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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MISAEL AGID MARTINEZ, Defendant and Appellant.	B281387 (Los Angeles County Super. Ct. No. BA436488)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed with directions.

Robert Franklin Howell, 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, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Misael Agid Martinez was driving under the influence of alcohol when he "T-boned" a car carrying a father and his two sons, killing the older son and seriously injuring the others. He then walked away from the scene. He was convicted of second degree murder and four related counts. He challenges the judgment, contending only that his due process rights were violated because the second degree murder conviction was not supported by substantial evidence. We disagree. We correct an error in the abstract of judgment and affirm.

PROCEDURAL BACKGROUND

Following trial, a jury convicted appellant of second degree murder (Pen. Code, § 187, subd. (a)), driving under the influence of alcohol (DUI) causing injury within 10 years of another DUI offense (Veh. Code, § 23153, subd. (a)); two counts of driving with a 0.08 percent blood alcohol content causing injury within 10 years of another DUI offense (Veh. Code, § 23153, subd. (b)); and hit and run driving resulting in death or serious injury to another person (Veh. Code, § 20001, subd. (b)(2)). The jury also found true great bodily injury enhancements for the three DUI counts. (Pen. Code, § 12022.7, subds. (a), (d); Veh. Code, § 23558.) Appellant was sentenced to 11 years, plus 15 years to life consecutive.

FACTUAL BACKGROUND

Appellant's sole contention on appeal is that insufficient evidence supported the implied malice required for second degree murder. We recite only the facts necessary to resolve that issue.

On May 8, 2015, at around 5:40 a.m., appellant was under the influence of alcohol when he drove his SUV into an intersection and "T-boned" an El Camino. He ran the red light, was speeding between 52 to 57 miles per hour in a 35-mile-per-

hour zone,[1] and did not attempt to stop. He suffered only minor injuries.

The driver of the El Camino, Juan Manzo, suffered three fractured ribs, a broken sternum, water in his lungs, and injuries to his right leg, right hand, and spine. His three-year-old son Noah was in the middle in a car seat, and he suffered a fractured pelvis. His 14-year-old son Nicholas was in the passenger seat, and he suffered injuries that rendered him brain dead. He passed away several days later. All three family members were wearing seatbelts, the light was green when they entered the intersection, and they were traveling around the posted speed limit of 35 miles per hour.

Stopped at the intersection, Giovanni Mendez and Anabel Barragan witnessed the collision. Barragan called 911 while Mendez tried to help appellant. They helped appellant crawl out of the driver's side window, and he seemed disoriented and confused, with a cut on his forehead and arm. He asked to borrow a cell phone to call his wife and the person he was en route to pick up. He said he wanted to leave but Mendez and Barragan advised him not to. Appellant's breath smelled of alcohol, and he was slurring his words. Barragan thought he looked like he had been drinking.

Appellant asked them, "Is it okay if I can leave because I've been drinking?" Mendez told him it would be "better" and a "smart choice" if he stayed because the police and ambulance had already been called. Appellant repeated three times that he was

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[1] The speedometer in the SUV was frozen at 56 miles per hour after the accident.

going to leave, and he started walking away. He passed the El Camino and looked over but kept walking.

Appellant was detained less than a mile away from the accident. He was walking unsteadily, smelled of alcohol, had watery and bloodshot eyes, and slurred his speech. He was handcuffed and placed in the back of a patrol car. Barragan and Mendez were separately brought to the location and identified him.

An investigating officer detected signs of intoxication from appellant and gave him a field sobriety test at the scene, which was recorded on a dash cam and played for the jury. Based on appellant's performance, the officer concluded he was under the influence of alcohol and could not safely operate a vehicle, so he placed him under arrest.

At the police station, appellant took a breath test at 8:15 a.m. He blew into the machine twice, with readings of 0.18 and 0.16. Blood alcohol content above 0.08 renders a person too impaired to safely operate a vehicle, and there was very high likelihood appellant's blood alcohol content was above 0.08 at the time of the collision.

When searching appellant's SUV, another investigating officer found appellant's identification and a bottle of tequila with a small amount of liquid in it. The officer concluded the primary factor in the collision was appellant driving under the influence of alcohol, with secondary factors of running the red light and speeding.

