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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS RODRIGUEZ, Defendant and Appellant.	2d Crim. No. B280336 (Super. Ct. No. 2013018903) (Ventura County)

Nine months after pleading guilty to driving under the influence (DUI) (Vehicle Code, § 23152, subd. (b)),[1] appellant Jose Luis Rodriguez consumed a total of nine alcoholic drinks at two bars. While driving his cousin and a friend back to the first bar, appellant crashed his car into a field, killing his cousin. Appellant's estimated speed was 110 miles per hour, and his blood-alcohol content (BAC) was almost twice the legal limit.

[1] All statutory references are to the Vehicle Code unless otherwise stated.

A jury convicted appellant of second degree murder (count 1; Pen. Code, § 187, subd. (a)), DUI causing injury (count 2; § 23153, subd. (a)), DUI with a BAC of .08 causing injury (count 3; § 23153, subd. (b)), and driving with a license suspended for a prior DUI (count 4; § 14601.2, subd. (a)). In counts 2 and 3, the jury also found true the enhancements that appellant was driving with a BAC of .15 (§ 23578). The trial court sentenced appellant to a prison term of 15 years to life, plus 16 months.

Appellant challenges the foundation laid for the admission of the employee handbook he was given when hired as a server at Lure Fish House (Lure). The handbook contained information about handling an intoxicated customer and the dangers of drunk driving. It was admitted as evidence of "implied malice," an element of murder. The trial court did not abuse its discretion in admitting the handbook. Moreover, any possible abuse of the court's discretion in admitting it was harmless by any standard. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellant's Current Offense

At 9:30 p.m. on June 13, 2013, appellant and a friend, Sergio Lemus-Martinez, went to Pirates Grub and Grog (Pirates) in Oxnard. Appellant was a regular at the bar, where he often drank four 25-ounce mugs of beer. That night, appellant drank five 25-ounce mugs of beer.

Appellant's cousin, Esmeralda Bello, joined appellant and Lemus-Martinez at 10:25 p.m. At 12:43 a.m., the group left Pirates and headed to the Victoria Pub and Grill (Victoria Pub) in Ventura. Lemus-Martinez said it was possible that he drove from Pirates to the Victoria Pub, but he was not sure.

At the Victoria Pub, appellant drank three 16-ounce beers, a shot of tequila, and also finished some of the beer left in Lemus-Martinez's glass. Lemus-Martinez noticed that appellant was becoming more intoxicated. When appellant, Lemus-Martinez and Bello were getting ready to leave at 2 a.m., the Victoria Pub's bouncer, Joshua Hodge, asked them if they needed a cab. One of them responded, "No." Hodge then asked who was going to be driving. He was told that the woman would be driving.

Thereafter, Lemus-Martinez told appellant it was not a good idea for appellant to drive because of his prior DUI conviction. Bello said appellant should let her drive. Appellant stated he was feeling okay and declined to let Bello drive. When they left the Victoria Pub, appellant was driving, Lemus-Martinez was in the front passenger seat, and Bello was in the backseat. They intended to take Bello back to Pirates so that she could retrieve her car.

On the way to Pirates, appellant started speeding, reaching upwards of 110 miles per hour. He was driving so fast the car began to shake. Both Bello and Lemus-Martinez told appellant to slow down. While traveling down a hill at the intersection of Victoria Avenue and Olivas Park Drive, appellant lost control of the car and crashed into an agricultural field. The car flipped over several times and came to rest upside down.

Bello died at the scene from blunt force head trauma and a broken neck. Lemus-Martinez suffered a fractured vertebra in his neck. Police discovered appellant sitting upside down in the driver's seat. A notice of the suspension/revocation of appellant's driver's license was found near the scene. A "Prime for Life" workbook bearing appellant's name was discovered

about five feet from the car. Also, a completion report from the Ventura County DUI awareness program was found near the car.

