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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTHONY LOPEZ, Defendant and Appellant.	B284743 (Los Angeles County Super. Ct. No. KA113053)

Appeal from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed as modified.

Janet Uson, 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, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert Anthony Lopez pleaded nolo contendre to a charge of driving with a suspended license after being previously convicted of driving with a suspended license. (Veh. Code, § 14601.1, subd. (b)(2).)[1] A jury thereafter convicted him of: (1) causing serious bodily injury to another while fleeing a peace officer (§ 2800.3, subd. (a)); (2) driving under the influence of alcohol and doing an illegal act, causing bodily injury to another (§§ 23153, subd. (a), 23560); (3) driving with a blood-alcohol content of 0.08 percent and doing an illegal act, causing bodily injury to another (§§ 23153, subd. (b), 23560). The jury also found true certain sentence enhancement allegations regarding the infliction of great bodily injury upon others in the commission of the crimes. The trial court sentenced defendant to 24 years in prison.

Defendant contends that the evidence was insufficient to support the verdicts, and that the court erred by: (1) allowing the prosecution to introduce evidence of a prior incident involving defendant's flight from police; (2) admitting into evidence statements defendant made to a police investigator after invoking his right to counsel; (3) failing to instruct the jury as to a predicate offense for purposes of section 23153, subdivisions (a) and (b); (4) failing to give a unanimity instruction; and (5) failing to apply Penal Code section 654 to stay the sentence on the conviction of driving with a suspended license. We agree with this last point and reject defendant's other contentions. We therefore modify the sentence accordingly and affirm the judgment as modified.

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[1] Unless otherwise specified, statutory references are to the Vehicle Code.

FACTUAL AND PROCEDURAL SUMMARY

A. *Prosecution Case*

On July 18, 2016 at about 7:51 p.m., West Covina Police Officers Pedraza and Volasgis were in a marked, black and white police car driving westbound on Maplegrove Street when they observed defendant driving eastbound in a white Acura sedan. Defendant stopped on Maplegrove for several seconds at a point where there was no stop sign or controlled intersection. Although defendant had his right turn signal on, he turned left in front of Officers Pedraza and Volasgis onto a residential street with a posted 25 mile per hour speed limit. The officers followed defendant and noted that he was travelling at 35 miles per hour.

Defendant turned left again, increased his speed, drove through a stop sign without stopping, turned right and increased his speed again to about 50 miles per hour. At that point, the officers activated their lights and siren. Defendant increased his speed to more than 60 miles per hour, made turns without stopping, and at times drove on the wrong side of the road. The officers pursued defendant, but eventually lost sight of him as he headed westbound on Francisquito Avenue toward Walnut Avenue.

The intersection of Francisquito and Walnut is a four-way intersection controlled by stop signs in each direction. Just before 8:00 p.m., Anabelle Padilla was driving her Nissan Maxima northbound on Walnut and stopped at the intersection with Francisquito. At about the same time, Nancy Gobrial was driving a Ford Expedition southbound on Walnut and stopped at the opposite side of the intersection. As Padilla entered the intersection,

defendant's Acura collided with her Maxima, which then collided with Gobrial's Expedition.[2]

Padilla's two daughters, ages 7 years and 18 months, were in the Maxima during the collision. The youngest suffered an intracranial injury, which prevented her from breathing on her own and following commands. At the time of trial, one year after the incident, she had not fully recovered. Padilla and her older daughter suffered abrasions. Gobrial, the driver of the Expedition, and two of her passengers also suffered injuries.

Shortly after the collision, Officer Pedraza arrived at the scene. The officer observed that defendant, who was in the Acura's driver seat, "looked disheveled," and that his eyelids appeared "droopy," his "eyes were bloodshot and watery," and he smelled of alcohol. Defendant was also shouting and appeared "excited" and "agitated." Officer Pedraza believed that defendant "may have consumed some alcohol."[3] The officers arrested defendant, placed him in Officer Pedraza's patrol car, and took him to a hospital. Defendant continued to shout and behave in an "excited" and "agitated" manner. He told Officers Pedraza and Volasgis, " 'You

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[2] The prosecution's accident reconstructionist testified that the Acura had been travelling westbound on Walnut. The prosecutor then elicited from the witness that Francisquito, not Walnut, runs east and west. Based on maps showing the intersection and the testimony of others in the accident, it appears that the reconstructionist incorrectly identified Walnut as the street from which the Acura had entered the intersection.

