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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DEBORAH KIM KING,

Defendant and Appellant.

H036859

(Monterey County

Super. Ct. No. SS082327)

Defendant Deborah Kim King appeals after conviction, by jury trial, of gross vehicular manslaughter while intoxicated. (Pen. Code, § 191.5, subd. (a).¹) The trial court found that she had three or more prior convictions of driving under the influence (§ 191.5, subd. (d)) and sentenced her to an indeterminate prison term of 15 years to life.

On appeal, defendant contends the trial court erred by failing to grant a new trial based on newly discovered evidence concerning the prosecution's toxicology expert. She also contends the trial court erred by failing to grant a mistrial when the toxicology expert mentioned that defendant had marijuana in her system. Finally, she contends the trial court erred by allowing the prosecution to introduce evidence concerning her prior acts of driving under the influence. We will affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

On September 2, 2008, defendant drove her car through Pacific Grove and struck pedestrian Joel Woods. Woods subsequently died of his injuries. Prior to the accident, witnesses had observed defendant driving in a manner that suggested she was under the influence of alcohol or drugs. After the accident, witnesses observed defendant acting in a manner that suggested she was under the influence of alcohol or drugs. At the scene, defendant acknowledged having taken some prescription medications that day. Defendant was subjected to field sobriety tests, the results of which suggested she might be under the influence of alcohol or drugs. Defendant's blood was drawn, and toxicology tests showed prescription medications in her system. Defendant's doctor confirmed that defendant regularly took a combination of prescription medications.

At trial, the evidence focused on the question of whether defendant was under the influence of prescription medications – i.e., whether her mental or physical abilities were so impaired that she was no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances. (See CALCRIM No. 2110.) The evidence also focused on the question whether defendant knew that driving under the influence of her prescription medications was dangerous to human life.

A. Defendant's History of Drunk Driving

Defendant was convicted of driving under the influence in 1991, 1995, 1996 and twice in 1998.² Following the 1991 conviction, she completed a one-year community alcohol awareness class. Following one of the 1998 convictions, she served a two-year prison term.

Corey Clendenen, defendant's son, testified about defendant's abuse of alcohol and prescription drugs in the early to mid-1990's, when he was in high school.

² The jury learned of these prior convictions by stipulation. The prosecution later proved three of the priors for purposes of the section 191.5, subdivision (d) enhancement: 1991, 1996, and 1998 convictions of Vehicle Code section 23152, subdivision (a).

Clendenen had seen defendant drive after taking both alcohol and medications. He would tell her, “You’re an idiot [for] drinking and driving. You’re going to kill somebody.” He told her that taking medication and driving was a problem. He gave defendant these warnings at least 20 times.

Clendenen called 911 three times following defendant’s use of alcohol and medication, and he performed rescue breathing on defendant each time. In 1996, Clendenen cut off contact with defendant, in part because of her abuse of alcohol and medications.

Defendant’s ex-husband, Ben Conway, had also seen defendant abuse alcohol and prescription drugs during the early to mid-1990’s. He estimated that he and defendant had 50 to 60 conversations about the consequences of driving under the influence, which included killing herself or someone else.

In 1996, defendant was arrested for driving under the influence after she crashed into a parked vehicle in the parking lot of a nightclub. The arresting officer smelled alcohol emanating from defendant’s car, and she staggered badly when he asked her to step out of the car. Defendant admitting drinking four beers and a vodka, and her breathalyzer results showed blood alcohol levels of 0.13 and 0.12 percent.

In 1998, defendant was again arrested for driving under the influence. An officer stopped her after seeing her weave and swerve. Defendant had slurred speech, watery eyes, and the odor of alcohol. She admitted drinking two to three beers and having taken anti-depressants. Her breathalyzer test results were 0.11 percent. A urine test was negative for amphetamines, barbiturates, benzodiazepines, and opiates.

In 2000, following defendant’s release from prison, Clendenen reconnected with her. He told her that her drinking and mixing alcohol with prescription medication had to stop, and that if her behavior continued he would not allow her around his children. Since that time, he had not seen defendant drink excessively nor drink and drive. During

Christmas of 2007, he had not seen any signs of defendant being impaired and had allowed defendant to drive his children to the movies.

B. Defendant's Prescription Drug Use

Defendant saw Adelheid Ebenhoech, M.D. from January 2001 until the time of the collision in September of 2008. Dr. Ebenhoech treated defendant for chronic back pain, depression, and anxiety.

In September 2008, defendant was regularly taking the following medications: Cymbalta (duloxetine) for pain and depression; Wellbutrin (bupropion) for depression; Kadian (morphine) for chronic pain; Xanax (alprazolam) as a sedative; and Trazodone (desyrel) for sleeping and depression. Defendant also had prescriptions for several other medications, including: Clonazepam, an anti-anxiety medication; Ambien (zolpidem), a sleep aid; and Norco (morphine plus acetaminophen), another pain medication. However, she had been instructed to stop taking the Ambien and to use the Norco only as necessary, "on a very limited basis." Defendant was to take one dose each of Wellbutrin, Cymbalta, and Kadian each morning. She was to take one dose each of Trazodone and Kadian each night. She was to take no more than two Xanax per day.

Dr. Ebenhoech warned defendant to be cautious about her medication use. He told defendant not to overuse the medications, because the sedative effects could be unpredictable. He had specifically warned her that taking the Xanax with the other medications would cause additional sedation. Dr. Ebenhoech told defendant that it was dangerous to drive while taking Norco and Kadian or if she was drowsy, and he told her to be extra careful if she took multiple medications at the same time. He told defendant not to take both doses of Kadian in the morning.

