Filed 6/15/17 P. v. Venegas CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERAPIO VENEGAS, Defendant and Appellant.	B270204 (Los Angeles County Super. Ct. No. MA066903)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

After a bench trial, defendant and appellant Serapio Venegas[1] was convicted of hit and run driving resulting in death or serious bodily injury, mayhem, driving with a suspended or revoked license, and assault with a deadly weapon. He contends the evidence was insufficient to support the mayhem and assault convictions. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

On July 18, 2015, at approximately 5:30 p.m., Stephen Wood was riding his bicycle on 10th Street West in Lancaster. Wood had activated two safety lights on his bicycle: a front facing white light and a rear-facing flashing red light. It was still daylight, but there was light fog and light rain.

Venegas, who was 77 years old, was driving a red pickup truck and had his driver's side window halfway open. Venegas rear ended Wood, throwing him off his bicycle and onto the truck's hood. After bouncing off the hood, Wood slid to the ground and became pinned underneath the truck towards the driver's side. He was unable to free himself. The collision caused obvious damage to the hood and knocked the passenger side headlight out of place. Venegas drove off, dragging Wood under the truck for approximately .3 miles. The bicycle remained at the scene of the collision.

Several eyewitnesses observed the collision or its aftermath. Shawn Sherman and Ashley Bonilla were in separate

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[1] Appellant's name appears in the record as both "Venegas" and "Venegas Vargas." We use the former, which appears to predominate in the record.

vehicles; both had their vehicles' driver's side windows down or partially down. Gregory Mendoza was at a gas station, sitting in the passenger seat of a parked car. Their testimony established that after the collision, Venegas stopped momentarily and then drove off without getting out of the truck, or did not stop at all. Wood was wedged between the pavement and the truck's front wheel area. He screamed for help, loudly. Mendoza ran to the impact point to assist and called 911. Upon observing the truck speeding by at 40-45 miles per hour with a person stuck under it, Sherman "started screaming out [his] window to stop" and flashed his emergency flashing lights. Venegas did not respond. Sherman and Bonilla made U-turns and followed Venegas. Venegas increased his speed to between 50 and 55 miles per hour. Both Mendoza and Bonilla could hear Wood screaming, " 'Hey, hey, hey,' " or " 'stop, stop.' " Wood constantly screamed for three-quarters of the time he was being dragged. Sherman could see Wood clinging to the front bumper, with his body dragging on the ground. After driving approximately 500 yards, Venegas made a right turn, causing Wood to roll free of the truck. Bonilla stopped to help Wood.

Sherman followed Venegas, who merged onto the 14 Freeway. Los Angeles County Sheriff's Deputy Jorge Aguirre stopped Venegas on the freeway, seven miles from the collision site. Venegas told Aguirre that he knew he "had hit somebody on 10th Street West and fled the scene, because he had a suspended driver's license and did not want to get in trouble." He stated that he did not know he was dragging the victim, and that he would have stopped had he known Wood was trapped beneath the truck. It did not appear to Aguirre that Venegas had difficulty hearing during their 15-minute conversation; Venegas

never asked Aguirre to repeat himself, despite the rain and the noise of "pretty heavy" freeway traffic.

Venegas's driver's license was suspended at the time the incident occurred.

Wood suffered severe injuries to his shoulder and head. The skin on his head was burned down to the bone, requiring skin transplants. A portion of his left ear was cut off during the incident. His left hand was a mass of "blackened flesh, bone and blood," and his left forearm was an "open cavity," with "gray road burn." He also had road burns on his hip and knees. Skin grafts were performed on his right forearm from the elbow to the fingers, and on his shoulder. At the time of trial, approximately six months after the incident, he still had significant scarring and swelling around the graft areas and significant scarring on the left side of his head. He could not bend three of the fingers on his left hand, and could not make a fist. He underwent a total of four surgeries and was hospitalized for three weeks. He is no longer able to ride his bicycle.

b. *Defense evidence*

Maria Venegas,[2] appellant's daughter, testified that she had noticed, in regard to her father's hearing, that he sometimes did not focus well. She sometimes had to repeat things when speaking to him. She had taken him to the doctor's office as a result.