[3] Officer Pedraza did not ask defendant to perform field sobriety tests based upon the officer's understanding that such tests should not be conducted when the subject has been injured in an accident.

guys shot at me; I don't know if it was you guys. I got shot at. I ran for my—I ran.' "

At the hospital, a nurse took a blood sample from defendant at 9:12 p.m. Officer Pedraza watched the nurse swab an area of defendant's left arm with hydrogen peroxide, then draw blood from that area into a vial. At some point after defendant's blood was drawn, the nurse mentioned to Officer Pedraza that she had previously used an alcohol swab on defendant's left arm.[4]

Forensic testing of the blood sample revealed a 0.20 percent blood-alcohol content. According to the prosecution's criminalist, most people are mentally impaired when their blood-alcohol concentration is 0.05 percent; and every person with a blood-alcohol concentration of 0.08 percent is impaired. Physical impairment will depend on a person's tolerance.

Over defendant's objection, the prosecution introduced evidence of a June 2005 incident where defendant, who was then 15 years old, was driving a motorcycle with a passenger. A police officer in a marked patrol car turned on his lights and sirens to make a traffic stop because defendant and the passenger were not wearing helmets. Defendant accelerated away from the officer and drove the motorcycle on the wrong side of the road in an attempt to evade the officer. After his arrest, defendant told the officer that he had seen the officer's lights and heard the siren, but fled because he did not want to get a ticket.

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[4] The nurse took a second blood draw from defendant at 10:02 p.m. This time, she used defendant's right arm and prepped the arm with sterilized water. This sample and the results from testing it, if any, were not offered or admitted into evidence.

B. *Defense Case*

Defendant testified as follows. Between 4:00 p.m. and 4:30 p.m. on the day of the incident, defendant drank about four 16-ounce beers. That evening, he received a call from his father's friend asking him to do some tune-up work on his car. Defendant has a high tolerance for alcohol and, at 7:50 p.m., did not feel impaired to drive.

Defendant drove his white Acura eastbound on Doublegrove to its intersection with Pass and Covina Road. A black SUV was heading northbound on Pass and Covina toward the intersection. As defendant turned left onto northbound Pass and Covina in front of the SUV, someone in the SUV began shooting at him with a firearm. Defendant, "fearing for [his] life," fled from the SUV. He turned right onto one street, then made another right turn to return to Doublegrove. He then headed westbound on Doublegrove, turned onto northbound Valinda Avenue, then left onto westbound Francisquito. He "then crashed on Francisquito and Walnut."

He believed he had been driving between 35 and 45 miles per hour. He did not see a police officer behind him at any time, and he did not hear any sirens. He was never at the point on Maplegrove where Officer Pedraza testified he first saw defendant.

After the collision, defendant started to get out of his car to help the others, but officers told him to get down. He yelled at the officers that he had been shot at and was in fear for his life. The officers, however, told him that he had been "running" from them, and proceeded to arrest him.

While defendant was at the hospital, a nurse drew blood from him. He later heard people saying the nurse had used an alcohol swab prior to the draw.

The day after the incident, West Covina Police Officer Eddie Gomez interviewed defendant in the hospital. Defendant told the officer that he was speeding because he was trying to get away from someone who had pointed a gun at him.

Defendant could not recall what he told Officer Gomez about how much he had drank on the day before the incident. He explained his inability to recall by stating that at the time of the interview he was "on morphine and stuff," and "was going in and out," "waking up and fading off—like falling asleep."

On cross-examination, defendant denied that he had told police officers as he was being driven to the hospital that he thought the police had been chasing him. Defendant admitted he had lied when he told Officer Gomez that he had not been drinking on the day of the incident. He acknowledged that he was "on probation for DUI" at the time of the incident, but denied that this was a motive for him to evade the police.

