Filed 2/7/19 P. v. Pulskamp CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN THOMAS PULSKAMP, Defendant and Appellant.	B281808 (Los Angeles County Super. Ct. No. PA084163) ORDER MODIFYING OPINION AND DENYING REHEARING; CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed on January 15, 2019, be modified as follows:

1. On page 1, the disposition is changed to read:

   Affirmed with directions.

2. On page 3, line 2, the sentence "We affirm" is deleted and replaced with the following:

   Pulskamp also requests that we remand the case for the trial court to exercise its discretion pursuant to Penal Code section 1385 as to whether

> to strike his prior serious felony enhancement under Penal Code section 667, subdivision (a)(1). We affirm the judgment but remand for the trial court to consider whether to exercise its discretion.

3. On page 16, following the last full paragraph, add the following section:

IV. Exercise of Discretion To Strike Prior Serious Felony Enhancement

Penal Code section 1385 provides the trial court with discretion to strike an enhancement in the furtherance of justice. At the time of sentencing, subdivision (b) of that section provided: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Senate Bill No. 1393, effective January 1, 2019, deleted former subdivision (b). (Stats. 2018, ch. 1013, § 2.)

The People concede that, because the judgment in this case is not yet final, the new law applies retroactively to Pulskamp. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973, review den. Jan. 16, 2019; see *People v. Brown* (2012) 54 Cal.4th 314, 319-324.) There is nothing in the record to indicate that the trial court would not exercise its discretion to strike the prior conviction if given the opportunity to do so. Accordingly, the case must be remanded for the trial court to exercise its discretion.

4. On page 17, under Disposition, following "The judgment is affirmed" add the following:

> The matter is remanded, and the trial court is directed to consider whether or not to exercise its

discretion pursuant to Penal Code section 1385 to strike Pulskamp's prior serious felony conviction enhancement under Penal Code section 667, subdivision (a)(1).

5. This modification changes the judgment. Appellant's petition for rehearing is denied.

ROTHSCHILD, P. J. JOHNSON, J. BENDIX, J.

Filed 1/15/19 P. v. Pulskamp CA2/1 (unmodified opinion)

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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. JOHN THOMAS PULSKAMP, Defendant and Appellant.	B281808 (Los Angeles County Super. Ct. No. PA084163)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Stanley L. Friedman for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

This case arose out of an early morning confrontation at a convenience store. A jury convicted defendant John Thomas Pulskamp of the attempted voluntary manslaughter of one of the store's customers, Raul Rubio (Pen. Code, §§ 192, subd. (a), 664), as a lesser offense of attempted murder and found true the allegation Pulskamp personally used a deadly and dangerous weapon, a truck, in the commission of the crime (*id.*, § 12022, subd. (b)(1)). The jury also convicted him of assault with a deadly weapon on the store clerk (*id.*, § 245, subd. (a)(1)), vandalism of the store causing over $400 in damage (*id.*, § 594, subd. (a)), and misdemeanor evading a peace officer (Veh. Code, § 2800.1, subd. (a)). Pulskamp pleaded no contest to an additional charge of vandalism over $400 based on damage he caused to Rubio's car.

Pulskamp admitted a prior serious felony conviction (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 1170.12). The trial court granted his motion to strike the prior conviction for purposes of the three strikes law (*id.*, § 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 529-530). It sentenced him to the upper term of five years and six months for the attempted voluntary manslaughter, plus one year for the use of a deadly weapon. The court imposed consecutive sentences of one-third of the middle term for the assault and vandalism, totaling two years and four months. It imposed five years for the prior serious felony conviction, for a total prison term of 13 years and 10 months. The court imposed a concurrent jail term of 180 days for the misdemeanor. Pulskamp timely appealed.

Pulskamp contends the trial court erred in admitting sanitized versions of his prior convictions for impeachment purposes, permitting the jury to learn of Rubio's significant

medical problems, and failing to read the full set of instructions to the jury. We affirm.

