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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VICENTE SANCHEZ, Defendant and Appellant.	B180113 (Los Angeles County Super. Ct. No. KA065072)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Vicente Sanchez challenges his second degree murder and related convictions on the ground that exclusion of defense evidence of voluntary intoxication under authority of Penal Code section 22[1] violated due process, equal protection, and the express terms of the statute. He further contends that admission of 911 calls made by persons who did not testify at trial violated his confrontation rights. We conclude that exclusion of appellant's proffered voluntary intoxication evidence did not violate due process, equal protection, or the terms of section 22. Further, the admission of tapes and transcripts of eyewitnesses' 911 calls did not violate appellant's confrontation rights, as the callers' statements were not testimonial in nature.

BACKGROUND AND PROCEDURAL HISTORY

A white Eagle Talon driven by appellant collided with a Ford Explorer driven by Brenda Casillas at the junction of the 60 and 71 Freeways. The Explorer overturned. Casillas was killed, and her two passengers, Ludivina Caro and Ofelia Llamas, were ejected from the vehicle and seriously injured. Witnesses described appellant's car as driving at high speed up to 120 miles per hour, passing other cars by driving on the shoulder, making a rapid lane change across several lanes of traffic, and striking the rear of Casillas's vehicle. Appellant fled the scene, and later called the police from a gas station about two miles from the scene of the accident. He admitted colliding with Casillas's vehicle, but claimed he was cut off by another car. The accident occurred at about 8:30 p.m. At 10:37 p.m., appellant's blood alcohol level measured 0.14 percent.

A jury convicted appellant of second degree murder; gross vehicular manslaughter while intoxicated; driving under the influence, causing injury; driving with a 0.08 percent or greater blood alcohol level, causing injury; and leaving the scene of an accident. The jury found appellant fled the scene of an accident and personally inflicted great bodily injury upon the three victims. The court sentenced appellant to prison for 19 years to life.

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1 All further statutory references are to this code.

DISCUSSION

1. Exclusion of appellant's proffered voluntary intoxication evidence did not violate due process.

Defense counsel informed the trial court he intended to call an expert witness to testify regarding the physiological effects of alcohol in order to establish "a diminished actuality" with respect to the mental state of implied malice. Counsel attempted to distinguish the defense he hoped to present from that barred by section 22, but also added that there was "a constitutional dimension" to the issue. The court ultimately ruled the testimony was inadmissible under section 22 and *People v. Martin* (2000) 78 Cal.App.4th 1107 (*Martin*).

Appellant contends that the 1995 amendment to section 22 violates his due process right to present a defense of voluntary intoxication to a charge of second degree murder based upon implied malice. Implied malice requires, inter alia, proof that the defendant knew that his conduct endangered the life of another and acted with a conscious disregard for life, i.e., that he actually appreciated the risk posed by his dangerous conduct. (*People v. Hansen* (1994) 9 Cal.4th 300, 308; *People v. James* (1998) 62 Cal.App.4th 244, 277.) Appellant argues evidence of implied intoxication is relevant to negate this element.

Before 1995, evidence of voluntary intoxication could be introduced to negate the subjective component of implied malice. Section 22, subdivision (a), which states the general rule that, "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition," was qualified by section 22, subdivision (b), which then provided, " 'Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.' " (*People v. Whitfield* (1994) 7 Cal.4th 437, 446 (*Whitfield*).) In *Whitfield*, the Supreme Court held that this reference to " 'malice

aforethought, when a specific intent crime is charged' " was sufficiently broad to cover implied malice. (*Id.* at pp. 446, 450.)

In reaction to the holding in *Whitfield*, the Legislature amended section 22, subdivision (b) in 1995. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1126.) That subdivision now provides, "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." Evidence of voluntary intoxication is therefore no longer admissible to negate implied malice. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6.)

