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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. HERMISHA MICHELLE DESILVA, Defendant and Appellant.	B264991 (Los Angeles County Super. Ct. No. TA125469)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed as modified with directions.

Richard M. Doctoroff, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel

C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Hermisha Michelle DeSilva, of vehicular manslaughter and leaving an accident scene. (Pen. Code, § 192, subd. (c)(1);Veh. Code, § 20001, subd. (a).)[1] The jury further found true the allegation that defendant fled the scene of the crime. (Veh. Code, § 20001, subd. (c).)[2] Defendant was sentenced to nine years in state prison. Defendant was 21 years old when the accident occurred and 24 years old when she was sentenced after fleeing California for Texas. We modify the judgment to omit a $20 deoxyribonucleic acid fee. (Gov. Code, § 76104.7, subd. (a).) We affirm the judgment in all other respects.

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[1] Vehicle Code section 20001, subdivision (a) provides: "The driver of a vehicle involved in an accident resulting . . . in the death of a person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004."

[2] Vehicle Code section 20001, subdivision (c) states: "A person who flees the scene of the crime after committing a violation of . . . paragraph (1) of subdivision (c) of Section 192 of the Penal Code, upon conviction . . . , in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation if charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision of an allegation made pursuant to this subdivision."

II. THE EVIDENCE

A. The Prosecution's Case

The pivotal issue in this case was whether defendant or her boyfriend, Eric William Bly, Jr., was driving her Nissan Altima at the time of the fatal collision. The collision occurred on October 30, 2011, at Figueroa and 113th Streets in Los Angeles. At 12:20 a.m. on that date, Mr. Bly received a traffic ticket while driving defendant's car in Hollywood. The collision that resulted in another driver's death occurred several hours later, at 4:41 a.m. Two witnesses testified for the prosecution. Both saw several young people running from the scene. One of the witnesses, Norphesa Jones, heard a female voice say: "Come on. Come on. I'm leaving my car." Ms. Jones thought the female sounded Hispanic. When Officers Carey Coco and Matthew Hilliard arrived at the scene, they found defendant's abandoned Altima with three open doors.

Officers Coco and Maurice Hallauer reconstructed the accident. Defendant's Altima was traveling northbound on Figueroa Street in the number 1 lane at a minimum speed of 85 miles per hour. The speed limit was 35 miles per hour. The victim's Plymouth Neon was also traveling northbound on Figueroa Street in the number 1 lane. Just north of Imperial Highway, defendant's Altima ran a red light and collided with the rear of the victim's Plymouth Neon. The Altima struck the Neon

three separate times. The Neon spun out of control and caught fire. The Neon also struck a parked car. The two cars came to rest near the intersection of Figueroa and 113th streets. The collision was captured on surveillance videotapes, which were shown to the jury.

After the accident, defendant telephoned a friend, Lauren Blackwell. Defendant's Altima was registered in Ms. Blackwell's name. This was because defendant did not have a driver's license. In that telephone conversation, defendant admitted she had been driving her car near Figueroa and 111th Streets when she got into an accident; further, she got scared and she left the scene. Defendant wanted Ms. Blackwell to find out what had happened to the Altima. Defendant wanted Ms. Blackwell to tell the police the Altima had been stolen. Ms. Blackwell spoke with a detective who said the Altima was totaled. When cross-examined, Ms. Blackwell testified defendant said, "I was in a[n] accident. . . ." Ms. Blackwell took that to mean defendant was the driver. Based on their telephone conversation, Ms. Blackwell was certain defendant was driving when the collision occurred.

At 5:45 p.m. on October 30, Officer Matthew Hilliard received a telephone call from a woman who identified herself as defendant. The woman said she had been at a Hollywood club with her boyfriend. The boyfriend had been involved in a fight. He had been hit over the head with a bottle and bled profusely.

At some point the boyfriend jumped out of the car and the woman chased him. While she was absent, someone stole her car. She later learned her Altima had been involved in a fatal accident. She asked Officer Hilliard about the damage to her car and when she could recover her property.

On October 31, in the afternoon, Detective Kikki Yount interviewed defendant. She denied having been involved in an accident. Consistent with the information conveyed to Officer Hilliard, defendant told Detective Yount the Altima had been stolen. Detective Yount observed that defendant had an injured knee. Defendant said she was hurt when she tried to break up the altercation involving Mr. Bly. Defendant also had a raised reddish area near her collarbone and on her face. She had a fresh red bruise on her forearm. She had broken fingernails. Detective Yount also interviewed Mr. Bly. His head was wrapped in white gauze.

