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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NEELY LEJON DINKINS, Defendant and Appellant.	B231829 (Los Angeles County Super. Ct. No. NA083282)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Neely Lejon Dinkins appeals from the judgment entered following his convictions by jury on count 1 – second degree murder (Pen. Code, § 187), count 2 – gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)), count 3 – driving under the influence causing injury (Veh. Code, § 23153, subd. (a)), count 4 – driving with a blood alcohol level of .08 percent or more causing injury (Veh. Code, § 23153, subd. (b)), and count 5 – leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), with findings as to each of counts 3 and 4 that he proximately caused bodily injury or death to multiple victims (Veh. Code, § 23558) and findings as to each of counts 2 through 5 that he personally inflicted great bodily injury on a person under five years old (Pen. Code, § 12022.7, subd. (d)). The court sentenced appellant to prison for six years eight months, plus 30 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence established on September 11, 2009, Mary Tillman, the mother of appellant's children, owned a 2008 Dodge Durango. Sometime after 7:00 p.m. on that date, appellant drove it from Tillman's house on an errand.

About 8:15 p.m., Alexi Alvarez, Yesenia Soto, and their two children Oscar and Kaylee were at the intersection of Tenth and Redondo in Long Beach. Oscar and Kaylee were about two years old and one year old, respectively. Streetlights on each corner of the intersection illuminated it, and lights from a gas station on the northwest corner provided additional illumination.

After the traffic light turned green for the family, the family began lawfully crossing Redondo together westbound in the crosswalk on the north side of Tenth. The children were in a Radio Flyer wagon. Unlike Oscar, Kaylee was wearing a seatbelt. Alvarez was pulling the wagon while Soto walked behind it.

While the family was crossing the intersection, appellant made a left turn from eastbound Tenth towards northbound Redondo and the family. A detective testified that, based on a video of the incident (that was played for the jury), it appeared the Durango

had an unobstructed view of the intersection. Yesenia testified to the effect appellant was driving erratically and swerving as he drove towards the crosswalk. The Durango entered the crosswalk and struck the family, dragging the children with it. Yesenia got up and saw the Durango driving away. Yesenia and a bicyclist chased it. A male had his hands raised and people everywhere were screaming. Appellant stopped about 300 feet north of the intersection.

Yesenia stood on a step on the Durango's passenger side. There were probably seven people around the Durango. Yesenia, screaming, began banging her fist on the partially open passenger window of the Durango. When she initially banged on the window, appellant did not respond. Appellant looked like he was in shock and he was looking everywhere. Yesenia repeatedly screamed for appellant to stop and told him "you have my kids in there." When appellant did not respond, Yesenia shouted a racial epithet at him to get his attention. Appellant looked at Yesenia, drove backwards, and she fell off the Durango. Appellant then drove away. The Durango was making a loud dragging noise and sparks were flying under it.

Alejandro Trevino was riding his bicycle when he saw the Durango hit the family and eventually stop. He rode his bicycle along the driver's side of the Durango to its front, held out his hands, and yelled for appellant to stop. The headlights of the Durango were operating. Appellant drove away, colliding with the bicycle.

Ira Cohen lived north of the intersection and testified to the events he experienced from that vantage point. Cohen heard a thumping sound, a female screaming, and people yelling, " 'Stop him! Stop him! Get him! Get him!' " Cohen saw the Durango approaching with something under its front. Cohen stepped into Redondo in front of the Durango, held out his hands to stop appellant, and appellant stopped. Oscar rolled from under the front of the Durango. Cohen yelled and motioned for appellant to stop, but appellant drove backwards. Cohen picked up Oscar, whom appellant had seriously injured. Kaylee remained trapped under the Durango. Appellant drove away, narrowly missing Cohen and Oscar.

Enrique Reynoso, driving his car southbound on Redondo, saw Oscar roll from under the Durango but Kaylee still trapped. Reynoso had a view of the front and driver's side of the Durango. He testified, ". . . I was waving my arms to get his attention, telling him to stop. There was another kid under there, just kept going . . . ." When the Durango drove away, it passed within five feet of Reynoso.

Robert Harvey saw the Durango hit Yesenia and later speed away. Harvey, in a vehicle, pursued appellant. Appellant drove between 40 to 60 miles per hour through residential areas to escape, and failed to stop for stop signs. Harvey was between 40 to 100 feet behind the Durango during the pursuit, but he could still hear a loud scraping noise coming from the Durango, and saw sparks flying from it.

