Filed 4/18/18 P. v. Shaw CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ALVIN RAY SHAW, JR., Defendant and Appellant.	B281348 (Los Angeles County Super. Ct. No. NA102370)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed.

Kevin D. Sheehy, 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, Senior Assistant Attorney General, and Zee Rodriguez, Acting Supervising Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Alvin Ray Shaw, Jr. (defendant) of second degree murder and six other offenses stemming from two drunk driving incidents. We consider whether the trial court should have instructed the jury that in lieu of finding defendant guilty of murder, it could find he committed involuntary manslaughter by reason of unconsciousness caused by voluntary intoxication.

I. BACKGROUND

A. The Charges

In 2015, defendant was involved in two vehicle collisions that prompted the Los Angeles County District Attorney to file criminal charges. Specifically, defendant was charged with four offenses arising from an August 2015 collision: murder (Pen. Code,[1] § 187, subd. (a)), causing injury while driving under the influence of alcohol within 10 years of another DUI offense (Veh. Code, §§ 23153, subd. (a), 23560), causing injury while driving with a blood alcohol level of 0.08 percent or more within 10 years of another DUI offense (Veh. Code, §§ 23153, subd. (b), 23560), and driving with a suspended or revoked license on account of a prior DUI conviction (Veh. Code, § 14601.2, subd. (a)). The district attorney also filed three charges in connection with an earlier June 2015 crash: driving under the influence of alcohol within 10 years of another DUI offense (Veh. Code, §§ 23152, subd. (a), 23540), driving with a blood alcohol level of 0.08 percent or more within 10 years of another DUI offense (Veh. Code, §§ 23152, subd. (b), 23540), and driving with a suspended

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[1] Undesignated statutory references that follow are to the Penal Code.

or revoked license on account of a prior DUI conviction (Veh. Code, § 14601.2, subd. (a)).

B. The Evidence at Trial

1. June 14, 2015

At approximately 7:30 a.m., defendant was parked on the right shoulder of the 210 freeway when another vehicle collided with his car. A California Highway Patrol officer arrived after the accident and found defendant standing beside his vehicle. Defendant told the officer he did not know why he was stopped. Defendant said he did not drink, but the officer noticed he was "unsteady" and smelled of alcohol.

Defendant was transported to a hospital for treatment. A sample of defendant's blood taken at the hospital revealed his blood alcohol level was 0.19 percent.

2. August 1, 2015

At approximately 7:00 a.m., Long Beach Police Department motorcycle officer Gamaliel Collazo was stationed at the intersection of Pine Avenue and Bay Street, directing vehicles away from an area closed to traffic for a Special Olympics marathon event to be held that morning. Officer Collazo noticed a car parked on Pine near the closed-off area. As the officer was watching, the car (a silver Mercedes) drove onto the sidewalk for 10 to 20 feet and then back onto Pine Avenue in the direction of the marathon course. Officer Collazo yelled at the driver to stop; when the driver failed to obey, the officer pursued the vehicle on his motorcycle with his police lights and siren on.

Officer Collazo followed the Mercedes for about four minutes. He saw the car drive around workers and barricades

blocking off the marathon course, increase its speed, make various turns, go through a roundabout in the wrong direction, crash through a barricade, nearly hit another law enforcement officer, drive onto a bike path, drive into a pedestrian-only area where about 30 people waited to board the ferry to Catalina Island, and drive around another chained-off barrier to reenter the street grid. Officer Collazo lost sight of the vehicle at that point.

As Officer Collazo was driving back to his post on Pine Avenue, a group of pedestrians called out to him. They pointed toward the Gerald Desmond Bridge nearby and said, "[h]e went the wrong way."

Officer Collazo drove to the bridge and saw a major accident had occurred in its eastbound lanes. Three vehicles were involved. A truck was turned on its side, flames were erupting from its hood, and its driver was unresponsive. A second vehicle, a white Ford, was seriously damaged but its driver was moving. The Mercedes that Officer Collazo had been following moments earlier—with defendant behind the wheel—was also on fire.

