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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ALEX YOUNGWOO JAE, Defendant and Appellant.	2d Crim. No. B280030 (Super. Ct. No. YA092979) (Los Angeles County)

Alex Youngwoo Jae appeals his conviction by jury of felony driving under the influence of alcohol. (DUI; Veh. Code, § 23152, subd. (a).) In a bifurcated proceeding, the trial court found that appellant suffered a 1990 conviction for gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) and that it was a prior strike. (Pen. Code, §§ 667, subd. (d); 1170.12, subd. (b).)[1] The court denied probation and sentenced appellant to six years state prison. We affirm.

[1] All further statutory references are to the Penal Code unless otherwise stated.

Facts

On the evening of May 29, 2015, appellant approached a Gardena Police Department DUI checkpoint and made an illegal right-hand turn to avoid the checkpoint. Detective Michael Ross gave chase with his motorcycle lights and siren activated. Swerving back and forth, appellant almost hit parked cars and passed three streets before stopping.

Detective Ross smelled a "really strong" odor of alcohol on appellant and observed that his eyes were extremely red and watery. In English, Detective Ross asked appellant to produce his driver's license and step out of the car. Appellant complied, swaying back and forth. Detective Ross asked if he had been drinking. Appellant answered "Two" and said that he spoke "Korean."

Detective Ross believed appellant was intoxicated and radioed for Officer Brian Park to take over the DUI investigation. Officer Park spoke Korean and had conducted 100 to 150 DUI investigations. When Officer Park arrived, appellant was sitting on the curb, smelled strongly of alcohol, and had bloodshot and watery eyes. Appellant spoke Korean but seemed to speak and understand English. Appellant was transported to a law enforcement staging area and asked to perform field sobriety tests (FSTs). Appellant almost fell during a walk-and-turn test, had trouble performing a stand-on-one leg test, and was unable to put his finger to his nose.

Appellant blew into a PAS Breathalyzer device but it was not enough to produce a reading. When Officer Park explained that appellant was required by state law to take either a breath or blood test, appellant refused and became belligerent. Fearful that an incident might occur, Officer Park turned on a

recording device and directed appellant to sit down. Based on his observations and the FSTs, Officer Park believed appellant was under the influence of alcohol and could not safely drive a car.

At trial, the People proved that appellant pled guilty to DUI in 2006 (*People v. Alex Youngwoo Jae,* Los Angeles County Sup. Ct., case no. 6BV01974) in English without an interpreter.

Expert Testimony

Appellant argues that the trial court erred in permitting Detective Ross and Officer Park to opine that appellant was under the influence of alcohol and could not safely operate a vehicle. Detective Ross had worked 27 years as a traffic police officer and conducted over 600 DUI investigations. The detective was asked to give his "expert opinion" on whether appellant was under the influence. Detective Ross answered, "Yes, I believed he was intoxicated" and based his opinion on appellant's bloodshot and watery eyes, the strong odor of alcohol, and appellant's unsteady walk and driving pattern. Officer Park also opined that appellant was under the influence of alcohol and was too intoxicated to safely drive a vehicle.

Appellant argues that an expert witness may not express an opinion on guilt because it usurps the function of the jury. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.) Appellant did not object on that ground and contends that he was denied effective assistance of trial counsel. To prevail on the claim, appellant must show that counsel's representation fell below an objective standard of reasonableness and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "A defendant must prove prejudice that is a '"demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Here there was no

prejudice and appellant makes no showing that it is reasonably probable that he would have obtained a more favorable verdict but for counsel's alleged errors. (*Ibid*.)

Appellant argues that the trial court erred in not sua sponte instructing on how to evaluate expert testimony pursuant to Penal Code section 1127b and CALCRIM No. 332.[2] (*People v. Haynes* (1984) 160 Cal.App.3d 1122, 1136-1137; *People v. Lynch* (1971) 14 Cal.App.3d 602, 610.) CALCRIM No. 332 instructs the jury to consider "the expert's knowledge, skill, experience, training and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion." (Judicial Council Cal. Criminal Jury Instructions (2017) CALCRIM No. 332, p. 97.) The trial court gave CALCRIM No. 333 on how to evaluate lay witness opinion testimony, which instructed the jury to consider "the extent of the witness's opportunity to perceive matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in

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[2] Section 1127b provides: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows: [¶] Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion if it shall be found by them to be unreasonable. [¶] No further instruction on the subject of opinion evidence need be given."

forming that opinion. . . . You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

The main difference between CALCRIM No. 332 and CALCRIM No. 333 is that the former directs the jury to consider the expert's formal background. Had the trial court given CALCRIM No. 332 it would have referred the jury to CALCRIM No. 226 which instructs the jury to "judge the credibility or believability of the witnesses," applying "the same standards" to "the testimony of each witness," and to "[c]onsider the testimony of each witness and decide how much of it you believe." CALCRIM No. 226, which was given, and stated that the jury could "believe all, part, or none of any witness's testimony" and that it "may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony."

Together, these instructions substantially covered all of the matters required by section 1127b and CALCRIM No. 332 and told the jury how to evaluate the officers' testimony. We presume the jury understood and followed the instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) On this record, any error in failing to give a section 1127b/CALCRIM No. 332 instruction was harmless. (See, e.g., *People v. Williams* (1988) 45 Cal.3d 1268, 1320; *People v. Lynch*, *supra*, 14 Cal.App.3d at p. 610.) Detective Ross's and Officer Park's observations of appellant's intoxication was not expert opinion testimony within the scope of section 1127b. (See *People v. Lynch*, *supra*, at p. 609 [medical doctor's testimony of physical condition of victim was not expert opinion and outside the scope of section 1127b]; *People v. Navarette* (2003) 30 Cal.4th 458, 493 [opinion testimony about

a person's state of intoxication does not necessarily require qualification as expert].)

During final argument, appellant objected to the prosecution's use of the word "expert." The trial court sustained the objection and ruled that it was "lay opinion." Appellant cannot have it both ways and claim, for the first time on appeal, that a section 1127b/CALCRIM No. 332 instruction on expert testimony was required. Defense counsel, in final argument, told the jury that the officers were "lay witness[es]" and "if you . . . read the instructions carefully, [their] opinions can be rejected."[3] The evidence was overwhelming. The failure to give a section 1127b/CALCRIM No. 332 instruction was harmless.

Prior Strike Enhancement

Appellant contends that he was denied effective assistance of counsel because trial counsel did not object to an amendment of the information to add the prior strike enhancement. The amendment was made the day before trial. Trial counsel acknowledged that he was told "some months ago" that the prosecution would be introducing evidence that appellant had suffered the 1990 prior strike conviction.

Section 969a requires that such an amendment be pursuant to the court's approval. "[I]n order to ensure that 'the

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[3] The jury was instructed: "You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (CALCRIM No. 333.) It was instructed: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." (CALCRIM No. 200.)

due process rights of criminal defendants are adequately protected' [citation], a trial court that is considering whether to permit a postplea amendment should consider several factors, including the reason for the late amendment, whether the defendant is surprised by the attempted amendment, and whether the prosecution's initial failure to allege the prior convictions affected the defendant's decisions with respect to plea bargaining. [Citation.]" *People v. Lettice* (2013) 221 Cal.App.4th 139, 141-142.)

Appellant speculates that the trial court may have denied leave to amend the information had defense counsel objected. Prior conviction enhancements, also known as "status" enhancements, may be added anytime up to sentencing. (§§ 969a, 969.5; *People v. Valladoli* (1996) 13 Cal.4th 590, 607-608 [amendment to add a prior conviction enhancement after verdict, but before sentencing is permissible].) There is no evidence that the prosecution acted in bad faith in belatedly amending the information or that appellant was surprised by the amendment.

Appellant's assertion that the late amendment may have affected plea bargaining is without merit. After the information was amended, the trial court confirmed the prosecution's offer was still 18 months state prison. Appellant was not interested in the offer and cautioned that the sentence could be greater than 32 months if he was convicted as charged. Had defense counsel objected to the late amendment, it would have in all likelihood been overruled. The Sixth Amendment did not require trial counsel to make futile or frivolous objections. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 905.)

Romero Motion

Appellant contends that the trial court abused its discretion in not striking the prior strike conviction. (§ 1385; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) In ruling on a *Romero* motion, the trial court considers the nature and circumstances of the charged felony offense, defendant's prior serious or violent felony convictions, and defendant's background, character and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) On review, appellant must show that the sentencing decision was irrational or arbitrary. (*Id.* at p. 162.) The current DUI, like the 1990 vehicular manslaughter, struck at the heart of public safety. The prior strike was a DUI hit and run with a fatality. Appellant approached an intersection at a high rate of speed, ran a red light, and hit and killed a pedestrian.

The trial court found that the 1990 vehicular manslaughter was not appellant's "only alcohol-related driving incident. [Appellant] had the 2006 D.U.I. and now in our case has done it again. . . . I think he presents a danger to the community. . . . I think he will drink and drive again. [¶] . . . You would think that after . . . killing someone while being under the influence and driving, that that would deter him from drinking and driving again. It didn't. . . . [¶] I have a duty, I believe, to insulate the public from danger."

The trial court reasonably concluded that the vehicular manslaughter was not an isolated incident or remote in time given the 2006 DUI conviction and current DUI. (See, e.g., *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [20-year old felony conviction not remote given defendant's criminal recidivism].) Appellant makes no showing that the Two Strikes sentence was irrational or arbitrary.

Probation Report

Appellant claims that the trial court did not consider the probation report that was filed November 8, 2016, the day before sentencing. (§ 1203, subd. (b)(3).) Although the trial court did not specifically refer to the report at the sentencing hearing, it is presumed that the court read and considered the report when it denied probation and imposed the six-year prison sentence. (*People v. Black* (2007) 41 Cal.4th 799, 818, fn. 7.) "When the record is silent as to such matters it will be presumed that the [trial] court has discharged the duty imposed upon it by law. [Citations.]" (*People v. Montgomery* (1955) 135 Cal.App.2d 507, 514-515.) Appellant makes no showing that the trial court failed to consider the probation report or abused its discretion in denying probation.

Prosecutorial Misconduct

Appellant next contends that the prosecution committed misconduct in closing argument. Appellant failed to object or request an admonition, forfeiting the error. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) On the merits, the alleged misconduct did not prejudice appellant.

Appellant asserts that it was misconduct for the prosecution to refer to Detective Ross and Officer Park as experts. The trial court sustained an "expert" objection and ruled that the officers' testimony was lay opinion. The prosecution told the jury that Detective Ross had 27 years experience as an officer, started out as a traffic officer, and then became a motorcycle officer. Detective Ross served on the South Bay DUI Task Force and "has done over 600 D.U.I. investigations . . . . That's why I called him an expert. But that's up to you to decide." Appellant did not object.

The prosecution argued: "Detective Ross gave us his expert opinion in this case -- or his opinion. And I call him an expert again, because 27 years, 600 D.U.I.s, call him what you want. And he said that this was a defendant who was under the influence of alcohol and unsafe to operate a motor vehicle. . . . You don't need to have done 600 D.U.I.s to know that. Right? [¶] This is a guy who avoided a D.U.I. checkpoint, makes an illegal right turn to do that. He has trouble staying in his lane. Hits -- nearly hits cars, slow to pull over, he reeked of alcohol, he has all the objective symptoms you would associate with somebody who is under the influence. He admits to drinking. He had to hold onto the car to prevent himself from falling over and he has got an unsteady gait. [¶] What do you guys think? You don't need to be a scientist to know that this is a person who is under the influence of alcohol."

With respect to Officer Park's testimony, the prosecution argued: "I am going to call [that] expert opinion, as well. This is a guy who has over a hundred D.U.I. investigations, has been an officer for over nine years, and he told you that based on his expertise, this defendant is under the influence of alcohol and unsafe to operate a motor vehicle on the night in question. So he did an independent investigation from Detective Ross and reached the same conclusion. Two officers with over 700 D.U.I. investigations came to the exact same conclusion. And I think your common sense will lead you to the same conclusion, as well. And this is based on the totality of the investigation. What we heard about the driving, the objective symptoms, performance in the field sobriety tests and the defendant's overall demeanor and behavior."

