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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO VALENCIA,

Defendant and Appellant.

2d Crim. No. B235548
(Super. Ct. No. PA065011)
(Los Angeles County)

Marco Antonio Valencia appeals from the judgment after conviction by a jury of second degree murder of Joseph Novotny (count 1, Pen. Code, § 187, subd. (a))¹; gross vehicular manslaughter of Novotny while intoxicated (count 2, § 191.5, subd. (a)); driving under the influence of alcohol causing injury to Rigoberto Jimenez, Jr. (count 3, Veh. Code, § 23153, subd. (a)); driving under the influence of alcohol causing injury, with a blood alcohol level of over .08 percent (count 5, Veh. Code, § 23153, subd. (b)); and leaving the scene of an accident (count 9, Veh. Code, § 20001, subd. (a)).

The jury found true allegations as to count 2 that Valencia fled the scene and suffered two prior convictions for driving under the influence. (Veh. Code, § 20001, subd. (c); Pen. Code, § 191.5, subd. (d).) As to counts 3 and 5 it found that

¹ All statutory references are to the Penal Code unless otherwise stated.

he personally inflicted great bodily injury on Jimenez and suffered two prior convictions. (§ 12022.7, subd. (a), Veh. Code, § 23566, subd. (a).) The trial court sentenced Valencia to 11 years, plus 15 years to life, in state prison.

Valencia contends a jury instruction on unconsciousness violated his right to due process by improperly shifting the burden of proof, and that the trial court abused its discretion when it did not allow Valencia's expert to testify about an interview with Valencia as a basis for his opinion that Valencia was unconscious while driving. We reject these contentions because unconsciousness resulting from voluntary intoxication is not a defense to implied malice murder. We agree that counts 1, 5, and 9 should have been stayed pursuant to section 654. We order the trial court to amend the abstract of judgment, but otherwise affirm.

FACTS

In 2007 and 2009, Valencia suffered two convictions for driving under the influence. As a result, he was advised of the hazards of drunk driving. He acknowledged in writing that driving under the influence is "extremely dangerous to human life" and that "[i]f I continue to drive while under the influence . . . and as a result of my driving someone is killed, I can be charged with murder." In February 2009, he wrote a letter about a visit to a morgue where he saw the bodies of victims of drunk driving.

In July 2009, Valencia had a blood alcohol level of about .23 when he drove into a group of cyclists. He killed one rider and seriously injured another. Eyewitnesses who had been following Valencia for about 30 minutes, described his erratic driving to a 911 operator.

At trial, Valencia's expert testified about the effects of alcohol on the brain. He said that, in his opinion, Valencia was unconscious from the point at which the witnesses first saw him driving until he hit the cyclists. He testified that a person who is clinically unconscious from intoxication can engage in behavior that seems to indicate he is aware of his surroundings when he really is not, and can talk about events that are occurring but be unable to remember the conversation later. The expert

relied on Valencia's blood alcohol level, and the fact that Valencia was having trouble managing his truck. He also relied on witness statements that Valencia's eyes were almost closed, he did not respond to a horn honking when he drifted out of his lane, he stopped in a through lane of traffic with his turn signal on for about two minutes, he hit a curb and a fence, and he did not apply his brakes when he drifted into the cyclists.

The court allowed Valencia's expert to testify that he had interviewed Valencia, but it did not allow testimony about the substance of those conversations. The prosecutor asked the expert whether he knew what was going on in Valencia's mind when he was driving and whether the expert assumed that what Valencia told him was true. In response, Valencia asked the court to reconsider its position and to give a limiting instruction. The court declined, finding that the prosecutor had not asked any questions about the content of the interview.

The court instructed the jury on involuntary manslaughter as a lesser included offense to second degree implied malice murder, using CALCRIM No. 626 (unconsciousness resulting from voluntary intoxication). The court acknowledged "a body of case law that appears to suggest that voluntary intoxication is not admissible as a defense to implied malice murder." Nevertheless, it "reluctantly" gave the instruction because "[t]here is no specific language in any holding that precludes such an instruction where the intoxication results in unconsciousness." Counsel for both sides stated they had no "comment" or "disagree[ment]" about the instruction.