FACTUAL BACKGROUND

I. Prosecution

At about 5:00 a.m. on August 24, 2015, Rubio parked his 2009 BMW in the parking lot of a 7-Eleven store on Hubbard Street in Sylmar. Rubio, who suffered from chronic kidney failure, was on his way to a dialysis appointment, and wanted to get something to eat during the three-hour procedure. Rubio went to dialysis three times a week. Rubio also suffered from spina bifida and cerebral palsy. This made him move slowly and take extra time getting out of his car and into the store.

Pulskamp drove up in a pickup truck with raised tires and backed into the parking space to the left of Rubio's car. He entered the store.

Adrian Ventura arrived at the 7-Eleven about the same time to get coffee on his way to the gym. He entered the store just ahead of Rubio. As Ventura was getting coffee, he noticed Pulskamp the next aisle over at the refrigerator containing beer. It appeared to be locked. Pulskamp approached Ventura and said he had a problem with him. Pulskamp was very close to Ventura, and Ventura could smell alcohol. Ventura felt uncomfortable and feared for his safety, because Pulskamp "was acting kind of hyper like he was on something." Ventura told Pulskamp he did not have a problem with him and continued getting his coffee.

Rubio heard Pulskamp start arguing with the store clerk. Pulskamp was upset because he could not buy beer. Pulskamp

cursed at the clerk and threatened him. The clerk told him to leave the store.[1] Rubio was about to put a donut in a plastic bag. Pulskamp lunged toward him and grabbed the bag from his hand. He made a fist and threatened to "fuck [Rubio] up." Rubio responded that he could understand if Pulskamp was mad at the world, but Rubio was not the one who made him mad. Rubio said he did not want any problems with him but just wanted to go to his medical treatment and be left alone. Pulskamp continued to threaten Rubio and told him to get out of this country. Rubio responded that he was born in Sun Valley. Pulskamp said he was Native American. Rubio did not know how to respond.

Pulskamp walked back to the beer refrigerator, and Ventura moved away from him. Pulskamp pointed at Ventura and said something to him. At that point, the clerk came out from behind the counter, holding a baseball bat. He ordered Pulskamp to leave the store. Pulskamp told the clerk he was going to return and kill him. He walked out the door but came back in almost immediately.

Pulskamp told Rubio, "I know what you drive and I'm going to kill you too." Rubio feared for his safety because of the threat, because Pulskamp was much larger than he was, and because Pulskamp appeared to be intoxicated. Rubio removed a small, .22 caliber revolver from his pocket[2] and pointed it at Pulskamp.

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[1] The clerk could not be located at the time of trial and did not testify.

[2] Rubio testified that he had the gun with him because it was early morning, he drove a BMW, and he had been followed in the past by people looking to carjack him, "and I just happened to have the weapon because I had went to the shooting range the day before and I didn't get it off my vehicle after that day." He

He told Pulskamp he took threats to his life seriously. Pulskamp asked if he thought Pulskamp was going to be scared because he had a gun. He told Rubio if he was a man, he should cock the hammer back. Rubio did so. Pulskamp told him what he was doing "wasn't cool." Rubio responded that Pulskamp's threat "wasn't cool."

The clerk stepped between the two, and Rubio lowered his gun. The clerk again ordered Pulskamp to leave the store. Pulskamp backed out of the store, stating, "All you motherfuckers are going to pay. I'm going to kill you guys."

After Pulskamp left, Rubio said he hoped Pulskamp would not do anything to his car. Just then, Pulskamp backed his truck into Rubio's car, pushing the car up over the concrete stopper and store walkway, almost to the store's plate glass window. Rubio went outside to get the truck's license plate number. Pulskamp began driving away. Rubio saw Pulskamp start to turn and felt Pulskamp was going to come at him. He pulled out his revolver and fired several shots at the truck's body and tires, hoping to flatten the tires or cause the truck to break down.

