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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN SCOTT BAIRD ,

Defendant and Appellant.

C074803

(Super. Ct. No. CRF12111)

Following a fatal car accident, a jury convicted defendant Ryan Scott Baird of second degree murder, gross vehicular manslaughter, driving under the influence of alcohol or drugs (DUI) causing injury to a person other than the driver, and driving with a blood-alcohol content of 0.08 percent or more causing injury to a person other than the driver. The trial court sentenced defendant to 23 years to life in state prison.

Defendant now contends (1) there is insufficient evidence of implied malice to support his second degree murder conviction; (2) the trial court failed to calculate defendant's presentence credit; (3) the great bodily injury enhancements that attached to his murder and manslaughter convictions must be stricken; and (4) his count 3 conviction for DUI causing injury and his count 4 conviction for driving with a blood-alcohol content of 0.08 percent or greater causing injury must be reversed because they are necessarily included in his count 2 conviction for gross vehicular manslaughter.

We conclude (1) there is ample evidence in the record to support the second degree murder conviction and we will affirm defendant's convictions; (2) we will remand the matter to the trial court for calculation of presentence credit; (3) we will strike great bodily injury enhancements 1a and 1b on the count 1 murder conviction and great bodily injury enhancements 2a and 2b on the count 2 manslaughter conviction; and (4) where, as here, the surviving victims of the offenses for DUI and driving with a blood-alcohol content of 0.08 percent or greater are not the same as the deceased victim of the manslaughter conviction, the DUI and blood-alcohol content offenses are not necessarily included in the manslaughter offense; nevertheless, we will strike great bodily injury enhancement 3a on the count 3 conviction for DUI causing injury, and great bodily injury enhancement 4a on the count 4 conviction for driving with a blood-alcohol content of 0.08 percent or greater causing injury, because those enhancements are based on the manslaughter victim's injuries.

BACKGROUND

Before going to a birthday party, defendant drove to a friend's house in Woodland and started drinking. About four hours later, defendant drove to the birthday party. Defendant drank beer and whiskey at the party, including a double shot of whiskey about 30 minutes before leaving the party. He then drove three others to another friend's house.

A few minutes into the drive, defendant attempted to exit the freeway while driving at least 89 miles per hour. He lost control of the vehicle, skidded across both lanes of the off-ramp, hit the pavement, and launched off the road. The vehicle rolled multiple times before stopping upside down in a ditch. A sign at the beginning of the ramp informs drivers that the safe speed for the off-ramp is 30 miles per hour.

One of defendant's passengers, R.S., died as a result of injuries sustained in the crash. Another passenger, J.B., suffered traumatic brain injury, was in a coma for several weeks, and had pelvic fractures, a fractured femur, a dislocated shoulder, and acute

respiratory failure. The third passenger, O.R., was ejected from the vehicle and sustained multiple vertebrae fractures, a head laceration and a fracture to his forearm.

When first responders arrived at the scene, defendant was in the driver's seat with his seatbelt on and had to be cut out of the car. He showed objective signs of intoxication, admitted he had been drinking and was feeling the effects of the alcohol, but at first denied he had been driving. Among the debris scattered around the vehicle were empty bottles of whiskey, empty beer cans, and a small bottle of marijuana. Inside the car was a Safety Center DUI offender education program workbook with defendant's name and handwriting. The workbook was course material for the alcohol education class defendant was attending as part of his probation for his prior DUI convictions.

A test of defendant's blood drawn at the scene contained active and inactive marijuana metabolites, indicating he had used marijuana within four hours of the blood draw. A toxicologist testified he would expect defendant was still under the influence of the marijuana when he was driving. Defendant's blood-alcohol content was 0.18 percent. A criminalist estimated that at the time of the crash, defendant's blood-alcohol concentration likely would have been between 0.19 and 0.20 percent. The criminalist testified it would not be safe to drive with that blood-alcohol content. A toxicologist testified that combining marijuana and alcohol generally creates a higher level of impairment. Marijuana exacerbates the effects of alcohol and adversely impacts a person's ability to operate a motor vehicle. The toxicologist testified that, based on the marijuana and alcohol in defendant's system, defendant was too intoxicated to safely operate a vehicle.

