Court of Appeal, Fourth Appellate District, Division Three - No. G060195

S271570

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DANIEL IRVING, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 9/22/21 P. v. Irving CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL IRVING, Defendant and Appellant.	G060195 (Super. Ct. No. C1651027) O P I N I O N

Appeal from a judgment of the Superior Court of Santa Clara, Jacqueline M. Arroyo, Judge. Affirmed.

Jason Szydlik, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta and Xavier Becerra, Attorneys General, Lance E. Winters, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Eric D. Share and Ashley Harlan, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Irving appeals from a judgment after a jury convicted him of two counts of driving under the influence of alcohol and causing bodily injury to another person. Irving argues insufficient evidence supports his convictions, the trial court erred by denying his right to cross-examination, and the court erred by denying probation based on the mistaken belief he was ineligible. None of his contentions have merit, and we affirm the judgment.

FACTS

Just before midnight, Antonio Maldonado was walking with his brother-in-law, Edgar Cantoran, on Market Street in downtown San Jose near the convention center. Cantoran was on his cell phone but ended the call when they approached the intersection. The intersection was well lit and visibility was excellent.

They pressed the pedestrian crosswalk button and began crossing the street. Cantoran initially said they entered the intersection when the red hand signaling do not walk was flashing (too early) and then said they were in the crosswalk when the red hand signaling do not walk started flashing (too late).

They were in the middle of the crosswalk when Maldonado heard Irving's car approaching "really fast." Maldonado, who was a couple of steps behind Cantoran, retreated toward the sidewalk, but Cantoran ran toward the opposite side of the street. Irving's Jetta hit Cantoran. Maldonado ran to Irving and punched him. Maldonado tried to talk to Cantoran, but he was unconscious and seizing.

Emergency response personnel arrived and took Cantoran to the hospital. Inside Irving's vehicle, police officers located an open container of alcohol, cannabis substances, and cannabis paraphernalia.

Officer Zachary Preuss arrived at the scene and determined the applicable speed limit was 35 miles per hour. Irving told Preuss that he was "120 [percent] positive" Cantoran was "in the crosswalk on a green light." Irving claimed he was

driving about 35 miles per hour. Irving initially denied drinking any alcohol or ingesting any cannabis. Irving ultimately admitted he drank two or three beers and smoked cannabis between two and four hours before the collision. Preuss conducted field sobriety and breathalyzer tests. The breathalyzer test measured Irving's blood alcohol content at 0.14 and 0.13 percent. At the police station a few hours later, Irving submitted to a blood draw.

Cantoran remained in a coma for two weeks—he suffered a brain injury, including brain bleeding, and acute respiratory failure. After waking from his coma, Cantoran was unable to speak. As a result of his injuries, Cantoran developed seizures and experienced changes to his personality. He was unable to recognize his partner and their child.

A third amended information charged Irving with the following: driving under the influence of alcohol and causing bodily injury to another person (Veh. Code, § 23153, subd. (a)) (count 1); driving under the influence of alcohol with a blood alcohol level of 0.08 percent and causing bodily injury to another person (Veh. Code, § 23153, subd. (b)) (count 2); and driving under the combined influence of any alcoholic beverage and drug and causing injury to another person (Veh. Code, § 23153, subd. (g))[1] (count 3). The information charged him with concurrently committing the following acts forbidden by law or neglecting to perform a legal duty on each count: basic speed law (Veh. Code, § 22350); prima facie speed law (Veh. Code, §§ 22351-22352); unsafe lane change (Veh. Code, § 22107); and failure to yield the right of way at a crosswalk (Veh. Code, § 21950). It also alleged he personally inflicted great bodily injury as to each count. (Pen. Code, §§ 12022.7, subd. (b), 1203, subd. (e)(3).) Finally, it alleged he suffered a prior driving under the influence conviction. (Veh. Code, § 23152.)

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[1] The information erroneously cited to subdivision (f).

At trial, Husband and Wife testified they were driving in downtown San Jose about 20 to 30 miles per hour. Husband did not recall seeing any pedestrians as he drove. They testified a green Volkswagen Jetta passed them, swerved into their lane, and swerved around the car in front of them. They estimated the Jetta was traveling 40 to 60 miles per hour. They both testified the light was green as the Jetta entered the intersection. Neither Husband nor Wife saw anyone in the crosswalk. Husband heard a loud sound no more than 10 seconds later. As they drove through the intersection, they saw a man lying underneath a car. Husband said, "[A]ll of a sudden I [saw] people on the sidewalk just stop . . . ." Husband estimated there were more than 10 people standing nearby. Wife estimated there were more than five or six people. Husband stopped the car, and Wife called 911. They walked to the intersection and saw a bunch of pedestrians.

Preuss testified concerning his patrol area. When the prosecutor asked Preuss what was "the foot traffic like[]" on a Friday night on the street in question, he answered the following: "It varies. If it's a nice night it can be pretty busy with traffic."

Detective Troy Sirmons testified as an expert in accident reconstruction, i.e., speed and measurements. Sirmons analyzed the data supplied to him by the investigating officers and conducted his own measurements. Sirmons determined Irving was travelling between 38.19 to 46.61 miles per hour. He added that depending on Cantoran's location within the crosswalk, Irving could have been travelling between 37.49 and 48.43 miles per hour. He also stated the calculation could vary depending on whether Cantoran's body stopped naturally or was stopped by the parked car. Sirmons opined Irving's minimum speed could have been 45.49 miles per hour.

Mark Burry, a supervising criminalist, testified as an expert in the effects of alcohol and cannabis on the human body as related to driving a motor vehicle. Burry testified Irving's blood was analyzed at 3:11 a.m. and he had 0.097 blood alcohol content

and 9.050 nanograms per milliliter of THC and 120.356 nanograms per milliliter of THC-COOH.[2] Burry opined that at 11:45 p.m., that individual's blood alcohol content would be between 0.13 and 0.16 percent. Burry explained a person driving a vehicle in this condition would be experiencing cognitive function impairments, including increased impulsiveness, overconfidence, and risk-taking behavior and decreased sensory function, including visual acuity, fine motor control, balance, and depth perception. Burry admitted THC's effects were less studied than alcohol and there was not a legal limit for THC. He stated though a combination of alcohol and THC, both central nervous system depressants, would increase effects and impairment. Based on a hypothetical mirroring the facts of the case, Burry opined that based on the alcohol alone, the individual was too impaired to safely operate a vehicle.

Irving offered the testimony of Brad Wong, an expert in speed and automobile/pedestrian collisions and human factors of drivers. Wong determined Irving was travelling between 35.25 and 36.6 miles per hour. Based on his analysis, Wong could not say within reasonable engineering certainty that the vehicle was travelling faster than 35 or 36 miles per hour. On cross-examination, Wong clarified the 35 to 36 miles per hour was a minimum speed calculation. He also calculated Irving was travelling at a maximum speed of 51 miles per hour, but he did not include that calculation in his report. He admitted it was "possibl[e]" Irving was travelling 51 miles per hour but did not find that rate to be "within reasonable engineering certainty."

The jury convicted Irving of counts 1 and 2 and found true he personally inflicted great bodily injury. The jury acquitted him of count 3. At a bifurcated bench trial, the trial court found true Irving suffered the prior conviction. The trial court sentenced Irving to prison for six years and four months.

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[2] The parties stipulated Irving's blood alcohol content was .097 percent and contained 9.050 nanograms per milliliter of THC and 120.356 nanograms per millileter of THC-COOH.