Officers were unable to pull Miguel Gonzalez (Gonzalez), the driver of the truck, out of his vehicle before it became engulfed in flames. Gonzalez died from blunt force trauma and the fire. The driver of the white Ford, Geoffrey Alesso (Alesso), was hospitalized with various injuries including head trauma, ruptured tendons in his left hand, and a broken jaw.

Defendant was "unconscious" after the accident. Firefighters extinguished the fire in his vehicle and pulled him out. He was transported to a hospital, where a sample of his

blood was taken. Defendant's blood alcohol level was 0.20 percent.

Officers determined defendant caused the collision on the bridge. Video footage captured by a camera in the area showed defendant's car traveling westbound in the bridge's eastbound lanes just before the crash, which occurred at the crest of the bridge

3. Prior bad acts evidence: a 2014 DUI

The prosecution presented evidence that defendant was convicted in 2014 of driving with a blood alcohol level of 0.08 percent or more (Veh. Code, § 23152, subd. (b)). When defendant entered a plea of no contest to that charge, he signed a statement acknowledging that driving under the influence was "extremely dangerous to human life" and that if someone died as a result of him driving under the influence in the future, defendant could be charged with murder. Defendant's driver's license was suspended on account of the 2014 incident, and it had not been reinstated at the time of the 2015 collisions.

C. The Verdict and Sentence

The jury convicted defendant of all seven charged counts. The jury also found true allegations that defendant caused great bodily injury to Alesso, and that he had a blood alcohol level of more than 0.15 percent at the time of the June 2015 incident. The trial court sentenced defendant to a term of 20 years to life: 15 years to life for the murder conviction and a five-year term for the Vehicle Code violations.

II. DISCUSSION

Defendant was tried and convicted of second degree murder on an implied malice theory, as upheld in *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*).[2] The Courts of Appeal have consistently read section 29.4 to preclude the admission of evidence of voluntary intoxication for the purpose of negating implied malice. Defendant contends, however, that those decisions do not prohibit trial courts from giving an unconsciousness instruction in an implied malice case.

We reject defendant's argument because it is inconsistent with the language of section 29.4, which does not distinguish between voluntary intoxication leading to unconsciousness and voluntary intoxication resulting in impaired conduct short of unconsciousness. Under either circumstance, the statute prohibits a murder defendant from relying on evidence of voluntary intoxication on the issue of whether he acted with implied malice aforethought. Regardless, reversal is not warranted in any event because there is no reasonable probability the jury would have reached a result more favorable to defendant if the unconsciousness instruction he now urges had been given.

A. Governing Law and the Standard of Review

Trial courts have a "'sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is

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[2] A "*Watson* murder" is a second degree murder in which "the intoxicated killer drove while aware of the risk to life and consciously disregarded that risk . . . ." (*People v. Doyle* (2013) 220 Cal.App.4th 1251, 1265.)

substantial evidence the defendant is guilty only of the lesser." [Citation.] Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, *but not the greater*, offense.'" (*People v. Landry* (2016) 2 Cal.5th 52, 96; see also *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*) [trial court must provide "'instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged'"].) Thus, "when the evidence suggests the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to 'consider the *full range* of possible verdicts—not limited by the strategy, ignorance, or mistakes of the parties,' so as to '*ensure* that the verdict is no harsher or more lenient than the evidence merits.' [Citations.] The inference is inescapable that, regardless of the tactics or objections of the parties, or the *relative* strength of the evidence on alternate offenses or theories, the rule requires sua sponte instruction on *any and all* lesser included offenses, or theories thereof, which are *supported* by the evidence."[3] (*Breverman*, *supra*, at p. 160.)

