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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EUGENE MORRIS COHEN, Defendant and Appellant.	B284216 (Los Angeles County Super. Ct. No. SA089594

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Zuckman, Judge. Affirmed.

Andrew Flier, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Eugene Michael Cohen of misdemeanor vehicular manslaughter and leaving the scene of an accident in connection with a fatal hit-and-run. On appeal, appellant challenges both convictions, asserting that the trial court committed multiple evidentiary, instructional, and other procedural errors, and that there was insufficient evidence to support the jury's verdicts. Finding no reversible error and concluding that substantial evidence supported the jury's verdicts, we affirm.

PROCEDURAL HISTORY

An information filed by the Los Angeles County District Attorney charged appellant with misdemeanor vehicular manslaughter (Pen. Code, § 192, subd. (c)(2))[1] and leaving the scene of an accident (Veh. Code, § 20001, subd. (a)). Following trial, a jury convicted him on both counts. The trial court sentenced appellant to four years in prison for leaving the scene of an accident and a concurrent term of one year in prison for vehicular manslaughter.

FACTS

A. *The Prosecution's Case-in-Chief*

Eleanor Nett testified that on Saturday, March 22, 2014, at around 1:00 a.m., she and her mother, Kathryn Theis, left a restaurant in Santa Monica and started crossing Ocean Avenue, heading west toward Nett's apartment nearby. There was no crosswalk where the two were crossing. As Theis and Nett reached the southbound traffic lanes, a taxi in the number one

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[1] All further statutory citations are to the Penal Code unless otherwise noted.

lane yielded for them to cross. When they reached the number two lane, another car, later determined to be driven by appellant, struck them. Nett was knocked to the ground. Theis was critically injured. The force of the impact caused her body to fly forward and slam into a parked car. Upon seeing Theis on the ground, Nett began screaming for help. Theis later died at the hospital.

Three additional eyewitnesses testified at trial. Julia Sommer, who was inside the parked car when the accident occurred, stated that she felt an impact to her car and heard a loud noise followed by a woman screaming. Sommer then saw a car speed away at what she estimated to be 50 to 60 miles per hour.

Scott Johnson was driving south on Ocean Avenue before the accident. Johnson testified that he observed a gray sports car driving aggressively between traffic lights, accelerating rapidly when a light turned green and braking abruptly at the next light. Johnson was able to see the driver, whom he identified at trial as appellant. Johnson stated that appellant appeared relaxed and seemed to be "having fun driving his car." Johnson later witnessed the collision from about 150 feet behind appellant's car. According to Johnson, following the collision, appellant continued driving and made a sharp right turn at the next street. Johnson immediately pulled over to assist the victims and call 911.

Minuk Davtyan, a taxi driver, testified he was driving southbound in the number one lane on Ocean Avenue when he saw a car speed past him in the number two lane. Moments later, he heard a woman scream and saw another woman on the ground. The car that had sped past Davtyan then accelerated

and immediately turned onto another street. Davtyan's dashboard camera captured the collision, and the video was played to the jury.

Shortly after the incident, police officers and investigators from the Santa Monica Police Department arrived at the scene and secured it for further investigation. Officer Veronica Baez gathered information from other officers and witnesses, photographed the scene, marked areas containing vehicle debris, and took various measurements.

Detective Jason Olson, the lead investigator, examined the evidence and reconstructed the events. Based on the video from Davtyan's taxi, Olson concluded that appellant's vehicle was traveling at 37 miles per hour before the collision, above the 30 miles per hour speed limit in that area. The video also showed that another taxi (not Davtyan's) had yielded to Theis and Nett and had its brake lights on. According to Olson's testimony, the taxi's brake lights should have alerted appellant that there was a hazard on the road, which in turn should have caused him to slow down. Instead, the video showed appellant continuing to accelerate after the taxi's brake lights came on.

Olson also reviewed a video captured from a surveillance camera at Casa Martin, a restaurant located near the accident site. Olson testified that using that video, he identified the point at which appellant's car hit Theis and Nett.[2] Olson was then able

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[2] Both appellant's and respondent's briefs suggest that Olson utilized the Casa Martin video in conducting his speed analysis. As discussed later in the opinion, that is incorrect. According to Olson's testimony, he used Davtyan's dashcam video to measure the time it took appellant to travel between two points visible in

to calculate the distance between appellant's car when Nett and Theis first became visible in the number two lane (based on Davtyan's video) to the point of impact. According to Olson, that distance would have allowed a reasonable driver to brake and avoid the collision. Olson requested a copy of the Casa Martin video, but the restaurant provided him with a copy of the wrong time frame. By the time Olson discovered the error, the restaurant's recording system had overwritten the correct time frame.