About two weeks prior to the incident, on August 15, 2008, defendant had a special visit with Dr. Ebenhoech because she was suffering from fatigue. Defendant seemed very tired and reported that she "felt that she couldn't function." Dr. Ebenhoech told her that some of the medications (the Norco, Ambien, and Xanax) could be

contributing to her fatigue. He warned her not to take the sleeping pills unless necessary and to minimize her driving, since “with that level of fatigue she couldn’t be behind the wheel.”

C. Defendant’s Pre-Accident Driving

On September 2, 2008, Alesia Uchida was driving to Pacific Grove. Uchida was stopped at a stoplight at the Highway 68 off-ramp when defendant approached from behind quickly. Uchida feared that defendant might not stop in time to avoid a collision. Defendant did not hit her, but she stayed right behind Uchida as both women drove down the “very curvy” road into Pacific Grove. Defendant crossed the double yellow center line several times. At subsequent stop lights, defendant again came very close to Uchida before stopping, and defendant would remain stopped at each stoplight for a while after it changed to green. Defendant would then catch up to Uchida, and she eventually passed her. Uchida called 911 and reported that defendant was driving recklessly.

Erica Clardy also noticed defendant while driving through Pacific Grove. Defendant was changing lanes quickly, without signaling. Clardy was a few car lengths behind defendant on Forest Avenue. Both were going at least 35 miles per hour.

D. The Accident

Joel Woods had come to Pacific Grove Middle School to pick up his son who had complained of being sick. Woods parked his truck on Forest Avenue across the street from the school. The area was posted as a school zone, with a 25 mile per hour speed limit when children are present. After his son got into the truck, Woods went around the back to get in on the driver’s side.

Clardy saw Woods standing next to his truck. Woods shut the door quickly and got “flat up to the truck” just before defendant drifted to the right and struck him. Defendant did not brake at all prior to striking Woods, nor did she make any effort to veer away from him. Woods flew over the front of his truck and landed about 10 yards in front of it.

Clardy pulled over. She heard defendant repeating, “ ‘What did I do?’ ” Defendant’s lack of reaction seemed odd to Clary. Defendant appeared tired, with bags under her eyes.

Uchida, who had seen something fly into the air, also stopped at the scene. Uchida heard defendant say, “ ‘I don’t know what happened.’ ” Defendant seemed “kind of out of it” and did not react when Uchida accused her of driving like a maniac. Uchida believed that defendant was under the influence.

Pacific Grove Middle School custodian Randle Withrow heard the impact and saw Woods laying in the street. He took Woods’s son to the office and then went back out to the street, where he flagged down a passing fire truck. Defendant approached him and asked, “ ‘Did I do this?’ ” Defendant seemed bewildered and dazed.

Christine Devine-Hyink arrived after the collision. She saw defendant sitting and watching. People were yelling at defendant. Devine-Hyink took defendant aside to a nearby bench and talked to her for 30 to 45 minutes. Defendant was crying and shaking. Devine-Hyink noticed nothing unusual about defendant’s speech, and she did not believe defendant was under the influence of anything.

Woods was treated at the scene and then flown to a trauma center by helicopter. He later died of his injuries.

E. Field Sobriety Tests

Sergeant David Diehl performed field sobriety tests on defendant at the scene. He had been trained to evaluate drivers for driving under the influence of alcohol and drugs, including prescription drugs, and he was certified in drug abuse recognition. He performed field sobriety tests that he had been using for 20 years.

Defendant did not smell of alcohol, but she had droopy eyes and a slow and deliberate manner. Defendant stated that she had a bad back and bad shoulders and that she sometimes suffered from vertigo. Sergeant Diehl modified one of his field sobriety tests because of defendant’s bad back.

The first field sobriety test was the “alphabet test,” in which defendant was asked to say the letters of the alphabet from A to Z. Defendant recited the alphabet correctly, but her speech was slower than expected, and “a little deliberate.”

The second field sobriety test was the “standing modified test.” Sergeant Diehl instructed defendant to stand with her feet together and her hands at her sides. He instructed her to tilt her head back slightly and close her eyes. The test is designed to see if a person can maintain his or her position. Defendant had a “slight circular sway” during the test.

The third field sobriety test was the “finger to nose test.” Defendant was instructed to stand with her feet together, extend both arms out with her index fingers pointed, and close her eyes. Sergeant Diehl then told her to touch the tip of her nose with either her left or right index finger and then return her hand to its original position. On each of her three attempts, defendant missed the tip of her nose. On her first attempt, she initially touched her eye and then the bridge of her nose. She touched the bridge of her nose on the second and third tries. Each time, defendant had to be reminded to return her hand to its original position.

The fourth field sobriety test was the “heel to toe standing modified test.” Defendant was instructed to stand erect with her hands at her sides, and to place one foot directly in front of the other. She was told to look to the side and give her home address. Defendant could not keep her balance after turning her head.

Defendant told Sergeant Diehl she had taken some prescription medications. She specifically mentioned only Wellbutrin, Cymbalta, and Clonazepam. Sergeant Diehl noted that her mannerisms were lethargic and slow, which was consistent with being under the influence of a central nervous system depressant.

Commander John Nyunt observed defendant’s field sobriety tests. He believed defendant appeared under the influence. She was unsteady on her feet, had slow and deliberate speech, and was not cognizant of her surroundings.

Sergeant Matthew Lindholm, an instructor in the California Highway Patrol's Drug Recognition Program, confirmed that slow and deliberate speech during the alphabet test is an indicator that someone is under the influence, although not sufficient by itself to show impairment. Likewise, the slight circular sway defendant exhibited during the standing modified test was not necessarily significant alone, but it was "one more clue" about her impairment. Referring to the finger-to-nose test, missing the tip of one's nose and forgetting instructions are significant clues about impairment. Failure to maintain balance during the heel-to-toe standing modified test is significant, but not enough by itself to show a person is under the influence. Defendant's driving pattern and sleepy/droopy eyes were more clues about her impairment.