In a phone call recorded between defendant and his mother, defendant admitted he was really drunk. He said he did not remember leaving the party or driving the vehicle but he had not made arrangements to get a ride or stay at the house.

Defendant had two prior DUI convictions in 2009 and 2010 and his license was suspended both times. In November 2011, defendant's license was reinstated with

restrictions allowing him to drive only to and from work and to and from his DUI offender education program. The restrictions were still in place at the time of this accident. After each conviction, defendant was advised that driving while intoxicated is “extremely dangerous to human life If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving, someone is killed, you can be charged with murder.” After his second conviction, he specifically indicated he understood driving under the influence is extremely dangerous to human life. The DUI program was an 18-month educational and counseling program, which covered DUI laws, DUI consequences, and the impact of drunk driving, including statistics on collisions and fatalities. The educational materials include a video produced by Mothers Against Drunk Driving (MADD) that shows the impact on the victims of drunk driving accidents. Prior to the collision, defendant had completed all of his required counseling sessions, including a session just three days before the crash. He also completed all of his education classes and 23 of 26 group counseling sessions.

A jury convicted defendant of the second degree murder of R.S. (Pen. Code, § 187, subd. (a) -- count 1),¹ gross vehicular manslaughter of R.S. (§ 191.5, subd. (a) -- count 2), DUI causing injury (Veh. Code, § 23153, subd. (a) -- count 3), and driving with a blood-alcohol content of 0.08 percent or greater causing injury (Veh. Code, § 23153, subd. (b) -- count 4). The jury also found true various enhancement allegations, including that defendant personally inflicted great bodily injury on O.R. (§ 12022.7, subd. (a) -- enhancements 1a, 2a, 3b, 4b), personally inflicted great bodily injury on J.B., causing him to be comatose due to a brain injury (§ 12022.7, subd. (b) -- enhancements 1b, 2b, 3c, 4c), personally inflicted great bodily injury on R.S. (§ 12022.7, subd. (a) -- enhancements 3a, 4a), and caused death or bodily injury to more than one victim (Veh.

¹ Undesignated statutory references are to the Penal Code.

Code, § 23558 -- enhancements 2c, 3d, 4d). In a bifurcated proceeding, defendant admitted he had two prior DUI convictions. (§ 191.5, subd. (d).)

The trial court sentenced defendant to 23 years to life in state prison calculated as follows: on the count 1 second degree murder conviction, 15 years to life, plus three years for enhancement 1a (inflicting great bodily injury on O.R.) and five years for enhancement 1b (inflicting great bodily injury on J.B. resulting in a coma); on the count 2 manslaughter conviction, 15 years to life, plus enhancements 2a, 2b and 2c, all stayed pursuant to section 654; on the count 3 DUI conviction, a concurrent two-year term for DUI causing injury, with enhancements 3a, 3b, 3c and 3d stayed pursuant to section 654; and on the count 4 conviction for driving with a blood-alcohol content of 0.08 percent or greater causing injury, two years, plus enhancements 4a, 4b, 4c and 4d, all stayed pursuant to section 654.

DISCUSSION

I

Defendant claims his conviction for second degree murder must be reversed because there is insufficient evidence of implied malice. Specifically, he contends that at the time of the collision, there was no evidence what his blood-alcohol level was, there was no evidence he was acting impaired when he got into the car, there was no evidence he intended to drive before he started drinking, and because no one else had been injured in his prior DUI convictions, he was not subjectively aware of the high probability of death. We are not persuaded.

“ “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ ” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322.) “We presume every fact in support of the judgment the trier of

fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "[M]alice may be express or implied." (§ 188.) Malice "is implied[] when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) "Implied malice requires that the defendant act with a wanton disregard of the high probability of death. [Citations.]" (*People v. Moore* (2010) 187 Cal.App.4th 937, 941.) The defendant must " "know[] that his conduct endangers the life of another and . . . act[] with conscious disregard for life." ' [Citations.]" (*People v. Martinez* (2003) 31 Cal.4th 673, 684.)

" 'Implied malice . . . may be proven by circumstantial evidence. [Citations.]" [Citation.]" (*People v. James* (1998) 62 Cal.App.4th 244, 277.) It may be found even if the act causes an accidental death. (*People v. Contreras* (1994) 26 Cal.App.4th 944, 954.) The rule of implied malice applies to vehicular homicide cases. When "the facts demonstrate a subjective awareness of the risk created, malice may be implied. [Citation.] In such cases, a murder charge is appropriate." (*People v. Watson* (1981) 30 Cal.3d 290, 298 (*Watson*).

In *Watson*, the California Supreme Court "deliberately declin[ed] to prescribe a formula for analysis of vehicular homicide cases, instead requiring a case-by-case approach." (*People v. Olivas* (1985) 172 Cal.App.3d 984, 989.) Courts of Appeal "have relied on some or all of the following factors in upholding such [murder] convictions: (1) blood-alcohol level above the 0.08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Austry* (1995) 37 Cal.App.4th 351, 358; see *People v. Talamantes*

(1992) 11 Cal.App.4th 968, 973.) Contrary to defendant's assertions, all four of these circumstances are present in this case.

In *Watson*, the defendant consumed alcohol then drove recklessly, killing two people when he collided with their car. In a pretrial proceeding, the defendant argued the facts did not support the charge of second degree murder. The court concluded the defendant's conduct, "reasonably viewed, exhibited wantonness and a conscious disregard for life." (*Watson, supra*, 30 Cal.3d at p. 295.) This supported a finding of implied malice, in turn justifying the murder charge against the defendant. (*Ibid.*)

The same is true here. Defendant had both marijuana and alcohol in his system. At the time of the accident, his blood-alcohol level was between 0.19 and 0.20 percent, over twice the legal limit. His level of impairment was even greater because of the marijuana in his system. He also admitted to officers at the scene of the accident that he had been drinking whiskey and "of course" was feeling its effects. Both the criminalist and the toxicologist testified that a person with defendant's level of intoxication could not drive safely. This is substantial evidence his blood-alcohol level was over the legal limit.

Defendant's license was restricted because of one of his prior drunk driving convictions. Yet, in violation of that restriction, he drove to his friend's house, began drinking, and then drove to the party, where he continued drinking alcohol. He did not make plans to stay at that house or get a ride from someone else. Instead, he drove himself and others from the party. This is substantial evidence supporting an inference that defendant had a predrinking intent to drive.

In the three years prior to the accident defendant had two prior DUI convictions. In the first he sustained a concussion. After each conviction he was advised that driving while intoxicated is extremely dangerous to human life and that if he killed someone while driving under the influence he could be charged with murder. He acknowledged that he understood. Defendant participated in a DUI education program. There is substantial evidence supporting an inference that defendant had knowledge of the risks to

human life posed by driving while intoxicated. (*People v. Murray* (1990) 225 Cal.App.3d 734, 746; *People v. Brogna* (1988) 202 Cal.App.3d 700, 705; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532.)

In addition, after consuming alcohol and marijuana, defendant exited the freeway driving at almost 90 miles per hour, approximately 20 miles per hour over the speed limit and 60 miles per hour over the posted safe speed. It was reasonable for the jury to infer from this evidence that defendant engaged in highly dangerous driving.

There is ample evidence to support defendant's second degree murder conviction.

II

Defendant next contends the trial court did not calculate his presentence credit. The People agree and we do too.

The trial court must calculate the actual presentence custody credit and presentence conduct credit a defendant may be entitled to receive. (§ 2900.5; *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) The failure to calculate presentence credit results in an unauthorized sentence. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

At the sentencing hearing, the trial court noted defendant was entitled to presentence credit. But because the trial court did not have an updated credit memorandum from the probation department, the trial court referred the matter back to the probation department for an updated memorandum. The record on appeal does not contain an updated credit memorandum and the abstract of judgment does not list defendant's presentence credit. Accordingly, we will remand the matter to the trial court for calculation of defendant's presentence credit.