As appellant acknowledges, his contention regarding section 22 was rejected in *Martin, supra*, 78 Cal.App.4th 1107. In that case, the defendant was convicted of second degree murder, gross vehicular manslaughter while intoxicated, and related charges. (*Id.* at p. 1110.) After conducting an extensive analysis of the history of section 22 and the cases applying it, the *Martin* court rejected the argument that the amendment to section 22 violated the defendant's right to present a defense: "The Legislature's most recent amendment to section 22 is closely analogous to its abrogation of the defense of diminished capacity. . . . The 1995 amendment to section 22 results from a legislative determination that, for reasons of public policy, evidence of voluntary intoxication to negate culpability shall be strictly limited. We find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their burden to prove every element of the crime charged beyond a reasonable doubt . . . ." (*Id.* at p. 1117.)

Appellant argues that *Martin* was wrongly decided in light of in *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Egelhoff*). There, a four justice plurality upheld the constitutionality of a Montana statute that provided that evidence of voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . . ." (Mont. Code Ann., § 45-2-203.)

Justice Scalia, in the plurality opinion, rejected the appellant's contention that the statute violated due process and held that the due process clause does not guarantee a defendant the right to present and have considered all relevant evidence. A criminal defendant was required to establish that his right to have a jury consider evidence of his voluntary intoxication in determining whether he possessed the requisite mental state is a fundamental principle of justice. (*Egelhoff, supra*, 518 U.S. at p. 43.) Using a historical analysis, the Supreme Court held that the right was not a fundamental principle of justice. (*Id.* at pp. 44-49.) The court concluded, "It is not surprising that many States have held fast to or resurrected the common-law rule prohibiting consideration of voluntary intoxication in the determination of *mens rea*, because that rule has considerable justification -- which alone casts doubt upon the proposition that the opposite rule is a 'fundamental principle.' " (*Id.* at p. 49, fn. omitted.) "Disallowing consideration of voluntary intoxication has the effect of increasing the punishment for all unlawful acts committed in that state, and thereby deters drunkenness or irresponsible behavior while drunk. The rule also serves as a specific deterrent, ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison. And finally, the rule comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences." (*Id.* at pp. 49-50.) The Montana Legislature could therefore properly preclude consideration of voluntary intoxication on the issue of a defendant's state of mind without infringing upon the defendant's right to due process. (*Id.* at p. 56.) Three justices joined in Justice Scalia's opinion.

Justice Ginsburg, in a concurring opinion joined by no other justice, reasoned that a statute that "is simply a rule designed to keep out 'relevant, exculpatory evidence' " would offend due process. (*Egelhoff, supra*, 518 U.S. at p. 57.) If, however, the statute redefined "the mental-state element of the offense," it would not violate due process. Justice Ginsburg opined that it would be constitutional for a statute to provide that "two people are equally culpable where one commits an act stone sober, and the other engages

in the same conduct after his voluntary intoxication has reduced his capacity for self-control." (*Ibid.*) Such a statute would embody "a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions." (*Ibid.*)

Appellant contends Justice Ginsburg's opinion sets forth the controlling law and her reasoning compels a reversal of his conviction. Appellant makes this contention because Justice Scalia's plurality opinion expresses its "complete agreement" with the rationale of the concurrence. Assuming, for the sake of argument, that Justice Ginsburg's opinion is controlling, we nonetheless conclude the application of section 22 does not violate due process. Section 22 is not an evidence exclusion statute. Rather, it is part of the Penal Code and reflects California's long history of limiting the exculpatory effect of voluntary intoxication. (See, e.g., *People v. Hood* (1969) 1 Cal.3d 444, 455-458.) The first sentence of section 22, subdivision (a), providing that an act is not less criminal when committed by a voluntarily intoxicated person, embodies a legislative decision that an intoxicated person bears criminal culpability to the same extent as a sober person engaged in the same conduct. The second sentence, concerning the capacity to form a mental state, is also a statement of substantive law precluding voluntary intoxication as a basis for a diminished capacity defense. Section 22, subdivision (b) completes the statutory scheme by establishing a limited exculpatory effect of voluntary intoxication on the mental state required for a criminal offense. It permits evidence of voluntary intoxication on the issue of whether a defendant has a specific intent, including in murder cases, and whether the defendant acted with premeditation, deliberation, or express malice aforethought. However, it makes a policy decision that voluntary intoxication is to have no exculpatory effect in the case of a murder charge based on the mental state of implied malice. Section 22, subdivision (b) does not reduce the prosecution's burden of proof or prevent a defendant from presenting all relevant evidence in defense. Accordingly, exclusion of appellant's proffered voluntary intoxication evidence did not violate due process.