DISCUSSION

I. Sufficiency of the Evidence

Citing to and disputing the prosecutor's statement during closing argument that it "'was a foot trafficked area[,]'" Irving argues insufficient evidence supports his convictions because he did not proximately cause Cantoran's injuries.[3] We disagree.

"'[W]e "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility.' [Citations.] 'Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Brown* (2014) 59 Cal.4th 86, 105-106.)

"'The criminal law . . . is clear that for liability to be found, the cause of the harm not only must be direct, but also not so remote as to fail to constitute the natural and probable consequence of the defendant's act.' (*People v. Roberts* (1992) 2 Cal.4th 271, 319 . . . .) In determining whether a defendant's acts were the proximate cause of the death of a human being, we ask whether the evidence sufficed to permit the jury to conclude that the death was the natural and probable consequence of defendant's act. [Citation.]" (*People v. Taylor* (2004) 119 Cal.App.4th 628, 639-640.)

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[3] Irving does not contend there was insufficient evidence supporting any other elements of the offenses. He only challenges the causation element. We limit our discussion accordingly.

"[A]n 'independent' intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be 'independent' the intervening cause must be 'unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.' [Citation.] On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability. 'A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. [Citation.] "[] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act." [Citation.]' [Citation.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1523.)

Here, in asserting there was no evidence of pedestrian foot traffic in the area, we discern Irving's argument to be there was an independent intervening cause relieving him of criminal liability: it was unforeseeable there would be pedestrians walking in the crosswalk against the do not walk signal. Irving suggests the bystanders were motorists who, like Husband and Wife, parked and walked to the scene instead of pedestrians. His claims are belied by the record.

The evidence demonstrated the incident took place in downtown San Jose near the convention center. Preuss testified the street in question could be pretty busy with foot traffic. Both Husband and Wife testified that as they drove past Cantoran, there were already people gathering around the scene. Husband estimated this was no more than 10 seconds after Irving hit Cantoran. From this evidence the jury could reasonably conclude it was foreseeable there was pedestrian foot traffic in the area. This evidence

supported the conclusion Irving should have foreseen the possibility of pedestrians walking in the crosswalk, even against the do not walk signal. (See Veh. Code, § 21950, subd. (d) [vehicle driver "duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection"].) Cantoran and Maldonado walking in the crosswalk against the do not walk signal was a reasonably foreseeable intervening *dependent* cause that did not relieve Irving of criminal liability for his speeding while under the influence of alcohol. There was sufficient evidence Irving proximately caused Cantoran's injuries, and, thus, substantial evidence supported his convictions.

II. Denial of Cross-Examination

Irving contends the trial court erred by denying his right to cross-examine Sirmons concerning his two reports detailing the primary and associated collision factors. Not so.

A. Background

Before the prosecutor offered Sirmons's testimony, the prosecutor moved to exclude any cross-examination of Sirmons as to who was at fault. During a hearing on the motion, the prosecutor stated Sirmons prepared a report that estimated Irving's speed. The prosecutor explained Sirmons's calculations were incorrect and his revised estimates showed Irving's speeds were lower. The prosecutor added Sirmons reviewed the police reports and offered his opinion as to the collision's primary factors of the collision. The prosecutor intended to question him only as an expert in accident reconstruction concerning speed and measurements. He did not intend to question Sirmons regarding the collision's cause because that was for the jury to decide.

Irving's trial counsel stated he agreed with much of the prosecutor's legal authority and he did not intend to question Sirmons about fault. Counsel explained though Sirmons prepared two reports. Counsel said that in his first report, Sirmons

miscalculated Irving's speed and opined the primary collision factor was his speeding, and the associated collision factors were his failure to yield to a pedestrian and driving under the influence. Counsel stated that in his second report, Sirmons calculated his speed to be lower and opined the primary collision factor was Cantoran violating the pedestrian walk/don't walk statute and the associated factors were Cantoran entering the intersection against the light and Irving driving under the influence. Counsel asserted he should be allowed to question him about those factors "without using the word 'fault' or 'substantial factor.'"

The trial court ruled it would permit the prosecutor to examine Sirmons about Irving's speed and measurements. The court ruled Irving's trial counsel could not question him about the primary or associated factors. The court concluded trial counsel could question him "very carefully" about his initial calculations and his revised calculations and the errors he made.

B. Law

"'California law allows expert testimony that is related "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."' [Citations.] Evidence Code section 805 permits such testimony to embrace an ultimate issue in the case, but experts may not offer their legal conclusions to the jury. [Citation.]" (*People v. Spence* (2012) 212 Cal.App.4th 478, 507.) "'There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. . . . '[T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. . . . Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be

fully tried without hearing opinions from those in better position to form them than the jury can be placed in." [Citations.]' [Citations.]" (*Id.* at p. 509.) We review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion. (*Ibid.*)

C. Analysis

Here, the trial court did not abuse its discretion by precluding Irving's trial counsel from cross-examining Sirmons about the primary and associated factors. The sole issue in this case was causation. The jury heard evidence Irving was speeding, under the influence of alcohol and marijuana, and driving erratically, and drove through a crosswalk. The jury also heard evidence Cantoran was in the crosswalk while the do not walk signal was illuminated. Based on the evidence presented at trial, the jury had to determine whether Irving's conduct was a substantial factor in causing Cantoran's injuries. (*People v. Sanchez* (2001) 26 Cal.4th 834, 848-849; CALCRIM No. 240.)

Sirmons's opinions concerning the collision's primary and associated factors were an impermissible legal conclusion that coincided with the ultimate issue in the case. (*Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1432 [police officer's opinion driver was "'most responsible'" for accident was a legal conclusion and not proper subject for expert opinion].) Although Irving's trial counsel assured the trial court it would not use the words fault or substantial factor, that is precisely what counsel sought to elicit from Sirmons. In his second report, Sirmons opined the primary factor of the collision was Cantoran violating the pedestrian walk/don't walk statute. The jury could rely on that expert opinion testimony to conclude Irving's conduct was not a substantial factor in causing Cantoran's injuries. That was an ultimate issue in the case, and thus Sirmons's testimony was impermissibly too helpful to the jury in performing its duty. (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183 [trial court excludes expert opinions that invade jury's province because in some cases they are "too helpful"].)

Additionally, Sirmons's opinion testimony concerning the collision's primary and associated factors were impermissible because they could be further simplified. The parties presented expert testimony about Irving's speed and intoxication. The jury also heard evidence Cantoran was on his cell phone as he approached the intersection, and he walked in the crosswalk in violation of the pedestrian do no walk signal. It was from this further simplified evidence that the jury could determine who caused the collision. The jury was as competent as Sirmons to weigh all the evidence and draw a conclusion on the issue of Irving's guilt. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

Irving cites to *People v. Glass* (1968) 266 Cal.App.2d 222 (*Glass*).[4] In that case, defendant, who was intoxicated, was driving between 60 and 65 miles per hour on a road with a posted speed limit of 45 miles an hour. (*Id.* at pp. 223-224.) Repair crews worked at an intersection and the road was significantly narrowed. (*Id.* at p. 224.) Defendant collided with a repair truck and killed two workmen. (*Ibid.*) There was evidence there was no flagman present to warn motorists of the repair crews, no speed reduction signs, and no barricades nearby to direct traffic out of the danger zone. (*Ibid.*) The trial court excluded a traffic engineer's expert witness testimony concerning the safety measures because it concerned the ultimate issue at trial. (*Id.* at pp. 224-225.) The Court of Appeal concluded this was error because the evidence could have shown that the unsafe condition of the road was the accident's sole cause. (*Id.* at p. 227.)

