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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BAUDELIO ZEPEDA, Defendant and Appellant.	F050481 (Super. Ct. No. BF112040A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Brian Alvarez and William K. Kim, Deputy Attorneys General for Plaintiff and Respondent.

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INTRODUCTION

The essential facts of this case are not in dispute. While driving under the influence of alcohol, defendant collided with a vehicle stopped at a red light. He then ran away from the scene of the accident. As a result of the accident, Sarah Bustamante was

killed and her daughter, Alicia Bustamante, was severely injured. The driver of the vehicle in which they were traveling, Yvonne Mendoza, sustained minor injuries.

A jury convicted defendant of gross vehicular manslaughter while intoxicated (count 2; Pen. Code, § 191.5, subd. (a)), driving under the influence causing injury (count 3; Veh. Code, § 23153, subd. (a))[1], driving with a blood alcohol content of .08 percent or more causing injury (count 4; Veh. Code, § 23153, subd. (b)), hit-and-run resulting in injury (count 5; Veh. Code, § 20001, subd. (a)), and driving without a valid driver's license (count 6; Veh. Code, § 12500, subd. (a)). The jury also returned true findings on enhancement allegations for proximately causing bodily injury to multiple victims (Veh. Code, § 23558), personally inflicting great bodily injury (Pen. Code, § 12022.7), having a prior conviction for driving under the influence (Veh. Code, § 23540), and being the driver of a vehicle involved in an accident resulting in death or serious injury to two people (Veh. Code, § 20001, subd. (b)(2)).

The trial court sentenced defendant to a total prison term of 13 years as follows: on count 2, the upper term of 10 years; on count 3, eight months (one-third the midterm) plus four months for the Vehicle Code section 23558 enhancement, plus one year for the Penal Code section 12022.7 enhancement; and on count 5, one year (one-third the

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1 The verdict reflects that the jury found defendant guilty of driving under the influence causing injury "as charged in the third count of the Information." As charged, count 3 names three victims: Sarah Bustamante, Alicia Bustamante, and Yvonne Mendoza. Although the issue has not been raised by the parties on appeal, we note that defendant could not be properly convicted of both the greater offense of gross vehicular manslaughter (count 2) and the lesser included offense of driving under the influence causing injury (count 3) as to the injuries suffered by Sarah Bustamante, the manslaughter victim. (See *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467-1468 [driving under influence causing injury is lesser included offense of gross vehicular manslaughter while intoxicated].) As the *Miranda* court explained: "One person who injures a person while driving under the influence commits a violation of Vehicle Code section 23153; and if that person dies from that injury – whether immediately or sometime later – a violation of Penal Code section 191.5 has occurred." (*Id.* at p. 1468.) However, any error in including the manslaughter victim in count 3 in this case was harmless. The evidence undisputedly established that defendant also caused great bodily injury to Alicia Bustamante. Vehicle Code section 23153, subdivision (a), required defendant injure only one person other than himself to be convicted under its terms. Thus, his conviction under count 3 is proper.

midterm) pursuant to Vehicle Code section 20001, subdivision (b)(2). The court imposed a concurrent six-month term on count 6. On count 4, the court stayed defendant's upper term sentence and the associated enhancements, including a Vehicle Code section 23558 enhancement, under Penal Code section 654. The court also stayed the Vehicle Code section 23558 enhancement on count 2 under Penal Code section 654.

On appeal, defendant contends the trial court made several sentencing errors. We agree the trial court should have stayed the four-month Vehicle Code section 23558 enhancement on count 3 under Penal Code section 654, and will modify defendant's sentence accordingly. However, as explained below, we reject defendant's other claims of sentencing error.

DISCUSSION

I. Penal Code section 654

A. Vehicle Code section 23558

Defendant contends, respondent concedes, and we agree, Penal Code section 654 precludes imposition of both the Vehicle Code section 23558 enhancement and the Penal Code section 12022.7 enhancement for the same injuries to the same victim in count 3; i.e., Alicia Bustamante. (*People v. Arndt* (1999) 76 Cal.App.4th 387, 397 [Pen. Code § 654 bars sentencing enhancement under Veh. Code § 23182 (now Veh. Code § 23558) where enhancement imposed under Pen. Code § 12022.7 for same injuries].)

