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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.

CHRISTOPHER NDIAGU,

Defendant and Appellant.

B266092

(Los Angeles County
Super. Ct. No. SA083239)

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

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Christopher Ndiagu appeals from a judgment and sentence, following his convictions for driving under the influence causing injury and driving with a blood alcohol level over .08 percent causing injury. He contends the trial court denied him his right to present a defense and to cross-examine witnesses when it ruled that he could not present evidence of three other drivers' blood alcohol levels. We conclude the court did not exclude such evidence at trial and accordingly, we affirm.

STATEMENT OF THE CASE

A jury convicted appellant of driving under the influence causing injury (Veh. Code, § 23153, subd. (a)),¹ and driving with .08 percent or greater blood alcohol level causing injury (§ 23153, subd. (b)). It found true seven great bodily injury enhancement allegations. In a bifurcated proceeding, the trial court found that appellant had two prior convictions for driving under the influence.

The court sentenced appellant to prison for a total term of 15 years. Appellant timely appealed.²

¹ All further statutory citations are to the Vehicle Code, unless otherwise stated.

² After the appeal was filed, this court requested and received the trial exhibits. Appellate counsel's subsequent motion to supplement the appellate record with the exhibits is therefore moot.

STATEMENT OF THE FACTS

A. *Prosecution Case*

Adrienne Walker testified that on December 15, 2012, at around midnight, she was driving a Dodge southbound on the 405 freeway when her car began breaking down. She pulled the Dodge over completely to the right shoulder of the highway and called her friend, Patrick Smith, for assistance. Walker waited about an hour until Smith arrived in his Kia SUV, which he parked directly behind the Dodge. Smith determined that the Dodge had run out of gasoline. He told Walker, "Let's go back [to] my car and I'll call triple A and ask them to bring some gasoline." They both got into the Kia. Smith turned on his emergency hazard lights and called AAA. Smith waited on hold for about 25 minutes until an AAA employee answered. At that moment, something hit the rear of the Kia. Walker felt a lot of pain in her neck, and saw Smith looking "disfigured, kind of pushed into the steering wheel." Three passing motorists helped Walker out of the Kia because its engine was smoking. As a result of the collision, Walker suffered a cracked vertebra in her neck. On cross-examination, she acknowledged being interviewed at the scene by a California Highway Patrol (CHP) officer, who asked her whether she had been drinking. She told him, "No." She also stated that at the time of the incident, the road was "a little wet" and there was a light drizzle.

Patrick Smith's testimony was substantially similar to Walker's. After Walker contacted him for help, he drove to her location and parked his Kia directly behind her vehicle,

on the shoulder of the freeway. When he failed to get Walker's vehicle to start, Smith returned to his Kia with Walker. He turned on his emergency lights, and phoned AAA. After being put on hold for 20 to 30 minutes, someone answered, and Smith said "Help." The next thing he remembered was hearing people outside his vehicle and being transferred to another vehicle. As a result of the incident, he became paralyzed. On cross-examination, Smith stated he had had one drink (a rum and club soda) that night, at around 11:00 p.m. He could not recall the weather condition, and did not remember the road being wet.

Hliang Thet testified that on December 15, 2012, he and his wife were driving home after dinner at a sushi restaurant in Santa Monica. He had had a few cups of sake at the restaurant. He was driving their red Mercedes and his wife was in the front passenger seat. Before the collision occurred, he was in the lane next to the carpool lane, driving at approximately 65 to 70 miles per hour. He observed the tail lights of a car stopped on the side of the freeway. Then he noticed debris on the freeway and immediately felt three impacts, two in the front and one to the rear. The Mercedes ended up near the middle divider, facing the wrong way. As a result of the collision, Thet suffered a fractured thumb and required ankle surgery. On cross-examination, Thet reiterated that he had had a few glasses of sake before leaving the sushi restaurant.

Laurie Hout, Thet's wife, testified that after the Mercedes was hit by a couple of cars, "everything else went

blank” and she woke up in the hospital. As a result of the collision, Hout suffered injuries to her back and knee.

Eloche Ukeje testified that he was the passenger in appellant’s car (an Audi) at the time. Ukeje met appellant through a mutual friend. Before the incident, appellant had picked him up at a bar. Ukeje did not remember anything about the collision. As a result of the collision, he suffered injuries to his left knee and right hand. On cross-examination, Ukeje stated he did not recall seeing appellant drink alcohol that night. Ukeje doubted that he smelled alcohol on appellant’s breath, as he would not have gotten into appellant’s car if he had. He also did not think that appellant was impaired.