Blood stains were found on the Altima's driver and front passenger airbags. Defendant's deoxyribonucleic acid was on the driver's airbag, but not on the passenger's airbag. Mr. Bly's deoxyribonucleic acid was on the front passenger's airbag.

B. The Defense Case

Defendant testified in her own defense. She had dressed as a bunny for Halloween the night of the accident. Mr. Bly had dressed as a basketball player. He wore a white shirt, basketball shorts and a black and gray Chicago Bulls cap. Together with defendant's sister, they had gone to a club in Hollywood. Mr. Bly drove. He was drinking vodka and smoking marijuana on the way to the club. They were stopped by police officers in Hollywood around 12:20 a.m. for playing loud music. Mr. Bly received a traffic citation.

At the club, both defendant and Mr. Bly consumed alcohol. Around 2 a.m., as they exited the club, they had an altercation with "a few guys," which led to an argument between defendant and Mr. Bly. When they left, Mr. Bly again drove. Defendant's sister was in the backseat. They went to an afterhours club in Compton. When they reached the Compton afterhours club, defendant and Mr. Bly argued again. He hit her. He told her to get in the car. Defendant got back in the car with Mr. Bly. Defendant's sister got into the back seat.

Mr. Bly was: driving; screaming at defendant; belligerent; speeding; and driving recklessly. That is when the collision occurred according to defendant. Mr. Bly told defendant, "Get the fuck out of the car." Defendant and Mr. Bly went down an alley to a gas station. They were accompanied by defendant's

sister who had been in the back seat of the car at the time of the collision. They paid a stranger $100 to take them to a friend's house in Inglewood.

Mr. Bly had a head injury. When they learned there had been a fatality, Mr. Bly feared he might return to prison. Mr. Bly, according to defendant, coached her to lie. Defendant then made a telephone call to Ms. Blackwell. Defendant denied in that telephone conversation admitting she had been driving. But defendant admitted she lied to the police about the car being stolen because she was terrified of Mr. Bly. Mr. Bly was an abusive boyfriend and a gang member who had threatened her. A few months after the accident, defendant went to Texas, where her mother resided. She was arrested in Texas.

A third eyewitness, Katie Dyck, testified for the defense. Ms. Dyck saw a vehicle hit several parked cars and hit another car head-on. Three individuals got out of the car and fled. The person she assumed was the driver was a tall and thin male African-American in his late 20s. He was wearing a white shirt and basketball shorts.

III. DISCUSSION

A. Ineffective Assistance of Counsel

Defendant contends her trial attorney, Paul Richard Peters, was ineffective for failing to retain a witness to challenge the deoxyribonucleic acid evidence presented by the prosecutor. As noted, the deoxyribonucleic acid evidence supported the prosecution's claim she was the driver. Defendant argues: "A [deoxyribonucleic acid] expert would have offered significant scientific insight showing that the [deoxyribonucleic acid] evidence was significantly flawed by contamination by fire department personnel and police officers at the collision scene and by lax collection and storage. An expert could have explained the shortcomings of [deoxyribonucleic acid] evidence when it becomes contaminated and questioned why other samples collected from the steering wheel, door handles, and other parts of the car were never tested for [deoxyribonucleic acid]." Defendant asserts, "[T]here could be no possible explanation why [defendant's] counsel should not have retained an expert to evaluate and challenge the [deoxyribonucleic acid] evidence."

To establish constitutionally ineffective assistance, a defendant must show both deficient performance, defense counsel's representation fell below an objective standard of reasonableness under professional norms, *and* prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v.*

Cunningham (2001) 25 Cal.4th 926, 1003; *People v. Kraft* (2000) 23 Cal.4th 978, 1068.) With respect to prejudice, a defendant must establish there is a reasonable probability the result would have been more favorable absent the error of defense counsel. (*Strickland v. Washington, supra,* 466 U.S. at pp. 694; see *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051.) As the United States Supreme Court explained in *Strickland,* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694; accord, *People v. Dickey* (2005) 35 Cal.4th 884, 913.) A defendant must show a reasonable probability of a different result as a demonstrable reality. (*People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Defendant has not shown either ineffectiveness or prejudice. Mr. Peters secured appointment of a witness with expertise in crime scene reconstruction and blood stain analysis. After consultation with the appointed witness, Mr. Peters decided not to call that individual to testify at trial. Instead, Mr. Peters relied on his cross-examination of the prosecution's witnesses together with his presentation of evidence showing Mr. Bly was the driver.