With respect to count 3, the jury found defendant proximately caused bodily injury "to more than one victim, to wit: Alicia Bustamante" in violation of Vehicle Code section 23558, and that defendant personally inflicted great bodily injury upon Alicia Bustamante within the meaning of Penal Code section 12022.7. The trial court imposed a four-month term for the Vehicle Code section 23558 enhancement, and a one-year term for the Penal Code section 12022.7 enhancement. Because the court erred in using the same injuries to sentence defendant under both enhancements, the Vehicle Code section 23558 enhancement on count 3 must be stayed and the abstract of judgment amended accordingly.

B. Vehicle Code section 20001, subdivision (b)(2)

In count 5, the jury found defendant guilty of hit-and-run resulting in injury in violation of Vehicle Code section 20001, subdivision (a). Defendant was sentenced to one year (one-third the midterm) for the offense pursuant to Vehicle Code section 20001, subdivision (b)(2) because the jury found true the allegations that defendant was the driver of a vehicle involved in an accident resulting in death or permanent serious bodily injury to Sarah and Alicia Bustamante.[2] Defendant contends that by imposing the enhanced punishment under Vehicle Code section 20001, subdivision (b)(2), instead of the punishment provided by Vehicle Code section 20001, subdivision (b)(1), the trial court violated Penal Code section 654. Defendant's argument is that he was improperly punished again for the same injuries to Sarah and Alicia Bustamante for which he was already punished under count 2 (gross vehicular manslaughter) and count 3 (driving under the influence causing injury). Defendant further contends the enhanced sentence violated state and federal double jeopardy protections against multiple sentences for the same offense. Defendant's contentions fail.

The principles governing appellate review of Penal Code section 654 issues are well settled. Applying these principles in the present case, the offenses involved separate intents and objectives and were therefore punishable as separate crimes. (*People v. Coleman* (1989) 48 Cal.3d 112, 162 [in determining whether facts call for application of Pen. Code, § 654, threshold inquiry is to determine defendant's objective and intent]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 [whether a course of conduct constitutes

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2 Vehicle Code section 20001 states, in relevant part: "(a) The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004. [¶] (b)(1) Except as provided in paragraph (2), any person who violates subdivision (a) shall be punished by imprisonment in the state prison, or in a county jail for not more than one year, ... [¶] (2) If the accident described in subdivision (a) results in death or permanent, serious injury, any person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, ..."

one indivisible act or more than one act depends on defendant's criminal intent and objective].)

A scenario similar to the one in this case was addressed in *People v. Butler* (1986) 184 Cal.App.3d 469. There, the defendant, while driving under the influence of alcohol, caused a fatal accident and fled the scene. (*Id.* at p. 471.) On appeal, the defendant argued the imposition of consecutive sentences for vehicular manslaughter and felony hit-and-run violated Penal Code section 654 because the defendant had engaged in only one indivisible course of conduct. (*Id.* at pp. 471-472.) The court rejected his argument, finding the evidence reflected two separate states of mind. (*Id.* at pp. 473-474.) The court further held it would violate public policy and the legislative intent behind Vehicle Code section 20001 to find felony hit-and-run was indivisible from vehicular manslaughter:

> "[T]he purpose of Penal Code section 654 … is to insure that a defendant's punishment will be commensurate with his culpability. If multiple punishment is prohibited in this case, as a matter of law, there would be no incentive for a person who causes an accident to stop and render aid as required by Vehicle Code section 20001. In fact, noncompliance would be rewarded. A defendant would suffer no greater criminal liability if he took his chances on escaping than if he stopped and rendered aid. Our Legislature could not and did not intend such an absurd result." (*People v. Butler*, *supra*, 184 Cal.App.3d at p. 474, citation omitted.)

We agree and find the court's analysis applies equally to the present case. As *Butler* aptly illustrates, the gravamen of the hit-and-run offense "is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid." (*People v. Escobar* (1991) 235 Cal.App.3d 1504, 1509; *People v. Braz* (1998) 65 Cal.App.4th 425, 432; *People v. Corners* (1985) 176 Cal. App. 3d 139, 148 ["Although a violation of [Vehicle Code] section 20001 is popularly denominated 'hit-and-run,' the act made criminal thereunder is not the 'hitting' but the 'running.'"].) The broad Legislative purpose of the statute is to benefit persons injured in vehicle accidents by prohibiting drivers from leaving them in distress and danger from lack of medical care, and from

seeking to avoid civil or criminal liability resulting from the accident. (*Karl v. C.A. Reed Lumber Co.* (1969) 275 Cal.App.2d 358, 361; *Bailey v. Superior Court* (1970) 4 Cal.App.3d 513, 518-519; *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.)