2. Neither due process nor the terms of section 22, subdivision (b) prohibit the prosecution from introducing evidence of voluntary intoxication to establish implied malice.

Appellant further contends that, by its own terms and as a matter of due process, section 22, subdivision (b) must preclude the prosecution, as well as the defense, from introducing evidence of voluntary intoxication on the element of implied malice.

Viewed in isolation, section 22, subdivision (b) would appear to make intoxication evidence inadmissible to either prove or disprove implied malice. However, the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. (*People v. King* (1993) 5 Cal.4th 59, 69.) The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. (*Ibid.*) The intent of a statute "prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*People v. Pieters* (1991) 52 Cal.3d 894, 899, internal quotations and citation omitted.) The legislative history and statutory context of section 22, subdivision (b) make it clear that the 1995 amendment was not intended to render intoxication inadmissible to prove implied malice in a murder case.

The legislative history clearly shows that the 1995 amendment was intended to abrogate the holding in *Whitfield, supra,* 7 Cal.4th 437. " 'The decisive problem with *Whitfield* is that it contradicts the specific intent doctrine it purports to serve. California law provides that aggravated drunk driving can increase a defendant's liability for a vehicular homicide to a second-degree murder. Post *Whitfield,* however, intoxication, if sufficiently severe, can simultaneously mitigate liability to involuntary or vehicular manslaughter by negating implied malice. Allowing the same fact to both aggravate and mitigate liability is contradictory and confusing to juries. . . . In effect, *Whitfield* created a strained interpretation of California homicide law and created a needless loophole that

is suspiciously close to the legislatively discredited diminished capacity defense.' " (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 121 (1994-1995 Reg. Sess.) July 11, 1995, p. 5.) Thus, the Legislature's decision to omit implied malice from the list of exceptions set forth in section 22, subdivision (b) was intended only to restrict the use of intoxication evidence to negate implied malice.

In addition, section 22, subdivision (b) is preceded by subdivision (a), which establishes the general principle that, "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition." Subdivision (b) sets forth particular exceptions, i.e., instances in which intoxication evidence is permitted on the limited issues of specific intent, express malice aforethought, deliberation and premeditation. The omission of implied malice from the list of exceptions in subdivision (b) shows only that the Legislature intended implied malice murder to fall within the general rule set forth in section 22, subdivision (a). It does not demonstrate that the Legislature intended to abrogate the well-established rule that driving while intoxicated could be used to establish implied malice.

Appellant further argues that the exclusion of intoxication evidence for defensive purposes violates due process. He relies primarily on *Wardius v. Oregon* (1973) 412 U.S. 470, which disapproved a statute that required the defense to give pretrial notice of alibi witnesses without affording it reciprocal discovery rights as to prosecution witnesses. The Supreme Court held that, absent "a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." (*Id.* at pp. 475-476, fn. omitted.)

Section 22 does not expressly apply different rules to the defense and prosecution. In effect, however, the statute creates a different standard with respect to the issue of

implied malice, as the prosecution is permitted to use intoxication evidence to prove implied malice, while the defense is precluded from introducing intoxication evidence to negate implied malice. *Wardius*, however, was concerned with the defendant's right to a fair trial. The issue is thus equivalent to that addressed in *Egelhoff*, *supra*, 518 U.S. 37, and the attempt to recast it as a matter of reciprocity adds nothing to appellant's basic claim. Due process concerns do not restrict the state's ability to formulate substantive rules of law imposing equal criminal liability upon inebriated and sober persons and precluding reliance upon voluntary intoxication as a basis for a diminished capacity defense. We therefore reject appellant's reformulated due process claim.

