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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAQUEL BURNETT,

Defendant and Appellant.

C071427

(Super. Ct. Nos. 09F04018 &
12F00832)

In case No. 12F00832, a jury convicted defendant of driving under the influence of alcohol and driving with a blood-alcohol level of .08 percent or greater, among other things. The trial court sentenced defendant in that case, and also in case No. 09F04018, imposing an aggregate prison term of seven years four months.

Defendant now contends (1) her convictions for driving under the influence and driving with a blood-alcohol level of .08 percent or greater must be reversed, because contrary to the allegations in the information, there is no evidence that she had three prior

“felony” violations of Vehicle Code section 23152 within 10 years “pursuant to Vehicle Code Section 23550.5”; and (2) there are errors in the abstract of judgment.

We conclude (1) defendant’s claim of insufficient evidence addresses a variance between pleading and proof, but the challenge to the variance is forfeited and it did not prejudice defendant; and (2) the abstract of judgment must be corrected.

We will affirm the judgment and direct the trial court to correct the abstract of judgment.

BACKGROUND

We do not recount the background for case No. 09F04018 as those facts are not relevant to the contentions on appeal. Private security officers Vitaliy Banakh and Artem Nika saw a dark SUV, driven by a woman, speed onto El Camino Avenue from Del Paso Boulevard. The SUV continued down El Camino Avenue past a funeral home. The security officers heard a loud pop followed by a bang.

The officers found the SUV stopped at the intersection of El Camino Avenue and Rio Linda Boulevard. A power pole was broken and the SUV had significant damage to the front suspension and wheel well. Banakh looked through the open front passenger window and saw a single occupant, defendant, in the driver’s seat.

Banakh asked defendant if she was all right. Defendant replied that she needed to “get out of here” and asked for a ride. Banakh left the SUV to speak with Nika; when he returned a moment later, defendant was gone.

Chantelle Johnson saw the accident and called 9-1-1. She reported that she thought defendant was drunk. Defendant walked away from the accident and Johnson followed her. Defendant repeatedly asked Johnson for help and offered her money.

Sacramento City Police Officer Dani Longanecker was dispatched to the scene, where she found defendant and Johnson. Defendant saw the patrol car, dropped a shopping bag, and walked away. Longanecker contacted defendant, who appeared to be intoxicated. Defendant said the SUV was hers but she was not the driver. Defendant

agreed to sit in the back of the patrol car, but almost fell backwards when she tried to climb in. Officer Longanecker searched the discarded shopping bag, which contained two unopened cans of cold beer.

The parties stipulated that defendant's preliminary blood-alcohol tests were 0.20 percent and 0.23 percent, and her blood draw tested at 0.28 percent.

Testifying for the defense, Aushajuan Hardy said that on the day of the accident he drove defendant to the store where she purchased two cans of beer. Hardy said that after the beer purchase, an unseen vehicle sideswiped the SUV, causing it to spin out of control. Hardy said he ran away in a panic when the SUV came to a stop.

In case No. 12F00832, a jury convicted defendant of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)),¹ driving with a blood-alcohol level of .08 percent or greater (§ 23152, subd. (b)), hit and run with property damage (§ 20002, subd. (a)), and driving with a suspended license (§ 14601.2, subd. (a)). The jury also found true an allegation that defendant had a blood-alcohol level exceeding 0.15 percent. (§ 23578). Defendant admitted three prior driving under the influence convictions within the last 10 years. (§ 23550.)

The trial court sustained a strike allegation (§§ 667, subs. (b)-(i), 1170.12) and found defendant in violation of her probation in a prior case, case No. 09F04018.² Sentencing defendant in both cases, the trial court revoked probation and imposed a six-year prison term plus a consecutive 16-month prison term, for an aggregate of seven years four months in prison.

¹ Undesignated statutory references are to the Vehicle Code.

² In case No. 09F04018, defendant had previously pleaded no contest to robbery while acting in concert. (Pen. Code, §§ 211, 213, subd. (a)(1)(A).) The trial court had placed her on probation for five years.

DISCUSSION

I

Defendant contends her convictions for driving under the influence and driving with a blood-alcohol level of .08 percent or greater must be reversed, because contrary to the allegations in the information, there is no evidence that she had three prior “felony” violations of Vehicle Code section 23152 within 10 years “pursuant to Vehicle Code Section 23550.5.”

Defendant was charged in count one with driving under the influence in violation of section 23152, subdivision (a), and she was charged in count two with driving a vehicle while having 0.08 percent and more alcohol by weight in her blood, in violation of section 23152, subdivision (b). Both counts further alleged that defendant had three prior “felony” violations of section 23152 within the preceding 10 years and that she was convicted of those offenses “pursuant to Vehicle Code Section 23550.5.”

Defendant admitted the three prior convictions before trial, and she concedes there is sufficient evidence to support the verdicts that she violated sections 23152, subdivisions (a) and (b) on the day of the accident. But she contends the three prior convictions were misdemeanors, not felonies as alleged in the information. She further claims there is no indication in the record that she was ever convicted of those prior offenses “pursuant to Vehicle Code Section 23550.5” as alleged in the information.

A violation of section 23152 can be punished as a felony in certain circumstances, such as those here where defendant has three prior convictions for violating section 23152 within 10 years. (§ 23550, subd. (a).) Section 23550 does not specify that the prior convictions must be felonies. Thus, because defendant admitted the three prior section 23152 convictions alleged in the information, there is sufficient proof that counts one and two could be punished as felonies pursuant to section 23550.

But the information in this case did not reference section 23550. Instead, it referenced section 23550.5, which specifies that the prior convictions must be felonies. Accordingly, there is a variance between pleading and proof.

Nonetheless, defendant did not object to the variance between pleading and proof, and thus her contention on appeal is forfeited. “There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions.” (*People v. Toro* (1989) 47 Cal.3d 966, 976, fn. omitted, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) The failure to promptly object is regarded as consent to the new charge and forfeiture of any objection. (*People v. Toro, supra*, 47 Cal.3d at p. 976.)

In addition, a challenge to a variance between pleading and proof cannot be made for the first time on appeal where defendant was not injured or prejudiced by the variance. (*People v. Amy* (1950) 100 Cal.App.2d 126, 128; see also Pen. Code, § 960.) Here, the variance did not cause harm or prejudice to defendant. She admitted the three prior convictions that qualify her for section 23550 sentencing, and her defense at trial was that she was not the driver. Because defendant’s trial strategy, and the outcome of the trial, would have been the same had the information included section 23550, she was not prejudiced by the omission of that section.

In light of our conclusion, we need not address the Attorney General’s argument that section 23550 is a sentencing provision that need not be pleaded.

II

The parties identify clerical errors in the abstract of judgment.

A

The trial court initially imposed a \$1,000 fine on defendant in case No. 12F00832. When the clerk inquired about a restitution fine, the trial court asked if the restitution fine is included in the \$1,000 fine. The clerk said yes. The trial court then imposed a \$240 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a \$240 parole revocation fine (Pen.

Code, § 1202.45). But the abstract of judgment lists a \$1,000 fine pursuant to section 23550, an additional \$200 restitution fine and a stayed \$200 parole revocation fine.

We will direct the trial court to correct the abstract of judgment to reflect the fines as orally imposed: a \$760 fine pursuant to section 23550, a \$240 restitution fine, and a stayed \$240 parole revocation fine.

B

The trial court awarded defendant 113 days of presentence credit (99 actual days and 14 conduct days). But the abstract of judgment indicates that defendant was awarded “99” days of total credit (“14” actual days and “113” conduct days).

We will direct the trial court to correct the abstract of judgment to reflect the orally imposed award of credit.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect a \$760 fine (§ 23550), a \$240 restitution fine (Pen. Code, § 1202.4, subd. (b)), and a stayed \$240 parole revocation fine (Pen. Code, § 1202.45) in case No. 12F00832. In addition, the trial court is directed to correct the abstract of judgment to reflect 113 days of presentence credit (99 actual days and 14 conduct days). The trial court is further directed to forward a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

_____ MAURO _____, Acting P.J.

We concur:

_____ DUARTE _____, J.

_____ HOCH _____, J.