Unlike *Glass*, here Irving's trial counsel sought to question Sirmons about the primary and associated factors of the collision. In other words, counsel wanted to elicit testimony Cantoran caused the collision by violating the pedestrian do not walk signal and walking in the crosswalk against a red flashing hand. What the *Glass* court

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[4] Disapproved on other grounds in *People v. Superior Court* (1972) 6 Cal.3d 757, 765-766, footnote 7.

held was that the trial court erred by excluding evidence of the underlying conditions of the collision. The trial court here admitted evidence of the underlying conditions of the collision—Irving's intoxication, speeding, reckless driving, and Cantoran's violating the pedestrian do not walk signal—and left it to the jury to decide the ultimate issue of who caused the collision. *Glass* does not hold an expert can offer an opinion on the ultimate issue of guilt. Thus, the trial court did not abuse its discretion by denying Irving the right to cross-examine Sirmons concerning the collision's primary and associated factors. Because the court did not err, Irving suffered no prejudice.

III. Probation Ineligibility

Irving asserts the trial court erred by denying him probation based on the mistaken belief he was presumptively ineligible. Alternatively, Irving asserts he received ineffective assistance of counsel. We discuss these contentions below.

A. Background

In the probation report, the probation officer stated Irving had "[l]imited eligibility pursuant to" Penal Code section 1203, subdivision (e)(3)—a trial court must not grant probation to any person who "willfully inflicted great bodily injury" except in unusual cases in which it serves the interests of justice. She indicated that although he had suffered no felony convictions, he had suffered two alcohol related misdemeanor convictions, one of which was for driving under the influence of alcohol, and he was on probation when he committed the current offense. The probation officer stated there were no mitigating circumstances and four aggravating circumstances, which were the following: the manner in which Irving conducted the crime indicates planning; the crime involved the actual taking of great monetary value; Irving's convictions were of increasing seriousness; and Irving's probation performance was poor. The probation officer stated she considered the mitigated term but Cantoran's severe injuries

outweighed such a sentence. She recommended the trial court impose the middle term of two years on count 1 plus five years for the great bodily injury enhancement for a total of seven years in prison.

Irving's trial counsel submitted a sentencing brief that requested the trial court impose probation on 26-year-old Irving. Counsel explained Irving was exposed to alcohol and methamphetamine in utero and he has suffered from developmental, psychological, and behavioral problems his entire life. However, counsel did not address whether Irving was eligible for probation.

At the sentencing hearing, the trial court indicated it had read the written submissions. The prosecutor requested the trial court not impose a sentence less than six years and four months. The prosecutor added probation was inappropriate based on the fact Irving was on probation for driving under the influence of alcohol when he drove intoxicated and hit Cantoran leaving him with "the brain capacity of a five-year-old."

Irving's counsel requested the trial court sentence Irving to probation. Counsel stated Irving "disagree[d] with the probation officer's report in many respects, and recommendation." Counsel disagreed Irving's prior convictions establish a pattern or that he lacked remorse. However, counsel did not dispute Irving was presumptively ineligible for probation.

The trial court explained it was very familiar with the facts and spent considerable time reflecting on the case. The court said, "it is very difficult because I understand how young . . . Irving is and how he didn't have fly [*sic*] malicious intent to hurt anyone." The court added though it had to consider Cantoran's and his family's damage, trauma, and loss. After stating it had to consider the facts, law, and aggravating and mitigating factors, the court said, "With respect to sentencing, probation is denied." The court sentenced Irving to the low term of 16 months on count 1 and a consecutive term of five years on the great bodily injury enhancement for a total of six years and four months in prison.

B. Law

"The decision whether to grant or deny probation is reviewed under the abuse of discretion standard. [Citations.] 'An order denying probation will not be reversed in the absence of a clear abuse of discretion. [Citation.] In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. [Citations.]' [Citation.]" (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.)

"'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, . . . the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).) "Where . . . a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination. [Citations.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

"Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] '"[A] trial court is presumed to have been aware of and followed the applicable law." [Citations.]' [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229; *Gutierrez, supra,* 58 Cal.4th at p. 1390.)

C. Analysis

Irving asserts the trial court mistakenly believed he was presumptively ineligible for probation and he forfeited appellate review of this issue because his trial counsel failed to dispute that proposition in his sentencing brief or at the hearing. As a result of counsel's failure, Irving argues he received effective assistance of counsel.

It is true the probation officer stated Irving was presumptively ineligible for probation because he willfully inflicted great bodily injury. It is also true his trial counsel did not dispute the probation officer's conclusion.

But we cannot conclude the trial court mistakenly believed Irving was presumptively ineligible for probation based on the record before us. During the sentencing hearing, the trial court stated, "[Irving] didn't have [any] malicious intent to hurt anyone." Based on the court's statement, we can reasonably conclude it did not proceed based on the conclusion Irving "willfully inflicted great bodily injury." Because we presume the trial court was aware of and followed the applicable law, we cannot conclude the court denied Irving probation based on the mistaken belief he was presumptively ineligible for probation. Moreover, the fact the court weighed the circumstances for and against probation indicates it was aware it had a choice.

Additionally, we cannot presume from a silent record the court erred. This was not a situation where the court made any comments demonstrating it believed Irving was presumptively ineligible for probation. In fact, the court made a factual finding that removed him from presumptive ineligibility. Based on this record, we conclude the trial court did not deny Irving probation under the mistaken belief he was presumptively ineligible.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

Hart v. Wielt (1970)

[Civ. No. 12219. Court of Appeals of California, Third Appellate District. February 6, 1970.] MARGARET A. HART, Plaintiff and Respondent, v. WILLARD WIELT et al., Defendants and Appellants

(Opinion by Regan, J., with Janes, J., concurring. Separate dissenting opinion by Friedman, Acting P. J.)

COUNSEL

C. D. Matthews, Jr., Bledsoe, Smith, Cathcart, Johnson & Rogers and Robert A. Seligson for Defendants and Appellants.

A. John Merlo for Plaintiff and Respondent.

OPINION

REGAN, J.

Margaret A. Hart, plaintiff, brought suit against the defendants for personal injuries incurred as the result of an automobile accident. After a trial by jury, plaintiff was awarded $28,000 in damages.

Defendants invited plaintiffs to accompany them to Reno, Nevada, in defendants' automobile. Plaintiffs accepted. It was agreed the parties would travel from Chico by way of

Highway 32, drop off Mrs. Hart's daughter in Chester and proceed to Reno. The purpose of the trip was the mutual enjoyment of the parties. Before departing Mr. Hart paid to fill the gas tank.

Facts

Plaintiff, Mrs. Hart, and defendants had been friends for a number of years. They had taken several trips together, two of these trips being to Reno. The evidence was conflicting as to whether plaintiff (and her deceased husband) fn. 1 and the defendants always shared travel expenses and spelled each other in the driving, or whether there was an agreement as to such. In previous times, when plaintiff and Mrs. Wielt (codefendant) took trips, the two shared expenses and driving. **[4 Cal. App. 3d 228]**

The accident occurred about 2 p.m. on Highway 32 going toward Chester. It was daylight and slightly cloudy or overcast. Although the road was dry when the party departed Chico, several of the passengers noticed patches of ice of "black ice" on the road prior to the accident. There were also cinders on the roadway, and there was snow piled on each side of the road.