3. Section 22 does not violate equal protection.

Appellant further contends that section 22 violates equal protection because it permits a voluntary intoxication defense to a charge of second degree murder based upon express malice, but not to a charge of the same offense based upon implied malice.

An equal protection claim requires unequal treatment of persons who are similarly situated. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.) If such disparate treatment is shown, the statute is reviewed differently based upon the nature of the classification. Strict scrutiny applies where the legislation creates a suspect classification based upon race or national origin or infringes upon a fundamental interest. An intermediate level of scrutiny applies to classifications based upon gender or illegitimacy. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. (*Ibid.*)

Assuming, for the sake of argument, that persons charged with second degree murder based upon express malice are similarly situated to persons charged with second degree murder based upon implied malice, the classification would be subject to rational basis scrutiny. Criminal statutes that distinguish among offenders on the basis of the circumstances of the offense or the manner in which it was committed do not require strict scrutiny simply because the offender's right to liberty is at stake. (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 837-838.) A defendant does not have a fundamental

interest in the specific definition of a crime, the designation a crime receives, or the term of imprisonment provided for a particular offense. (*Id.* at p. 838.) "Application of the strict scrutiny standard in this context would be incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment." (*Ibid.*)

As the legislative history discussed in the preceding section reveals, the Legislature had a rational basis for not allowing voluntary intoxication to act as a defense in an implied malice case. In the context of a vehicular homicide case, voluntary intoxication could be used to both aggravate and mitigate the offense. The Legislature deemed such potential dual use confusing for jurors. Accordingly, the classification drawn in section 22 has a rational basis. It therefore does not violate equal protection.

4. The admission of tapes and transcripts of eyewitnesses' 911 calls did not violate appellant's confrontation rights.

Over appellant's objection, tapes of three 911 calls made by accident eyewitnesses were played during trial. None of the three callers testified at trial or, as far as the record reveals, at any proceeding, and the prosecutor made no attempt to demonstrate that the callers were unavailable to testify.

During the first call, Jeff Sumter told the 911 operator that he wanted to report an accident that had just occurred. He stated that one car was upside down and "a white car [ran] away." The operator connected him to the Highway Patrol 911 operator and he repeated his description of the location and results of the accident. He added that "there was a crazy maniac driver, driving on the emergency lane and he sped by us. So I don't know if he caused the accident or not." He continued, "[I]t was a white car that kept on speeding, going probably 90, a 100 miles an hour."

During the second call, Darren Bradshaw told the 911 operator he was reporting a rollover accident with victims ejected from the vehicle. He then added, "I want to also let you guys know, that I guarantee, by a thousand dollars that this was created by a little, uh I'm gonna say about early 90's uh, little Mitsubishil [*sic*] . . . doing a 120, it had to be on

the 60." He also told the operator the car to which he referred was white. The operator asked if he got the license plate number, and he said he did not, but added, "I actually happened to see him go by me literally a minute earlier and I said 'you know boy . . . or I hope they don't cause an accident, an[d] uhm, I pull up to this.' " He continued, "And uh, heck, I was doing 80, to be honest. And they just came me [*sic*] like I was standing still. Cutting all across lanes and such."

The third 911 call played at trial was made by John Smith. He reported "a really bad wreck" with "[c]ars flipped over." He added that "[i]t's a white car hit and run, he caused the wreck flying through. Looked like a white Trans-Am or something." Smith continued to describe the ejection of persons from a vehicle. The operator asked him what type of vehicle "took off." He reiterated that it was a white Trans-Am or "Camaro looking car," and then changed his description to a Mitsubishi Eclipse. When the operator asked if he noted the license plate, he replied, "[T]hey flew past us, I knew they were gonna probably cause a wreck."

Appellant contends the 911 calls constituted testimonial evidence, and their admission violated his federal constitutional right to confront witnesses against him.

Crawford v. Washington (2004) 541 U.S. 36 (*Crawford*) held that with respect to testimonial evidence, such as police interrogations or testimony from grand jury proceedings, a preliminary hearing, or a former trial, the confrontation clause demands both unavailability of the witness and a prior opportunity for cross-examination. (*Id.* at p. 68.) Otherwise, such testimonial hearsay is inadmissible.

