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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HENOCK ADMASSU,

Defendant and Appellant.

A141084

(San Mateo County  
Super. Ct. No. SC078238A)

Defendant Henock Admassu challenges one count of his conviction for driving under the influence of alcohol, causing injury; driving with a blood alcohol content of 0.08 percent or more, causing injury; and misdemeanor driving with a suspended or revoked driving license. He contends that the conviction for driving with a blood alcohol content in excess of 0.08 percent must be reversed because expert testimony supporting that count was the answer to a hypothetical question premised on a fact for which there was no evidence. We agree that the expert should not have been permitted to answer a hypothetical question based on the unsupported assumed fact, but conclude that the error was not prejudicial because the expert’s critical opinion—that defendant’s blood alcohol level was 0.19 percent at the time of the accident—was not based on that assumption. We shall therefore affirm the judgment.

**Background**

On the evening of December 10, 2012, defendant’s vehicle plunged off of Skyline Drive near the intersection with John Daly Boulevard in San Mateo County, into a wooded area below the highway. The passenger in the vehicle, Ajamu Collins, was

seriously injured. Defendant extricated himself from the wreckage and at 10:58 p.m. called 911 asking for assistance, but could not describe where he was. He climbed up to Skyline Boulevard and at about 1:00 a.m. flagged down the driver of another car who made a second call to 911 reporting the accident. Initially officers looking for the wreck were unable to locate it. Defendant left the scene, went home, and returned with his sister looking for the vehicle and the injured passenger. The vehicle with Collins still inside was ultimately located shortly before 4:00 a.m.

Because defendant does not challenge his conviction for driving under the influence of alcohol, it is unnecessary to recount the overwhelming evidence that supports conviction on that count.<sup>1</sup> Suffice it to state that his extreme lack of sobriety was evidenced by several witnesses who observed his appearance, behavior and smell of alcohol on his breath, by his lack of coherence when speaking with the police dispatcher and others, by the results of field sobriety tests, as well as by the nature of the accident.

At 6:07 a.m. a preliminary alcohol screening (PAS) recorded defendant's blood alcohol level at 0.051 percent. A second PAS taken at 6:10 a.m. recorded a blood alcohol level of 0.049 percent. A blood draw taken at 7:02 a.m. was later analyzed and reflected a blood alcohol content of 0.03 percent.

Defendant was interviewed by Officer Cathy Bowling at a California Highway Patrol office beginning at about 11:25 a.m. on December 11. Defendant stated that at about 6:00 p.m. the night of the accident he and Collins went to Dolores Park in San Francisco and each drank a can of Four Loko malt liquor. Somewhere between 8:00 p.m. and 9:30 p.m. they left that park, drove to another park near the Cliff House, and defendant drank a quarter to a half of a second can of Four Loko. The cans were never located but at trial defendant identified a 23.5-ounce can of Four Loko as the size of the cans from which he drank. Officer Bowling determined from the Internet that Four Loko

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<sup>1</sup> Before paramedics arrived, defendant moved Collins into the driver's seat and initially claimed that Collins had been driving. Defendant subsequently admitted that he had been the driver, which was confirmed by other evidence, including bruising on his body consistent with a left-shoulder seatbelt.

is sold with 6 percent, 8 percent or 12 percent alcohol content and she testified that defendant did not know the concentration of the alcohol in the cans from which he drank. The can shown to defendant contained 12 percent alcohol, but when the prosecutor offered it in evidence the court sustained defendant's objection with the comment, "Well, I'm dangerously concerned it's a 12 ounce. No, it could have been 6, 8, 12. So we can exclude that."