When California Highway Patrol officers spoke to appellant at the hospital, they observed objective signs of alcohol intoxication. A blood test taken around 4 a.m. recorded appellant's BAC at .19. Tests also showed the presence of cocaine in appellant's system. Trevor Booth, a forensic scientist, estimated that a male with the same drinking pattern as appellant would have had a BAC of .15 at the time he was driving. Booth opined that the hypothetical individual would have been impaired for purposes of driving.

In the early morning hours after the crash, appellant told officers that he was drinking beer with Lemus-Martinez, who was the designated driver for the night. He said Lemus-Martinez drove the group to the Victoria Pub. When the group left the Victoria Pub, Lemus-Martinez said he could not drive because he had two beers. Appellant decided to drive because he needed his car to get to work in the morning.

Appellant admitted that he drank more than two beers. He also admitted that he ingested cocaine while at Pirates. He said he should not have driven because he "was drinking" and thus "wasn't able to drive."

Appellant told the officers that he had been convicted of a DUI eight months earlier. He said that he completed the mandatory DUI classes. Appellant acknowledged that, when he was convicted, a judge had informed him of the dangers of driving under the influence. When the officers asked appellant what the DUI classes had taught him, appellant responded that he was "told . . . not to drink and drive." He added, "Because it's bad like -- and you could cause like, like what I did right now."

Appellant's Prior Offense

At approximately 1 a.m. on September 24, 2012, appellant crashed his car into parked cars on Bryce Canyon Avenue in Oxnard and drove away. When officers located appellant, they noticed that he had slurred speech, could not balance, had red and watery eyes, and smelled of alcohol. Appellant could not complete any sobriety tests. A breath test recorded appellant's BAC at .16.

When appellant pled guilty to DUI with a BAC of .08 (§ 23152, subd. (b)) and misdemeanor hit and run (§ 20002, subd. (a)), appellant initialed a *Watson*[2] advisement on the plea form, which informed appellant that he could be charged with murder if someone died as a result of his driving under the influence.[3] The trial court signed the plea form, indicating that it found that appellant expressly, knowingly, understandably, and intelligently waived his rights. Appellant's defense counsel did not sign the section stating that he reviewed with appellant his rights, the facts of the case, and the consequences of his plea. A minute order stated that the court advised appellant of all of the consequences of his plea. Appellant was placed on probation for three years.

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[2] *People v. Watson* (1981) 30 Cal.3d 290.

[3] Appellant initialed next to section 21 of the plea form, which read: "I understand that being under the influence of alcohol or drugs, or both, impairs my 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 I continue to drive while under the influence of alcohol or drugs, or both, and as a result of my driving, someone is killed, I can be charged with murder."

As part of the plea agreement, appellant was required to attend a Ventura County DUI awareness program. The goal of the program is to reduce recidivism and to increase public safety. By the time appellant completed the three-month program, he had attended 12 group sessions, six education sessions, and three face-to-face individual counseling sessions. The sessions included videos documenting stories about people who have experienced tragedies because of drunk driving.

During the DUI program, appellant received a "Prime for Life" workbook. The workbook included material about the differences between high- and low-risk choices related to alcohol and drugs. In a section of the workbook asking the enrollee what he or she had learned, appellant wrote that he learned high tolerance for alcohol increases one's risk, because "[i]t confuses you too [*sic*] think that your [*sic*] not drunk."

During his exit interview from the program, appellant told counselors that he did not intend to drink and drive again. He stated it was "not worth the risk."

The Lure Handbook

Appellant began working as a server for Lure in January 2013. Lure's records show that appellant attended a mandatory two-hour new employee orientation on January 5, 2013. According to Lure's vice president of operations, Micah Thomas, the purpose of the orientation is to introduce new employees to the culture of the company and to review the general information section of the company's handbook, which includes three pages on responsible alcohol beverage service.