Defense expert Ronald Moore, an independent forensic scientist, testified that the preferred protocol for field sobriety tests in drug cases is a 12-step process that includes taking the person's pulse, performing eye exams, and subjecting the person to balance and coordination tests. He acknowledged that the standardized tests vary by agency and individual officers. He also acknowledged that field sobriety tests alone do not determine whether someone is impaired. Impairment is generally determined with reference to blood test results, driving patterns, field sobriety tests, and demeanor.

Moore acknowledged that the alphabet test given in this case was a common field sobriety test. He did not believe that saying the alphabet slowly and deliberately was necessarily a sign of impairment, as it was possible defendant was just being careful.

According to Moore, the standing modified test administered to defendant was similar to a standardized test called the modified position at attention test. Both tests involve watching the person for sway. Some sway is within the normal range, so he did not believe that defendant's slight sway was evidence of impairment.

The finger-to-nose test conducted in this case was also not done pursuant to the newer standardized protocol, but it was similar to the original protocol. Moore did not think that defendant exhibited any scientifically valid signs of impairment during this

test. He acknowledged that her failure to follow all instructions and failure to touch the tip of her nose could be evidence of impairment, but he also thought defendant could have been affected by distractions at the scene.

The heel-to-toe test that was conducted in this case was similar to a standardized test called the walk-and-turn test. The test in this case deviated from the standardized test in that defendant was asked to turn and give her address. Moore did not think the results of this test gave any clues about defendant's impairment.

F. Defendant's Blood Draw and Arrest

Defendant was taken to the hospital for a blood draw, which was performed about one and a half hours after the incident. During the car ride to the hospital, defendant exhibited lethargic behavior. Her speech was slow and her eyes were hazy and glassy. The officer transporting her described defendant as "kind of out of it."

Defendant's purse contained a bottle labeled as Clonazepam, but it contained various pills with different colors and markings. An officer looked them up and found the pills were Ambien, Clonazepam, Norco, Xanax, and Trazodone.

When interviewed at her home the following day by Detective Adam Sepagan and Detective Ryan McGuirk, defendant reported that she had taken Cymbalta, Wellbutrin, and two Kadian on the day of the accident. She reported that she had taken other medications the night before.

Defendant gave Detective Sepagan medication bottles from her home, and he recorded the number of pills and prescription information. The number of pills left in each bottle was generally consistent with the prescription dates and amounts. For some medications, defendant had more pills left than expected if she had taken the medications as prescribed.

A week after the incident, defendant was arrested. At the time, she told an officer that she was "detoxing." When booked, defendant again reported that she was detoxing,

explaining that she had not taken any Kadian, Xanax, or Klonopin (clonazepam) for a few days.

G. Toxicology Reports and Analyses

Forensic toxicologist Ronald Kitagawa analyzed defendant's blood sample. He first screened the sample for different classes of drugs. The screening was positive for opiates, which are pain-killers. Kitagawa initially testified that the screening was also positive for benzodiazepines and marijuana, but he later clarified that the screening was negative for benzodiazepines and that the marijuana found was an inactive metabolite.

Kitagawa then did a more thorough test using a gas chromatograph mass spectrometer (GCMS). The results were positive for the following: hydrocodone (Norco), morphine (Kadian), alprazolam (Xanax), zolpidem (Ambien), trazodone (Desyrel), and hydroxybupropion (Wellbutrin).³

Kitagawa only quantified the hydrocodone and morphine. The test showed hydrocodone present at a level of 22 nanograms per milliliter, and it showed morphine present at a level of 16 nanograms per milliliter. Assuming that those were the peak levels, the drugs would have been taken an hour and a half earlier at therapeutic levels. However, if the drugs had been taken earlier, the dose would have been greater than a therapeutic level.

For the other drugs, quantification is typically done only if there is a question about whether someone's death was caused by an overdose. There is too much variation in the range of those drugs for a quantification to help determine whether someone is impaired. In order to make that determination, one would also need to know how the person was driving and the field sobriety tests.

³ Kitagawa initially indicated that duloxetine (Cymbalta) was found during the GCMS test, but he later confirmed that none was present.

According to Kitagawa, taking hydrocodone with a central nervous system depressant such as Xanax (alprazolam) would have an additive effect. If the Xanax was taken the night before in a double dose, it could have residual additive effects the following day. Taking a narcotic can affect a person's ability to process information. When driving, a narcotic can cause the driver to have problems tracking the road, and it might slow the driver's recognition of things such as stoplight color changes. Kitagawa believed, based on the toxicology results, defendant's driving pattern, the field sobriety tests, and defendant's behavior, that defendant had been driving under the influence of central nervous system depressants.

Kitagawa began with 8.5 milliliters of blood, and he used nearly 6.5 milliliters during the testing. He then used an additional one milliliter to do a quantitative test for Xanax (alprazolam), but the results were not reportable under laboratory policy, since there was no established quality control reference.

The remainder of defendant's blood sample – about one milliliter – was sent to Forensic Analytical Sciences for retesting by toxicologist Judy Stewart, who was hired by the defense. The blood sample was not large enough to do all of the testing that defendant requested. Stewart screened defendant's blood for Ambien (zolpidem) and the result was negative. Her screening would only have found that drug if there was a concentration of 10 nanograms per milliliter or more. Since Kitagawa's test results indicated the presence of Ambien (zolpidem), it must have been in a concentration of less than 10 nanograms per milliliter

Stewart also screened for the class of drugs that includes Xanax (alprazolam). She got a positive result, but she could not quantify the amount without more blood. She found it unusual that Kitagawa's screening had not picked up the Xanax, while his GCMS test did. Stewart believed that Kitagawa's GCMS simply showed a "deflection" of Xanax rather than a true confirmation of its presence. She believed that any Xanax

had been taken the night before, and the amount in defendant's blood at the time of the accident would have been too small to have an additive effect with any other medication.