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[3] The Attorney General contends the invited error doctrine forecloses defendant's claim of error. A trial court's "'obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given.'" (*Breverman*, *supra*, 19 Cal.4th at p. 154, citations omitted.) But the invited error doctrine will bar a claim of error if the record shows defense counsel "'"intentionally caused the trial court to err"'" and "expresse[d] a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Souza* (2012) 54

We review de novo a claim the trial court erred by failing to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1367 (*Turk*).)

B. The Trial Court Had No Obligation to Instruct on Involuntary Manslaughter by Reason of Voluntary Intoxication Causing Unconsciousness

Defendant contends there was substantial evidence he intoxicated himself to the point of unconsciousness when he killed Gonzalez and this evidence required the trial court to instruct the jury with CALCRIM No. 626.[4] In a case where a

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Cal.4th 90, 114, citation omitted.) We do not apply the invited error doctrine because we do not believe the record sufficiently demonstrates the decision by defendant's trial attorney to forgo seeking a lesser included offense instruction was a product of "a conscious, deliberate tactical choice." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

[4] CALCRIM No. 626 states: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. [¶]

defendant properly raises unconsciousness as a defense justified by the evidence, the state bears the burden of proving consciousness.[5] (*People v. Babbitt* (1988) 45 Cal.3d 660, 693-694.)

Unconsciousness "need not mean that the actor lies still and unresponsive . . . ." (*People v. Ochoa* (1998) 19 Cal.4th 353, 423 (*Ochoa*).) A defendant may be found to be unconscious ""'where the [defendant] physically acts in fact but is not, at the time, conscious of acting.'" [Citations.]" (*Id*. at p. 424; see also *People v. Abilez* (2007) 41 Cal.4th 472, 516 (*Abilez*) [unconscious "person need not be incapable of movement"].)

"Involuntary manslaughter is ordinarily a lesser offense of murder." (*Abilez*, *supra*, 41 Cal.4th at p. 515.) Involuntary manslaughter may be predicated on three types of acts: misdemeanors, lawful acts, and noninherently dangerous

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Involuntary manslaughter has been proved if you find beyond a reasonable doubt that: [¶] 1. The defendant killed without legal justification or excuse; [¶] 2. The defendant did not act with the intent to kill; [¶] 3. The defendant did not act with a conscious disregard for human life; [¶] AND [¶] 4. As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter)."

[5] We assume, solely for argument's sake, that there was substantial evidence of unconsciousness despite the paucity of evidence concerning the circumstances of defendant's pre-collision drinking and the facts concerning some of defendant's apparently purposive driving maneuvers.

felonies. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006.) Section 192, subdivision (b) defines involuntary manslaughter based on conduct "not amounting to a felony," i.e., misdemeanors and lawful acts, and the statute expressly forbids treating "acts committed in the driving of a vehicle" as involuntary manslaughter. Because section 192 refers only to misdemeanors and lawful acts, it is possible that a vehicular homicide may still be treated as involuntary manslaughter if the manslaughter theory is predicated on the commission of a non-inherently dangerous felony. (See *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1082 (*Ferguson*).)

CALCRIM No. 626 is based on section 29.4 (former § 22, reenacted as section 29.4 by Stats. 2012, ch. 162, § 119), which generally provides that an act is no less criminal by reason of the actor's voluntary intoxication. (§ 29.4, subd. (a); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1113 (*Martin*) [discussing former section 22].) The statute prohibits defendants from relying on evidence of voluntary intoxication to "negate the capacity to form any mental states for the crimes charged" (§ 29.4, subd. (a)) and limits evidence of voluntary intoxication "solely" to "the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored *express* malice aforethought." (§ 29.4, subd. (b), emphasis added.)

Before it was amended in 1995, former section 22, subdivision (b) allowed evidence of voluntary intoxication to be admitted "solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (Former § 22, subd. (b), amended by

Stats. 1995, ch. 793 § 1.) In a 1994 decision construing the statute, our Supreme Court held "that evidence of voluntary intoxication is admissible under section 22 with regard to the question whether the defendant harbored malice aforethought, whether such malice is express or implied." (*People v. Whitfield* (1994) 7 Cal.4th 437, 441 (*Whitfield*).)