DISCUSSION

Instruction on Involuntary Manslaughter (CALCRIM No. 626)

Valencia contends that the instruction on unconsciousness violated his due process rights because the jurors were likely to have understood it to shift to him the burden of proving he was unconscious. Whether or not the prosecution proved consciousness beyond a reasonable doubt, the result would be the same because unconsciousness is not available as a defense. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 707.)

Where an actual mental state is charged and the defendant raises a reasonable doubt that he was unconscious by involuntary intoxication, the prosecution has the burden of proving beyond a reasonable doubt that the defendant was conscious. (*People v. Babbitt* (1988) 45 Cal.3d 660, 693 [unconsciousness instruction given based on evidence that defendant may have beaten his victims during psychomotor epileptic seizures].) But unconsciousness by voluntary intoxication cannot negate the implied mental state of implied malice. "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 22, subd. (b).)

Valencia was prosecuted for second degree murder on an implied malice theory. A person, with knowledge of the hazards of drunk driving, who drives a vehicle while intoxicated and proximately causes the death of another may be convicted of second degree murder under an implied malice theory. (*People v. Watson* (1981) 30 Cal.3d 290, 300-301) But when malice is implied, voluntary intoxication cannot negate it. (*People v. Carlson, supra*, 200 Cal.App.4th at p. 707.) This rule does not change when intoxication leads to unconsciousness. "No reason exists to carve out an exception where a person drinks so much as to render him or her unconscious." (*Ibid.*) Moreover, crimes committed "in the driving of a vehicle" are expressly excluded from the definition of involuntary manslaughter. (§ 192, subd. (b).)

Curtailment of Defense Expert Testimony

We reject Valencia's contention that the court improperly limited his expert's testimony when it excluded the substance of his interview of Valencia and refused a limiting instruction.

We review a trial court's ruling on the admissibility of expert testimony for abuse of discretion. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) The trial court acted within its discretion when it precluded testimony about Valencia's self-serving hearsay statements to the expert. (*Id.* at p. 1172 [trial court may properly

require hypothetical questions to "avoid putting this potentially self-serving and unreliable hearsay before the jury, without defendant ever having testified and submitted to cross-examination"].) Moreover, the trial court would have been within its discretion to exclude altogether the expert's testimony about unconsciousness. Section 22 precludes evidence of involuntary unconsciousness to negate implied malice. (*People v. Carlson, supra*, 200 Cal.App.4th at p. 706.)

Stay of Sentence on Counts 1, 5, and 9 (§ 654)

The sentence on counts 1, 5, and 9, should have been imposed and stayed, rather than imposed concurrently, because the court found that section 654 applied to these counts. (*People v Cruz* (1995) 38 Cal.App.4th 427, 434 [the imposition of concurrent sentences is precluded by section 654].) Respondent concedes.

The trial court sentenced Valencia to 11 years plus 15 years to life in state prison consisting of concurrent terms of 15 years to life for the murder and gross vehicular manslaughter of Novotny, plus 5 years for leaving the scene (counts 1 and 2); 3 years for driving under the influence causing injury to Jimenez, plus 3 years for great bodily injury (count 3); a concurrent 3 year term for driving under the influence plus 3 years for great bodily injury (count 5); and a concurrent 3 year term for leaving the scene (count 9).

The trial court properly found that section 654 applied to counts 1 and 2 (murder and manslaughter of Novotny); to count 9 and the allegation in count 2 (leaving the scene); and to counts 3 and 5 (both driving under the influence causing injury to Jimenez). It should not have imposed concurrent terms.

Also, the trial court incorrectly computed the total term as 6 years plus 20 years to life because it added the 5-year determinate enhancement to the minimum term of his indeterminate sentence for gross vehicular manslaughter. Valencia's determinate terms should not be added to the minimum terms of his indeterminate life sentence. (§ 669 [the determinate term of imprisonment shall be served first].) The correct sentence is 11 years plus 15 years to life.

DISPOSITION

The sentence on counts 1, 5 and 9 are stayed pursuant to section 654. The total term is 11 years plus 15 years to life. The trial court shall amend the abstract of judgment accordingly and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Daniel B. Feldstern, Judge
Superior Court County of Los Angeles

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

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