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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOSEPH DANIEL CANTRELL, Defendant and Appellant.	2d Crim. No. B292316 (Super. Ct. No. 2015026891) (Ventura County)

Joseph Daniel Cantrell appeals after a jury convicted him of second degree implied malice murder (Pen. Code, §§ 187, subd. (a), 189), gross vehicular manslaughter while intoxicated (*id.*, § 191.5, subd. (a)), fleeing the scene of an accident involving death (Veh. Code,[1] § 20001, subd. (b)(2)), and driving with a suspended license with a prior conviction for driving under the influence of alcohol (DUI) (§ 14601.2, subd. (a)). The jury also found true allegations that appellant had two prior DUI

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

convictions (DUI) (§ 23152, subd. (a)) and fled the scene of the accident (§ 20001, subd. (c)). The trial court sentenced him to five years plus 15 years to life in state prison for gross vehicular manslaughter and fleeing the scene; a sentence of 15 years to life for second degree murder was stayed under section 654. Appellant contends (1) extrajudicial statements obtained in violation of his *Miranda*[2] rights were erroneously admitted against him; (2) the results of his blood test should have been suppressed; (3) the evidence is insufficient to support his murder conviction; and (4) the court committed instructional error. We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 7:45 p.m. on August 23, 2015, Randy Fillmore was walking across the street in a marked crosswalk when appellant drove through a red light and hit and killed him. Appellant did not stop and continued speeding away until he crashed into a parked car. He ran from the car. A bystander who gave chase stopped appellant and seated him on the curb. Appellant appeared to be intoxicated and was screaming, "Oh, no." He also yelled "[w]hat did I do" and said "I hit someone."

Ventura County Sheriff's Deputy Vince Reynoso responded to the scene and stood next to appellant as he was being checked by paramedics. Appellant smelled like alcohol and was crying and yelling. He complained of chest pain so he was transported by ambulance to the hospital.

Deputy Reynoso followed the ambulance to the hospital and stood at the emergency room nurse's station while appellant was in a bed approximately 20 to 30 feet away. Deputy Dan Turock

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

subsequently arrived, approached appellant in his hospital bed, and introduced himself. Appellant smelled of alcohol and his eyes were red, watery, and glassy. When asked about the incident, appellant said he drank two vodka drinks that afternoon while at a barbeque at his mother's house. At some point he got into an argument with his mother and she told him to leave. He knew he was too drunk to drive and had planned to sit in his car until he "sober[ed] up." After getting into his car, he did not remember anything else until he was in the ambulance.

Based on his observations of appellant, Deputy Turock concluded he was under the influence of alcohol and informed him he was being placed under arrest for DUI. A blood sample drawn from appellant at the hospital contained a blood alcohol level of .172 percent. To reach this blood alcohol level, a person of appellant's size would have to drink eight to nine standard alcoholic drinks.

In 2008, appellant pleaded guilty to driving with an .08 percent or higher blood alcohol level (§ 23152, subd. (b)) and admitted a blood alcohol level of .15 or more (§ 23578). His initialed and signed plea form included the *Watson*[3] advisement, which stated: "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."

In 2009, appellant pleaded guilty to DUI and possessing an open container. His initialed and signed plea form included the

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

Watson advisement. As a result of both convictions, appellant's driver's license was suspended and the suspension was never lifted.

Appellant testified on his own behalf. At the time of the incident he was living in his car and sometimes stayed at his mother's house, where his wife and two children also lived. He spent that day at the house with his mother, wife and children. He drank three vodka lemonades but was not planning to drive. He got into an argument with his mother and went to his car. He knew he was too intoxicated to drive and did not recall doing so.

DISCUSSION

Miranda *Motion*

Appellant contends the trial court erred in denying his motion to exclude the extrajudicial statements he made to Deputy Turock at the hospital on the ground they were obtained in violation of *Miranda*. We conclude otherwise.