Tillman heard a noise outside her home at 3444 Wilton in Long Beach. She went outside and saw the Durango in the driveway and police everywhere. Tillman told an officer that appellant was the driver of the Durango. Tillman also told an officer that appellant exited the Durango and said, " 'I fucked up.' " After appellant said that, he walked away.

Kaylee, still trapped in the wagon by her seatbelt, was found under the right front wheel well of the Durango at Tillman's house. We will not detail the horrific and fatal injuries appellant caused to Kaylee other than to sadly observe appellant drove 1.3 miles from Tenth and Redondo to Tillman's house, parts of Kaylee were strewn along that route, and when she was found under the wheel well, half her head was gone. Appellant's California driver's license was issued in 1994. It was suspended in May 2008, and remained suspended as of September 11, 2009.

Long Beach Police Officer Danielle Quinones, en route to Tenth and Redondo, saw appellant and detained him. Quinones asked appellant where appellant was coming from, and appellant replied, "Over there." Quinones asked appellant to clarify his answer but appellant did not orally respond.

Quinones put appellant in the patrol car and took him to the hospital. En route, appellant said, "I was pretty much in the right-of-way whoever that lady was she was just

trying to beat traffic" and "I know what I did. They was (*sic*) jaywalking. I don't know who that lady was, but she was jaywalking." At the hospital, appellant said he "had the green light."

After appellant arrived at the hospital, he initially refused to give a blood sample but later provided one after police told him they would hold him down and take one. At 9:35 p.m., on September 11, 2009, a sample of appellant's blood was drawn and it contained a blood alcohol content (BAC) of .20 percent. A criminalist testified a person with a BAC over .20 percent would experience a gross level of impairment and a person with a .20 percent BAC might have difficulty concentrating on several tasks simultaneously. On September 12, 2009, appellant asked the jailer why appellant was in jail. The jailer told appellant that appellant was there because appellant had "hurt some kids down the street." Appellant replied, "Well, they shouldn't have been jaywalking."

ISSUES

Appellant claims (1) there was insufficient evidence of implied malice supporting his murder conviction, (2) Quinones violated appellant's *Miranda*[1] rights, (3) the trial court erroneously denied appellant's motion for disclosure of juror identification information, (4) the trial court erroneously denied appellant's continuance motion, and (5) the trial court erroneously denied appellant's motion for a new trial.

DISCUSSION

1. *There Was Sufficient Evidence of Implied Malice.*

Appellant claims there is insufficient evidence of implied malice supporting his murder conviction. We disagree. Malice consists of physical and mental components. The physical component requires the performance of an act, the natural consequences of which are dangerous to life. The mental component requires that the defendant know his or her conduct endangers the life of another and that the defendant act with a conscious

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

disregard for life. (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) Appellant expressly disputes only the sufficiency of the evidence of the mental component.

We have set forth the pertinent facts in our Factual Summary. Suffice it to say that, based on the events transpiring from the time appellant drove from Tillman's house to the time he drove into the family, the jury reasonably could have concluded appellant's actions created the risk that if appellant failed to stop for the red light for him and drove the Durango into the crosswalk where the family was walking in plain view, the Durango would strike and/or kill one or more family members. Appellant was driving under the influence of alcohol, with a BAC later determined to be .20 percent. Appellant took no action to avert the impending collision and instead he drove into the crosswalk and the family.

Moreover, based on the events transpiring from the time appellant, under the influence, drove into the family to the time he stopped on Redondo and Oscar was dislodged from the Durango, including the sound of the collision, the dragging noises, and people screaming to the effect appellant was dragging children, the jury reasonably could have concluded appellant was driving the Durango while dragging Oscar and Kaylee down the street, endangering, and knowing his conduct was endangering, the children's lives, and harboring a conscious disregard for life.

Further, based on the events transpiring from the time appellant, under the influence, drove from Redondo to the time he arrived at Tillman's house and walked away, including the facts Yesenia had screamed to appellant to the effect her "kids" were under the Durango yet only Oscar was dislodged, the jury reasonably could have concluded appellant was driving the Durango while dragging Kaylee down streets, endangering, and knowing his conduct was endangering, her life, and harboring a conscious disregard for life. Appellant's statement to Tillman that appellant " 'fucked up' " and appellant's walking away evidenced consciousness of guilt.[2]

[2] Appellant does not dispute his conviction for a violation of Vehicle Code section 20001, subdivision (a) (count 5) or the jury instructions pertaining to that count. We note

Finally, the jury reasonably could have concluded from appellant's statements to Quinones and the jailer that, at the time appellant drove the Durango into the family, appellant endangered the life of another, knew it, and had a conscious disregard for life as evidenced by his specious assertions to the effect he had the right of way because the family was jaywalking. There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, appellant committed murder with implied malice, including sufficient evidence of its mental component. (Cf. *Cravens*, *supra*, 53 Cal.4th at p. 507; *Ochoa, supra,* 6 Cal.4th at p. 1206.)