Defense medical expert Eugene Schoenfeld, M.D. reviewed the toxicology report and defendant's medical records. He testified that the amounts of morphine and hydrocodone found in defendant's blood were within the therapeutic range. He believed that a person should be warned not to drive when taking those medications until he or she becomes accustomed to the effects. A person who continues to take those medications develops a tolerance to them, which means that the medications provide pain relief without impairment. He did not necessarily think that someone taking both medications should not drive.

Dr. Schoenfeld has had patients taking a similar combination of medications as defendant. Those patients would drive to his office. Defendant had been using morphine and hydrocodone long enough to develop a tolerance. However, if defendant doubled her usual dose of morphine, it could have changed what she was used to and affected her driving.

H. Accident Reconstruction and Safety Experts

Following the incident, the City of Pacific Grove hired John Ciccarelli, a bicycle and pedestrian planner and safety analyst, to do a pedestrian safety assessment. The City had identified several sites of concern, including the Forest Avenue pick-up area at Pacific Grove Middle School. Ciccarelli believed that the road was too narrow to provide safe access to the driver's side doors of cars. He recommended the City consider removing the stopping and parking permissions at that location.

Defense expert Terrill Morris, a traffic accident reconstructionist, recreated the incident and assessed the roadway. He found that the road went from a four percent downhill grade to a two and a half percent grade at the site of the incident. He also found that the road curved to the left. The curve would make it difficult for a driver to estimate

a lateral distance and it would take a driver's attention in the direction the road was curving.

Morris measured the width of the road. It was 16 feet from the center of the road to the sidewalk. However, a parked car similar to the one Woods drove would have decreased the roadway width to about eight feet. Considering the width of defendant's car, defendant would have had only two feet, five inches to maneuver with Woods standing at the driver's door of his vehicle.

According to Morris, the average perception reaction time of a reasonable driver is 1.5 seconds. A person under the influence of alcohol or drugs will normally have a slower response time. If defendant was traveling at a speed of 35 miles per hour, she would have needed 77 feet to react within 1.5 seconds if she was not under the influence. It would have taken Woods about three seconds to walk to his car door, open it, look, and close it.

Morris did not believe that defendant drifted into Woods; he would have seen different damage to Woods's vehicle and to Woods himself. He believed defendant was "continuing on a straight path," rather than making an unsafe turn.

Morris opined that the three factors contributing to the accident were the roadway features, defendant, and Woods. He found it unclear why defendant did not observe Woods prior to the accident or make any evasive maneuvers to avoid striking him, but he acknowledged that intoxication would explain her lack of response.

To Morris's knowledge, there were no prior similar accidents at that specific location, although there had been 10 accidents in the past five years in the general area. Signs in the area clearly indicated that it was a school zone, that there was a crosswalk, and that drivers should watch for pedestrians.

I. Charges and Verdicts

Defendant was charged with murder (§ 187, subd. (a)) and gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)). The information alleged that

defendant had two or more prior convictions of driving under the influence. (§ 191.5, subd. (d).)⁴ Defendant waived jury trial on the special allegation.

The jury found defendant not guilty of murder, but it found her guilty of gross vehicular manslaughter while intoxicated. The trial court found true the prior conviction allegations. Defendant was sentenced to a prison term of 15 years to life.

J. Post-Trial Discovery

After the verdicts but prior to sentencing, defendant learned that the Department of Justice (DOJ) was investigating possible quality control compromises by toxicologist Kitagawa. She requested discovery from the prosecutor, who provided a letter from the DOJ.

The DOJ letter stated that its Toxicology Laboratory had discovered that two evidence samples analyzed by Kitagawa had been “unintentionally switched.” The DOJ had then conducted a “departmental quality assurance review” of Kitagawa’s casework dating back over a year, which was about 850 cases. That review revealed one other sample switch, and the DOJ was aware of two previous sample switches, in 2008 and 2009. The DOJ had determined that the sample switches were “isolated errors.”

Following receipt of the DOJ letter, defendant requested additional discovery. The prosecutor then forwarded a second letter from the DOJ. This letter noted that Kitagawa had been “taken off of casework” during the review of his cases.

The second DOJ letter detailed the most recent sample switch, which Kitagawa himself had discovered. The letter also described additional errors in Kitagawa’s work, including a fifth sample switch error. The following errors were classified as administrative errors: (1) a report stating that all three components of marijuana were

⁴ The information was subsequently amended to add a count of driving under the influence causing injury (Veh. Code, § 23153, subd. (a)) and an associated great bodily injury allegation, but that charge and allegation were later dismissed.

present when only the inactive metabolite had been found; (2) a report failing to list lidocaine, which was detected; (3) a report failing to list morphine.

According to the second DOJ letter, two other “discrepancies” were found in Kitagawa’s work prior to the recent review of his cases. In 2008, a tube had broken in a centrifuge and the case number written on the tube was obliterated. In 2009, there was an error during the transfer of blood into a test tube. Both errors were addressed by subsequent modifications to the standard procedures. Procedural modifications were also instituted to remediate the sample switch errors.

The second DOJ letter concluded that there was no “evidence of malicious intent or any pattern of failure to meet professional standards by Mr. Kitagawa.” It stated that his mistakes were “isolated and relatively infrequent compared to the large number of samples he analyzes each year.”

The prosecution subsequently produced a declaration from DOJ Toxicology Laboratory Assistant Director Dan Coleman. Coleman reviewed the file in the instant case and opined that Kitagawa’s report was accurate, noting: (1) the results were consistent with defendant’s prescription medications; (2) another analyst had done the initial screening; (3) the screening and GCMS analysis had produced consistent results; (4) some of the drugs were found in multiple different analyses; and (5) Kitagawa’s results were reviewed by a second toxicologist and a supervisor.