Miranda dictates that a person questioned by law enforcement after being "taken into custody" must first be warned that he or she has the right to remain silent, that any statements that he or she makes may be used against the person, and that he or she has a right to the presence of retained or appointed counsel. (*Miranda*, *supra*, 384 U.S. at p. 444.) For the *Miranda* rule to apply, there must be an interrogation by the police while the suspect is in police custody. (*Id.* at p. 478.)

Whether a person is in custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323 [128 L.Ed.2d 293] (*Stansbury*).) "The question whether [the] defendant was in custody for *Miranda* purposes is a mixed

question of law and fact." (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) "[A]n appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

"To determine whether an interrogation is custodial we consider a number of circumstances, including: 'whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.'" (*People v. Torres* (2018) 25 Cal.App.5th 162, 172-173.)

At the hearing on appellant's suppression motion, Deputy Reynoso testified that he handcuffed one of appellant's hands to the gurney in the ambulance because appellant was behaving erratically and the deputy believed he may have fled the scene of an accident. The deputy told appellant that he was being detained but was not under arrest. While appellant was in the emergency room with one of his hands handcuffed to the bed, Deputy Reynoso asked him what had happened that evening. Appellant replied that he had a few vodka drinks at his mother's house, left after getting into an argument, and went to sit in his car. He did not recall anything after that.

Deputy Turock later arrived and spoke to appellant after conferring with Deputy Reynoso. Upon entering the room, Deputy Turock told appellant he was handcuffed to the bed because he was being combative with hospital staff. The deputy said he wanted to talk to appellant about a traffic accident and wanted to remove his handcuff so appellant would be comfortable and able to place his focus on their conversation. The deputy also told appellant he was not under arrest. Deputy Turock removed the handcuff after appellant assured him he would not be combative. Appellant then told the deputy what he recalled.

The trial court excluded the statements appellant made to Deputy Reynoso while handcuffed to the bed, but admitted the statements he made to Deputy Turock after the handcuffs were removed. The court reasoned that "the removal of the handcuffs, the explanation as to why the handcuffs could and would be removed, the fact that he was told he was not under arrest, is enough to ameliorate the custodial pressures that often exist [for] someone being handcuffed."

The court did not err. Appellant made the challenged statements while in a hospital bed free of physical restraints. He was told that he was not under arrest and only two deputies were present. Moreover, there is no indication deputies were aggressive or accusatory or employed special techniques to pressure appellant. The court thus correctly found, under the totality of the circumstances, that appellant's statements were not the result of a custodial interrogation.

People v. Bejasa (2012) 205 Cal.App.4th 26 (*Bejasa*), upon which appellant relies, is inapposite. The defendant in that case was involved in a car accident and admitted to a police officer he was on parole. (*Id.* at p. 30.) The officer searched the defendant and found methamphetamine. (*Ibid.*) The officer handcuffed the defendant, placed him his patrol car, and told him he was being detained for a possible parole violation. (*Ibid.*) After five additional officers arrived, the defendant was released from the patrol car and his handcuffs were removed. (*Id.* at pp. 31, 33.) The defendant was subsequently arrested but was not given *Miranda* advisements until he arrived at the jail. (*Ibid.*)

The appellate court concluded that the statements the defendant made after he was removed from the patrol car and the results of his field sobriety tests should have been excluded, but deemed the error harmless. *(Bejasa*, *supra*, 205 Cal.App.4th at p. 31.) The court highlighted the defendant's incriminatory statements before he was restrained and the officer's quick decision to handcuff him after he admitted being on parole and in possession of drugs. (*Id.* at p. 37.) Moreover, the officer did not merely tell the defendant was being detained, but that he was being detained for a possible parole violation. (*Ibid.*) Although the defendant's handcuffs were removed, the court concluded

"[t]he removal of the restraints was not enough to ameliorate the custodial pressures that likely remained from the initial confinement. Furthermore, defendant was released from the police car only after numerous officers had arrived at the scene. The ratio of officers to suspect had increased to at least seven to one, thus increasing the custodial pressure on defendant." (*Id.* at pp. 38-39, fn. omitted.)