Among other things, the handbook cautions employees not to serve alcohol to guests who appear intoxicated. Instead, employees are to serve the guests non-alcoholic drinks

and bread. Should intoxicated guests want to leave and drive themselves, the handbook instructs employees to try to keep the guests in the restaurant as long as possible or to offer to call a cab and, if those methods fail, to call the police. The section also includes a BAC chart and notes that "[f]or drivers age 35 and older with BAC at or above 0.15 percent on weekend nights, the likelihood of being killed in a single-vehicle crash is more than 380 times higher than it is for non-drinking drivers."

Motion to Admit the Lure Handbook at Trial

Prior to trial, the prosecution moved to introduce evidence of the Lure handbook and related testimony for purposes of proving that appellant had acted with implied malice. This evidence included showing that appellant had been "a server [at Lure] at the time of the offense . . . and, as such, was trained in noticing inebriated customers and in taking steps to no longer serve them alcohol." The prosecution argued that this evidence would "demonstrate[] [appellant's] awareness of the dangers of driving while impaired and his conscious decision to disregard the knowledge of those dangers when he killed his rear passenger in the present offense."

Defense counsel opposed admission of the evidence on foundational grounds. Specifically, counsel objected to the extent the witness who would testify for the prosecution had no knowledge of appellant's actual level of training regarding being "aware of the seriousness and consequences of alcohol abuse . . . ."

The trial court acknowledged that before introducing the proffered evidence, the prosecution would have to satisfy certain foundational requirements, including that the prosecution's witness could competently testify as to whether a particular policy existed at the time appellant worked at Lure,

that Lure required appellant to learn the material at issue, and that appellant was made aware of that requirement.

The prosecutor conceded that Lure does not have a document stating that appellant received and read the handbook. The prosecutor represented, however, that appellant stated during an interview at the hospital that he was "aware as a Lure server of how to recognize people that are impaired to give them water or a soda rather than alcohol if that's what they're requesting. So there's some knowledge that he is aware of Lure training him in the recognition of inebriation."

Based on these representations, the trial court concluded there was sufficient foundation to admit evidence of the Lure handbook. The court determined that a "foundation between the policy and practice" existed since "somebody from Lure . . . will testify the defendant was employed at a time when all new employees were given this book. This then becomes a matter of weight about whether he actually received it or not." The court further stated that it appeared "there's a foundation between that evidence and an admission by the defendant that he was made aware in some form of issues that would have been covered by this book . . . ."

The jury was instructed that the information contained in the Lure handbook "is not being received, and you are not to consider it, for its truth (that is, for the truthfulness or accuracy of any information contained therein). Instead, you may only consider such information for the effect, if any, you find that the information may have had on the defendant's state of mind as it relates solely to the issue of his knowledge of the dangers and risks of driving under the influence of alcohol in relation to the

element of implied malice required for second degree murder as charged in Count 1."

DISCUSSION

Appellant contends the trial court committed reversible error by admitting the Lure handbook without requiring the prosecution to lay the proper foundation for its admission. The People respond that Lure's vice president of operations (Thomas) provided the necessary foundation. We agree with the People.[4]

Standard of Review

"A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) "We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.'" (*People v. Earp* (1999) 20 Cal.4th 826, 878, quoting Evid. Code, § 353, subd. (b), and citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) To establish prejudice under the *Watson* standard, "'[t]he defendant must show that there is a reasonable probability that, but for [the] . . . errors, the result of the proceeding would have been different. . . .' [Citation.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

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[4] The People argue that appellant forfeited his right to challenge the admission of the Lure handbook because his counsel did not object at trial. In opposing the prosecution's pre-trial motion to admit the handbook, defense counsel objected on foundational grounds. The objection was overruled. It was unnecessary to renew that objection at trial.

Admission of the Lure Handbook

Lure's policy is for new employees to attend a two-hour orientation session. Thomas testified that the orientation includes a review of the restaurant's service handbook, which he primarily prepared. The manager conducting the orientation provides each new employee with a copy of the handbook and reviews the general guidelines in the handbook, including the three pages devoted to alcohol awareness training.