Pulskamp drove back into the parking lot and toward Rubio. Rubio tried to run but slipped and fell to the ground. Pulskamp drove over Rubio but, due to the truck's oversized tires,

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then added that the gun was in a lockbox in his car, but he took it out prior to entering the 7-Eleven "[i]n case someone tried to car jack me while I was walking in and out of the store." He identified the shooting range as the Angeles Shooting Range in Lake View Terrace, an outdoor range. He said he checked in prior to using the range. He later stated that he could have been at the range a couple of days before the incident; he could not recall exactly when he went.

did not hit him. He continued on, crashing into the front doors of the store. He then backed up, again driving over Rubio, and drove away.

Rubio got up, got his cell phone from his car, and called his family and 911. Pulskamp returned to the parking lot and parked in one of the spaces. Rubio went back into the store. He and the clerk waited behind the counter. Pulskamp stayed in the parking lot for a couple of minutes and then drove away again.

Los Angeles Police Officer Quincy Walunga and his partner received a radio call regarding the incident at 5:01 a.m. and arrived at the 7-Eleven at 5:29 a.m. Officer Walunga observed Rubio's BMW on the walkway and the store's glass front doors shattered. Officer Walunga interviewed Ventura and the store clerk. He then interviewed Rubio. Rubio did not mention that he had fired his gun at Pulskamp's truck because he did not want to get in trouble.

Rubio's parents and brother came to the store to get him. At about 6:00 a.m., when the interviews had concluded and the officers were returning to their car, Pulskamp drove back into the parking lot. Someone yelled, "That's him. He is there." Rubio's brother went to the truck and tried to open the door. Pulskamp drove away, dragging Rubio's brother to the street.

Officer Walunga and his partner got into their car and followed Pulskamp. Pulskamp made a U-turn and sped off. The officers activated their lights and siren and followed him. The pursuit lasted about two minutes. Pulskamp stopped his truck and put his hands out the window. After other officers arrived, police ordered Pulskamp out of the truck and placed him under arrest.

Pulskamp refused to take a field sobriety test. He was taken to the police station. At the station, he behaved in a boisterous, agitated, and angry manner; he appeared to be intoxicated. He refused both a field sobriety test and a chemical test.

Detective Donald Goossens obtained surveillance video from the 7-Eleven. The detective did not notice Rubio draw or fire a gun on the video. After it was brought to his attention during the preliminary hearing, Detective Goossens looked at the video again and observed that Rubio was holding a gun in his hand when he pointed at Pulskamp. Detective Goossens interviewed Rubio outside the courtroom where the preliminary hearing was taking place. The detective asked if Rubio had anything to add to his previous statement. Rubio said he did not. Detective Goossens then played him the surveillance video which showed the gun. Rubio apologized and acknowledged he should have mentioned it.

Detective Goossens asked Rubio why he was armed. Rubio told him that he had spina bifida and could not use his right arm very well. He displayed the gun because he thought Pulskamp was going to hurt him. He fired the gun at Pulskamp's truck to keep Pulskamp from leaving and then coming back to kill him. Rubio added that he had forgotten to put the gun in the trunk of the car after going to an indoor shooting range he frequented.

Rubio did not have a concealed weapons permit and knew it was illegal for him to carry a concealed, loaded firearm. He surrendered his gun to Detective Goossens. The court appointed an attorney to represent him. He was given use immunity for his testimony.

II. Defense

The manager of the Angeles Shooting Range reviewed the sign-in records for August 16 through 25, 2015. Rubio did not sign in during that period.

Pulskamp testified on his own behalf. He acknowledged having been convicted of felonies involving moral turpitude in 1988 and 2001.

On the morning of August 24, 2015, Pulskamp had been drinking alcohol and was drunk. He had an alcohol problem. Nevertheless, he drove to the 7-Eleven and parked his truck. He did not remember entering the store. He remembered wanting to buy beer and being told he could not. This upset him. He tried to persuade the clerk to let him buy some beer.