We also reject appellant's contention that his statements to Deputy Turock were obtained through an unconstitutional two-step interrogation, in violation of *Missouri v. Seibert* (2004) 542 U.S. 600 [159 L.Ed.2d 643] (*Seibert).* *Seibert* prohibits law enforcement officers from employing a deliberate two-step interrogation technique where they elicit a confession, administer *Miranda* warnings and obtain a waiver of *Miranda* rights, then elicit a repeated confession. (*Id.* at pp. 604, 609-610, plur. opn. of Souter, J.; *id.* at p. 622, conc. opn. of Kennedy, J.) *Seibert*, however, involved *Miranda* warnings delivered in the midst of a custodial interview. (*Id.* at p. 604, plur. opn.) Moreover, *Siebert* only applies when the police have deliberately and intentionally sought to circumvent *Miranda*. (See *People v. Rios* (2009) 179 Cal.App.4th 491, 504-505.) Because appellant was not in custody when he spoke to Deputy Turock, the deputy did not administer *Miranda* warnings, and there is no evidence the deputy deliberately and intentionally sought to circumvent *Miranda*, appellant's reliance on *Siebert* is misplaced.

Even if appellant's statements to Deputy Turock should have been excluded, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; *People v. Neal* (2003) 31 Cal.4th 63, 86.) It was undisputed at trial that appellant ran a red light and hit and

killed Fillmore, that he fled the scene of the accident, and that he was driving with a suspended license. Other evidence established that appellant's blood alcohol level was more than double the legal limit, that he had two prior DUI convictions, and that he had received *Watson* advisements in both prior cases. In light of this evidence, any error in admitting appellant's statements that he had been drinking and did not intend to drive drunk was harmless beyond a reasonable doubt.

Blood Test Results

Appellant claims the court erred in denying his motion suppress the results of his blood test because his blood was drawn without his voluntary consent. We are not persuaded.

"A blood draw is a search subject to the Fourth Amendment. [Citation.]" (*People v. Balov* (2018) 23 Cal.App.5th 696, 700 (*Balov*).) If a suspect voluntarily consents to having his or her blood drawn, no warrant is required. (*People v. Harris* (2015) 234 Cal.App.4th 671, 689.) "The . . . voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process. 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.'" (*Balov*, at p. 701, internal quotation marks and citations omitted.)

Appellant's blood was drawn at the hospital before Deputy Turock arrived. At the suppression hearing, the lab assistant who drew appellant's blood testified that she did so for "hospital purposes" only. Pursuant to hospital policy, she also drew an extra tube of blood to give to the Sheriff's Department; in her

experience, this was usually ordered by the attending nurse in alcohol-related incidents. When the blood was drawn, appellant exhibited signs of intoxication and was going in and out of consciousness.

After Deputy Turock advised appellant he was under arrest, he read the standard advisement regarding the implied consent law (§ 23612). The deputy told appellant he was required to submit to either blood or breath testing. Appellant said he wanted a blood test. The deputy told appellant that a nurse had drawn his blood earlier and that he could either submit that blood sample or have his blood drawn again. Appellant replied "that he was fine if we just used the blood that had already been taken from him."

At the conclusion of the suppression hearing, defense counsel argued that appellant's consent to the testing of his blood was not voluntary because Deputy Turock told him he was "required" to submit to blood or breath testing when he was actually free to refuse. In denying the motion, the court reasoned that "[a]t no time did [appellant] say he was unwilling to give the test."