Maria also testified that on July 2, 2015, she took Venegas to the doctor and afterwards he had to wear an eye patch for 24

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[2] For ease of reference, and with no disrespect, we hereinafter refer to Maria Venegas by her first name.

hours.[3] On August 27, 2015, she took him to the doctor, and he again wore an eye patch for 24 hours.

2. *Procedure*

After conducting a bench trial,[4] the court found Venegas guilty of felony hit and run driving resulting in death or serious injury (Veh. Code, § 20001, subd. (b)(2)), mayhem (Pen. Code, § 203),[5] driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)), a misdemeanor, and assault with a deadly weapon (§ 245, subd. (a)(1)). It also found true the allegation that in the commission of the assault offense, Venegas personally and intentionally inflicted great bodily injury on Wood. (§ 12022.7, subd. (a).)

The trial court suspended imposition of sentence and placed Venegas on formal probation for a period of five years, on condition he spend 365 days in jail, with credit for 264 days. It imposed a restitution fine, a suspended probation revocation fine, a criminal conviction assessment, and a court operations assessment. It also ordered Venegas to pay direct victim restitution in an amount to be set at a subsequent restitution hearing. Venegas appeals.

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[3] Maria testified that Venegas had cataract surgery, but the trial court struck this portion of her testimony for lack of foundation.

[4] Venegas waived his right to a jury trial.

[5] All further undesignated statutory references are to the Penal Code.

DISCUSSION

The evidence was sufficient to prove mayhem and assault with a deadly weapon

1. *Standard of review*

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) We must accept logical inferences the trier of fact might have drawn from the evidence even if we would have concluded otherwise. (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.)

2. *The offenses*

A defendant is guilty of mayhem when he "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip." (§ 203.) Mayhem is a general intent crime. (*People v. Newby* (2008)

167 Cal.App.4th 1341, 1347; *People v. Park* (2003) 112 Cal.App.4th 61, 64; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1226.) A specific intent to maim or disfigure is not required. (*People v. Hayes* (2004) 120 Cal.App.4th 796, 804-805; *People v. Sekona* (1994) 27 Cal.App.4th 443, 453; *Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624.) "Maliciously," as used in the statute, means an intent to vex, annoy, or injure another person, or an intent to do a wrongful act. (§ 7; *People v. Santana* (2013) 56 Cal.4th 999, 1007; *People v. Licas* (2007) 41 Cal.4th 362, 366 ["Conviction under a statute proscribing conduct done 'willfully and maliciously' does not require proof of a specific intent"]; *People v. Iraheta* (2014) 227 Cal.App.4th 611, 620-621; *People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1169.) Malice may be inferred from the types of injuries resulting from the intentional acts. (*People v. Hayes, supra,* at p. 805; *People v. Villegas, supra,* at p. 1226; *People v. Sekona, supra,* at p. 453; *Goodman, supra,* at p. 624.) For example, "If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party . . . the crime is nevertheless mayhem." (*People v. Nunes* (1920) 47 Cal.App. 346, 349; see *People v. Park, supra,* at p. 64.)

To establish assault with a deadly weapon, the People must prove: (1) the defendant committed an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; (2) the defendant did the act willfully; (3) the defendant was aware of facts that would lead a reasonable person to realize that his act would directly and probably result in the application of force to someone; and (4) when the defendant acted, he had the present ability to apply

force with a deadly weapon. (*People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1186-1187; *People v. Golde* (2008) 163 Cal.App.4th 101, 108-109; CALCRIM No. 875; § 245, subd. (a)(1).) Assault is a general intent crime, and does not require a specific intent to injure the victim; however, the defendant must actually know facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another. (*People v. Wyatt* (2012) 55 Cal.4th 694, 702; *People v. Chance* (2008) 44 Cal.4th 1164, 1167-1168.) The present ability element is satisfied when a defendant " 'has attained the means and location to strike immediately.' " (*People v. Chance, supra*, at p. 1168.) A deadly weapon is any object, instrument or weapon that is used in such a manner as to be capable of producing, and is likely to produce, death or great bodily injury. (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275-276.) A vehicle may be used as a deadly weapon. (See *People v. Russell* (2005) 129 Cal.App.4th 776, 782; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 11.)

3. *The evidence was sufficient*

Venegas contends the evidence was insufficient to prove the mayhem and assault convictions because the evidence showed he was unaware the victim was under the truck when he drove away from the accident scene.[6] He urges that absent such knowledge, he could not have acted with malice, an element of mayhem, nor could he have been aware a battery would result from his conduct, an element of assault. We disagree.

