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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD ISAAC HUBER,

Defendant and Appellant.

E052734

(Super.Ct.No. SWF026085)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed with directions.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Heidi T. Salerno, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Chad Isaac Huber guilty as charged of three counts of second degree murder (Pen. Code, § 187, subd. (a); counts 1-3)¹ and one count of hit and run causing death (Veh. Code, § 20001, subds. (a), (b)(2); count 4). The jury also found defendant had three prior convictions which the trial court found constituted two prior serious felony convictions (Pen. Code, § 667, subd. (a)), two prior strike convictions (Pen. Code, § 667, subds. (c), (e)(2)(a)), and one prison prior (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to a determinate term of 40 years, to be followed by an indeterminate term of 160 years to life in prison.²

The murder and hit and run charges were based on a traffic collision that occurred on a rural two-lane road near Lake Skinner. After consuming alcohol at a local bar and while driving his “lifted” pickup truck at a high rate of speed in the opposing lane of traffic, defendant struck an oncoming car head-on, causing the deaths of its three occupants, Andres and Maribeth Sanagustin and their four-year-old son Angelo Sanagustin. Defendant then fled from the scene.

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

² The determinate sentence of 40 years consisted of two 5-year terms for the two prior serious felony convictions on counts 1 through 4. The indeterminate sentence of 160 years to life consisted of consecutive terms of 15 years to life on counts 1 through 3, tripled to 45 years to life, plus a consecutive term of 25 years to life on count 4. (§ 1170.12, subd. (c)(2)(A)(i).)

On this appeal, defendant claims his second degree murder convictions must be reversed because insufficient evidence shows he acted with implied malice at the time of the fatal collision. We conclude there is sufficient evidence of implied malice.

The People and we agree with defendant's additional claims of error, namely, that: (1) two 5-year terms for the two prior serious felony convictions were erroneously imposed on count 4 because hit and run is not a serious felony; (2) insufficient evidence supports the one-year prison prior finding; and (3) clerical errors in the abstracts of judgment must be corrected on remand.

Accordingly, we strike the two 5-year terms imposed on count 4, the one-year term imposed but stayed on the prison prior, and the prison prior itself, and we remand the matter with directions to correct and amend defendant's abstracts of judgment to reflect this court's modifications to the judgment and to correct clerical errors. In all other respects, we affirm the judgment.

II. FACTS AND PROCEDURAL HISTORY

During the late afternoon on Sunday, June 29, 2008, defendant and his friends Jarred Abatti and Abatti's girlfriend, Monica Perez, were at defendant's apartment in Temecula. Abatti and Perez invited defendant to ride with them that evening to Perez's mother's house in San Diego. Defendant said he was going to the Skybox Grill & Tavern for a while before he accompanied them to San Diego.

The Skybox is on Benton Road near Winchester Road. It was the last day of work for one of the bartenders, Vantha Tho, for whom defendant had an unrequited romantic

interest. Defendant drove to the Skybox in his full-sized 2007 GMC Sierra pickup truck, which had a “lift kit” or was “lifted” off the ground. Defendant was at the Skybox from around 7:00 p.m. to 8:00 p.m. While at the Skybox, defendant drank four shots of Jagermeister, two or three pints of beer, and a “Jagerbomb,” a shot of Jagermeister in an energy drink. Defendant told Tho that his friends were coming to pick him up and they were going to San Diego. There were several telephone calls between defendant and Abatti concerning this while defendant was at the Skybox.

Abatti and Perez arrived at the Skybox in Perez’s Toyota Tundra. They found defendant seated at the bar with a beer in front of him. Perez noticed that defendant’s eyes were red and his voice was loud, but she did not think he was impaired. Abatti, however, told an investigator he could see from defendant’s speech and gait that defendant was intoxicated, and he did not think defendant should be driving. Perez and Abatti were at the Skybox for around 10 minutes. Defendant closed out his tab at 7:48 p.m. The three of them went outside.

