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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSVALDO OROZCO,

Defendant and Appellant.

G044560

(Super. Ct. No. 09NF0232)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Reversed.

Ron Boyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Oswaldo Orozco appeals from a judgment sentencing him to prison for committing vehicular manslaughter and inflicting great bodily injury. He contends there is insufficient evidence to support his conviction, and instructional and evidentiary errors mandate reversal. We reject his challenge to the sufficiency of the evidence but agree the court erroneously instructed the jury on the presumption of innocence and reasonable doubt. We therefore reverse the judgment.

FACTS

On the night of January 10, 2009, appellant and Andrew Martinez attended a house party in La Habra. At around 3:00 a.m., Martinez received a phone call from his former girlfriend. She said she was being harassed by a guy in Orange, and Martinez agreed to come help her out. However, Martinez did not want to get behind the wheel, so he asked if anyone at the party was sober enough to drive. Although appellant had been drinking, he said he was “fine” and agreed to give Martinez a ride. Appellant also agreed to take along Jesus Colin and Louis Mendez when he left the party, which was around 4:00 a.m.

That morning, Esther Carroll was driving to work on the 57 Freeway. At roughly 4:40 a.m., an “old Chevy Nova,” appellant’s car, came up from behind and passed her in the number one lane. According to Carroll, the car was going about 70 to 75 m.p.h. She testified “it didn’t pass too quickly. It was just a regular [pass], you know, maybe five, ten miles [per hour faster] than I [was] going.”

Not noticing anything unusual about the Nova, Carroll lost sight of it following the pass. As she explained it, “[T]hat particular part of the freeway [where the pass occurred] curves to the right quite a bit for a long period of time, so as we were driving, we were all . . . kind of going to the right, and the car just disappeared.” At first, Carroll did not know what happened to the Nova. When asked if she ever saw it leave the road, she said no. However, about a quarter mile up the road, she noticed the car had

veered off the right side of the road and was totally ablaze. Upon seeing the wreck, she immediately pulled over and called 911.

Police and fire crews responded to the scene at about 4:50 a.m. After the fire was extinguished, they found Colin and Martinez inside the Nova, dead from traumatic and thermal injuries. Investigators determined the car had hit a tree after leaving the roadway. Skid marks were found where the car left the road, but there were no signs of any obstructions on the roadway in that area. Nor were weather or visibility a problem at the time.

Appellant and Mendez survived the crash and made their way to a rock pile about 500 feet from the car. Between 4:52 a.m., the time of the crash, and 5:13 a.m., appellant made 11 cell phone calls to friends. Then, at 5:16 a.m., he called 911 and reported he had been involved in an accident.

At 5:24 a.m., CHP Officer Todd Kovaletz found appellant and Mendez by the rock pile. Mendez had numerous cuts and scrapes, fractured ribs and a broken arm, and appellant had head wounds (including a possible concussion), a fractured vertebrae and leg pain. Appellant told Kovaletz a blue Chevy Malibu had cut him off the road, causing him to lose control of his car. He said he was going about 70 m.p.h. at the time.

At 6:00 a.m., CHP Officer Brandon Marshall arrived on the scene and spoke with appellant in the back of an ambulance. Appellant told him a Chevy Chevelle had cut him off the road. He also claimed he had only consumed two beers that evening. However, blood testing revealed appellant's blood-alcohol level was .07 percent at 7:00 a.m. That indicated appellant probably had closer to 10 beers that night, and his blood-alcohol level would have been about .10 percent at the time of the accident.

The prosecution presented evidence appellant attended a victim impact program presented by Mothers Against Drunk Drivers (MADD) in May 2005. That same year, appellant also completed a three-month alcohol education and treatment program

entitled Driver Benefits. Both programs detailed the dangers of drinking and driving, as well as the possible criminal consequences of such.

Appellant was charged in a single count information with negligent vehicular manslaughter while intoxicated. Colin was named as the victim, and it was also alleged appellant fled the scene of the crime and caused great bodily injury to Martinez and Mendez. The jury convicted appellant on the manslaughter charge and found the injury allegation true, but it found the fleeing allegation not true. The court sentenced appellant to seven years in prison.

I

Appellant contends his conviction must be reversed because there is insufficient evidence Colin's death was caused by the commission of a driving infraction. We disagree.

