Filed 2/8/18 P. v. Newman CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES NEWMAN, Defendant and Appellant.	B280638 (Los Angeles County Super. Ct. No. BA438557)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie C. LaForteza, Judge. Affirmed as modified.

Sally Patrone Brajevich, 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, Steven D. Matthews, Supervising Deputy Attorney General, and Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

A jury convicted Charles Newman (defendant) of the felonies of driving under the influence (DUI) and driving with a blood-alcohol concentration of 0.08 percent or more ("driving with at least a 0.08 BAC"), along with the misdemeanor of driving on a suspended license. In this appeal, he argues that (1) the prosecutor wrongly withheld discovery, (2) the trial court erred in denying his motion to suppress, (3) the trial court misinstructed the jury on "reasonable doubt" during voir dire, (4) insufficient evidence supports his conviction for DUI, and (5) the trial court erred in not staying the sentences imposed for all but the DUI count. Defendant's first four arguments lack merit, so we affirm his convictions. His last argument has merit, so we modify his sentence.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On a Monday afternoon in July 2015, a motorcycle police officer saw a car speeding down a hill. The speed limit was 45 mile per hour at the top of the hill, and 40 miles per hour at the bottom. The officer estimated the car was traveling at 61 miles per hour, and his laser gun clocked the car at 63 miles per hour.

The officer immediately pulled the car over and did not observe any further "erratic" driving. Defendant was the driver. As the officer spoke with defendant, he smelled the odor of alcohol, saw defendant covering his mouth with his hand, and noticed that defendant was avoiding eye contact. When asked for his driver's license, defendant said it was suspended due to a prior DUI. After being asked to get out of his car, the officer could see that defendant's eyes were bloodshot and watery, and defendant leaned against the car for support. Defendant

admitted he "drank a beer," told the officer he was "sorry," and pleaded with the officer not to take him to jail.

The officer then administered a number of field sobriety tests, including the horizontal gaze nystagmus test, the "finger-to-nose" test, the "walk-and-turn" test, and the "one-leg stand" test. Defendant had a difficult time following the officer's directions. Defendant's performance on the field sobriety tests indicated he was impaired.

The officer arrested defendant, transported him to the police station, and administered two breath tests indicating that defendant's blood-alcohol content was 0.155 percent, which is nearly twice the legal limit of 0.08 percent.

II. Procedural Background

In the operative second amended information, the People charged defendant with: (1) felony DUI, with a prior DUI conviction in the past 10 years (Veh. Code, §§ 23152, subd. (a) & 23550.5); (2) felony driving with at least a 0.08 BAC, with a prior DUI conviction in the past 10 years (*id.*, §§ 23152, subd. (b) & 23550.5); and (3) misdemeanor driving on a license suspended due to a prior DUI conviction (*id.*, § 14601.2, subd. (a)). The People alleged that defendant's 2015 felony conviction for driving with at least a 0.08 BAC constituted a prior DUI conviction and a prior prison term (Pen. Code, § 667.5, subd. (b)).

Defendant waived his right to counsel and represented himself.

After the trial court bifurcated the trial regarding defendant's prior conviction, a jury found defendant guilty of all three offenses. The court then found the allegations regarding the prior conviction to be true.

The trial court sentenced defendant to state prison for four years and to county jail for an additional 180 days. The court imposed four years on the DUI count, comprised of a three-year base term plus one year for the prior prison term. The court imposed a concurrent three-year term on the driving with at least a 0.08 BAC count, and a consecutive 180-day jail sentence on the misdemeanor driving on a suspended license count.

Defendant filed this timely appeal.

