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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MICHAEL EUGENE JASTRAUB,  
  
Defendant and Appellant.

C066540  
  
(Super. Ct. No.  
08F04045)

A jury found defendant Michael Eugene Jastraub guilty of second degree murder and additional counts related to driving under the influence and unlawful possession of illegal substances. The trial court found a prior strike allegation true.

On appeal, defendant contends the court abused its discretion by admitting evidence of his uncharged misconduct. He also contends, and the People concede, that the trial court miscalculated the number of presentence custody credits due him. We will accept the People's concession regarding the custody credits and, in all other respects, affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

At approximately 3:00 p.m. on May 15, 2008, defendant ran a red light at the intersection of Florin Road and South Land Park Drive. He collided with and seriously damaged a vehicle driven by Tim Nguyen. Defendant sped away from the scene of the collision, leaving his bumper underneath the other vehicle. Nguyen noticed defendant's face looked "droopy" and a little bit "sleepy." Nguyen's passenger, Danh Truong, said defendant "looked dazed and confused" just prior to the collision.

Shortly thereafter, defendant returned to the scene of the collision, swerving, driving up onto the sidewalk at times, and nearly colliding with another vehicle before driving away again.

Witnesses Jessica Sayler and Cory Fukuoka saw defendant leave the accident scene, return minutes later driving erratically, then leave a second time. Sayler told investigators defendant had a "wild" or "crazy" facial expression and looked like he was "hopped up" on something. Fukuoka said defendant "looked like he was tweaking, like he was on drugs." Fukuoka followed defendant's truck as it headed onto the freeway on-ramp, but stopped his pursuit when defendant slammed on his brakes, made a U-turn, and drove up the grassy hill back toward Florin Road.

Around that time, Janell Cummings was driving home on Florin Road after picking up her niece, Maleka, and a friend, Destiny Estrada, from school. Both girls sat in the backseat of Cummings's car. As Cummings pulled into the left-hand turn lane, defendant's pickup truck collided with hers, forcing her

car into the path of an oncoming car driven by Roberto Comparan. Comparan was unable to stop and crashed into Cummings's car. Cummings later died as a result of the collision. Maleka suffered a broken jaw and a facial laceration that left her with a permanent scar. Estrada suffered minor injuries.

Police searched defendant's truck and found 36 tablets of carisoprodol, one clonazepam tablet, .05 grams of methamphetamine, drug paraphernalia, and a prescription bottle bearing a name other than defendant's. Defendant initially denied being under the influence of drugs, but later told police his blood test would likely show methamphetamine and heroin in his system and admitted having taken those drugs around noon that day.<sup>1</sup>

Defendant was charged with second degree murder, two counts of driving under the influence causing injury, unlawful possession of methamphetamine, unlawful possession of clonazepam, being under the influence of methamphetamine, possession of clonazepam pills without a prescription, possession of drug paraphernalia, driving without a valid license, driving without insurance, and leaving the scene of an accident. It was further alleged that, with respect to the murder and driving under the influence, defendant personally inflicted great bodily injury, and had a prior serious felony conviction, a strike.

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<sup>1</sup> Defendant's blood and urine tested positive for methamphetamine, methadone, diazepam, cocaine, and meprobamate.

A jury found defendant guilty of all charges and found the special allegations true with the exception of two of the personal infliction of great bodily injury allegations. The trial court found the prior strike allegation true.

The trial court sentenced defendant to state prison for an indeterminate term of 30 years to life, plus a consecutive determinate term of 11 years and 4 months, imposed specified fees and fines, and awarded him 863 days of actual presentence custody credit. Defendant filed a timely notice of appeal.

#### DISCUSSION

##### I

##### *Admissibility Of Evidence Of Uncharged Misconduct*

Defendant contends the trial court's admission of evidence of an incident involving Connie Rodriguez prior to the fatal collision was prejudicial error requiring reversal of his judgment of conviction for second degree murder. We disagree.

In May 2008, Connie Rodriguez was living in defendant's house on Florin Road, sleeping on a couch in the living room.<sup>2</sup> Rodriguez was drinking heavily and using a lot of methamphetamine at the time.

In the early morning hours of the day of the fatal collision, defendant's friend, Sharon Stone, brought a bag of methamphetamine to defendant's house. Stone shared half of the bag with Rodriguez and gave the other half to defendant, who

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<sup>2</sup> Defendant slept in a recliner in the living room.

took it and went into the bathroom where he regularly injected drugs. Rodriguez was awake for some time after smoking the methamphetamine. She finally fell asleep on the couch around 10:00 a.m. that morning.

Rodriguez awoke around noon to find defendant sitting in the recliner looking at her, his face pale and gray, looking like she had never seen him look before. Defendant got up and tried to pin her arms to the couch, but she was frightened and got up and ran to the bathroom. Although she had cleaned the bathroom earlier that morning, Rodriguez saw drug paraphernalia and evidence of recent drug use on the counter. She waited for some time in the bathroom until she heard the sound of a car starting, then ran out of the house and across the street to the home of defendant's ex-wife, Deborah Jastraub. Within approximately 30 minutes, Rodriguez heard the sound of sirens and saw traffic backing up on Florin Road.