Applying the above principles here, we cannot agree with defendant's argument that the increased punishment under Vehicle Code section 20001, subdivision (b)(2) punishes him again for the same injuries underlying counts 2 and 3. Rather, he is punished more harshly for leaving the scene of an accident where the injured persons are in the direst need of help and the temptation for a defendant to take his chances on escaping to avoid liability is potentially the greatest. Contrary to defendant's suggestion, the increased punishment under Vehicle Code section 20001, subdivision (b)(2) creates a stronger incentive to stay at the scene of a serious accident and render assistance than subdivision (b)(1) alone would provide.

Because the offense of hit-and-run was divisible from the offenses of vehicular manslaughter and driving under the influence causing injury, and the enhanced sentence did not simply punish defendant again for the same injuries punished under the other counts, we reject his claim that the imposition of the increased sentence under Vehicle Code section 20001, subdivision (b)(2) violated either Penal Code section 654 or double jeopardy principles.

II. Imposition of upper terms

Towards the beginning of the sentencing hearing, the trial court stated that it intended to send defendant to prison for the maximum period of time, explaining:

> "My intent is to give the defendant the maximum sentence that I can give based upon his prior drunk driving offense in which, if he didn't know the danger of the drunk driving before, when he was arrested, brought before a judge, sentenced and went to the Victim Impact Panel at the library, there is no excuse for him not to know the dangers of drinking and driving after that. In addition, he has the unlicensed driver offense after that. So those two – those are factors in aggravation. There is no factors in mitigation. So I do intend on giving him the maximum sentence that I can impose."

Prior to pronouncing defendant's sentence, the trial court explained its selection of the upper terms as follows:

> "As I've indicated earlier, there are no circumstances in mitigation. Circumstance in aggravation include that the defendant was on misdemeanor probation in two cases, including one for a prior DUI, when this crime was committed, the other for driving without a license; the second circumstance in aggravation, the defendant's prior performance on misdemeanor probation was unsatisfactory in that he violated terms and re-offended; and, three, the defendant's blood alcohol level was well over twice the legal limit.
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> "I will say, though, that the first circumstance in aggravation, in and of itself, would clearly outweigh the fact there is no circumstances in mitigation and that prior DUI and prior 12500 would clearly allow for the upper term to be selected."

On appeal, defendant contends the trial court abused its discretion in imposing the upper term because it relied on an aggravating factor not supported by the evidence at trial, i.e., that his blood alcohol level was over twice the legal limit.

It is well settled that when "a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) Assuming, arguendo, the evidence did not support the trial court's statement that defendant's blood alcohol level was over twice the legal limit, any error in relying on an improper aggravating factor was harmless.

As seen above, prior to sentencing, the trial court stated its intention to impose the maximum sentence based on defendant's prior convictions for driving under the influence and driving without a license and the lack of any mitigating circumstances. Then, just before sentencing defendant, the trial court pointedly noted that the circumstance of defendant's prior convictions was sufficient by itself to support selection of the upper term. Defendant does not dispute that this was a proper aggravating factor, and acknowledges a single factor in aggravation will support imposition of an upper

term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The trial court's comments flatly contradict defendant's assertion on appeal that "[defendant's] criminal history is relatively minor, and it is reasonably probable that, if the court had not been confused about what [defendant's] blood alcohol content was at the time of the accident, it would have seen the whole picture differently and imposed middle terms." In light of the court's comments stressing defendant's prior convictions and the absence of any mitigating factors, we find no reasonable probability the trial court would have imposed a lesser sentence had it known one of the enumerated aggravating factors was improper. Thus, remand for resentencing is not necessary.

III. Imposition of consecutive sentences

Defendant contends the trial court abused its discretion in ordering his sentence for count 3 to run consecutively to his sentence on count 2, and in ordering his sentence on count 5 to run consecutively to his sentence on count 3. We find no reversible error.

California Rules of Court, rule 4.425(b), which governs when a trial court may impose consecutive sentence, specifically provides that "[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences …."

Contrary to defendant's assertion, the trial court properly considered the fact of multiple victims as a circumstance in aggravation when it ordered defendant's sentence for the offense of driving under the influence in count 3 to run consecutively to his sentence for the offense of vehicular manslaughter in count 2. When, as here, two crimes are transactionally related and each involves a different victim, it is permissible to impose consecutive sentences in order to make the punishment commensurate with the defendant's degree of culpability. (*People v. Valenzuela* (1995) 40 Cal.App.4th 358, 362-365 [consecutive sentences appropriate for two counts of gross vehicular manslaughter where each victim was a passenger in the same car]; see also *People v. Leung* (1992) 5 Cal.App.4th 482, 505 [affirming imposition of consecutive terms for simultaneous robbery of several restaurant employees on "multiple victim" theory]; but

see *People v. Humphrey* (1982) 138 Cal.App.3d 881, 882 [interpreting early court rule setting forth factors for imposing consecutive sentences].)