In reviewing the sufficiency of the evidence to support a criminal conviction, we do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) If, in so doing, the record “discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt,” we must affirm. (*People v. Stuedemann* (2007) 156 Cal.App.4th 1, 5, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

“The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a

contrary finding does not warrant a reversal of the judgment. [Citation.]”” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) We may only “reverse a conviction for insufficiency of the evidence [if] it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955; see also *People v. Wader* (1993) 5 Cal.4th 610, 640.)

Appellant was charged with committing negligent vehicle manslaughter while intoxicated. (Pen. Code, § 191.5, subd. (b).) More particularly, it was alleged that, while driving under the influence, appellant committed a driving infraction that proximately caused Colin’s death. (*Ibid.*; Pen. Code, § 191.5, subd. (f); CALCRIM No. 3404.) As predicate infractions, the prosecution alleged appellant drove at an unsafe speed, made an unsafe turn, and failed to stay within his lane. (Veh. Code, §§ 22350, 22107 & 21658.)

Appellant argues there is insufficient evidence Colin’s death was the proximate result of any one of those infractions. In so arguing, he posits, “There are any number of events, human and mechanical, that *could have* transpired inside the car or out that *could have* caused his car to leave the roadway.” That is true, of course. Nevertheless, the circumstances of the accident were such that the jury could reasonably conclude that Colin’s death was proximately caused by the commission of the alleged driving infractions.

The record shows appellant was driving after a long night of partying that swelled his blood-alcohol level over the legal limit for operating a motor vehicle. Although he was not driving in an overtly reckless fashion when he passed Carroll shortly before the crash, she did estimate that he was driving about 70-75 m.p.h., which is above the posted speed limit for that area. Even appellant admitted to the police that he was speeding at the time of the accident.

Driving over the speed limit does not necessarily constitute unsafe driving, but combined with his intoxication, appellant’s excessive speed could very well have

caused problems for him when he tried to negotiate the winding stretch of roadway where the accident occurred. Indeed, because traffic was light, and there was no evidence that weather, visibility or road conditions were a problem at the time, the jury could reasonably conclude the accident was caused by appellant driving in an unsafe manner. Other causes were *possible*, to be sure, but the jury obviously did not believe appellant's self-serving story that another driver cut him off the road, and we are not at liberty to second-guess the jury's finding in that regard. In fact, as we have explained, we are powerless to reverse appellant's conviction unless it appears that upon *no hypothesis whatsoever* is there substantial evidence to support it. Based on the totality of the evidence, we are convinced there is substantial evidence to support the prosecution's theory that Colin's death was proximately caused by the commission of a driving infraction. Therefore, we reject appellant's challenge to the sufficiency of the evidence.

II

Citing remarks the trial judge made during voir dire, appellant argues the judge "confused and diminished the presumption of innocence and the burden of proof." We agree with appellant that the challenged remarks warrant a reversal.

During jury selection, the trial judge told the prospective jurors, "At the end of the production of evidence by the attorneys and their arguments, I'll instruct you on the law that applies to the case I'm not going to go over all of those instruction[s] now, but there's one instruction I want to tell you about now to make sure everybody is on board and can follow this instruction. It's called the instruction on presumption of innocence and burden of proof. And it goes something like this: In every criminal case, including this case, . . . the defendant is presumed to be innocent, unless and until his guilt is actually shown by evidence during the trial. And in a case where the evidence does not sufficiently show his guilt, he's entitled to an acquittal or a verdict of not guilty.

"This presumption of innocence then places upon the prosecutor . . . the burden of proving to you his guilt beyond a reasonable doubt. And there's a portion of

the instruction that even defines what is a reasonable doubt. It's not, for example, a mere possible doubt, because everything in life is open to possible or imaginary doubt. Instead it's the kind of the case where, after you heard all the evidence, it's left your mind in the kind of a state where you can't say you feel an abiding conviction of the truth of the charge. Whatever that means.

“This could mean different things to different people, but there's a couple of things it does mean. And one thing that it means is it's a presumption, which is a starting point. This is not what you call a substantive presumption, where I am telling you the defendant is innocent. I'm telling you that the trial starts with him being presumed innocent. And . . . your vote would have to remain innocent unless and until it was overcome by evidence, actual evidence, produced by somebody during the course of the trial that convinced you.”