The only evidence that defendant's blood alcohol exceeded 0.08 percent at the time of the accident was the expert testimony of criminalist Scott Rienhardt. Rienhardt provided extensive testimony concerning the effects of alcohol on the human body and on the ability to drive safely, the rate at which the body eliminates alcohol, and the concept of "drink equivalents." Rienhardt also explained the process of "back extrapolation" by which one derives a person's blood alcohol concentration at a prior point in time from the level of alcohol concentration at the time of measurement, the time at which the person stopped drinking, and the rate at which the body eliminates alcohol from its system. Based on the assumptions that the blood alcohol level of a male matching defendant's height and weight was 0.03 at 7:02 in the morning, and that he had taken his last drink at around 10:00 p.m. the night before, Rienhardt testified that his blood alcohol level at 11:00 p.m., the approximate time of the accident, would have been 0.19 percent. Asked to assume, over objection, that a drink contains 12 percent alcohol, Rienhardt testified that in 24 ounces of such a drink there are "4.8 drink equivalents, nearly five drinks," and that if a person were drinking between 7:30 p.m. and 10:30 p.m., in order to wind up with a blood alcohol level of 0.19 percent at 11:00 p.m., he would have consumed 7.8 drink equivalents—"just over one and a half Four Locos."

Defendant was charged by an amended information with driving under the influence of alcohol, causing bodily injury (Veh. Code,<sup>2</sup> § 23153, subd. (a) (count 1)); driving with a blood alcohol level of 0.08 percent or more, causing bodily injury (§ 23153, subd. (b) (count 2)); and misdemeanor driving with a suspended or revoked

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<sup>2</sup> All statutory references are to the Vehicle Code unless otherwise noted.

license (§ 14601.5 (count 3)). In connection with count 2 it was also alleged that defendant inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)), that the offense was a serious felony (Pen. Code, § 1192.7, subd. (c)(8)) and a violent felony (Pen. Code, § 667.5, subd. (c)(8)), and that within 10 years of the offense defendant had been convicted of violating section 23152, subdivision (b) (§ 23540). Defendant entered a plea of no contest to count 3 and the jury found defendant guilty on counts 1 and 2 and found the enhancement allegations to be true. The court denied probation and sentenced defendant to concurrent prison terms of two years under counts 1 and 2, plus a consecutive term of three years for the infliction of injury enhancement, plus a concurrent 180-day sentence under count 3, for a total term of five years.

Defendant filed a timely notice of appeal and, on appeal, challenges only his conviction under count 2.

### **Discussion**

Defendant's principal contention is that the court erred in permitting Rienhardt, the expert criminalist, to answer a hypothetical question based on the assumed fact that the alcoholic beverage defendant drank contained 12 percent alcohol. There was no evidence of this fact. The only evidence concerning the alcoholic content of Four Loko was that it is sold with either 6 percent, 8 percent or 12 percent alcohol. The court properly rejected the offer into evidence of the can shown to defendant on the witness stand, which he confirmed was the size of the can from which he drank, because that can contained 12 percent alcohol and it was not shown whether the can from which he drank contained 6, 8 or 12 percent. However, after an unreported bench conference, the court permitted Rienhardt to answer a hypothetical question based on the 12 percent assumption.

This was error. Although the trial court has broad discretion in determining acceptable limits of hypothetical questions, the “ ‘hypothetical question must be rooted in facts shown by the evidence.’ ” (*People v. Boyette* (2002) 29 Cal.4th 381, 449.) “[T]he expert's opinion may not be based ‘on assumptions of fact without evidentiary support [citation], or on speculative factors . . . . [¶] Exclusion of expert opinions that rest on

guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?’ ” (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.) The Attorney General defends the admission of Rienhardt’s response to the hypothetical question based on the 12 percent assumption by arguing that “[t]here was evidence that 12 percent alcohol, the alcohol content of most wine, was one of the potencies marketed by the company. A can of 12 percent Four Loko malt beverage was identified by appellant as similar, in size at least, to what he consumed. There was no evidence that lesser potencies were marketed in California. Thus 12 percent Four Loko was one of the possible substances consumed by appellant.” This justification misses the mark. It is not the burden of the objecting party to introduce evidence negating the assumptions underlying a hypothetical question. The party propounding the hypothetical has the burden of presenting such evidence, and it is not sufficient to present evidence that the assumed fact is one of several possibilities. A party may not use hypothetical questions “to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced.” (*People v. Boyette, supra*, at p. 449.)

