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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHARON MAY KIM,

Defendant and Appellant.

B237771

(Los Angeles County
Super. Ct. No. KA093222)

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas Sortino, Judge. Reversed with directions.

Jay Jaffe for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Sharon May Kim appeals from the judgment entered following a jury trial in which she was convicted of driving under the influence, causing injury; and driving with a 0.08 percent blood-alcohol content, causing injury. Defendant contends insufficient evidence supports her convictions, the prosecutor committed misconduct in argument, and her trial attorney was ineffective. We conclude trial counsel was ineffective and reverse.

BACKGROUND

At 12:45 a.m. on December 2, 2010, California Highway Patrol officers and other emergency personnel arrived on the scene of a single-car crash on Pathfinder Road in Rowland Heights. Officer Cody Eisenbarth testified that he observed defendant in the driver's seat of a BMW and defendant's husband, Eddie Lee, trapped in the front passenger seat of the car. The car had sustained major front-end damage, and a wooden fence post had penetrated the windshield and was lodged inside the car's interior. The right front tire was also embedded in the passenger compartment. Defendant had sustained minor injuries, including a head laceration. Lee appeared to be in significant pain and distress. It took more than an hour for fire department personnel to cut open the car and extract Lee from it. Lee sustained a broken leg and broken toes. He was taken to a hospital and underwent surgery.

Eisenbarth spoke to defendant and immediately detected an odor of alcohol emanating from her body. She also had red, watery eyes and was dazed and disoriented. Eisenbarth asked defendant if she had consumed alcoholic beverages that evening, and defendant stated she had had two shots of tequila. In response to standard questions Eisenbarth asked, defendant said she was not sick or injured, she did not know of any mechanical problems with her car, and she had been driving "less than 60 miles an hour." The posted speed limit on Pathfinder Road in the area of the crash was 45 miles per hour. Results of a preliminary alcohol screening device testing defendant's breath indicated blood-alcohol content of .22 percent at 1:08 a.m. and .20 percent four minutes later.

Defendant was taken to a hospital, where her blood was drawn. Laboratory testing on defendant's blood sample established a .217 percent blood-alcohol content.

Eisenbarth testified that neither defendant nor Lee said anything about anyone other than defendant driving the car.

Eisenbarth, who had training and experience in accident investigation, including determining how an accident took place, made observations of the car and the scene—including the road, fence, and a wall—and took measurements. There were no skid marks or braking marks on the road, and he saw nothing else on the road itself to indicate how the crash occurred. There were two areas of damage to a wooden fence and one 20-foot-long area of damage to a concrete wall that was farther off the road behind the fence. There were tire tracks in the dirt and grass off the road leading to the fence and wall. Eisenbarth prepared a "factual diagram" that noted all of the incontrovertible factual evidence regarding the crash. He also prepared a "sketch diagram" depicting his opinion about the car's path leading up to and during the accident. Both were admitted in evidence at trial. Other officers took photographs of the car and the scene, which were also admitted at trial. Eisenbarth testified that in his opinion defendant's car had been traveling eastbound in the number two lane, took an abrupt turn to the right, hit first the fence, then the wall at a 45-degree angle, then veered to the left, struck the fence again at a different point, and came to a rest. He opined that the movement of the car violated section 22107. There was no driveway or intersection that defendant might have been attempting to turn into near point of impact with the wall.

Defendant testified that she and Lee had been drinking with friends at a restaurant. Lee was more inebriated than defendant was. Defendant had consumed at least two margaritas and a gin and tonic. She did not remember drinking shots of tequila or telling Eisenbarth she had done so. She also did not remember any of the other statements to which Eisenbarth testified. Defendant was irritated with Lee because she did not want to drive, and he insisted that she do so. They argued as she was driving. Lee yelled hurtful things in her face as she drove. She slapped his face with the back of her hand. He

pushed her face into the window. She lost control of the car. Lee grabbed the steering wheel, then the car went through the fence. The last thing defendant remembered was a fence post came through the windshield and the air bags deployed.