The investigation soon led police to appellant. The investigators subsequently learned that immediately following the incident, appellant made a series of phone calls to acquaintances, seeking a body shop that could fix his car that day -- a Saturday. Later that day appellant rented a car from a dealer who knew one of his friends. Further investigation revealed that the following day, appellant placed the car involved in the incident in a storage facility owned by his father. About two weeks later, on appellant's instructions, a tow truck retrieved the car from the storage facility and towed it to a chop shop, where the car was cut into pieces.

B. *The Defense*

The defense revolved around appellant's diabetic condition. Appellant testified in his own defense. While he did not deny driving the car that hit Theis and Nett, he testified that he had

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that video. Olson testified that he identified the location of both points using Davtyan's video. Thus, as the prosecutor later clarified to the court, in response to defense counsel's objections, Olson's speed analysis was based solely on Davtyan's video and "had nothing to do with the Casa Martin video."

no recollection of the incident. According to appellant, he felt tired while driving on the night of the accident. He stopped at the side of the road and checked his blood-sugar level, which tested normal. As he was approaching the Santa Monica Pier, he felt "some anxiety from the potential onslaught of symptoms of a low blood sugar." He testified he had no clear recollection of the rest of his path home. According to appellant, when he awoke that morning, he was surprised to see damage to the front side of his car. He later saw news coverage of the fatal collision and realized he might have been involved in the accident. He testified he became scared and thus rented a car, stored his car at his father's storage facility, and later made arrangements to dispose of it.

Dr. Michael Hirt, appellant's physician, testified about appellant's diabetic condition. Hirt confirmed that appellant was diabetic and had to inject insulin to maintain a normal blood-sugar level. According to Hirt, symptoms of a low blood-sugar level could include anything from light-headedness and dizziness to death.

The defense also called Cole Brewer, a traffic-collision reconstruction expert. Using the dashboard-camera video from Davtyan's taxi to estimate appellant's speed before the collision, Brewer agreed with Olson that appellant was travelling at about 37 miles per hour. Based on a traffic survey he conducted, Brewer estimated that cars travelling 40 miles per hour represented the 85th percentile of cars driving at the site of the accident at around 1:00 a.m., meaning that 85 percent of the cars traveled at 40 miles per hour or a lower speed. He explained that authorities typically determine appropriate speed limits based on the speed of the 85th percentile at nonpeak hours but conceded

on cross-examination that the survey he conducted would not provide a sufficient basis to decide the speed limit. In response to a question by the prosecutor, Brewer confirmed that a reasonable person should "adjust their behavior to expect the unexpected" when confronted with a stopped vehicle in the adjacent lane.

C. *Rebuttal*

Dr. Omar Deen, an internal medicine specialist, reviewed appellant's records and opined that his blood-sugar level in 2014 appeared to be well controlled. Deen opined that a diabetic patient suffering from a low-blood sugar level would not appear relaxed but instead would exhibit symptoms that would be visible even to a layperson, such as lethargy and excessive sweating. According to Deen, only a dangerously low blood-sugar level could produce memory loss, and a person in that condition would be unable to operate a car.

D. *Closing*

The prosecution argued that appellant caused the accident by negligently speeding or, alternatively, by negligently driving with knowledge of his compromised medical condition at the time of the incident. It also contended that the evidence showed appellant was fully aware of the collision but chose to flee the scene, and later attempted to conceal the evidence of his crime.

The defense asserted that appellant was travelling at a reasonable speed and that Nett and Theis's conduct caused the accident. The defense argued that holding appellant liable for driving with knowledge of his medical condition was tantamount to saying that diabetics must never drive. Finally, the defense reiterated appellant's contention that he was unaware of the collision due to his medical condition at the time of the collision.

DISCUSSION

A. *Sufficiency of the Evidence*

Appellant contests the sufficiency of the evidence to support his convictions for vehicular manslaughter and leaving the scene of an accident. In assessing the sufficiency of the evidence, "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. Lindberg* (2008) 45 Cal.4th 1, 27.) We discuss each of appellant's convictions in turn.

1. *Vehicular Manslaughter*

To prove vehicular manslaughter under section 192, subdivision (c)(2), the prosecution must establish: (1) while driving, the defendant committed a misdemeanor, an infraction, or a lawful act in an unlawful manner; (2) the relevant act was dangerous to human life; (3) the defendant committed the relevant act with ordinary negligence; and (4) the act caused the death of another person. (§ 192, subd. (c)(2).) Here, the prosecution alleged that appellant committed the infraction of speeding in violation of the basic speed law (Veh. Code, § 22350). The prosecution also alleged, in the alternative, that appellant negligently committed a lawful act in an unlawful manner, namely, driving with knowledge of his compromised medical condition at the time of the incident.