Our Supreme Court later described, in *People v. Mendoza* (1998) 18 Cal.4th 1114, statutory changes made in response to the *Whitfield* decision. The Court noted the Chief Justice and two associate justices in *Whitfield* "would have found voluntary intoxication not admissible to negate implied malice" and the Legislature amended section 22 "in apparent reaction to [the *Whitfield*] holding. (*Id.* at pp. 1125-1126.) The Court explained: "The Legislative Counsel's Digest to the bill amending section 22 stated: 'Under existing law, as held by the California Supreme Court in [*Whitfield*], the phrase "when a specific intent crime is charged" includes murder even where the prosecution relies on a theory of implied malice. [¶] This bill would provide, instead, that evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.' (Legis. Counsel's Dig., Sen. Bill No. 121 (1995–1996 Reg. Sess.).)" (*Id.* at p. 1126.)

Our Supreme Court has not squarely addressed whether unconsciousness may be raised as a partial defense to a *Watson* murder; the Court has stated in dictum that "depending on the facts, it . . . appears that [a] defendant's voluntary intoxication, even to the point of actual unconsciousness, would not prevent his conviction of second degree murder on an implied malice

theory . . . ." (*People v. Boyer* (2006) 38 Cal.4th 412, 469, fn. 40.) But it is well settled that the 1995 amendment to section 22, now codified at section 29.4, prohibits evidence of voluntary intoxication from being admitted to negate implied malice in a murder case. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 706 (*Carlson*); *People v. Lam* (2010) 184 Cal.App.4th 580, 585; *Ferguson*, *supra*, 194 Cal.App.4th at p. 1081; *Turk*, *supra*, 164 Cal.App.4th at p. 1375; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 (*Timms*); *Martin*, *supra*, 78 Cal.App.4th at p. 1114; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6 (*Reyes*).)

In the most recent of these cited cases, *Carlson*, *supra*, 200 Cal.App.4th 695, the defendant was convicted of second degree murder after she caused a fatal collision while driving drunk. (*Id.* at pp. 699-700.) The trial court rejected the defendant's request to instruct the jury with CALCRIM No. 626—involuntary manslaughter by reason of unconsciousness caused by voluntary intoxication—and the defendant later claimed this was error. (*Id.* at p. 702.) The Court of Appeal found the contention meritless, reasoning the defendant's argument that unconsciousness brought on by voluntary intoxication could reduce her criminal culpability was still "based on the premise voluntary intoxication can . . . negate a finding of implied malice." (*Id.* at p. 707.) The Legislature invalidated that interpretation when it amended section 22 in response to *Whitfield*, and the *Carlson* court saw "[n]o reason . . . to carve out an exception where a person drinks so much as to render him or her unconscious." (*Ibid.*)

Carlson is persuasive here. Section 29.4, subdivision (b) restricts the admission of voluntary intoxication evidence in murder cases to "the issue of . . . whether the defendant premeditated, deliberated, or harbored *express* malice

aforethought." (Emphasis ours.) The statute's plain language bars the use of voluntary intoxication evidence on the issue of whether a murder defendant acted with implied malice aforethought; it makes no distinction regarding the extent of the defendant's intoxication or whether the defendant desires to rely on intoxication as a complete or partial defense. (See *Timms*, *supra*, 151 Cal.App.4th at p. 1301 [quoting legislative committee analysis of bill amending section 22 as stating enactment would "[e]xpressly limit[ ] the admissibility of voluntary intoxication to the issue of express malice, making it inadmissible when a theory of implied malice is used"]; *Reyes*, *supra*, 52 Cal.App.4th at p. 984, fn. 6 ["evidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought"].) In a case where the defendant's culpability is premised on implied malice, allowing the jury to consider whether he committed involuntary manslaughter rather than murder because the conduct precipitated by his voluntary intoxication raised a reasonable doubt about whether he was conscious is no different, for purposes of applying section 29.4, than admitting evidence of voluntary intoxication to negate implied malice entirely.

