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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.

CORY ALLEN LATHAM,

Defendant and Appellant.

G047438

(Super. Ct. No. 11CF2570)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed.

Correen Ferrentino, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \*

Defendant Cory Allen Latham filed a notice of appeal. His appointed counsel filed a brief setting forth a statement of the case, but advised this court she found

no issues to support an appeal. We provided Latham 30 days to file his own written argument, but he has not responded. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

## FACTS

A felony complaint filed in September 2011 charged Latham with causing bodily injury while driving under the influence of alcohol (DUI) and driving with a blood-alcohol concentration (BAC) exceeding 0.08 percent (Veh. Code, § 23153, subds. (a), (b)), and leaving the scene of the accident (Veh. Code, § 20001, subd. (a)). It also alleged his BAC was 0.20 percent or more at the time of driving (Veh. Code, § 23538, subd. (b)(2)), he personally inflicted great bodily injury on two persons (Pen. Code, § 12022.7, subd. (a)), and he had previously committed a DUI offense in May 2011, suffering a conviction in August 2011. (See Veh. Code, § 23560.)

At the preliminary hearing, Officer Paul Fox of the California Highway Patrol testified he was on duty on August 27, 2011, at 3:34 p.m. He received a call of a hit and run injury collision on the northbound 55 Freeway near Dyer Road in the City of Tustin. He found a male, Perry Schetter, and a female, Emily Valles, lying in the traffic lanes of the freeway. They had suffered cuts and lacerations on their face, shoulders, arms and hands and appeared to be in pain.

A witness driving in the number one lane reported seeing a black Infiniti in the carpool lane travelling at 68 miles an hour. The Infiniti passed him, swerved to the right, crossed two traffic lanes, then swerved back into the number two lane, where it struck the rear end of a motorcycle. The motorcycle ejected its driver and passenger onto the pavement. The Infiniti did not stop. The witness described the Infiniti's driver as a white male with dark hair wearing a black t-shirt.

Fox spoke with another witness who told him she also saw the accident and followed the black sedan, which ultimately pulled over on the right shoulder of the 55

Freeway near the on-ramp to Interstate 5 Freeway about a mile from the accident. A man matching the first witness's description, later identified as Latham, exited the vehicle, put items in his pocket, then walked along the shoulder toward an overpass. An officer apprehended Latham about 100 yards from the Infiniti and returned him to the scene of the collision. Latham appeared grossly intoxicated. He emitted a "very strong odor of alcoholic beverage," had red, watery eyes, slurred his speech, and could not maintain his balance. He threw up and urinated on himself in the patrol car, and fell asleep.

Fox found keys and an insurance card for the Infiniti in Latham's pocket. Fox testified the victims' motorcycle was "embedded into the front" of the Infiniti and the car's airbag had deployed.

Fox transported Latham to the California Highway Patrol station, where a technician drew blood. A forensic scientist from the county crime lab stated Latham's BAC was 0.239 percent. A trauma surgeon at Western Medical Center treated Valles for deep abrasions to her face, shoulders, arms and feet, which required skin grafts. Valles also suffered pelvic fractures and permanent scarring. Schetter suffered contusions, lacerations, and a concussion and also suffered permanent scarring.

Another witness, Roderick Anderson, stated he and Latham attended a company party. Latham drank heavily and became "very intoxicated." Anderson agreed to serve as Latham's designated driver, but got into a minor collision on the 55 Freeway. While he conversed with the other driver, Latham drove away in the Infiniti. Anderson did not know Latham collided with the motorcycle.

Records showed Latham pleaded guilty to driving under the influence on August 11, 2011, about two weeks before the current incident.

The magistrate declined to find the offenses were misdemeanors (Pen. Code, § 17, subd. (b)) and held Latham to answer (Pen. Code, § 872). An amended information filed in superior court in June 2012 charged Latham with the offenses and enhancing allegations listed above. The trial court denied Latham's demurrer and his

motion to set aside the information. The court rejected Latham's argument Penal Code section 12022.7 enhancements did not "constitute a public offense that is not already included in an underlying violation of Vehicle Code section 23153 . . . ."

In August 2012, Latham pleaded guilty to the charges and admitted the allegations. He executed a written guilty plea form that advised him of the constitutional and other rights he waived by pleading guilty. He agreed and understood the court would consider probation, but acknowledged the court could impose a seven-year eight-month prison sentence.

Latham offered the following factual basis for the plea: "In Orange County, California, on 8-27-11 I drove a vehicle while under the influence of alcohol with a B.A.C. of 0.20% or above and that I swerved my vehicle in neglect of a lawful duty which proximately caused bodily injury to both Perry S. and Emily V. Further, I failed to stop and render aid to both victims and I was previously convicted of VC 23152 with an offense date of 5-22-11. The injuries to both Perry S. and Emily V. qualify as Great Bodily Injury and under PC 12022.7(a) under current California law and, as the driver of the vehicle, I personally inflicted those injuries with both victims being non-accomplices."

Counsel signed the plea form acknowledging he had discussed its contents with Latham, explained his rights, discussed the charges, facts, possible defenses, sentence options, and other consequences of the plea with Latham. He concurred with Latham's decision to waive his rights and plead guilty.

In open court, Latham stated he understood his constitutional rights and the consequences of pleading guilty. He had discussed the charges, facts and defenses with counsel, understood and waived his right to speedy and public jury trial, the right to confront and cross-examine witnesses at trial, the right to testify or remain silent, and the right to subpoena witnesses and present evidence in his defense. He stated the factual basis was true and he was pleading guilty freely and voluntarily. Latham pleaded guilty

to each charge and admitted the enhancing allegations. Counsel joined in the plea and waivers.