Abatti got into the driver’s seat of his Tundra and Perez got into the front passenger seat. Perez was surprised when defendant got into his GMC instead of getting into the Tundra with her and Abatti. Speaking from one vehicle to the other, Perez offered to drive the GMC. Defendant turned up the radio in his truck and shook his head “no.”

The GMC and the Tundra headed away from the bar, first traveling eastbound on Benton Road, then turning southbound on Washington Street. Washington Street

becomes Borel Road, and Borel Road goes through several S-curves before becoming a straight, east-west, two-lane road in a rural area. Steven Marquette was driving southbound through the S-curves when, looking in his rearview mirror, he saw defendant's GMC pass the Tundra on a curve at a high rate of speed. While Marquette was still in an S-curved section of the road—where the view of oncoming traffic was obscured by a curve and a hill, the speed limit was 55 miles per hour, and there was a “no passing” sign—the GMC crossed a double solid line to pass him going 75 to 80 miles per hour. The Tundra also passed Marquette, but safely in a broken-line passing zone. Melissa Hawley lived in a house overlooking part of the east-west stretch of Borel Road. While she was outside watering plants, she saw the GMC go by at a speed she estimated at over 100 mile per hour, followed within inches by the Tundra.

Near the entrance to Lake Skinner, Borel Road makes a 90-degree bend to the south and becomes Warren Road, also a two-lane road. Pedro Cerda was driving eastbound on Borel Road approaching the 90-degree bend. He was startled when defendant's GMC crossed a double solid line to pass him going 75 miles per hour at a “Do Not Pass” sign just before the crest of a hill. The GMC continued driving in the opposing lane of traffic as it approached the 90-degree bend, which was marked with a traffic sign showing a curved arrow and “40 MPH.” As the GMC entered the bend, Cerda saw that it was attempting to return to the proper lane, but it was unable to do so due to centrifugal force. Cerda did not see the GMC's brake lights come on.

As soon as the GMC emerged from the 90-degree bend, the GMC collided head-on with a 1999 Chevrolet Malibu traveling northbound in its proper lane on Warren Road. Cerda, a gunnery sergeant in the United States Marines, saw the collision and likened it to the explosion of an improvised explosive device. The GMC rode over the top of the Malibu. “The whole top was sheared off,” and the Malibu was “[c]ompletely destroyed.” Information retrieved from the black boxes in the vehicles indicated that, at the moment of impact, the GMC was travelling 68 to 80 miles per hour and the Malibu was traveling 22 miles per hour. The Malibu came to rest on its wheels on the east side of Warren Road. The GMC rolled several times and came to rest upside down on the east side of Warren Road, 150 feet south of the Malibu.

Abatti stopped the Tundra by defendant’s overturned truck to see what had happened. As he and Perez were about to get out of the Tundra, defendant opened the rear door on the passenger side, jumped in, and yelled, “Go!” Abatti drove away from the scene, southbound on Warren Road.

Cerda and Marquette stopped at the scene of the collision. They looked into the overturned GMC and did not see anyone. Marquette called 911 at approximately 8:09 p.m. Andres Sanagustin was driving the Malibu. He was wearing a seat belt, but the belt tore loose from the frame of the car. He was thrown from the car onto the shoulder of the road. His skull was completely crushed. Andres’s wife, Maribeth Sanagustin, was in the left rear passenger seat of the Malibu, and four-year-old Angelo Sanagustin, the son of Andres and Maribeth, was in a car seat in the middle of the back seat. Maribeth remained

in her seat, but her skull was also crushed. When emergency responders arrived, both Andres and Maribeth were dead. Angelo's skull was also crushed, but he had a pulse. Emergency responders rushed him to a hospital in an ambulance, but doctors pronounced him dead on arrival.