C. *Rebuttal evidence*

In the prosecution's rebuttal case, a criminalist testified that if defendant drank beer between 4:00 and 4:30 p.m. and had a blood-alcohol level of 0.20 percent at 9:12 p.m., his blood-alcohol content would have been within a range of 0.20 to 0.22 percent at 7:51 p.m. It was "impossible," however, for defendant to have reached that blood-alcohol level by drinking only four 16-ounce beers. He would need to have consumed about eight and one-half standard drinks to reach that level. The criminalist further testified that although a person may develop tolerance for alcohol and not feel its effects, a person with a blood-alcohol level of 0.20 percent is under the influence of alcohol.

Officer Pedraza testified that he did not see defendant in the area of Pass and Covina Road and Doublegrove Street—

the intersection where defendant said he began to flee from a shooter. When Officer Pedraza did see defendant near Pass and Covina, he did not see a black SUV. Nor did Officer Pedraza hear any gunshots, and he did not hear or make any broadcasts about shots being fired.

When Officer Pedraza transported defendant to the hospital, defendant acknowledged that he had been aware that the police were trying to pull him over.

Over defense objection, the prosecution introduced the audio recording of Officer Gomez's interview of defendant. During the interview, defendant admitted that he did not have a driver's license, that he had been convicted of driving under the influence, and was currently on probation. Defendant told Officer Gomez that someone started shooting at him and he "took off." He reached speeds of 45 or 50 miles per hour. Defendant said he was uncertain as to the particular streets where the shooting occurred.[5] Eventually, defendant explained, he drove down Francisquito and was going to make a left turn on Walnut "to try to get away from that guy," when he crashed. He did not see the stop sign at Walnut because he had "ducked" down to avoid getting shot. If he had stopped, he explained, the "guy would have killed" him.

Defendant also told Officer Gomez that he had not been drinking on the day of the incident, but had been "binge" drinking the night before. When Officer Gomez told defendant that the officers had smelled alcohol on his breath after the accident,

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[5] Initially, defendant said the shooting occurred at Francisquito and Valinda. He later said it occurred at Lark Ellen and Francisquito and on Pass and Covina.

defendant said that it was because he had gone to the beach weeks before and alcohol was all over the car.

Eventually, defendant told Officer Gomez that he was "done talking," that he did not feel well, and the morphine that he had been given was "starting to kick in." The interview then ended.

DISCUSSION

I. Evidentiary Issues

Defendant contends that the court erred and deprived him of a fair trial by admitting evidence of (1) his prior juvenile conduct for evading a police officer; and (2) his probation for driving under the influence.

A. *Evidence of Prior Incident of Evading Police*

At the outset of the trial, the prosecutor informed the court and counsel that she planned to offer evidence of the 2005 incident where defendant attempted to evade a police officer while driving a motorcycle. Defendant objected on the ground that its probative value was substantially outweighed by prejudice to the defendant. (See Evid. Code, § 352.) The court overruled the objection because the evidence "would be relevant to establish absence of mistake, knowledge of mechanics of arrest, in terms of detention by an officer, red lights, siren, et cetera." Defendant contends that the ruling was error.

Evidence Code section 1101 prohibits the admission of a person's character or character trait when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence of a prior crime or other act, however, may be admitted to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. (Evid. Code,

§ 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Even if offered for such a purpose, the court may exclude the evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code, § 352.)

We review the admission of evidence under sections 352 and 1101 for an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1002-1003.)

Here, the evidence of the 2005 incident was relevant to show defendant's motive and intent in fleeing from police in 2016; specifically, to avoid getting caught for violating the law. In 2005, defendant fled from police to avoid getting a ticket for driving a motorcycle without a helmet; in 2016 he fled (according to the prosecution) to avoid getting caught for violating his probation. The incidents were sufficiently similar because each involved defendant engaging in illegal activity prior to being pursued by police, an attempt by police to conduct a traffic stop of defendant using the police car's lights and sirens, and defendant's attempt to evade police. The court could thus reasonably conclude that the evidence of the prior incident was substantially probative of defendant's intent and motive in this case.

The evidence of the 2005 incident was not unduly prejudicial. Prejudice, for purposes of Evidence Code section 352, refers "to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) In particular, evidence of a defendant's prior bad acts poses a risk that the jury will convict a defendant of the pending charge based on the belief that he escaped punishment for the earlier crime. (*People v. Foster* (2010) 50 Cal.4th 1301, 1331.)