At trial, the prosecution sought to admit Rodriguez's testimony regarding the incident involving defendant, including that defendant was naked except for one sock, he was masturbating, and he told Rodriguez he "could smell [her]."

The prosecution argued the incident between Rodriguez and defendant was relevant and therefore admissible, in its entirety, as follows: "What [Rodriguez] stated was that normally [defendant] is a nice guy and she talked about 'he's done nothing but respected me until this particular event.' [¶] The fact that on this event he was a very different person than from what she knows him to be would be relevant to the use of

the pills which were found in his bloodstream. [¶] She says that he was very different, and she talks about that. And even on the stand she was clearly reluctant to be here. And she said that he's been -- 'He's done nothing but help me.' This was a very rare, unusual event. [¶] The fact that this occurred, which would be out of the norm, is relevant to show that he had ingested something different than from the norm of the heroin and the methamphetamine. It also shows why she would have run into the bathroom."

Defense counsel objected, arguing in part that "[t]he issues, the elements of this offense are whether or not [defendant] had a subjective knowledge that driving under the influence of drugs and/or alcohol is an act which could cause the death of another person. [¶] That's what the DA has to prove beyond a reasonable doubt. That's implied malice. . . . What the DA has to show in order to show implied malice is that [defendant] was informed of the dangerousness of the conduct, . . . . And that -- how it's normally shown is through prior convictions of DUI, driving under the influence, going through drug rehab programs. [¶] None of the information that Ms. Rodriguez provided or offered, to which she's testified to, has anything to do with [defendant]'s subjective knowledge. [¶] . . . [¶] As far as the prior acts between [defendant] and her about what she testified, she can testify that Sharon Stone came over with drugs at 1:30 in the morning. [¶] She can testify that, if, in fact, she saw this . . . that she saw Sharon Stone give [defendant] a bundle or a portion of

methamphetamine. She can testify that at one point in the morning she went to the bathroom and there was paraphernalia that normally was kept in the cupboard and was now on the sink . . . . That, the DA can get into with Ms. Rodriguez. That -- we don't have an objection to that. That's the facts. [¶] But what I don't understand, what I don't see any relevance whatsoever, is this middle part, where supposedly [defendant] was sitting there naked and masturbating and made the comment. That doesn't have anything to do with the issues in this case, whatsoever. [¶] . . . [T]here is slight, if any, probative value of that particular instance, the contact between the two in the living room area when she woke up on the couch and he, [defendant], was in the recliner. That doesn't have any relevance or any probative value, whatsoever, to the issues in this case. And the prejudicial effect, to be accused of basically a sexual assault when he's not charged with that, is obvious and overwhelming. So I don't believe that that should be relevant whatsoever, at all. . . . [¶] . . . [¶] It doesn't have anything to do with [defendant's] subjective knowledge, which is necessary to show implied malice."

The court issued a tentative ruling admitting Rodriguez's testimony regarding the incident, but excluding, under Evidence Code section 352, any reference to defendant "having taken off all of his clothes and being naked except for one sock, his masturbating, and what he said to Ms. Rodriguez."

During continuing discussions between counsel and the court, defense counsel argued as follows: "[Defendant]'s

knowledge of the effect of methamphetamine on him is not relevant in this case. What [the prosecutor] is confusing is what knowledge she has to prove in order to prove a second-degree implied malice murder. [¶] The knowledge that she has to prove, the subjective knowledge that she has to prove, is that [defendant] has been informed, is aware, has been made aware of the effects of driving under the influence of drugs and/or alcohol, not what drugs and/or alcohol do to him but the dangers, as the Court has pointed out numerous times, the dangers of driving under the influence." The court agreed that "it has to be relevant to show [defendant's] knowledge of the dangers, not just the impact it might have on him."

At the conclusion of the Evidence Code section 402 hearing, defense counsel objected again to admission of Rodriguez's testimony having no relevance or probative value, but being "extremely prejudicial" because "basically what the prosecutor would be telling the jury is that [defendant] committed at the minimum the crime of false imprisonment, potentially assault with intent to commit some type of sexual offense, that he was acting in a way that was scary, frightening, whatever." The court confirmed its prior tentative ruling, stating as follows: "[T]his conduct is relevant to the issue of the defendant's knowledge of the dangerousness to human life when driving under the influence. [¶] [Rodriguez's] conduct in terms of running away from him and securing herself from him, protecting herself from him just before he got in the car, drove on a public highway, and engaged in the hit-and-run accident or collision

that is alleged and then the collision that is alleged to have caused the death of Miss Cummings is relevant to the issue of implied malice." Exercising its discretion under Evidence Code section 352, the court ruled that "[T]he People can[]not elicit certain testimony relating to masturbation, [defendant] being nude except for one sock, and his statement that he made to -- allegedly made to [Rodriguez]."