Abatti drove to defendant's apartment. Defendant was bleeding from his scalp, and Perez thought he had a concussion. Defendant refused to go to the hospital and cleaned his wound. Abatti, Perez, and defendant then drove to San Diego, while defendant used his cellular telephone to make several calls. Defendant called Tho at the Skybox, told her he thought his wife had stolen his truck from the parking lot, and asked whether there were surveillance cameras in the parking lot. Tho told defendant she did not know whether there were cameras outside.

Defendant placed two calls to his wife, Jennifer Conklin-Huber, at 8:23 p.m. and 8:48 p.m. She did not answer, but defendant left messages accusing her of stealing his truck. Defendant also contacted the California Highway Patrol and gave a false story that his wife had stolen his truck from the parking lot of a hotel in San Diego where defendant was staying with his girlfriend.

Defendant, Abatti, and Perez returned to Temecula on the night of Sunday, June 29, 2008, and stayed at Perez's apartment. Perez had a court appearance on Monday, June 30, and Abatti drove her to court. Later that day, Abatti drove defendant to the border crossing at San Ysidro, and Abatti and defendant walked into Mexico. Abatti left defendant at a taxi stand in Tijuana and returned to Temecula. Abatti later pled guilty to

helping defendant leave the scene of an accident and to accessory after the fact for helping defendant escape to Mexico. In November 2008, defendant was apprehended in Upland on an unrelated matter.³

Both the prosecution and the defense called expert witnesses to testify about defendant's likely blood-alcohol content near the time of the collision, based on his size and weight, assumptions about the amount of alcohol he consumed at the Skybox, and the time over which he consumed it. The prosecution expert, Maureen Black, estimated that defendant's blood-alcohol content was between .11 and .14 percent at the time of the collision. The defense expert, Dr. Darrell Clardy, estimated it was between .026 and .078 percent.

The prosecution also introduced evidence of a police interview of defendant in May 2007, a little more than a year before the fatal collision on June 29, 2008. During the interview, defendant told the officer his practice was not to drive after drinking alcohol.

³ In a prior decision (*People v. Huber* (May 18, 2010, E048050) [nonpub. opn.]), this court affirmed defendant's convictions for unlawfully driving a vehicle (Veh. Code, 10851, subd. (a)), receiving stolen property (Pen. Code, § 496d, subd. (a)), and evading an officer (Veh. Code, § 2800.2, subd. (a)). As discussed in the opinion, defendant evaded a traffic stop and led officers on a high speed chase after a sheriff's deputy saw him throw a lighted cigarette out the window of a car that had been reported stolen. Defendant had two prior strikes and was sentenced to 25 years to life.

III. DISCUSSION

A. *Substantial Evidence Shows Defendant Acted With Implied Malice*

Defendant claims his second degree murder convictions must be reversed because there is insufficient evidence he acted with implied malice at the time of the fatal collision. We disagree.

1. Standard of Review

“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.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.]” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 293.)

2. Applicable Legal Principles

Second degree murder is an unlawful killing with malice aforethought, but without the willfulness, premeditation, and deliberation necessary for first degree murder.

(§§ 187, subd. (a), 189; *People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 697.) By contrast, vehicular manslaughter is an unlawful killing without malice. (§ 192, subd. (c); *People v. Watson* (1981) 30 Cal.3d 290, 295-296 (*Watson*).) For purposes of the general murder statutes (§§ 187-189), malice may be express or implied (§ 188).

“Malice is implied when the killing is proximately caused by “an 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.”” (*People v. Knoller* (2007) 41 Cal.4th 139, 143; *Watson, supra*, at p. 300.) Thus, second degree implied malice murder requires an actual appreciation or subjective awareness on the part of the defendant that his actions, consciously and deliberately performed, endangered the life of another. (*Watson, supra*, at pp. 296-297, 300-301.)

3. Analysis

Defendant claims no reasonable trier of fact could have found beyond a reasonable doubt that he acted with implied malice at the time of the collision. He argues there is no evidence he was subjectively aware that he was endangering the lives of others when he drove away from the Skybox in his truck or while he was speeding, passing cars, and changing lanes shortly before the fatal collision.

