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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTOS GARCIA NIETO,

Defendant and Appellant.

F063708

(Kings Super. Ct. No. 10CM8636)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Donna Tarter, Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne LeMon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J. and Poochigian, J.

STATEMENT OF THE CASE

On August 26, 2011, appellant Santos Garcia Nieto pleaded no contest to the following charges:

Count 1 – gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)); Veh. Code, § 23578)

Count 2 –driving under the influence of alcohol and/or drugs with a blood-alcohol content of 0.15 percent or higher and causing great bodily injury or death (Veh. Code, §§ 23153, subd. (a), 23558, 23578; Pen. Code, § 12022.7, subd. (a));

Count 3 – driving under the influence of alcohol and/or drugs with a blood-alcohol content equal to or great than 0.08 percent and causing great bodily injury or death (Veh. Code, §§ 23153, subd. (b), 23558, 23578; Pen. Code, § 12022.7, subd. (a)); and

Count 4 – driving on the wrong side of the roadway (Veh. Code, § 21650), an infraction.

On September 26, 2011, the trial court denied appellant probation and sentenced him to a total term of 16 years 8 months in state prison. The court imposed the upper term of 10 years on count 1, a consecutive eight-month term (one-third of the middle term) on count 2 and two consecutive three-year terms for the great bodily injury enhancements (Pen. Code, § 12022.7, subd. (a)).¹ The court stayed sentence on count 3 (Pen. Code, § 654) and dismissed count 4. The court did not impose an additional one-year prison term for appellant's violation of Vehicle Code section 23558. The court awarded appellant 594 days of custody credits.

On October 24, 2011, appellant filed a notice of appeal.

¹ One enhancement related to victim Jamee Bolding and the other related to victim Ramon Fuerte.

STATEMENT OF FACTS²

On the afternoon of April 24, 2010, Kings County Deputy Sheriff Samuel Weimer responded to the scene of a fatal vehicular accident near Highway 269 and Interstate Freeway 5. A white Chevrolet Avalanche and a Ford Cobra Coupe were involved in the accident. Deputy Weimer and other officers determined that appellant was driving the Avalanche southbound on Highway 269 and Jack Bolding was driving the Cobra northbound on the same roadway. Appellant veered on the roadway on the west side and caused the Avalanche to straddle the raised asphalt. He attempted to steer his vehicle back onto the roadway and over steered in an attempt to get the Avalanche over the raised curb. Because of the over steering, the Avalanche went into an uncontrolled skid and traveled into oncoming northbound traffic. The Avalanche struck Bolding's Cobra head-on in the northbound lane.

American Ambulance personnel found appellant face down on the ground behind the Avalanche. He was transported to Fresno Regional Community Medical Center by helicopter. Weimer noticed open beer cans in the back of the Avalanche and a few more open cans on the roadway and in the dirt next to the roadway. Officers found Bolding deceased in the front driver's seat of the Cobra. His body had sustained multiple injuries and was slumped over toward the passenger side of the front seat. Officials later determined that Bolding died from blunt force trauma.

Weimer contacted a second victim, Ramon Fuerte, who was a passenger in the Avalanche. Fuerte emitted a strong odor of alcohol, had bloodshot, watery eyes, and appeared to be intoxicated. Fuerte said he was asleep at the time of the collision and did not know what had happened. Fuerte said he and defendant were returning from Kettleman City. In response to questioning by Weimer, Fuerte said appellant had been

² Because appellant pleaded no contest to all counts, the facts are taken from the probation officer's report filed September 19, 2011.

drinking constantly since the preceding day. Fuerte had a small laceration on the right side of his face directly behind his eye. He also had a laceration on his left forearm but declined medical attention.

Emergency medical technician J. Mazzaserro arrived at the scene with her partner, J. Price, shortly after the collision occurred. Upon arrival, she provided assistance to the occupants of the Cobra. Mazzaserro declared Bolding deceased at 4:01 p.m. Price checked on the passengers of both vehicles and determined that Jamee Bolding, the passenger in the Cobra, needed more medical attention than the others. According to Mazzaserro, Jamee Lynn Bolding was not breathing, but she did have a pulse when paramedics arrived. Mazzaserro performed several life support and first aid procedures on Jamee Bolding, who was eventually airlifted to Fresno Community Regional Medical Center.

At 6:32 p.m., Weimer contacted appellant at the hospital. An attending physician advised Weimer that appellant has sustained a broken left arm and some minor scrapes on his chest and stomach area. Hospital staff also informed Weimer that appellant was still intoxicated. When Weimer finally spoke with appellant, he could smell a strong odor of alcohol. Appellant's eyes were bloodshot and watery, and his speech was slurred. Appellant initially said he could not remember anything about the collision. He eventually said that Jack Bolding pulled into his lane, and he could not miss him. When Weimer asked about his alcohol consumption before the collision, appellant said he had consumed about three beers but could not remember any other details. Hospital personnel took a blood sample from appellant at about 7:19 p.m. and it yielded a blood-alcohol content of 0.25 percent.