The road the Harts and the Wielts were traveling, at a speed of 30-35 miles per hour, was described as "a mountain curvy road, defiles and canyons," consisting of one curve after another. There were no speed-limit signs along the highway; thus, the applicable speed limit at the time was 65 miles per hour, subject to the basic speed law which is always the proper speed that conditions would warrant as safe. Mr. Wielt testified he knew he might hit patches of ice on the roadway and that he did not have on chains even though he carried them.

The accident occurred on a sharp and severe curve. Wieldt testified that as he approached the crest of the hill, he took his foot off the throttle to slow down. He began the turn and then encountered ice on the roadway, causing him to slide and skid, ending up colliding with a tree. There was a total of 201 feet of curving skid marks going from one side of the road to the other.

Prior to the accident, Wielt had passed a sports car driven by one Donald Snyder. Although Snyder had noticed no erratic driving on the part of Wielt, he testified: "I thought it was odd that he passed me when he did. Other than that I do not believe he was driving in an unsafe manner." Snyder stated that the road was a narrow mountainous road, very curvy, and that there was ice on the road.

After Wielt passed Snyder, Snyder stayed about 100 yards behind Wielt, both traveling at

about 30-35 miles per hour. Snyder observed the Wielt car going downhill and starting to negotiate an elongated "S" curve when it went out of control and hit the tree. The plaintiff, Mrs. Hart, suffered severe injuries.

Defendants contend that trial court committed prejudicial error in permitting the investigating police officer to state his opinion and conclusion on what a reasonable rate of speed was in and about the area of the accident and whether the driver's speed was excessive.

[1a] Officer Hugon of the California Highway Patrol was the investigating officer. He was generally qualified by counsel as being proficient in determining particular speeds for various highway conditions. Hugon was asked the following question by plaintiff's counsel: "Now based on your training and experience assuming ideal road conditions, say in the middle **[4 Cal. App. 3d 229]** of summer, no snow, not wet, what would be the reasonable speed in and about the area of the accident?"

Defense counsel objected that the question called for the conclusion of the witness. The trial court overruled the objection, but at the same time admonished the jury that it was up to the jury to make the final decision as to proper speed and also as to whether Hugon was qualified as an expert to give his opinion on speed. Officer Hugon then stated that a reasonable speed would be 25 miles per hour. Hugon testified that if the road was wet with snow on the side a reasonable speed in and about the area of the accident would be 10-15 miles per hour. In answer to another query, Hugon stated that a person driving under these conditions, in and about the area of the accident, at a speed of 30-35 miles per hour, could reasonably anticipate he might slip, slide, and have an injury accident. Defendant cites the foregoing opinion testimony as prejudicial error.

[2] It is generally established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations. (Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 631 [277 P.2d 897]; Zelayeta v. Pacific Greyhound Lines (1951) 104 Cal. App. 2d 716, 723-727 [232 P.2d 572]; See Evid. Code, § 801; Witkin, Cal. Evidence (2d ed. 1966) § 412, subd. 5, pp. 372-373, § 418, p. 378.)

In Kastner v. Los Angeles Met. Transit Authority (1965) 63 Cal. 2d 52, 57 [45 Cal. Rptr. 129, 403 P.2d 385], the court states: "It is equally clear that cases may occur where the opinions of trained experts in the field on this subject [of collision] will be of great assistance to the members of the jury in arriving at their conclusions. In such cases, a traffic officer who has spent years investigating accidents in which he has been required to render official reports

not only as to the facts of the accidents but also as to his opinion of their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field much must be left to the common sense and discretion of the trial court." (See also, People v. Haeussler (1953) 41 Cal. 2d 252, 260 [260 P.2d 8]; Wells Truckways, Ltd. v. Cebrian (1954) 122 Cal. App. 2d 666, 676-677 [265 P.2d 557].)

[1b] We find no abuse of discretion. Officer Hugon had been in the Highway Patrol for 13 years, had extensive training and schooling in accident investigations (including proper speeds under various conditions), and had investigated more than one accident weekly.

In Enos v. Montoya (1958) 158 Cal. App. 2d 394 [322 P.2d 472], the court found no error for the trial court to admit opinion evidence of the **[4 Cal. App. 3d 230]** highway patrolman who investigated the accident who testified to what was a reasonable and prudent speed at the curve where the accident occurred. In the instant case, as in Enos and Kastner, supra, the jurors were properly instructed they were not bound by the opinion of the witness but were free to determine the weight to which they deemed it entitled, and could reject it if in their judgment the reasons given for it were unsound.

[3a] Defendants next contend plaintiff and her counsel committed prejudicial error by repeatedly asking the prospective jurors on voir dire whether they owned stock in State Farm Mutual Automobile Insurance Company (which does not sell stock to the public), and by otherwise emphasizing the fact that State Farm was the automobile liability insurer involved in the instant case and that the defendants were insured by the company.

Section 1155 of the Evidence Code provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing." fn. 2

Defendants first claim as error the fact that on voir dire examination of the prospective jurors, plaintiff's counsel posed the following question: "Do you or any member of your family or are you or any member of your family employed by the State Farm Insurance Company or do you or any of your member of your family own any stock in the State Farm Insurance Company?" Counsel for defendants made no timely objection nor requested that the jury be admonished.

[4] In a personal injury action, counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company so long as the question does not unnecessarily convey the impression that defendant is in fact insured. (Jones v. Bayley (1942) 49 Cal. App. 2d 647, 659 [122 P.2d 293]; 2 Wigmore on Evidence (3d ed.) § 282a,

pp. 134-135.) [3b] We find no evidence of bad faith here.

[5] The second instance cited by defendant occurred during plaintiff's counsels direct examination of plaintiff regarding the various doctors who had examined plaintiff. After eliciting the fact that four doctors had examined plaintiff, the following occurred:

"Q. What about Dr. Olker? A. I had an examination with the State Farm Insurance for them."

The answer was nonresponsive and unexpected, for it is clear from later questioning that counsel was trying to elicit that plaintiff had been examined **[4 Cal. App. 3d 231]** by Dr. Oker at the behest of defense counsel. Counsel for defendants objected only on the ground the answer was not responsive. There was no request that the jury be admonished.

Later, during direct examination regarding plaintiff's medical bills, the following exchange occurred:

"Q. Is this a summary of the bills here indicated in the amount of each bill? A. These are the bills they sent me, they sent me 2 copies and I sent one to State Farm."

Defense counsel objected, stating: "There is no insurance company involved in this lawsuit" and the trial court so admonished the jury.

Again the plaintiff's reply was unexpected and unresponsive. Under the circumstances, we do not think either of the above instances constitutes error, since the answers could be characterized as either voluntary, unexpected, unresponsive or incidental. (Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 358 [37 P.2d 99]; see Little v. Superior Court (1961) 55 Cal. 2d 642, 645 [12 Cal. Rptr. 481, 361 P.2d 13]; Note, 4 A.L.R.2d 761,784.) Furthermore, the court properly admonished the jury.

[6] Later on, during redirect examination of plaintiff, counsel asked Mr. Hart who advised her to bring this suit, and Mrs. Hart replied: "Mrs. Wielt did." The question was improper, but an objection was immediately sustained. There was no request that the jury be admonished. Although this was error, in light of all the facts of the case, we deem it nonprejudicial under the circumstances here.