As a general rule, “[o]ne who willfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle . . . reasonably may be held to exhibit a conscious disregard of the safety of others.” (*Watson, supra*, 30 Cal.3d. at pp. 300-301, quoting *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897.)

Defendant points out that he was not drinking at the bar “knowing he would have to drive later,” but he was “expecting to get a ride from his friends.” He also argues there were “no near-collisions or other external events” that would have alerted him that his reckless driving was endangering the lives of others. Essentially, defendant claims he was so

impaired when he left the bar that he could not have actually appreciated that his reckless driving was endangering the lives of others.⁴

Substantial evidence shows, however, that even though he was at least somewhat impaired when he left the Skybox, defendant actually appreciated and was subjectively aware that his reckless driving shortly before the collision was endangering the lives of others. Between 7:00 p.m. and 7:48 p.m., defendant drank five shots of Jagermeister and two pints of beer. He told the bartender, Tho, that his friends were picking him up, but after Abatti and Perez arrived and Perez asked defendant to let her drive his truck, defendant shook his head “no” and drove away in his truck. Defendant’s statements to Tho that his friends would be picking him up showed he knew he would be too impaired to drive when he left the bar. Also, Perez’s and Abatti’s testimony concerning defendant’s speech, gait, and demeanor showed that, though he was probably too impaired to drive, he was not too impaired to appreciate the grave risks that his acts of reckless driving were posing to others on the road.

Indeed, after leaving the Skybox, defendant drove his “lifted” GMC pickup truck extremely recklessly on a two-lane, winding and hilly road, at speeds exceeding 80 miles per hour, passing several cars in no passing zones. Defendant was driving in the opposing lane of traffic at the excessive speed of 68 to 80 miles per hour when he struck the Sanagustin family’s Malibu, resulting in the deaths of all three of its occupants.

⁴ This is in contrast to the defense position at trial, which was that defendant was not impaired when he left the Skybox and was merely speeding and passing other vehicles, not driving recklessly or endangering the lives of others.

Defendant's claim that he was too impaired to appreciate that his driving endangered the lives of others is also belied by his actions and statements after the collision. Defendant fled from the scene without attempting to render assistance to the Sanagustin family. He got into Abatti's truck and yelled, "Go." This showed he was conscious enough to understand that he had just caused a fatal collision, and wished to get away before being observed by other witnesses. That same night, defendant made several telephone calls and concocted an elaborate story that his wife had stolen his truck while he was in San Diego, in an attempt to cover his tracks and create an alibi for himself. In sum, the jury could have reasonably inferred that defendant was sufficiently sober to actually appreciate that his reckless driving was endangering the lives of others.

B. Two 5-year Enhancements Were Erroneously Imposed on Count 4

The trial court imposed two 5-year terms on each of counts 1 through 4 based on the jury's finding that defendant had two prior serious felony convictions. (§ 667, subd. (a).) Defendant claims, and the People agree, that defendant's conviction for hit and run in count 4 is not a serious felony, and for this reason the two 5-year terms were erroneously imposed on that count. We agree. Thus we strike the two 5-year terms imposed on count 4.

Penal Code section 667, subdivision (a)(1) states: "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction" As used in the statute, a "serious

felony’ means a serious felony listed in subdivision (c) of [Penal Code] section 1192.7.” (Pen. Code, § 667, subd. (a)(4).) Defendant was convicted in count 4 of hit and run in violation of Vehicle Code section 20001, subdivision (a).