Based on Lure's payroll records, Thomas confirmed that appellant attended a two-hour orientation session on January 5, 2013. The Lure handbook would have been distributed to appellant and other employees at the session. Thomas also would have heard the manager's discussion of the handbook's general guidelines, including those related to the serving of alcohol. As the trial court observed, "[a]ssuming [appellant] received this information, it would contribute to his knowledge of the risks of drinking and driving."

Appellant contends the Lure handbook should not have been admitted because the prosecution did not prove, as previously represented to the trial court, that appellant stated during the hospital interview that he was "aware as a Lure server of how to recognize people that are impaired to give them water or a soda rather than alcohol if that's what they're requesting." While this is true, appellant made other admissions at the hospital that suggested he was aware of the issues addressed in the alcohol awareness portion of the handbook. Most notably, he conceded he "wasn't able to drive" because he had been drinking, and that he was told that drinking and driving could cause a crash "like what I did right now."

In sum, Thomas's testimony provided sufficient foundation for the admission of the handbook. First, Thomas confirmed that appellant attended one of Lure's mandatory orientation sessions. Next, Thomas explained what occurs at such sessions. He testified that attendees are provided with a copy of the handbook, and that a manager reviews portions of the handbook, including a section on responsible alcohol beverage service. This testimony was probative of appellant's knowledge of this information, and the jury was entitled to draw a reasonable inference that appellant gained alcohol responsibility awareness through such information. (Evid. Code, § 210; see *People v. Murray* (1990) 225 Cal.App.3d 734, 745 [attendance at mandatory DUI course was probative of the defendant's knowledge of the course material].) We conclude the court did not abuse its discretion by admitting the handbook.

Even if an Error Did Occur, It was Harmless

The People contend that even if there was insufficient foundation to introduce the Lure handbook, the error was harmless. We agree. Appellant has not shown that it is reasonably probable that he would have received a different result at trial absent the handbook's admission. (*People v. Fuiava* (2012) 53 Cal.4th 622, 671.)

Appellant admits the only issue at trial was whether he acted with implied malice. The evidence in this case overwhelmingly supports such a finding. Indeed, appellant concedes that "the jury certainly could have convicted [appellant] of second degree murder without considering the handbook evidence."

Notwithstanding his prior DUI conviction, license suspension and extensive alcohol awareness training, appellant

drove again after drinking. He drove with a BAC greatly in excess of the legal limit, and was speeding at 110 miles per hour, twice the speed limit, down a city street, before tragically ending his cousin's life. Based on these facts, it is not reasonably probable a jury would have found in appellant's favor on the issue of implied malice, namely, that he did not appreciate the risk involved in his action or that he did not act in wanton disregard for human life. (See *People v. Brogna* (1988) 202 Cal.App.3d 700, 709 ["One who drives a vehicle while under the influence after having been convicted of that offense knows better than most that his conduct is not only illegal, but entails a substantial risk of harm to himself and others"].)

Moreover, appellant acknowledged that he was aware of the risks of drinking and driving. At the hospital, appellant told officers that he "wasn't able to drive" because he had been drinking, and that he was informed that drinking and driving could cause a crash "like what I did right now." During his exit interview from the DUI program, appellant said he did not intend to drink and drive again because it was "not worth the risk." He also admitted that a high tolerance for alcohol increases one's risk, because "[i]t confuses you too [*sic*] think that your [*sic*] not drunk." Additionally, in connection with his prior plea, appellant initialed a *Watson* advisement warning him that he could be charged with murder if he killed someone while drinking and driving. This type of evidence satisfies the knowledge requirement for implied malice. (See, e.g, *People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1359 [warning in conjunction with prior DUI conviction]; *People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1090 [prior DUI conviction or near miss with other vehicles

can establish the defendant's awareness of the life-threatening risks of drunk driving].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Matthew P. Guasco, Judge
Superior Court County of Ventura

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

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