DISCUSSION

I. Discovery Violations

Defendant argues that the prosecutor violated the Criminal Discovery Act (Act) (Pen. Code, § 1054.1 et seq.), and in so doing, committed prosecutorial misconduct and violated defendant's constitutional rights to confrontation and due process. In particular, defendant asserts that the prosecutor did not timely disclose: (1) the video footage from a "helmet cam" worn by the officer during the traffic stop; (2) the prosecution's witness list; (3) the Department of Motor Vehicles (DMV) records reflecting the suspension of defendant's driver's license; and (4) the certified documents reflecting defendant's prior DUI conviction.[1] The trial court either expressly or implicitly concluded there was no underlying discovery violation under the Act, and we review that

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[1] Defendant invokes *Brady v. Maryland* (1963) 373 U.S. 83, but *Brady* obligates the prosecutor to disclose evidence "favorable" to a criminal defendant (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282). Because all of the evidence the prosecutor allegedly failed to disclose was inculpatory, there can be no *Brady* violation. (*People v. Verdugo* (2010) 50 Cal.4th 263, 281.)

finding for substantial evidence. (*People v. Riggs* (2008) 44 Cal.4th 248, 306.)

A. Video Footage from Helmet Cam

Among other things, the Act requires "[t]he prosecuting attorney [to] disclose" both (1) a defendant's "[s]tatements" and (2) "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged." (Pen. Code, § 1054.1, subds. (b) & (c), italics added.) Absent "good cause," these disclosures must generally be made "at least 30 days prior to the trial" or, if the information only comes into the prosecuting attorney's possession or knowledge after that 30-day cutoff, "immediately" after acquiring the information. (*Id.*, § 1054.7.) A prosecutor may "disclose" information either by (1) making a copy and physically giving it to the defense, or (2) "affording the defendant an opportunity to examine, inspect, or copy the discoverable items." (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1237-1238 (*Schaffer*); *Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, 478-479; *People v. Zaragoza* (2016) 1 Cal.5th 21, 51.)

The prosecutor complied with the duty to disclose the video footage from the helmet cam. The prosecutor did not physically give a copy of the disc containing the video footage to the defense because he could not: Defendant was in custody (where no discs were allowed) and had no counsel. So the prosecutor let the defendant know—more than 10 weeks before trial—that the disc was available for his investigator to pick up and view. Four weeks later, the prosecutor informed defendant that his investigator had yet to pick up the disc, and the defendant admitted he "forgot to tell him" to do so. Two weeks before trial, defendant indicated that he had "yet to even see the video," and

the prosecutor again indicated that the video was available for inspection. Defendant made no further effort to obtain the video prior to trial.[2] And when defendant complained he had still not viewed the video on the first day of trial, the court stopped the trial to let defendant watch it outside the jury's presence. On this record, the prosecutor "afford[ed] the defendant an opportunity to examine, inspect, [and] copy" the video (*Schaffer*, *supra*, 185 Cal.App.4th at pp. 1237-1238, 1244-1245); defendant's failure to avail himself of that opportunity does not equate to nondisclosure.

B. Prosecution's Witness List

The Act also requires the "prosecuting attorney" to disclose "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial." (Pen. Code, § 1054.1, subd. (a).) By its terms, this provision effectively requires the prosecutor to disclose his or her witness list. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375.)

The prosecutor complied with this duty. At trial, the prosecutor called four witnesses—two percipient witnesses, a chemist, and a paralegal to authenticate DMV records. The prosecutor disclosed the two percipient witnesses nearly two months before trial when the prosecutor told defendant that the People's witnesses were listed in the police report, which was already in defendant's possession and which identified the two percipient witnesses who testified at trial. The prosecutor disclosed that the he would be calling a chemist nearly two

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[2] Thus, defendant's statement to the trial court on the first day of trial that the prosecutor had ignored defendant's requests for a copy of the videotape is factually inaccurate.

months before trial, explained that he would not know the chemist's name until right before trial, and promised to—and did—disclose the chemist's name when he obtained it. The prosecutor disclosed that he would be calling a paralegal to authenticate DMV records a week before trial, after defendant changed his position to indicate that he would not stipulate to his prior license suspension documented in the DMV records; the DMV records themselves had been disclosed three months prior to trial, at the preliminary hearing. On these facts, the prosecutor complied with the duty to disclose the *names* of the prosecution's witnesses. The prosecutor was not obligated to timely disclose in a timely manner their *addresses* to defendant. (Pen. Code, § 1054.2). Defendant points to the prosecutor's statement that he was not obligated to hand over a witness list. To the extent the prosecutor meant he was not required to identify the witnesses, his statement was both legally incorrect (because he was) and irrelevant (because he actually did identify the witnesses); to the extent the prosecutor meant he was not required to create a separate document called a "witness list," he is correct.

