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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LYNELL KING,

Defendant and Appellant.

C063804

(Super. Ct. No.  
06F02847)

When firefighter Mark Cullison responded to the report of an assault outside a bar, he discovered a bleeding man standing on the sidewalk. Cullison then heard a loud crash and saw a body sliding across the street toward him, followed by a speeding white van. He later identified defendant Kevin Lynell King as the driver.

An information charged defendant with second degree murder, gross vehicular manslaughter while intoxicated, vehicular manslaughter with gross negligence, driving under the influence within 10 years of three or more convictions, hit and run from a fatal accident, and driving with a suspended license. (Pen. Code, §§ 187, subd. (a), 191.5, subd. (a), 192, subd. (c)(1); Veh. Code, §§ 23152, subd. (a), 23550, subd. (a), 20001, subd. (a)(b)(2), 14601.2.)<sup>1</sup>

A jury found defendant guilty on all counts. Sentenced to 19 years to life in state prison, defendant appeals, challenging the sufficiency of the evidence.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Quite early one May morning, firefighter Mark Cullison was dispatched to a reported assault outside a bar. He found a bleeding man, a sliding body, and a van headed in his direction; Cullison later identified defendant as the driver.

An information charged defendant with second degree murder, gross vehicular manslaughter while intoxicated, vehicular manslaughter with gross negligence, driving under the influence having previously suffered three prior convictions within 10 years, hit and run from a fatal accident, and driving with a revoked or suspended license. In addition, as to the gross vehicular manslaughter count, the information alleged defendant had two prior convictions for driving under the influence and a

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise designated.

conviction for fleeing the scene of an accident. Defendant entered a plea of not guilty.

A jury trial followed. The following evidence was introduced at trial.

#### **The Scene at the Bar**

Around 1:45 a.m., Cullison was dispatched to a reported assault at the Reno Club in West Sacramento and found a bleeding victim. As Cullison talked with the man, he heard a very loud crash. He looked up and saw a body sliding across the pavement. Cullison saw a white van accelerating rapidly in his direction at approximately 45 to 55 miles per hour. Cullison yelled "stop," but the van continued to accelerate. As it sped away, Cullison estimated the van accelerated to 65 to 70 miles an hour. The van never slowed down.

Cullison radioed dispatch to report the hit and run, then attempted to aid the man who had been struck by the van, to no avail. Cullison recognized the man as someone who had been walking down the street as the firefighter responded to the dispatch.

Cullison identified defendant as the driver of the van. The victim, Ist Deo Sharma, died of injuries suffered in the collision.

#### **What the Officer Observed**

A police officer for the Sacramento Port working in a guard station heard the radio dispatch of the hit and run. The officer saw a van speeding and weaving in and out of traffic.

The van stopped and the occupant jumped out and ran. The officer reported the incident to the sheriff's dispatch.

A responding officer found defendant running away and detained him at gunpoint until other officers arrived. Defendant was not wearing a shirt. Officers detected a moderate odor of alcohol on defendant's breath. His eyes were bloodshot and watery. Defendant refused to take a field sobriety test. Around 2:30 a.m., a blood sample was taken from defendant. Fifteen minutes later, defendant was given a breathalyzer test, and three minutes after that, he was given a second breathalyzer test. The results from both breathalyzer tests were .01 percent blood alcohol content. Defendant's blood tested positive for marijuana, cocaine, and Ecstasy.

#### **Toxicologist Testimony**

A forensic toxicologist testified that, in his opinion, defendant had ingested marijuana, cocaine, and Ecstasy prior to the incident. The toxicologist stated the marijuana and cocaine were probably ingested within hours of the blood being drawn; the Ecstasy might have been ingested earlier than the other substances.

The toxicologist could not state with certainty that these substances would have impaired defendant's ability to drive safely. However, the toxicologist testified he found it hard to believe the drugs would not have affected defendant negatively.

#### **Search of the Van**

Officers searched defendant's van. Damage to the van was consistent with a violent collision. A mechanical examination

of the van revealed no problems with the braking system that would have prevented the vehicle from stopping and showed the headlights were on at the time of the collision. The police concluded that the lighting conditions were good at the scene of the incident and the crosswalk was clearly marked.

### **Prior Incidents**

In 2005 officers arrested defendant for driving under the influence. The arresting officers testified that, at the time of his arrest, defendant was uncooperative and refused to take a sobriety test.

In 2000 defendant was cited for driving under the influence, for which he signed a promise to appear. The officer involved testified that he performed field sobriety tests on defendant and, based on those tests and his observations of defendant, determined defendant was under the influence.

### **Defense Case**

Defendant argued Sharma's death was an accident that could have happened even if defendant had been completely sober and driving at the speed limit. Since Sharma's blood alcohol content was 0.25 percent, he would have been severely impaired at the time of the incident.