In contrast to the 2016 incident in which defendant's evasion led to an accident in which several individuals, including children, were injured, no one was injured in the 2005 incident. The prior incident, therefore, was not likely to evoke an emotional bias and there was little risk that the jury would desire to use a guilty verdict in the present case to punish defendant for the prior incident. Accordingly, the court did not abuse its discretion in determining that any prejudice resulting from the admission of the 2005 incident did not substantially outweigh its probative value.

B. *Evidence of Probation and DUI Conviction*

After defendant informed the court that he would testify in his defense, the prosecutor inquired of the court about cross-examining defendant as to him being on probation for driving under the influence. Defendant objected on the ground that "it's not a crime of moral turpitude." The court ruled that the evidence was admissible to show that defendant had a "motive to flee" from the police.

During cross-examination of defendant, the prosecutor asked whether he was "on probation for DUI." When defendant answered, "Yes," the prosecution asked, "And so knowing you were on DUI probation and hadn't been on probation that long, you ran from the police because you didn't want to get caught, correct?" Defendant said, "No." The recording of defendant's hospital interview also included defendant's admissions that he had been convicted of driving under the influence and was then on probation for an "open container."

Defendant contends that allowing such evidence "violated [his] constitutional due process rights to a fair trial by admitting evidence that [he] was on probation for a DUI conviction." Initially,

we note that the only ground for excluding the evidence that was preserved for appeal—that the prior conviction was not a crime of moral turpitude—is without merit. Whether a conviction was for a crime of moral turpitude is a question relevant to determining whether evidence of a prior conviction can be used to impeach a witness's credibility. (See *People v. Castro* (1985) 38 Cal.3d 301, 313-316.) Here, however, the prosecution sought to introduce the evidence to establish a motive for evading the police: Defendant did not want to get caught for violating his probation. It was not offered to impeach his credibility.

Moreover, defendant's argument is made without support by citation to authority or a cogent explanation. He asserts that introducing evidence that defendant was on probation for driving under the influence "was not necessary to establish that [defendant] was unlicensed." This, however, ignores the fact that the prosecution introduced the evidence not to prove that defendant was unlicensed, but to establish a motive for evading the police. Even if defendant had preserved this issue for appeal, the court did not abuse its discretion by allowing the challenged statements into evidence.

II. Voluntariness of Defendant's Statements During Hospital Interview

Officer Gomez interviewed defendant in the hospital the day after the accident. Shortly after Officer Gomez informed defendant of his right to have counsel present, defendant requested a lawyer. Officer Gomez responded: "So that means you don't want to tell me about what happened? I'm trying to get your side of the story." Defendant then allowed the interview to continue up to a point where defendant said, "I really don't feel like talking anymore, sir.

They've got morphine in me and it's starting to kick in." Defendant added, "They just gave it to me right before you came."

The prosecution did not offer to introduce any statements defendant made during the interview in its case-in-chief because of the likelihood that they would be excluded as violative of defendant's *Miranda*[6] rights. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 484 [accused, who invokes right to counsel, does not then waive his *Miranda* rights by merely responding to police questions].)

After defendant testified in his defense, the prosecution sought to introduce the recording of the interview to impeach defendant's testimony regarding his defense that he was fleeing a shooter and that his conversation with Officer Gomez was affected by the morphine he had been given.

Defense counsel objected, stating: "[T]here's an issue about *Miranda* where [defendant] is advised of his *Miranda* right and he invokes his right to an attorney. The officer does not provide an attorney for him at the time that he requested. He continues with the conversation and the interview. My client's in the hospital—he's in a hospital bed detained. So he's in custodial interrogation at that point."

Counsel also objected to the use of defendant's statements about being "part of a tagging crew" under Evidence Code section 352, and to the use of defendant's statements that he had been driving without a license and was on probation for driving under the influence.

The court overruled the *Miranda* objection, stating that the statements "can come in as evidence of a prior consistent or

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

inconsistent statement after the defendant testifies." The court agreed with defense counsel as to defendant's "tagging crew" statements, and the prosecutor agreed to omit such references from the recording and to redact the written transcript accordingly. The court overruled the remaining objections.