Pulskamp remembered approaching Ventura and saying something to him. He remembered harassing other people in the store. He remembered acting belligerently and rudely.

Pulskamp recalled going over to Rubio and grabbing the plastic bag from his hand just to be rude. He knew they had words but could not recollect what was said. He also knew that Rubio was significantly smaller than he, and was merely a customer in the store.

The clerk walked toward Pulskamp, holding a baseball bat. Pulskamp walked toward the clerk and acted belligerently, but Pulskamp again could not remember what he, himself, had said. He did not remember threatening to kill anyone. He walked out of the store but immediately re-entered. He pointed at the clerk and said something. He felt angry that the clerk was holding a baseball bat.

Rubio approached Pulskamp with his gun drawn. Rubio cocked the gun and told Pulskamp, "I am going to fuckin' kill

you." This upset Pulskamp, who responded, "I'm going to fuck you up." Pulskamp felt more angry than scared. He left the store.

Pulskamp pointed toward the store and repeated, "I'm going to fuck you up." He got into his truck, drove forward, and positioned it to push Rubio's BMW. He pushed the vehicle toward the store then began to drive home.[3] As he drove from the parking lot, he heard a gunshot. He looked back and saw two gunshot flashes coming from Rubio, who was outside the store.

Pulskamp believed Rubio was trying to kill him and feared for his life. He decided to fight rather than flee. He saw Rubio walk toward the center of the parking lot, "obviously setting himself up for a better shot." Pulskamp turned the truck around and drove toward Rubio. He did not intend to kill Rubio. He wanted to hit Rubio with the truck so he would stop shooting at Pulskamp.

Pulskamp drove forward and crashed into the front of the store. He did not see Rubio and thought Rubio might have avoided him; he did not realize he had driven over Rubio. He then backed up, unaware that Rubio was behind him and he had again driven over Rubio. Once he backed up, he saw he had driven over Rubio but could not tell if Rubio was badly injured. He then saw Rubio get to his feet, and walk into the store, apparently unharmed, so he drove away.

Pulskamp returned to the 7-Eleven about 45 minutes later. He knew he was in trouble and wanted a chance to tell his side of the story. When he got there, the police were already there. As

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[3] Pulskamp knew pushing the car was a crime, and for that reason he pled guilty to one of the vandalism counts prior to trial.

he drove into the parking lot, a man reached into the truck through the open rear window and hit him. He got scared and drove away. When he saw the police following him, he drove a short distance and stopped. He remembered cursing at the officers.

DISCUSSION

I. Admission of Sanitized Prior Convictions

Prior to Pulskamp's testimony, the trial court discussed the admissibility of his prior felony convictions for impeachment purposes. There were two convictions of driving under the influence, from 1995 and 2001, and there was a conviction of assault with a deadly weapon from 1988. The court was unwilling to admit both prior driving under the influence convictions, particularly because they were remote in time. The trial court indicated the People could use the more recent of the two for impeachment.

Defense counsel pointed out the remoteness factor, adding "because this is also a case of driving under the influence and prejudice, which for whatever reason it wasn't filed, I think it could be prejudicial and I don't think it's really necessary." The prosecutor argued that if the court only admitted the 1988 conviction, it would appear that Pulskamp had not suffered convictions since that time. The prosecutor also downplayed the potential for prejudice, in that Pulskamp was not charged with driving under the influence.

The court acknowledged driving under the influence was "definitely on the low end of relevance for veracity even though it's moral turpitude. So I'm going to exclude them since we did

have some evidence of—was some drinking and driving in this case. So there's some risk of unfair prejudice to the defendant . . . ." The prosecutor noted that the court could sanitize the conviction. He did not want it to seem like Pulskamp had a clean record since 1988.