2. *No Miranda Violation Occurred.*

a. *Pertinent Facts.*

The record, fairly read, reflects that during an admissibility hearing Quinones testified as follows. About 8:15 p.m., Quinones was dispatched to a location on Wilton. En route, Quinones saw appellant, and Quinones and his partner contacted appellant. Quinones grabbed appellant's arm when Quinones contacted him. Quinones asked appellant, " 'Where are you coming from?' " and appellant replied, " 'Over there.' " Quinones asked appellant, "What does 'over there' mean?" but appellant did not answer. During this time, appellant was detained and had not been *Mirandized*.

At some point appellant was handcuffed and later placed in a patrol car. A couple of minutes passed from the time Quinones grabbed appellant's arm to the time appellant was placed in the car. Quinones did not question appellant after Quinones arrested him. Appellant was *Mirandized* in the patrol car. After appellant was placed in the patrol car, he made spontaneous statements.

During argument, the prosecutor conceded appellant was in custody but did not explicitly state whether that concession applied to Quinones's two previously quoted questions. In fact, the prosecutor argued appellant was in the patrol car in handcuffs

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the court instructed the jury pursuant to CALJIC No. 12.70 that an element of that crime was appellant "knew that an accident had occurred, knew that he was involved in the accident and either knew that the accident resulted in injury to or death of a person or knew that it was of such a nature that it was probable that it resulted in injury or death."

when he made "the first of the statements," and appellant's statements were spontaneous. Appellant argued, inter alia, police should have *Mirandized* appellant when they "contact[ed]" him and asked " 'Where are you coming from?' "

After argument, the court did not address whether appellant was in custody for purposes of *Miranda*. Instead, the court indicated as follows. The question " 'Where are you coming from' " was not interrogation. At some point appellant was *Mirandized*. None of the other questions constituted interrogation. No violation of *Miranda* occurred. Appellant's spontaneous statements were admissible.

b. *Analysis*.

Appellant claims Quinones violated appellant's *Miranda* rights by asking him "Where are you coming from?" and "What does 'over there' mean?" Appellant argues in his opening brief these questions constituted impermissible "post-arrest" interrogation that occurred absent a *Miranda* waiver. We reject appellant's claim.

The threshold issue is whether appellant was in custody for purposes of *Miranda* when Quinones asked the two challenged questions. The record, fairly read, reflects Quinones asked the two questions (only the first of which appellant answered) while police detained appellant. Quinones later arrested appellant and placed him in the patrol car, and appellant subsequently made spontaneous statements, but appellant does not challenge the admissibility of those statements.

Appellant does not dispute he was lawfully and briefly detained for investigation. The fact Quinones asked appellant the two challenged questions while Quinones and his partner merely detained appellant in public at night does not compel the conclusion appellant was in custody for purposes of *Miranda*. Nor does the record demonstrate appellant was in handcuffs when Quinones posed the two questions but, even if appellant was, that fact would not convert a detention into a de facto arrest. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1517.) Appellant concedes in his reply brief "the challenged questions occurred before his arrest."

We conclude when Quinones asked appellant the two challenged questions, appellant was not in custody for purposes of *Miranda*. (Cf. *People v. Leonard* (2007) 40 Cal.4th 1370, 1400; *People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Clair* (1992) 2 Cal.4th 629, 679-680 (*Clair*); *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, fn. 1, 1404; *People v. Lopez* (1985) 163 Cal.App.3d 602, 608.)[3] Moreover, "interrogation" for purposes of *Miranda* consists of words or actions on the part of officers that they should know are reasonably likely to elicit an incriminating response. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034 .) Based on the record in this case, the two questions did not constitute "interrogation." (Cf. *Clair*, *supra*, 2 Cal.4th at pp. 679-680.)