The coroner who performed Sharma's autopsy concluded the death was an accident. However, the coroner also testified that an accident determination did not preclude a finding of second degree murder.

## **Rebuttal**

An officer who interviewed a nearby bar's bouncer after the incident testified the bouncer went outside to look for the man who had been assaulted, and Sharma pointed out the man to him. The bouncer crossed the street in the crosswalk. Sharma was crossing the street behind him when the bouncer heard the impact from the collision and saw the van.

## **Verdict and Sentencing**

The jury found defendant guilty of all charges and found the special allegations true. The court sentenced defendant to 19 years to life in prison: a determinate term of 4 years for hit and run, a consecutive indeterminate term of 15 years to life for second degree murder, and a concurrent term of 180 days for driving on a revoked or suspended license. The court also imposed restitution fines. Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **I.**

Defendant contends the prosecution relied on a theory of implied malice, which required proof beyond a reasonable doubt that he was driving while intoxicated. Defendant claims insufficient evidence supports any finding that he was intoxicated when he struck and killed Sharma.

In considering the sufficiency of the evidence to support a conviction, we review the entire record, considering the evidence most favorably to the prevailing party, and we determine whether a rational trier of fact could have found the

prosecution proved its case beyond a reasonable doubt. We do not reweigh the evidence or determine the credibility of witnesses; that is the province of the jury. Instead, we determine if substantial evidence supports the jury's conclusions. (*People v. Medina* (2009) 46 Cal.4th 913, 919; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1076 (*Kainzrants*)).

Murder is the unlawful killing of a human being committed with malice aforethought. (§ 187, subd. (a).) "In this state, 'malice' is defined by statute as 'express' if the defendant intended 'unlawfully' to kill his victim, and 'implied' if the killing was unprovoked or the circumstances showed 'an abandoned and malignant heart.' (§ 188.) . . . But the quoted portion of the California statutory definition of implied malice has given way to a definition more meaningful to juries, so that malice is now deemed implied "'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" [Citations.] Such conduct amounts to second degree murder . . . ." (*People v. Martinez* (2003) 31 Cal.4th 673, 684 (*Martinez*)). Implied malice requires that the defendant acted with a wanton disregard of a high probability of death. (*People v. Watson* (1981) 30 Cal.3d 290, 300 (*Watson*); *People v. Moore* (2010) 187 Cal.App.4th 937, 941.)

A finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, in effect employing a subjective standard. (*Watson, supra*, 30 Cal.3d at pp. 296-297.) The defendant must know the conduct endangers another yet act with a conscious disregard for life. (*Martinez, supra*, 31 Cal.4th at p. 684.) The prosecution may prove implied malice by circumstantial evidence, and even if the act causes an accidental death, the circumstances surrounding that act may evince implied malice. (*People v. James* (1998) 62 Cal.App.4th 244, 277; *People v. Contreras* (1994) 26 Cal.App.4th 944, 954 (*Contreras*).)

## **II.**

At the outset, defendant challenges the sufficiency of the evidence to support his conviction for second degree murder. According to defendant, the prosecution, under the facts of the case, could not meet its burden of proving beyond a reasonable doubt that he was under the influence of alcohol or drugs at the time of the incident. He argues that since his impairment was key to establishing implied malice, his conviction must be reversed.

In support, defendant notes his blood alcohol level of 0.01 percent was far below the legal limit of 0.08 percent. The prosecution did not offer expert testimony that the combined level of drugs and alcohol in defendant's system would have impaired his ability to drive. These failings, defendant asserts, doom any finding of implied malice.

However, "the absence of intoxication or high speed flight from pursuing officers does not preclude a finding of malice. These facts merely are circumstances to be considered in evaluating culpability. Where other evidence shows a 'wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied. (§ 188.) In such cases, a murder charge is appropriate.' [Citations]." (*Contreras, supra*, 26 Cal.App.4th at p. 955.) Such is the evidence in the case before us.

Here, for whatever reason, defendant sped down the street and slammed into a pedestrian crossing in a well-lit crosswalk. He did not stop or attempt to stop after the collision but instead sped away.

Afterward, defendant wove in and out of traffic at a high rate of speed. Defendant stopped the van, jumped out, and ran. When officers caught up with him, he had a moderate odor of alcohol on his breath. This was not defendant's first brush with the law involving alcohol: he had a prior arrest, and convictions for driving under the influence.

There is also ample evidence to support a finding that defendant's deadly behavior was due to his consumption of drugs and alcohol. Defendant's blood draw, taken less than an hour after the incident, revealed he had been using marijuana, cocaine, and alcohol. The toxicologist testified he could not be certain the combination of drugs and alcohol would cause defendant to be legally impaired, but also testified he thought

it was likely defendant was negatively impacted by the combination in his system.

