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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.

OSCAR JAVIER DELATORRE
VILLALOBOS,

Defendant and Appellant.

G050099

(Super. Ct. No. 09NF1691)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance P. Jensen, Judge. Affirmed as modified.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Fleeing from the police, defendant Oscar Villalobos sped through a red light at nearly 90 miles per hour, colliding with another car at the intersection. Four cars crashed as a result of defendant's actions. One man, Orlando Botello, was killed. Two others, Carlos Butrus and Alejandro Serrano, were injured.

A jury convicted defendant of all four counts with which he was charged: (1) second degree murder (Pen. Code, § 187, subd. (a)); (2) driving under the influence causing bodily injury (Veh. Code, § 23153, subd. (a)); (3) driving with blood alcohol of .08 percent or more causing bodily injury (Veh. Code, § 23153, subd. (b)); and (4) evading a peace officer while driving recklessly and causing death and serious bodily injury (Veh. Code, § 2800.3). As to both counts 2 and 3, the jury found true three enhancement allegations: (1) defendant had a blood alcohol concentration of .20 percent or more (Veh. Code, § 23538, subd. (b)(2)); (2) defendant personally inflicted great bodily injury on victim Butrus (Pen. Code, §§ 12022.7, subd. (a)); and (3) defendant personally inflicted great bodily injury on victim Serrano (Pen. Code, §§ 12022.7, subd. (a)). Defendant admitted that he had suffered two prior prison terms. (Pen. Code, § 667.5, subd. (b).)

The court sentenced defendant to an indeterminate term of 15 years to life on count 1. The court also sentenced defendant to a consecutive, determinate term of 12 years 8 months. The determinate term consisted of: three years on count 2; six years for the great bodily injury enhancements on count 2; 1 year 8 months on count 4; and 2 years for the two prison priors. The court stayed execution of sentence pursuant to Penal Code section 654 as to count 3.

First, defendant argues that the court erred in not staying execution of sentence on count 4 pursuant to Penal Code section 654. The Attorney General concedes that defendant is correct, observing “that the evidence shows but one criminal course of conduct of reckless driving while intoxicated, with a single criminal objective of evading the police.” (See *People v. Sewell* (2000) 80 Cal.App.4th 690, 697, overruled on another ground in *People v. Howard* (2005) 34 Cal.4th 1129, 1139, fn. 5 [dictum indicating “court properly stayed sentence under Penal Code section 654 on the conviction for evading a peace officer causing serious bodily injury or death”].) We accept the concession and will modify the judgment accordingly.

Second, defendant contends that the abstract of judgment incorrectly classifies count 4 (Veh. Code, § 2800.3) as a “serious felony,” because this crime is not listed as a “serious felony” in Penal Code section 1192.7, subdivision (c). But, as the Attorney General points out, Penal Code section 1192.8, subdivision (a), explicitly classifies as a serious felony “any violation of . . . Section 2800.3 [and others] of the Vehicle Code, when any of these offenses involve the personal infliction of great bodily injury on any person other than an accomplice, . . . within the meaning of paragraph (8) . . . of subdivision (c) of [Penal Code] Section 1192.7.” Defendant personally inflicted great bodily injuries on nonaccomplices. (See *People v. Henley* (1999) 72 Cal.App.4th 555, 559 [circumstances in which section 2800.3 is violent felony].) The abstract of judgment correctly classifies count 4 as a serious felony.

DISPOSITION

The judgment is modified to stay execution of sentence on count 4, which results in defendant’s determinate sentence being reduced from 12 years 8 months in prison to 11 years in prison. The matter is remanded to the trial court with directions to

prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.