On appeal, defendant concedes that the *Miranda* violation by itself would not preclude the use of his statements for impeachment purposes. (See *Harris v. New York* (1971) 401 U.S. 222, 225-226; *People v. Peevy* (1998) 17 Cal.4th 1184, 1196.) He contends, however, that the statements are inadmissible because he made them involuntarily.

The Attorney General contends that defendant forfeited this argument by failing to object on that basis below. We agree. Although defense counsel asserted objections on several grounds, involuntariness was not one of them.

In his reply brief, defendant responds to the forfeiture argument by stating that his counsel had pointed out that the statements were made while he was injured and in the hospital. These comments, however, were made to support counsel's argument that defendant was in custody for purposes of *Miranda*; counsel did not suggest that defendant's presence in the hospital rendered his statements involuntary.

Even if defendant had raised an involuntariness objection, the argument is without merit. A statement is involuntary in this context if, under the totality of the circumstances, it is "not 'the product of a rational intellect and a free will.' " (*Townsend v. Sain* (1963) 372 U.S. 293, 307; accord, *People v. Rundle* (2008) 43 Cal.4th 76, 114, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The only part of the interview that arguably suggests that defendant's statements might not satisfy

this test is when he informs Officer Gomez that he did not "feel like talking anymore" because the morphine that he had been given "right before" Officer Gomez entered the room was "starting to kick in." At that point, however, the interview was terminated. Under the totality of the circumstances, defendant's statements were made voluntarily.

III. Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to support the verdicts because (1) he established the defense of necessity; and (2) the evidence was insufficient to prove that he was driving under the influence or with a blood-alcohol level of 0.08 percent. We reject these arguments.

A. *Necessity Defense*

As defendant acknowledges, he had the burden of proving the elements of the necessity defense by a preponderance of the evidence. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901; *People v. Condley* (1977) 69 Cal.App.3d 999, 1012-1013.) These elements are: (1) The defendant's criminal act was done to prevent a significant and imminent evil; (2) There was no reasonable lawful alternative to the commission of the act; (3) The reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided; (4) The defendant entertained a good faith belief that his act was necessary to prevent the greater harm; (5) That belief was objectively reasonable under all the circumstances; and (6) The defendant did not substantially contribute to the creation of the emergency. (CALJIC No. 4.43; *People v. Trujeque* (2015) 61 Cal.4th 227, 273.) Defendant, citing only his own testimony, argues that he established these elements and, therefore, the judgment should be reversed.

Although defendant includes this argument within a discussion of the sufficiency of the evidence, our review is not, as he suggests, to determine whether he had proffered sufficient evidence to establish the defense. Even if his testimony was adequate to establish each element of the defense, the jurors were not required to believe him—and their verdict implies they did not. (See CALCRIM No. 226 [jurors "may believe all, part, or none of any witness's testimony"]; *People v. Wiest* (1962) 205 Cal.App.2d 43, 46 [jurors were not required to believe defendant's alibi testimony].) Because the jury was entitled to reject defendant's testimony regarding his necessity defense, it did not err in doing so.

B. *Blood-Alcohol Level*

Defendant contends that the evidence is insufficient to support the convictions for driving under the influence and driving with a blood-alcohol content of 0.08 percent because the nurse who collected the blood sample did not properly sterilize the skin. We reject this contention.

The procedures for drawing blood for forensic purposes are described in California Code of Regulations, title 17. Relevant here is the regulation that "[a]lcohol or other volatile organic disinfectant shall not be used to clean the skin where a specimen is to be taken." (Cal. Code Regs., tit. 17, § 1219.1, subds. (a) & (b).) The failure to comply with the regulations does not prevent the blood test results from being admitted into evidence, but evidence of the failure can be offered to discredit the test result. (*People v. Perkins* (1981) 126 Cal.App.3d Supp. 12, 18; cf. *People v. Adams* (1976) 59 Cal.App.3d 559, 567 [noncompliance with "regulations goes only to the weight of the blood-alcohol concentration evidence"].)

