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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL CERVANTES,

Defendant and Appellant.

C067510

(Super. Ct. No. 09F01898)

Defendant Angel Cervantes drove a vehicle while drunk in the parking lot of a nightclub and caused physical injury to four people, two seriously. A jury convicted him of driving under the influence and proximately causing bodily injury and driving with a blood alcohol content of 0.08 percent or more and proximately causing bodily injury. The jury found that he personally inflicted great bodily injury upon two separate victims and proximately caused bodily injury to more than one victim. The jury also found that defendant willfully refused to submit to and complete chemical testing and drove with an alcohol content of 0.15 percent or greater. The jury acquitted defendant of three counts of assault by means of force likely to produce great bodily injury.

Sentenced to state prison for an aggregate term of eight years and four months, defendant appeals. He contends that the trial court abused its discretion in denying probation. We will affirm the judgment.

#### FACTS

On March 6, 2009, Luis Andrade, Sr., (Sr.) and Luis Andrade, Jr., (Jr.) went to a restaurant and nightclub to celebrate their respective birthdays.<sup>1</sup> At the club, they met several friends. One of their friends noticed defendant sitting at a “reserved” table with four or five other people. The table had five buckets with six beers in each. Defendant looked drunk, his eyes were red, and he seemed to be dizzy.

When the club closed at 1:30 a.m., Jr. and Sr. went out the front door to find security guards breaking up a fight between two women, one of whom the Andrades had met. Jr. walked two other women to a car which was located behind the club. The car belonged to one of the women fighters who was escorted by security to the car. Sr. watched as Jr. said his goodbyes to the women.

A Lincoln Navigator, driven by defendant, pulled up next to Jr. Defendant told the woman fighter that “she should have gotten her ass kicked.” Someone saw a beer bottle tossed from the back seat of the Navigator. According to another witness, defendant insulted the two women Jr. had escorted to the car. Yet another witness believed that defendant’s front seat passenger, his cousin Jimmy Cervantes, had taunted the crowd. People in the crowd yelled things back to the people in the Navigator. Several people in the crowd attacked the Navigator, hitting and kicking it and someone said that Jr. punched defendant.

Defendant took off, spinning the tires on the Navigator, and hit Jr.’s leg which got caught in the rear tire. Jr. was knocked to the ground, unconscious. Sr. ran to Jr. who

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<sup>1</sup> No disrespect is intended by using Jr. and Sr.

was face down and tried to pick him up but was unable to do so. People tried to stop defendant, hitting the Navigator with their hands, and to pull the people out of the car but the windows had been raised.

Defendant drove the Navigator at a fast pace in reverse. Sr. moved Jr.'s head but could not get out of the way himself. Defendant hit Sr. with the rear bumper in his pelvic area, knocking him to the ground. The bumper also hit two security guards, Nicholas Napier and Robert Wimberly. Sr. could not get up.

Defendant turned the Navigator around and drove forward towards Sr., striking him. Sr. lost consciousness. Defendant also ran over Jr.'s hand and "burned rubber" on Jr.'s left foot. Jonathan Morris, a security guard, fired his weapon. He emptied his firearm, reloaded and fired again, shooting between 9 and 11 rounds. Someone heard a loud blow, possibly a gunshot, before the Navigator hit Jr. Wimberly claimed Morris fired during the melee. Two others said shots were fired after the Navigator hit Jr. and Sr. and was leaving the parking lot.

Seven minutes after the club closed and the parking lot chaos, defendant pulled his Navigator into oncoming traffic, requiring a medic vehicle to stop. The medic vehicle had been driving "code three," meaning full lights and sirens, to the nightclub. Defendant frantically told the paramedic that his friend had been shot and needed to go to the hospital. The backseat passenger, Evan Rocha, had a graze wound on his wrist and the paramedic did not believe the injury was life-threatening but defendant insisted they take Rocha to the hospital. The paramedics called for another unit and the police.

