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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD TROYER,

Defendant and Appellant.

D059700

(Super. Ct. No. SCD229232)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kronberger, Jr., Judge. Affirmed.

A jury convicted Ronald Troyer of driving under the influence of a drug resulting in bodily injury (Veh. Code, § 23153, subd. (a)),¹ reckless driving causing bodily injury (§ 23104, subd. (a)), hit and run driving with an injury (§ 20001, subd. (a)) and driving a vehicle with a suspended license causing injury (§ 14601.4, subd. (a)). In connection with the driving under the influence count, the jury sustained allegations that Troyer

¹ Statutory references are to the Vehicle Code unless otherwise specified.

caused injury to more than one victim (§ 23558) and inflicted great bodily injury upon four individuals (Pen. Code, § 12022.7, subd. (a)). In connection with the reckless driving count, the jury sustained allegations that Troyer caused great bodily injury to one individual (Pen. Code, § 12022.7; Veh. Code, § 23104, subd. (b)) and inflicted great bodily injury on four individuals (Pen. Code, § 12022.7, subd. (a)).²

The trial court sentenced Troyer to 16 years eight months in prison.

FACTS

On August 15, 2010, at about 6:15 p.m., Troyer, driving a Chrysler LeBaron, picked up his friend Jeffrey Stewart outside an Alcoholics Anonymous meeting at Draper Avenue and Arenas Street in La Jolla. They decided to drive to an area where they could watch the surf. As Troyer drove south on La Jolla Boulevard, he saw a classic 1958 Chevrolet at Palomar Avenue and pointed out the vehicle to Stewart. After passing Palomar Avenue, Troyer slowed down and the Chevrolet pulled in back of Troyer's vehicle. The driver of the Chevrolet noticed Troyer's vehicle was swerving back and forth—hitting the curb of the center median and almost hitting the parked cars on the other side.

² Before trial, Troyer entered a plea of nolo contendere to driving with a suspended license that was suspended for a prior driving under the influence conviction within five years of the instant offense (§ 14601.2, subds. (a), (d)(2)) and driving with a suspended license that was suspended for refusing to take a blood alcohol test with five years of the instant offense (§ 14601.5, subds. (a), (d)(2)). Troyer also admitted allegations he had two prior convictions of driving under the influence within 10 years of the instant offense (§§ 23626, 23566, subd. (b)) in connection with the driving under the influence count and the reckless driving count.

Troyer's vehicle hit the curb as he was driving in a roundabout at La Jolla Boulevard and Camino de la Costa.³ At that point, Stewart told Troyer he should pull over. Troyer did not respond to Stewart, but straightened out the vehicle, accelerated sharply and took his hands off the steering wheel. Stewart, who said he was terrified, characterized what Troyer was doing as "ghostrid[ing]." At La Jolla Boulevard and Forward Street, Troyer's vehicle hit the roundabout, went up on the sidewalk, traveled on the sidewalk for half a block, hit an electrical box and then went through the front glass window of the Cass Street Bakery.

On the sidewalk at the time were five teenagers, who were walking north on La Jolla Boulevard after eating dinner at a Mexican restaurant down the street. Immediately after they passed the Cass Street Bakery, three of the teenagers were hit by Troyer's vehicle. Alani Aguerre, then 14 years old, was dragged by the vehicle into the restaurant. When the vehicle stopped, Aguerre's body was underneath it; paramedics and fire crews jacked up the vehicle to remove her. Aguerre was hospitalized for five weeks, two of which she was in a coma. She suffered an open wound to her torso and her lower rib cage, and fractures to her pelvis, left tibia, left fibula and a metatarsal in her right foot. Aguerre's left humerus was shattered as well.

³ A roundabout is a circular intersection in which the traffic flows in one direction around a central island. Vehicles already in the circle have the right-of-way. There are four such traffic control devices along La Jolla Boulevard. Southward from Camino de la Costa, there are roundabouts at Bird Rock Avenue, Forward Street and Midway Street. Troyer did not drive past the Forward Street roundabout.

Myles Polger, then 14 years old, suffered a broken leg and arm. When Troyer's vehicle hit him, he was thrown 15 to 20 feet from where he had been standing. Polger spent 11 days in the hospital and had five surgeries on his leg by the time of the trial.

Ian Brininstool, also 14 years old, suffered a broken leg and spent four days in the hospital.

Jeffrey Macelli, who was eating dinner at the Cass Street Bakery with his wife and sitting at a window table, was struck by Troyer's vehicle. The impact threw Macelli in the air, and he landed on the side of his body and hit his head on the floor. Macelli was hospitalized for three days with cuts all over his body, fractured ribs and a gash on the side of his head. Later, Macelli underwent surgery to repair a torn tendon in his knee, which he sustained when Troyer's vehicle struck him.

Both Macelli and his wife heard Troyer say, "Someone stole my car." Others at the scene also heard Troyer say something similar.