Attempting to further explain the presumption of innocence, the judge gave the prospective jurors a hypothetical in which they were forced to vote on the case before any evidence was presented. The court said in that situation, they would have to vote not guilty because they hadn't heard any evidence. However, the judge told them, “As soon as you hear evidence then it may tend to overcome” the presumption of innocence.

The judge also told the prospective jurors it was important for them to keep an open mind about the case. And if the prosecution failed to prove its case, “so that [defendant's] not technically guilty,” then they must be willing to decide the case in favor of the defense, even if they did not personally like that result.

Appellant contends the trial judge erred by telling the prospective jurors the presumption of innocence could be overcome as soon some evidence of his guilt was presented at trial. We agree. The law is well established that the presumption of innocence applies throughout the presentation of evidence at trial; it serves as an important constitutional safeguard until any such time that the jury actually comes to a final decision the defendant's guilt has been proven beyond a reasonable doubt. (*People*

v. Goldberg (1984) 161 Cal.App.3d 170, 189-190.) It was therefore improper for the trial judge to instruct otherwise.

It was also clearly improper for the trial judge to derogatorily interject, “Whatever that means,” after providing the prospective jurors with a definition of reasonable doubt and to tell them reasonable doubt “could mean different things to different people.” As the United States Supreme Court has made clear, “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’ [Citation.]” (*In re Winship* (1970) 397 U.S. 358, 363.) So to imply, as the trial judge did here, that the standard is so nebulous as to defy uniform application was error of constitutional magnitude.

The constitutional standard of proof was further diminished when the trial judge stated defendant would be “technically” not guilty if the prosecution failed to prove its case. The presumption of innocence and reasonable doubt standard are essential components of due process, and when the prosecution fails to carry its burden of proof in a criminal case, the defendant does not get off on a technicality; he is deemed not guilty because the Constitution dictates that result as a matter of fundamental fairness. Indeed, one of the primary purposes of the due process clause is to “protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*In re Winship, supra*, 397 U.S. at p. 364.) The trial judge’s opening remarks to the prospective jurors in this case eviscerated that protection.

Rather than trying to defend the subject instructions, the Attorney General claims appellant waived his right to challenge them by failing to object at the time they were made. However, because the trial judge’s instructions implicated appellant’s fair

trial rights, the lack of an objection is not a bar to appellate review. (Pen. Code, § 1259; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984.)

The Attorney General also claims the trial judge's instructions during voir dire were not that important because they "were not directed at explaining the law on reasonable doubt or the presumption of innocence, but instead were meant to give the jurors a general overview of the structure and order of a criminal trial." The record belies this claim. During voir dire, the trial judge did inform the prospective jurors he would be instructing them on the law at the conclusion of the evidence. However, the judge also said "there's one instruction I want to tell you about now to make sure everybody is on board and can follow this instruction. It's called the instruction on presumption of innocence and burden of proof." The judge then spent the next several minutes going over that instruction and attempting to explain those concepts. This not only shows the judge gave those concepts special attention, but that he also expected the prospective jurors to remember and abide by that instruction in deciding the case. That special attention to the reasonable doubt instruction undermines our confidence the jury would have disregarded what they were told at the very outset of the case.

It is true, as the Attorney General points out, that by utilizing the standard jury instructions applicable in criminal cases, the judge's final jury instructions were accurate and complete in terms of explaining reasonable doubt and the presumption of innocence. (CALCRIM No. 220.) But those instructions cannot be said to have cured the judge's earlier remarks, which, as explained, confused and diminished those very concepts. In fact, by the time the final instructions were given, it is quite possible the jurors had already formed impressions in the case based on the flawed instructions they received during voir dire. Since those earlier instructions effectively lowered the prosecution's burden of proof in violation of appellant's due process rights, the error compels reversal per se and vitiates all of the jury's findings. (*People v. Johnson, supra*, 119 Cal.App.4th at pp. 984-986 [even though the trial court correctly instructed the jury

in its final instructions, its erroneous instructions on reasonable doubt during voir dire violated due process and mandated automatic reversal].)

Because of this, we need not consider appellant's remaining claims. Although we conclude the prosecution presented sufficient evidence to support appellant's conviction, and therefore a retrial is permissible, the judgment cannot stand in light of the erroneous instructions the trial judge gave during the jury selection process.

DISPOSITION

The judgment is reversed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.