CHP Patrol Officer Chad Watkins responded to the scene. Officer Watkins observed damage to the rear of both the Kia and the Dodge. It appeared the two vehicles had been in a collision. The Kia was “completely on the right shoulder and into the bushes.” South of the two vehicles was an Audi, that had “serious traffic collision damage,” including to its front and rear bumpers. Based on his training and experience, and on the physical evidence, Officer Watkins opined that the Audi, the Kia and the Dodge had been involved in a collision on the right shoulder. Further south of the vehicles, near the middle divider, were a Mercedes, a Pontiac, and a Toyota. All three vehicles appeared to have been involved in a collision.

Appellant's blood was drawn at 5 a.m. at the hospital. The blood sample showed that his blood alcohol level was 0.19 percent.

CHP Officer Patrick Crow testified as the prosecution's traffic collision expert. Based on his training and experience, his observations of the scene (including the friction marks, the damage to the vehicles and the debris) and the victims' statements, Officer Crow opined that appellant initiated a chain reaction collision involving six vehicles. According to the officer, appellant drove his Audi into the back of the Kia, which was parked on the shoulder of the freeway. The Kia then struck the Dodge. After the Audi hit the Kia, the Audi veered onto the freeway where it collided with the Pontiac and the Mercedes. The Mercedes then hit the Toyota which also collided with the Pontiac.³

On cross-examination, Officer Crow testified that when he interviewed the various witnesses at the scene, he smelled alcohol on Walker, Thet and Coronado. Although Officer Crow did not speak to Smith, he also smelled the odor of alcohol on him.

CHP Sergeant Tom Webster, who responded to the scene before Officer Crow, testified that he too smelled alcohol coming from the driver of the red Mercedes (Thet) and noticed that he had red or watery eyes. Webster did not

³ The driver of the Pontiac, Christopher Coronado, did not testify. The jury acquitted appellant of proximately causing injury to Coronado.

interview appellant, as when Webster arrived, appellant was unconscious and paramedics were treating him.

B. *Defense Case*

Appellant testified that on the date of the incident, he had attended a wake, beginning at about 11:30 p.m. or midnight. He ate food and drank two Guinness stouts and a small bottle of African palm wine. After finishing the wine, appellant left to pick up Ukeje at a restaurant. It took 20 minutes for him to drive to the restaurant, and about five to 10 minutes to locate Ukeje inside. Because it was raining, appellant drove in the slow lane of the freeway. After about 10 minutes, appellant saw a dark colored vehicle (later identified as the Kia) partly protruding into the slow lane. Its hazard lights were not on. Appellant thought, “How can people park [their] car like this and leave it here?”

Appellant decided to veer his Audi to the left adjacent lane to avoid the parked Kia. However, there was a vehicle in the lane, so appellant stepped on the brakes and waited for that vehicle to pass. The Audi hydroplaned and hit the rear bumper of the protruding Kia, causing the Audi to ricochet into the middle of the freeway where the oncoming vehicles slammed into it.

DISCUSSION

Appellant contends the trial court erred when it prohibited him from cross-examining several witnesses (Walker, Smith and Thet) about their blood alcohol levels on the night of the incident.

1. *Relevant Factual Background*

Blood samples taken from Walker, Smith and Thet showed that Walker had a blood alcohol level of 0.02 percent, Smith 0.10, and Thet 0.06. The presumptive limit for intoxication in California is 0.08. Before trial, the prosecutor moved to exclude “evidence that three of the nominal victims had various levels of alcohol in [their] system at the time of the accident.” In its tentative oral ruling on the motion, the court stated, “this really gets us into the realm of causation and relevancy. Evidence that a nominal victim was impaired or contributed in any way to the cause of the accident may be relevant. So for example, Thet, who had a measurable amount of alcohol in his blood and who collided into the Audi as the Audi was spinning out of control, I think is fair game for the defense.” “What is not relevant in my view under [section] 352 is . . . the fact that Smith, who was in a stationary vehicle, was impaired.” The same reasoning applied to Walker.

After further argument, the court stated, “The only hesitation I have about [excluding] evidence of Mr. Smith’s intoxication is this, and I may change my mind between now and 10:30 [a.m]. If there’s a factual dispute as to where the cars were located at the time of the accident, I suppose [defense counsel] could argue that it’s more probable that the cars were illegally parked because the driver was impaired than not, and I think that’s a legitimate argument.” The court noted that its evidentiary rulings were based on the

prosecution's statement of the evidence, and could change based on the actual trial testimony.

