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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN GABRIEL RIOS,

Defendant and Appellant.

B269815

(Los Angeles County  
Super. Ct. No. KA108315)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Bruce F. Marrs, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Lance E. Winters, Assistant Attorney General, Steven D.  
Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Defendant Juan Gabriel Rios appeals following his conviction for one count of murder (Pen. Code, § 187, subd. (a)), one count of gross vehicular manslaughter (§ 191.5, subd. (a)), one count of driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a)), one count of driving with a .08 percent blood-alcohol content causing injury (Veh. Code, § 23153, subd. (b)), and one count of hit and run driving resulting in death or serious injury (Veh. Code, § 20001, subd. (b)(2)). The jury found true the allegations that defendant personally inflicted great bodily injury in the commission of the Vehicle Code section 23153 violations. The trial court sentenced defendant to 20 years to life in prison, consisting of 15 years to life for the murder conviction plus the midterm of two years for driving under the influence plus a three-year enhancement term for the great bodily injury allegation. The court imposed and stayed sentence on the remaining three counts pursuant to Penal Code section 654.

Defendant contends there is insufficient evidence to support his conviction for second degree murder. He also contends the trial court erred in instructing the jury with CALJIC No. 2.03. Defendant's own statements, which are amply corroborated, provide substantial evidence to support his conviction. The trial court did not err in instructing the jury. We affirm the judgment of conviction.

## BACKGROUND

The basic facts of this case are simple. Defendant drove his cousin Pedro Lopez to a TGI Fridays restaurant and bar in Rosemead early in the evening of November 7, 2014. Defendant had both a regular driver's license and a Class A commercial license. Both men went into the bar and consumed numerous alcoholic drinks and some food over the course of five to six hours. Their drinking was captured on surveillance video and was reflected in their

bill. The video shows defendant drinking eight beers and six distilled spirits or mixed drinks. Between 9:45 and 10:00 p.m., the bartender serving the men became concerned about the amount of alcohol they had consumed. She told bartenders in another area to let a manager know. Defendant and Lopez left about 15 minutes later.

Surveillance video of the parking lot shows defendant and Lopez getting into a teal Honda Civic and driving off. The car did “not observe the stop” as it left the parking lot.

After leaving the parking lot, defendant drove the Honda onto Rosemead Boulevard and then onto the entrance ramp for the eastbound side of the 10 freeway. A witness saw the Honda, travelling fast, reach the top of the on-ramp and broadside a Toyota Camry which was exiting the freeway. Both cars went off the freeway and down the drain embankment. Defendant and Lopez got out of the Honda and left the scene of the accident.

Ken and Kit Leung were trapped inside the Camry. Firefighters used tools to get them out. Kit Leung was taken to the hospital, where she died from her injuries. Ken Leung underwent surgery for internal injuries. His spleen was removed but he survived.

Los Angeles County Sheriff's Deputy Antonio Ortega and El Monte Police Officer Aaron Armstrong located defendant and Lopez on a nearby surface street and detained them. Defendant was detained at about 12:08 a.m. Officer Armstrong could immediately smell alcohol on defendant. Defendant told Officer Armstrong he had been in a car accident.

California Highway Patrol (CHP) Officer Jaime Andrade came to the location where defendant and Lopez were being detained. Officer Andrade interviewed both men. A video recording of the interview was played for the jury, and a transcript of the interview was admitted into evidence. In the

recorded portion of the interview, defendant admitted that he was the driver of the Honda and that he had been drinking.

Officer Andrade testified that defendant also admitted that he knew that he had alcohol in his system when he drove and knew that driving under the influence could hurt or kill someone. Officer Andrade asked him why he drove with alcohol in his system, knowing that he could possibly kill someone. Defendant replied that “it was a poor decision.”

Officer Andrade performed a field sobriety test, concluded defendant was under the influence, performed a breathalyzer test, obtained a positive result, and took defendant for blood testing. Defendant was determined to have a blood-alcohol content of 0.15.<sup>1</sup>

Lopez admitted to Officer Andrade that he and defendant had been drinking. He stated defendant was the driver. Lopez said that defendant was “driving too crazy” and lost control of the car.

The CHP investigated and partially reconstructed the accident. Officer Andrade and Officer Jarrod Calder took measurements and prepared a diagram of the accident scene. Both the diagram and photos show that the on-ramp is a single lane which curves sharply to the right at the top in order to run parallel to a single collector lane for traffic which has exited the freeway. Until the two lanes become parallel, they are separated by a concrete island. A driver who continues in a straight line on the ramp rather than follow the curve would cross this island and enter the collector lane at a 90 degree angle.

