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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE VALLE, Defendant and Appellant.	B264047 (Los Angeles County Super. Ct. No. GA095274)

THE COURT:*

Jose Valle (Valle) was convicted of driving under the influence of alcohol and causing bodily injury (Veh. Code, § 23153, subd. (a); count 1),[1] and driving with a 0.08 percent blood alcohol content and causing bodily injury (§ 23153, subd. (b); count 2). He now appeals. His appointed counsel filed a no merit brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441 (*Wende*) raising no issues for us to consider. On December 8, 2015, we notified Valle of the no merit brief and gave him leave to file, within 30 days, a brief or letter setting forth any arguments supporting his appeal. He filed a timely letter on January 3, 2016. Upon review of counsel's no merit *Wende* brief, Valle's letter and

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* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

1 All further statutory references are to the Vehicle Code unless otherwise indicated.

the record, we conclude that there are no arguable issues, and Valle is not entitled to appellate relief.

The record establishes the following:

In the early morning hours of August 31, 2014, Araceli Arias (Arias) was sitting in her car in a parking structure with the door open as she spoke to a friend named Israel Ramirez Cervantes (Cervantes).[2] A nearby car was parked sideways across two parking slots. Its lights were on, and it was running. Arias and Cervantes wondered if the driver had fallen asleep. Minutes later, the car backed into Arias's car door, causing it to close on Cervantes's legs and trap him. A passer-by, Jennifer Zabala (Zabala), heard screams for help. She went to the parking structure and saw that Valle was passed out inside the car that had backed into Arias's car. Zabala woke Valle up, pulled him out and got into his car. It was still running, and it was in reverse. She put the car in drive and pulled forward.

City of Glendale Police Officers Christopher Ayad and Nicholas Anderson responded to the scene in separate vehicles.

Officer Ayad and Officer Anderson both spoke to Valle at the scene. Officer Ayad observed that Valle had bloodshot, watery eyes and smelled like alcohol. Valle said he had been at a nightclub called Giggles, which was behind the parking structure. He was not aware of the collision. When asked if he had been drinking, he said he had three beers and one drink called "Adios." Further, he said that he had started drinking at 9:00 p.m. and finished at 3:30 a.m., and that he was feeling the effects of the alcohol.

Officer Ayad conducted field sobriety tests. When Officer Ayad asked Valle to take a preliminary alcohol screening test, he refused. Valle was arrested and taken to a hospital for a blood draw.

Senior Criminalist Bridgette Harrison tested the blood sample taken from Valle and determined that his blood alcohol level was 0.27 percent.

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[2] Arias and Cervantes testified through a Spanish interpreter.

The Los Angeles County District Attorney's Office filed a felony complaint against Valle, charging him with counts 1 and 2. As for special statutory factors, it was alleged that Valle's blood alcohol concentration was 0.15 percent by weight or more within the meaning of section 23578, and it was 0.20 percent by weight or more within the meaning of section 23566, subdivision (b)(4). It was further alleged that he had a prior driving under the influence conviction (§ 23152, subd. (b)) within the meaning of sections 23540 and 23546.

On February 19, 2015, the trial court granted the prosecution's motion pursuant to Penal Code section 17, subdivision (b)(5) to amend the complaint to deem counts 1 and 2 misdemeanors.

The matter proceeded to trial on April 6, 2015.

In her opening argument, defense counsel stated, "The reason [Valle] is contesting this case is because he contests that he was not driving. As the prosecutor just said, [in his opening argument], [Valle] was passed out. . . . The car . . . was parked in a lot. . . . [T]here was a slight incline . . . in the parking structure, and [Valle's car] rolled very gently." According to defense counsel, Valle did not dispute that his blood alcohol level was 0.27 percent. She intimated that Valle believed someone had spiked one of his drinks with a drug because he only had four drinks, a normal amount for him, and started feeling "funny." After that, he felt sleepy. From that point on, his memory was a blank.

The prosecutor called Arias, Cervantes, Officer Ayad, Officer Anderson and Criminalist Harrison as witnesses.

For the defense, Valle was the sole witness. He stated that he had four drinks on the night of the incident, and he felt super sleepy afterwards. That had never happened to him before. He did not remember being woken up in the parking lot, being questioned or taking field sobriety tests. The next thing he remembered after being in the club was waking up in jail.

In her closing argument, defense counsel stated, "If . . . [Valle] was passed out, unconscious, asleep and the car rolled by itself . . . due to the incline of the parking lot[,]

and he did not do any particular act to cause that vehicle to go backward, then he was not driving[.]"