Defendant was detained. Officers noticed the strong odor of alcohol on defendant. Defendant's eyes were red and watery. Defendant refused to complete the field sobriety tests and refused to breathe into a preliminary alcohol screening (PAS) device. An officer took defendant in for a forced blood draw at 3:25 a.m. when defendant continued to refuse to submit to other tests. His blood sample contained a blood alcohol content of 0.19 percent and at the time of driving, it was estimated to be 0.23 percent.

Sr. suffered a lacerated liver, bruising or bleeding in part of his intestine, a very severe pelvic fracture (potentially life threatening), an open left foot fracture, a broken arm, a dislocated shoulder, a fractured sternum, multiple rib fractures, a concussion, a collapsed lung (potentially life threatening), a broken leg, and fractures in his lower back. He had nine surgeries and was hospitalized for 19 days. He has screws in his foot and pelvis and a plate in his hand. He can no longer work and walks with a cane.

Jr. suffered a fractured arm; a pulmonary embolism; a closed fracture of the clavicle; tissue graft complications; a fractured rib; complicated open wounds on the knee, leg, and ankle; a broken foot; friction burns on his hip and leg; and a blood clot in his legs. He had four surgeries and was hospitalized for almost a month. He has a plate and screws in his foot. The open wound on his leg required a skin graft.

Napier's right hand and elbow were injured. Wimberly sustained minor scrapes and limped for two weeks.

At trial, defendant's cousin, Jimmy Cervantes, testified that he and defendant drank two or three beers with dinner, and drank beer at the nightclub, staying until closing. A 30-pack container of beer was later found in defendant's Navigator. Jimmy claimed that the crowd tried to pull him and defendant out of the Navigator, information Jimmy did not provide to officers that night. Instead, he had claimed he had no idea why they had been shot at but surmised it was because of the nice rims on the Navigator.

Defendant testified that he drank beer at dinner and at the nightclub but did not pay attention to how many he had. He felt "buzzed" when he left the club. He claimed the crowd surrounded the Navigator, trying to break the windows, and someone punched him. He was scared, not upset that people were kicking his vehicle. He did not know that he had hit anyone and did not intend to do so. He admitted that he refused to perform all alcohol tests. He claimed the officer who transported him to jail was mean, telling him that he had killed five people. The transporting officer denied the same. There was an in-car camera which recorded the transport.

## DISCUSSION

Defendant claims the trial court abused its discretion in denying probation. We reject defendant's contention.

### Background

The probation report recommended a nine-year state prison sentence. The prosecutor sought a 10-year sentence and argued probation should be denied, citing the seriousness of the offense (Cal. Rules of Court,<sup>2</sup> rule 4.414(a)(1))<sup>3</sup>, defendant's use of a deadly weapon, to wit, his vehicle (Rule 4.414(a)(2)), the vulnerability of the victims (Rule 4.414(a)(3)), defendant engaged in a pattern of violent conduct as shown by his blood alcohol content (Rule 4.414(b)(1)), and the lack of mitigation.

Defense counsel argued that the case was an unusual one warranting probation based on defendant's lack of intent (Rule 4.413(c)(1)(A)), he and his car were attacked by the crowd and the security guard (Rule 4.413(c)(2)(A)), defendant's youth, and his lack of a significant record (Rule 4.413(c)(2)(C)). Defense counsel claimed the crimes were serious but Napier did not seek medical treatment (Rule 4.414(a)(1)), defendant did not use a firearm, and he was acquitted of the assault offenses (Rule 4.414(a)(2)), there was great provocation unlikely to reoccur (Rule 4.414(a)(7)), the lack of criminal sophistication (Rule 4.414(a)(8)), and defendant did not take advantage of a position of trust (Rule 4.414(a)(9)). Defense counsel also claimed that defendant had an insignificant record (Rule 4.414(b)(1)), was willing to comply with probation (Rule 4.414(b)(3)), was remorseful (Rule 4.414(b)(7)), and was unlikely to be a danger if

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<sup>2</sup> All further rule references are to the California Rules of Court (hereafter Rule or Rules).