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6 Venegas does not challenge the sufficiency of the evidence to establish the remaining elements of the assault and mayhem offenses, nor does he contend the evidence was insufficient to prove hit-and-run driving and driving with a suspended license.

It was essentially undisputed that Venegas could not see Wood trapped beneath the truck. However, there was ample evidence from which the trial court could infer Venegas nonetheless knew he was dragging Wood under the truck, but chose not to stop. It was undisputed that Venegas knew he hit a bicyclist. The court could have readily inferred Venegas must have observed that the bicyclist was thrown onto the hood, and then bounced off; therefore, Venegas knew Wood was somewhere on the ground. Wood and/or three eyewitnesses testified that Wood screamed loudly and constantly for three-quarters of the .3 mile distance he was dragged. Wood's screams were so loud that Bonilla could hear them "over the rain, over the other traffic," and despite the fact Sherman's car was between Bonilla's car and Venegas's truck. Bonilla realized Wood was under the truck because she heard the screaming, even though she could not initially see him. Sherman heard Wood's screams over the noise of his own car radio and the noise emanating from other cars. Mendoza – who was in a car parked at a gas station approximately five or six car lengths from the truck -- also testified that Wood's screams were so loud he heard them over the traffic and the rain. Additionally, Sherman yelled at Venegas to stop and flashed his vehicle's lights at him. Venegas's driver's side window was open, and Wood was pinned towards the driver's side of the truck. Deputy Aguirre testified that he spoke with Venegas for approximately 15 minutes on the shoulder of the freeway, with "pretty heavy" traffic going past, yet Venegas did not appear to have any difficulty hearing him. From these facts, the trial court could readily infer that Venegas – who was much closer to the victim than were the other witnesses – must have heard the screams and, given the totality of the circumstances,

surely realized Wood was pinned, but chose not to stop. He had a motive to flee despite the victim's predicament because he was worried about the fact he was driving with a suspended license.

Venegas does not dispute that, if he knew the victim was under the truck, the evidence was sufficient to prove the requisite intent. Knowingly driving off at a high speed with a person stuck beneath one's truck clearly reflects an intent to do a wrongful act, the intent required to prove mayhem. If Venegas knew he was dragging Wood under his vehicle, but did not stop, his conduct was willful and he was aware of facts that would lead a reasonable person to realize his actions would directly and probably result in the application of force, as required to prove assault with a deadly weapon.

Venegas nonetheless urges that the evidence was insufficient to prove he knew Wood was pinned under the truck. In support of his argument, he points to the following evidence. When Venegas spoke to Deputy Aguirre he denied knowing he was dragging someone under the truck. Venegas was elderly (77 years old at the time of trial), spoke no English, and had recently had cataract surgery.[7] Maria stated her father sometimes did

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[7] As noted, the trial court did not admit evidence showing the nature of the medical procedure that caused Venegas to wear the eye patches. But assuming for purposes of argument Venegas underwent cataract surgery, this fact is largely irrelevant. There was no showing whether, or to what extent, such surgery would have limited Venegas's vision at the time of the collision. Moreover, it was undisputed that Venegas could not see Wood pinned under the truck; instead Venegas's knowledge was inferable from the evidence of the victim's screams and the nature of the accident. Likewise, Venegas's ability to speak English was not significant: the court could have

not focus well, she sometimes had to repeat things when speaking to him, and she had taken him to the doctor as a result. When the incident occurred it was rush hour and was raining, "to some extent" obscuring Venegas's ability to hear. Even though witnesses heard screaming, they were not in the same position as Venegas, who was in the cab of the truck. Venegas was in a "panicked state of mind" due to his fear of being caught driving without a license. He could not have seen the victim, who was obscured under the truck. The victim was dragged less than a third of a mile, while Venegas was driving at a relatively high speed, meaning that the screaming did not go on for an extended period. Venegas insists that under these circumstances, only speculation and conjecture, not solid evidence, supported the convictions.