A January 20, 2015 minute order states: "Ex parte motion for order appointing defense expert . . . is filed[] this date. [¶] Order appointment defense expert is filed and signed[] this date." On May 20, 2015, the trial court asked Mr. Peters whether defendant would testify. Mr. Peters responded: "I don't believe I have to call [defendant] to testify to defend this case. If my witnesses testify as anticipated, I've got Ms. Dyck whose [identification] of the driver is corroborated by the surveillance and the [deoxyribonucleic acid] evidence my expert [has] looked at. And I've got plausible explanation as to how that was deposited on the air bags. I think that's sufficient." After the prosecution presented its case, the trial court inquired about potential witnesses: "The Court: You are not going to call your expert? [¶] Mr. Peters: The People's witnesses testified exactly the way I needed them to. There's nothing to gain to have my witness testify. [¶] . . . [¶] . . . I spoke with him this morning when I picked him up from the hotel."

Mr. Peters's cross-examination of the prosecution's witnesses covered the questions defendant now frames as requiring further testimony. And in his argument to the jury, Mr. Peters repeatedly asserted: there was deoxyribonucleic acid evidence that was not collected; the crime scene was contaminated; and evidence was mishandled and improperly preserved. Defendant concedes Mr. Peters "raised many

questions about the [deoxyribonucleic acid] evidence through cross-examination and argument . . .” to the jury.

Further, Mr. Peters's defense rested on evidence Mr. Bly was the driver, not defendant. Ms. Dyck testified the driver was an African-American male wearing a white shirt and basketball shorts. This was consistent with defendant's description of Mr. Bly's clothing. Ms. Dyck's testimony was also consistent with defendant's testimony that Mr. Bly was driving the car when the accident occurred. Mr. Peters argued the surveillance videotape showed a person matching Mr. Bly's description exiting the driver's door of defendant's car after the collision. And it was undisputed that at approximately 12:20 a.m., prior to the accident, Mr. Bly received a traffic citation while driving defendant's car. We will not second guess Mr. Peters's tactical decisions. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059; *People v. Hill* (1969) 70 Cal.2d 678, 690; see *Harrington v. Richter* (2011) 562 U.S. 86, 111 [“In many instances, cross-examination will be sufficient to expose defects in an expert's presentation . . . .”].)

We also find no prejudice to defendant because of: the credible evidence pointing to her as the driver including her leaving California for Texas and staying there for several years; Mr. Peters's cross-examination of the prosecution's witnesses as to the deoxyribonucleic acid evidence; Mr. Peters's presentation of evidence that Mr. Bly was the driver; and Mr. Peters's argument

to the jury. It is thus not reasonably probable the verdict would have been more favorable to defendant had a witness testified concerning deoxyribonucleic acid evidence at trial. And of course, in terms of prejudice, there is no evidence as to what the appointed witness with expertise in crime scene reconstruction and blood stain analysis would have testified to in this case.

B. CALCRIM No. 373

As discussed above, the defense rested on evidence Mr. Bly, not defendant, was driving her car when the accident occurred. That evidence led defendant to request instruction pursuant to CALCRIM No. 373. The trial court denied the request. We find no error and no prejudice to defendant.

CALCRIM No. 373 states: "The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has/those other persons have) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged." (CALCRIM No. 373, Jan. 2006.) Our Supreme Court has explained, "'"The purpose of [the instruction] is to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown

by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators." (*People v. Cox* (1991) 53 Cal.3d 618, 668.)'" (Cf. *People v. Lawley, supra*, 27 Cal.4th at p. 162 [CALJIC No. 2.11.5]; accord, *People v. O'Malley* (2016) 62 Cal.4th 944, 986.)

Defendant argues no instruction directed the jury to consider whether Mr. Bly was responsible for the victim's death. As a result, defendant reasons, the jury convicted her rather than hold no one responsible for the victim's death. Defendant asserts, "[The refusal to so instruct] removed from the jury's consideration [defendant's] defense." Defendant claims this is federal constitutional error subject to the harmless error standard of review under *Chapman v. California* (1967) 386 U.S. 18, 24. (See *Neder v. United States* (1999) 527 U.S. 1, 19.)