Defendant and the People agree that hit and run is not a serious felony listed in subdivision (c) of Penal Code section 1192.7. Subdivision (c)(8), for instance, lists “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice” But as the People concede, this language does not encompass a violation of Vehicle Code section 20001, subdivision (a). “The conduct prohibited by [Vehicle Code] section 20001 is not the causing of an accident or injury but leaving the scene without presenting identification or rendering aid.” (*People v. Powell* (2010) 181 Cal.App.4th 304, 316.) Indeed, “[Vehicle Code] section 20001 does not make criminal the actual accident or event which causes the physical contact with the victim. It merely addresses the duties of a driver . . . once the accident and its attendant injuries have occurred. . . .” (*People v. Wood* (2000) 83 Cal.App.4th 862, 866.) Thus, we strike the two 5-year terms imposed on count 4, and reduce defendant’s aggregate (unstayed) determinate sentence from 40 to 30 years.

C. Insufficient Evidence Supports the Prison Prior Finding

Defendant next claims, and the People agree, that insufficient evidence supports the jury’s finding that he had one prison prior. (§ 667.5, subd. (b).) Again, we agree. We therefore strike the one-year term the trial court imposed but stayed for the prison prior, together with the prison prior finding itself.

As pertinent, section 667.5, subdivision (b) requires the court to impose a one-year term “for each prior separate prison term served for any felony” But when the felony for which the prior prison term was served was committed in another jurisdiction, the defendant must have actually *served*—not been sentenced to—at least one year in prison for the offense in the other jurisdiction. (§ 667.5, subd. (f); *People v. Pinette* (1985) 163 Cal.App.3d 1122, 1124; *People v. Harbolt* (1988) 206 Cal.App.3d 140, 159.)

The prosecution presented evidence that defendant was convicted in Arizona of unlawfully fleeing from a pursuing law enforcement vehicle in violation of Arizona Revised Statutes section 28-622.01, but the evidence also showed that defendant served less than one year in prison for the offense. (Pen. Code, § 667.5, subd. (f).) For this reason alone, insufficient evidence supports the prison prior finding, and both the finding and the one-year term imposed but stayed for the finding must be stricken from defendant’s aggregate determinate sentence.

D. Defendant’s Indeterminate Abstract of Judgment Must Be Corrected and His Determinate Abstract Must Be Amended

Lastly, defendant claims, and the People and we agree, that several clerical errors in defendant’s abstracts of judgment must be corrected on remand. (*People v. Mitchell* (2001) 26 Cal.4th 181, 183, 187-188; § 1237.1.)

Specifically, the indeterminate abstract of judgment must be corrected to show that: (1) defendant was convicted in counts 1 through 3 for second, not first, degree murder; (2) the dates of his convictions in counts 2 through 4 were November 4, 2010,

not November 14, 2010; and (3) on line 8, that defendant was sentenced pursuant to the “Three Strikes” law, the box on the line preceding the phrase “PC 667(b)-(i) or 1170.12,” must be checked.

We disagree, however, with defendant’s claim that the *determinate* abstract must be corrected to show on line 4 that defendant was sentenced under the *Three Strikes* law. The box on line 4 of the *determinate* abstract is required to be checked if the defendant was sentenced under the *Two Strikes* law.

The *determinate* abstract must however be amended to reflect the modifications to defendant’s *determinate* sentence as set forth in this opinion. Paragraph 3 of the *determinate* abstract must be corrected to (1) eliminate the reference to the prison prior and the “S” for stayed term originally imposed on the prison prior (§ 667.5, subd. (b)) and (2) show that a total of 15 years, not 20 years, is currently imposed (and not stayed) on each of defendant’s two prior serious felony convictions, resulting in an aggregate unstayd *determinate* sentence of 30 years, not 40 years.

IV. DISPOSITION

The following portions of the judgment are stricken: (1) the two 5-year terms imposed on count 4 for defendant’s two prior serious felony convictions; (2) the jury’s finding that defendant had a prison prior; and (3) the one-year term imposed but stayed for the prison prior. The matter is remanded to the trial court with directions to amend defendant’s *determinate* abstract of judgment to reflect these modifications, and to correct the errors described above in defendant’s *indeterminate* abstract of judgment. The trial

court is further directed to forward copies of defendant's corrected and amended abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Codrington
J.