Here, Officer Pedraza testified that he saw the nurse use a hydrogen peroxide swab on the area of defendant's arm immediately before drawing blood from that area. The prosecution's criminalist testified that hydrogen peroxide complies with the regulatory requirements, and defendant does not dispute that fact. Defendant argues, however, that the nurse who drew the blood had previously used an alcohol swab—which is not permitted under the regulations—and that the subsequent blood draw was therefore "not reliable."

The prosecution's criminalist was questioned on this point at trial. He explained that the testing machine used for defendant's blood sample distinguishes between ethyl alcohol—the kind of alcohol found in alcoholic drinks—and rubbing alcohol, or isopropyl alcohol—which is used as a sterilizing agent. The results of defendant's blood test reflect only ethyl alcohol in the blood sample. In addition, the criminalist testified that the prior use of an alcohol swab would not have affected the results because "alcohol is volatile" and would have vaporized quickly due to the skin's body temperature. This testimony supports the jury's implied finding that the challenged blood-alcohol test result was reliable and constitutes substantial evidence that defendant had a blood-alcohol level of at least 0.08 percent.

Defendant also contends that Officer Pedraza failed to properly preserve the vial of defendant's blood because the vial was kept in a police car for about 11 hours before the sample was placed in an evidence locker. Defendant does not, however, point to any evidence, regulation, or legal authority indicating that the officer's handling of the vial had any effect on the integrity of the blood sample or the reliability of the test results.

Defendant further argues that, regardless of the test results, the evidence was insufficient to prove that he was driving under the influence. His "manner of driving," he asserts, "was based on his fleeing to save himself from the person shooting at him." As discussed above, however, the jury was not required to believe his testimony on that point. Moreover, the prosecution's expert testified that a person with a 0.20 percent blood-alcohol level "is under the influence of alcohol" and "would not be able to operate [a] vehicle safely." We therefore reject defendant's substantial evidence arguments.

IV. Instructional Errors

Defendant contends that the court erred by (1) failing to instruct as to each element of driving under the influence and driving with a blood-alcohol level of 0.08 percent; and (2) failing to give a unanimity instruction.

Defendant was charged in separate counts with violating section 23153, subdivisions (a) and (b). Subdivision (a) provides: "It is unlawful for a person, while under the influence of any alcoholic beverage, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." (§ 23153, subd. (a).) Section 23153, subdivision (b) is substantially similar except that the element of being under the influence of alcohol is replaced with the element of having a blood-alcohol level of 0.08 percent or more. (See *People v. Minor* (1994) 28 Cal.App.4th 431, 437-438.) Each subdivision requires that the defendant was, while driving, doing an "act forbidden by law" or neglecting a "duty imposed by law." (§ 23153, subds. (a) & (b).)

When the charge is based on the defendant doing an act forbidden by law, the court must instruct the jury of the forbidden act.[7] (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1338 (*Ellis*).) Here, the court instructed the jury that it must find that the defendant "concurrently did an act which violated the law, or neglected to perform a duty required by law, namely speeding and failing to stop."

In *Ellis*, *supra*, 69 Cal.App.4th 1334, the defendant was charged with violating subdivisions (a) and (b) of section 23153 based upon an act forbidden by law, namely, "speeding." (*Ellis*, *supra.* at p. 1337.) The trial court did not instruct as to the meaning of "speeding." The Fifth District considered how to apply the rule that a court has a sua sponte duty to give amplifying or clarifying instructions where a term in an instruction has a technical meaning peculiar to the law, and no such duty where the term is commonly understood by those familiar with the English language. (*Id.* at p. 1338.) Although speeding would be commonly understood as "driving faster than the posted speed limit," there was no evidence in that case that the defendant had exceeded a posted speed limit or even of the defendant's exact speed. (*Id.* at p. 1339.) Therefore, if the defendant violated a law against speeding, he violated the "basic speed law." That law requires that drivers drive no faster "than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." (*Id.* at pp. 1337-1338, quoting

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[7] When the charge is based on defendant's neglect of a duty imposed by law, it is not necessary to prove that any specified section of [the Vehicle] [C]ode was violated." (§ 23153, subd. (c).)