Substantial evidence supports the court's finding that appellant's consent was voluntary. *People v. Ling* (2017) 15 Cal.App.5th Supp. 1 (*Ling*), and *People v. Mason* (2016) 8 Cal.App.5th Supp. 11 (*Mason*), which appellant cites in support of his claim, are both factually inapposite. *Balov*, *supra*, 23 Cal.App.5th 696, is on point. Following a traffic stop and arrest on suspicion of DUI, an officer informed Balov "'that per California law he was required to submit to a chemical test, either a breath or a blood test.'" (*Id.* at p. 699.) The officer did not inform Balov of the statutory consequences of refusing

testing. Balov chose a blood test. (*Ibid.*) In concluding that Balov's consent was voluntary, the appellate court reasoned that "by the act of driving on California's roads, Balov accepted the condition of implied, advance consent [to blood or breath testing] if lawfully arrested for drunk driving." (*Id.* at p. 702.) Although that advance consent could have been withdrawn at the time of arrest had Balov refused testing, his consent after arrest reaffirmed the implied consent. The court noted that the officer telling Balov he was required to submit to chemical testing was not inaccurate because "Section 23612 required Balov to submit to a chemical test" or else "face[] the consequences specified under the consent law including a fine, the loss of his driver's license, and mandatory imprisonment if convicted of driving under the influence." (*Balov*, at p. 703.) The court found no evidence that the officer intended to deceive Balov by providing an incomplete admonition. The court reasoned that "failure to communicate the consequences of refusing a chemical test did not make [the officer's] statement any more or less coercive than if the information had been provided" because in "neither case is the driver advised of his or her right to refuse to test altogether." (*Id.* at p. 704.) The totality of the circumstances in this case similarly support a finding of voluntary consent.[4]

Sufficiency of the Evidence – Implied Malice Murder

Appellant contends that his conviction of second degree implied malice murder must be reversed for insufficient evidence. We conclude otherwise.

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[4] Appellant also claims the cumulative effect of the errors in admitting his statements to Deputy Turock and the results of blood test compel the reversal of his convictions. Because we reject both claims of error, there is no error to cumulate.

In reviewing claims of insufficient evidence, we "must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054-1055, internal quotation marks omitted.) We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*)

"'Second degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements—i.e., willfulness, premeditation, and deliberation—that would support a conviction of first degree murder.'" (*People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1358 (*Jimenez*).) Malice can be express or implied, and "[m]alice may be implied when a person willfully drives under the influence of alcohol." (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 681, citing *Watson*, *supra*, 30 Cal.3d 290.) "Following the Supreme Court's ruling in *Watson*, appellate courts have upheld numerous murder convictions in cases where defendants have committed homicides while driving under the influence of alcohol. [Citations.] Generally, these opinions 'have relied on some or all of the following factors' that were present in *Watson*: '(1) 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.' [Citation.]" (*Wolfe* at pp. 682-

683.) However, "nowhere does the opinion in *Watson* state that all of the factors present in that case are necessary to a finding of second degree murder. Rather, the opinion states that the presence of those factors was sufficient *in that case* to support a murder conviction." (*People v. Olivas* (1985) 172 Cal.App.3d 984, 988.) In evaluating whether the evidence is sufficient to support a conviction in this context, we apply "a case-by-case approach." (*Id.* at p. 989.)

The evidence is sufficient to sustain the jury's finding that appellant was guilty of implied malice murder. Appellant was driving with a blood alcohol level more than twice the legal limit when he ran a red light and hit Fillmore, whose body was thrown more than 50 feet. As appellant acknowledges, he "flagrant[ly] failed to even slow for the red light as he passed another motorist stopped at the light." He also had two prior DUI convictions that resulted in the suspension of his license, and in conjunction with those convictions he was given *Watson* advisements warning him of the dangers of drinking and driving and that he could be charged with murder if he killed someone while drinking and driving. This evidence satisfies the subjective knowledge requirement for implied malice. (See, e.g, *Jimenez*, *supra*, 242 Cal.App.4th at p. 1359 [warning in conjunction with prior DUI conviction]; *People v. Murray* (1990) 225 Cal.App.3d 734, 746 [prior drunk driving convictions and mandatory educational programs]; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 534 [multiple prior drunk driving convictions and exposure to drunk driving education programs].)