<sup>3</sup> Rule 4.414 sets forth the "criteria affecting the decision to grant or deny probation includ[ing] facts relating to the crime and facts relating to the defendant."

granted probation (Rule 4.414(b)(8)), and that his imprisonment would adversely affect his wife and two children (Rule 4.414(b)(5)).

In denying probation, the trial court stated:

“I have considered [the enhancement for personal infliction of great bodily injury], but the applicable Rules of Court in evaluating this case the defendant is not eligible for probation pursuant to Penal Code section 1203[, subdivision] (e)(3) unless I find unusual circumstances which warrant a grant of probation.

“The fact that the defendant is youthful and has no prior serious criminal record certainly would be one of the factors I consider as pointed out in the probation report.

“That, however, it pales in comparison to the aggravating or additional factors I have to consider.

“And they’re set forth. And while Mr. Balcom [defense counsel] you set forth quite succinctly I think and accurately some of the mitigating factors that exist in this case, I think the problem is a number of things that were not mentioned are things that are aggravating in this case.

“And I will list some of them: In [Rule] 4.414(a)(1), while you acknowledge the crimes are serious you indicate that this particular crime is less serious than other instances of the same crime and you reference Mr. Napier.

“But that’s not really what they’re talking about. They’re talking about this particular DUI with injury, how does it compare to other DUIs with injury.

“And I find it difficult to believe you could have a DUI with injury with greater injury than exists in this case, absent somebody dying. I mean both the two victims, junior and senior, were horribly injured. Partly because the manner in which your client drove and partly because of the speed at which he was traveling.

“On [Rule 4.414](a)(2), you utilize the term ‘firearm’ in analyzing whether your client used, and you put, quote, ‘a firearm.’ But that’s not what the [Rule 4.414](a)(2) said.

“The terminology they use is ‘used a weapon.’ And in this case the manner in which his vehicle was driven can be described as nothing other than a weapon of the type that [Rule 4.414](a)(2) is considering.

“[Rule 4.414](a)(3) isn’t mentioned at all, but it talks about the v[ul]nerability of the victim. There can be no way to characterize the two victims in this case other than extremely v[ul]nerable. They did nothing to cause themselves to be damaged in the manner in which they were.

“You can discuss and talk about the fact that your client was fleeing at the speed he was or the pace that he was because there were shots being fired at him. I have no doubt that that in some way contributed.

“And I’m never going to figure out whether he made a U-turn and came back because the combination of alcohol intoxication and the flying bullets caused him to lack judgment in terms of the direction that he was traveling in. His inability to perceive alternative methods of travel to depart that location, or whether he did it on purpose.

“I don’t know. Only one person does. And quite honestly, because of the cloud of alcohol, he may not remember. I don’t know that either.

“But they were v[ul]nerable. And so [Rule 4.414](a)(3) also applies in terms of aggravation or at least I’m only talking about now whether probation is appropriate.

“Whether the defendant inflicted physical or emotional injury under [Rule 4.414](a)(4) certainly is a significant factor in this case.

“The degree of monetary loss to the victim is mentioned [Rule 4.414(a)(5)]. Whether the defendant was an active or passive participant is also a factor [Rule 4.414(a)(6)]. And as difficult I think as this case is for everyone, your client I have no doubt is remorseful [Rule 4.414(b)(7)]. He’s remorseful for the fact he got behind the wheel, he’s remorseful for the fact he ran over people. I don’t know whether it’s in his character to do that.

“I am, I will tell you, quite candidly bothered by the fact [as set forth in the probation report] that in 2007, in June the 24th, in North Las Vegas Police Department the defendant was charged with willfully, unlawfully, feloniously and intentionally placing another person, to wit: Cameron T. in reasonable apprehension of immediate bodily harm with use of a deadly weapon, to wit: A vehicle, by attempting to strike him with said vehicle.