C. DMV Records

The DMV records admitted to establish defendant's license status qualify as "real evidence . . . obtained as a part of the investigation of the offenses charged." (Pen. Code, § 1054.1, subd. (c).) The prosecutor complied with the duty to disclose the DMV records because an unredacted version of those records was disclosed to the defendant during his preliminary hearing, which was held three months prior to trial. Defendant asserts that he did not obtain the records until trial, but that is refuted by the record.

D. Certified Conviction Records

The certified conviction records regarding defendant's prior DUI conviction constitute "real evidence . . . obtained as a part of the investigation" as well as "a felony conviction of a[] material witness." (Pen. Code, § 1054.1, subds. (c) & (d).) Although the prosecutor did not obtain (and hence disclose) a copy of the *certified* conviction documents until the second half of the birfurcated trial (when defendant's prior conviction was litigated), the prosecutor introduced defendant's "rap sheet" listing all of his prior convictions at the preliminary hearing and gave defendant a copy of that rap sheet three months prior to trial.

II. Motion to Suppress

Defendant moved to suppress all evidence from the traffic stop on the ground that it was the product of being stopped in a "speed trap" that did not comply with the requirements of the Vehicle Code. The trial court denied defendant's initial motion at the preliminary hearing, and denied his renewed motion prior to trial. We review the trial court's factual findings regarding the motion for substantial evidence and its ultimate conclusion de novo. (*In re Raymond C.* (2008) 45 Cal.4th 303, 306.)

The trial court did not err in denying the motion to suppress. We need not decide whether the hill where defendant was speeding constitutes a speed trap within the meaning of Vehicle Code section 40802 because that determination does not matter for two reasons. First, the Vehicle Code itself only requires evidence from an unlawful speed trap to be excluded "upon a charge involving the speed of a vehicle." (Veh. Code, § 40803, subd. (a).) Because this is a DUI case (and not a speeding ticket case), these provisions do not by their own terms

apply. (*People v. Hardacre* (2004) 116 Cal.App.4th 1292, 1296-1299.) Defendant cites *People v. Sullivan* (1991) 234 Cal.App.3d 56 and *People v. Gray* (2011) 199 Cal.App.4th Supp. 10, but *Sullivan* rested on an earlier version of Vehicle Code section 40803 that did not limit the exclusion of evidence to speeding charges (*Sullivan*, at pp. 59-60) and *Gray* was depublished. Second, violations of state law do not, in any event, affect the propriety of a search or seizure under the Fourth Amendment. (*People v. Redd* (2010) 48 Cal.4th 691, 720, fn. 11; *People v. Bennett* (2011) 197 Cal.App.4th 907, 918.) Defendant does not challenge the stop under traditional Fourth Amendment principles, and for good reason: A traffic stop need only be based on reasonable suspicion of a traffic violation (*People v. Wells* (2006) 38 Cal.4th 1078, 1082), and there is substantial evidence that defendant was driving at least 20 miles per hour over the speed limit. Defendant asserts that speeding cannot provide the basis for the stop because he was not ultimately cited for speeding. But it is well settled that "[a] traffic stop is lawful at its inception if it is based on a reasonable suspicion that *any* traffic violation has occurred, even if it is ultimately determined that no violation did occur." (*Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 510.) Under this law, an officer's decision not to cite a defendant for a violation that *did* occur does not invalidate a stop.