On March 23, 2015, the court issued a written decision on this issue. It noted that a defendant may be criminally liable for a result directly caused by his wrongful act even if there was another contributing cause. It held: "Evidence that a nominal victim who [was] driving at the time of the collision [was] impaired, or otherwise contributed to the cause of the accidents, is relevant. This appears to exclude evidence that Smith and Walker were intoxicated, since their car was immobile at the time of the collision. The Court has considered the argument that it is more probable that the Kia was illegally parked because the occupants were drunk. The Court finds that even if the jury were to find that the Kia was unlawfully parked, the fact that it was stationary at the time of the accident makes the victims' intoxication only slightly probative on the issue of causation; that minimal probative value is substantially outweighed by the probabil[ity] that the issue of their intoxication will necessitate undue consumption of time, including testimony of experts, and create a substantial danger of confusing the issue."

Smith was the first of the three impaired witnesses who testified. After his direct testimony, the court changed its ruling with respect to Smith and Walker. It stated, "[T]aking about five steps back, I think it is improper for me to prevent the defense from developing evidence of impairment -- of a possible impairment of a percipient

witness.” “The defendant has a 6th Amendment right to confront witnesses and I just, on balance, think he should be able to go in to it.”

As detailed above, on cross-examination, Smith stated he had had one drink that night. Walker stated she told a CHP officer she had not been drinking. As to Thet, defense counsel had previously elicited testimony from CHP Sergeant Webster that Thet smelled of alcohol. Thet himself testified on direct that he had had a few glasses of sake that night, and he reiterated that testimony on cross-examination. Finally, Officer Crow testified that he smelled alcohol on Thet, Walker and Smith.

During closing argument, defense counsel attacked Smith’s credibility. He stated that Smith “[r]eluctantly mentioned that he had one drink. It’s always one drink, ladies and gentlemen. Have you ever met somebody and said how many drinks? It’s always one drink.” He followed up: “[The prosecutor] will have you believe that Mr. Smith did everything correctly, even though we know that one drink statement -- how everyone only had one drink, how a person sat there and socialized for two hours, maybe longer, but he nursed that drink. He took that drink. And we know the effects of alcohol. And Officer Crow -- they want to talk about the effects and the impairment of alcohol because Mr. Ndiagu had some beers and wine, but everyone else can drink and no impairment. No problems. [Officer Crow] [c]ould smell liquor on their breath.”

As to Thet, defense counsel argued that Thet had “a couple of glasses of sake.” “Had [Thet] not been impaired and kept his eyes on the road, he probably would have been able to safely navigate through this.” Counsel noted that Thet was in the far lane of the freeway, but he looked over to the right shoulder before turning back to see debris on the road. Counsel also noted, “We know he smelled . . . of alcohol.”

2. *Analysis*

As the foregoing demonstrates, the trial court did not preclude appellant from cross-examining Walker, Smith and Thet about their intoxication. With respect to Thet, the court’s initial ruling was that Thet’s intoxication was “fair game for the defense.” Indeed, defense counsel elicited testimony from the first prosecution witness (Sergeant Webster) that Thet smelled of alcohol and had red, watery eyes. Thet also testified about drinking, and was cross-examined on the issue. With respect to Smith and Walker, although the court initially ruled that evidence of their intoxication was not relevant, it later changed its ruling and permitted defense counsel to go into the issue of impairment. Defense counsel did so during the cross-examinations of Smith and Walker, as well as during the cross-examination of Officer Crow. Officer Crow testified he smelled alcohol on Walker and Smith when he responded to the scene, and Smith admitted having had one drink that evening. On this record, we find no evidentiary bar to the admission of evidence about the victims’ intoxication.

Appellant contends that the trial court's exclusion of the blood alcohol test results remained, noting that defense counsel never broached that issue. Although the motion in limine may have been raised in the context of excluding the blood alcohol test results, the trial court's rulings were not so limited, but encompassed any evidence of impairment, including blood alcohol levels. Thus, the rulings did not preclude defense counsel from introducing evidence of the test results. Counsel's reasons for not doing so are not in the record. However, in light of the evidence of intoxication that was admitted, evidence of specific blood alcohol levels would not have been significant to appellant's defense.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.