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

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL KEITH ALEXANDER,

Defendant and Appellant.

C068986

(Super. Ct. No.
10F05063)

Defendant Darryl Keith Alexander climbed behind the wheel of a motor home while under the influence of alcohol. He backed up the motor home, striking and ultimately crushing the victim. An information charged defendant with murder, gross vehicular manslaughter while intoxicated, vehicular manslaughter while intoxicated without gross negligence, felony hit and run, felony driving under the influence of alcohol, and driving on a suspended license. (Pen. Code, §§ 187, subd. (a), 191.5,

subds. (a), (b); Veh. Code, §§ 20001, subd. (b)(2), 23153, subd. (a), 23153, subd. (b), 14601.1, subd. (a).)¹

A court trial followed. The court found defendant guilty of all charges except vehicular manslaughter while intoxicated without gross negligence. Sentenced to 70 years to life plus 11 years in state prison, defendant appeals, contending (1) insufficient evidence supports his second degree murder conviction, (2) the court erred in failing to stay the felony hit and run sentence under section 654, (3) the court abused its discretion by imposing a consecutive term for felony hit and run, and (4) the court improperly ordered defendant to submit to an AIDS test. We find the last contention has merit and shall instruct the court to eliminate the court ordered AIDS test from the judgment. In all other respects, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, inebriated, backed up a motor home, hitting Ginger Ball, a woman with whom he was having a romantic relationship. After attempting to pull Ball's body out from under the vehicle's wheel, defendant drove away, running over Ball once again. After defendant abandoned the vehicle, officers arrested him.

An information charged defendant with murder (count one), gross vehicular manslaughter while intoxicated (count two), vehicular manslaughter while intoxicated without gross

¹ All further statutory references are to the Penal Code unless otherwise designated.

negligence (count three), felony hit and run (count four), felony driving under the influence of alcohol (count five), felony driving with a blood alcohol content of 0.08 percent and more (count six), and misdemeanor driving on a suspended license (count seven). As to count two, the information alleged defendant had three prior drunk driving convictions pursuant to Penal Code section 191.5, subdivision (d), and as to counts two and three, the information alleged that defendant fled the scene of the crime (Veh. Code, § 20001, subd. (c)). As to counts one through six, the information alleged, for purposes of Penal Code section 667, subdivision (a), that defendant was convicted of residential burglary in 1982 (Pen. Code, § 459) and assault with a deadly weapon in 2005 (Pen. Code, § 245, subd. (a)(1)), and for purposes of Penal Code section 667.5, subdivision (b), that defendant had served a prison sentence for grand theft in 2009 (Pen. Code, § 487).

Defendant waived his right to a jury trial and agreed to a court trial. The following evidence was introduced at trial.

Prosecution's Case

The Incident

One summer day in 2010 Louise Bristow, who was homeless and living in her car, took her friend Ginger Ball to the bank to withdraw money. Ball was in a romantic relationship with defendant, and both were also homeless. After leaving the bank, Bristow dropped off Ball and picked up defendant. She drove defendant to his parents' home, where he would use Ball's money to buy a motor home.

Later that evening, in the area where she parked her car, Bristow saw a motor home pull up, driven by someone named Shorty. Shorty, Ball, defendant, and Shorty's girlfriend got out of the motor home. Defendant appeared intoxicated: he stumbled, slurred his words, and smelled of alcohol.

Ball and defendant went into the motor home and an argument broke out between them. Ball left the vehicle and walked behind it with Bristow and Shorty's girlfriend. Defendant began arguing with Shorty, who had been sitting in the driver's seat. Shorty got out of the motor home.

Rickey Henderson, sitting in a car nearby, saw defendant arguing with two men in the middle of the street. Henderson got out of his car and went up to the group. Henderson wrestled with defendant for a short time and then returned to his car. He observed defendant return to the motor home.

Defendant sat in the driver's seat and attempted to start the motor home. Bristow, standing behind the motor home, heard the gears grinding as defendant started the engine, revved it, and released the clutch.

The motor home lurched backwards towards Bristow, Ball, and Shorty's girlfriend. The trio stood approximately three feet behind the motor home. As the motor home moved toward them, Bristow jumped to the middle of the street and Shorty's girlfriend jumped to the curb. However, Ball, who had been standing between the other two women, was unable to move out of the way.