Venegas's arguments amount to a request that this court reweigh the evidence and substitute our judgment for the trier of fact's. This we cannot do. The evidence regarding Venegas's knowledge was conflicting. But the fact the evidence might have been reconciled with a contrary finding does not warrant a reversal. (See, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 849-850; *People v. Livingston* (2012) 53 Cal.4th 1145, 1170.) We resolve neither credibility issues nor evidentiary conflicts. (*People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Tripp* (2007) 151 Cal.App.4th 951, 955; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant "merely reargues the evidence in a way more appropriate for trial than for appeal," we are bound by

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concluded the sound of screams emanating from under the truck alerted Venegas to Wood's predicament, regardless of the actual words being screamed.

the trier of fact's determination].) Although it is the trier of fact's duty to acquit if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the trier of fact, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Harris*, at pp. 849-850; *People v. Iboa* (2012) 207 Cal.App.4th 111, 117.) As we have discussed, the evidence supported the verdict, and there was no evidentiary deficit.

Venegas's citation to *People v. McKelvy* (1987) 194 Cal.App.3d 694, does not assist him. There the court considered whether the imperfect self-defense doctrine was applicable to the crime of mayhem. (*Id.* at p. 698.) *McKelvy* postulated that although mayhem was a general intent crime and no specific intent to maim or disfigure was required, the inclusion of the word " 'maliciously' " in the statutory definition required proof of "something more than that the act was done intentionally, willfully or knowingly." (*Id.* at p. 702.) Instead, malice required either an actual intent to cause particular harm, or the " 'wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result.' " (*Ibid.*) A single justice concluded the unreasonable self-defense doctrine applied to the offense of mayhem. (*Id.* at pp. 702-704.) But, as we observed in *People v. Iraheta, supra,* 227 Cal.App.4th 611, *McKelvy*'s lead opinion did not command a majority, its conclusion regarding the imperfect self-defense instruction was dictum, and the opinion has not been followed. (*Iraheta*, at p. 621.) Even if we agreed with *McKelvy* as to its discussion of malice, here that standard was met: if Venegas knowingly continued to drive at a high speed, knowing Wood was trapped

underneath his truck, his conduct certainly qualified as the wanton and willful doing of an act with awareness of a plain and strong likelihood the actual harm inflicted would result.

To the extent Venegas suggests his age and health concerns were mitigating circumstances that undercut the validity of his conviction, he is incorrect. These facts could properly be taken into account by the trier of fact in determining whether Venegas actually knew he was dragging a trapped victim as he drove. They do not, however, otherwise affect the sufficiency of the evidence.

Nor are we persuaded that *People v. Cotton* (1980) 113 Cal.App.3d 294 or *People v. Jones* (1981) 123 Cal.App.3d 83 compel a finding of insufficiency. In *Cotton,* the defendant led police on a high speed chase through residential streets at speeds approaching 100 miles an hour. When a police vehicle appeared at an intersection, he swerved and applied his brakes but hit the police car, causing it to burst into flames. (*Cotton*, at pp. 296-298.) After a bench trial, he was found guilty of, inter alia, assault with a deadly weapon. The appellate court reversed. The trial court had misapplied the concept of transferred intent. It had not credited evidence that the collision was intentional, and mere reckless conduct was insufficient to constitute an assault. The appellate court rejected the argument that a general intent to cause injury to everyone in the defendant's path could be presumed from his inherently dangerous disregard for human life and safety. (*Id.* at pp. 301-302.) *People v. Jones,* also involving a high speed chase, held similarly. (*People v. Jones, supra,* at pp. 96-97.) But it has been observed that "[s]ubseuqent controlling authority" has "fatally undermine[d] both of these opinions." (*People v. Aznavoleh, supra,* 210 Cal.App.4th at

p. 1190.) Even if *Cotton* and *Jones* are still valid, the facts here are distinguishable. Venegas's assault conviction was not based on evidence he merely drove recklessly. It was based on evidence he willfully drove from the accident scene, knowing full well that the victim was trapped under the car. These willful and knowing actions are distinct from mere reckless driving resulting in an accident.

Venegas's citation of additional authorities in which assault convictions were upheld does not compel a finding of insufficiency here. (See *People v. Aznavoleh, supra,* 210 Cal.App.4th 1181; *People v. Golde, supra,* 163 Cal.App.4th 101; *People v. Finney* (1980) 110 Cal.App.3d 705, 716.) That different, or stronger, evidence may have been present in other cases considering the issue does not establish the evidence was insufficient here; each case must be considered on its own facts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

JOHNSON (MICHAEL), 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.