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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE H. ALVARADO, Defendant and Appellant.	E079224 (Super.Ct.No. BAF1800198) OPINION

APPEAL from the Superior Court of Riverside County. Stephen J. Gallon, Judge. Affirmed.

Enrique H. Alvarado, in pro. per.; and Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted Enrique Heredia Alvarado of one count of second degree murder (Pen. Code, § 187, subd. (a)) for killing Denise C. and one count of causing injury to Daniel M. while driving with a blood-alcohol content (BAC) of 0.08 or greater (Veh. Code, § 23153, subd. (b)). (Unlabeled statutory references are to the Penal Code.) The trial court sentenced Alvarado to an aggregate term of 17 years to life in state prison.

We appointed counsel to represent Alvarado on appeal, and counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738, asking us to conduct an independent review of the record. After defense counsel filed the *Wende* brief, we advised Alvarado that he could file a personal supplemental brief, which he has done. We reject Alvarado's arguments, and our independent review of the record has revealed no arguable issues. We therefore affirm the judgment.

BACKGROUND

A. *The Collision*

One night in February 2018, Jesus M. drove north on Lyon Avenue in a minivan. Daniel (Jesus's son) sat in the front passenger seat, and Denise (Jesus's granddaughter and Daniel's niece) sat in the row of seats behind Jesus and Daniel. About 20 minutes before midnight, Jesus approached the intersection of Lyon Avenue and Ramona Boulevard. The intersection had a four-way stop, so all lanes of traffic were required to stop. The speed limit on Lyon Avenue was 45 miles per hour. The speed limit on Ramona Boulevard east of the intersection was 35 miles per hour and 45 miles per hour

west of Lyon Avenue. The intersection had one streetlight. Daniel described the lighting as "[m]ediocre."

As Jesus approached the intersection, he noticed a car's headlights to the right on Ramona Boulevard. Daniel also noticed headlights that appeared to be far away. Jesus came to a complete stop and then proceeded cautiously. Denise screamed. The minivan was struck on the passenger side by a sedan driven by Alvarado and traveling westbound on Ramona Boulevard. Jesus could not recall the collision. The minivan spun around and came to a stop when it crashed into a gate or a fence. Jesus and Daniel exited through the driver's door. Daniel found Denise lying on the ground next to a light post. She was nonresponsive.

People who happened upon the scene called 911. Daniel estimated that law enforcement arrived within 10 minutes of the collision.

Sheriff's deputies arrived on the scene before midnight and within minutes of being dispatched. The first deputy to arrive went to Denise and found her unresponsive and without a pulse. Paramedics performed CPR on her and transported her to a hospital, where she was pronounced dead. Denise died as a result of "[b]lunt impact injuries to the head and neck."

Daniel was having difficulty breathing and was in pain, so paramedics also took him to a hospital. Daniel was bleeding internally in his abdomen and had abrasions around his neck, collarbone, and chest.

The second sheriff's deputy at the scene checked on Alvarado. Alvarado was semi-conscious, had a bloody nose, and was having difficulty breathing. The deputy

spoke briefly with Alvarado and smelled "a faint smell of alcohol" coming from Alvarado's mouth. A paramedic assessed Alvarado and transported him to a hospital. The paramedic smelled alcohol on Alvarado's breath and noticed that Alvarado slurred his speech.

Deputies discovered two empty beer cans in Alvarado's car, one of which was on the front passenger seat, and another six unopened cans of beer in an open case of Bud Light on the floorboard of the passenger side. The on-site deputies did not ask Alvarado any questions about whether he had consumed alcohol, because Alvarado was injured.

B. *Blood-Alcohol Content*

Blood was drawn from Alvarado at 1:00 a.m., 2:19 a.m., and 2:20 a.m. The 1:00 a.m. sample was collected from Alvarado at the emergency room for medical treatment purposes. The two later samples were taken pursuant to a warrant.

A laboratory tested the blood plasma from the 1:00 a.m. sample for alcohol. It had a BAC of .238 or .242 percent. A toxicologist separately tested the whole blood from the 1:00 a.m. blood draw and determined that the BAC was .250 percent. The toxicologist explained how those results were consistent. Alvarado's BAC at 2:19 a.m. or 2:20 a.m. was .207 percent.

The toxicologist opined, based on hypothetical facts about a collision mirroring the ones in this case and with the BAC from the blood samples at the same intervals postcollision, that when the collision occurred the driver "would be impaired for the purposes of driving." The toxicologist explained that "everyone is impaired" for driving with a BAC level of .08 percent.

C. *The Investigation*

Several deputies who had investigated the collision between Alvarado's car and Jesus's minivan testified. From the damage sustained by Alvarado's car and the placement of initial gouge marks on the road from his tires, investigators determined that Alvarado's car was airborne when it hit the minivan. The needle on the speedometer of Alvarado's car displayed the speed the car was traveling at impact because Alvarado's car lost power as a result of the severity of the impact, so the needle did not reset. The speedometer indicated that Alvarado was traveling at 90 miles per hour at impact, which the primary investigator opined was consistent with the totality of the circumstances of the collision.

