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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. JOSE D. DELGADILLO, Defendant and Appellant.	B281230 (Los Angeles County Super. Ct. No. BA436900)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Nancy J. King, 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, Paul M. Roadarmel, Jr. and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose D. Delgadillo appeals from the judgment of conviction of second degree murder (Pen. Code, § 187, subd. (a), count 1)[1] and gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a), count 2). He received a sentence of 15 years to life on each count, with a consecutive 5-year flight enhancement on count 2. The court stayed execution of the sentence on count 2 under section 654.

Defendant contends the trial court erred by denying his request for bifurcation, overruling an evidentiary objection, and instructing the jury on implied malice under CALCRIM No. 520. Finding no error, we affirm.

FACTS & PROCEDURAL BACKGROUND

About 4:30 p.m. in the afternoon of May 27, 2015, defendant was driving a Ford Explorer on Cahuenga Boulevard West, a two-lane road with a single lane of travel in each direction. After crossing the median, defendant began driving in the wrong direction into oncoming traffic. Defendant crashed the Explorer head-on into an oncoming Mazda sedan driven by Gilbert McDonald. McDonald's wife Maral Servat McDonald, the front passenger, died from injuries caused by the collision.

Shortly after the accident occurred, a 911 call was received stating that the driver of the Explorer was wearing a red shirt and had run inside a nearby construction site at 2775 Cahuenga Boulevard West (the complex). At 5:00 p.m., Los Angeles Police Officers began searching for the missing driver. Warnings were broadcast from a police helicopter advising the suspect to surrender or risk being bitten by a police dog. At 7:00 p.m., a

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[1] All undesignated statutory references are to the Penal Code.

police dog found defendant hiding in the lower level of the complex. Defendant was dressed in a grey sweatshirt, and a red shirt was recovered by officers who searched a room near where defendant was found.

Defendant appeared to be under the influence of alcohol. He smelled of alcohol and urine, his pants were wet, his eyes were red and watery, and his speech was slurred. Preliminary alcohol screening breath tests taken by defendant shortly after 7:00 p.m. registered blood alcohol levels of .13 and .14. Later that evening, at 9:00 pm., defendant provided a blood sample which registered a blood alcohol level of .13.

Defendant was charged with second degree murder and gross vehicular manslaughter while intoxicated.[2] The information contained sentencing allegations that he fled the scene (Veh. Code, § 20001, subd. (c) [5-year flight enhancement]), and had two prior convictions for driving while under the influence of alcohol (DUI) (Veh. Code, § 23152): the first conviction was in 2004 (L.A. County Super. Ct., 2004, No. 04CM08068), and the second was in 2009 (Contra Costa County Super. Ct., 2009, No. 041632587). The prior conviction allegation, if proven, subjected defendant to a possible penalty of 15 years to life imprisonment on count 2. (§ 191.5, subd. (d).)

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[2] "Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section[s] 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence." (§ 191.5, subd. (a).)

Defendant requested a bifurcated trial. He sought to have the charged offenses tried first, in a separate proceeding during which evidence of his prior DUI convictions would be excluded. That evidence would be admitted later, during a separate trial on the truth of the prior conviction allegation. The court denied this request, finding the prior DUI convictions were relevant to determine defendant's mental state, and were not unduly prejudicial. (Evid. Code, § 352.)

At trial, defendant's identity was established through DNA evidence and personal items found inside the Explorer. Gilbert McDonald and other eyewitnesses testified that defendant caused the accident by driving on the wrong side of the road and crashing into the oncoming car.

Shannon Dietterick testified that she was driving behind defendant's Explorer when it crossed the median and entered the wrong lane. Dietterick honked to alert defendant, but he continued driving in the wrong lane. As she slowed down, defendant suddenly accelerated, made "a very dramatic right-hand turn," and crashed into the oncoming Mazda. After the accident, Dietterick saw defendant running away while "laughing like a crazy person."

Forensic criminalist Melissa Kramer Sarrett provided expert testimony based on a hypothetical situation that mirrored the facts of this case. Sarrett testified that at the time of the accident, the blood alcohol level of the driver of the Explorer was between .17 and .26. In her opinion, a person with that blood alcohol level is too impaired to drive safely.

Outside the jury's presence, the trial court inquired whether defendant intended to admit the prior DUI convictions. The court explained that the statute requires the prosecution to

prove the prior convictions unless they are admitted by the defendant. (Citing § 191.5, subd. (d).) After explaining this "has nothing to do with bifurcation," the court asked how he wished to proceed. In response, defendant entered a stipulation by which the jury was informed that Exhibits 26 through 29 showed that:

- In the 2004 case (No. 04CM08068), defendant pled guilty to DUI and "hit and run causing property damage," and admitted a blood alcohol level above .20.
- In the 2009 case (No. 041632587), defendant pled guilty to DUI and admitted a blood alcohol level above .15.
- In the 2009 case, defendant signed a written advisement stating: "'You are hereby advised that being under the influence of alcohol or drugs or both impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs or both. If you continue to drive while under the influence of alcohol or drugs or both and as a result of that driving someone is killed, you can be charged with murder.'"

Defendant did not testify or call witnesses in his defense.

The prosecutor argued that defendant caused the accident by driving while intoxicated on the wrong side of the road. She argued that defendant knew he could kill someone by driving while under the influence of alcohol but did so anyway. His knowledge of that risk may be inferred, she argued, from his 2004 DUI conviction with a .20 blood alcohol level that resulted in property damage, his 2009 DUI conviction with a .15 blood

alcohol level, and the 2009 advisement informing him that driving while intoxicated is dangerous to human life and can result in the death of another person.

Defense counsel argued that defendant was simply negligent as opposed to grossly negligent. She conceded the accident occurred while defendant was driving on the wrong side of the road, but argued there was no evidence of implied malice or gross negligence.

The trial court instructed the jury that implied malice exists if: "(1) [the defendant] intentionally committed an act; (2) the natural and probable consequences of the act were dangerous to human life; (3) at the time he acted, the defendant knew that his act was dangerous human life; and (4) he deliberately acted with conscious disregard for human life." (CALCRIM No. 520.) The jury was instructed that "an act causes death if the death is the direct, natural and probable consequence of the act and the death would not have happened without the act. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence."

In addition to being told that driving on the wrong side of the road is a misdemeanor (Veh. Code, § 21651, subd. (b)), the jury was instructed that in order to convict defendant on count 2 it must find that: (1) he drove while under the influence of alcohol; (2) he also committed a misdemeanor that might cause death; (3) the misdemeanor was committed with gross negligence; and (4) by his grossly negligent conduct, he caused the death of another person. (CALCRIM No. 590.)

The jury was instructed that gross negligence is something "more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when: [¶] 1. He acts in a reckless way that creates a high risk of death or great bodily injury; and [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with gross negligence when the way he acts is so different from how an ordinary, careful person would act in the same situation that his act amounts to disregard for human life or indifference to the consequences of this act."

On count 2, the court provided instructions on several lesser offenses: vehicular manslaughter with gross negligence without intoxication; vehicular manslaughter with ordinary negligence while intoxicated; and vehicular manslaughter with ordinary negligence without intoxication.

During deliberations, the jury sought clarification of the instruction that implied malice is an *act* that is *intentionally* committed with the knowledge that its natural and probable consequences are dangerous to human life. It requested an explanation of the terms "intentionally" and "act," and also inquired whether driving under the influence and driving on the wrong side of the road constitute one collective "act" or two separate "acts."

After conferring with counsel, the trial court responded that: (1) "act" refers to "driving under the influence of alcohol and driving on the wrong side of the road"; (2) "intentionally" is to be given its "ordinary, everyday meaning"; and (3) driving under the influence and driving on the wrong side of the road may be treated as either one collective act or two separate acts.

The jury returned guilty verdicts on counts 1 and 2. It also found both sentencing allegations to be true: that defendant fled the scene of the crime and had suffered two prior DUI convictions. This timely appeal followed.

DISCUSSION

I

Defendant contends that his prior DUI convictions should have been excluded because they are not relevant to the determination of his guilt. This objection was forfeited, however, when his trial counsel conceded the prior convictions were "obviously relevant." (*People v. Partida* (2005) 37 Cal.4th 428, 438 [evidentiary objection based on theory not raised below is not cognizable on appeal].)

Defendant's principal argument is that the prejudicial impact of the prior convictions outweighs any probative value, and the trial court erred in overruling his objection under Evidence Code section 352. We disagree.

The trial court has discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." Evid. Code, § 352.)

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies 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. In applying section 352, "prejudicial" is not synonymous with "damaging.'" [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; see *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532–533 [affirmed convictions of second degree murder and gross vehicular homicide, finding prior DUI convictions were properly admitted to demonstrate knowledge element of implied malice].)

Applying this standard, we find no abuse of discretion in admitting the prior convictions pursuant to a stipulation that provided the jury with a minimal description of defendant's prior conduct. Neither involved personal injury or death, and any prejudicial effect of the brief references to the prior convictions did not flow from the inflammatory nature of the uncharged conduct, but rather from the emotional nature of the current offense. The fact that the prior DUI convictions are highly probative does not mean the trial court abused its discretion by deeming them admissible under Evidence Code section 352.

Even were we to conclude otherwise, defendant has not established the error was prejudicial. He argues that exclusion of the prior convictions would have led to a more favorable result, but the record does not support his contention.

Malice and gross negligence are evaluated under different standards. Gross negligence is evaluated under an *objective* standard, and it exists "if a *reasonable person* in defendant's position would have been aware of the risk involved." (*People v. Watson* (1981) 30 Cal.3d 290, 296.) It involves an act that is "so different from how an ordinary, careful person would act in the same situation that [it] amounts to disregard for human life or indifference to the consequences." Malice is determined under a

subjective standard. Malice "may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." (*Ibid.*)

Even without the prior convictions, the remaining evidence in this case satisfies both standards. There was no defense evidence to contradict the prosecution's evidence that:

- Defendant's DNA and personal belongings were found inside the Explorer.
- Defendant was heavily intoxicated during the accident.
- Defendant committed a misdemeanor by driving on the wrong side of the road.
- Despite being warned by the honking of a car horn, defendant continued driving in the wrong direction into oncoming traffic.
- In the face of oncoming traffic, defendant suddenly accelerated and swerved head-on into the other car.
- After the accident, defendant fled and changed his shirt.
- Defendant remained hidden inside the construction site until a police dog found him several hours later.

Under either a subjective or objective standard, the fact that defendant acted with conscious disregard for life is readily inferable from his undisputed conduct before, during, and after the accident. Because his actions are strongly indicative of a deliberate and conscious disregard for life, exclusion of the prior DUI convictions is not likely to have led to a more favorable

outcome under either the *Chapman*[3] standard advocated by defendant or the *Watson*[4] standard. (See *People v. Page* (2008) 44 Cal.4th 1, 41–42 [absent violation of federal constitutional rights, evidentiary error is measured under *Watson* standard of prejudicial error].) On this record, we are confident that no reasonable juror would have doubted defendant's objective or "subjective awareness or appreciation of the life-threatening risk created by his conduct." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215.)

II

Defendant challenges the denial of his request for a bifurcated trial, arguing it was based on a mistaken belief that the prior convictions are an element of the charged offenses. The record does not support his assertion.

The record shows that the request for bifurcation was denied because the trial court correctly recognized that the prior offenses were relevant and admissible to prove defendant's state of mind during the current offense. This was a proper exercise of discretion. (*People v. Calderon* (1994) 9 Cal.4th 69, 78 [where prior convictions are admissible to prove defendant's state of mind during current offense, trial court does not abuse its direction in denying motion for bifurcation].)

The record does not suggest that the trial court believed that prior convictions are an element of the charged offenses. The court's statement, "It has nothing to do with bifurcation," was made while inquiring whether defendant intended to dispute

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[3] *Chapman v. California* (1967) 386 U.S. 18, 24.

[4] *People v. Watson* (1956) 46 Cal.2d 818, 836.

the prior convictions. The statement indicates the court was trying to prevent further discussion of the previously denied request for bifurcation, and proceed with the proof of the prior convictions.

III

For the first time on appeal, defendant challenges the adequacy of the jury instruction on implied malice. The disputed instruction states that implied malice exists if: "(1) [the defendant] intentionally committed an act; (2) the natural and probable consequences of the act were dangerous to human life; (3) at the time he acted, [the defendant] knew that his act was dangerous human life; and (4) he deliberately acted with conscious disregard for human life." (CALCRIM No. 520.)

Defendant contends this instruction is inadequate because it fails to convey that implied malice requires "proof beyond a reasonable doubt that he committed an act involving a high degree of probability that death would result." Based on his view that the "high probability of death" formulation is more stringent than the "natural consequences" test, defendant argues the trial court had a sua sponte duty to add the "high probability of death" formulation to the implied malice instruction. He claims it is incongruous that even though "[i]mplied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence" (*People v. Watson*, *supra*, 30 Cal.3d at p. 296), only the gross negligence instruction contains language regarding "a high risk of death or great bodily injury." (CALCRIM No. 590.)

In *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 111 (*Nieto Benitez*), the Supreme Court approved the removal of the "high probability of death" formulation from the implied malice

instruction in CALJIC No. 8.31, the predecessor to CALCRIM No. 520. In rejecting an assertion similar to the one made in this case that "the high-probability requirement should be reinstated in the instructions defining second degree murder," the *Nieto Benitez* court explained that "the two linguistic formulations—'an act, the natural consequences of which are dangerous to life' and 'an act [committed] with a high probability that it will result in death' are equivalent and are intended to embody the same standard. [Citations.]" (*Nieto Benitez*, at p. 111.) Because the Supreme Court's determination is binding on all lower state courts (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), it is fruitless to argue to this court that *Nieto Benitez* was wrongly decided.[5]

In *People v. Knoller* (2007) 41 Cal.4th 139, 156–157, the Supreme Court approved the implied malice instruction known as the *Phillips* test (*People v. Phillips* (1966) 64 Cal.2d 574, 587), and it is the basis for the instruction given in this case. Because the "high probability of death" formulation is equivalent to the "natural and probable consequences" test (*Nieto Benitez*, *supra*, 4 Cal.4th at p. 111), the trial court correctly instructed the jury and had no independent duty to provide the "high probability" of death formulation. Accordingly, the instructional issue was forfeited by the failure to make a timely request. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1012 [where instruction correct

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[5] In any event, defendant has not shown that the terms "high risk" and "high probability" have substantially different meanings. The primary dictionary definition of "risk" is the "possibility of loss or injury." (<https://www.merriam-webster.com/dictionary/risk> (as of May 17, 2018).) Its secondary definitions include the "degree of probability" of loss or injury. (*Ibid.*)

in law and responsive to evidence was given, defendant must request appropriate supplemental instruction to preserve issue for appeal].)

This brings us to defendant's alternative contention that his trial counsel provided ineffective assistance by failing to make an appropriate request below. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 615 [defendant claiming ineffective assistance of counsel must show trial counsel failed to act in manner of reasonably competent attorneys acting as diligent advocates].) Because the omission of the supplemental formulation was approved by the Supreme Court (*Nieto Benitez*, *supra*, 4 Cal.4th at pp. 104, 111; *People v. Knoller*, *supra*, 41 Cal.4th at p. 157), defendant faces a difficult task of showing that his trial counsel was ineffective. He has provided no persuasive authority or argument that supports his contention.

In any event, the failure to request a supplemental instruction was not prejudicial. (See *People v. Cudjo*, *supra*, 6 Cal.4th at p. 615 [prejudice is necessary element of ineffective assistance of counsel claim].) Even had the jury been given the "high probability of death" formulation of implied malice, it would have reached the same verdict. The questions posed by the jury regarding the implied malice instruction do not create a reasonable doubt that the verdict would have been the same had the additional instruction been given.

As previously discussed, the evidence of gross negligence and implied malice was undisputed. Because a "high risk of death" is synonymous with a "high probability of death," the likelihood that the "high probability of death" formulation would have resulted in a more favorable verdict is exceedingly slim. We therefore conclude the failure to request a supplemental

instruction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.