Defendant attempts to defuse the impact of this evidence, arguing it merely suggests inattention, or that he may have fallen asleep, but "falls far short of the type of driving required to establish a wanton disregard for life." We disagree. In considering the sufficiency of the evidence, we uphold the conviction unless it appears that upon no conceivable hypothesis is there sufficient substantial evidence to support it. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Defendant, after drinking and consuming drugs, sped through a crosswalk, killing Sharma. Without hesitating, defendant took off, again driving fast and recklessly until apprehended by the police. Viewing the evidence most favorably to the prosecution, we find a reasonable jury could have found the prosecution proved defendant acted with implied malice when he struck and killed Sharma.<sup>2</sup>

### III.

In a related claim, defendant challenges the trial court's admission of the toxicologist's statements regarding the impact of the alcohol and drugs in defendant's system. According to

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<sup>2</sup> Defendant references cases in which implied malice was found under much more egregious circumstances. However, the question of implied malice is determined after considering all the circumstances, regardless of what constituted implied malice in other cases. The fact that other cases in which implied malice was found were more egregious does not foreclose such a finding in the present case.

defendant, the trial court erred in allowing the toxicologist to offer a personal opinion.

### **Background**

The toxicologist testified he could not be certain defendant was legally impaired by the drugs and alcohol. This testimony followed:

"[Prosecution:] Do you have opinions, nonetheless, even if you're not provided with enough information to say that somebody is under the influence? Do you have a range of, yeah, even though I'm not willing to say that in a court of law, I think likely or not likely, do you have any kind of what would that be a range short of concluding outright that he was under the influence?"

"[Toxicologist:] Sure.

"[Prosecution:] In this case have you reached any such opinions relative to your work?"

"[Toxicologist:] I have a personal opinion, yes."

Defense counsel objected that the testimony was personal opinion. The court responded: "I am not sure if that means professional. He is testifying as an expert in the field." The prosecution agreed and the court overruled the objection.

The prosecution then asked: "Even though you don't have enough to tell us in your comfortable zone of a conclusion/opinion in this case on this issue, do you have personal opinion other than that less than certain on this issue of under the influence?" Defense counsel again objected, and the trial court again overruled the objection. The toxicologist

testified: "Well, I have an opinion *based on* my professional experience, of course, like I say my professional opinion I would not express without more information, but from what I know about the drugs and what I found and what I have seen in this case, I would find it hard to believe that the drugs were not effecting [*sic*] him in a negative manner." (Italics added.)

### **Discussion**

Defendant argues the toxicologist's testimony amounted to his personal opinion on the ultimate issue. As such, the testimony was wholly without value to the jury.

We review the court's decision to admit expert testimony under an abuse of discretion standard. (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.) An expert may offer testimony if the subject is sufficiently beyond common experience and the testimony would assist the trier of fact. (Evid. Code, § 801.)

As often happens in the give and take of trial testimony, the toxicologist's testimony is less than clear. On the one hand, the toxicologist cautioned that he needed more information before rendering a professional opinion. On the other hand, the toxicologist offered his opinion "from what I know about the drugs and what I found and what I have seen in this case."

Though the toxicologist qualified his opinion, emphasizing that it was based on his knowledge and observations of the evidence before him, we cannot find his testimony inadmissible personal opinion. He based his opinion, weak though it may have been, on his background as a toxicologist. Any equivocation and hesitation about offering his opinion affected its weight, not

its admissibility. The court did not err in admitting the testimony.

#### IV.

Defendant argues his convictions for gross vehicular manslaughter and driving under the influence must also be reversed, since the prosecution failed to prove beyond a reasonable doubt that he was intoxicated. In essence, defendant renews the same claim he asserted in challenging his conviction for second degree murder.

Again, we review the evidence most favorably to the judgment and determine whether substantial evidence supports the conviction. (*Kainzrants, supra*, 45 Cal.App.4th at p. 1076.) The counts in question require proof that defendant was under the influence of drugs or alcohol to the extent it affected his ability to operate a vehicle. (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665-666.)

As noted, *ante*, defendant's blood draw, taken less than an hour after the crash, revealed defendant had used cocaine, marijuana, Ecstasy, and alcohol. Defendant's breath test, taken 15 minutes after the blood draw, showed he had a measurable amount of alcohol in his system.

After consuming these substances, defendant sped into a pedestrian crosswalk, struck and killed Sharma, and then sped away. Officers detained defendant after he wove in and out of traffic at a high rate of speed, eventually abandoning his car. Officers detected the smell of alcohol on defendant's breath.

Based on the evidence at trial, a rational jury could find that defendant's consumption of drugs and alcohol impaired his ability to operate a vehicle. We find sufficient evidence to support defendant's convictions for gross vehicular manslaughter and driving under the influence.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.