Appellant asserts the evidence was insufficient to prove that he was speeding or otherwise driving negligently. We disagree. Under the basic speed law, a person must not drive at a greater speed than is reasonable or prudent considering the

weather, visibility, traffic, and other conditions of the highway or at a speed that endangers the safety of persons or property. (Veh. Code, § 22350.) Trial testimony established that shortly before the accident, appellant was driving aggressively and faster than the speed limit. The evidence also showed that appellant continued to accelerate, even after the taxi in the adjacent lane had stopped in the middle of the road and had its brake lights on. The jury heard the prosecution's expert witness opine that a reasonable driver should slow down under such circumstances. Appellant's own expert agreed that under those circumstances, a reasonable driver should adjust his driving and exercise caution. This was sufficient evidence for the jury to conclude that appellant was driving negligently and at an imprudent speed considering the conditions of the road.

Appellant further claims that Theis stepped in front of his vehicle and that her own conduct served as an intervening cause that should relieve him of criminal liability for her death. But "[t]o relieve a defendant of criminal liability, an intervening cause must be an unforeseeable and extraordinary occurrence." (*People v. Crew* (2003) 31 Cal.4th 822, 847.) "The defendant remains criminally liable if either the possible consequence might reasonably have been contemplated or the defendant should have foreseen the possibility of harm of the kind that could result from his act." (*Ibid.*) Here, a jury could reasonably find that the inability to avoid striking an emerging pedestrian is a foreseeable result of driving at a high speed while passing a stopped vehicle. In sum, substantial evidence supported the jury's verdict as to the vehicular manslaughter charge.

2. *Leaving the Scene of an Accident*

Vehicle Code section 20001, subdivision (a), provides, "The driver of a vehicle involved in an accident resulting in injury to any person, other than himself or herself . . . shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004." In turn, Vehicle Code sections 20003 and 20004 require the driver to, among other things, provide specified information, render aid to any person injured and, in the event of death, notify authorities of the accident without delay.

Appellant does not contend he complied with these requirements after the incident. Instead, he argues that the evidence was insufficient to prove he was aware of the accident, as he claimed he suffered a diabetic attack and had no memory of the collision. There was, however, ample evidence tending to show that appellant was aware of the accident but chose to flee rather than stop. First, given the damage to his car and the fact that Nett began screaming loudly after the impact, the jury could conclude that appellant must have been aware of the collision. Evidence that he sped away and turned onto a different street at his first opportunity and later engaged in extensive efforts to conceal his involvement in the accident also suggested his awareness. Additionally, the prosecution presented evidence tending to refute appellant's specific claim that symptoms of a low blood-sugar level caused him to have no recollection of the accident: Johnson testified that appellant appeared relaxed just before the accident, and Dr. Deen opined that a person with severe symptoms of a low blood-sugar level would not appear relaxed and, in fact, would be unable to operate a car. In short,

sufficient evidence supported appellant's conviction of leaving the scene of an accident.

B. *Failure to Order a Mistrial or Continuance in Response to the Prosecution's Failure to Disclose a Measurement Index*

1. *Background*

Appellant argues that the court erred in denying a mistrial or, in the alternative, a continuance after discovering that the prosecution failed to disclose a measurement index that Officer Baez prepared. The existence of the measurement index first became known during Baez's testimony. Baez testified that she marked and measured certain locations at the scene based on witness statements, debris, and blood splatter. On cross-examination, Baez revealed that she had prepared a measurement index, which recorded the various measurements she took at the scene. The parties agree that neither Detective Olson nor the prosecutor knew before Baez's testimony that this measurement index existed.

Appellant then moved for a mistrial, asserting that the prosecution had violated its discovery obligations by failing to tender the measurement index. The court ordered the prosecutor to provide the index to appellant that day and after the prosecutor complied, denied the motion for a mistrial. Several days later, appellant requested a continuance to allow Brewer, his expert, to make calculations based on the measurement index. The trial court denied the motion, noting that Brewer still had time to visit the location and perform his calculations before he was scheduled to testify. Brewer testified the next day, and the defense rested the following day. The trial court later instructed the jury that it could consider the prosecution's late disclosure of the measurement index in evaluating the evidence.

2. *Analysis*

On appeal, the parties agree that Baez's measurement index was subject to disclosure prior to trial. Appellant contends that the prosecution's failure to disclose the document prior to trial compelled the trial court to declare a mistrial or at least grant a continuance.