When defense counsel sought clarification regarding how defendant's "behavior in a house sitting in a chair [is] relevant to his knowledge of driving," the court responded, "He saw what he has knowledge of, how he was reacting, and her response to that. That goes to show his knowledge that his conduct his behavior is dangerous. Why would somebody be scared and run away from him if he weren't acting dangerously?" Counsel replied, "But the issue -- the implied malice on a second-degree vehicular homicide is not if I take drugs, I'm dangerous. It's if I take drugs and drive, I'm dangerous." The court agreed, but added, "But this is right before he hops in the car. This isn't attenuated in terms of time."

Noting the defendant's objection, the court ruled Rodriguez's testimony regarding the incident was admissible subject to the limitations previously imposed.

#### *The Law*

Second degree murder is the rash and impulsive killing of another without premeditation and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.)

"We have said that second degree murder based on implied malice has been committed when a person does "'an 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.] Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]" (*People v. Watson* (1981) 30 Cal.3d 290, 300; see, also *State of California ex. rel. Dept. of Transportation v. Superior Court* (1985) 37 Cal.3d 847, 856 [in order to be convicted of second degree murder, defendant must have intentionally committed an act with a high probability that it would result in death, and he must have subjectively appreciated the risk created by his act].)

The determination whether to admit evidence of uncharged offenses is within the discretion of the trial court. (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) The trial court has the discretion to admit evidence of uncharged crimes after weighing the probative value against the prejudicial effect. (*People v. Butler* (2005) 127 Cal.App.4th 49, 60.) We review a trial court's ruling under Evidence Code sections 1101 and 352 for abuse of discretion. (See, e.g., *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1001.)

### *Analysis*

The basis of defendant's argument is that Rodriguez's testimony regarding the incident in the living room has no probative value on the issue for which it was admitted, that is, implied malice, and that it was highly prejudicial because it suggested he had the character trait or propensity to commit violent acts.

Rodriguez testified that the incident involving defendant took place at approximately noon on May 15, 2008, at least 30 minutes if not more before defendant caused the fatal collision. The trial court admitted her testimony, finding the fact that she ran away from defendant and attempted to protect herself from him by securing herself in the bathroom just before he got into his truck and caused a fatal collision was relevant to defendant's knowledge of the dangerousness to human life when driving under the influence. "[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard. [Citation.]" (*People v. Watson, supra*, 30 Cal.3d at pp. 296-297.) The trial court erred.

It is one thing to find Rodriguez's fearful reaction to defendant's extreme and out-of-the-ordinary behavior was relevant to show defendant appreciated the dangers of being under the influence of drugs. However, it is another thing altogether to find Rodriguez's reaction in the house at least 30 minutes prior to the fatal collision showed defendant appreciated the dangerousness of driving while under the

influence of drugs, and it was error to admit the evidence on that basis.

The error was, however, harmless under any standard. There was significant, if not overwhelming, evidence that defendant actually appreciated the risks involved with driving while under the influence of drugs.

First, defendant admitted to investigators that drugs had an effect on his driving; that, in terms of his level of sobriety at the time of the accident, he considered himself to be a three on a scale of one to 10 (with 10 being the least sober), a level at which he did not think it would be safe to drive; that he would not have driven had his grandchildren been in the truck; and, that if he had it to do over again, he would not have driven.

Second, prior to the fatal collision and while under the influence, defendant caused a collision that seriously damaged Nguyen's car, immediately fled the scene, then returned again within minutes, only to flee a second time. "[C]ourts have recognized repeatedly that a motor vehicle driver's previous encounters with the consequences of recklessness on the highway--whether provoked by the use of alcohol, of another intoxicant, by rage, or some other motivator--sensitizes him to the dangerousness of such life-threatening conduct. This is so because apprehensions for drunk [or reckless] driving, and the citations, arrests, stiff fines, compulsory attendance at educational programs, and other consequences do not take place in a vacuum." (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 112-

113.) "A jury is entitled to infer that regardless of the mental state or condition that accompanies an instance of reckless driving--whether intoxication, rage, or willful irresponsibility--the driver's subsequent apprehension and prosecution for that conduct must impart a knowledge and understanding of the personal and social consequences of such behavior." (*Id.* at p. 115.) Here, defendant was not apprehended or prosecuted for the first collision, most likely because he fled the scene and was, within minutes, causing the fatal collision. However, that first collision was certainly sufficient to apprise him of the risk he was creating. (See *People v. Olivas* (1985) 172 Cal.App.3d 984, 988 [court found minor preaccident collision caused by the defendant sufficiently apprised him of potential risk of continuing to drive under the influence].)

The trial court's error in admitting evidence of defendant's prior misconduct was harmless.

## II

### *Presentence Custody Credit*

Defendant contends his presentence custody credit was miscalculated in that he was awarded 863 actual days but is entitled to 869 days, given that he was arrested on May 15, 2008, and sentenced on October 1, 2010. The People concede the issue. We accept the concession and shall order the trial court to amend the October 1, 2010, abstract of judgment to reflect that defendant was awarded 869 days of actual presentence

custody credit. (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

DISPOSITION

The judgment is modified to provide that defendant is awarded 869 actual days of presentence custody credit. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation.

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ROBIE, Acting P. J.

We concur:

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BUTZ, J.

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MAURO, J.