[7] Finally, defendants object to counsel's cross-examination of defendants' private investigator culminating in the fact that such investigator had previously worked as an adjuster for the State Farm Insurance Company "which Mr. Hogan Matthews [defense counsel] is now the attorney." There was no objection made to this line of questioning nor a

request that the jury be admonished.

In Moniz v. Bettencourt (1938) 24 Cal. App. 2d 718, 724 [76 P.2d 535], the court states: "Facts tending to show interest, bias or motive on the part of a witness may always be brought out on cross-examination even though it may thereby be disclosed that the defendant was protected by insurance." (See also, 2 Wigmore, Evidence § 282a, p. 135; Note, 4 A.L.R.2d 779.)

We think the cases cited by defendant are distinguishable. In Swift v. Winkler (1957) 148 Cal. App. 2d 927 [307 P.2d 666], counsel went far beyond the bounds of proper inquiry as to whether a prospective juror had an interest in a particular insurance company, and the question of liability was a very close one. **[4 Cal. App. 3d 232]**

In Stevenson v. Link (1954) 128 Cal. App. 2d 564 [275 P.2d 782], counsel made repeated and persistent reference to "the insurance company" on voir dire examination of the prospective jurors. And again, the evidence was sharply conflicting on the question of liability. In Mahnkey v. Bolger (1950) 98 Cal. App. 2d 628 [220 P.2d 824], although holding questions regarding insurance improper, the court declined to rule on this point and reversed on other grounds.

In concluding that there was no prejudicial error, we are well aware of the thin line that exists in this area (see Arnold v. California Portland Cement Co. (1919) 41 Cal. App. 420, 425-426 [183 P. 171], however, under the compulsion of Sabella v. Southern Pac. Co. (1969) 70 Cal. 2d 311 [74 Cal. Rptr. 534, 449 P.2d 750], we feel that the line was not crossed. In Sabella, supra, the court, in affirming a judgment for plaintiff after a jury verdict, found plaintiff's counsel to be guilty of deplorable misconduct "which might well have been prejudicial." (P. 317.) The court calls attention to Cope v. Davison (1947) 30 Cal. 2d 193, 203 [180 P.2d 873, 171 A.L.R. 667], as stated in Sabella, supra, 70 Cal.2d at page 317, footnote 5: "In any event, the trial court impliedly found no misconduct, or at least no prejudice, when ruling on the motion for new trial. 'A trial judge is in a better position that an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.'"

"'Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished.' [Citations.] '"As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the court an

opportunity to so act in the premises, if possible, as to correct the error and avoid a mistrial. Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would have removed the effect.'" [Citation.] "'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." [Citation.] ... [W]e are aware of no California case wherein a plaintiff's verdict was **[4 Cal. App. 3d 233]** reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such admonition could be effective.' [Citation.]

"This case is neither precisely like Horn v. Atchison T. & S. F. Ry. Co., 61 Cal. 2d 602 [39 Cal. Rptr. 721, 394 P.2d 56], supra, in which no objection or request for admonition was made until after conclusion of the closing argument (and relief was thus denied); nor like Hoffman v. Brandt (1966) 65 Cal. 2d 549 [55 Cal. Rptr. 417,421 P.2d 425], in which an admonition, especially as there given by the trial court, could not have been effective under the circumstances; nor like Love v. Wolff (1964) 226 Cal. App. 2d 378 [38 Cal. Rptr. 183], in which admonition of the jury was requested several times but disregarded by the trial court. Here defendant remained silent as to all but one line of argument, and as to the latter he objected but failed at any time to request an admonition of the jury to disregard the remarks. Under the circumstances we conclude that defendant must be denied relief. (See Estate of Hart (1951) 107 Cal. App. 2d 60, 70 [236 P.2d 884].)" (Sabella v. Southern Pac. Co., supra, 70 Cal.2d at p. 319.)

In the case before us the defendant's motion for a new trial was denied. Also, the defendant's motion for a judgment notwithstanding a verdict for plaintiff was denied and plaintiff was awarded her costs incurred. The trial court impliedly found no misconduct, or at least no prejudice when ruling on these motions.

Finally Sabella, supra, states (at pp. 320-321):

"We emphasize again that the particular language used by counsel and the form or lack of objection by defendant in this case are not meant to serve as invariable guidelines for future reference. Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.

"Our conclusions should in no way be interpreted as condoning the deplorable conduct of plaintiff's counsel. However, punishment of counsel to the detriment of his client is not the function of the court. [Citation.] Intemperate and unprofessional conduct by counsel as is here involved runs a grave and unjustifiable risk of sacrificing and otherwise sound case for recovery, and as such is a disservice to a litigant. These same tactics, in another context, would likely result in a reversal. However, under the **[4 Cal. App. 3d 234]** facts and circumstances of this case, we conclude that the award to plaintiff, as modified by the remittitur, is justified."

During the course of plaintiff's counsel's opening argument in the case before us, he stated: "I thought she [plaintiff] was very strong, she didn't break down. So I think she did better that I thought she would and she was stronger that I thought she would be but she still is on charity and she has never been on charity in her life. I don't think she should be on charity because I feel the responsibility is upon the defendant to leave her on charity that she must now receive -- which she now receives. The responsibility is upon the defendant who is responsible for her condition and the charity should end by an award sufficiently large against the defendant so she can put it out at reasonable interest and relieve herself of being a burden on the taxpayers -- she shouldn't be a taxpayers' burden and I can assure you ..."

Defense counsel at this point objected and cited misconduct of counsel. The court immediately admonished the jury that the case was to be decided upon the facts and law, and not upon emotional feelings.

[8] In an action for damages, a showing of poverty of the plaintiff is highly prejudicial; if such evidence is deliberately introduced, it may constitute reversible error. (Hoffman v. Brandt (1966) 65 Cal. 2d 549, 552-553 [55 Cal. Rptr. 417, 421 P.2d 425]; Witkin, Cal. Evidence (2d ed. 1966) § 376, p.334.)

However, the statements of counsel must be put in context. During the trial, and without objection the following matters were placed into evidence: Plaintiff's present source of income was $165 from state disability and $69 from Social Security due to being totally disabled from a leg injury sustained in the accident and subsequent nervous problems; she was unable to have an eye problem attended to because she had no money. [9] Thus, it could be argued that counsel was merely commenting upon the evidence produced at trial. Nevertheless, we think the references to "charity" and "a burden on the taxpayers" went too far and were improper.

In seeking a reversal on the ground of prejudicial misconduct, defendants rely on Hoffman

v. Brandt, supra, 65 Cal. 2d 549. In Hoffman, plaintiff, a 20- year-old woman, was in an automobile collision with defendant, who was 69 years of age. A strong case for recovery was shown, but the verdict went for defendant. The court reversed on the basis that defense counsel was guilty of misconduct. In his closing argument counsel stated that the amount demanded would send his client to a home for the indigent, and that this could be considered by the jury in reaching its verdict. This deliberate suggestion of poverty was improper and false, since defendant was **[4 Cal. App. 3d 235]** in fact covered by insurance. The judge's equivocal admonition, i.e., that the argument was not evidence, did not cure the deliberate and highly prejudicial error.