Nevertheless, the error was harmless in the present case. The significant opinion to which Rienhardt testified was that defendant’s blood alcohol content was 0.19 percent at the time of the accident. In deriving and explaining that opinion, Rienhardt reasoned backward from the 0.03 percent blood alcohol level defendant was shown to have at 7:02 a.m., utilizing an alcohol elimination rate of 0.02 percent an hour and the assumption that defendant took his last drink at about 10:30 p.m., to derive the 0.19 percent conclusion. This analysis was not based on any assumption of the alcohol content of the malt liquor consumed by defendant. It was based solely on defendant’s proven blood alcohol level at 7:02 a.m., the 0.02 percent rate of elimination, and the time at which the evidence showed defendant to have taken his last drink.

The 12 percent alcohol content of Four Loco that Rienhardt was asked to assume was relevant only to his calculation of the number of “drink equivalents” in a 24 ounce can of Four Loco. That number admittedly was used to bolster Rienhardt’s 0.19 percent

opinion, by pointing out that applying that number of drink equivalents to 0.19 percent produced the approximate amount of drinking before the accident that defendant acknowledged—one and one-quarter to one and one-half cans of Four Loco. While this additional testimony was supportive of Rienhardt’s 0.19 percent opinion, we have no doubt, after reviewing the entirety of Rienhardt’s testimony and the entirety of the record, that his uncontradicted opinion would have been accepted and the jury’s verdict no different in the absence of that supportive calculation. Defendant cast no doubt on the reliability of the back extrapolation method used by Rienhardt to calculate the 0.19 percent. And the substantial evidence of defendant’s extreme inebriation by those who observed him after the accident also tended to confirm that defendant’s blood alcohol level must have exceeded the legal maximum.

Rienhardt’s opinion rested on his use of 0.02 percent per hour as the rate at which a male with defendant’s physical characteristics would eliminate alcohol from his blood level. By extrapolating backwards from the 0.03 percent level at 7:02 a.m. he derived 0.19 percent at the approximate time of the accident. Defendant’s counsel cross-examined Rienhardt extensively about the validity of this factor, bringing out that a person’s elimination rate may range between 0.009 percent per hour and 0.029 percent per hour, and that using a different elimination rate would change the calculated blood alcohol level at the time in question. But Rienhardt explained that “it’s 95 percent probability that everybody falls within the 0.009 to 0.029” and that the rate that he used was commonly used and supported by numerous studies. While the cross-examination may have raised questions about whether the 0.02 percent per hour elimination rate was precisely accurate, 0.19 percent was more than double the percentage necessary for conviction; any plausible adjustment of the elimination rate would still have yielded a blood alcohol level in excess of 0.08 percent.

Defendant’s attempt to analogize the present case to the situation in *People v. Beltran* (2007) 157 Cal.App.4th 235 is unconvincing. In *Beltran*, which like the present case involved a conviction for driving with a blood alcohol content of 0.08 percent or more, the court held that it was improper to instruct the jury with CALJIC No. 1261.1,

permitting the jury to infer that the defendant was driving with a blood alcohol level of 0.08 percent or more from the fact that a blood test taken within three hours of operating the vehicle revealed a blood alcohol content of 0.08 percent or more. In that case a PAS at the time the defendant was stopped revealed a blood alcohol level of only 0.068 percent, there was other evidence that the defendant's blood alcohol level was rising during the period he was no longer driving, and there was no other evidence of a 0.08 percent blood alcohol level when driving. Therefore, the connection between the proved fact that his blood alcohol level had reached 0.08 percent within three hours and the inferred fact that it had been at that level when driving was not established beyond a reasonable doubt and it was constitutional error to permit the jury to draw that inference. (*Id.* at p. 247.) In the present case not only was no such permissive instruction given, but Reinhardt's 0.19 percent calculation expressly took into account the time period during which defendant's blood alcohol level would be expected to rise before declining. The jury was not permitted to draw an inference for which there was no evidentiary support.

**Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Jenkins, J.