The prosecution also produced reports from the DOJ’s review of Kitagawa’s cases, which detailed additional cases with errors. These errors included: spelling errors in seven cases; two cases in which Kitagawa had written the wrong case number on the data packets; two more cases in which a drug had been found but not reported; a case in which a drug (benzodiazepine) had been found during a screening but Kitagawa had failed to list it as not having been confirmed by the GCMS; two cases in which reports needed clarifying notes; two cases in which a THC analyte was misidentified as a

similarly-named THC analyte; and a case in which Kitagawa had tested the wrong blood sample due to a case number mix-up.

DISCUSSION

A. *Denial of Motion for New Trial*

Defendant contends the trial court erred by denying her motion for a new trial following the post-trial discovery regarding the errors in toxicologist Kitagawa's work. She contends the trial court applied the wrong standard in ruling on her motion, because it did not determine whether the newly-discovered evidence would " 'make a different result probable on retrial.' " (*People v. Verdugo* (2010) 50 Cal.4th 263, 308 (*Verdugo*)). She further contends that the newly-discovered evidence would, in fact, " 'make a different result probable on retrial.' " (*Ibid.*) Additionally, she claims the prosecution's failure to disclose the evidence constituted error under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

1. Background

After receiving the discovery regarding Kitagawa's errors, defendant moved for a new trial based on newly discovered evidence.⁵ (See § 1181, subd. (8).) In her motion, she also argued that the prosecution's failure to disclose the evidence prior to trial was a *Brady* violation that denied her the right to due process of law and a fair trial under the state and federal constitutions.

In denying the motion for a new trial, the trial court stated, "When considering a motion for a new trial the Court really does sit as a 13th juror, I think. And the question is whether or not the Court would differ, I suppose, in its estimation as to whether or not the evidence was sufficient." The trial court noted that the number of errors found were

⁵ Defendant initially filed a motion for a new trial after receiving the first two DOJ letters. She filed a first amended motion for a new trial after receiving the additional discovery.

small in relation to the number of cases reviewed. It further noted that the errors were generally not favorable to the prosecution. The trial court reviewed the evidence of defendant's driving pattern and her behavior after the incident, including her performance on the field sobriety tests, and her admission to using all of the prescription drugs found in Kitagawa's testing. The trial court concluded, "And so, there just isn't any question from the evidence that was presented that the jury reached the right decision in this case. So, the motion for a new trial is denied."

2. Standard for New Trial Motion Based on Newly Discovered Evidence

Section 1181 authorizes a defendant to move for a new trial based upon nine different grounds, including "[w]hen new evidence is discovered material to the defendant, and which he [or she] could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. (8).)

" 'To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial.' [Citation.] '[T]he trial court has broad discretion in ruling on a new trial motion . . . ,' and its 'ruling will be disturbed only for clear abuse of that discretion.' [Citation.] In addition, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citation.]" (*Verdugo, supra*, 50 Cal.4th at p. 308.)

Defendant contends that the trial court applied the wrong standard to the motion for a new trial because it was based on newly discovered evidence, not insufficiency of the evidence. The People appropriately concede error. Instead of determining whether the newly discovered evidence would " 'make a different result probable on retrial' " (*Verdugo, supra*, 50 Cal.4th at p. 308), the trial court found that it effectively sat as a "13th juror," that the evidence was "sufficient," and that "the jury reached the right decision." The standard that the trial court applied here is appropriate for a ruling on a motion for a new trial based on insufficiency of the evidence. (See *Porter v. Superior*

Court (2009) 47 Cal.4th 125, 133 [“If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury’s verdict is ‘contrary to [the] ... evidence’ ” and, in doing so, “the judge acts as a 13th juror who is a ‘holdout’ for acquittal.”].) However, the standard to be applied to a motion for a new trial based on newly-discovered evidence is whether the newly discovered evidence would “ ‘make a different result probable on retrial.’ ” (*Verdugo, supra*, 50 Cal.4th at p. 308.)

Defendant argues that applying the wrong standard requires reversal per se, because it is an abuse of discretion. She relies primarily on *People v. Soojian* (2010) 190 Cal.App.4th 491 (*Soojian*). In *Soojian*, the defendant was convicted of attempted murder and robbery. At trial, he tried to show that his cousin was the perpetrator. After trial, he discovered additional evidence implicating his cousin. The trial court denied his motion for a new trial, but the matter was reversed on appeal because the trial court “had utilized an incorrect standard when analyzing the motion.” (*Id.* at p. 494.) On the appeal after remand, the appellate court again found that the trial court had applied the wrong standard. (*Id.* at p. 518.) Specifically, the trial court had erroneously required the defendant to establish that he would be found not guilty on retrial. The appellate court clarified that the defendant was only required to establish a different result was probable on retrial, which could include a hung jury – i.e., if “it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented.” (*Id.* at p. 521.)

The *Soojian* court then discussed the proper remedy for the trial court’s error, noting it had “three options: (1) remand to permit the trial court to apply the correct definition of a ‘better result,’ (2) find the error did not cause Soojian any prejudice and affirm the judgment, or (3) order the trial court to grant Soojian’s motion for a new trial.” (*Soojian, supra*, 190 Cal.App.4th at p. 521.) The court declined to remand the case after noting a number of unique circumstances, including the trial judge’s subsequent disqualification from ruling on the motion. (*Id.* at pp. 521-522.) The court declined to

find the error harmless after assessing the evidence as conflicting on important issues. (*Id.* at pp. 522-523.) The court ultimately ordered a new trial based on its “confident” determination that there was “a reasonable possibility that if a jury were to consider all of the evidence, at least one juror would have voted to find Soojian not guilty.” (*Id.* at p. 524.)