Our Supreme Court has held, "The independent or de novo standard of review is applicable in assessing . . . whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration (see *People v. Figueroa* (1986) 41 Cal.3d 714, 723-741; *People v. Leonard* (2000) 78 Cal.App.4th 776, 794)." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Further, our Supreme Court has explained: "In determining whether the failure to instruct requires reversal, '[w]e apply the normal standard of review for state law error:

whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' (*People v. Carpenter* (1997) 15 Cal.4th 312, 393; see *People v. Dickey, supra*, 35 Cal.4th at p. 905; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.)" (*People v. McKinnon* (2011) 52 Cal.4th 610, 679.)

As noted, the central issue in this case was whether defendant was driving her Altima when the collision occurred. The prosecution presented evidence defendant was the driver. Defendant presented evidence Mr. Bly was the driver. In her argument to the jury, the prosecutor, Shannon K. Cooley, emphasized the evidence pointing to defendant and challenged the evidence pointing to Mr. Bly. At the outset of his closing argument, Mr. Peters told the jury: "This case is pretty much going to boil down to who was the driver. I'm sure that's pretty obvious based on what the prosecution's talking about. You can see the red light. We've had testimony about how fast the car was going. Primary issue is who was the driver." The issue was clearly before the jury. Nothing in CALCRIM No. 373 was necessary to focus the jury's attention to that issue. Moreover, the trial court's refusal to instruct with CALCRIM No. 373 did not remove any relevant issue from this case. There was no error nor prejudice to defendant.

C. Cruel and Unusual Punishment

Defendant challenges her nine-year sentence as cruel and unusual punishment. Defendant observes that she was a young, first-time felon who caused a fatal automobile collision but expressed remorse. Defendant forfeited this argument by failing to raise it in the trial court. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

Moreover, even if properly before us, defendant has not shown her punishment shocks the conscience and offends fundamental notions of human dignity. (*People v. Boyce* (20104) 59 Cal.4th 672, 721; *In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) Defendant, who had sustained 6 prior misdemeanor adjudications or convictions, was traveling at a speed 50 miles per hour over the speed limit. Defendant then ran a red light and hit another moving car. Defendant sought to avoid responsibility for the accident by leaving the scene and then falsely claiming her car had been stolen. And, knowing it was probable the other driver had been injured, she nevertheless callously fled the scene leaving the victim to die. (See *In re L.K.* (2011) 199 Cal.App.4th 1438, 1448 [legislative purpose to prevent driver from leaving the injured person in distress and danger]; *People v. Newton* (2007) 155 Cal.App.4th 1000, 1004 [same]; *Bailey v. Superior Court* (1970) 4 Cal.App.3d 513, 521 ["Reasonable and prompt assistance

may prevent aggravation of or further injuries, or may save a life."]) Defendant has made no effort to compare her sentence to punishments imposed in California for more serious crimes or to those imposed in other jurisdictions for the same offenses. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427; *People v. Reyes* (2016) 246 Cal.App.4th 62, 87.) Defendant's only comparison analysis is, "This same District Attorney's office chose to not even charge sports and reality television celebrity Caitlyn Jenner with any crime at all for rear-ending another car on the Pacific Coast Highway in Malibu on February 7, 2015, although that four-car collision also resulted in a death of one of the drivers." This refers to an automobile collision, the specific facts of which neither we nor defendant have any significant knowledge. Defendant's cruel or unusual punishment contentions are without merit.

D. The Deoxyribonucleic Acid Fee

We asked the parties to brief the question whether it was error to impose a $20 "DNA fee." Government Code section 76104.7 authorizes imposition of a deoxyribonucleic acid collection fee when certain other fines are imposed on the defendant. (Gov. Code, § 71604.7, subd. (a).) No such predicate fine was imposed in the present case. The Government Code section 71604.7 penalty does not apply to the: restitution fine (§ 1202.4, subd. (b); parole revocation restitution fine (§ 1202.45);

criminal conviction assessment (Gov. Code § 70373, subd. (a)); or court facilities assessment (Pen. Code, § 1465.8). (Pen. Code, § 1465.8, subd. (b); Gov. Code, §§ 70373, subd. (b), 76104.7, subd. (c)(1); *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396.) The "DNA fee" was unauthorized. Therefore, the judgment must be modified and the abstract of judgment amended to omit the $20 fee.

IV. DISPOSITION

The judgment is modified to reverse imposition of the $20 "DNA fee." The judgment is affirmed in all other respects. The clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

KRIEGLER, J. KUMAR, 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.