We review the trial court's ruling on a motion for a mistrial for abuse of discretion. (See *People v. Ayala* (2000) 23 Cal.4th 225, 282.) "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged . . . ." (*People v. Silva* (2001) 25 Cal.4th 345, 372.) Aside from abstract assertions that the information in the measurement index was "crucial," "critical," and "key to the case," appellant fails to explain either the relevance of any particular measurement or how the late disclosure of the document might have impacted his defense. He has therefore forfeited any argument in this regard. (See, e.g., *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 [arguments not developed are forfeited].) Thus, appellant has shown no irreparable damage to his chances of receiving a fair trial and no abuse of discretion in the trial court's denial of a mistrial. (See *People v. Ayala*, *supra*, 23 Cal.4th at p. 282.)

Turning to appellant's motion for a continuance, we will not reverse a conviction based on the denial of a continuance absent "a showing of an abuse of discretion and prejudice to the defendant." (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.) As with the denial of his motion for a mistrial, appellant asserts without elaboration that had Brewer received the index earlier, he "could have used it to undercut Olson's testimony and opinion." Again, however, he fails to explain how Brewer could

have used the index or what opinions he would have formed based on it. Thus, appellant fails to show any prejudice from the trial court's denial of a continuance.

C. *Evidentiary Challenges*

Appellant challenges multiple evidentiary rulings. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. (See *People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) "Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Ibid.*) It is the appellant's burden to show that any error resulted in a miscarriage of justice. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) A miscarriage of justice results only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

1. *Admission of Olson's Testimony about the Casa Martin Video*

a. *Background*

Appellant claims the trial court should not have permitted Detective Olson to testify about the content of the video from Casa Martin that he had reviewed shortly after the incident. The video itself was unavailable because, as noted, the restaurant later provided Olson with a copy of the wrong time frame, and its recording system had overwritten the relevant time frame before Olson discovered the error.

In a pretrial motion, the prosecutor moved to admit Olson's testimony about the content of the Casa Martin video based on the Secondary Evidence Rule (Evid. Code, § 1521, subd. (a)).

Appellant objected, arguing that such testimony would violate his right to cross-examination. The trial court sustained the objection and declined to allow the testimony. The prosecutor renewed the motion later during trial, again asserting that Olson's testimony about the Casa Martin video satisfied the requirements of the Secondary Evidence Rule. The prosecution argued the video was lost or destroyed through no fault of Olson's, that it was highly relevant, and that Olson could be cross-examined about his observations. Appellant rested on the objections he had previously made, and the court again denied the prosecution's request.

Prior to Olson's testimony, the prosecutor asked the court for guidance on how to present Olson's various calculations, which were based in part on his observations from the Casa Martin video. Appellant countered that the issue had already been litigated and decided, but the court responded that this was the first time the parties were litigating the prosecutor's ability to examine Olson on the Casa Martin video as the basis for his opinion, as opposed to the prosecutor's ability to present testimony on its content "directly to the jury."

Appellant then reiterated his objection to testimony regarding the Casa Martin video, arguing that he would be unable to cross-examine Olson about his observations. After hearing from Olson about the circumstances surrounding the Casa Martin video, the court found that Olson had exercised due diligence in attempting to obtain the video, which, through no

fault of his, had been inadvertently overwritten.[3] The court then allowed Olson to explain to the jury how he had identified the point of impact from the Casa Martin video.

b. *Analysis*

Appellant contends: (1) Olson's testimony about the video constituted improper hearsay testimony; (2) the video had not been properly authenticated; and (3) the testimony should have been precluded under the Secondary Evidence Rule.

Respondent argues that appellant has forfeited his hearsay and authentication objections by failing to raise them below. We agree. Although he objected to Olson's testimony about the Casa Martin video, appellant argued only that he would be denied the right to cross-examine Olson on it. An objection on that ground does not preserve hearsay and authentication objections. (See *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 ["If a defendant fails to make a timely objection on the precise ground asserted on appeal, the error is not cognizable on appeal"].)

Appellant claims he "referenced" foundation and hearsay in his "original objections." The objections he points to, however, concerned other videos, including the one from Davtyan's taxi. Moreover, the court initially sustained appellant's objection to testimony about the Casa Martin video. Subsequently, when the prosecutor asked for permission to elicit that the Casa Martin video provided the basis for Olson's determination of the point of impact, appellant protested that the issue had already been litigated. The court then clarified that the admissibility of

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[3] Relatedly, the court also found no violation of due process under *California v. Trombetta* (1984) 467 U.S. 479 (addressing prosecutors' duty to preserve potentially exculpatory evidence).