On the morning of April 27, 2010, Deputy Sheriff Perla Trejo contacted appellant at the medical center. Appellant reported that he was traveling southbound on Highway 269 at 3:00 p.m. on the day of the collision. Appellant said he and Fuerte were on their way home from picking onions in the Huron area. Appellant said he had one or two

beers around noon but did not have anything to eat. Appellant claimed he could not drink heavily because he suffered from diabetes and leukemia. Appellant said he was traveling 55 miles per hour when he saw a car move into his lane at a much faster speed.

Appellant said he swerved to the left to avoid a head-on collision. Appellant told Trejo, “ ‘If I didn’t move, he would’ve hit me.’ ” Appellant said everything happened so fast that he did not remember any details about the other car. According to appellant, the damage to his vehicle was on the front passenger side because he turned to the left to avoid the collision.

Appellant said he was ejected from his vehicle and believed the injury to his shoulder occurred when his shoulder hit the steering wheel at the time of ejection. Upon further questioning by Trejo, appellant said he was wearing his seatbelt but removed it when he got out of the vehicle. Appellant said he was very weak and unable to stand up at the time he got out of the vehicle. He claimed that he has a clear mind and had not consumed anything to impair his driving. Appellant admitted there was some alcohol in his system but maintained it was not enough to impair him. Appellant also said that he and Fuerte were collecting cans and that is why there were beer cans in his vehicle.

The following day, Trejo contacted Fuerte at his residence. Fuerte said appellant stopped by his home on the morning of April 24, 2010, and invited him to join him on a trip to Huron to pick up his paycheck. Fuerte said he had a beer before appellant picked him up but claimed that appellant was not intoxicated and that he, Fuerte, felt safe enough to get into appellant’s vehicle. Contrary to his earlier statements to Weimer, Fuerte said appellant may have consumed one beer before arriving at Fuerte’s home. After the pair picked up the paycheck, they went to the Huron home of appellant’s cousin and appellant drank a 12-ounce can of Coors Light beer. Appellant and Fuerte spent about one hour in Huron, and then they drove back home. On their way home, Fuerte fell in and out of sleep. At one point, Fuerte heard appellant say, “ ‘A car keeps crossing into our lane.’ ” Shortly after the collision occurred, Fuerte confirmed that he was wearing

his seatbelt but did not know whether appellant was wearing his. Fuerte did not believe that appellant was under the influence at the time of the collision. Trejo sought clarification of Fuerte's statement about appellant drinking "constantly." Fuerte explained that appellant was known to drink daily and to consume a beer and drive home after visiting with Fuerte. Trejo said appellant's drinking had become a problem with friends to the point where some friends would not invite him over any longer.

On March 24, 2011, Weimer contact Ellen Bolding, the mother of Jamee Lynn Bolding. Ellen reported that her daughter suffered two skull fractures, a crushed left cheekbone, a broken left jaw, damage to two front teeth, a broken collarbone, the removal of her left kidney, an injury to lower back vertebrae which required Jamee to wear a back brace for 45 days, two broken arms, two broken legs, and double vision.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING CONSECUTIVE TERMS OF IMPRISONMENT ON COUNTS 1 AND 2.

Appellant contends the trial court abused its discretion by imposing consecutive terms of imprisonment on counts 1 and 2.

A. Presentencing Report

In her September 19, 2011, report, the probation officer indicated that appellant was presumptively ineligible for a grant of probation (Pen. Code, § 1203, subd. (e)(3)) because he willfully inflicted great bodily injury in the perpetration of the crime of which he had been convicted. The probation officer found no unusual circumstances to overcome this rule of presumptive ineligibility. In recommending the state prison sentence, the probation officer noted: "As to Counts I and II, pursuant to Rule 4.425(a)(1), the crimes and their objectives were predominantly independent of each [other] and involved separate victims. Therefore consecutive sentencing is being recommended."

B. Sentencing Proceeding

At the September 26, 2011, sentencing hearing, the trial court read and considered the probation officer's report and a letter from appellant to the court expressing remorse and regret. The court then heard victim impact statements from Fuerte, Ellen Bolding (the wife of Jack and mother of Jamee), Kara Bolding (daughter of Jack and sister to Jamee), and Linda Arietta (sister-in-law to Jack and aunt of Jamee). Appellant apologized to the Bolding family and asked for their forgiveness. Defense counsel offered extensive arguments in support of a grant of probation. In the event the court declined to grant probation, defense counsel asked the court to impose concurrent terms of imprisonment on counts 1 and 2. The prosecutor agreed with the probation officer's recommendation of a term in state prison. The prosecutor noted appellant had willfully imposed great bodily injury on two separate victims after willfully drinking alcohol, driving with a passenger, and causing his vehicle to veer into Bolding's lane, causing the collision. The prosecutor argued: "[T]he consequences of Mr. Nieto's actions were so horrible and aggravated and deeply felt and will be permanent to the Bolding family that only the most aggravated term would be most appropriate to resolve what happened on April 24th, 2010."

