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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. EVEL ERNESTO FLORES, Defendant and Appellant.	B286863 (Los Angeles County Super. Ct. No. KA114773)

APPEAL from a judgment of the Superior Court of Los Angeles County. Juan Carlos Dominguez, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Evel Ernesto Flores appeals the judgment entered following a jury trial in which he was convicted of one felony count of driving under the influence of alcohol in violation of Vehicle Code[1] section 23152.[2] Appellant admitted two prior conviction allegations. (Pen. Code, §§ 667.5, subd. (b), 1203, subd. (e)(4).) The trial court sentenced appellant pursuant to section 23550.5 to a total term of three years imprisonment in county jail. (Pen. Code, § 1170, subd. (h).)

Appellant contends the trial court erred and violated his due process rights in giving inaccurate and incomplete responses to the jury's inquiries which diluted the prosecution's burden of proof. He further argues that the trial court erred in sentencing him under section 23550.5 because his prior conviction was not punished as a felony and was therefore not a qualifying conviction. We disagree and affirm.

FACTUAL BACKGROUND

On February 4, 2017, about 9:40 p.m., California Highway Patrol Officer Jonathan Dockweiler and his partner, Officer Matthew Henderson, spotted a black Jeep driven by appellant on the 60 Freeway traveling at speeds in excess of 90 miles per hour. Officer Dockweiler followed, accelerating to 110 miles per hour to match the Jeep's speed. When appellant nearly collided with a car in front of him, Officer Dockweiler activated his emergency

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[1] Undesignated statutory references are to the Vehicle Code.

[2] The jury acquitted on count 1, which charged driving under the influence of alcohol or drugs, or a combination of both (§ 23152, subd. (f)), and count 3, which charged driving with 0.08 percent blood-alcohol content (§ 23152, subd. (b)).

lights to conduct a traffic stop. Officer Henderson instructed appellant to exit the freeway.

Appellant exited the freeway and eventually came to a stop in a parking lot. When Officer Dockweiler approached the vehicle he smelled alcohol and marijuana coming from the interior. Appellant's speech was "slurred," and his thoughts seemed "scattered." His eyes appeared red and watery and exhibited a "lack of smooth pursuit," a sign of alcohol consumption. Appellant told the officer he had had one tall beer.

Officer Dockweiler conducted a series of field sobriety tests. Appellant's performance on these tests suggested he was impaired by alcohol: Throughout the tests appellant had difficulty following the officer's instructions, he swayed, and he frequently lost his balance. For the final field sobriety test appellant blew into a machine (a preliminary alcohol screening (PAS) device), which measured the alcohol in his breath. Officer Dockweiler had appellant take the test twice. The first test, administered at 10:05 p.m., resulted in a reading of 0.089, and the second test gave a reading of 0.090 at 10:08 p.m.

Based on his observations of appellant's driving, the smell of alcohol on appellant's breath and marijuana in the car, appellant's red and watery eyes and slurred speech, the PAS test results, and appellant's performance on the field sobriety tests, Officer Dockweiler concluded that appellant was under the influence of alcohol.

Appellant was arrested and transported to a sheriff's station for an official chemical breath test. Two tests administered at 11:03 and 11:06 p.m. showed a blood-alcohol content of 0.05 percent.

A senior criminalist in the Los Angeles County Sheriff's Department Crime Laboratory testifying as an expert opined that

a PAS test result of 0.089 followed by a breath test result of 0.056 an hour later is consistent with declining blood-alcohol levels over time. The defense expert testified that the results from the breath tests administered at the station were more reliable than the PAS test conducted in the field.

DISCUSSION

I. The Trial Court's Responses to the Jury's Inquiries

A. *Relevant background*

1. The jury instructions

During trial the court and counsel discussed CALCRIM No. 2110, which defines the elements of driving under the influence in violation of section 23152, subdivision (a) and explains what it means to be "under the influence of an alcoholic beverage." Defense counsel requested that the court read subdivision (a)(2) of section 23610[3] verbatim, which states that no presumption of being under the influence of an alcoholic beverage arises when the blood-alcohol test result is between 0.05 and 0.08 percent. The trial court denied the request, noting that because the language of section 23610, subdivision (a)(2) is "neutral," the

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[3] Section 23610, subdivision (a)(2) provides: "If there was at that time 0.05 percent or more but less than 0.08 percent, by weight, of alcohol in the person's blood, that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense."

jury would not be concerned with any presumptions based on blood-alcohol content.