It was fair comment on the evidence. (*People v. Jackson* (2016) 1 Cal.5th 269, 349.) "It is hardly surprising that police officers who deal daily with intoxicated persons become expert at recognizing the physical effects of intoxication, and that they learn to perceive effects somewhat more subtle than those apparent to the amateur. This does not make them scientists." (*People v. Ojeda* (1990) 225 Cal.App.3d 404, 408.) Appellant singles out isolated words and phrases, but viewing the statements in the context of the whole argument, there was no misconduct. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) The trial court instructed that nothing the attorneys say or ask is evidence and that "[o]nly the witnesses' answers are evidence." (CALCRIM No. 222.) It is presumed that the jury understood and followed the instruction. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Appellant makes no showing that the prosecution acted in bad faith or used deceptive methods to sway the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Appellant claims that the prosecution vouched for the credibility of the officers by referring to them as experts. The prosecution asked the jury to draw its own conclusion based on the officers' testimony, qualifications, experience, and appellant's objective signs of intoxication. "Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching' . . . . [Citation.]" (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

The prosecutor argued that appellant was "a little bit aggressive" after the traffic stop and it showed that he had been drinking. Appellant asserts that the prosecutor was offering his personal opinion as to how an intoxicated person might act. It is

not misconduct for a prosecutor to argue that alcohol can make a person prone to aggressive behavior. (See, e.g., *People v. Kelly* (1973) 10 Cal.3d 565, 576-577 [alcohol may distort judgment and relax controls on aggressive and antisocial impulses]; *People v. Smith* (1983) 145 Cal.App.3d 1032, 1034 [equating alcoholic euphoria with aggressive behavior].) Appellant refused to submit to a blood or breath test, was belligerent, and said "fuck you" to Officer Park after he failed the FSTs.

Appellant complains that the prosecution argued that Detective Ross and Officer Park have "combined over 700 D.U.I. investigations. As far as I know, [trial counsel] hasn't completed any police investigations." The argument was in response to defense argument that Officer Park was trained to "parrot" the objective symptoms of alcohol intoxication. Counsel argued that the FSTs were an "unscientific leap of faith" and the "lack of foundation infects all of the field sobriety tests, every one of them." The prosecutor's comments were a fair response to defense counsel's remarks and did not disparage counsel. (See, e.g., *People v. Bemore* (2000) 22 Cal.4th 809, 846–847 [prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account].) There is no reasonable likelihood that the jury construed the remarks in an objectionable fashion. (*People v. Edwards* (2013) 57 Cal.4th 658, 738.) The prosecution urged the jury to focus on the evidence and the law, not the techniques used by defendant's counsel. That is not misconduct. "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper. [Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47.)

Appellant contends that the prosecution portrayed appellant as a dangerous repeat offender who should not be driving when it referred to the *Watson* advisement that appellant received when he pled guilty to the DUI in 2006.[4] We reject appellant's argument that the passing reference inflamed the jury or denied appellant a fair trial.

Appellant also contends that the prosecution misstated the law in arguing "there is one question to answer in this case. Did the defendant drive with the care and caution of a sober person as a result of his drinking?" The argument correctly paraphrased the law. The jury was instructed that "[a] person is *under the influence* if, as a result of drinking or consuming an alcoholic beverage, his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances." (CALCRIM No. 2110.) Appellant admitted that he had been drinking before the traffic stop. We reject the argument that the prosecution misstated the law in arguing that the jury could convict if it found that appellant was too alcohol impaired to safely drive a vehicle.

Cumulative Error and Prejudice

Appellant contends that the combined effect of the alleged errors denied him a fair trial. Our Supreme Court has said, ""[a] a defendant is entitled to a fair trial but not a perfect one."' [Citation.]" (*People v. Williams* (1988) 45 Cal.3d 1268,

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[4] The *Watson* advisement refers to an advisement, based on *People v. Watson* (1981) 30 Cal.3d 290, about the dangers of drinking and driving, and warns that those who kill someone while driving under the influence can be charged with murder.

1333.) So too here. Our review of the record discloses that none of the purported errors, singularly or cumulatively, denied appellant a fair trial.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Mark S. Arnold, Judge

Superior Court County of Los Angeles

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