Olson's testimony about the Casa Martin video as the basis for his opinion, as opposed to testimony about that video as independent evidence, had not been litigated. Faced with a clean slate of objections, appellant argued only that the testimony would violate his right to cross-examine the witness. He did not ask the court to exclude Olson's testimony about the Casa Martin video as the basis for his opinions on hearsay or authentication grounds. Accordingly, appellant has forfeited the hearsay and authentication objections by failing to raise them below.[4] (See *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 ["arguments raised for the first time on appeal are generally deemed forfeited"].)

We now turn to appellant's contentions under the Secondary Evidence Rule. Under that rule, "[t]he content of a writing may be proved by otherwise admissible secondary

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[4] Regardless of appellant's forfeiture of this issue, we note that Olson's testimony about the Casa Martin video was not hearsay. Under Evidence Code section 1200, hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The Evidence Code further defines a "'[s]tatement'" as an "oral or written verbal expression or . . . nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225)

The Casa Martin video is not a statement of a person under the Evidence Code. (See *People v. Goldsmith, supra,* 59 Cal.4th at p. 274 [traffic enforcement videos "are not statements of a person as defined by the Evidence Code"].) Accordingly, it was not hearsay. (See *ibid.*) Nor was Olson's testimony about the video hearsay. (See Evid. Code, § 1200 [hearsay does not include statement made "by a witness while testifying at the hearing"].)

evidence."[5] (Evid. Code, § 1521, subd. (a).) The rule also provides, however, that courts must exclude secondary evidence of the content of a writing if its admission would be "unfair." (Evid. Code, § 1521, subd. (a)(2).)

Appellant argues that the admission of Olson's testimony about the Casa Martin video was unfair. In his opening brief, he offers only a perfunctory statement that "it was unfair for Olson to testify about evidence that was not available to the defense and which denied [appellant] the right to cross examine Olson on such a crucial area." Only in his reply brief does appellant attempt to support this contention with argument. "It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54 Cal.4th 952, 1075.) In any event, we perceive no unfairness in the admission of Olson's testimony that could render the trial court's ruling an abuse of discretion. Notably, according to the trial court's findings, the destruction of the video came through no fault of Olson's, and appellant had an opportunity -- albeit limited -- to cross-examine Olson about his observations.

Finally, even if the trial court had abused its discretion in allowing oral testimony about the Casa Martin video, appellant makes no showing that this testimony prejudiced his defense. He asserts that Olson used the Casa Martin video to estimate his car's speed before the collision, and that the speed analysis was critical to the verdict. But that assertion misreads the record:

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[5] A video recording is a "writing" for purposes of the secondary evidence rule. (*People v. Panah* (2005) 35 Cal.4th 395, 475.)

Olson relied solely on the video from Davtyan's taxi in calculating the speed of appellant's vehicle. Appellant makes no meaningful attempt to explain how any calculation Olson actually made using the Casa Martin video might have affected the jury's verdict. Accordingly, we discern no error in the admission of Olson's testimony about the Casa Martin video.

2. *Exclusion of the Measurement Index*

At the conclusion of trial, appellant moved to admit a police report containing Officer Baez's measurement index. When the prosecution objected on hearsay grounds, appellant responded that he was offering the index for impeachment purposes and to show "lack of proper police protocol and procedure," rather than for the truth of the matters asserted in the index. The trial court excluded the report.

On appeal, appellant asserts in conclusory fashion that the measurement index was not hearsay, and that the measurements it contained "could have been useful for the defense," suggesting that the jury could have taken the index for the truth of the matters asserted in it. Because he fails to offer a meaningful legal argument and advances a position he expressly disclaimed before the trial court, we deem the matter forfeited. (See *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 250 ["A conclusory statement is insufficient to challenge a court's evidentiary ruling"]; *Perez v. Grajales*, *supra*, 169 Cal.App.4th at pp. 591-592 ["arguments raised for the first time on appeal are generally deemed forfeited"].)

3. *Admission of Evidence of Appellant's Recommendation for Medical Marijuana*

a. *Background*

Appellant challenges the trial court's decision to admit evidence that he had obtained a recommendation for medical marijuana following the accident. Prior to cross-examining appellant, the prosecutor asked the court for permission to ask appellant if he had used marijuana at the time of the collision and, if he denied such use, whether he had a recommendation for medical marijuana, either at the time of the accident or at the time of trial. Appellant objected on ground that the recommendation for medical marijuana was irrelevant and unduly prejudicial, but the court overruled his objection. The court reasoned that a recommendation for medical marijuana before the accident would be probative of appellant's use of marijuana at the time of the incident. It further reasoned that if appellant denied having a recommendation for medical marijuana at the time of the incident, evidence that he possessed such a recommendation at the time of trial could serve to impeach him.