Defendant testified that she and Lee had been married for two years. Lee had been physically violent toward her on “probably less than 10” prior occasions. She testified, “The reason why he would hit me is because the fact that I was defending myself to argue with him back.” In November of 2008, she called the police after he pushed her during an argument, causing her to fall backwards over a chair. Lee was arrested and prosecuted, even though defendant did not want the case to go forward. She asked the police to drop the charges, saying she caused her own injuries. She testified similarly at Lee’s trial and admitted she was trying to “minimize the damage” because she did not want her husband to go to jail.

The jury convicted defendant of driving under the influence, causing injury; and driving with a 0.08 percent blood-alcohol content, causing injury. (Veh. Code, § 23153, subds. (a)–(b); undesignated statutory references are to the Vehicle Code.) With respect to each count, the jury found that defendant personally inflicted great bodily injury and that her blood-alcohol content was 0.15 percent or higher. The trial court sentenced defendant to three years in prison.

DISCUSSION

1. Sufficiency of evidence

Section 23153, subdivision (a), provides, “It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, 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.” Section 23153, subdivision (b), is virtually identical but requires that the person have “0.08 percent or more, by weight, of alcohol in his or her blood,” in lieu of simply being “under the influence of any alcoholic beverage or drug.” Thus, to sustain a conviction under

either subdivision (a) or (b) of section 23153, the prosecution must prove beyond a reasonable doubt that while the defendant drove, he or she also either committed an illegal act or neglected to perform a legal duty, which proximately caused bodily injury to a second person. “This element [of an unlawful act or neglect of a legal duty] is separate from and is not satisfied by evidence that the defendant was under the influence of alcohol while operating the vehicle. [Citation.] The evidence must establish an unlawful act or omission in addition to driving under the influence of alcohol.” (*People v. Oyaas* (1985) 173 Cal.App.3d 663, 667–668.)

With respect to the required illegal act or negligence, the trial court instructed the jury as follows: “The People allege that the defendant committed the illegal act of violating Vehicle Code section 22107, committing an illegal turning movement. [¶] To decide whether the defendant committed an illegal turning movement, please refer to the separate instructions that I will give you on that crime. [¶] The People also allege that the defendant failed to perform the following legal duty while driving the vehicle: the duty to exercise ordinary care at all times and to maintain proper control of the vehicle. [¶] Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.” (Italics added.) The court also instructed the jury on the elements necessary to find a violation of section 22107.

Defendant contends that there was insufficient evidence “that she committed an illegal turn or that she failed to exercise ordinary care and maintain control of her vehicle.” She admits that “there was evidence that [she] veered off the road and struck the wooden fence and concrete wall, but there was nothing showing what occurred *before* [she] veered off the road or what caused her to veer off the road.” She argues, “It is just as likely [she] hit a pot hole or an oil slick and that that was [what] caused her to veer off the road.” In her reply brief defendant suggests she may have veered off the road

because she fell asleep or there may have been “a mechanical defect.” She further argues that because there was no evidence of other motorists on the road at the time of the accident, her conduct in veering off the road did not constitute an unsafe turn in violation of section 22107.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Substantial evidence is ““evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”” (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) We presume the existence of every fact supporting the judgment that the jury could reasonably deduce from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) Where substantial evidence supports the verdict, we must affirm, even though the evidence would also reasonably support acquittal. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

Viewing the evidence in the light most favorable to the judgment, we conclude substantial evidence showed that defendant committed an illegal act, namely a violation of section 22107, or that she failed to perform her legal duty of exercising ordinary care and maintaining control of her car. Eisenbarth testified that there were no skid marks on the road, and he saw nothing else on the road itself to indicate how the crash occurred. He further testified that, in response to his question, defendant stated she knew of no mechanical problems with her car. If defendant had lost control of her car because the car malfunctioned or she fell asleep or hit an oil slick or pothole, as she suggests on appeal, she could have so testified. She mentioned none of these matters in her testimony, and instead attributed her loss of control solely to Lee’s conduct in pushing her, then grabbing the steering wheel. Thus, the alternate explanations suggested on appeal are nothing more than speculation.

Eisenbarth's testimony about his observations of the accident scene established that defendant's car turned or veered off the road at a 45-degree angle, striking first a fence and then a concrete wall, then turned or veered back into the fence. Defendant's car was severely damaged, and Lee sustained injuries from one or more of these impacts. If the jury rejected defendant's testimony explaining how the crash occurred, it could reasonably infer that defendant turned the steering wheel and caused a sharp change of direction of her car off the roadway and into the fence and wall. The jury could reasonably conclude beyond a reasonable doubt that this change of direction violated section 22107, which prohibits a person from "turn[ing] a vehicle from a direct course or mov[ing] right or left upon a roadway until such movement can be made with reasonable safety" and requires a prior turn signal "in the event any other vehicle may be affected by the movement." The presence of the fence and wall clearly made defendant's turn or movement of her car unsafe. There need not be another motorist affected by a defendant's turn or movement to establish a violation of the portion of section 22107 prohibiting an unsafe turn or movement to the left or right. (*People v. Smylie* (1963) 217 Cal.App.2d 118, 121 [evidence supported finding defendant violated section 22107 when he struck pedestrian walking parallel to roadway].) The jury could, alternatively or in addition, reasonably conclude that defendant's sharp change of direction of her car to propel it off the road toward a fence and concrete wall violated her duty to use ordinary care at all times and to maintain proper control of her vehicle. Accordingly, substantial evidence supports the verdict.

Although during trial defendant did not challenge the foundation for Eisenbarth's expert opinion, she does so on appeal, arguing that Eisenbarth was not present at the time of the accident and thus did not know what was going on in the car before it veered off the road. An expert need not be a percipient witness to the events to which his or her testimony relates. Eisenbarth established, without objection by defendant, his training and expertise in investigating the cause of traffic accidents. This was sufficient to establish that he had special knowledge, skill, experience, training, or education in the

subject area of his proposed testimony. (Evid. Code, § 720, subd. (a).) Eisenbarth based his opinion on the physical evidence and statements by defendant, and reasonable inferences therefrom. Notably, Eisenbarth did not testify that defendant's explanation for why she lost control of the car was false, and defendant's speculative suggestions on appeal, such as a pothole or oil slick, do not undermine the foundation for Eisenbarth's testimony.

2. Prosecutorial misconduct

Defendant contends that the prosecutor committed misconduct in argument by erroneously telling the jury that defendant's neglect of a legal duty was established by her conduct in driving with a 0.21 percent blood-alcohol content.

Defendant's claim is based upon the following argument by the prosecutor: "Using ordinary care means using reasonable care to prevent reasonable [*sic*] foreseeable harm to someone else, and a person fails to exercise ordinary care if she does something that a reasonable careful person would not do if [*sic*] the same situation or fails to do something a reasonable careful person would do in the same situation. I bolded the emphasis on 'does something that a reasonably careful person would not do.' A reasonably careful person is not going to get behind the wheel of that car after God knows how many margaritas, gin and tonics, or whatever, enough to be a .21. This accident never occurs if she does not do that one thing. She told us the very thing. Had she taken a cab, none of this—at least the accident, none of that occurs. A reasonably careful person does not swerve off the road to the point where they collided three times with walls. A reasonably careful, if you believe the defendant's testimony and we'll get back to that, does not engage in a fight that she says occurred while she's driving while she's a .21. So that was doing something a reasonable careful person would not do or you can fail to do something that a same reasonably careful person would do. [¶] Reason [*sic*] careful person would be able to maintain control of their vehicle and not swerve it off the road. A reason [*sic*] careful person, and what we mean by that is a sober person because a reasonably careful person in this scenario is someone who does not

have two and a half times the legal limit in them. They would have a normal reaction time and it's very important—remember Erin Doyle's testimony, the criminalist who testified. She told us how driving is a divided attention task. You're doing tons of little activities and tasks and mental and physical all at the same time when you are driving. . . . There are tons of things that come up that make it so important that you act with that care of a reasonably careful person. She couldn't do that because she was a .21."