The court subsequently found that probation would not be appropriate, even if appellant was not statutorily ineligible. The court noted "the circumstances of the offense indicate that Mr. Nieto poses a significant risk to the lives of the public and his incarceration is necessary for the safety of society." The court went on to weigh circumstances in mitigation and aggravation:

“[T]he circumstances in mitigation include the fact that the defendant has no prior record, and even though he did plead guilty at the trial confirmation one day before trial, the Court does consider that an early acknowledgment of wrongdoing. However, in this case Mr. Nieto at the time of his apprehension not only denied culpability but blamed the accident on the victim in this case.

“In looking at the circumstances in aggravation and mitigation, an element of the crime cannot be used to impose the greater term. However, the facts surrounding the charged offense and this case that the defendant veered off the roadway and he straddled a curb, and then in an attempt, and as pointed out by [the prosecutor], instead of stopping he over steered to get back over this curb and that’s when he lost control. That conduct in and of itself is enough to support a conviction for gross vehicular manslaughter.

“The level of intoxication was a .25 percent, and this blood [test] was taken over three hours after his apprehension. No evidence or reasonable inference could be made that Mr. Nieto had any access to alcohol. So even without calculating a falling blood alcohol level, Mr. Nieto’s blood alcohol level was over three times the legal limit. The Court does find that this aggravating term or this aggravating circumstance substantiates the imposition of the aggravated term. The Court does find that this term does serve the interest of justice based on the high degree of danger the defendant poses to the community.”

The court went on to impose the terms of imprisonment, noting as to Count 2:

“[F]or violating Vehicle Code Section 23153(a), that term will run consecutive to Count 1, and the term is a one-third consecutive term or eight months.”

C. Applicable Law

Penal Code section 669 grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes. California Rules of Court, Rule 4.425 (formerly rule 425) provides:

“Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

“(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

“(b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant’s prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.”

D. Analysis

Appellant contends all of the factors of California Rule of Court, rule 4.425(a) “point towards imposition of concurrent terms.” He maintains “[t]here was no behavior by Mr. Nieto toward the persons injured in count 2 [Jamee Bolding and Ramon Fuerte] that was separate from his behavior toward the person killed in count 1 [Jack Bolding].” (AOB 10-11) He further submits that mitigating factors, such as early acknowledgment of guilt (Cal. Rules of Court, rule 4.423(b)(3)) and the lack of a prior record (Cal. Rules of Court, rule 4.423(b)(1)), predominated as to the question of whether to impose consecutive or concurrent terms.

Only a single aggravating circumstances is required to impose consecutive sentences. A trial court has discretion to impose consecutive sentences where, as here, a single act has resulted in crimes against multiple victims. (*People v. Leon* (2010) 181 Cal.App.4th 452, 468-469.) Appellant points out “the trial court imposed consecutive terms, citing no reasons therefor.” A trial court errs when it fails to state its reasons for imposing consecutive sentences. However, a defendant waives this issue by failing to raise it in the trial court. (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1084.) Appellant contends he preserved this issue by requesting the trial court to grant probation or, in the alternative, concurrent terms of imprisonment.

Assuming the claim of error has been preserved, we note a failure to state reasons is not prejudicial error per se. If the error is harmless, the matter need not be remanded for resentencing. To determine whether a trial court’s error in making a sentencing choice requires a remand for resentencing, the reviewing court must determine if it is reasonably probable a result more favorable to the appealing party would have been reached absent the error. (*People v. Gutierrez* (1991) 227 Cal.App.3d 1634, 1638.) Although the trial court did not expressly cite the factor of multiple victims in choosing consecutive terms, that factor was cited in the report of the probation officer, which the trial court read and considered. Given the factor of multiple victims, it is not reasonably

probable a result more favorable to appellant would have been reached absent the failure to expressly state reasons for the imposition of consecutive sentences.

II. THE ABSTRACT OF JUDGMENT SHOULD BE AMENDED.

Appellant contends and respondent concedes the abstract of judgment erroneously reflects the imposition of a three-year enhancement for great bodily injury (Pen. Code, § 12022.7, subd. (a) as to count 1.

Respondent agrees and correctly explains: “The abstract of judgment reflects that the trial court imposed an enhanced punishment pursuant to Penal Code section 12022.7, subdivision (a), for count one. [Citation.] The trial court clearly intended to have both of the enhancements it imposed on appellant, pursuant to Penal Code section 12022.7, subdivision (a), to be imposed for count two. [Citation.] Therefore, the abstract of judgment is corrected to reflect that the enhanced punishment pursuant to Penal Code section 12022.7, subdivision (a), was not imposed for count one, but instead was imposed for count two.”

DISPOSITION

The judgment is affirmed. The superior court is directed to correct the abstract of judgment to reflect the imposition of two three-year enhancements pursuant to Penal Code section 12022.7, subdivision (a) with respect to count 2 and no such enhancements with respect to count 1. The superior court is further directed to transmit certified copies of the amended abstract to all appropriate parties and entities.