Appellant's arguments to the contrary disregard the deferential substantial evidence standard of review, which requires us to view the evidence in the light most favorable to the

judgment. To the extent he asserts that he had no predrinking intent to drive, "[t]he criminal act underlying vehicular murder is not use of intoxicating substances in anticipation of driving, but is driving under the influence with conscious disregard for life. Nothing in *Watson* states that the former is necessary to a finding of the latter." (*People v. Olivas*, *supra*, 172 Cal.App.3d at pp. 988-989.) In any event, the jury was free to reject appellant's self-serving statements that he had no predrinking intent to drive. His claim of insufficient evidence fails.[5]

Alleged Instructional Error

Appellant claims the trial court committed reversible error in failing to sua sponte instruct the jury on the union or joint operation of act and intent, as provided in CALCRIM No. 252.[6]

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[5] Appellant also contends "[i]t is time to reconsider the *Watson* murder doctrine and the legal fictions on which it rests." He acknowledges, however, that we are bound by the doctrine of stare decisis to follow the decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

[6] The instruction provides in pertinent part: "The crime[s] [(and/or) other allegation[s]] charged in Count[s] _____ require[s] proof of the union, or joint operation, of act and wrongful intent. [¶] The following crime[s] . . . require[s] general criminal intent: <insert name[s] of alleged offense[s] and enhancement[s] and count[s], e.g., battery, as charged in Count 1>. For you to find a person guilty of (this/these) crime[s] [or to find the allegation[s] true], that person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act [or fails to do a required act]; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime [or allegation]. [¶] The following crime[s] [and allegation[s]]

We agree that CALCRIM No. 252 should have been given, but conclude the error was harmless because it is not reasonably probable that appellant would have achieved a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Covarrubias* (2016) 1 Cal.5th 838, 919 [applying *People v. Watson* standard of review to claim that court failed to instruct on the concurrence of act and mental state or intent].)

Although the trial court did not give CALCRIM No. 252, the instructions it gave adequately set forth the concept of joint operation of act and intent. (See *People v. Hayden* (1994) 22 Cal.App.4th 48, 58 ["Although the 'concurrence of act and intent' instruction should have been given sua sponte, its omission was not prejudicial" because "[o]ther instructions . . . focused on the defendant's intent at the time of the [crime]"].) The instructions on implied malice murder (CALCRIM No. 520) made clear that appellant could not be convicted of that offense unless the jury found he "committed an act that caused the death of another person" and that "[w]hen the defendant acted, he had a state of mind called malice aforethought." The instruction went on to define express and implied malice.

The other crimes of which appellant was convicted are all general intent crimes. To find appellant guilty of those offenses,

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require[s] a specific intent or mental state: <insert name[s] of alleged offense[s] and count[s], e.g., burglary, as charged in Count 1> <insert name[s] of enhancement[s]>. For you to find a person guilty of (this/these) crimes [or to find the allegation[s] true], that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation]."

the jury merely had to find he intentionally committed each prohibited act, without regard to whether he intended to break the law. The instructions on gross vehicular manslaughter adequately informed the jury that appellant was guilty of that offense if he drove a vehicle while under the influence of alcohol and was grossly negligent in committing an infraction (running a red light in violation of section 21452) which caused the death of another person. (CALCRIM No. 590.) The instructions on fleeing the scene of an accident (CALCRIM No. 2160) made clear that the prosecution had to prove appellant knew he had been in an accident and that he willfully (i.e., willingly or on purpose) fled the scene. The instructions on driving with a suspended license (CALCRIM No. 2220) contain a similar knowledge requirement. Accordingly, the error in failing to give CALCRIM No. 252 was harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Ferdinand D. Inumerable, Judge
Superior Court County of Ventura

Sylvia W. Beckham, 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, Zee Rodriguez and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.