Crawford did not define the term "testimonial." After reviewing the history and purpose of the confrontation clause, the Supreme Court concluded that it was intended chiefly to combat "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," in which justices of the peace or other officials examined suspects and witnesses before trial, and these examinations were read in court in lieu of live testimony. (*Crawford*, *supra*, 541 U.S. at pp. 43-50.) The court noted that "[v]arious formulations of this core class of 'testimonial' statements

exist: '*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' . . . 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' . . . [and] 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Id.* at pp. 51-52, citations omitted.) The court did not adopt any of these "formulations," but held that, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.) The court noted that it used "interrogation" in a colloquial, not a technical legal sense, and stated that the witness's "recorded statement, knowingly given in response to structured police questioning" qualified as interrogation under any definition. (*Id.* at p. 53, fn. 4.) The statement in issue in *Crawford* was a tape-recorded statement given to police officers during a custodial interrogation. (*Id.* at p. 38.)

The issue here is whether any or all of the 911 calls were testimonial in nature.[2] Unlike the statement in controversy in *Crawford*, the three 911 calls were initiated by witnesses to a traffic accident that had just occurred. The calls were spontaneous reactions to developing events, not part of an investigation or legal proceedings. A review of the transcript of these calls reveals that each caller's primary purpose was to inform the police and rescue services of the accident and thereby to arrange assistance for the persons ejected from the overturned vehicle and any other victims who might have still been inside of it. To the extent that each caller spontaneously or in response to questioning told the 911 operators what he knew, thought he knew, or assumed about the

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[2] At least two other cases concerning the testimonial nature of 911 calls are pending before the California Supreme Court: *People v. Caudillo* (2004) 122 Cal.App.4th 1417,

cause of the accident, the purpose of the statements apparently was to assist authorities in apprehending the driver who appeared to the callers to have caused or played a role in causing the accident, thereby preventing any additional harm to other persons and potentially assisting those already harmed in the reported accident in a future effort to obtain compensation for their injuries and losses. The operator's questions were brief and limited in scope to a description of the car and its license plate. Not all questioning by a police officer or agent constitutes interrogation or is analogous to the civil law ex parte examination of a suspect or witness at which the confrontation clause is chiefly aimed. Although the 911 calls made were ultimately used in a trial, no trial was reasonably contemplated at the time the calls were made. No one had been arrested and no one but appellant knew the identity of the fleeing driver of the other car. No one actually knew whether any circumstances existed that rendered appellant's conduct criminal. In the apt and well-chosen words of a New York court addressing the same issue, "The 911 call -- usually, a hurried and panicked conversation between an injured victim and a police telephone operator -- is simply *not* equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry." (*People v. Moscat* (2004) 3 Misc.3d 739, 746 [777 N.Y.S.2d 875, 880].)

Division Six of this district's Court of Appeal reached the same conclusion in *People v. Corella* (2004) 122 Cal.App.4th 461 (*Corella*), which dealt with the admissibility of a victim's 911 call reporting that her husband had beaten her. The *Corella* court noted that the victim's statements to the 911 dispatcher "were not 'knowingly given in response to structured police questioning,' and bear no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford.*" (*Id.* at p. 468.) The court reasoned that, "Not only is a victim making a

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review granted January 12, 2005, S129212, and *People v. Lee* (2004) 124 Cal.App.4th

911 call in need of assistance, but the 911 operator is determining the appropriate response. The operator is not conducting a police interrogation in contemplation of a future prosecution." (*Ibid.*)[3]

Accordingly, we conclude that none of the three 911 calls was testimonial in nature, and their admission did not violate appellant's confrontation rights.

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.

483, review granted March 16, 2005, S130570.

3 To the extent the opinion in *Corella* may be read as concluding that a "police interrogation" and/or "a relatively formal investigation" is required to trigger the protections of the confrontation clause, we respectfully disagree with *Corella*, as it appears to be based upon an unduly narrow reading of *Crawford*.