At trial, the prosecution offered certified documents showing appellant had 1994 and 2007 misdemeanor DUI convictions pursuant to Vehicle Code section 23152, subdivision (b). In the 2007 case, appellant was given a "*Watson* advisement"

pursuant to *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*), explaining to him that "being under the influence of alcohol or drugs or both impairs his or her ability to safely operate a motor vehicle and it is extremely dangerous to human life to drive while under the influence of alcohol or drugs or both. The defendant was further advised that if he or she continues to drive while under the influence of alcohol or drugs or both and, as a result [of] his driving, someone is killed, the defendant can be charged with murder."[2]

As a condition of probation in the 2007 case, appellant was required to complete a three-month, first offense alcohol program and a "Victim Impact Program" with Mothers Against Drunk Driving. The custodian of records for Mothers Against Drunk Driving testified to records showing appellant attended a Spanish-language program in 2008. The program educated attendees on the dangers of drinking and driving, including the *Watson* advisement that if they drink and drive knowing that they received an education on its dangers, they could be charged with murder. The custodian of records for DIAL Education Center, First Offender DUI program testified to records showing appellant attended the three-month program in 2008. It consisted of three face-to-face interviews with certified drug and alcohol counselors and weekly two-hour classes that included graphic videos showing what could happen from driving under the influence. Attendees are also given the *Watson* advisement that if they drink and drive and kill someone, they could be charged with murder.

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[2] A court is required to give this advisement following a conviction for violating Vehicle Code section 23152. (Veh. Code, § 23593.)

DISCUSSION

1. Sufficient Evidence Showed Implied Malice

To decide whether a conviction is supported by substantial 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.) 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 may be express or implied, and implied malice exists " 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his [or her] conduct endangers the life of another and who acts with conscious disregard for life.' " (*Ibid.*)

"Implied malice is determined by examining the defendant's subjective mental state to see if he or she actually appreciated the risk of his or her actions. [Citations.] Malice may be found even if the act results in a death that is accidental.

[Citation.] It is unnecessary that implied malice be proven by an admission or other direct evidence of the defendant's mental state; like all other elements of a crime, implied malice may be proven by circumstantial evidence." (*People v. Superior Court* (*Costa*) (2010) 183 Cal.App.4th 690, 697.)

"A person who, knowing the hazards of drunk driving, drives a vehicle while intoxicated and proximately causes the death of another may be convicted of second degree murder under an implied malice theory." (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1112, citing *Watson, supra*, 30 Cal.3d at pp. 300-301 & overruled on another ground by *People v. Hicks* (2017) 4 Cal.5th 203, 214, fn. 3.) Courts have identified the following factors in deciding whether substantial evidence supports a second degree murder conviction based on drunk driving: " '(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.' " (*Batchelor, supra,* at p. 1114.)

The evidence in this case readily demonstrated each of these factors, allowing the jury to find the implied malice necessary for second degree murder. In the early morning hours, appellant drank to the point of becoming intoxicated and then got in his SUV and started driving apparently to pick someone up. The nearly empty tequila bottle found in his SUV showed he could have been drinking *while* driving. He was traveling 20 miles per hour over the posted speed limit and ran a red light. Immediately after the accident, he was so intoxicated two witnesses and the police immediately noticed his condition. He asked Mendez if he could leave the accident scene because he had been drinking. Then he fled the scene, suggesting he understood

his conduct was dangerous and wrongful. Once caught, he failed a field sobriety test. A breath test less than three hours after the crash showed his blood alcohol level was twice the legal limit.

The evidence also showed appellant subjectively understood the dangers of drinking and driving. He was previously convicted of DUI offenses in 1994 and 2007. In conjunction with his 2007 conviction, the court gave him a *Watson* advisement warning him of the dangers of drinking and driving, and he had attended two different drunk driving programs, which also warned him of the dangers of drunk driving and that he could be charged with murder if he killed someone while drinking and driving. This type of 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 [repeated drunk driving convictions and mandatory educational programs]; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 534 [four prior drunk driving convictions and repeated exposure to drunk driving education programs].)

We reject appellant's contrary arguments, which ignore the deferential substantial evidence standard of review. The evidence was, frankly, overwhelming. It was certainly sufficient to support his second degree murder conviction.

2. Corrected Abstract of Judgment

At the sentencing hearing, the trial court imposed but stayed appellant's sentence and three-year enhancement for count 4, resulting in an aggregate determinate term of 11 years. The parties agree the determinate abstract of judgment erroneously indicates the enhancement for count 4 was not stayed and incorrectly states appellant's aggregate determinate

sentence was 14 years. The determinate abstract of judgment must be corrected accordingly.

DISPOSITION

The trial court is directed to forward a corrected determinate abstract of judgment to the Department of Corrections and Rehabilitation indicating the enhancement on count 4 is stayed and appellant's aggregate determinate sentence is 11 years. In all other respects, the judgment is affirmed.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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