Subsequently, when the court instructed the jury, it omitted the bracketed paragraph from CALCRIM No. 2110 pertaining to the presumption based on blood-alcohol content in accordance with the Bench Notes.[4] The court also gave CALCRIM No. 220, the standard instruction describing the presumption of innocence, the People's burden of proof beyond a reasonable doubt, and the legislatively approved definition of reasonable doubt.

2. The jury's inquiries

During deliberations the jury submitted two notes to the trial court. The first asked, "Is there a legal limit by law to be considered impaired vs. so impaired" in reference to section 23152, subdivision (a). The defense renewed its request that the jury be instructed on the statutory presumptions set forth in section 23610, subdivision (a). The court denied the request, reasoning that to instruct the jury there is no presumption between 0.05 and 0.08 percent would provide no guidance as to the distinction between "impaired" and "so impaired." After

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[4] The bracketed paragraph states: "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense." The Bench Notes to CALCRIM No. 2110 call for omission of the paragraph "if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent."

further discussion, the court simply told the jury to refer to CALCRIM No. 2110.

About an hour later, the jury submitted the second note: "We are at a stalemate concerning our decision [on two of the three counts]. Please advise!" The court inquired whether there was anything it could do to assist in breaking the stalemate. The foreperson reported that although the jury had reached a verdict on one count, some jurors were questioning the evidence with respect to "the doubt factor." The foreperson asked, "is it an exact reasonable doubt that we have to actually have?" The court replied, "I'm not sure that there is such a thing as a[n] exact reasonable doubt. That's why the word 'reasonable' is used. [¶] . . . [¶] And the definition in 220 does not help?" The foreperson responded that the definition was not helpful, and again raised a question about the distinction between "impaired" and "so impaired."

The court explained that CALCRIM No. 2110 addressed the issue of impairment and quoted the portion of the instruction that describes when a person may be found to be under the influence of alcohol. The court then quoted the paragraph in CALCRIM No. 220 defining reasonable doubt, and told the jury to reread and discuss those jury instructions. The court reminded the jury it could ask for read-backs of testimony and suggested that after reviewing the instructions, if the jury still had questions, it should articulate them as precisely as possible.

Less than an hour after resuming deliberations, the jury returned its verdict.

B. *The trial court properly responded to the jury's inquiries*

"The court has a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Beardslee*

(1991) 53 Cal.3d 68, 97.) During jury deliberations "when the jury 'desire[s] to be informed on any point of law arising in the case . . . the information required must be given.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 97, quoting Pen. Code, § 1138.) However, a court need not necessarily elaborate on standard instructions, and it takes some risk in doing so when its comments diverge from the accepted instructions: "Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*Beardslee*, at p. 97; *Brooks*, at p. 97.) We therefore review any claimed error under Penal Code section 1138 for abuse of that discretion. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 539; *People v. Waidla* (2000) 22 Cal.4th 690, 745–746 ["An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury"].)

1. The trial court properly refused to instruct under section 23610

Section 23152, subdivision (a) does not proscribe the operation of a vehicle with a particular blood-alcohol content.[5] Rather, a violation of the statute requires proof that (1) the defendant drove a vehicle, and (2) when he drove, he "was under the influence of an alcoholic beverage." (CALCRIM No. 2110;

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[5] Section 23152, subdivision (a) provides: "It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle."

People v. Weathington (1991) 231 Cal.App.3d 69, 79.) A person is under the influence if, as a result of alcohol consumption, "his physical or mental abilities are impaired to such a degree that he no longer has the ability to drive his vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances." (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1194; *People v. Lopez* (2012) 55 Cal.4th 569, 574, fn. 1; see *People v. Canty* (2004) 32 Cal.4th 1266, 1278; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [being "under the influence" means alcohol " 'so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree *the ability to operate a vehicle* in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties' "].) Because no particular blood-alcohol content is required to establish a violation of section 23152, subdivision (a), even if a defendant's blood-alcohol level was below the legal limit of 0.08 percent, the prosecution may nevertheless prove the defendant was under the influence "by showing that the alcohol made the defendant unable to 'drive . . . with the caution of a sober person, using ordinary care, under similar circumstances.' " (*People v. Lopez*, *supra*, 55 Cal.4th at p. 574, fn. 1.)

Although a trial court must instruct the jury on general principles of law that are relevant to the issues raised by the evidence and necessary for the jury's understanding of the case (*People v. Carter* (2003) 30 Cal.4th 1166, 1219), the court has "a correlative duty to refrain from instructing on irrelevant and confusing principles of law." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250.) And while " ' "a defendant has a right to an instruction that pinpoints the theory of the defense" ' " (*People v. Burney* (2009) 47 Cal.4th 203, 246), the court may " 'properly refuse an instruction offered by the defendant if it incorrectly

states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].' " (*Ibid*.)

Here, CALCRIM No. 2110, the standard instruction the trial court gave, plainly and accurately instructed the jury on the elements the prosecution was required to prove to establish a violation of section 23152, subdivision (a). Because blood-alcohol content is not an element of the offense, any pinpoint instruction under section 23610, subdivision (a)(2) about the lack of a presumption based on blood-alcohol level was irrelevant. Worse, such an instruction likely would have created confusion about the prosecution's burden of proving the second element of the offense, that appellant's driving "was actually impaired by his drinking." (*People v. McNeal* (2009) 46 Cal.4th 1183, 1193.) Accordingly, the court did not err in refusing to instruct the jury under section 23610 in response to the jury's inquiry.

2. The trial court properly responded to the jury's inquiry regarding the prosecution's burden of proof

We also reject appellant's contention that the trial court's response to the jury's request for clarification of the legal concept of reasonable doubt was "inadequate and served to dilute or trivialize the prosecution's burden of proof." In so arguing, appellant suggests that the court's sole response to the jury's inquiry was to say there is no such thing as an *exact reasonable doubt*. To the contrary, the court's attempt to clear the jury's confusion went well beyond a single peremptory answer to the jury's question.

In this regard, appellant's reliance on *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250–253, is misplaced. In *Thompkins*, after the jury reported it was deadlocked, it submitted two written inquiries to which the trial court gave inadequate

peremptory responses. The first question sought to clarify how premeditation relates to sudden heat of passion in CALJIC No. 8.20. The court answered, " 'It doesn't.' " To the second question—" 'Can sudden heat of passion nullify premeditation[?]' "—the court simply said, " 'No.' " The trial court then told the jury, " 'So with that added information, please continue your deliberations.' " (*Id.* at pp. 249–250.)

Unlike in *Thompkins*, the trial court's responses to the jury's inquiries in this case were neither peremptory nor perfunctory. After reminding the jury of the elements of the offense given in CALCRIM No. 2110, the court reread the third paragraph of CALCRIM No. 220, which defines the legal concept of reasonable doubt: " '[P]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.' " This definition is constitutionally valid, and courts have repeatedly upheld its use in the face of challenges like appellant's. (*Victor v. Nebraska* (1994) 511 U.S. 1, 14–15 ["An instruction cast in terms of an abiding conviction as to guilt . . . correctly states the government's burden of proof"]; *People v. Romero and Self* (2015) 62 Cal.4th 1, 42–43 [CALJIC No. 2.90]; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268 [CALCRIM No. 220 "neither lowers the prosecution's standard of proof nor raises the amount of doubt the jury must have in order to acquit"].)

"[A]ppellate courts have long cautioned against 'an impromptu instruction on reasonable doubt.' [Citations.] . . . [V]arying from the standard is a 'perilous exercise.' " (*People v. Freeman* (1994) 8 Cal.4th 450, 503–504.) In assessing a trial court's charge to the jury, including any elaborations or

explanations of the standard instructions, we must consider the instructions as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) In the context of the entire charge, an instruction can only be found to be ambiguous or misleading if there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*Id.* at p. 1237.)

Here, the plain language of CALCRIM Nos. 220 and 2110, taken with the court's reiteration of those instructions and the rest of the charge, made it clear that the People bore the burden of proving every element beyond a reasonable doubt. In addition, the fact that the jury did not have any more questions, but returned its verdict within 45 minutes of resuming deliberations is a strong indication of the adequacy of the court's explanations. In these circumstances, we find no instructional error or due process violation.

II. The Trial Court Properly Found Appellant's Prior Conviction Under Vehicle Code Section 23152 Was Punished as a Felony and Thus Constituted a Qualifying Conviction Under Section 23550.5

In January 2011, appellant suffered a felony conviction for driving under the influence of alcohol and causing injury to another in violation of section 23153, subdivision (a). He was sentenced to 36 months formal probation with eight days of county jail.

Section 23550.5, subdivision (a) provides in relevant part:

"A person is guilty of a public offense, punishable by imprisonment in the state prison . . . if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of . . . [¶] . . . [a] prior violation of Section 23153 that was *punished as a felony*." (Italics added.)