Defense counsel did not object to this argument, but defendant argues that the trial court had a sua sponte duty to prevent the prosecutor from misstating the law. To preserve a claim of prosecutorial misconduct for appeal, the defendant must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm or objection would have been futile. (*People v. Thomas* (2012) 54 Cal.4th 908, 937.) The trial court has no sua sponte duty to control or remedy purported misconduct. (*People v. Fuiava* (2012) 53 Cal.4th 622, 681.) Nothing in the record indicates that an objection would have been futile or that an admonition would not have cured the harm inherent in the prosecutor's erroneous and misleading argument. Counsel's failure to object to the prosecutor's argument precludes defendant from asserting misconduct on appeal.

3. Ineffective assistance of trial counsel

Defendant contends that her trial attorney rendered ineffective assistance by (1) failing to object to the prosecutor's misstatement of the law addressed in the prior section of this opinion or to counter that misstatement in his own argument, and (2) failing to request a pinpoint instruction regarding the victim's intentional conduct as a superseding cause.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, the defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*) Defendant must

overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid.*) Counsel is given wide latitude and discretion in the area of tactics and strategy, but the exercise of that discretion must be founded upon reasonable investigation and preparation, and reasonable and informed in light of the facts and options reasonably apparent to counsel at the time of trial. (*Id.* at pp. 561, 564–565.) “Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

a. Failure to object to or counter prosecutor’s misstatement of law

The prosecutor’s argument regarding defendant’s neglect of a legal duty, even when read in the context of the entire argument, clearly and repeatedly told the jury that defendant’s act of driving with a 0.21 blood-alcohol content was alone sufficient to show that she failed to perform a legal duty. The prosecutor stated, “A reasonable careful person is not going to get behind the wheel of that car after God knows how many margaritas, gin and tonics, or whatever, enough to be a .21.” He further told the jury that a reasonably careful person “would have a normal reaction time” and be able to cope with the “tons of little activities and tasks and mental and physical all at the same time when you are driving,” which defendant “couldn’t do . . . because she was a .21.”

In pertinent part, the jury instructions informed the jury that to establish a violation of section 23153, subdivision (a), the prosecution was required to prove “2. When she drove a vehicle, the defendant was under the influence of an alcoholic beverage. [¶] 3. While driving a vehicle under the influence, the defendant committed an illegal act or neglected to perform a legal duty[.]” Similarly, the instruction upon a violation of section 23153, subdivision (b), informed the jury that the prosecution was required to prove “2. When she drove, the defendant’s blood alcohol level was 0.08

percent or more by weight; [¶] 3. When the defendant was driving with that blood alcohol level, she *also* committed an illegal act or neglected to perform a legal duty[.]” (Italics added.) The language of the instruction regarding section 23153, subdivision (a) did not preclude the jury from adopting the prosecutor’s argument that defendant’s act of driving under the influence of alcohol was sufficient to establish that defendant neglected to perform a legal duty. Notably, neither of the section 23153 instructions specified that the illegal act or breach of a legal duty must be something other than driving under the influence of alcohol or with a blood-alcohol content of 0.08 percent or more. Although the inclusion of “also” in element three of the instruction pertaining to section 23153, subdivision (b) implied that the illegal act or neglect to perform a legal duty must be something other than driving with a blood-alcohol content of 0.08 percent or more, the jury nonetheless could be misled by the prosecutor’s argument, given the omission of the word also from the instruction on section 23153, subdivision (a); the absence of any express statement in either instruction that the illegal act or breach of a legal duty must be something other than driving under the influence of alcohol or with a blood-alcohol content of 0.08 percent or more; the nearly identical language of the section 23153 subdivision (a) and (b) instructions; and the prosecutor’s argument that the elements of the section 23153, subdivision (b) charge were “the same” as the elements of the section 23153, subdivision (a) charge “except in this case it deals with .08 Again, largely equivalent, all the same elements except 1, the second element. All that is saying is count 1 deals with impaired driving regardless of what the alcohol content is, and count 2 deals with that blood alcohol content is [*sic*] and it’s [*sic*] relationship to .08 regardless of how impaired the driver is.” Accordingly, the prosecutor’s erroneous argument created a substantial risk of misleading the jury, notwithstanding the jury instructions.