Finally, appellant's answer to the first challenged question was not facially incriminating. Appellant never orally answered the second question. The spontaneous statements appellant later made were far more incriminating than his response to the first question. There was ample evidence of appellant's guilt independent of that response. Any *Miranda* violation was harmless beyond a reasonable doubt. (Cf. *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

3. *The Court Properly Denied Appellant's Motion for Disclosure of Juror Identification Information.*

a. *Pertinent Facts.*

During its final charge to the jury, the court gave CALJIC Nos. 8.72 and 17.10.[4] The jury announced its verdicts on February 2, 2011, and the court continued the case to

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[3] To the extent the trial court did not expressly rule on this issue, we review the trial court's ruling, not its reasoning. (*People v. Cressy* (1996) 47 Cal.App.4th 981, 986, fn. 3.)

[4] CALJIC No. 8.72 indicated if the jury was convinced beyond a reasonable doubt the killing was unlawful but agreed there was reasonable doubt whether the crime was murder or manslaughter, the jury had to convict appellant of manslaughter. CALJIC No. 17.10 indicated the jury was to determine whether appellant was guilty of the crime charged; if the jury was not convinced beyond a reasonable doubt appellant was guilty of the charged crime, the jury could convict him of any lesser crime if the jury was

March 8, 2011, for sentencing. On March 7, 2011, appellant faxed to the trial court a "petition for order disclosing personal juror information [¶] (CCP § 237[])" (petition). The petition requested said information so appellant could file a motion for a new trial based on jury misconduct.

The sole supporting declaration, that of attorney Charles Frisco, appellant's trial counsel, indicated as follows. After the verdicts, Frisco spoke with jurors including Juror No. 9. Juror No. 9 said that during deliberations, jurors told her that the judge said the jury could not convict appellant on count 2 unless the jury convicted him on count 1, and jurors told Juror No. 9 that the jury had to convict appellant on the greater offense before the jury could convict him on the lesser included offense. Juror No. 9 also told Frisco that Juror No. 9 believed appellant was not guilty of murder, and but for the erroneous information conveyed to her by other jurors, Juror No. 9 would have acquitted appellant on count 1. Frisco indicated the above events violated the trial court's instructions to the jury to follow the law as given by the trial court, and the violation substantially influenced the verdict.

On March 8, 2011, during argument on the petition, the prosecutor opposed it, commenting she had received the petition only shortly before the court session and appellant had not met his burden of justifying disclosure. Appellant submitted the matter. The court denied the petition on the ground the court had given CALJIC No. 17.10 at appellant's request and the court presumed the jury had followed it. The court also denied the petition on the ground Frisco's declaration gave his "impressions of Juror No. 9's disclosure," Juror No. 9 had not submitted a declaration, and appellant had not sustained his burden as to the petition.

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convinced beyond a reasonable doubt appellant was guilty of it; and if the jury acquitted appellant of the greater crime of murder, the jury could convict appellant of the lesser crime of involuntary manslaughter.

b. *Analysis.*

Appellant claims the trial court erred by denying his petition. We disagree. Frisco's declaration reflected, inter alia, Juror No. 9 told Frisco that Juror No. 9 believed appellant was not guilty of murder, and but for the erroneous information conveyed to her by other jurors, Juror No. 9 would have acquitted appellant on count 1. To that extent, the petition proffered evidence of the effect of alleged statements on Juror No. 9 in influencing her to assent to the verdict on that count, and proffered evidence concerning the mental processes by which Juror No. 9 determined that verdict. That evidence was inadmissible under Evidence Code section 1050, subdivision (a), as well as being hearsay.

As to the rest of Frisco's declaration, we note the following. According to the declaration, an unspecified number of unidentified jurors at an unstated time during deliberations told Juror No. 9 that (1) the judge said the jury could not convict appellant on count 2 unless the jury convicted him on count 1, and (2) the jury had to convict appellant on the greater offense before the jury could convict him on the lesser included offense.

However, Frisco's hastily submitted declaration, lodged with the trial court on March 7, 2011, for a March 8, 2011, court proceeding but discussing events that allegedly occurred more than a month before, lacks specificity and context even for a prima facie showing of good cause. Such a showing is a prerequisite to a hearing on whether juror information is to be released. (See Code Civ. Proc., §§ 206, subd. (g) & 237, subd. (b).)