III. Comments During Voir Dire

Defendant argues that the trial court's prefatory comments to the jury at the outset of voir dire tainted the court's later, indisputably correct instructions to the jury on the meaning of

"beyond a reasonable doubt."[3] Although a judge's comments during voir dire are ""not intended to be, and [are] not, a substitute for full instructions at the end of trial"" (*People v. Avila* (2009) 46 Cal.4th 680, 716), we will treat the judge's comments in this case as part of the instructions and review them independently as part of the aggregation of all jury instructions in defendant's case. (*People v. Johnson* (2016) 6 Cal.App.5th 505, 509-510; *People v. Holt* (1997) 15 Cal.4th 619, 677.)

Tracking the language in the standard CALCRIM No. 220 instruction, the trial court started by telling the jury venire, "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." Then the court expounded on the last portion: "Everything is possible[,] [r]ight? An alien can come down and commit a crime. I presume it's possible, but is

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[3] In his reply brief, defendant asserts that the trial court also erred in telling the jury, "If you or I were charged with a crime, we all carry that presumption of being innocent" because that statement inappropriately put the jurors in the shoes of an accused defendant. Defendant waived this argument by not raising it until his reply brief and by not supplying any authority or reasoned analysis in support. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 794 [waiver if issue raised for first time in reply brief]; *In re S.C.* (2006) 138 Cal.App.4th 396, 408 [waiver if no reasoned analysis of issue].) The argument lacks merit in any event, as the presumption of innocence applies to anyone charged with a crime and does not entail a risk of inflaming the jury. (Cf. *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860 [error to ask jurors to put themselves in victim's position].)

that reasonable? Right? Is that reasonable, and do you have an abiding conviction that the charge is true."

The trial court's extraterrestrial-focused illustration of the reasonable doubt standard did not constitute error. The danger that arises when courts add a gloss to the standard reasonable doubt instruction is the danger of diluting the standard in a way that allows a conviction with less certainty than the reasonable doubt standard requires. This is why it is error to liken the reasonable doubt standard to the certainty jurors use in making everyday decisions. (*People v. Johnson* (2004) 119 Cal.App.4th 976, 985 [analogies to "everyday decisionmaking in a juror's life" improper]; see also *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172 [analogies to taking "vacations" and getting on "airplanes" improper]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36 [analogies to "get[ting] married" and "chang[ing] lanes" while driving improper].) Explaining that jurors do not have a reasonable doubt if the proffered defense was that "an alien could have done it" is hyperbolic and does not in any way dilute the standard of proof. Further, the court's creative analogy was a single comment among a charge that quoted the standard reasonable doubt instruction repeatedly; there is no "reasonable likelihood" that the jury understood the trial court's alien-based example to alter the meaning of "beyond a reasonable doubt." (*People v. Ochoa* (1998) 19 Cal.4th 353, 421.)

Defendant goes on to suggest that *any* and *all* deviations from the standard reasonable doubt instruction—not just deviations that dilute the standard—mandate reversal. However, the law is to the contrary. (See *People v. Garcia* (1975) 54 Cal.App.3d 61, 65-66 [failure to follow standard instruction does not by itself constitute error].)

IV. Sufficiency of the Evidence

To prove DUI (rather than driving with at least a 0.08 BAC), the People must prove (1) defendant drove a vehicle (2) while his ability to drive was actually impaired by alcohol or a drug. (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1211; CALCRIM No. 2110; *People v. Martinez* (2007) 156 Cal.App.4th 851, 855.) Defendant asserts that insufficient evidence supports the jury's finding that he was actually impaired. In evaluating this assertion, we ask only whether the record contains evidence that is reasonable, credible, and of solid value sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Brooks* (2017) 3 Cal.5th 1, 57.) In examining the record, we view the evidence in the light most favorable to the jury, accepting all reasonable inferences and resolving all credibility disputes in favor of the verdict. (*People v. Salazar* (2016) 63 Cal.4th 214, 242.)