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<sup>1</sup> The breathalyzer test was conducted at about 1:00 a.m. and showed defendant was “a little bit over twice the legal limit” of .08. Defendant’s blood was drawn at about 2:00 a.m. Criminalist Somavadey Neal opined that defendant’s blood-alcohol level at the time of the accident would have been between .15 and .21.

Officer Calder opined that the driver of the Honda drove too fast up the on-ramp to the freeway, lost control at the point where the ramp made a sharp right turn, continued travelling straight, drove over the raised concrete island and center-punched the Toyota as it drove in the collector lane. The force of the impact caused both cars to leave the freeway and tumble down an embankment. His opinion was based on marks on and physical damage to the freeway, the location of and damage to the two cars and witness statements.

According to Officer Calder, the speed limit for the 10 freeway, including the on- and off-ramps is 65 miles an hour. Officer Calder explained, however, that in some areas the safe speed is less than the posted or maximum permitted speed limit. In his opinion, the Rosemead on-ramp was one of those areas. Officer Andrade testified that in his opinion 30 to 35 miles per hour was a safe speed for that on-ramp.

CHP Sergeant Chris Buono examined data from the air bag control module of defendant's Honda Civic. The data showed that the car increased its speed from about 25 miles per hour five seconds before the crash to 46 miles per hour 0.5 seconds before the crash. There was insufficient force on the brakes to turn on the brake lights until "time 0" just before the crash.

## DISCUSSION

### **I. Sufficiency of the Evidence**

Defendant contends the evidence is insufficient to prove that he was subjectively aware that his conduct posed a danger to human life and so insufficient evidence to support his conviction for second degree murder under an implied malice theory.

### **A. *Implied malice***

Murder is the unlawful killing of a human being, with malice aforethought. (Pen. Code, § 187, subd. (a).) Malice may be either express or implied. (Pen. Code, § 188.) Malice may be implied when a defendant “does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]” (*People v. Watson* (1981) 30 Cal.3d 290, 300.) Wanton disregard “in the context of implied malice essentially means indifference to a subjectively understood danger to life.” (*People v. Brown* (2001) 91 Cal.App.4th 256, 270.)

“The cases have relied upon some or all of the following factors in upholding drunk-driving-murder convictions: (1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving.” (*People v. Talamantes* (1992) 11 Cal.App.4th 968, 973.) “[T]here is no requirement of a ‘predicate act,’ i.e., a prior DUI or an alcohol-related accident necessary to establish implied malice.” (*People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1091.)

### **B. *Analysis***

Defendant claims the prosecutor offered only circumstantial evidence to show that he was subjectively aware that his conduct posed a danger to life, and this evidence did not support an inference that he was aware of the danger. We agree with the prosecutor that defendant’s “own statements from his mouth alone are sufficient to convict him of murder.” In addition, there is ample evidence corroborating defendant’s statements.

Defendant stated that he lived in Perris and drove to a bar in Rosemead. He acknowledged spending about five hours at the bar, and

consuming numerous alcoholic drinks. He agreed he was the driver of the Honda at the time of the crash. Defendant also acknowledged that he could feel the effect of the alcohol when driving. He described the effects as “happy numb” and “like you can drive fast” and “you want to drive faster.” Defendant stated that he “didn’t yield to my red light to make a right.”<sup>2</sup> Defendant told Officer Andrade that “pretty much what it was is I was driving drunk,” and indicated that he left the scene because he did not want to get a DUI conviction. Officer Andrade testified that defendant also admitted that he knew that he had alcohol in his system when he drove and knew that driving under the influence could hurt or kill someone. Officer Andrade asked him why he drove with alcohol in his system, knowing that he could possibly kill someone. Defendant replied that “it was a poor decision.” Thus, defendant’s own statements show a pre-drinking intent to drive, intoxication, a knowledge of the dangers of driving while intoxicated and very dangerous driving.

Defendant’s admissions were supported by other evidence. The testimony of the TGI Fridays bartender, videos from TGI Fridays showing defendant drinking and defendant’s bar bill all show defendant’s consumption of a large quantity of alcohol. The testimony of criminalist Neal established that defendant had a blood-alcohol level of .15 and that a person with such a blood-alcohol level was mentally impaired and could not operate a vehicle safely. Defendant’s recent acquisition of a commercial driver’s license showed that he had recently been informed of the dangers of drunk driving.