Hoffman recognizes, however, that the effect of an admonition upon such misconduct depends upon the facts of each case. We think Hoffman is distinguishable from the present case and that the admonition cured the error. When the argument was objected to, the court immediately admonished the jury that the case was to be decided upon the facts and law, not on appeals to emotions, which are improper. Thus, there is no equivocal admonition as in Hoffman, nor was there false argument such as in Hoffman. After the trial court's admonition, counsel immediately dropped the subject. We find the error to be nonprejudicial.

Defendant next assigns as error the fact that the trial court declined to instruct the jury that plaintiff was a guest, but rather submitted the issue of whether plaintiff was a guest or a passenger to the jury.

The jury was fully instructed with regard to the California guest law. (Veh. Code, § 17158.) There were no special verdicts. Thus, necessarily implied in the general verdict was a jury finding either that plaintiff was a passenger rather than a guest or that defendants were guilty of misconduct.

[10] Whether a person riding with another is a passenger or guest is to be determined by deciding whether the rider conferred a benefit on the driver in return for the ride. (Martinez v. Southern Pac. Co. (1955) 45 Cal. 2d 244, 250 [288 P.2d 868].) [11] As a general rule, the question is for the jury; once the jury has determined the question, the province of the appellate court is simply to examine the record to determine whether the finding is substantially supported. (Ibid.)

Here there was evidence, although conflicting, that the Harts and Wielts had shared expenses and driving chores prior to the trip in question, and there is at least an inference that this trip was to be no different since Mr. Hart paid for the gas prior to departure.

[12] We believe that there was substantial evidence form which the jury could reasonably infer that defendants' motivation in offering the ride was plaintiff's former conduct in sharing expenses and the driving, and thus there was no error in submitting the passenger-guest issue to the jury. (Cf. Nevarez v. Carrasco (1969) 1 Cal. 3d 518 [82 Cal. Rptr. 721, 462 P.2d 577].)

Defendants rely upon McCann v. Hoffman (1937) 9 Cal. 2d 279 [70 P.2d 909]. In that case, however, there had been no previous joint trips, **[4 Cal. App. 3d 236]** and there was no understanding as to the sharing of driving. We find McCann to be distinguishable.

Finally, we are convinced that the facts in this case present substantial evidence that Mr. Wielt was guilty of willful misconduct in attempting to negotiate the curve at the indicated speed under the weather and road conditions that existed at the time. (See Williams v. Carr (1968) 68 Cal. 2d 579, 584 [68 Cal. Rptr. 305, 440 P.2d 505]: Meyer v. Blackman (1963) 59 Cal. 2d 668, 677 [31 Cal. Rptr. 36, 381 P.2d 916].)

The judgment is affirmed.

Janes, J., concurred.

FRIEDMAN, Acting P. J.

I dissent. A trial is an entity. The cumulative effect of a group of improprieties cannot be assessed by measuring the quantum of prejudice attributable to each separate one. In weighing a compound of misconduct, "[e]ach case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." (Sabella v. Southern Pac. Co., 70 Cal. 2d 311, 320 [74 Cal. Rptr. 534, 449 P.2d 750].)

It is impossible to read the present record without inferring a deliberate program of plaintiff's attorney to brainwash the jury into a verdict motivated by awareness that Mr. and Mrs. Wielt were only nominal defendants, who had invited plaintiff (their long-time friend) to collect from State Farm Mutual Insurance Company, the real defendant, an award which would take her off the charity rolls and off the backs of the taxpayers (such as the jurors).

This program had its inception in the voir dire question inquiring into the panel members' interest in the insurance company. Viewed in isolation, that question was innocuous,

permissible if asked "in good faith." (2 Witkin, Cal. Procedure (1954) p. 1738.) Viewed as the first step in a sequence, it takes on harsher coloration. Not knowing what was to follow, defense counsel could not be expected to object to this unobjectionable voir dire inquiry.

The second step was Mrs. Hart's gratuitous pair of references to State Farm. These nonresponsive references may have been unexpected and, in **[4 Cal. App. 3d 237]** fairness to plaintiff's attorney, we should not assume that they were the product of coaching. However produced, they did contribute to the result.

Third was the grossly irrelevant, grossly improper, question which elicited the response that Mrs. Wielt had advised plaintiff to file the lawsuit. This question and its answer were so utterly and blatantly illicit that no innocent motive can be ascribed to them.

Fourth was the cross-examination of the defense investigator, through which the jury was told that defense counsel, Mr. Hogan Matthews, was really in court as the attorney for the insurance company. The question cannot be justified as an inquiry into bias, for the investigator's former employment by the insurance company had nothing to do with Mr. Matthews' status as its attorney.

Fifth was the blatantly impermissible appeal to the jury to award damages in order to take Mrs. Hart off charity and off the backs of the taxpayers. No express appeal was needed to have the jurors identify themselves as taxpayers. They would do that of their own accord.

California courts do not indulge in the naive assumption that uncolored awareness of insurance coverage will lead the jurors into an excessive verdict. (Causey v. Cornelius, 164 Cal. App. 2d 269, 276-280 [330 P.2d 468].) The vice of the present trial is the plaintiff's attempt to supplant legitimate decisional norms with a set of illegitimate jury motivations, that is, an emotional bias compounded out of sympathy for the destitute plaintiff, indifference to the acquiescent and even friendly defendants and awareness of the big, rich, impersonal target which would bear the cost.

For all that any of us judges know, the attempt may have been successful. I have trouble with the notion that the appellate court should accept the trial court's determination of misconduct's effect unless it is "plainly wrong." (See Sabella v. Southern Pac. Co., supra, 70 Cal.App.2d at p. 317, fn. 5.) The determination is too subjective, involving variables of tolerance. Moreover, trial judges have no more access to jury room dialogues than do appellate judges.

There were enough objections and requests for admonition to demonstrate that defense counsel was not indulging in silence for the purpose of gambling on the verdict. (Cf. Sabella

v. Southern Pac. Co., supra, 70 Cal.App.2d at pp. 318-319; Horn v. Atchison T. & S. F. Ry. Co., 61 Cal. 2d 602, 610 [39 Cal. Rptr. 721, 394 P.2d 561].) The cumulative prejudice from the combination of improprieties was such that no admonition **[4 Cal. App. 3d 238]** could cure it. (Hoffman v. Brandt, 65 Cal. 2d 549, 553 [55 Cal. Rptr. 417, 421 P.2d 425].)

In our exalted moments we of the bench and bar are wont to describe a trial as a "search for truth." Forensic hijinks such as the present make a mockery of that description. The financial stakes in personal injury trials are high. The participants are engaged in relentless struggle. Appellate wrist-slappings are not going to stop the unseemly stagecraft which characterizes many jury trials. Seen in the perspective of social history, the personal injury settlement-and-trial industry may be an expensive anachronism whose overhead society can ill afford. Even within the existing rules of the game, judges and lawyers should not forget the judgments of history.

I agree that we must not deprive litigants of favorable verdicts in order to punish counsel. (Sabella v. Southern Pac. Co., supra, 70 Cal.2d at pp. 320-321.) I am conscious too that article VI, section 13, of the California Constitution permits reversal only where justice has miscarried. (Garden Grove School Dist. v. Hendler, 63 Cal. 2d 141, 144 [45 Cal. Rptr. 313, 403 P.2d 721].)