Although defense counsel may have refrained from objecting to the prosecutor’s argument to avoid seeming obstreperous and potentially annoying the jury, he had an opportunity in his own upcoming argument to inform the jury that the prosecutor had misstated the law and to correct that misstatement. Under the circumstances, there

cannot be a satisfactory explanation for defense counsel to both refrain from objecting and fail to correct the prosecutor's misstatement of the law in his own argument, thereby leaving the jury subject to a misunderstanding of the law on a critical, contested element.

b. Failure to request instruction on superseding cause

As previously noted, a violation of section 23153 requires a finding that while the defendant drove a vehicle under the influence of alcohol or with a blood-alcohol content of 0.08 percent or greater, he or she concurrently performed an "act forbidden by law" or neglected "any duty imposed by law in driving the vehicle." A violation further requires that the defendant's act or neglect of duty "proximately cause[d] bodily injury to any person other than the driver." (§ 23153, subs. (a)–(b).) The jury instructions on violations of section 23153 included the following causation instruction: "An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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. [¶] There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A substantial factor is more than a trivial or remote factor. However, it need not be the only factor that causes the injury."

"In general, '[p]roximate cause is clearly established where the act is directly connected with the resulting injury, with no intervening force operating.'" (*People v. Schmies* (1996) 44 Cal.App.4th 38, 48–49.) "If an intervening act, event or force is present, however, it is necessary to determine whether that act, event or force is sufficient to absolve the defendant of liability 'because the "defendant may also be criminally liable for a result directly caused by his or her act, even though there is another contributing cause.'" (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1325 (*Brady*), quoting *People v. Cervantes* (2001) 26 Cal.4th 860, 866–867 (*Cervantes*)).

A dependent intervening cause does not relieve the defendant of criminal liability. ““If an intervening cause is a normal and reasonably foreseeable result of defendant’s original act the intervening act is ‘dependent’ and not a superseding cause, and will not relieve defendant of liability.”” (*Cervantes, supra*, 26 Cal.4th at p. 871.)

A ““superseding cause” means “an independent event [that] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen that the law deems it unfair to hold him responsible.”” (*Brady, supra*, 129 Cal.App.4th at p. 1325.) “In general, an “independent” intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be “independent” the intervening cause must be “unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.”” (*Cervantes, supra*, 26 Cal.4th at p. 871.) ““[W]here [an] injury was brought about by a later cause of independent origin . . . [the question of proximate cause] revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If *either* of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff; if, however, it is determined that the intervening cause was not foreseeable *and* that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff’s injuries.” [Citation.] Thus, “[t]he defendant remains criminally liable if either the possible consequence might reasonably have been contemplated or the defendant should have foreseen the possibility of harm of the kind that could result from his act.”” (*Brady, supra*, 129 Cal.App.4th at pp. 1325–1326.)

“[T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote. Ordinarily the question will be for the jury, though in some instances undisputed evidence may reveal a cause so remote that a court may properly

decide that no rational trier of fact could find the needed nexus.’’ (*Brady, supra*, 129 Cal.App.4th at p. 1326.)

Given defendant’s uncontradicted testimony about Lee’s violent act of shoving her face against the window, causing her to lose control of the car, followed by Lee’s act of grabbing and turning the steering wheel, Lee’s conduct could be found by a properly instructed jury to have been an independent intervening act, and thus a superseding cause of Lee’s injuries. If a jury so found, it could not convict defendant of violating section 23153. This was the defense theory. The causation portion of the court’s instructions on violations of section 23153 did not address superseding causes, did not provide any standard by which the jury could assess whether Lee’s conduct was a superseding cause, and did not tell the jury that a superseding cause meant that defendant’s negligence was not the legal cause of Lee’s injuries. Although the instruction given implies that causation does not exist if something “unusual intervenes,” it does not provide an adequate framework for the jury to evaluate whether an intervening cause was independent, and thus superseding. For instance, the instruction did not direct the jury to consider whether the intervening cause “produc[ed] harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen.” (*Brady, supra*, 129 Cal.App.4th at p. 1325.) Because the theory that Lee’s conduct was a superseding cause was the basis of the defense and cases such as *Brady, supra*, 129 Cal.App.4th at pages 1328–1329, established authority for a pinpoint instruction upon superseding cause, there can be no satisfactory explanation for defense counsel’s failure to request a pinpoint instruction upon superseding cause.

c. Prejudice

If the jury did not believe defendant’s testimony that Lee pushed her and grabbed the wheel, defense counsel’s errors were not prejudicial, as the jury would have found no conduct by Lee that could be a superseding cause and it necessarily would have found from the evidence that defendant violated section 22107 by veering or turning the car off of the road and toward a fence and concrete wall. Thus, the verdict would not have

rested on a finding that defendant failed to exercise ordinary care, and the prosecutor's misstatement of law would have played no role in the jury's decision.