In this case, the People urge us to use the second option from the *Soojian* case – i.e., to find that the trial court’s error in applying the wrong standard did not cause defendant any prejudice. Other cases confirm that such an error can be found harmless if the reviewing court can determine that “the trial court would have reached the same result using correct legal standards” (*People v. Knoller* (2007) 41 Cal.4th 139, 158) or if “the evidence in question would not affect the outcome of the case” (*People v. Martinez* (1984) 36 Cal.3d 816, 824). Further, it is well-settled that an appellate court reviews the trial court’s ruling, not its reasoning, and that we may affirm if the judgment is correct on any ground. (*People v. Geier* (2007) 41 Cal.4th 555, 582.)

We agree that the trial court’s application of the wrong standard to defendant’s motion for a new trial did not cause defendant any prejudice. In light of the trial court’s comments, the nature of the newly-discovered evidence, and the evidence at trial, it is not reasonably probable that the trial court would have ruled differently under the proper standard.

First, as the trial court recognized, none of the newly-discovered evidence showed that Kitagawa’s results were inaccurate in this case. (Compare *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1184 [newly discovered evidence showed that expert’s results were wrong].) Thus, the new evidence was only material to the impeachment of Kitagawa generally. Typically, “ ‘[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered evidence is as impeaching evidence’ or to contradict a witness of the opposing party. [Citations.]” (*People v. Hall* (2010) 187 Cal.App.4th 282, 299.)

Second, even assuming that the newly discovered evidence was admissible to impeach Kitagawa generally, it was not sufficient to cast any doubt on the blood test results. Kitagawa's test results were consistent with the medications that defendant had been prescribed by her doctor, the medications in her possession at the time of the accident, and the medications she admitted to taking. The defense expert confirmed the presence of nearly all of the medications listed in Kitagawa's report.⁶ Also, the toxicology reports were consistent with defendant's driving pattern prior to the accident, her demeanor after the accident, and her performance on the field sobriety tests.

Third, Kitagawa's general credibility would not have been significantly damaged by introduction of the new evidence because the errors discovered during the review were primarily clerical. Most were spelling errors, case numbering errors, or sample switch errors. Kitagawa discovered some of the errors himself. Further, the number of cases with errors was a very small percentage of the cases Kitagawa had worked on, and the DOJ had found no reason to believe that Kitagawa failed to meet professional standards.

Finally, this case did not turn on the results of Kitagawa's toxicology report. The toxicology results did not determine the ultimate question of whether defendant was under the influence. The toxicology report merely stated what drugs were found in defendant's blood. Only the morphine and hydrocodone were quantified, and even those results did not determine whether defendant was under the influence. The jury had to consider all of the evidence to make that decision, including the observations of defendant before and after the accident, the field sobriety tests, the testimony of defendant's doctor, and defendant's admissions to taking numerous medications.

⁶ Although Stewart did not find any Ambien (zolpidem) in her screening, she acknowledged that her test was less sensitive than the one Kitagawa used. Likewise, although she disagreed about Kitagawa's interpretation of the GCMS test for Xanax (alprazolam), she herself got a positive result for that drug when she screened for it.

Considering all of the evidence introduced to show that defendant was under the influence, none of the newly discovered evidence was reasonably likely to change the mind of any juror. Thus, a different result is not probable on retrial. (*Verdugo, supra*, 50 Cal.4th at p. 308.)

3. Brady Violation

“In *Brady*, the United States Supreme Court held that ‘the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’ [Citation.] Thus, under *Brady* and its progeny, the state is required to disclose to the defense any material, favorable evidence. [Citations.] Favorable evidence includes both evidence that is exculpatory to the defendant as well as evidence that is damaging to the prosecution, such as evidence that impeaches a government witness. [Citations.]” (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1471-1472.)

“Evidence is ‘material’ ‘only if there is a reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different.’ [Citations.] The requisite ‘reasonable probability’ is a probability sufficient to ‘undermine[] confidence in the outcome’ on the part of the reviewing court. [Citations.]” (*In re Sassounian* (1995) 9 Cal.4th 535, 544.)

Here, assuming *arguendo* that the prosecution had a duty to provide the defense with the evidence of the DOJ’s review of Kitagawa’s casework before trial, reversal is not required because that evidence was not material within the meaning of *Brady* – that is, there is no reasonable probability that the result would have been different if the evidence had been disclosed to the defense. (*In re Sassounian, supra*, 9 Cal.4th at p. 544.) As explained in the above section, the new evidence would only have impeached Kitagawa generally. The new evidence would not have cast any serious doubt on the actual blood test results, since those results were consistent with other evidence of

defendant's prescription drug use. The evidence disclosed that a very small percentage of Kitagawa's cases had errors, most of which were clerical, and that the DOJ believed Kitagawa continued to meet professional standards. The newly discovered evidence did not address whether defendant was under the influence. Considering all of the evidence – including the observations of defendant before and after the accident, the field sobriety tests, the testimony of defendant's doctor, and defendant's admissions to taking numerous medications – there is no reasonable probability that there would have been a different result if the new evidence had been disclosed to the defense earlier.

B. Denial of Mistrial

Defendant contends that the trial court erred by failing to grant a mistrial when toxicologist Kitagawa testified that her blood had tested positive for marijuana.

1. Background

Defendant brought a motion in limine to bar the prosecution from introducing evidence that an inactive metabolite of marijuana was found in defendant's blood. The trial court initially denied the motion, but it later ordered that there be no reference to the marijuana metabolite.

When testifying, Kitagawa stated that his initial screening showed a positive result for opiates. The prosecutor asked, "And . . . for Benzodiazepines; correct?" Kitagawa responded, "I believe that, and marijuana."