In criminal cases it is recognized that a judgment reached through an unfair trial is a denial of due process, which cannot be shielded by article VI, section 13. (People v. Lyons, 47 Cal. 2d 311, 324 [303 P.2d 329]; People v. Sarazzawski, 27 Cal. 2d 7, 11 [161 P.2d 934].) Since the concept of due process applies to property as well as life and liberty, I see no reason why this salutary concept of appellate control cannot hold sway as a means of ordering retrials in unfairly tried civil cases. I would reverse.

FN 1. Mr. Hart was originally a plaintiff, but he died of causes not connected with the accident prior to trial. His case was dismissed at the trial-setting conference.

FN 2. The Law Revision Commission Comment states that this section codifies existing law, citing Roche v. Llewellyn Iron Works Co. (1903) 140 Cal. 563 [74 P. 147].

Filed 4/30/14 P. v. Landeros CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID BRANDON LANDEROS, Defendant and Appellant.	C072553 (Super. Ct. No. 12F01176)

Defendant David Brandon Landeros, heavily intoxicated and driving down I Street in Sacramento at a high rate of speed, crashed into two vehicles. After clipping the first car as he passed it on the right, causing minor damage to the tail light, he crashed into a second car that was parked in front of the Sacramento County Jail, sending this car onto the sidewalk and into a tree. Roxanne Contreras and her husband's grandparents, Manuel and Ernestine Contreras, were in the second car. Manuel and Ernestine sustained serious injuries. Defendant was convicted by jury of causing bodily injury while driving under the influence of alcohol (Count 1), causing bodily injury while driving with a blood-alcohol concentration of 0.08 percent or more (Count 2), and driving with a suspended license (Count 3). With respect to Counts 1 and 2, the jury found various great bodily injury enhancement allegations to be true and also found defendant caused bodily injury to more than one victim. With respect to Count 2, the jury also found defendant's blood-

alcohol concentration was 0.15 percent or more. The trial court sentenced defendant to serve an aggregate prison term of 13 years and imposed other orders.

On appeal, defendant contends the trial court prejudicially erred by allowing a police officer to testify to her opinion that he drove at an unsafe speed and caused the accident because "these issues were for the jury to decide." We conclude the trial court did not abuse its discretion in allowing this testimony. We therefore affirm the judgment.

FACTS

During the early morning hours of February 11, 2012, defendant left a nightclub in Midtown Sacramento and drove down I Street in a white Mercedes. He was heavily intoxicated and driving at a high rate of speed, "probably like 70" miles per hour, according to David McClure, the driver of the first car he crashed into.

McClure was driving a black Mercedes in the middle lane at about 30 miles per hour. As McClure approached 7th Street, defendant passed him on the right and clipped his tail light in the process. McClure "felt like [he] had been hit," continued through 7th Street, and pulled over to the left side of I Street. Before McClure could park, he witnessed defendant's car crash into a silver Toyota that was parked in front of the Sacramento County Jail on the right side of I Street. The impact sent the Toyota onto the sidewalk and into a tree in front of the jail.

Roxanne Contreras and her husband's grandparents, Manuel and Ernestine Contreras, were in the Toyota when the accident occurred. They had parked moments before. Manuel was driving; Roxanne and Ernestine were seated in the back seat. All three suffered injuries and were taken by ambulance to University of California at Davis Medical Center.

Ernestine's injuries were the most severe. The treating neurosurgeon explained: "She had a bleed on the right side of the head that was pushing on her brain, and there was quite a bit of swelling from the impact to her brain." This injury resulted in her being in a comatose state when she arrived at the hospital and required a portion of her

cranium to be temporarily removed to relieve the pressure on her brain. Ernestine also had a spinal fracture between the fifth and sixth cervical vertebrae, requiring placement of a titanium plate and screws to stabilize her spine, as well as pelvis and rib fractures. She remained at the hospital for about two months. Manuel, 84 years old, also sustained serious injuries. He had a spinal fracture of the twelfth thoracic vertebra, requiring placement of rods and screws, as well as blunt trauma to the head and a left fibula fracture. Manuel remained at the hospital for about two weeks. Roxanne's injuries were less serious. She was released after 24 hours with bruises on her arms and legs and pain in her tailbone that lasted about a month.

After the accident, defendant got out of his car and sat on a cement bench in front of the jail, where he was contacted by Officer Matt Hoffman of the Sacramento Police Department. Officer Hoffman immediately "smelled a strong odor of alcoholic content coming from his person." Defendant's speech was slurred and his eyes were "bloodshot and very watery." He admitted to driving the white Mercedes involved in the accident and said he had one drink. When asked to produce a driver's license, defendant responded that "he did not have a driver's license because it was suspended." At this point, Officer Hoffman asked defendant some "preliminary alcohol screening questions" and continued with a field sobriety test, the results of which indicated "there was a high volume of alcohol in his blood." Officer Hoffman then administered a field breath test, which confirmed "there was a significant amount of alcohol in his system," and placed defendant under arrest for driving under the influence. Defendant's blood was drawn around 3:20 a.m., about an hour after the accident. His blood alcohol concentration was 0.33 percent, over four times the legal limit.

The accident was captured on the jail's video surveillance system. The footage was played for the jury during Officer Tobi Hitchcock's testimony. She conducted an accident investigation, which included personally taking a statement from Manuel, obtaining the statements taken from defendant and McClure, observing the vehicles

involved in the crash, taking measurements, and viewing the surveillance video. Officer Hitchcock concluded defendant's speed at the time of the accident was "unsafe for the conditions" and his speed caused the accident.

DISCUSSION

Defendant contends the trial court prejudicially erred by allowing Officer Hitchcock to testify to her opinion defendant drove at an unsafe speed and his speed caused the accident because "these issues were for the jury to decide." We disagree.

A.

Additional Background

Defendant was charged in Counts 1 and 2 with causing bodily injury while driving under the influence of alcohol and causing bodily injury while driving with a blood-alcohol concentration of 0.08 percent or more. Vehicle Code section 23153, subdivision (a), provides: "It is unlawful for a person, while under the influence of any alcoholic beverage to drive a vehicle *and concurrentl do an act forbidden b law, or neglect an dut imposed b law in driving the vehicle, which act or neglect pro"imatel causes bodil injur to an person other than the driver.*" (Italics added.) Similarly, subdivision (b) of this section provides: "It is unlawful for a person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle *and concurrentl do an act forbidden b law, or neglect an dut imposed b law in driving the vehicle, which act or neglect pro"imatel causes bodil injur to an person other than the driver.*" (Veh. Code, § 23153, subd. (b), italics added.) Thus, in addition to determining whether or not defendant drove while under the influence of alcohol and/or while having a blood-alcohol concentration of 0.08 percent or more, the jury was required to determine (1) whether or not he did an act forbidden by law while driving the vehicle (i.e., driving at an unsafe speed), and if so, (2) whether or not this act caused bodily injury to the victims.

During Officer Hitchcock's testimony, she was asked whether she had formed an opinion concerning the speed of defendant's car based on her review of the surveillance

video. Defense counsel interjected: "I am going to object to the line of questioning *as to foundation*. And so I don't drive everyone nuts, I am going to just ask there to be an ongoing objection, because we seem to be getting into it anyway." (Italics added.) The trial court responded: "And there is nothing to object to yet here." Addressing the prosecutor, the trial court stated: "I want you to rephrase this question. You are setting up a foundation of does she have an opinion, but I want to know what opinion you are going to be asking her; in other words, the scope of the opinion." The prosecutor responded: "I am going to ask her for the opinion of whether the speed contributed to the causation of the accident." Noting defendant's "continuing objection," the trial court ruled: "All right. I'll allow that." Officer Hitchcock then testified she determined the accident was caused by defendant driving at an unsafe speed.