On cross-examination, appellant admitted having smoked marijuana, but denied using it close to the time of the incident. In response to the prosecutor's questions, appellant also denied having a recommendation for medical marijuana in 2014 but acknowledged obtaining one in 2015. The prosecutor made no mention of this testimony in closing argument.

b. *Analysis*

Appellant argues that evidence of his 2015 recommendation for medical marijuana was irrelevant and unduly prejudicial. We agree that any connection between

appellant's 2015 recommendation for medical marijuana and his potential drug use prior to the accident in 2014 was tenuous. However, assuming admission of this evidence was erroneous, it did not result in a manifest miscarriage of justice. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Initially, we observe that the contested evidence played only a minor role in the prosecution's case. The prosecutor made no further mention of this evidence to the jury. Its theory regarding the vehicular manslaughter charge was that appellant's speeding or, alternatively, his driving with knowledge of his compromised medical condition at the time, caused the accident. The prosecution never alleged that drug use played a part in causing the accident.

Moreover, the evidence against appellant was strong. As previously discussed, the evidence showed that before the accident, appellant was driving above the speed limit and continued to accelerate even when a taxi in the adjacent lane stopped in the middle of the road to allow Theis and Nett to cross. Given the circumstances of the accident, i.e., the force of the impact and Nett's subsequent screams for help, it was highly unlikely that appellant failed to notice the collision. And his conduct immediately following the collision and thereafter strongly suggested he was aware of his involvement in the incident but chose to conceal it.

Appellant claims that the evidence of his 2015 recommendation for medical marijuana was crucial because it "plugged a gap in the government's case as to why [he] was driving erratically and struck the pedestrians." He apparently suggests that absent such an explanation, the jury would have concluded that diabetes-related symptoms caused him to drive

aggressively and to lose all recollection of what he had done. However, his account of a diabetes-induced memory loss was effectively refuted by the testimony of Johnson and Deen, and the prosecution neither attempted nor was obligated to provide a motive for appellant's aggressive driving.

In view of the extensive evidence against appellant and the minimal effect his 2015 medical marijuana recommendation could have had on the jury, any error in admitting the recommendation was harmless. (See *People v. Samuels* (2005) 36 Cal.4th 96, 117 [no manifest miscarriage of justice where prosecution evidence was strong and challenged evidence was peripheral to the case].)

D. *Challenges to the Jury Instructions*

Next, appellant advances two challenges to the trial court's jury instructions. "We review assertions of instructional error de novo." (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 751.) When evaluating whether jury instructions are misleading, we consider the instructions as a whole to determine if there was a reasonable likelihood that the jury applied the challenged instruction in a misleading manner. (*People v. Jennings* (2010) 50 Cal.4th 616, 677.) Even where an instruction, or the failure to give an instruction, was erroneous, we will not reverse a conviction unless the error resulted in a manifest miscarriage of justice. (See *People v. Avena* (1996) 13 Cal.4th 394, 416; *People v. Johnson* (1993) 6 Cal.4th 1, 46, disapproved on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879.) We discuss each of appellant's challenges in turn.

1. *CALCRIM No. 306*

The trial court gave the jury the following instruction pursuant to CALCRIM No. 306:

> "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose: Measurement Index within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

Appellant argued that this instruction also should have included the prosecution's failure to provide the Casa Martin video, but the court overruled the objection.

On appeal, appellant contends the court's failure to give the requested instruction was erroneous. Requested jury instructions must be supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) The discovery obligations that CALCRIM No. 306 discusses, and which appellant claims the prosecution violated, stem from section 1054.1. That provision requires the prosecution to disclose certain information to the defendant before trial. (§ 1054.1.) As our Supreme Court has explained: "[u]nder section 1054.1, evidence is subject to disclosure, if at all, only to the extent it is 'in the possession of the prosecuting attorney or [known by [him/her]] to be in the [actual] possession of the investigating agencies.'" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1163, quoting § 1054.1, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Appellant does not assert that either the prosecutor's office or any investigating agency actually possessed the Casa Martin video. Rather, appellant claims Detective Olson was negligent in

failing to discover that he had received a video of the wrong time frame from the restaurant in time to prevent the correct video's destruction. From this, he suggests that Olson's theoretical ability to obtain a copy of the correct video gave him "constructive possession" of it. Regardless of any theoretical "constructive" possession of the Casa Martin video, section 1054.1's discovery obligations were not triggered. The prosecution was not required to provide appellant with a video that neither it nor any investigator had obtained. The trial court reasonably concluded that the video was destroyed through no fault of Olson's and it correctly refused to instruct the jury on a discovery violation relating to the video. (See *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 572.)