Defense counsel argued that Pulskamp's "character in this case is not an issue," because the case would be decided based on the surveillance video. The court noted "credibility is always an issue. So, I think that's a good way to handle it. It can be mentioned a felony conviction from 1988 and a felony conviction from 2001." Defense counsel said, "Well, then it leaves the speculation, your honor, to the jury." The trial court told him, "Well, if you want to bring in the names of the charges, we can do that," but "[i]t's for the defendant's benefit that they are sanitized." Defense counsel responded, "I understand."

Pulskamp argues that the court was correct in its initial statement that it would not admit evidence of either of his driving under the influence convictions, but erred in even admitting a "sanitized version" of them. Pulskamp misconstrues the record. The court only admitted evidence of one driving under the influence conviction, though "sanitized," and admitted evidence of the "sanitized" 1988 assault with a deadly weapon conviction. In any case, we find no abuse of discretion.

The California Constitution " 'provides in pertinent part that "[a]ny prior felony conviction . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." ' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 723; see Cal. Const., art. I, § 28, subd. (f).) The Supreme Court has held that this provision " ' "authorizes the use of any felony conviction which necessarily involves moral

turpitude, even if the immoral trait is one other than dishonesty." ' [Citation.]" (*Edwards*, *supra*, at pp. 723-724.) However, admission of a prior felony conviction for impeachment purposes is subject to the trial court's exercise of discretion under Evidence Code section 352. (*Id*. at p. 723.) This " 'discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.' [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 887.)

" 'The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense.' [Citation.]" (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267; see *People v. Edwards*, *supra*, 57 Cal.4th at pp. 721, 723.) The trial court therefore may "sanitize" the prior convictions, i.e., allow impeachment with felonies involving moral turpitude without allowing the jury to know the specific crimes resulting in the convictions. (*People v. Sandoval* (1992) 4 Cal.4th 155, 177-178; *People v. Mickle* (1991) 54 Cal.3d 140, 172; *People v. Ballard* (1993) 13 Cal.App.4th 687, 697-698.) This procedure may prevent prejudice to the defendant if the prior felony is similar to that charged, in order to prevent the jury from convicting the defendant based on propensity to commit that type of crime. (See *Edwards*, *supra*, at p. 723; see also *Ballard*, *supra*, at pp. 697-698.)

Here, the convictions for driving under the influence and assault with a deadly weapon were relevant as impeachment evidence. Remoteness alone does require exclusion of a prior conviction for impeachment where a conviction is part of a history of prior felony convictions. The trial court was within its

discretion to conclude that excluding the prior convictions would give the jury a false aura of Pulskamp's credibility.

The trial court, moreover, did not abuse its discretion in deciding to sanitize the two convictions. In doing so, the trial court had to weigh the prejudice from telling the jury about prior convictions that involved similar conduct to that involved in the trial. We cannot conclude that under the facts before the trial court, it abused its discretion in erring on the side of caution and sanitizing the prior convictions.

In addition, we conclude any error in the admission of the prior convictions was harmless. As Pulskamp's counsel noted, there was surveillance video of the incident on which the jury could rely; it did not have to rely solely on the credibility of the witnesses. Finally, the jury convicted Pulskamp of the lesser included offense of attempted voluntary manslaughter in the attack on Rubio. It is not reasonably probable Pulskamp would have received a more favorable result had evidence of the prior convictions for impeachment purposes been excluded. (*People v. Bedolla* (2018) 28 Cal.App.5th 535, 555; see *People v. Gurule* (2002) 28 Cal.4th 557, 609.)

II. Admission of Evidence of Rubio's Medical Issues

Before trial, the defense filed a motion under Evidence Code section 402 to exclude evidence of Rubio's medical issues. The prosecutor argued the evidence was relevant to explain why Rubio carried the gun with him and drew it in response to Pulskamp's aggressive behavior. The prosecutor added that Rubio's physical condition would be visible on the surveillance video, which would be shown to the jury. Defense counsel stated that the evidence would be prejudicial because it would cause the

jury to feel sympathy toward the victim. The trial court stated, "I don't see that as being a big problem here. I do see that there can be some relevance if we are going to have [a] self-defense defense. I don't think it outweighs whatever relevance there is. So I will allow that to come in. I don't want to spend a lot of time on his medical condition."