Another patron of the Cass Street Bakery, William Fischer, saw Troyer walk slowly to the front of his vehicle and say: "This is bad." Fischer described Troyer as "slow, sort of out of balance," with a dazed look on his face. According to Fisher, Troyer appeared to be intoxicated and was not reacting normally to the incident.

Motorist Brad Partington witnessed Troyer's vehicle crash into the window of the Cass Street Bakery. Partington saw Troyer get out of the vehicle and say, "What happened? What's going on?" Troyer then reached into the vehicle, took out some items and tried to walk away from the bakery without helping any of the victims. People stopped Troyer from leaving the scene.

San Diego Police Department Officer Robert Wells arrived on the scene about an hour after the collision. Troyer told Wells he did not remember the collision and did not ask the officer if he had hit anyone. Troyer's speech was slurred, he had an unsteady gait and his eyes were bloodshot. Troyer performed poorly in most of the field sobriety tests that Wells had him perform. Troyer's physical manifestations, such as pulse rate, indicated he was under the influence of a controlled substance. Wells concluded Troyer was under the influence of a controlled substance.

On the way to the hospital, Troyer told Wells he had blacked out during the collision, which he had also done on a previous occasion when he had been involved in a collision.⁴

After he was arrested and read his *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) rights, Troyer told another police officer he believed he had blacked out. Troyer said he had smoked marijuana earlier in the day. Troyer also said, "I knew I shouldn't have been driving. This happened to me before." Troyer related he previously crashed a vehicle after blacking out.

In 2006, Troyer passed out between two parked cars on the street and was taken to the hospital. Upon leaving the hospital, Troyer was advised not to drive.

An automobile technician employed by the San Diego Police Department examined Troyer's vehicle and found no mechanical problems. A police accident investigator estimated Troyer's vehicle was traveling between 25 to 30 miles per hour

⁴ At trial, Troyer testified he never had a blackout while driving prior to August 15, 2010.

when it first struck the raised curb in the third roundabout, and between 20 and 25 miles per hour when it crashed into the window of the Cass Street Bakery. There was no evidence of braking before the collision.

About three hours after the collision, Troyer's blood was drawn at the hospital and later analyzed. Troyer had 3.5 nanograms of Delta-9-THC (tetrahydrocannabinol), the active component of marijuana, per milliliter of blood. The prosecution's forensic toxicologist opined the levels of Delta-9-THC in Troyer's system were much higher at the time of the collision and, at that time, Troyer was driving under the influence.

A video of an interview Troyer gave to a television reporter was played for the jury. During the interview, Troyer said the collision was caused by mechanical problems of the vehicle.

The defense presented the testimony of two doctors who treated Troyer after the collision. A treating internist concluded Troyer suffered a syncopal episode (loss of consciousness) based largely on the history Troyer gave him. Before the collision, Troyer experienced a metallic taste in his mouth, which can indicate an aura that occurs before seizure activity. A treating neurologist testified Troyer could have experienced a syncopal episode or partial complex seizure before the collision.

The defense also presented the expert testimony of a doctor who specializes in pain management and uses marijuana to treat patients. The expert said it is not possible to conclude whether Troyer was under the influence of marijuana on the basis of blood tests. The expert also said Troyer's use of marijuana was unlikely to have caused a seizure because marijuana is often used to treat seizures. People who use marijuana

while driving typically drive more carefully, the expert testified. Marijuana can affect a person's reaction time, however.

Troyer testified he had smoked marijuana at 10:00 a.m. but was not feeling any effects of the marijuana when he picked up Stewart sometime after 6:00 p.m. Immediately after he saw the classic Chevrolet, Troyer noticed a steering problem with his vehicle. Troyer's vehicle clipped the first roundabout and hit the second roundabout. At the second roundabout (at Bird Rock Ave.), Troyer said his vehicle was going out of control, and he began looking for a place to pull over, but did not see one. (See fn. 3, *ante.*) At the third roundabout (at Forward St.), Troyer could not believe what was happening—he could not turn the steering wheel. (See fn. 3, *ante.*) Troyer tried to hit the emergency brake, but he could not move his foot. When the vehicle hit the curb, Troyer's head hit the steering wheel, and he did not remember anything after that until stepping out of his car.