There was no evidence that Alvarado attempted to brake before the collision. If Alvarado had applied the brakes, the car would have stopped.

D. *Alvarado's Prior Conviction*

In 2009, Alvarado pled guilty to two counts of driving under the influence (DUI) in violation of Vehicle Code section 23152, subdivisions (a) and (b). Alvarado signed a plea agreement that contained the following advisement: "'You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs or both. If you continue to drive while under the influence of alcohol or drugs or both, and, as a result of that driving someone is killed, you can be charged with murder.'" (Such advisement is commonly referred to as a "*Watson* advisement" after *People v. Watson* (1981) 30 Cal.3d 290, 296 (*Watson*) and

is required to be given under Vehicle Code section 23593 to any person convicted of a DUI.) A minute order from the 2009 proceeding indicated that the trial court orally gave Alvarado the required advisement.

The court ordered Alvarado to attend a four-month alcohol program. Alvarado attended a program called the "Rehabilitation Alcohol Program." The course consisted of 15 once-weekly, two-hour classes. Students were taught that "driving under the influence is dangerous to human life" and shown "gruesome" video recordings of car accidents resulting in death to demonstrate "how alcohol can have an impact on driving." Alvarado completed the course.

DISCUSSION

Alvarado argues that (1) the trial court erred by excluding evidence that Denise was not wearing a seatbelt at the time of the collision; (2) the trial court erred by not instructing the jury on gross vehicular manslaughter as a lesser included offense; (3) trial counsel provided ineffective assistance by not objecting on either ground; (4) there is insufficient evidence of intent to kill to support the murder conviction; and (5) "California's 1st, and 2nd-Degree felony murder is now void for vagueness." We reject the arguments.

A. *Ineffective Assistance of Counsel*

Contrary to Alvarado's contention, defense counsel advocated both for the admission of evidence that Denise was not wearing a seatbelt and for instruction on gross vehicular manslaughter as a lesser included offense of second degree murder. Because trial counsel in fact made the arguments that Alvarado contends his counsel did not make,

Alvarado has not carried his burden on appeal of establishing that counsel was ineffective on that basis.

B. *Seatbelt Evidence*

The trial court did not abuse its discretion by excluding evidence that Denise was not wearing a seatbelt. (*People v. Waidla* (2000) 22 Cal.4th 690, 723 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence"].) In granting the prosecution's motion to exclude the seatbelt evidence as not relevant (Evid. Code, § 350), the trial court found *People v. Wattier* (1996) 51 Cal.App.4th 948 (*Wattier*) directly on point. We agree with the court's assessment.

In *Wattier*, the defendant was charged with vehicular manslaughter after causing a collision that resulted in the death of a passenger in another car who was not wearing a seatbelt. (*Wattier*, *supra*, 51 Cal.App.4th at p. 951.) *Wattier* concluded that the trial court had properly excluded the evidence as irrelevant to the causation of the passenger's death. (*Id.* at p. 953.) *Wattier* explained that (1) "[f]acts attacking legal causation are only relevant if the defendant's act was *not* a substantial factor in producing the harm or injurious situation," (2) a "defendant is liable for a crime *irrespective* of other concurrent causes contributing to the harm [citation], and particularly when the contributing factor was a preexisting condition of the victim," and (3) "a superseding cause must break the chain of causation *after* the defendant's act before he or she is relieved of criminal liability for the resulting harm." (*Ibid.*) Applying those principles of law, *Wattier* concluded that the decedent passenger's "'failure to provide . . . a safety belt barrier . . .

did not "break" the chain of causation; rather it was an *absence* of intervening force, which *failed to break* the chain of the natural and probable consequences of [the] appellant's conduct. . . . [The d]efendant *cannot complain because no force intervened to save him from the natural consequences of his criminal act*. . . ." (*Ibid.*)

We agree with the analysis and conclusion of *Wattier*, *supra*, 51 Cal.App.4th at page 953. In any event, *Wattier* is directly on point, and there is no contrary authority. The trial court accordingly was required to follow *Wattier*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).) For these reasons, we conclude that the trial court did not abuse its discretion by excluding evidence that Denise was not wearing a seatbelt.

C. *Sufficiency of the Evidence*

Alvarado also argues that there was insufficient evidence of intent to support the second degree murder conviction. We disagree. In reviewing the sufficiency of the evidence, we "view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier [of fact] could reasonably deduce from the evidence." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Murder committed without premeditation and deliberation is of the second degree. (§ 189; *People v. Elmore* (2014) 59 Cal.4th 121, 133.) Malice may be express or implied for second degree murder. (§ 188, subd. (a); *People v. Wolfe* (2018) 20 Cal.App.5th 673, 681.) "Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life,

performed with conscious disregard for that danger." (*Elmore*, *supra*, at p. 133.) Thus, killing a person while driving intoxicated is second degree murder if "a person, knowing that his [or her] conduct endangers the life of another, nonetheless acts deliberately with conscious disregard of life." (*Watson*, *supra*, 30 Cal.3d at p. 296.)