The jury was instructed, inter alia, on the elements of the charged crimes and that "[a] person drives a vehicle when he or she intentionally causes it to move by exercising actual physical control over it. [¶] The person must cause the vehicle to move, but the movement may be slight." Regarding lesser included crimes, the jury was instructed that Valle violated section 23512, subdivision (a) or (b) if, respectively, he drove a vehicle while he was under the influence of an alcoholic beverage, or he drove while his blood alcohol level was .08 percent or more. Further, the jury was instructed that Valle could not be found guilty of the charged crimes, or any lesser included crimes, if he acted while unconscious. The trial court stated, "Unconsciousness may be caused by a blackout or involuntary intoxication. [¶] The defense of unconsciousness may not be based on voluntary intoxication."

Valle was convicted by jury of the charged offenses in counts 1 and 2. Moreover, the jury found true the allegations that Valle had a blood alcohol concentration of 0.15 percent or more, within the meaning of section 23578, and a blood alcohol concentration of 0.20 percent or more, within the meaning of section 23556, subdivision (b)(4).

In a subsequent proceeding, Valle admitted his prior conviction.

As to count 1, the trial court suspended imposition of sentence and placed Valle on probation for four years with various probation conditions, including that he serve 270 days in county jail. The trial court stayed imposition of sentence as to count 2.

We turn, now, to the points raised in Valle's letter.

He suggests that defense counsel should have filed a motion to dismiss the charges. According to Valle, "On February [19], 2015[,] the witnesses were subpoena[ed] [but] . . . didn't show[] up[.] [B]ecause of that[,] the [P]eople decided to drop the charges from felony to misdemeanor because it was [in] their best interest to buy time." It appears that Valle believes his attorney could have had the case dismissed

because the People were unable to proceed on the first day of trial. If further appears that Valle is advancing an ineffective assistance of counsel claim.

"Ineffective assistance of counsel under the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a similarly objective standard of a reasonable probability of a more favorable outcome in the absence of the deficient performance. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202, fn. 11.)

The record indicates that on February 19, 2015, the People did indeed announce unable to proceed. The prosecutor stated, "Rather than electing to dismiss and refile the case, based on the facts in this case, the People would be making a motion . . . to reduce counts 1 and 2 to misdemeanors[.]" The trial court asked if the reason was that the injuries to Cervantes were minimal. The prosecutor said yes. At that point, defense counsel said she believed the prosecutor was electing to reduce the charges because he did not have his witnesses, and that the failure to proceed was a violation of Valle's speedy trial rights. The trial court stated: "Well, he's not going to have any violation to a right to a speedy trial if this case were reduced to misdemeanors now. Show me any—any law that says the People can't move to reduce to a misdemeanor and have a case set for trial, even though it's date 10 of 10 if it were to be a felony." Defense counsel said she was not aware of a "particular case," but nonetheless argued it should not be allowed based on justice and fairness. The trial court pointed out that "if they really wanted it to be a felony, it would be dismissed because they were unable to proceed. If there were massive injuries and they were unable to proceed, it would be dismissed today and refiled as a felony. So I don't see any prejudice to your client so—and I don't see any law that would prevent that. [¶] So why have them to refile, whether they file as a felony or misdemeanor, it drags out the time, which may be what you want, but that's not in the interest of justice." The trial court granted the People's motion and stated, "Now, [Valle] does have a right to—he's out of custody now. He can be re-arraigned on these as misdemeanors since it's essentially a different charge." Defense counsel waived the reading of the misdemeanor complaint on behalf of her client.

In our view, defense counsel essentially urged the trial court to dismiss the case. The trial court refused. Furthermore, it indicated dismissal would delay the case, not end it, because the People could refile. Valle has not explained why, under these facts, defense counsel failed to perform her job in an objectively reasonable manner. Moreover, Valle fails to explain how he was prejudiced by anything defense counsel did. Impliedly, he suggests that if defense counsel had made a formal motion to dismiss, the case would have been dismissed and not refiled. But his offenses occurred in August 2014. In February 2015, the People still had plenty of time to refile charges within the one-year statute of limitation applicable to misdemeanors under Penal Code section 802, subdivision (a). Further, the new charges resulted in the filing of a misdemeanor complaint. At the time, he was out of custody. Consequently, under Penal Code section 1382, subdivision (a)(3), the People had 45 days to bring Valle to trial. The trial proceeded on the 45th day.

