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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.

CHRISTOPHER PAUL SHORE,

Defendant and Appellant.

G046826

(Super. Ct. No. 11HF1712)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent Christopher Paul Shore on appeal. Counsel filed a brief that set forth the facts of the case. Counsel did not argue against her client but advised the court no issues were found to argue on his behalf. Shore was given 30 days to file written argument on his own behalf. Shore subsequently filed a brief with this court.

Pursuant to *Anders v. California* (1967) 386 U.S. 738, to assist the court in conducting its independent review, counsel provided the court with information as to issues that might arguably support an appeal. Counsel listed as possible but not arguable issues: (1) whether the prosecutor violated Shore's Fifth Amendment rights by improperly asking the officer about Shore's silence in response to the officer's questions at the scene; and (2) whether the trial court abused its discretion by admitting evidence of "highly inflammatory photographs." In his brief, Shore raises numerous issues: (1) his drinking was not the cause of the accident and evidence of his blood alcohol level should not have been admitted; (2) he was not advised of his rights before questioning; (3) the results of the field sobriety tests should not have been admitted because the test was invalid; (4) the introduction of the photographs of his wife and her injuries was improper; and (5) the jury improperly considered newspaper and Internet material in violation of the trial court's admonition.

We have reviewed the information provided by counsel and Shore's brief. We have also independently examined the record. We found no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) We affirm the judgment.

FACTS

At approximately 10:00 p.m., on the night of the accident, Fua Vi Elaine Vaena and her husband, Tony Tauai, were driving from Santa Ana to Oceanside on the Interstate 5 freeway. Somewhere near San Juan Capistrano, Vaena saw a truck cut across traffic from the left lane to in front of her car in the right lane without signaling.

The truck went off the ramp and crashed into an open field. Vaena called 911 to report the accident.

At approximately 10:30 p.m., California Highway Patrol Officer Matthew Butler responded to the Junipero Serra off-ramp. Butler saw a woman, Tina Wilson Shore,¹ lying by the truck. Shore was the driver of the vehicle. Butler smelled the odor of alcohol emitting from Shore and observed Shore's eyes were red and watery. The officer also observed Shore's speech to be slurred.

Shore told Butler that he was struck by another car. When asked about his drinking, Shore was nonresponsive and quiet. But Shore did tell the officer he had gotten married that day and he drank a few drinks of alcohol earlier in the evening.

Shore was unable to satisfactorily perform the various sobriety tests Butler administered. When asked to complete the one legged stand test, Shore complained he had leg pain. The officer discontinued administration of that test. Shore became nonresponsive and quiet when the officer asked him further questions about drinking. When asked if he wanted to submit to a preliminary alcohol screening test, Shore did not respond. Shore told Butler he sustained a bump to his head. Tina had trauma to her head and cuts on her forehead. Shore and Tina were transported to Mission Hospital.

Tina was treated at the hospital that night for lacerations to her face, a fracture of the left orbital and left frontal sinus, and a possible fracture of the second lumbar vertebra. At the hospital, Butler took pictures of Tina's injuries. A blood sample drawn from Shore shortly after midnight revealed a blood alcohol content of 0.127 percent.

An amended information charged Shore with the following: driving under the influence of alcohol causing bodily injury with two or more prior violations of Vehicle Code section 23153, subdivision (b), in violation of Vehicle Code section 23153,

¹ We refer to the victim, Tina Wilson Shore, as Tina to avoid confusion. We intend no disrespect.

subdivision (a), a felony (count 1); and driving with a blood alcohol level of 0.08 percent or more causing bodily injury, in violation of Vehicle Code section 23153, subdivision (b), a felony (count 2). As to count one, the amended information alleged Shore personally inflicted great bodily injury upon Tina pursuant to Penal Code section 12022.7, subdivision (a). With respect to counts 1 and 2, the amended information alleged Shore suffered two prior convictions of Vehicle Code section 23152, subdivision (b).

At trial, an expert testified that based on Shore's height and weight, the test results indicate Shore had approximately eight drinks. Based on a hypothetical mirroring the facts of this case, the expert also opined there were six cues the driver was under the influence for the purpose of driving. The expert agreed a head injury could affect performance on one of the sobriety tests.

Tina testified she and Shore got married on the day of the accident at approximately 3:30 p.m. at the courthouse. After the marriage ceremony, Shore returned to work. At approximately 6:30 p.m., Tina and Shore went to BJ's Restaurant and Brewhouse (BJ's) where they ate pizza and an appetizer, and they each had one drink. At approximately 8:00 p.m., they left BJ's and sat in the car for an hour. They then went to Mugs Away Saloon (Mugs Away) where Tina had one beer and Shore had one beer and two shots.

After leaving Mugs Away, they headed home. On their way home, they were involved in a car accident. Shore was driving the car. Tina sustained an injury above her left eyebrow. She was treated and discharged the same day. Tina testified she was able to do all the things she normally does the next day, and did not think the injury was serious.

The trial court granted Shore's motion to bifurcate the prior convictions, and granted his Penal Code section 1118.1 motion to dismiss count two based on

insufficiency of the evidence. Shore waived his right to a jury trial on the prior convictions.

The jury found Shore guilty of count one and found the enhancement allegation that he personally inflicted great bodily injury pursuant to Penal Code section 12022.7, subdivision (a), to be not true. The prosecution dismissed the prior convictions by electing not to proceed with a court trial on the prior convictions.