III

Based on the California Supreme Court's recent decision in *People v. Cook* (2015) 60 Cal.4th 922 (*Cook*), defendant contends the great bodily injury enhancements attached to his convictions for second degree murder and gross vehicular manslaughter must be stricken. The People agree and so do we.

On defendant's count 1 conviction for second degree murder, the trial court sentenced him to 15 years to life plus enhancements pursuant to section 12022.7, subdivisions (a) and (b), for inflicting great bodily injury on O.R. and J.B. On the count 2 conviction for gross vehicular manslaughter, the trial court sentenced him to 15 years to life plus enhancements pursuant to section 12022.7, subdivisions (a) and (b) and Vehicle Code section 23558 [causing death or bodily injury to more than one victim], but stayed the sentence pursuant to section 654.

Section 12022.7, subdivision (g) provides that "[t]his section" shall not apply to murder or manslaughter. In *Cook*, the California Supreme Court held that subdivision (g) means what it says. (*Cook, supra*, 60 Cal.4th at pp. 924, 935.) We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we will strike enhancements 1a, 1b, 2a and 2b. We will not strike enhancement 2c, as it is based on Vehicle Code section 23558 and thus is not governed by the express language of section 12022.7, subdivision (g).

IV

Defendant contends his count 3 conviction for DUI causing injury and his count 4 conviction for driving with a blood-alcohol content of 0.08 percent or greater causing injury must be reversed because they are necessarily included in his count 2 conviction for gross vehicular manslaughter. The People respond that because the felony drunk driving convictions were committed against the surviving victims, they were not lesser included offenses of the manslaughter conviction. They note, however, that the great bodily injury enhancements premised on the manslaughter victim's injuries must be stricken.

"In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of any number of the offenses charged.'" (§ 954; *People v. Ortega* (1998) 19 Cal.4th 686, 692.)' (*People v. Montoya*

(2004) 33 Cal.4th 1031, 1034.) Section 954 generally permits multiple conviction.”
(*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227, italics omitted.) “But a judicially
created exception to this rule prohibits multiple convictions based on necessarily included
offenses. (*People v. Ortega, supra*, at p. 692; *People v. Pearson* (1986) 42 Cal.3d 351,
355.)” (*Montoya*, at p. 1034.) “[I]f a crime cannot be committed without also necessarily
committing a lesser offense, the latter is a lesser included offense within the former.”
(*People v. Lopez* (1998) 19 Cal.4th 282, 288.)

Defendant is correct that as to the same victim, the crimes of DUI causing bodily
injury to a person other than the driver (Veh. Code, § 23153, subd. (a)) and driving with a
blood-alcohol level of 0.08 percent or more causing bodily injury to a person other than
the driver (Veh. Code, § 23153, subd. (b)) are lesser included offenses of gross vehicular
manslaughter while intoxicated (§ 191.5). (*People v. Miranda* (1994) 21 Cal.App.4th
1464.) Here, however, the offenses were committed against different victims. Defendant
contends there is no distinction, but we disagree.

Defendant relies on *People v. Miranda, supra*, 21 Cal.App.4th 1464, and *People v.
Binkerd* (2007) 155 Cal.App.4th 1143 to support his claim. Although there were
surviving victims in both *Miranda* and *Binkerd*, the defendants in those cases were
charged with injuring (under the Vehicle Code) and killing (under the Penal Code)
the same victim. (*Miranda*, at p. 1466; *Binkerd*, at p. 1146.) “One person who injures
a person while driving under the influence commits a violation of Vehicle Code
section 23153; and if *that* person dies from that injury -- whether immediately or
sometime later -- a violation of Penal Code section 191.5 has occurred. The People do
not suggest how a victim could be killed by a moving vehicle and not incur injury in the
process. We cannot envision such a scenario, nor is one created by a hypertechnical
reading of Penal Code section 191.5.” (*Miranda*, at p. 1468, italics added; see also
Binkerd, at p. 1148 [“Appellant could not commit a violation of count 1 (former § 192,
subd. (c)(3)), without injuring that same victim, as charged in count 2”].)