After a sidebar conducted pursuant to defendant's request, Kitagawa continued testifying. He explained that he did a confirmatory test for marijuana but "just found one of the metabolites." He testified that there was no active marijuana in defendant's system.

Defendant objected to this testimony and requested the trial court give a curative instruction stating that Kitagawa had misspoken. When the trial court refused to give such an instruction, defendant moved for a mistrial. The trial court denied the mistrial request, finding that the evidence would not affect the trial and that the jury could follow

an instruction to disregard it. Defendant argued that the evidence would leave the jury with the impression that she was an illegal drug user. She requested an instruction stating that the evidence did not show defendant had used marijuana.

Defendant filed a written motion for a mistrial following Kitagawa's testimony. The trial court denied the motion, finding that there was no bad faith by either the witness or the prosecutor, and that the evidence would not have an impact on the trial. Following further discussion, the trial court told the jury:

“ ‘During his testimony criminalist Ron Kitagawa mentioned marijuana and THC. No marijuana or active THC was found in Ms. King's blood. Mr. Kitagawa's mention of marijuana and related metabolites was irrelevant. It has no bearing on this case.’ I think that was made clear also through the testimony.

“The Court hereby orders such evidence stricken from the record. You're not to consider this evidence for any purpose, you're not to discuss such evidence, or allow it to influence your deliberations in any way.”

2. Standard for Granting a Mistrial

“A trial court should grant a motion for mistrial ‘only when “ ‘a party's chances of receiving a fair trial have been irreparably damaged’ ” ’ [citation], that is, if it is ‘apprised of prejudice that it judges incurable by admonition or instruction’ [citation]. ‘Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’ [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion. [Citation.]” (*People v. Avila* (2006) 38 Cal.4th 491, 573 (*Avila*).

“Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction. [Citation.]” (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834 (*Navarrete*).

Defendant contends that the marijuana reference was incurably prejudicial, because it effectively told the jury that she was an illegal drug user. The People point out that there are circumstances under which marijuana use is not illegal, and that the jury was likely to assume that appellant had used it for her chronic pain. The People further contend that the jury could follow an instruction to disregard the reference.

We find no abuse of discretion in the trial court's determination that a curative instruction, rather than a mistrial, was the appropriate remedy for Kitagawa's improper testimony. His reference to marijuana was brief, and he explained that only an inactive metabolite was found in defendant's blood. The trial court could reasonably find that the jury would be able to follow an instruction not to consider the evidence.

The cases relied upon by defendant are distinguishable. In *Navarrete, supra*, 181 Cal.App.4th 828, the witness's improper remark strongly suggested that the defendant had confessed to the crime of committing a lewd act on a child. The evidence was otherwise "not overwhelming," in that there was no medical or forensic evidence, and the witness's remark inferred that the police had not collected forensic evidence because the defendant had confessed. (*Id.* at p. 834.) In finding that a curative instruction was not sufficient, the *Navarrete* court emphasized "the condemning power of a confession." (*Id.* at p. 835.) The court referred to the error as "the sort of 'exceptional circumstance' that supports granting a mistrial because a curative instruction cannot undo the prejudice to the defendant. [Citations.]" (*Id.* at p. 836.)

Likewise, in *People v. Bentley* (1955) 131 Cal.App.2d 687 (*Bentley*) (disapproved on other grounds by *People v. White* (1958) 50 Cal.2d 428, 430-431), the improper evidence suggested the defendant had committed prior child molestations. As a result, the defendant had to defend himself against these additional charges of misconduct. The appellate court concluded that under the circumstances, a mistrial would have been the proper response, rather than a curative instruction. "The mere direction that the testimony should be disregarded was no antidote for the poison that had been injected

into the minds of the jurors.” (*Bentley, supra*, at p. 690.) Since the evidence left “some doubt” whether the defendant committed the charged offense, reversal was required. (*Ibid.*)

The improper testimony in this case suggested possible marijuana use, not child molestation. While marijuana use is often illegal, the suggestion that defendant may have used it was not so prejudicial that a curative instruction could not be followed. Cases have often found that a brief reference to prior criminal activity does not warrant a mistrial. For instance, in *Avila, supra*, 38 Cal.4th 491, a witness violated a pretrial order by saying that the defendant had recently been in prison. The California Supreme Court found no abuse of discretion in the trial court’s decision to order the testimony stricken and instruct the jury not to consider it, rather than granting a mistrial. (*Id.* at pp. 573-574.)

The trial court’s decision is also reasonable based on the state of the evidence at the time the jury heard the improper testimony. By that time, the jury had heard a significant portion of the prosecution’s case. Witnesses had testified that just before the incident, defendant was driving in an erratic and dangerous manner, suggesting she was under the influence. The evidence established that she made no effort to avoid striking Woods, which further suggested she was under the influence. After the incident, defendant seemed to be under the influence. Her performance on the field sobriety tests suggested she was under the influence. The toxicology report showed that she had taken prescription drugs some time before the accident. She was taking a number of prescription drugs regularly, and her doctor had warned her of the dangers of driving while taking some of them at the same time. Defendant admitted having taken some of the prescription drugs that day, including two Kadian, which was double her prescription. Considering the very strong evidence showing defendant’s impairment, the trial court could reasonably determine that the jury could follow an instruction to ignore the brief remark about marijuana.

C. Evidence of Prior Convictions and Conduct

Defendant contends the trial court erred by admitting evidence of her prior DUI convictions in addition to evidence that she abused alcohol and prescription medication in the early to mid-1990's.

1. Background

Defendant moved, in limine, to exclude the evidence of her prior DUI convictions and the underlying conduct. Defendant also moved to exclude the testimony of her ex-husband and son. The prosecution opposed the motion, contending that the evidence was relevant to the issue of implied malice – i.e., an element of the murder charge.