Defendant counters that both *Turk*, *supra*, 164 Cal.App.4th 1361 and *Ferguson*, *supra*, 194 Cal.App.4th 1070 considered whether a CALCRIM No. 626 unconsciousness instruction was supported by the evidence notwithstanding the courts' conclusion that section 29.4 applied. He reasons the decisions would not have done so if the statute is properly read to foreclose such a defense, but neither of those decisions expressly considered whether section 29.4 precludes the giving of CALCRIM No. 626 in an implied malice murder case. (See *Turk*, *supra*, at p. 1379, fn. 14 [assuming "for purposes of this decision" the instruction

should be given if supported by the evidence but citing the dictum in *Boyer*, *supra*, 38 Cal.4th at p. 469, fn. 40 as an indication to the contrary]; *Ferguson*, *supra*, at p. 1083 [finding instruction unsupported by the evidence "*[e]ven were we to agree* there are circumstances in second degree implied malice murder drunk driving cases in which a defense of unconsciousness from voluntary intoxication can be raised"], emphasis added.) The assumptions made in *Turk* and *Ferguson* fall short of persuading us defendant's position has merit.

Defendant additionally argues section 29.4 has no bearing on evidence of unconsciousness, regardless of the theory of prosecution, because the statute makes no reference to consciousness or unconsciousness and our Supreme Court stated, in cases postdating the amendment to section 22, that an unconsciousness instruction must be given when supported by the evidence. Defendant's arguments are unconvincing. Section 29.4 governs the admissibility of evidence of voluntary intoxication in a murder case, full stop. The absence of any reference to consciousness or unconsciousness in the statute signifies only that the statute applies without regard to the extent of the defendant's intoxication. In addition, the California Supreme Court decisions defendant cites, *People v. Halvorsen* (2007) 42 Cal.4th 379 (*Halvorsen*) and *Ochoa*, *supra*, 19 Cal.4th 353, are not controlling here because *Halvorsen* and *Ochoa* both involved murder convictions based on premeditation and deliberation, not implied malice. (See *Halvorsen*, *supra*, at pp. 384-385, 416; *Ochoa*, *supra*, at p. 391.)

Defendant asserts that even if section 29.4 prohibits the admission of voluntary intoxication evidence on the issue of whether he "deliberately acted with conscious disregard for

human life" to support a finding of implied malice, such evidence is admissible regarding whether he "intentionally committed an act." Defendant posits that if an actor is unconscious, he or she may not have "intentionally committed" the relevant act. This is unconvincing hair-splitting. A finding of implied malice is based on subsidiary findings that the defendant "intentionally committed an act" whose "natural and probable consequences . . . were dangerous to human life," the defendant knew the "act was dangerous to human life" while acting, and the defendant "deliberately acted with conscious disregard for [human] life." (CALCRIM No. 520.) Because intentionally committing an act is an element of implied malice, section 29.4 precludes a defendant who is being prosecuted for an implied malice murder from relying on evidence of voluntary intoxication to negate that element.

C. There Is No Reasonable Probability of a More Favorable Result If the Jury Had Been Instructed on Unconsciousness

In addition to the lack of a proper legal basis for an instruction that implied malice could be negated by unconsciousness induced by voluntary intoxication, defendant's instructional argument for reversal suffers from a fatal factual problem. The evidence presented at trial that defendant was unconscious when leading the police on the vehicle chase that resulted in Gonzalez's death was weak. Even assuming it were enough to constitute substantial evidence warranting an instruction, the absence of such an instruction was not prejudicial.