Troyer testified about experiencing blackouts in 2006. He did not experience a blackout or seizure since 2006 after he stopped drinking alcohol and using cocaine. When he left the hospital in 2006 and was instructed not to drive, Troyer believed the doctor was referring to not driving from the hospital.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence in the superior court. Counsel presents no argument for reversal, but asks that this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible, but not arguable,

issues: (1) whether the trial court erred by imposing injury enhancements for each victim when they were incurred in one incident; (2) whether the court erred by allowing evidence of prior drunk driving convictions for showing the knowledge element in the reckless driving count even though marijuana—not alcohol—was involved in the instant incident; (3) whether custody credits were properly limited to 15 percent of actual time;⁵ (4) whether the court erred by allowing amendment of the information to include a new count of driving under the influence, which was not charged at the time of the preliminary hearing; (5) whether the absence of expert testimony on the effect of marijuana in Troyer's system during the preliminary examination should have precluded the finding of probable cause to believe Troyer was driving under the influence; (6) whether the court abused its discretion by allowing graphic photographs of the victims' injuries when defense did not contest the great bodily injury allegations; (7) whether the court abused its discretion by imposing the maximum sentence on the driving under the influence of a drug resulting in bodily injury count; (8) whether substantial evidence supported the conviction of driving under the influence of a drug resulting in bodily injury when there is no statutorily prescribed THC level for being under the influence of marijuana; (9) whether the court properly instructed the jury on lack of consciousness as a defense; and (10) whether an unanimity instruction was required on the reckless driving count, which was based on two separate theories—(a) Troyer was reckless to get in the

⁵ The record does not indicate Troyer's custody credits were limited to 15 percent.

car and drive while under the influence because of his history; and (b) Troyer drove the vehicle recklessly at the time of the collision.

We granted Troyer permission to file a brief on his own behalf. He has responded.

Troyer claims section 23153, subdivision (a) is unconstitutional to the extent the statute criminalizes driving a vehicle under the influence of a drug such as marijuana and causing bodily injury to another person. Specifically, Troyer challenges the lack of a legal standard to establish intoxication by (or being under the influence of) marijuana—or its active component, Delta-9-THC—and, therefore, argues the statute is void for vagueness—that is, without "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) Troyer is mistaken.

" "A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." ' [Citation.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107.)

Section 23153, subdivision (a) provides: "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." " 'Drug' " is defined in section 312, which reads: "The term 'drug' means any substance or

combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

Marijuana meets the definition of " 'drug' " set forth in section 312.

The "very fact" that a person has used a drug as defined by section 312 "should notify a person of ordinary intelligence that he is [at risk] of violating" section 23153, subdivision (a) should he drive a vehicle and injure another person. (See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 271.)

The statute also provides sufficient standards for ascertainment of guilt in order to prevent arbitrary and discriminatory enforcement by police. (See *Williams v. Garcetti* (1993) 5 Cal.4th 561, 575-577.)

To the extent Troyer is complaining section 23153, subdivision (a) does not set forth at what level Delta-9-THC has a pharmacological effect on the human body that adversely affects driving—such, as the 0.08 percent or more, by weight of alcohol in a person's blood stated in subdivision (b) of the statute—he is confusing one crime with another. An offense of section 23153, subdivision (a) is different and separate from an offense of section 23153, subdivision (b). Subdivision (a) of the statute criminalizes driving under the influence of alcohol and/or drugs and causing bodily injury; "[t]he gravamen of [the crime] is driving despite an impairment of capacity." (*People v. Canty* (2004) 32 Cal.4th 1266, 1279, italics omitted.) Its focus is on conduct by requiring recognizable impaired driving. Subdivision (b) of section 23153, which only applies to

consumption of alcohol, criminalizes driving with a blood-alcohol content of .08 percent or more and causing bodily injury. The focus is not on conduct but rather a bodily condition based upon a measurement. The latter is sometimes referred to as " 'per se' " driving under the influence because the prosecution does not have "to prove the accused driver was actually impaired at the time of the offense, but only that he drove with a blood-alcohol level at or exceeding 0.10 percent." (*People v. McNeal* (2009) 46 Cal.4th 1183, 1193.)⁶

Troyer also challenges the lack of a unanimity instruction for the reckless driving count. The prosecution presented evidence that (1) given his history, Troyer was reckless by getting into the car and driving while under the influence; and (2) Troyer drove recklessly at the time of the collision. A unanimity instruction is required when the evidence shows more than one unlawful act could support a single charged offense unless the prosecution elects which act it is relying upon. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) However, no unanimity instruction is required when the prosecution presents multiple theories regarding one discrete criminal act or event. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135; *People v. Carlin* (2007) 150 Cal.App.4th 322, 347.) Here, there was one crime of recklessly driving and causing bodily injury and two prosecution theories by which Troyer was guilty of the offense.

⁶ When section 23152, subdivision (b), and section 21353, subdivision (b) were enacted in 1981, the provisions criminalized driving with a blood-alcohol level of 0.10 percent or more. (Stats. 1981, ch. 940, §§ 33, 34, p. 3578.) In 1989, the Legislature lowered the punishable blood-alcohol threshold from 0.10 percent to 0.08 percent for these crimes. (Stats. 1989, ch. 1114, §§ 27, 30, 32, pp. 4080, 4082, 4084.)

The jury had to unanimously agree Troyer committed the crime, but did not need to unanimously agree whether he did so by recklessly entering the car and driving under the influence, or by driving recklessly at the time of the collision.

A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738 has disclosed no reasonably arguable appellate issues. Competent counsel has represented Troyer on this appeal.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

McINTYRE, J.