The trial court sentenced Shore to the upper term of three years in state prison on count 1.² Shore filed a timely notice of appeal.

DISCUSSION

We will first address the issues suggested by counsel, and then address the issues raised in Shore's brief.

Prosecutor's Questions and Comments about Shore's Silence

The prosecutor was allowed to ask the officer about Shore's failure to answer certain questions at the scene and to comment on Shore's failure to respond during closing argument. The record is clear the officer posed his questions at a time when he was trying to determine whether Shore had been driving under the influence and before any arrest was made.

At trial, defense counsel first argued that when Shore failed to respond to the officer's questions during the field sobriety test, Shore was exercising his Fifth Amendment rights. A suspect "must articulate his desire to [remain silent] sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [an invocation of the right to remain silent]." (*Davis v. United States* (1994) 512 U.S. 452, 459.) The record shows Shore told the officer he was the driver and provided information regarding his name and date of birth. When asked how the accident

² The trial court found Shore to be in violation of probation in case number 09HF0274 (*People v. Shore* (Super. Ct. Orange County, 2009)), with credit for time served, but that sentence is not a subject of this appeal.

had occurred, Shore told the officer his car had been struck by another vehicle. Shore only answered some of the officer's pre-sobriety test questions. He admitted to consuming alcoholic beverages, but he did not specify the number. These facts do not lead to an inference Shore was invoking his right to remain silent.

Defense counsel also suggested it would be *Griffin*³ error for the prosecutor to comment on Shore's reluctance or failure to answer questions. The trial court overruled the objection and found no violation of Shore's Fifth Amendment rights. Under *Griffin*, the prosecutor is prohibited from commenting when the defendant exercises his or her right to remain silent. (*Griffin, supra*, 380 U.S. at p. 615.) Concluding there was no invocation of the right to remain silent, we find no *Griffin* error.

Admission of Victim Photographs

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1281-1282.)

Two photographs of the victim depicting her injuries were admitted over Shore's objection. Shore argued the photographs did not tell the jury much about the severity of the injuries and the prejudicial value outweighed the probative value. Here, the trial court expressly weighed the risk of undue prejudice against the probative value of the photographs, and found the probative value outweighed any prejudice. The court observed the victim was depicted wearing a neck brace, with gauze over her left eye, and the cuts were severe enough that bleeding could be seen. The court then noted the crux

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Griffin v. California (1965) 380 U.S. 609 (*Griffin*).

of the case was whether there was infliction of great bodily injury, a fact the defense was contesting. It was only after the appropriate weighing process that the court admitted the photographs. We have reviewed the photographs and find no abuse of discretion.

Issues Raised in Shore's Brief

Shore contends his drinking was not the cause of the accident and evidence of his blood alcohol level should not have been admitted. On appeal, an appellate court's role is to "ensure the evidence is reasonable, credible, and of solid value," and, "if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) In applying the substantial evidence standard of review, the appellate court adopts all reasonable inferences and presumes in support of the judgment the existence of every fact that a jury reasonably could have deduced from the evidence. The trier of fact makes credibility determinations and resolves factual disputes. An appellate court will not substitute its evaluation of a witness's credibility for that of the fact finder." (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352.)

The cause of the accident was a factual issue for the jury. We reject Shore's contention his drinking and driving was not the cause of the accident. Substantial evidence supports a finding Shore was operating a motor vehicle while under the influence of alcohol and committed two or more traffic violations. Shore fails to establish why the test results should not have been admitted. After reviewing the record, we conclude the results were properly admitted into evidence.

Shore complains he was not advised of his "rights" before he was questioned. We assume Shore means his *Miranda*⁴ rights. The requirements of *Miranda* are well settled. A suspect may not be subjected to a custodial interrogation unless he or

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

she has been advised of and knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel if indigent. (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) Custodial interrogation has two components. First, the person being questioned must be in custody. Second, the questioning must constitute an interrogation. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) “The phrase ‘custodial interrogation’ is crucial. The adjective [custodial] encompasses any situation in which ‘a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’ [Citation].” (*Id.* at p. 648.) The advisement of *Miranda* rights is only required when a person is subject to custodial interrogation. Here, Shore was not in custody when questioned at the scene. Accordingly, there was no need to advise him of his *Miranda* rights.

Shore complains the results of the field sobriety tests should not have been admitted into evidence because the tests were invalid. He argues his performance on the tests was influenced by his injuries. Evidence of Shore’s physical condition and injuries was before the jury. Officer Butler testified that when Shore was initially asked if he was sick or injured, he responded he was not. When asked if he had any physical impairments, Shore said he did not. Later, when he was asked to complete the one legged stand test, Shore complained he had leg pain. The officer then discontinued administration of that test. The officer also recounted Shore complained of head pain from a bump on his head. The officer conceded a head injury could negatively affect performance on the nystagmus test.

Shore fails to establish why the results of the field sobriety tests were invalid and therefore, should not have been admitted into evidence. The jury was aware of the injuries Shore claimed to have and could give those factors whatever weight it felt appropriate in evaluating the results of the tests. After reviewing the record, we conclude the results were properly admitted into evidence.

Shore claims the jury improperly considered newspaper and Internet material in violation of the trial court's admonition. He claims his wife heard jurors outside the courtroom discussing the case and articles about the case. Our review is limited to the record before us. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183.) Shore offers no other support for his claim of jury misconduct, and we find none in the record.

Lastly, Shore complains about the admission of the photographs of his wife's injuries. We have addressed the issue and need say nothing more.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.