“He was thereafter convicted by plea September 18th of 2007, to an admittedly reduced charge of battery.

“I’m also mindful of the fact the 60 day suspended sentence, a fine and alternative community service with impulse control counseling suggests there may have been other things going on in that case.

“But, [defendant], you are urging this Court to give you another chance. You were given a chance. And that should have been the light that caused you to alter your path.

“Your second child wasn’t even born at that time. Your first child was probably three or four years old. Yet you find yourself here today.

“Probation is denied because I think it is inappropriate to grant probation considering the aggravating and mitigating factors which exist. And I will deny probation.”

#### Analysis

Defendant was convicted of driving under the influence and with a blood alcohol content of 0.08 percent or more, proximately causing bodily injury, and the jury found that he personally inflicted great bodily injury upon two separate victims. (Veh. Code § 23153, subd. (a).) The defendant’s sentence was enhanced under the provisions of Penal Code section 12022.7, subdivision (a), which provides, as applicable: “Any person who *personally inflicts* great bodily injury on any person . . . shall be punished by an

additional and consecutive term of imprisonment in the state prison for three years.”  
(Italics added.)

In refusing to grant probation, the court said: “I have considered [the enhancement for personal infliction of great bodily injury], but the applicable Rules of Court in evaluating this case the defendant is not eligible for probation pursuant to Penal Code section 1203[, subdivision] (e)(3) unless I find unusual circumstances which warrant a grant of probation.”

Penal Code section 1203, subdivision (e)(3), provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . [¶] . . . [¶] (3) [a]ny person who willfully inflicted great bodily injury . . . in *the perpetration of [a] crime . . .*”<sup>4</sup> (Pen. Code § 1203, subd. (e), (e)(3).) “In the perpetration of a crime” means that an injury inflicted in the course of the criminal offense was willful, regardless of the fact that the culpable act made punishable by the crime was not willful.

The crime of which defendant was convicted, Vehicle Code section 23153, subdivision (a), provides for punishment where any person drives a vehicle “under the influence of any alcoholic beverage [and] do[es] any act . . . which act . . . proximately causes bodily injury to any person other than the driver.” The culpable act made punishable under section 23153, subdivision (a), is the act of driving under the influence of an alcoholic beverage, not the act of inflicting bodily injury on another. However, as the facts make clear the defendant willfully ran over the victim in the course of committing the section 23153, subdivision (a), offense.

The court was not in error in believing that probation was subject to the unusual circumstances test. More importantly, the trial court meticulously applied the provisions

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<sup>4</sup> The term “willfully,” as applicable to Penal Code section 1203, subdivision (e)(3), means “the intent with which an act is done . . .” (Pen. Code § 7, subd. 1.)

of Rule 4.414(a) in considering whether to grant probation which applies regardless of whether unusual circumstances are found pursuant to Rule 4.413(c). Hence, defendant would not have been granted probation regardless of the presence of unusual circumstances.

Defendant claims the trial court properly considered certain factors in favor of a grant of probation (his age and lack of a serious criminal record), but failed to recognize other factors, including the great provocation which led to his conduct (although noting that the trial court recognized that shots had been fired), his fear and panic, lack of intent, intoxicated condition, not armed, and his remorse. Defendant concedes that he “inflicted serious injury on two vulnerable individuals who suffered considerable monetary loss” but claims these aggravating factors are outweighed by those in mitigation.

Defendant simply reargues the factors defense counsel argued in the trial court. This court does not reweigh the factors and substitute its judgment for that of the trial court. Defendant has not demonstrated that the trial court’s sentencing determination was arbitrary or irrational. The trial court’s findings indicate it took the relevant factors into account in denying probation. The trial court’s decision was well within its broad discretion.

#### DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.