B.

Forfeiture

Defendant's argument on appeal is not that Officer Hitchcock's opinion lacked foundation. Instead, defendant contends it "usurped the jury's function of determining each element of the crime." The Attorney General contends the claim is forfeited because defendant did not object to Officer Hitchcock's testimony on this basis at trial. (See *People v. D kes* (2009) 46 Cal.4th 731, 756 ["trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal"].) In response, defendant argues any objection to Officer Hitchcock's testimony on the basis that her opinion invaded the province of the jury would have been futile because, despite his limited objection, the trial court asked the prosecutor what the opinion would be and ruled the opinion admissible. (See *People v. Wilson* (2008) 44 Cal.4th 758, 793 ["litigant need not object . . . if doing so would be futile"].) He also notes we have "discretion to consider issues that have not been formally preserved for review." Finally, in the alternative, defendant asserts his trial

counsel provided constitutionally deficient assistance by failing to object to Officer Hitchcock's testimony on the ground now asserted on appeal.

Defendant clearly did not object to Officer Hitchcock's testimony on the same ground asserted on appeal. However, the trial court did not simply overrule the foundation objection and allow the testimony, but instead asked the prosecutor to reveal the substance of Officer Hitchcock's proposed testimony and ruled that her opinion regarding whether defendant's speed caused the accident would be admitted notwithstanding defendant's "continuing objection." The question is whether this ruling would have indicated to defense counsel that a further objection on the basis of improper opinion would be futile. We need not decide the issue. Because defendant's alternative claim of ineffective assistance of counsel would require consideration of the merits in determining whether counsel's performance fell below an objective standard of reasonableness, we assume for purposes of this opinion the claim is preserved for review and reach the merits.

C.

Merits

"It is generally established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations." (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229 (*Hart*).) Such testimony "is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.)

"However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 (*Summers*).) For example, "an expert's opinion . . . is not admissible if it invades the province of the jury to decide a case. 'Undoubtedly there is a kind of statement by the witness which

amounts to no more than an expression of his [or her] general belief as to how the case should be decided or as to the amount of unliquidated damages which should be given. It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.' " (*Id.* at pp. 1182-1183, quoting 1 McCormick on Evidence (4th ed. 1992) § 12, p. 47.) "Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). '[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." [Citation.]' (*People v. Torres* (1995) 33 Cal.App.4th 37, 47 [39 Cal.Rptr.2d 103]; see 1 McCormick on Evidence, *supra,* § 12, p. 49, fn. 11 ['The fact that an opinion or inference is not objectionable because it embraces an ultimate issue does not mean, however, that all opinions embracing the ultimate issue are admissible. . . . Thus, an opinion that plaintiff should win is rejected as not helpful'].) In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Summers, supra*, 69 Cal.App.4th at p. 1183.)

We review the trial court's decision to allow Officer Hitchcock's expert opinion testimony for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 266; *Kastner v. Los Angeles Metropolitan Transit Authorit* (1965) 63 Cal.2d 52, 57 ["in this field much must be left to the common sense and discretion of the trial court"].)

In *Hart, supra*, 4 Cal.App.3d 224, we concluded there was no abuse of discretion where the trial court allowed "the investigating police officer to state his opinion and conclusion on what a reasonable rate of speed was in and about the area of the accident

and whether the driver's speed was excessive." (*Id.* at p. 228.) Similarly, in *Enos v. Monto a* (1958) 158 Cal.App.2d 394 (*Enos*), the First District Court of Appeal concluded there was no abuse of discretion where the trial court allowed "opinion evidence of the California highway patrolman who investigated the accident as to what was a reasonable or prudent speed at the curve where the accident occurred." (*Id.* at p. 398.) In neither case was the expert's opinion merely an expression of his belief as to how the case should be decided. And in both cases, "the jurors were properly instructed they were not bound by the opinion of the witness but were free to determine the weight to which they deemed it entitled, and could reject it if in their judgment the reasons given for it were unsound." (*Hart, supra,* 4 Cal.App.3d at p. 230; *Enos, supra,* 158 Cal.App.2d at p. 399; see also *People v. Cole* (1956) 47 Cal.2d 99, 105 ["The jurors, of course, were not bound by the opinion of the witness but were free to determine the weight to which it was entitled and to disregard it if they found it to be unreasonable, and they were so instructed"].)

Here, like *Hart* and *Enos*, Officer Hitchcock provided useful testimony concerning defendant's speed at the time of the accident. She also testified to her opinion that this speed contributed to causing the accident. While these opinions embraced ultimate issues, they did not usurp the role of the jury. Indeed, also like *Hart* and *Enos*, the trial court specifically instructed the jury: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, *but ou are not required to accept them as true or correct.* The meaning and importance of any opinion are for you to decide. [¶] In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether the information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (Italics added.) There was no abuse of discretion.

Nor are we persuaded by defendant's reliance on *Summers, supra*, 69 Cal.App.4th 1155. There, the Fifth District Court of Appeal held expert opinion testimony from an attorney (Anderson) in a wrongful death case crossed the line between aiding and supplanting the jury. The death occurred when the decedent, Summers, was involved in an accident with a truck pulling two trailers of corn. Two of the defendants in the lawsuit were Cotton and Gilbert. Cotton owned the truck and trailers; Gilbert owned the corn. (*Id.* at pp. 1159-1160.) At trial, "Anderson opined that Gilbert had a nondelegable duty; Cotton was hauling illegally; Gilbert's contracts with Cotton were illegal; Gilbert was legally required to be registered as a contract carrier rather than a private carrier; and Gilbert was *liable* for Cotton's acts under the doctrine of nondelegable duty, respondeat superior and negligent hiring of an incompetent contractor. Anderson even pulled out his proverbial crystal ball and predicted what future Courts of Appeal would do with respect to the current regulation of transportation in California." (*Id.* at p. 1160.) After holding most of Anderson's testimony was not admissible because it improperly expounded upon the law and thereby usurped the role of the trial court (*id.* at pp. 1184-1185), the court went on to hold: "Anderson's opinion that Gilbert was *liable* for Cotton's conduct was not admissible because it went beyond merely addressing an ultimate issue. Anderson's 'expert opinion' was nothing more than an attempt to direct the jury to the ultimate conclusion they should reach—Gilbert must be held liable for damages suffered by plaintiffs as the result of decedent's death. This opinion is not helpful; it is an attempt by the witness to usurp the role of the jury in weighing the evidence and drawing the appropriate conclusions. Reading Anderson's testimony in its entirety, we conclude that he was *advocating*, not *testif ing*. In essence, cloaked with the impressive mantle of 'expert,' Anderson made plaintiff's closing argument from the witness stand. This is a misuse of expert witnesses, and renders his testimony inadmissible under Evidence Code section 801." (*Id.* at p. 1185.)

This case is not *Summers*. Officer Hitchcock's testimony was not merely an attempt to direct the jury how to decide the case. Nor was she advocating from the witness stand. She offered her opinion as to defendant's speed at the time of the accident and whether his speed caused the accident. While her testimony embraced ultimate issues to be decided by the jury, it did not invade the province of the jury to decide the case. We conclude the trial court did not abuse its discretion in allowing the challenged testimony.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

RAYE, P. J.

BUTZ, J.