At the hearing on the motion, defendant pointed out that the prior convictions all occurred at least 10 years before the current offense. She also pointed out that they all involved alcohol, whereas there was no allegation of alcohol use in the current offense. Defendant acknowledged that during one of her arrests, she had admitted using some prescription drugs, but argued that there was no evidence she had actually been under the influence of narcotics while driving. She further argued that her admission to narcotics use did not show she knew that such narcotics would affect her driving.

The trial court ruled that it would admit the evidence of defendant's prior convictions and the prior warnings from her ex-husband and son concerning her abuse of alcohol and prescription drugs. It reasoned that, taken together, the evidence put defendant on notice that driving under the influence of prescription medication was dangerous.

The jury learned of these prior convictions by a stipulation stating that defendant "suffered convictions in 1991, 1995, 1996, and twice in 1998 for driving and being under the influence." The stipulation also stated that in 1991, defendant "submitted to a court proof of completion of a one year community alcohol awareness class" and that in 1998, she was sentenced "to two years of prison for driving under the influence."

The trial court gave the jury a limiting instruction regarding the evidence of defendant's prior uncharged acts. The limiting instruction stated that the evidence could be considered only "for the limited purpose of deciding whether or not the defendant acted with malice aforethought and/or gross negligence and/or ordinary negligence."

2. The Trial Court Did not Abuse Its Discretion

"Although evidence of other criminal acts or misconduct of a defendant is inadmissible to prove the accused had the propensity or disposition to commit the crime charged [citations], it is ordinarily admissible where it tends to show motive, knowledge, identity, intent, opportunity, preparation, plan, or absence of mistake or accident. [Citations.] Evidence admissible under subdivision (b) of Evidence Code section 1101 remains subject to exclusion under Evidence Code section 352. [Citation.] 'The proffered evidence must logically, naturally and by reasonable inference tend to prove the issue in dispute. It must be offered upon an issue that will ultimately prove to be material to the People's case and it must not merely be cumulative with respect to other evidence which the People may use to prove the same issue. [Citations.]' [Citation.]" (*People v. Brogna* (1988) 202 Cal.App.3d 700, 706-707.)

In *People v. McCarnes* (1986) 179 Cal.App.3d 525 (*McCarnes*), the court explained why evidence of prior driving under the influence convictions is relevant in an implied malice murder case: "[T]he reason that driving under the influence is unlawful is *because* it is dangerous, and to ignore that basic proposition, particularly in the context of an offense for which the punishment for repeat offenders is more severe [citations], is to make a mockery of the legal system as well as the deaths of thousands each year who are innocent victims of drunken drivers." (*Id.* at p. 532.)

The *McCarnes* court further explained that evidence of education about driving under the influence is also relevant. Thus, in that case, it was relevant that the defendant had been ordered to "enroll in and complete a drinking driver's education program. Even if we assume defendant did not realize after his *convictions* that it was dangerous to drink

alcohol and drive, surely realization would have eventually arrived from his *repeated* exposure to the driver's educational program. To argue otherwise is little short of outrageous." (*McCarnes, supra*, 179 Cal.App.3d at p. 532.)

Evidence of prior driving under the influence convictions and warnings about the danger of driving under the influence is also admissible to show gross negligence in a gross vehicular manslaughter case. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1205-1206 (*Ochoa*.) Such prior convictions and warnings are relevant to the question whether a reasonable person in the defendant's position would have been aware of the risk of driving under the influence. (*Ibid.*)

Defendant argues that the trial court should have limited the evidence rather than admitting all of the prior convictions and testimony, describing it as cumulative and "overkill." She claims that it is "universally known" that driving while intoxicated is dangerous and points out that the jury heard Dr. Ebenhoech's testimony about warning defendant about the dangers of driving while affected by the prescription drugs. Thus, she reasons, it was unnecessary to introduce other evidence regarding defendant's knowledge of the danger.

Defendant compares this case to *People v. Williams* (2009) 170 Cal.App.4th 587 (*Williams*), where the court admitted "evidence about dozens of contacts defendant and fellow gang members had with law enforcement." (*Id.* at p. 595.) The defendant had been charged with possessing a firearm, ammunition, and a controlled substance, plus participation in a criminal street gang and gang enhancements. On appeal, the *Williams* court found that several of the prior incidents were admissible to show knowledge, under Evidence Code section 1101, subdivision (b). The court found that other prior incidents were admissible for impeachment, and that still other prior incidents were admissible as predicate crimes for the gang charge and gang enhancements. (*Id.* at pp. 607-609.) However, the trial court should have limited the evidence under Evidence Code section 352, because the presentation of all the prior misconduct evidence necessitated an

undue consumption of time. Under the circumstances, “[t]he sheer volume of evidence extended the trial – and the burden on the judicial system and the jurors – beyond reasonable limits.” (*Id.* at p. 611.)

In the instant case, the evidence of defendant’s prior convictions and prior conduct did not approach the volume of evidence introduced in *Williams*, and presentation of the evidence did not necessitate an undue consumption of time. The testimony of the witnesses was brief, particularly in relation to the substantial amount of evidence presented overall, and the prior convictions were admitted through a stipulation. Moreover, the evidence was not as repetitive as the evidence in *Williams*, and defendant *did* dispute that she knew it was dangerous to drive while taking her prescription medications. As noted above, her prior convictions of driving under the influence and the prior warnings she received were highly relevant to that issue. (*McCarnes, supra*, 179 Cal.App.3d at p. 532; *Ochoa, supra*, 6 Cal.4th at pp. 1205-1206.) Further, the trial court gave a limiting instruction to ensure that the jury did not use the evidence for any improper purpose. Thus, the trial court did not abuse its discretion by finding that admitting the evidence would not cause an unreasonable burden on the judicial system or the jurors or any other substantial prejudice under Evidence Code section 352.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.