continued after the collision with Dixon's motorcycle.

¹⁰ Respondent may raise the claim for the first time on appeal: “ ‘It is well settled . . . that the court acts in “excess of its jurisdiction” and imposes an “unauthorized” sentence when it erroneously stays or fails to stay execution of a sentence under section 654’ and therefore a claim of error under section 654 is nonwaivable.” (*People v. Le* (2006) 136 Cal.App.4th 925, 931.)

The trial court did not err in its determinations under section 654.

DISPOSITION

The trial court's judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.