In *Watson*, the Supreme Court "held that the following evidence, in combination, was sufficient to support a finding that the defendant had acted with conscious disregard for life: (1) The defendant had consumed enough alcohol to impair his physical and mental faculties, knowing he would have to drive later, and presumably was aware of the hazards of driving while intoxicated; (2) the defendant had driven at high speeds on city streets, creating a great risk of harm or death; and (3) the defendant was aware of the risk, as shown by the near collision and by the belated attempt to brake before the fatal collision." (*People v. Olivas* (1985) 172 Cal.App.3d 984, 988 (*Olivas*); *Watson*, *supra*, 30 Cal.3d at pp. 300-301.) *Watson* did not hold that any of those particular facts or factors is necessary in order to justify a second degree murder conviction in a vehicular homicide case. (*Olivas*, *supra*, at p. 989.)

Nevertheless, there was sufficient evidence of all of the *Watson* factors here. Viewing the evidence in the light most favorable to the People, the evidence was as follows: Alvarado's breath smelled of alcohol immediately after the collision. He had two empty beer cans and six unopened beer cans in his car. About one hour after the collision, Alvarado's BAC was somewhere between .238 and .250 percent—nearly three times the legal limit—and an hour and 20 minutes later it was over twice the legal limit. (Veh. Code, § 23153, subd. (b).) A toxicologist opined that the measurements meant that

Alvarado was impaired when the collision happened. Alvarado was driving 90 miles per hour—55 miles per hour over the speed limit—when his car struck Jesus's minivan, after Alvarado failed to stop at a stop sign. Alvarado did not apply his brakes before the collision. In addition, Alvarado had a prior DUI conviction and consequently had received oral and written *Watson* advisements that it was extremely dangerous to human life to drive while under the influence of alcohol and that he could be charged with murder if he killed anyone while doing so. The point was reiterated and emphasized in the 15-week mandated course that Alvarado attended, in which he was shown graphic videos of fatal collisions caused by driving under the influence. We conclude that the evidence was sufficient to support Alvarado's second degree murder conviction. (See, e.g., *People v. McCarnes* (1986) 179 Cal.App.3d 525, 533-535 [sufficient evidence of implied malice based on BAC level of .27 percent, four prior DUI convictions, and "extremely reckless" driving].)

D. *Gross Vehicular Manslaughter Instruction*

Defense counsel moved the trial court to instruct the jury on gross vehicular manslaughter as a lesser included offense of second degree murder. Relying on *People v. Sanchez* (2001) 24 Cal.4th 983 (*Sanchez*) and *People v. Wolfe* (2018) 20 Cal.App.5th 673 (*Wolfe*), the trial court denied the motion and did not give the instruction. Alvarado contends that the ruling was error. We disagree.

"Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of [specified laws prohibiting DUIs] . . . ." (§ 191.5, subd. (a).)

In general, "when a defendant is charged with a crime, the trial court must instruct the jury on any lesser included offenses that are supported by the evidence." (*Wolfe*, *supra*, 20 Cal.App.5th at p. 684.) "'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*Ibid.*) We independently review whether a trial court erred by failing to instruct on a lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

In determining whether a defendant could properly be convicted of both murder and gross vehicular manslaughter while intoxicated based on the same conduct, *Sanchez* held that gross vehicular manslaughter while intoxicated under section 191.5 is not a lesser included offense of murder because intoxication and driving a vehicle are elements of the section 191.5 offense but are not elements of murder. (*Sanchez*, *supra*, 24 Cal.4th at p. 989.) In *Wolfe*, the defendant was charged with second degree *Watson* murder and not gross vehicular manslaughter while intoxicated. (*Wolfe*, *supra*, 20 Cal.App.5th at p. 685.) *Wolfe* held that in light of *Sanchez* the trial court did not err by not instructing the jury on gross vehicular manslaughter while intoxicated as a lesser included offense of second degree murder. (*Wolfe*, at p. 686.) In light of those holdings, by which the trial court was bound (*Auto Equity*, *supra*, 57 Cal.2d at p. 455), we conclude that the trial court did not err by declining to instruct the jury on gross vehicular manslaughter.

E. *Felony Murder*

We need not and do not address Alvarado's argument about the constitutionality of felony murder, because Alvarado was not convicted under a felony murder theory.

F. *Independent Review*

We have independently reviewed the record and find no arguable error that would result in a disposition more favorable to Alvarado. (*People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *Wende*, *supra*, 25 Cal.3d at pp. 441-442.)

DISPOSITION

The judgment is affirmed.

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MENETREZ
J.

We concur:

CODRINGTON
Acting P. J.

RAPHAEL
J.