The motor home struck Ball and she fell beneath the rear wheel. The others screamed at defendant to stop the motor home; one person shouted, "You hit her!" As it continued to back up, the motor home dragged Ball 10 feet and then stopped.

Defendant got out of the vehicle and walked around to the passenger side of the motor home. He began to pull on Ball's body, which was stuck under the rear tire. As defendant pulled Ball's leg, it began to detach from her body. Ball gasped for air, bleeding from her mouth and nose.

Defendant dropped Ball's body in front of the motor home's rear tire. He climbed back into the motor home and drove it forward over Ball's body, which tumbled forward.

The Aftermath

Henderson, who had remained nearby, saw Ball's body beneath the motor home and dialed 911. Henderson saw defendant pull on Ball's body and saw her gasp for air.

Defendant drove away at approximately 30 to 40 miles per hour, with Henderson following in his car. In an effort to shake off Henderson, defendant swerved from side to side. Eventually, defendant pulled onto a residential street, stopped the vehicle, got out, and approached Henderson's car. Henderson and defendant exchanged words and then defendant jumped over a nearby fence.

Officer Joshua Dobson received a report of a hit and run and learned that a witness was following the suspect. After learning of the suspect's location, Officer Dobson arrived at

the scene. Henderson informed the officer that defendant had jumped several fences.

At a nearby intersection Officer Dobson saw defendant, shirtless and holding a rag in his hand. After Officer Dobson took defendant into custody, he noted defendant had blood on his hands and shoes. Defendant slurred his words and his eyes were watery. Defendant's pocket yielded the key to the motor home, and his shirt was found on a driveway.

Physical Evaluation of Defendant

Officer Keri Wilson performed a driving under the influence (DUI) evaluation of defendant. Officer Wilson observed that defendant smelled of alcohol and his eyes were watery. Defendant, who was uncooperative and belligerent, required assistance to stand and walk.

Defendant agreed to have blood drawn. As a technician drew his blood, defendant said, "[T]his uneducated bitch thinks I do drugs. I ain't done any drugs. I drank, but that's all." The blood test revealed defendant had a blood alcohol content of 0.19 percent.

Examination of the Crime Scene

Officer Kelly Fox was the first officer at the scene. Officer Fox saw Ball lying in the street and tire marks measuring 11 feet in length along the street. Bloody T-shirts, shoes, and a piece of human tissue with drag marks lay in the street. At least one of the T-shirts had been used to cover Ball's body.

Autopsy

The forensic pathologist who examined Ball's body found numerous injuries consistent with being struck and run over by a motor vehicle. Ball's face and chest revealed numerous bruises, lacerations, and abrasions, indicating the body had been dragged. Bruising on Ball's hip appeared to have been caused by an impact with a hard object. The pattern of bruising on Ball's shoulder matched a pattern that is left by a tire tread.

Fractures on Ball's left side were consistent with an injury from crushing. Based on the location of bruises and fractures, the pathologist concluded a tire had run over Ball's body from shoulder to chest.

Injuries to Ball's right leg were the result of an object like a spinning tire causing friction and peeling off the skin. Ball's right leg suffered multiple fractures consistent with crushing. The injuries to her right leg were so severe that the lower part of the leg was partially detached from the upper leg and was held together only by skin and tissue.

Prior Convictions

Defendant had prior convictions for driving under the influence of alcohol in 1987, 1999, 2000, and 2002. Defendant had also been convicted of first degree residential burglary in 1982, assault with a deadly weapon in 2005, and grand theft in 2009.

Defense Case

Defendant testified in his own behalf. Defendant and Ball, who had been together six years, were engaged. He bought the

motor home from his parents because his house had recently burned down and he needed a place to live. Defendant had never driven a motor home before that day. Shorty drove the motor home from defendant's parents' home because defendant's license had been suspended.

Shorty and defendant picked up Ball and Shorty's girlfriend and went to a nearby park. During their four-hour sojourn, defendant drank 10 beers.

Later that evening, the group drove to an intersection downtown. Defendant saw Bristow and showed her the inside of the motor home. An individual named George, with whom defendant had recently quarreled about disrespectful comments George made to Ball, arrived.

George and defendant began yelling at each other, and the disagreement degenerated into a physical fight. Defendant kicked George in the head. George threatened to "pop" the tires on the motor home. Afraid George would damage the motor home, defendant decided to move it.

Defendant got into the motor home, checked the rearview mirrors, and started the engine. The engine began to stall, so defendant pumped the gas pedal. Defendant had no idea there was anything behind the motor home when he began to back up. He did not hear people shouting.

As he backed up, defendant felt the motor home climb over the curb and go onto the dirt. He put the vehicle in drive and drove forward. As he drove forward, defendant looked in the mirror and saw someone rolling behind the motor home. He

slammed on the brakes, ran back behind the motor home, and discovered Ball. She did not appear to be stuck under the tire, but defendant did not see the extent of her injuries. Defendant tried to lift Ball, but she was too heavy. He asked Shorty to watch her while he drove around the corner to a fire station to get help.

Defendant missed the turn and ended up on the freeway. He noticed Henderson following him. Lost and crying, defendant stopped the motor home and approached Henderson to ask him to call the police. Defendant became paranoid and jumped over a fence into a yard, where he sat crying until the police arrived.

Verdict and Sentence

The court found defendant guilty on all counts except vehicular manslaughter while intoxicated without gross negligence, and found all allegations to be true.² The court sentenced defendant to an aggregate state prison sentence of 70 years to life plus 11 years: 45 years to life on count one, a consecutive 25 years to life on count four, a concurrent one-year term on count seven, a consecutive term of 10 years under section 667, subdivision (a), and a consecutive term of one year pursuant to section 667.5, subdivision (b). Pursuant to section 654, the court stayed the prison terms imposed on count two, count five, and count six. Defendant filed a timely notice of appeal.

² Defendant was convicted of murder in the second degree.

DISCUSSION

SUFFICIENCY OF THE EVIDENCE

At the outset, defendant asserts there was insufficient evidence of implied malice to support his conviction for second degree murder. According to defendant, the People failed to prove he was subjectively aware of the risks of drunk driving. Nor did the People prove defendant was aware that his driving posed a danger to Ball.

In reviewing a defendant's challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. Substantial evidence is evidence that is credible, reasonable, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

We do not reassess the credibility of witnesses, and we draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Unless it is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) "In this state, 'malice' is defined by statute as 'express' if the defendant intended to 'unlawfully' 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, 277-278; *People v. Contreras* (1994) 26 Cal.App.4th 944, 954.) Malice may be implied where an intoxicated driver who kills someone appreciated the risk involved in the act. (*Watson, supra*, 30 Cal.3d at pp. 296-297.)

At trial, the People presented two theories supporting a finding of implied malice. First, the People argued defendant demonstrated a conscious disregard for Ball's life when he dropped her body in front of the motor home's rear tire and then drove the vehicle over the body. Defendant knew Ball was injured, knew she was stuck in front of the tire, and knew he would run over her if he drove the motor home forward. When defendant decided to drive the vehicle forward he demonstrated a wanton disregard for human life.

The People's second theory of implied malice noted that defendant's four prior DUI convictions made him aware of the inherent, very real risk of driving while intoxicated. Despite this knowledge, defendant chose to drive the motor home while drunk, resulting in Ball's death.

Defendant disagrees with both theories. Defendant notes he and Ball were engaged to be married and she had his name tattooed on her back. Therefore, according to defendant, "[t]here was no evidence suggesting [defendant] subjectively knew that by returning to the motor home and driving forward, he ran the risk of killing the woman he loved." As to the People's second theory, defendant argues that "because it was not shown [defendant] was aware that driving the motor home in a forward direction could kill Ball, the mere fact that he drove while intoxicated, even with four prior DUI convictions, in and of itself was not an act dangerous to life."

In finding implied malice, the trial court concluded: "And certainly at the time the defendant acted he knew that that

action was dangerous to Ginger Ball, who was laying [sic] in the street in the path of that camper or that motor home. And the defendant acted with deliberate disregard for Ginger Ball's life." In addition, the court stated someone under the influence of alcohol "simply should not get behind the wheel of a car because they don't exercise the same judgment that a person would who otherwise is not under the influence of alcohol."