In particular, the declaration does not reflect whether Juror No. 9 indicated (1) when the alleged statements of the unidentified jurors occurred, e.g., at the beginning or end of deliberations, (2) whether the unidentified jurors and/or Juror No. 9 stated during deliberations whether they were willing or unwilling to follow the law, (3) whether another juror(s) made correcting statements to Juror No. 9 and the unidentified jurors during deliberations, and/or (4) whether the unidentified jurors and/or Juror No. 9 ultimately stated during deliberations that they understood and would follow

the law. Frisco presumably could have obtained statements from Juror No. 9 concerning these issues when he talked with Juror No. 9. Moreover, the jury instructions, i.e., CALJIC Nos. 8.72 and 17.31, adequately conveyed to the jury it could convict appellant of a lesser offense without convicting him on a greater one. We presume the jury followed the instructions. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Further, as the trial court intimated, some language of the declaration (i.e., Frisco's phrase "but for the erroneous information") suggests Frisco was not reciting but characterizing some of the alleged statements of the alleged unidentified jurors.

The trial court reasonably could have concluded Frisco's hurriedly submitted declaration may have reflected only Frisco's conclusory characterizations, and statements by Juror No. 9 concerning isolated musings by an unspecified number of unidentified jurors prior to full jury deliberations and consideration of the jury instructions. The trial court did not abuse its discretion by denying appellant's petition. (See *People v. Jones* (1998) 17 Cal.4th 279, 316-317; *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322; Evid. Code, § 1150, subd. (a).)[5]

4. *The Trial Court Properly Denied Appellant's Continuance Motion and Appellant Made No Motion for a New Trial*.

a. *Pertinent Facts*.

As mentioned, Frisco represented appellant during trial and the jury convicted him on February 2, 2011. On that date, appellant waived his statutory right to sentencing within 20 court days, asked for a continuance so Frisco could prepare for appellant's prior convictions trial and sentencing, and suggested a date of March 8, 2011. The court continued the case to that date.

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[5] The court cited *People v. Murtishaw* (1981) 29 Cal.3d 733. To the extent that citation was erroneous, we review a trial court's ruling, not its reasoning. (Cf. *People v. Mason* (1991) 52 Cal.3d 909, 944.)

On March 8, 2011, appellant made another continuance motion. The court denied it. Frisco later indicated he "need[ed] to file a motion for new trial based upon my request for juror contact," i.e., based on the previously mentioned petition. Frisco noted this was his first continuance motion after the verdicts. The court indicated appellant could make a continuance motion later. After the court later denied the petition as previously discussed, appellant renewed his continuance motion. Frisco stated he needed to get a declaration from Juror No. 9 so the court could determine whether or not there was juror misconduct.

Later, the court, purporting to "address the motion for a new trial" indicated as follows. The motion for a new trial was premised upon the court's ruling on the petition, the court had ruled there was no basis for disclosing juror information, and that ruling was the law of the case. Appellant had ample time to act from the date of the verdicts to the date of the sentencing hearing. The court denied appellant's "motion for new trial."

Frisco commented he had been engaged in trial elsewhere. However, the trial court below told Frisco on March 8, 2011, that he was then in trial in that court, including representing appellant during his prior convictions trial. The court later sentenced appellant.

b. *Analysis.*

Appellant makes related claims the trial court erroneously denied his continuance and new trial motions. We disagree. As for the continuance motion, although the record is not ideal in clarity, the record, fairly read, reflects as follows. The court continued the case for sentencing and, at appellant's suggestion, set the date for March 8, 2011, well past the statutory time limit appellant waived. On March 8, 2011, appellant moved for a continuance to enable him to prepare a motion for a new trial based on jury misconduct. Appellant intended the motion for a new trial to be supported by a declaration he would obtain from Juror No. 9 after the court granted appellant's petition.

However, as we have previously discussed, the trial court properly denied appellant's petition because it was not supported by good cause. A continuance would not, therefore, have been useful and there was no likelihood benefit would result from the continuance. The trial court did not abuse its discretion or deny appellant's right to due process, right to effective assistance of counsel, or any other constitutional right of appellant by denying his continuance motion. (See *People v. Roldan* (2005) 35 Cal.4th 646, 670; *People v. Snow* (2003) 30 Cal.4th 43, 70, 77; *People v. Smithey* (1999) 20 Cal.4th 936, 1011-1012; *People v. Barnett* (1998) 17 Cal.4th 1044, 1126; *People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

As for the alleged motion for a new trial, although the trial court purportedly ruled on such a motion, appellant merely moved for a continuance to enable him to prepare a motion for a new trial. Appellant concedes a motion for a new trial "was neither prepared nor filed." The burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Appellant has failed to demonstrate he made a motion for a new trial based on jury misconduct, or otherwise. Accordingly, there is no need to reach the issue of whether the trial court properly denied any such motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J. ALDRICH, J.