Moving on, Valle refers to his probation report[3] and notes that it refers to a witness who "stated that she found [me] in the vehicle unconscious. [She] [t]ried to wake [me] up, [but was] unable to do so[, so] she dragged [me] out [of] the vehicle, put the vehicle in gear and moved the car." He offers no argument. Rather, he asks us to review the record for error. Upon review of the record, we do not perceive any trial error associated with the probation report.

Valle's letter contains a passage that suggests that he was barred from fully presenting his defense. That passage states: "Now the [trial] court's jury instructions were that in this case, being a circumstantial case, [the prosecution] need not . . . eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [Defense counsel] didn't create nor wasn't allowed to go in that

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[3] Specifically, he referred to "[t]he collation report" that "wasn't just admitted to trial but couldn't talk about the facts in it." We presume this is a reference to the probation report.

direction to suggest that another person moved the vehicle[,] . . . [which] changed the outcome of my trial."

A criminal defendant has a right to present all relevant evidence of significant probative value to his defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) Presumably, Valle believes he was denied this right. But he has not identified the excluded evidence, if any, he believes would have changed the outcome of his trial. A review of the record reveals no evidentiary error.

Valle suggests that his convictions should be reversed for these additional reasons: the witnesses lied; the evidence was conflicting and inconsistent; and Arias was biased. Whether these assertions are true does not aid Valle. The law establishes that the resolution of conflicting evidence and credibility issues was for the jury to decide. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) The jury resolved those issues against Valle, and we are obligated to defer.

He complains that the defense was unable to produce three witnesses to impeach Arias's testimony. This is not an assertion of error. Thus, it is not a cognizable ground for reversal. (See *People v. Montes* (2014) 58 Cal.4th 809, 876 [state law error requires reversal only if there is a reasonable probability the defendant would have obtained a more favorable result absent the error].)

From Valle's vantage, the questions and answers during the trial were not accurately interpreted. But he does not identify any misinterpretations, nor does he suggest how they might have prejudiced him. Our review of the record reveals one objection by defense counsel regarding a misinterpretation. Apparently, Valle stated in Spanish that the "car was heavy," and that was interpreted as the "car was painful." This misinterpretation was not material. Moreover, the trial court cured it by having Valle restate his testimony. Insofar as Valle is concerned about any other misinterpretations, the issue is unreviewable because any other misinterpretations were not identified for the record.

Valle asserts that Juror No. 4 had a hearing impairment. Implicitly, he raises a concern that Juror No. 4 was unable to hear or comprehend the evidence. If his allegation

was true, that might very well indicate a denial of due process because this would be a case in which a juror decided guilt or innocence based on something other than the evidence. (*Skilling v. United States* (2010) 561 U.S. 358, 438 [a criminal defendant has a right to "a trial in which jurors . . . decide guilt or innocence 'based on the evidence presented in court'"].) The problem for Valle is that most of the voir dire was omitted from the reporter's transcript, and we do not have the benefit of the colloquy, if any, regarding Juror No. 4's alleged hearing impairment. Thus, the record is inadequate for meaningful appellate review with respect to this issue. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Beyond the foregoing, Valle does not indicate that Juror No. 4 failed to hear and comprehend the evidence, and nothing in the record suggests Juror No. 4 should have been excused. It is noteworthy that at the end of voir dire, which was captured in the reporter's transcript, the trial court stated, "Juror No. 4, I am going to remind you if at any point you don't hear something, either from me, counsel or a witness, just put your hand up, and we'll repeat it. . . . We want to make sure you hear everything. [¶] Okay, Juror No. 4?" Juror No. 4 replied, "Yes sir." This exchange establishes that the trial court was aware of a potential problem with Juror No. 4 and settled on an appropriate procedure that would allow Juror No. 4 to perform his or her civic duty without jeopardizing the fairness of the trial.

We cannot conclude that the presence of Juror No. 4 on the jury was error.

If we do not reverse the judgment, Valle requests that we reduce his conviction to "involuntary intoxication." We decline. Involuntary intoxication is a defense, not a lesser included crime of driving under the influence of alcohol and causing bodily injury to a third person. In any event, the evidence establishes that Valle drank alcohol on the night in question, and his alcohol intoxication was voluntary. As a result, being unconscious was not a defense.

We are satisfied that Valle's counsel complied with her responsibilities. We conclude that Valle has received adequate and effective appellate review of the judgment entered against him by virtue of counsel's compliance with the *Wende* procedure, and our

review of the record. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

The judgment is affirmed.

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