Moreover, just as he fails to show any prejudice resulting from Olson's testimony about the Casa Martin video, appellant also fails to show prejudice flowing from the absence of the instruction he sought regarding the video. In fact, he makes no attempt to establish any resulting prejudice.

2. *CALCRIM No. 593*

As previously discussed, to prove a charge of vehicular manslaughter under section 192, subdivision (c)(2), the prosecution must prove, among other things, that the defendant caused a person's death by negligently committing a misdemeanor, an infraction, or a lawful act in an unlawful manner. (§ 192, subd. (c)(2).) The prosecution's theory at trial was that appellant caused Theis's death by either negligently speeding or negligently driving with knowledge of his compromised medical condition. The relevant portion of the trial court's jury instruction under CALCRIM 593 provided:

> "To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that:
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> "(1) While driving a vehicle, the defendant committed an infraction or a lawful act in an unlawful manner;
>
> "(2) The infraction or otherwise lawful act was dangerous to human life under the circumstances of its commission;
>
> "(3) The defendant committed the infraction or otherwise lawful act with ordinary negligence;
>
> "AND
>
> "(4) The infraction or otherwise lawful act caused the death of another person.
>
> "The People alleged that the defendant committed the following infraction: Speeding. [¶] . . . [¶] The People also allege that the defendant committed the following otherwise lawful act with ordinary negligence: Drove with knowledge of medical condition."

The instruction defined "ordinary negligence" as "the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else" and explained, "A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation." Finally, the court instructed the jury that it had to agree whether speeding or driving with knowledge of medical condition caused Theis's death. Appellant objected to the inclusion of the reference

to driving with knowledge of medical condition, but the court overruled his objection.

Appellant renews his objection on appeal. He asserts that the court's instruction "holds [him] strictly liable for being diabetic." The very language appellant challenges refutes this contention. That language set forth the prosecution's theory that appellant committed the otherwise lawful act -- driving with knowledge of his medical condition -- "with ordinary negligence." Thus, regardless of whether the term "medical condition" in the instruction could be read to refer to appellant's diabetes generally, rather than to his claimed condition at the time of the incident, the instruction appropriately charged the jury with determining whether appellant was negligent. Accordingly, we find no fault in the trial court's instruction under CALCRIM 593.[6]

E. *Failure to Excuse Jurors for Cause*

1. *Background*

Appellant claims the trial court abused its discretion in denying his for-cause challenges to four prospective jurors during voir dire, thereby violating his right under the federal and state

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[6] Likewise, the prosecutor's closing argument made clear that it was not appellant's initial decision to drive that satisfied the negligence element of the offense, but his decision to continue driving while conscious that he was medically compromised. The prosecutor emphasized that even were the jury to credit appellant's "unreasonable story" that he was "experiencing a diabetic emergency," he was nevertheless culpable for having continued to drive instead of pulling over: "[A]sk yourself: if you want to believe his story, was it reasonable to drive with your medical condition, when you knew that you weren't feeling well . . . ? Was it reasonable not to pull over . . . ?"

constitutions to a fair trial by an impartial jury. Appellant used peremptory challenges to remove three of those prospective jurors. He exhausted his peremptory challenges, and did not remove the fourth contested juror, Juror No. 4802, after the court rejected his request to remove her for cause.

Juror No. 4802 lived in Santa Monica and was familiar with the case. She revealed during voir dire that she had "read some things that could give [her] a possible bias." Later, at a sidebar conference, the juror explained, "I read that the mother and daughter were hit in the crosswalk at 1:00 a.m., and that the guy wasn't found until, like, months later." The juror stated she would keep an open mind but that she had "formed some opinions" about the defendant's guilt. She added that she felt like "it" sounded "very suspicious" and noted that her father was a defense attorney. In response to the court's questions, the juror confirmed that she understood that what she read in the newspapers might not be accurate. And she later stated, "I don't think I formed that opinion [that the defendant is guilty] necessarily. . . . I think it sounds suspicious, kind of like interesting circumstances, but I don't think there is enough evidence where I would say he's guilty." The juror confirmed she could give the defense a fair trial. The court subsequently denied counsel's request to dismiss the juror for cause, and she ultimately remained on the panel.

2. *Analysis*

A party may challenge a prospective juror for cause based on actual or implied bias. (Code Civ. Proc., § 227.) Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without

prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).) Implied bias exists in a few enumerated circumstances, including "the existence of a state of mind in the juror evincing enmity against, or bias towards, either party." (Code Civ. Proc., § 229, subd. (f).)