With respect to the offense of felony hit-and-run in count 5, the parties recognize that the trial court failed to state a reason for imposing a consecutive sentence. The failure to state reasons for a consecutive sentencing choice is error. (*People v. Powell* (1980) 101 Cal.App.3d 513, 518 [decision that sentences run consecutively is a sentencing choice for which trial court is required to state its reasons at time of sentencing]; Pen. Code, § 1170, subd. (c); Cal. Rules of Court, rule 4.406(b)(5).) However, the instant error is harmless and no remand is required if it is not reasonably probable that a result more favorable to defendant would occur. (*People v. Blessing* (1979) 94 Cal.App.3d 835, 838-839.)

Here, the record establishes that a remand would not change the result. The trial court stated explicitly early in the sentencing hearing that its intention was to impose the maximum prison sentence. The probation report listed an aggravating factor available to the court on remand which would support a consecutive sentence for count 5: "The crimes and their objectives were predominantly independent of each other." (See Cal. Rules of Court, rule 4.425(a)(1).) In view of the record, it would be idle to remand for a statement of reasons. (*People v. Green* (1988) 200 Cal.App.3d 538, 543; *People v. Porter* (1987) 194 Cal.App.3d 34, 39.)

IV. Blakely

Defendant contends the trial court's imposition of upper terms and consecutive sentences violated his rights to a jury trial and to due process of law because they were based upon facts not found to be true beyond a reasonable doubt by a jury. (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 546 U.S.___ [127 S.Ct. 856] (*Cunningham*).)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-justice majority of the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.]" (*Blakely*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinant sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham*, *supra*, 546 U.S. ___ [127 S. Ct. 856].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (a)"'the fact of a prior conviction'" (*Blakely*, *supra*, 542 U.S. at p. 301); (b) "facts reflected in the jury verdict" (*id.* at p. 303, italics omitted); and (c) facts "admitted by the defendant" (*ibid.*, italics omitted). The first type is at issue here.

As *Apprendi* states, and *Blakely* agrees, prior recidivist conduct may be used by a sentencing judge, even absent a jury finding, to increase a defendant's term. (*Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 542 U.S. at p. 301.) Because defendant has suffered prior convictions and the court found the fact of these prior convictions sufficient to justify imposition of the upper term, defendant's sentence does not violate *Apprendi*, *Blakely*, or *Cunningham*. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [recidivism is traditional, if not most traditional, basis for increasing offender's sentence].)

Any error in considering factors not falling in one of the three permissible categories identified in *Blakely* was harmless under either *Chapman v. California* (1967) 386 U.S. 18 (harmless beyond a reasonable doubt) or *People v. Watson* (1956) 46 Cal.2d 818, 836 (reasonable probability error did not impact outcome). As discussed above, the trial court expressly stated that the circumstance of defendant's prior driving-related convictions was sufficient by itself to justify imposition of the upper term. This is a clear statement that the trial court would have imposed the upper term based on the prior convictions even in the absence of any impermissible factors. Remand for resentencing would be a futile act.

As to defendant's claim that the court impermissibly imposed consecutive sentences based on impermissible factors under *Blakely*, the imposition of a consecutive sentence based on facts determined by the trial court, not admitted by defendant or found by a jury, does not deprive defendant of his constitutional right to a jury trial or his rights to have all facts legally essential to his sentence proved beyond a reasonable doubt. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1262-1263, 1265, overruled on other grounds in *Cunningham*, *supra*, 546 U.S. ___ [127 S. Ct. 856], [*Blakely's* underlying rationale is inapplicable to trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently].) The *Cunningham* court did not address the distinct issue of imposition of consecutive sentencing for separate crimes. No further discussion is required.

DISPOSITION

The four-month enhancement (Veh. Code, § 23558) on count 3 is stayed under Penal Code section 654. The judgment is affirmed in all other respects. The matter is remanded to the superior court for issuance of a new abstract of judgment.

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HILL, J.

WE CONCUR:

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CORNELL, Acting P.J.

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DAWSON, J.