At the September 14, 2012 sentencing hearing, the court stated it had read the probation report and a subsequent supplemental report. The court denied probation. It noted Latham was presumptively ineligible because of the great bodily injury findings. The court also stated “the thing that tips the balance easily [against probation] is the fact a couple of weeks before the date of the violation, you were in court pleading guilty to a misdemeanor drunk driving, and admonished by the judge [about] the dangers of drinking and driving, and you are probably lucky you didn’t kill one of these people because you would be looking at 15 to life.” The court imposed an aggregate four-year four-month sentence, including the low term of 16 months for the violation of Vehicle Code section 23153, subdivision (a), and a consecutive three-year enhancement under Penal Code section 12022.7, subdivision (a). The court imposed concurrent terms for the other violations and enhancements, assessed various fines and fees, and reserved jurisdiction to award restitution to the victims. The court also revoked Latham’s driver’s license.

#### POTENTIAL ISSUES

Latham’s appellate lawyer identifies two potential issues for our consideration: (1) Can a Penal Code section 12022.7 great bodily injury enhancement attach to a violation of Vehicle Code section 23153; and (2) Did the trial court abuse its discretion by denying probation?

#### *Great Bodily Injury Enhancement*

In August 2011, Vehicle Code section 23153 provided, “(a) 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.” (Italics added.) The version of Penal Code section 12022.7 then in effect provided, “(a) Any person who *personally inflicts great bodily injury* on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.”

As explained in *People v. Guzman* (2000) 77 Cal.App.4th 761, “the ‘bodily injury’ component of Vehicle Code section 23153 requires only proof of “‘harm or hurt to the body.’” [Citation.] . . . . [¶] Section 12022.7 is a legislative attempt to punish more severely those crimes that actually result in great bodily injury. [Citation.] It applies except where serious bodily injury is already an element of the substantive offense charged. [Citation.] . . . [¶] Since th[e] bodily injury was determined to be great bodily injury, it exceeded the level of injury required under Vehicle Code section 23153. In such a situation, it is appropriate to increase the punishment by way of an enhancement.” (*Id.* at p. 765; see also *People v. Sainz* (1999) 74 Cal.App.4th 565 [court rejected argument Vehicle Code statutes established a specific sentencing scheme for DUI with injury precluding imposition of the section 12022.7 enhancement]; accord *People v. Arndt* (1999) 76 Cal.App.4th 387, 393 [Veh. Code § 23182 does not preempt application of Pen. Code § 12022.7].) Accordingly, a Penal Code section 12022.7 great bodily injury enhancement may attach to a violation of Vehicle Code section 23153. This does not present an arguable issue.

### *Denial of Probation*

Penal Code section 1203 provides: “At a time fixed by the court, the court shall hear and determine the application, if one has been made, or, in any case, the suitability of probation in the particular case. At the hearing, the court shall consider any

report of the probation officer, including the results of the SARATSO, if applicable, and shall make a statement that it has considered the report, which shall be filed with the clerk of the court as a record in the case. If the court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, it may place the person on probation.” (Pen. Code, § 1203, subd. (b)(3); see Cal. Rules of Court, rules 4.413, 4.414.)

The court stated Latham was presumptively ineligible because of the great bodily injury findings. The court did not provide authority for its conclusion. The probation report noted “[t]he defendant does not appear specifically prohibited from a grant of probation [(Cal. Rules of Court, rule 4.413(a))].” The trial court may have relied on Penal Code section 1203, subdivision (e), which provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: . . . (3) Any person who *willfully* inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.” (Italics added.) In *People v. Lewis* (2004) 120 Cal.App.4th 837, the court held Penal Code section 1203 subdivision (e)(3) requires that the defendant “*intend[ed]* to cause great bodily injury or torture, not merely that the crime resulted in great bodily injury or torture.” (*Id.* at p. 853.)

Here, as in *Lewis*, there was no admission or factual finding Latham intended to cause the victims great bodily injury. (See *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1349-1351 [under section 1203, the trial court may make the factual determination necessary for application of the restriction]; see also *In re Varnell* (2003) 30 Cal.4th 1132, 1140-1144.) But assuming the trial court erred in determining Latham was presumptively ineligible for probation, the court also concluded probation was unwarranted based on “the fact a couple of weeks before the date of the violation, [Latham was] in court pleading guilty to misdemeanor drunk driving, and admonished by

the judge [about] the dangers of drinking and driving, and you are probably lucky you didn't kill one of these people because you would be looking at 15 to life.”<sup>1</sup> The probation report listed numerous other criteria relating to the crime and to Latham to justify denying probation, including: the instant offense appeared more serious than comparable crimes; the victims were particularly vulnerable because they were on a motorcycle; Latham caused the victims to suffer extensive injuries and they remained emotionally traumatized and anxious about driving; Latham was an active participant in the crime; the offense did not occur because of unusual circumstances; Latham was on informal probation for the previous DUI; his propensity to drink and drive indicates he has a serious alcohol problem impairing his capacity to comply with reasonable terms of probation; and he posed a hazard to the community based on his drinking and driving without regard for public safety. (See Cal. Rules of Court, rule 4.414(a), (b).) It is not reasonably probable the trial court would have granted probation had it not erred. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318; *People v. Watson* (1956) 46 Cal.2d 818, 836.) There is no arguable issue concerning the court's denial of probation.

We have reviewed the record and discern no other potential or arguable issues.

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<sup>1</sup> As noted by the court, Vehicle Code section 25593, subdivision (a) provides “The court shall advise a person convicted of a violation of . . . Section 23152 . . . as follows: [¶] ‘You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.’” (See also Veh. Code, § 13385 [as of July 1, 2008, all application forms for driver's licenses or driver's license renewal notices shall include the advisement].)

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.