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 910.) The trial court determines "whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.]" (*Ibid.*) "A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause." (*Ibid.*) "The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.]" (*Ibid.*)

"When a defendant uses peremptory challenges to excuse prospective jurors who should have been removed for cause, a defendant's right to an impartial jury is affected only when he exhausts his peremptory challenges and an incompetent juror . . . sits on the jury . . . ." (*People v. Black* (2014) 58 Cal.4th 912, 920.) We therefore focus our discussion on Juror No. 4802, the only contested prospective juror who ultimately served on the jury.

Appellant argues that Juror No. 4802 was biased against him and therefore incompetent to serve on the jury. He highlights that she was familiar with the case, had read articles about the accident, had formed "some opinions," and stated that "it" sounded "very suspicious" to her. We agree that these

circumstances could suggest bias. But the juror later clarified that her opinion was not firm and that she had not formed an opinion that appellant was guilty. She also assured the court that she would remain fair and impartial.

People v. Hillhouse (2002) 27 Cal.4th 469, is instructive. There, a prospective juror gave what the Supreme Court described as "equivocal and somewhat conflicting" statements. (*Id.* at p. 488.) The juror relayed that based on what he had read in the newspapers, he believed the defendant was guilty, yet he understood that "he had to base his decision on the evidence at trial rather than what he read in [the] newspapers, and he said he would try to be impartial." (*Ibid.*) Upholding the trial court's denial of the defendant's challenge for cause, the Supreme Court stated: "On this record, the trial court could reasonably conclude the juror was trying to be honest in admitting to his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions." (*Ibid.*)

We reach the same conclusion in the instant case. Though she admitted to some preconceptions, Juror No. 4802 recognized that she had to decide the case based on the evidence presented at trial and affirmed her ability to remain impartial. Given the entirety of the juror's statements, the trial court reasonably found that the juror could be fair and impartial and would follow the law. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488.) Substantial evidence supports this finding. (See *People v. Weaver*, *supra*, 26 Cal.4th at p. 910.)

F. *Denial of a* Pitchess *Motion Without In Camera Review*[7]

1. *Background*

Appellant argues that the trial court erred by denying his motion under *Pitchess* to obtain Detective Olson's personnel records. He maintains the court should have held an in camera hearing to review Olson's records. In his motion, appellant sought discovery of personnel records related to any misconduct, dishonesty, or improper investigative techniques by Olson.

In a declaration attached to the motion, defense counsel asserted his belief that Olson engaged in "dishonesty and inappropriate behavior," that his reports were "inaccurate," and that he was not being truthful. Counsel stated that appellant believed that Olson "made threatening remarks to and about" appellant and to potential witnesses. Finally, counsel maintained that "[t]raits of dishonesty, use of excessive force, misconduct and improper investigative techniques [were] very relevant issues in this matter." The City of Santa Monica opposed the motion. At a hearing on the motion, appellant's counsel added that Olson "kicked down the door" of a particular witness and "threatened her." Following the hearing, the trial court found appellant had failed to show good cause and denied the *Pitchess* motion.

2. *Analysis*

On appeal, appellant maintains that he complied with the necessary procedures to obtain the discovery he sought, and that the information sought was relevant to his defense. We review a trial court's ruling on a *Pitchess* motion for abuse of discretion.

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[7] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

(*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) When a defendant seeks discovery from a peace officer's personnel records under *Pitchess*, the defendant must make a preliminary showing of good cause. (*Id.* at p. 1228.) If the court determines that good cause has been established, the custodian of records brings to court all documents that are "'potentially relevant' to the defendant's motion." (*People v. Mooc*, at p. 1226) The court then conducts an in camera review of the documents and, subject to certain limitations, discloses to the defendant any information that is relevant to the subject matter of the defendant's case. (*Ibid*.) To establish good cause for an in camera review, the defendant must, among other things, present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025.) That factual scenario must either support the defendant's proposed defense or be likely to lead to information that would. (*Id.* at pp. 1026-1027.)

Here, defense counsel's declaration presented no specific factual scenario of misconduct by Detective Olson. It provided no detail about Olson's alleged "acts of dishonesty and inappropriate behavior," the alleged inaccuracies in his reports, or the content of the threats he allegedly made. Nor did counsel's declaration provide any concrete explanation of how the information sought might support appellant's defense. Under these circumstances, the trial court did not abuse its discretion in concluding appellant had failed to show good cause and in denying his *Pitchess* motion. (See *Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1026.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.