"Substantial evidence" a defendant is guilty only of a lesser included offense—thereby requiring an instruction on that offense—is evidence "which a reasonable jury could find persuasive." (*Halvorsen*, *supra*, 42 Cal.4th at p. 414.) A court reviewing a claim of instructional error in this context considers the evidence in the light most favorable to the defendant. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30.) "In noncapital cases, 'the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) Accordingly, in order to establish prejudicial error caused by a failure to instruct on a lesser included offense in a noncapital case, the defendant "must show it is reasonably probable a more favorable result would have been obtained absent the error." (*Ibid*., citation omitted; see also *Breverman*, *supra*, 19 Cal.4th at p. 165.)

We are convinced the evidence at trial in this case does not meet the higher threshold for prejudice, i.e., the incrementally more demanding showing that moves beyond what a jury *could* find (which would warrant giving an unconsciousness instruction) and asks what a jury *is reasonably likely* to have found if the instruction were given (which, if more favorable to defendant, would warrant reversal). In other words, defendant has not shown it is reasonably probable the jury would have convicted him of involuntary manslaughter rather than second degree murder (or simply hung on second degree murder) if an unconsciousness instruction had been given.

The strength of the evidence defendant was conscious, and that he acted with a conscious disregard for life, persuades us there was no prejudice. Defendant began driving after being

parked for less than five minutes. After initially driving onto the sidewalk, he brought the car back down to the street. As defendant drove, he evaded multiple barricades and avoided hitting people in his path. When Officer Collazo started his pursuit, defendant accelerated and attempted to flee. (See *Ferguson*, *supra*, 194 Cal.App.4th at p. 1085 [consciousness shown by evidence the defendant "had been rapidly accelerating but then lifted his foot off the accelerator an instant before" causing a collision].) In short, defendant's "complicated and purposive" (*Halvorsen*, *supra*, 42 Cal.4th at p. 418) driving pattern strongly suggests he was aware of what he was doing.

There was also no expert or eyewitness testimony at trial tending to show defendant was "unconscious" while driving or that his blood alcohol level would have put him in a state where he was physically acting but not conscious of acting. (*Turk*, *supra*, 164 Cal.App.4th at p. 1380; compare *People v. Williams* (1971) 22 Cal.App.3d 34, 55 & fn. 28 [defendant argued he acted while having a psychomotor epileptic attack and experts testified that persons experiencing psychomotor seizures could appear to be acting normally and purposefully even though they were not actually in a conscious state].) Indeed, defendant had a similar blood alcohol level on the date of the earlier June 2015 incident, and though he may have had a memory lapse on that occasion, he otherwise showed indicia of conscious behavior: defendant was standing, responsive, and evasive with the officer about his alcohol intake.

Furthermore, in order to find defendant guilty of involuntary manslaughter rather than murder, the jury would need to find "defendant did not act with a conscious disregard for human life." (CALCRIM No. 626.) Here, there was undisputed

evidence defendant had a prior DUI conviction in which he acknowledged the dangers associated with drunk driving, and there was no evidence that even suggested he drank alcohol on the date of the crash without knowing he would be driving. (See *Ferguson*, *supra*, 194 Cal.App.4th at pp. 1082-1083 [positing for the sake of argument that a defense of unconsciousness to implied malice murder might be available when a defendant "begin[s] drinking not intending to drive, but then drinks to the point of unconsciousness and in that unconscious state . . . drives," but concluding the facts of the case did not support such a defense]; see also, e.g., *People v. Murray* (1990) 225 Cal.App.3d 734, 744 [evidence a defendant suffered prior DUI conviction and was required to participate in program emphasizing dangers of drunk driving relevant to show conscious disregard]; *Watson*, *supra*, 30 Cal.3d at pp. 300-301 [evidence a defendant voluntarily became intoxicated knowing he would drive "'reasonably may be held to exhibit a conscious disregard for the safety of others'"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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