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<sup>2</sup> It is not clear what light defendant meant. Officer Calder testified that the on-ramp had a meter light, but he had never seen it turned on at night.

Video from the TGI Fridays parking lot shows that defendant's dangerous driving began immediately after he took the wheel: he failed to observe a stop on his way out of the lot. The CHP's accident analysis showed dangerous driving: rapid acceleration, loss of control, driving across a raised island and failing to brake. Lopez said defendant was "driving too crazy" and lost control of the car. An eyewitness on the freeway said defendant appeared to be driving very fast. The Honda's air bag controller showed the car was travelling at 46 miles per hour, which, although below the speed limit of 65 miles per hour, was not a safe speed on the on-ramp with its sharp curves.

Defendant claims that this evidence shows only an "intellectual knowledge" of the dangers of drunk driving, and that a conviction for implied malice murder requires "the intellectual plus visceral knowledge" acquired through prior drunk driving convictions or collisions while driving under the influence. California law does not require a "predicate act" to establish implied malice in a drunk driving case. (*People v. Johnigan, supra*, 196 Cal.App.4th at p. 1091.)

Defendant also cites several past cases in which the Courts of Appeal have relied on evidence of a prior conviction for drunk driving to affirm a second degree murder conviction. "Reviewing the sufficiency of evidence, however, necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)" (*People v. Rundle* (2008) 43 Cal.4th 76, 137–138, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.)



## II. CALJIC No. 2.03

Defendant contends the trial court erred prejudicially in instructing the jury that it could infer consciousness of guilt from a willfully false or deliberately misleading statement because there is no evidence that he made such a statement. He further contends the instruction is improper because it violates his state and constitutional rights to due process and a fair trial.

### A. *Law*

A trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

CALJIC No. 2.03, as given, told the jury: “If you find that before this trial . . . the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he [or] she is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

This instruction may be given when a defendant makes “inconsistent and contradicted statements to police attempting to minimize involvement” in a crime. (*People v. Stitely* (2005) 35 Cal.4th 514, 555.) A defendant’s pretrial statement may be shown to be false by physical evidence or the testimony of other witnesses. (See *People v. Kimble* (1988) 44 Cal.3d 480, 497-498 [discussing admissibility of defendant’s pretrial statement to show consciousness of guilt].) “Of course, the jury need not believe the prosecution’s evidence suggesting that the statement was false, and even if it finds that the statement was false, it need not conclude that defendant deliberately lied to hide his complicity in the crime.” (*Id.* at p. 498.)

## **B. *Analysis***

There is substantial evidence to support the instruction. As diagrams, photographs and expert testimony showed, the on-ramp is a single lane from the surface street entrance to the concrete island. The expert testimony showed that defendant left the single lane of the on-ramp by crossing the concrete island and entering the single collector lane at a perpendicular angle, hitting the Camry. According to the expert, there was no opportunity for another car to cut off defendant. Defendant nevertheless claimed that he was cut off by another car and the next thing he remembered was flipping over. He did not remember hitting the Camry. A jury could reasonably find these statements to be false and to have been made in an attempt to shift or minimize blame for the accident.

Defendant argues, both here and in the trial court, that it might have been possible for a car travelling in the wrong direction to cut him off or that “a car came out of nowhere” and cut him off. Perhaps so.<sup>3</sup> That does not render the instruction improper. CALJIC No. 2.03 contemplates that the jury will be faced with different and contradictory versions of the crime, and will decide which is more credible. The instruction begins, “*If you find . . . the defendant made a willfully false or deliberately misleading statement . . .*” (Italics added.)

Defendant also contends, in passing, that CALJIC No. 2.03 violates his state and federal constitutional rights to due process and a fair trial because it predisposed the jury to look with doubt on defendant’s testimony and

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<sup>3</sup> This argument does not appear to be consistent with defendant’s statement that the car was coming “inside the freeway, same, same direction.” It is not clear what defendant means by “out of nowhere,” but we will construe the phrase to include other improper forms of driving such as travelling on the shoulder.

defense theory while leaving intact the credibility of the prosecution's witnesses and its case. The California Supreme Court has rejected this challenge and similar challenges to the instruction. (See *People v. Stitely*, *supra*, 514, 555.) We reject it as well. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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\* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.