Appellant incorrectly interprets the phrase "punished as a felony" to exclude any disposition involving probation, claiming that because his prior felony conviction did not result in a prison sentence, it was punished as a misdemeanor, not a felony. "[I]n most circumstances the trial court has broad discretion to choose probation when sentencing a criminal offender" (*People v. Moran* (2016) 1 Cal.5th 398, 402), and the selection of probation does not change the felony nature of the crime or the punishment.[6]

In *People v. Camarillo* (2000) 84 Cal.App.4th 1386 (*Camarillo*), the court rejected the argument (advanced by the Attorney General in that case) that any offense originally punished as a felony would trigger the sentencing provision of former section 23175.5 (former § 23175.5, added by Stats. 1997, ch. 901, § 6, repealed by Stats. 1998, ch. 118, § 41.5, and renumbered as § 23550.5, Stats. 1998, ch. 118, § 84), even if the conviction was later reduced to a misdemeanor. (*Id.* at p. 1390.) In *Camarillo*, defendant was convicted in 1991 of felony driving under the influence causing injury in violation of section 23153, subdivision (b). The trial court suspended imposition of sentence and placed defendant on probation for five years with 364 days in jail. After defendant had completed three years of his probation, the trial judge designated the offense as a misdemeanor " 'for all purposes' " under Penal Code section 17, subdivision (b)(3), and ordered that " 'the previous grant of formal probation be modified

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[6] Indeed, the statutory scheme of which section 23550.5 is a part plainly contemplates probation as one of the sentencing options for the punishment of a felony conviction under section 23153. (See, e.g., §§ 23530, 23556 [mandatory conditions of probation].)

to summary probation.' " (*Id.* at pp. 1388, 1390.) In 1998, defendant was charged with a felony violation of section 23152, with the 1991 conviction charged as a prior felony conviction under former section 23175.5.

On appeal, the court held that the 1991 conviction could not be charged as a prior felony conviction after it had been reduced to a misdemeanor " 'for all purposes.' " (*Camarillo*, *supra*, 84 Cal.App.4th at p. 1389.) In so holding, the court noted it had no quarrel with "the Attorney General's position that the 1991 prior conviction was *originally* 'punished as a felony' under former section 23175.5. Clearly, [defendant] was initially admitted to felony probation." (*Id.* at p. 1390.) However, the trial court's declaration that the 1991 offense was a misdemeanor " 'for all purposes' " under Penal Code section 17 precluded the use of that conviction as a prior felony conviction in a subsequent prosecution. (*Ibid.*)

The appellate court's review of the legislative history of section 23175.5 led to the same conclusion. The court found that the final amendment to the bill limited the law's application "to a 'prior violation . . . that was punished as a felony.' This change was intended to mean that the statute applied to 'any person who is convicted of a DUI within ten years of having previously been convicted of a felony DUI. . . .' (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 130 (1997–1998 Reg. Sess.) Sept. 4, 1997.) Under this version, all driving under the influence convictions would qualify, *if they were felony convictions.*" (*Camarillo*, *supra*, 84 Cal.App.4th at p. 1393.) The court explained, "The series of amendments to Assembly Bill No. 130 appear to have been predicated upon a consideration of the nature of the prior offense as a felony, rather than the intent to subject persons such as [defendant], whose offense had been

ultimately designated as a misdemeanor, to enhanced penalties. . . . We view this change in language as signifying the Legislature's intent to narrow application of the statute, to differentiate between felony convictions and misdemeanor convictions, and to preclude the use of wobbler offenses that did not also result in felony convictions." (*Ibid*.; see *People v. Lopes* (2015) 238 Cal.App.4th 983, 986 [" ' "violation . . . that was punished as a felony" ' has more to do with the discretion of sentencing courts to identify 'wobbler' offenses as either felonies or misdemeanors"].)

Camarillo plainly contradicts the proposition underlying appellant's argument that imposition of formal probation as punishment for a felony conviction reduces that offense to a misdemeanor. Here, appellant's sentence of formal probation with eight days of jail did not alter the fact that he was punished for a felony. Moreover, given that appellant's 2011 section 23153 violation was a "wobbler," the court could have sentenced it as a misdemeanor by imposing summary rather than formal probation. (See *People v. Willis* (2013) 222 Cal.App.4th 141, 145, 147 [summary probation is reserved for misdemeanors, and is not authorized in felony cases].) By sentencing appellant to formal probation, the court imposed a felony punishment for a felony conviction. Accordingly, the trial court properly sentenced the current offense as a felony pursuant to section 23550.5, based on appellant's 2011 prior felony conviction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.