§ 22350.) This definition of speeding, the court concluded, was not commonly understood and should have been included in the instructions. (*Id.* at p. 1339.) Although the trial court erred by failing to define speeding, the appellate court further held, in an unpublished portion of the opinion, that the error was harmless. (*Id.* at p. 1340.)

In contrast to *Ellis*, there was evidence in the instant case of the posted speed limits on the streets where defendant was pursued and that defendant exceeded those limits, and the prosecution did not rely upon a violation of the basic speed law. In contrast to *Ellis*, there was thus no need to define speeding. Moreover, as the Attorney General points out, the jury was also instructed that it could find defendant guilty based on his "failure to stop," which, in the context of the evidence in this case, would commonly be understood as a failure to stop at a stop sign.[8]

Moreover, any error in failing to define speeding was harmless. The evidence was undisputed that defendant had exceeded speed limits and drove "at a speed which endangers the safety of persons or property." (§ 22350.) Defendant admitted that he had exceeded speed limits and drove into the Francisquito/Walnut "stop sign-controlled" intersection without stopping; his defense was not that he obeyed the traffic laws, but

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[8] Because the instruction regarding failing to stop is neither challenged nor defective, even if the instruction regarding speeding was inadequate, we would not reverse the judgment "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the [speeding] theory." (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) The record in this case does not demonstrate such a probability.

that he was justified in not doing so. (See *People v. Flood* (1998) 18 Cal.4th 470, 507 [instruction that omitted an element was harmless where the element involved an "uncontested, peripheral element of the offense, which effectively was conceded by defendant, [and] was established by overwhelming, undisputed evidence in the record"].)

Defendant further argues that the court was required sua sponte to give a unanimity instruction because some jurors might have convicted him based upon violating the laws against speeding and others based upon his failing to stop at a stop sign.

A unanimity instruction is required when "the evidence shows that more than one criminal act was committed which could constitute the charged offense, and the prosecution does not rely on any single act." (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.) When, however, "the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed . . . , the jury need not unanimously agree on the basis" for defendant's guilt. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

The criminal act that constitutes a violation of section 23153, subdivision (a), " 'is the act of driving a vehicle intoxicated and, when so driving, violating any law relating to the driving of a vehicle.' " (*People v. Mitchell* (1986) 188 Cal.App.3d 216, 221.) The various laws that may be violated while driving while intoxicated are not "separate act[s] from the standpoint of the gravamen of the offense which is, simply, driving while intoxicated"; rather they "are 'just alternate ways of proving a necessary element of the *same offense*.' " (*Id.* at pp. 221-222.) Therefore, jurors need not be instructed that they must agree as to which law the defendant violated. (*Ibid.*; accord, *People v. Durkin* (1988)

205 Cal.App.3d Supp. 9, 14.) To the extent that *People v. Gary* (1987) 189 Cal.App.3d 1212, upon which defendant relies, is contrary, we decline to follow it.

V. Section 654

In addition to sentencing defendant to 24 years in prison based on the conviction for violating section 23153 and the true findings on certain enhancements, the court sentenced defendant to 180 days in county jail for his conviction of driving with a suspended license. ~(3RT 2104, 2107; CT 255, 258)~ The court did not stay the 180-day sentence under Penal Code section 654.[9] Defendant contends this was error, and the Attorney General agrees.

Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (Pen. Code, § 654, subd. (a).) This statute precludes punishment for more than one crime when the different crimes arise from an indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 636-637.) When it applies, "the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited." (*People v. Correa* (2012) 54 Cal.4th 331, 337.)

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[9] The abstract of judgment included in our record does not refer to the conviction for driving with a suspended license. In amending the abstract as directed in our disposition, the court should correct this omission.

Here, defendant's conviction for driving with a suspended license is based upon an indivisible course of conduct—driving a vehicle continuously over a span of no more than 10 minutes—that ended with the collision and injuries upon which the convictions for violating section 23153 are based. The court therefore erred by failing to stay the sentence on the conviction for driving with a suspended license.

DISPOSITION

The judgment is modified to stay the sentence on count 6 pursuant to Penal Code section 654. In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification and to forward a certified copy of the amended abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J. CURREY, J.*

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