But if the jury believed defendant's testimony that Lee pushed her, causing her to lose control of the car, then grabbed and turned the wheel, the convictions could not be based upon a finding that defendant violated section 22107, and thus necessarily rested upon a finding that defendant violated her duty to exercise ordinary care. Such a finding could have been based upon either the prosecutor's erroneous argument that defendant's act of driving with a 0.21 blood-alcohol content was alone sufficient to show that she failed to perform a legal duty or the prosecutor's theory that defendant violated her duty to exercise ordinary care by slapping Lee, or a combination of both theories.

Given defendant's uncontradicted testimony of Lee's conduct in the car, the undisputed evidence of Lee's history of violent assaultive behavior against defendant, which was corroborated to some extent by the institution of criminal proceedings against Lee for domestic violence, and the absence of any other evidence regarding why the car veered off the road at a 45-degree angle, we conclude that defendant has shown a reasonable probability—that is, a probability sufficient to undermine confidence in the outcome—that she would have obtained a more favorable result if defense counsel had requested a pinpoint instruction regarding superseding cause and either objected to the prosecutor's misleading and erroneous argument or corrected the prosecutor's misstatement of law during defense counsel's own argument. The prosecutor's erroneous argument potentially eliminated the need for the jury to find an essential and contested element of the charged violations of section 23153, and the absence of a pinpoint instruction on superseding cause left the jury without guidance regarding the analysis and effect of Lee's conduct on defendant's liability. With respect to the latter, we note that given Lee's history of violence toward defendant, some reaction by Lee to defendant's slap was reasonably foreseeable, but a properly instructed jury could have concluded that Lee's extreme reaction—which gravely jeopardized not only defendant but also himself, their car, and the property of others—was an extraordinary and abnormal occurrence that

produced harm of a kind and degree far beyond the risk created by defendant's slap. Accordingly, we conclude defense counsel's errors deprived defendant of her constitutional right to the effective assistance of counsel, requiring reversal of her convictions.

The errors here affected only the degree of the crimes of which defendant was convicted and the Penal Code section 12022.7 great bodily injury enhancement, but not the jury's section 23578 finding that defendant had a blood-alcohol content of 0.15 percent or more. "Where error goes only to the degree of the offense for which a defendant is convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial." (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1223, citing [Pen. Code,] § 1260.) However, "[w]hen a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (*People v. Kelly* (1992) 1 Cal. 4th 495, 528.)" (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1596.) Accordingly, if the district attorney does not elect to retry the section 23153 charges and enhancement allegations within 60 days after the filing of the remittitur in the trial court pursuant to Penal Code section 1382, subdivision 2 (unless time is waived by defendant), the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect misdemeanor convictions for violations of section 23152, subdivisions (a) and (b), with a true finding on the allegation under section 23578, and resentence defendant accordingly. (*People v. Edwards* (1985) 39 Cal.3d 107, 118; *Woods*, at p. 1596.)

DISPOSITION

The judgment is reversed with directions as follows: If the district attorney does not elect to retry the Vehicle Code section 23153, subdivisions (a) and (b) charges and the Penal Code section 12022.7 and Vehicle Code section 23578 allegations within 60

days after the filing of the remittitur in the trial court pursuant to Penal Code section 1382, subdivision 2 (unless time is waived by defendant), the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect misdemeanor convictions for violations of Vehicle Code section 23152, subdivisions (a) and (b), with a true finding on the allegation under Vehicle Code section 23578 enhancement, and resentence defendant accordingly. Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is directed to send a certified copy of this opinion to the State Bar.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.