Sufficient evidence supports the jury's finding that defendant was actually impaired while driving, which is the sole element defendant contests. Among other ways, "actual impairment" may be proven through (1) "the driver's appearance," (2) "impaired motor skills," (3) "slowed or erratic mental processing," and (4) testimony that certain blood-alcohol concentrations typically impair the nervous system. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1198; *People v. Covarrubias* (2015) 236 Cal.App.4th 942, 949.) In this case, defendant's eyes were bloodshot and watery; defendant was unable to stand without leaning on the car when getting out of the car and was thereafter unable to complete four different field sobriety tests; defendant was unable to follow the officer's directions during the tests and was driving more than 20 miles per hour over the speed

limit on a surface street; and the People's expert witness testified to the effect that a 0.155 percent blood-alcohol content has on the nervous system. This evidence of actual impairment was bolstered by defendant's expression of regret and pleas not to be taken to jail, which constitute evidence of consciousness of guilt. (See *People v. Green* (1980) 27 Cal.3d 1, 40-41.)

Defendant levels two challenges at this evidence.

First, he argues that the evidence is insufficient because there is no evidence that he was driving erratically. For support, he cites *People v. Torres* (2009) 173 Cal.App.4th 977. As a legal matter, and as noted above, erratic driving is not the only way to establish actual impairment. *Torres* is not to the contrary. There, the court overturned a DUI conviction based on driving while under the influence of methamphetamines where there was "no evidence" that the defendant's "methamphetamine use actually impaired his driving ability," including no field sobriety tests and no evidence that the defendant "was driving erratically"; there was evidence that the defendant was fidgety, sweaty, and had a "high pulse rate," but no evidence that those symptoms of methamphetamine use "make a person an unsafe driver." (*Id.* at p. 983.) Unlike in *Torres*, here there was ample evidence that defendant's consumption of alcohol affected his motor skills and judgment, and thus actually impaired his driving.

Second, defendant contends that some of the People's evidence of actual impairment should be discounted. He argues that his poor performance on the field sobriety tests should be disregarded because he had atrophy in his leg, which undermined the results of the tests. This argument has some force with respect to the balance-based tests (that is, the "walk-and-turn"

and "one-leg stand" tests), but none whatsoever with respect to the horizontal gaze nystagmus test (which looks to eye movement) or the "finger-to-nose" test (which tests upper-body coordination). The latter two tests were sufficient by themselves to establish actual impairment; indeed, the officer testified that the horizontal gaze nystagmus test *alone* was enough to show actual impairment. Defendant next argues that his speeding should be disregarded as proof of erratic driving because he was speeding *down a hill*. While the downslope might account for some of defendant's speed, the jury could reasonably find that it did not account for the entire 15 to 20 miles per hour excess. Further, defendant's speeding was not the sole evidence of his impairment. Defendant lastly asserts that the officer's observations about him should be disregarded because the officer was not credible. Except in extreme cases where testimony is physically impossible or inherently improbable, however, we must defer to the jury's decision to believe a witness (*People v. Prunty* (2015) 62 Cal.4th 59, 89); the jury did so here, and nothing in the officer's testimony takes it outside the general rule.

V. Sentencing Issues

Defendant argues that the trial court erred in not staying the driving with at least a 0.08 BAC and driving on a suspended license counts under Penal Code section 654. The People agree, and so do we. Penal Code section 654 precludes a court from imposing more than one sentence on a single "act or omission." Because the driving with at least a 0.08 BAC and the misdemeanor counts arise from the same "act" of driving as the DUI count, those two counts must be stayed.

DISPOSITION

The convictions are affirmed. The judgment is modified to reflect that the concurrent, three-year sentence on count two is stayed pursuant to Penal Code section 654, and that the consecutive sentence of 180 days in county jail on count 3 is also stayed pursuant to Penal Code section 654. The trial court is ordered to prepare and forward the California Department of Corrections and Rehabilitation an abstract of judgment modified accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST