Filed 1/14/26 P. v. Gomez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE DE JESUS VELAZQUEZ GOMEZ, Defendant and Appellant.	F088379 (Super. Ct. No. LF014653A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Nicholas Seymour, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Kimberley A. Donohue, Assistant Attorney General, Ivan P. Marrs and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jose de Jesus Velazquez Gomez (appellant) was convicted of three counts of murder, among other crimes, after he crashed into another vehicle, killing its three occupants. Appellant's blood tested positive for methamphetamine.

The parties agree the trial court erred in instructing the jury that implied malice murder can be based on an act that was "reasonably foreseeable" to cause death (rather than "highly likely" to cause death). The parties further agree that the prosecutor erred by making arguments to the jury on the same point. We conclude this error was prejudicial.

We reject appellant's claim that prejudicial *Miranda*[1] error occurred.

We reverse appellant's murder convictions, which may be retried on remand. In all other respects, we affirm the judgment.

BACKGROUND

In an information filed February 20, 2024, the Kern County District Attorney charged appellant with three counts of second degree murder (Pen. Code,[2] § 187, subd. (a); counts 1–3), three counts of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a); counts 4–6), and three counts of vehicular manslaughter (§ 192, subd. (c)(1); counts 7–9). The information further alleged as to each count that appellant engaged in dangerous conduct (Cal. Rules of Court,[3] rule 4.421(b)(1)), and had prior convictions that were numerous or increasing in seriousness (rule 4.421(b)(2)).

A jury convicted appellant on counts 1 through 6, and the prosecutor sought and obtained dismissal of counts 7, 8, and 9, as lesser included offenses of counts 4, 5, and 6.

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

2 All further statutory references are to the Penal Code unless otherwise indicated.

3 All further rule references are to the California Rules of Court.

Appellant waived his right to a jury trial of the aggravating circumstance allegations. The trial court found the dangerous conduct allegation not true, but found the numerous/increasingly serious prior convictions allegation true.

The trial court sentenced appellant to consecutive terms of 15 years to life on each of counts 1 and 2, a concurrent term of 15 years to life on count 3, and stayed (§ 654) terms of six years each on counts 4, 5, and 6. The court also imposed various fines and fees.

FACTS

On November 3, 2023, at about 5:37 a.m., California Highway Patrol (CHP) Officer Adrian Aguilar responded to the intersection of South Edison Road and Di Giorgio Road, where four stop signs, each preceded by a yellow "stop ahead" sign, controlled the intersection. At the scene, Officer Aguilar found a white Volkswagen Tiguan with major damage to its right side and its airbags deployed. All three occupants of the Volkswagen were pronounced dead at the scene. An impact had caused the front passenger seat to shift all the way over to the center of the vehicle. Officer Aguilar concluded that, on impact, the Volkswagen lifted partially in the air and moved 43 feet before colliding with a railroad crossing arm.

Officer Aguilar also found a red Jeep Wrangler with moderate damage to its front fender; its airbags had not deployed. He spoke with appellant who identified himself as the driver of the Jeep. Officer Aguilar noticed that appellant's eyes were very red and his speech was a little slow. Appellant told Officer Aguilar he had not been drinking. Appellant told another officer later that morning that he had fallen asleep.

Officer Aguilar found no physical evidence, like tire traction marks, showing either driver had applied their brakes before the collision. He concluded appellant caused the collision by running the stop sign at the intersection and driving under the influence.

CHP Officer Jacob Catalina of the CHP's Multidisciplinary Accident Investigation Team testified that he downloaded the airbag control module (ACM) data from the

Volkswagen. The ACM registered a collision that pushed the vehicle to the left. During the five seconds before the collision, the Volkswagen was traveling at 21 miles per hour and being driven "relatively straight all the way up to impact." Four seconds before impact, the Volkswagen was traveling at 16 miles per hour and its brakes were being applied. Three seconds before impact, the Volkswagen was traveling at 11 miles per hour. Two seconds before impact, the Volkswagen was traveling at 10 miles per hour, and its brakes were no longer being applied and the accelerator began to be applied. One second before impact, the Volkswagen was traveling at 11 miles per hour. At the time of impact, the Volkswagen was traveling at 12 miles per hour with the accelerator still being applied.

The damage to the Volkswagen was consistent with the Jeep having been traveling at 55 to 60 miles per hour at the time of impact. Officer Catalina opined that neither the Volkswagen nor the Jeep stopped at the four-way stop.

Further Investigation

CHP Officer Gustavo Garcia contacted appellant at the hospital after 7:00 a.m. that morning. He observed that appellant's eyes were red and watery. Officer Garcia testified that he spoke with appellant "to help the officers investigating the accident" and that "part of the process for investigating the traffic accident with any fatalities is getting a 24-hour profile of everyone involved." Officer Garcia claimed that when he started the recorded conversation with appellant, he was not investigating any crime.

He spoke to appellant in Spanish. The jury was provided with a transcript of an English translation, which the trial court instructed them to use. Throughout the interview, Officer Garcia would smell an occasional faint odor of alcohol coming from appellant's body.

Appellant said he used to live with his wife, Yesenia Acosta, in an apartment in Arvin. However, two weeks ago they got into a fight and appellant had been sleeping in his Jeep "in the fields." The day before the collision, appellant went to a restaurant on

California and Mt. Vernon streets, where they serve cocktails. Appellant stayed for 15 minutes, then went to a park and had his cocktail. However, appellant later claimed he did not drink the day before the collision. He said he purchased several drinks but threw them away without drinking them.

Later, appellant went to get business cards and looked for an apartment to rent. Appellant then went to the house of a Mr. Bernavel. That night, appellant went to sleep at 10:00 or 11:00 p.m. At 2:00 a.m., he went to visit Acosta. Appellant was there for about an hour and she told him to leave.

Initially, appellant claimed that on the morning of the collision, he woke up and immediately began driving. He did not notice what time he woke up. Later, however, appellant said he never went back to sleep after visiting Acosta. Later still, appellant said he *did* go back to sleep after visiting her.

Appellant claimed that at the time of the collision, he was cruising without a specific destination (i.e., that he "didn't have nowhere to go.") Appellant said he fell asleep while driving and did not see the stop sign. He said he had fallen asleep while driving on other occasions, including two days prior to the collision. Defendant estimated driving 55 to 60 miles per hour before falling asleep and not seeing the stop sign at or the flashing yellow lights before the intersection of Di Giorgio and Edison Roads. He was awakened by the impact of the collision.

Appellant said he was unconscious for some time after the collision because when he awoke there were "a lot" of people there. Appellant claimed he had never used medication or any drugs. The interrogation ended at 8:13 a.m.

Officer Aguilar arrived at the Kern Medical Center at 8:30 a.m. Officer Garcia summarized the interrogation for Officer Aguilar. Officer Garcia said he detected the scent of alcohol, but Officer Aguilar did not perceive it himself. During pre-field sobriety questioning, appellant again denied alcohol and drug use. Officer Aguilar then

administered two field sobriety tests: the horizontal gaze nystagmus test and use of a preliminary alcohol screening (PAS) device.

There are six potential "clues" in a nystagmus test that could suggest inebriation, but none were present when Officer Aguilar administered the test to appellant. Appellant provided two samples for the PAS device, both of which tested negative for alcohol—i.e., 0.00 blood alcohol concentration.

Appellant then consented to a voluntary blood draw. A registered nurse drew appellant's blood at 9:15 a.m. Appellant's blood tested positive for methamphetamine at 114.2 nanograms per milliliter, and positive for amphetamines at 25.6 nanograms per milliliter.

Yesenia Acosta

Acosta testified that she had been in a relationship with appellant for two years prior to the collision, and they lived together for a year and a half. However, 10 days prior to the collision, Acosta kicked appellant out of their home.

On the morning of November 3, Acosta told CHP investigators that she had noticed a change in appellant's behavior around June or July. Appellant would "see things or hear things." Appellant would imagine things and had exaggerated jealousy. Appellant also screamed, and "confront[ed]" Acosta, even pushing her "with his body"—though he never hit her. Appellant would also disappear for three or four days at a time. Acosta associated several of appellant's behaviors with a nephew of hers who used methamphetamine. Consequently, Acosta assumed appellant "was doing it" as well. Acosta told appellant she thought he was using "crystal" (meaning methamphetamine), and appellant neither denied nor accepted the allegation. Acosta called him a drug addict and appellant said it was a mistake and that he was never going to do it again. When appellant would return from his disappearances, he would apologize to Acosta and promise to change.

Acosta took appellant back in July and he was well-behaved until September 30. She began to notice "strange things," but the behavior was "very light" until the end of October, when they had a big fight and she told him to leave.

On the morning of November 3, appellant came to Acosta's apartment around 2:20 or 2:30 a.m. Appellant broke the door frame by pushing it and entered the apartment. Appellant said he wanted to talk, but Acosta told him to come back the next day. Appellant claimed Acosta had told him to push hard on the door, but in fact she had been asleep. Acosta believed appellant hallucinated her statement. Appellant was present for less than five minutes before heeding Acosta's request that he leave.

Appellant returned around 3:30 a.m. to the parking area outside Acosta's apartment. She called appellant and told him to go to sleep and come back tomorrow.

Acosta knew two of the deceased individuals in the Volkswagen because they had been her coworkers.

Methamphetamine Impairment

Kern County District Attorney's Office investigator Matthew Iturriria testified for the prosecution. He called methamphetamine a very powerful stimulant that affects the central nervous system. Initially, the drug causes feelings of euphoria. Chronic use of methamphetamine causes high blood pressure, dilated pupils, and high heart rate. The demeanor of a methamphetamine user will typically be nervous, fidgety, and aggressive. Methamphetamine use can also cause insomnia and hallucinations. The effects of methamphetamine begin within seconds of ingestion and last approximately eight hours.

Investigator Iturriria opined that a test showing 100 or more nanograms per milliliter of blood is considered a "high" level of methamphetamine that would more than likely "impair[]" the person. He explained that methamphetamine impairs a driver by causing agitation, lack of concentration, lessened attention span, increased risk-taking behavior, increased erratic behavior, impaired cognition, and impaired impulse control. He testified that methamphetamine can also cause the body to become so tired from being

stimulated that it shuts down and the person falls asleep any time from exhaustion. Methamphetamine users can fall asleep, or be "on the nod," "instantly" while driving.

When offered a hypothetical matching several facts concerning appellant in the present case, the investigator opined such a driver would be impaired by methamphetamine and that impairment was the primary factor in the collision.

Kern County Regional Crime Laboratory criminalist Ada Rodriguez testified that 20 nanograms of methamphetamine per milliliter of blood is the threshold for testing positive. She placed the abuse level at 50 nanograms per milliliter. Rodriguez also noted that some severe narcolepsy patients take methamphetamines that raise blood levels to 100 to 200 nanograms per milliliter to treat their condition.

Watson Advisement

In 2011, in connection with a criminal case, appellant was given the following advisement as required under Vehicle Code section 23593 and *People v. Watson* (1981) 30 Cal.3d 290, 296:

> "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." (Unnecessary capitalization omitted.)
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> Appellant also signed a written advisement to that effect.

DISCUSSION

I. The Trial Court Erred in Instructing the Jury on Implied Malice Murder, and the Prosecutor Made Erroneous Arguments to the Jury Predicated Thereon

Appellant contends the trial court erred in defining the second element of implied malice and the prosecutor made erroneous arguments to the jury on the issue. The Attorney General concedes both errors but argues they were harmless. We agree with appellant and will briefly describe the errors before explaining our finding of prejudice.

"Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder. (See §§ 187, subd. (a), 189.) … '[M]alice may be either express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' " (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

Malice may be implied "when [a] defendant does an act *with a high probability that it will result in death* and does it with a base antisocial motive and with a wanton disregard for human life." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1219, italics added.) Examples of such acts include, "striking the victim with a knife; firing a shotgun at trespassers; shooting with intent to wound; and … firing shots at random into a crowded dance hall." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 113 (conc. opn. of Mosk, J.).)

CALCRIM No. 520 instructs juries on implied malice as follows:

"The defendant had *implied malice* if:

"1. (He/She) intentionally (committed the act/[or] failed to act);

"2. The natural and probable consequences of the (act/[or] failure to act) were dangerous to human life;

"3. At the time (he/she) (acted/[or] failed to act), (he/she) knew (his/her) (act/[or] failure to act) was dangerous to human life;

"AND

"4. (He/She) deliberately (acted/[or] failed to act) with conscious disregard for (human/[or] fetal) life."

Here, the trial court instructed the jury with a modified description of the second element of implied malice. That element as given by the court was: "the natural

and probable consequences of the act were dangerous to human life, *in that it was reasonably foreseeable that the act would result in death*." (Italics added.) The italicized language significantly altered the pattern instruction.

Malice may be implied when a defendant's act has " 'a high probability that it will result in death.' " (*People v. Dellinger*, *supra*, 49 Cal.3d at p. 1219.) Consequently, the trial court erred here by requiring only that death be a *reasonably foreseeable* consequence of appellant's act, rather than a *highly probable* one. Similarly, the prosecutor erred by arguing to the jury that it need not find that appellant's act of driving impaired created a "strong probability" of death.

The Attorney General argues the errors are harmless. When the trial court misinstructs the jury on an element of a charged crime, we consider prejudice under the standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Hendrix* (2022) 13 Cal.5th 933, 942.) Under that standard, we reverse the judgment unless the error was harmless " 'beyond a reasonable doubt.' "[4] (*Ibid*.)

The verdicts make clear that the jury concluded that death was, *at a minimum*, a "reasonably foreseeable" consequence of appellant's driving under the influence of methamphetamine. The question before us is whether we have any reasonable doubt that the jury, if properly instructed, would have gone further and found that death was a "highly probable" consequence of appellant's acts.

We begin by emphasizing that the charges at issue here are murder, not negligent homicide. Acts that carry a high probability of death in implied malice murder cases include, "striking the victim with a knife; firing a shotgun at trespassers; shooting with

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[4] While prosecutorial errors in argument to the jury are often considered under *People v. Watson* (1956) 46 Cal.2d 818, 836, the prosecutorial error here is relevant to the prejudice evaluation of the trial court's instructional error. Consequently, in our *Chapman* review of the instructional error, we will also consider the prosecutor's erroneous argument to the jury.

intent to wound; and … firing shots at random into a crowded dance hall." (*People v. Nieto Benitez*, *supra*, 4 Cal.4th at p. 113 (conc. opn. of Mosk, J.).) While this list of examples is certainly not exhaustive, it is helpful to note how different driving while impaired is from these prototypical instances of wrongful deeds that have rendered a defendant criminally liable in reported implied malice murder cases. We make this observation only to show that impaired driver is on the "weaker" end of the spectrum of acts that have traditionally supported an implied malice murder conviction.

Impaired driving can result in many possible outcomes: death to another, death to the impaired driver, serious nonlethal injuries, nonserious injuries, or, in fortunate cases, no injury or death at all. Certainly, the mere possibility of death or injury makes the act of impaired driving morally culpable. But that is not the same as saying the death of another person is a "highly probable" consequence of driving while impaired.

Indeed, the prosecutor acknowledged as much in her closing argument to the jury:

> "Somebody getting hurt or killed is a reasonably foreseeable result of impaired driving of somebody who drives under the influence.
>
> "The defendant was told that in his *Watson* advisal. He knows the downfall the drug has on him. He's already fallen asleep. He knows under those conditions what any reasonable person would, that those conditions are dangerous to human life, and that's a reasonably foreseeable result of driving impaired.
>
> "*The consequence may not have been a strong probability*. How many times have you heard or seen somebody drive impaired? You live long enough, I guess everybody drives impaired. This isn't making a moral judgment about driving impaired.
>
> "Everybody agrees on it. You try not to do it because it's so dangerous. *The consequences need not have been a strong probability, which is why so many people do drive drunk*. I can make it and get where I'm going. It's not going to be a problem. It's not going to happen to me, and when somebody dies, they're wrong.
>
> "But it doesn't need to be a strong probability. It doesn't need to be a strong probability you'll hit another car while you're driving impaired. It

> doesn't need to be a strong probability that you'll kill people while driving impaired. A possible consequence which might reasonably been contemplated is enough.
>
> "Can you kill somebody while you're driving impaired? Can you kill somebody while driving under the influence? Yes, it's far more likely than when you're driving sober. That's the cause of the defendant's impairment. The precise consequence need not have been foreseen.
>
> "It is enough that the probability of some harm of the kind which resulted from the act was done. So clearly it was here." (Italics added.)

Even if we ignore the truth or falsity of the prosecutor's probability assessment, the fact that counsel argued this point emphasizes the disputed nature of the second element of implied malice at trial.

Moreover, we note that impairment is a spectrum. We cannot make a blanket statement that ingesting any amount of impairment-inducing substances, like alcohol or methamphetamine, before driving is always highly likely to cause death. Instead, a jury would look at the specific facts of the case to see if the specific defendant's level of impairment (and other factors) meant his particular act of impaired driving was *highly* likely to cause death.

Here, appellant's blood was positive for 114.2 nanograms per milliliter of methamphetamine a few hours after the collision. The prosecution's expert testified that he had never seen a case where a person was not impaired at over 100 nanograms per milliliter. However, his opinion was that 100 or more nanograms per milliliter would mean the person was "more than likely" impaired. A criminalist testified that some severe narcolepsy patients take methamphetamines that raise blood levels to 100 to 200 nanograms per milliliter. And even if 100 or more nanograms per milliliter always caused impairment, the extent of that impairment would fall on a spectrum depending on the level of methamphetamine and its impacts on the specific defendant. A jury could reasonably conclude that there are some lower levels of impairment that—while illegal, irresponsible and dangerous—are not *highly* likely to cause death.

We do not deny that a rational jury could find death is a highly probable consequence of driving while impaired on methamphetamine. But *Chapman* asks the inverse question: whether we have any *reasonable doubt* that *any* rational jury could find otherwise. On this exacting standard of review, we must find the error prejudicial. Consequently, we reverse the three murder convictions. They may be retried. As a result of our conclusions, we do not reach any remaining, related contentions raised in appellant's briefing.

II. Any Error in Admitting Appellant's Non-*Mirandized* Statements was Harmless Beyond a Reasonable Doubt

Before trial, the prosecution moved to admit appellant's pre-blood draw statements to officers. Conversely, appellant moved to have the statements excluded or alternatively, to conduct a hearing under Evidence Code section 402 to determine the admissibility of the statements. The trial court ultimately held an Evidence Code section 402 hearing.

Officer Aguilar testified at the hearing that he responded to the collision scene before 6:00 a.m. on the morning of November 3, 2023. He asked appellant if he had a California driver's license, and appellant responded, "No." Officer Aguilar "obtained" appellant's Mexican consular identification card at the scene, but he does not remember if he then gave it to the ambulance or to an Officer Camargo. Officer Aguilar observed appellant's eyes were "very red" and his speech was "a little slow." Officer Garcia told Officer Aguilar that he smelled the faint odor of alcohol and that appellant had felt tired at the time of the crash.

Appellant was transported to the hospital by ambulance and was accompanied by Officer Camargo. He informed appellant that officers would come to speak to him about the incident. Officer Garcia arrived later, at around 7:39 a.m., and found appellant on a stretcher in the emergency room. Officer Garcia had been asked to "obtain a statement for the 24-hour profile of the crash." It is CHP policy to obtain 24-hour statements from

everyone involved in a collision resulting in fatalities. Officer Garcia then summarized portions of appellant's statement.

Shortly after 8:00 a.m., Officer Aguilar went to Kern Medical Center and spoke with appellant to "investigat[e] the crash." The officer specifically went to the hospital to conduct a driving under the influence (DUI) investigation.

Appellant had been at the hospital for approximately two hours prior to Officer Aguilar's arrival. Doctors and nurses were attending to appellant, and asking him questions. Appellant received a shot and had "cords" on him. Officer Camargo was still present. When asked if the purpose of Officer Camargo's presence was to ensure that appellant did not leave, Officer Aguilar testified: "I'm not sure. Because I've had people jump out of an ambulance and I lost my whole investigation, so we follow just to make sure they remain because you can discharge yourself from an ambulance prior to even getting to [the hospital]."

Officer Aguilar did not advise appellant of his *Miranda* rights because "[h]e was not under arrest." Neither Officers Aguilar nor Garcia told appellant he was under arrest. Appellant was not handcuffed to his bed. Officer Aguilar claimed appellant was actually free to leave, but he did not tell appellant he was free to leave.

Officer Aguilar asked appellant questions while Officer Garcia translated. Officer Aguilar first asked appellant about his injuries. He then asked appellant "[w]hat happened with the crash." Appellant told the officer that he was driving northbound at an unknown speed when he "believed" he fell asleep and ran the stop sign and crashed.

Officer Aguilar then asked appellant if any alcohol or drugs had been involved. Appellant denied using alcohol or drugs. Officer Aguilar performed two field sobriety tests on appellant, neither of which indicated alcohol use. Appellant agreed to have his blood drawn.

Officer Aguilar performed a "warrant check" on appellant and found he had a prior arrest warrant issued on April 19, 2016, for a 2015 DUI arrest. He asked appellant if he was aware of the warrant, to which appellant responded affirmatively.

After appellant was "medically cleared," Officer Aguilar arrested him for the outstanding DUI warrant. When asked why he did not arrest appellant for the November 3, 2023 collision, Officer Aguilar testified: "Usually with fatal collisions, if we don't have the alcohol or drugs at the time or still waiting for the blood results, we need a [c]omplaint to be filed. So at that time, the only thing I had for an arrest was for the warrant without further investigation into the matter." Appellant was then booked into jail on the outstanding warrant only. After booking, another officer called Officer Aguilar and told him that follow-up investigation and conversations with witnesses made him believe he had enough information to "upgrade the charges" on appellant "for the crash."

When asked if he told appellant to turn over his cellphone, Officer Aguilar testified, "No. I believe Officer Garcia had the cell phone already."

After argument from counsel, the trial court ruled that appellant's statements would be admitted. Specifically, the court explained,

> "Okay. The way I view this is there's two separate rounds of questioning regarding two separate topics. There's some follow-up with Officer Aguilar and with Officer Garcia, but Officer Garcia made it clear in his testimony here that he was investigating the crash with the three fatalities.
>
> "It's a 24-hour statement. It's in regard to investigation of the crash or collision. He's entitled to do that without *Miranda* as long as the defendant has not been placed in a custodial—he hasn't been arrested. He can be detained in order to do that investigation.
>
> "In regard to Officer Aguilar, for a DUI-type investigation, which is what Officer Aguilar testified he was conducting, and also temporarily detaining someone to do that investigation, that does not require the invocation or administration, I should say, of *Miranda*.

> "In regard to … defendant receiving medical care, he's in a hospital bed. He doesn't have a shirt on. Arguably he doesn't have shoes on. He's at Kern Medical Center in the emergency room. What exact medical care he was receiving, I don't know. We don't have any evidence of that.
>
> "But I do not believe … defendant was in custody, that he was not free to leave to the point that *Miranda* would need to be given. Law enforcement are, by statute and case law, allowed to question in regard to finding out what happened in a traffic collision, then separately and distinctly and sometimes related, in regard to a DUI investigation.
>
> "I'll allow the statements."[5]

Analysis

Appellant contends he should have been *Mirandized* and the trial court erred in finding the statements admissible. The Attorney General counters that *Miranda* warnings were not required and that, even if they were, any error is harmless. We conclude any *Miranda* error was harmless and therefore do not reach the issue of whether the evidence was erroneously admitted.

"When statements are obtained in violation of *Miranda* … the error is reviewed under the federal 'harmless beyond a reasonable doubt' standard set forth in *Chapman*." (*In re Art T.* (2015) 234 Cal.App.4th 335, 356.) "The People bear the burden of proving that the error was harmless beyond a reasonable doubt. [Citations.] In applying this standard, ' "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ' " (*Id*. at p. 357.)

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[5] Appellant also cites to the transcripts of his statements, which were admitted at trial. However, the Attorney General observes that the transcripts were not admitted at the Evidence Code section 402 hearing. We agree that appellant cannot rely on evidence that was not raised at the hearing. Appellant responds by observing that appellate courts conduct " 'independent review' " when an interview is recorded. But our standard of review is different from whether an appellant may rely on evidence that was not before the court when its ruling was made.

Even if appellant's challenged statements had been excluded, there was overwhelming evidence that: (1) appellant caused the collision by running a stop sign at 55 miles per hour or more and (2) appellant was under the influence of, and impaired by, methamphetamine at the time of the collision. And it is these facts that would have formed the primary basis for his convictions.

In arguing prejudice, appellant points to his admission that he fell asleep before the collision. But separate evidence plainly established that appellant had methamphetamine in his blood at a level that would cause impairment, and that he ran a stop sign at a high rate of speed. Once those facts were established, it is relatively unimportant whether the *precise manifestation* of impairment in this particular case was "nodding off" versus lack of concentration versus lessened attention span versus increased risk-taking behavior or some combination of these.[6] We are confident that if the jury only knew that appellant ran a stop sign at 55 or more miles per hour with blood levels of methamphetamine that cause impairment—and did not know whether or not appellant had fallen asleep—they would not have evaluated the case any differently.

Appellant observes that the prosecutor argued to the jury that appellant knew—based on an experience a few days prior—that he could nod off while driving when using methamphetamine. Later, the prosecutor tied this nodding off to negligence and then again to malice, arguing:

> "I want to go back quickly to second degree murder because the *Watson* advisal is not the only thing that gives rise to the knowledge that is in malice aforethought. The fact that … defendant signed a *Watson* advisal is one thing. The fact that he had a prior DUI and he knows what drugs or alcohol or both can do to your system is another thing that puts him on notice, gives him knowledge.

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[6] These are some of the types of impairment caused by methamphetamine as testified to by Investigator Iturriria.

> "And the third thing is the fact he nodded off just two days before. Again, [Acosta] tells us this is a time when he's using again. He's using methamphetamine again. You get a predictable symptom of being on methamphetamine, crashing, being on the nod. In the unfortunate moment, when he's behind the wheel, all choices that he makes, that goes to knowledge."

But even this argument shows that there was plenty of other evidence on negligence and malice besides appellant's admission of falling asleep. Appellant signed a *Watson* advisal and had a prior DUI. We also note that there was evidence, including Acosta's statement and testimony, giving rise to an inference appellant had used methamphetamine in the past and would therefore know its impairing effects apart from falling asleep. In sum, appellant's admission he fell asleep was cumulative to other evidence on the knowledge issue.

For these reasons, we are convinced that *Miranda* error alleged by appellant was harmless beyond a reasonable doubt. As a result, we do not reach any remaining, related contentions.

DISPOSITION

Appellant's convictions on counts 1, 2, and 3 are reversed. The charges may be retried on remand. The People shall inform the trial court as to whether they will retry those counts within 60 days of issuance of the remittitur from this court. In all other respects, the judgment is affirmed.

HARRELL, J.

WE CONCUR:

HILL, P. J.

LEVY, J.