We agree that Rubio's medical issues had minimal relevance, serving only to help explain why Rubio carried the gun with him, which was not an issue in this case. Pulskamp argues that the court erred in admitting evidence of Rubio's medical issues. We need not decide the question, because, if error, it was harmless error.

Even if the jury might have felt sympathy toward Rubio because of his medical issues, the fact that Rubio drew a gun, threatened to shoot Pulskamp, and then left the safety of the 7-Eleven to shoot at Pulskamp's truck would negate some of that sympathy. Additionally, much of Rubio's testimony was corroborated by the surveillance video and the testimony of Ventura and Pulskamp himself. We note as well that the jury did not convict Pulskamp of the charged offense of attempted murder of Rubio but instead convicted him of the lesser offense of attempted voluntary manslaughter. There is no reasonable probability Pulskamp would have obtained a more favorable judgment had the jury not learned of Rubio's medical condition. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1167; *People v. Stewart* (2004) 33 Cal.4th 425, 494.)

III. Failure To Read Full Set of Instructions to the Jury

After the jury had been instructed and begun its deliberations, the trial court noted that "[v]oluntary intoxication

is a defense to evading, but there is an intent to evade element." The jury had not been instructed on this, so the court asked counsel "what do you want to do about it? I can submit another instruction." The prosecutor said, "Okay." Defense counsel responded, "I think that's fine, your honor. I don't think it's worth bringing them back to argue." The trial court said it would prepare the instruction, submit it to counsel, and "then we'll just send it to the jurors." Defense counsel did not object. The court provided the jury with the instruction it had prepared and did not read the instruction to the jury.[4]

Pulskamp now contends the trial court's failure to read the instruction to the jury violated his right to due process. However, defense counsel's acquiescence in the procedure suggested by the court and failure to request that the instruction be read to the jury forfeited the claim of error on appeal. (*People v. Rogers* (2006) 39 Cal.4th 826, 877; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1193-1194.)

Moreover, any error in failing to give the instruction orally (see, e.g., *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1106-1107) was harmless. The failure to instruct on intoxication is "subject to the usual standard for state law error: 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' [Citation.]" (*People*

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[4] The instruction explained that "[v]oluntary intoxication may be a defense to Evading a Peace Officer as alleged in Count 3 if you find that such intoxication negated the 'intent to evade' element of the offense. [¶] The People have the burden of proving beyond a reasonable doubt that the Defendant acted with the necessary 'intent to evade.' If the People have not met this burden, you must find the Defendant not guilty of that crime."

v. Mendoza (1998) 18 Cal.4th 1114, 1134-1135; see also *People v. Pearson* (2012) 53 Cal.4th 306, 325 & fn. 9 [failing to give voluntary intoxication instruction does not deprive the defendant of federal constitutional rights].)

As the People point out, the jury was instructed that voluntary intoxication could negate the intent to kill required for a conviction of attempted murder or attempted voluntary manslaughter. (CALCRIM Nos. 600, 603, 625.) By convicting Pulskamp of attempted voluntary manslaughter, the jury necessarily found that his voluntary intoxication did not negate his ability to form a specific intent. We note as well that Pulskamp himself testified that he was "running from the police a little bit" when he continued driving after the police activated their lights and siren and began pursuing him. It is not reasonably probable that, had the instruction been read to the jury, it would have found that Pulskamp's voluntary intoxication negated his intent to evade the police. Therefore, the trial court's failure to read the instruction to the jury was harmless error. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 898-899; *People v. Jandres* (2014) 226 Cal.App.4th 340, 359.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.