Despite defendant's protestations that had he recognized the danger "he certainly would not have run over the woman to whom he was engaged to be married," the evidence revealed defendant dropped Ball's body in front of the motor home's rear tire and then drove forward over her body. In so doing, defendant acted with a conscious disregard for Ball's life.

In addition, "One who drives a vehicle while under the influence after having been convicted of that offense knows better than most that his conduct is not only illegal, but entails a substantial risk of harm to himself and others." (*People v. Brogna* (1988) 202 Cal.App.3d 700, 709.) Defendant, convicted of four prior DUIs, acted with an abandoned and malignant heart when he climbed behind the wheel of a motor home while drunk; backed it up, hitting Ball; and then drove it forward even though he knew Ball lay in front of the rear wheel. Sufficient evidence supports his conviction for second degree murder.

CONVICTIONS FOR SECOND DEGREE MURDER AND FELONY HIT AND RUN

Defendant contends the court erred in failing to stay the 25-years-to-life sentence imposed for felony hit and run. According to defendant, the prosecution recognized that Ball's death occurred after defendant, realizing he had backed over Ball, drove forward in an effort to "'get out of the area.'" Therefore, Ball's death was incidental to his desire to flee; the second degree murder count and the felony hit and run count constituted a single act, and a consecutive sentence should not have been imposed.

Prior to sentencing, defense counsel requested the court either impose a concurrent term on count four, the felony hit and run conviction, or strike the term pursuant to section 654. The court imposed a consecutive term of 25 years to life on count four.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The prohibition against multiple punishment applies where there was a course of conduct that violated more than one statute but nevertheless constituted an indivisible transaction. Whether a course of conduct is indivisible depends upon the intent and objective of the actor. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) We uphold the trial court's finding of a

divisible course of conduct if it is supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

At sentencing, defense counsel argued that under section 654, the felony hit and run was a continuation of the second degree murder conviction, and therefore a consecutive sentence should not be imposed for the hit and run. The prosecution argued the two crimes were divisible offenses because the hit and run conviction concerned different conduct and intent on defendant's part.

The trial court's imposition of a consecutive sentence for the hit and run conviction does not run afoul of section 654. Defendant argues his only intent was to flee, and his driving over Ball's body was part and parcel of that impulse. However, defendant, while drunk, backed the motor home into Ball; after he discovered her mangled body, he then drove the vehicle forward, again running over Ball. These actions support a finding of implied malice and second degree murder. After running over Ball a second time, defendant sped away in an effort to flee the scene, evincing a different mental state. Since the two crimes had objectives and mental states different from one another, the court properly sentenced defendant on both counts.

CONSECUTIVE TERM FOR HIT AND RUN

Defendant argues the court abused its discretion in imposing a consecutive term for the felony hit and run conviction.

Section 667, subdivision (e)(2)(B) requires that the indeterminate term imposed under section 667, subdivision (e)(2)(A) "shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law." Under section 667, subdivision (e)(2)(B), "[a]ny other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison."

Here, at sentencing, the court stated section 667, subdivision (e)(2)(A)(ii) required that a consecutive sentence be imposed for count four, the hit and run conviction. Based on defendant's two prior felony convictions, the court was required to impose an indeterminate life term for count one. (§ 667, subd. (e)(2)(A).) As discussed above, defendant's hit and run conviction and his second degree murder conviction constituted separate criminal acts, requiring the court to impose a consecutive sentence for count four. The court properly imposed a consecutive sentence for the felony hit and run conviction.

AIDS TEST REQUIREMENT

Finally, defendant argues the trial court lacked jurisdiction to order him to submit to an AIDS test under section 1202.1. The People agree that the order was unauthorized and request that we modify the judgment to eliminate the AIDS test order.

The trial court may order a defendant convicted of enumerated sexual offenses to submit to an AIDS test within

180 days of the date of conviction. (§ 1202.1, subds. (a), (e).) However, since defendant was not convicted of any of the offenses enumerated in section 1202.1, the court was without authorization to make the order requiring the AIDS test and the order must therefore be stricken.

DISPOSITION

The order requiring defendant to submit to AIDS testing pursuant to section 1202.1 is stricken and the court is directed to amend its records to so reflect, to amend the abstract of judgment accordingly, and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ MAURO _____, J.

_____ HOCH _____, J.