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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNETH GERALD DICK, Defendant and Appellant.	A127954 (San Francisco County Super. Ct. No. 202882)

I. INTRODUCTION

After a traffic altercation in a San Francisco residential area, an altercation which resulted in two successive collisions between appellant's car and another man's car and a subsequent verbal argument between the two men, appellant was charged with six counts, two of assault (Pen. Code, § 245, subd. (a)(1)), and four Vehicle Code violations. The jury found him guilty on all counts, although of a lesser-included offense on one of the charges. It also found true an allegation that, at the time of the incidents in question, appellant had a blood alcohol level of over .15 percent. Appellant appeals and, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asks this court to review the record and determine if there are any issues deserving of further briefing. We have done so, find none, and hence affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

By an information filed on September 25, 2007, in San Francisco Superior Court, appellant was charged with one felony and five misdemeanors arising out of the collision

of his car with another driver's car and person several months earlier; that incident, as described at the subsequent trial, will be discussed further below.

The felony charge in the information was of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), charged in count 2. The misdemeanor counts were one charging the same crime as a misdemeanor and then four Vehicle Code misdemeanors, i.e., driving under the influence with resulting injury, driving with over .08 percent blood alcohol content with resulting injury, driving on a suspended license, and hit and run—respectively counts 1, 3, 4, and 5. The third and fourth counts also contained an allegation that appellant's blood alcohol content was over .15 percent. (See Veh. Code, §§ 23153, subd. (a) & 23578, 23153, subd. (b) and 23578, 14601.1, subd. (a), and 20002.) Appellant entered pleas of not guilty to all the charges shortly after the information was filed.

Per a first amended information filed shortly before trial in 2009, counts 3 and 4 of the information were amended to effectively delete the original "with injury" allegation in those counts.

A jury trial commenced on September 28, 2009. The prosecution presented testimony concerning two collisions between two automobiles, both occurring at the intersection of Congdon and Ney Streets in San Francisco's Bernal Heights neighborhood at about 5:45 p.m. on July 18, 2007. The cars involved were an Acura being driven by Benjamin Hermes and appellant's Ford Taurus.

According to the trial testimony of the first two prosecution witnesses, Antonio Deluca and Richard Morin, appellant's Taurus was stopped at a stop sign at that intersection, headed uphill. According to Deluca, the Taurus was "taking forever to go past the stop sign", while Hermes was behind it in his Acura. When appellant's car did not proceed through the stop sign, Hermes both honked his car's horn and started yelling at appellant. That resulted in appellant yelling back at Hermes and then either backing his car into Hermes' Acura or allowing it to roll back into that car.

Hermes then drove his Acura around appellant's car and stopped in front of it, effectively blocking it. He started to get out of his Acura, but then appellant started up

his car, and another collision resulted. This time, the right hand side of appellant's car hit the driver's side door of Hermes' Acura, bending it backwards and also pinning Hermes "against his door." Appellant then kept going, made a turn onto Ney Street and got out of his car, whereupon the two men started arguing. Deluca testified that appellant appeared to be intoxicated. Deluca then called 911 to report the incident.

Witness Morin agreed that appellant "appeared drunk," was "looking a little shabby," "[d]idn't have shoes on," and was "walking unbalanced." Morin also testified that, after the two collisions between the cars, Hermes tried to use his cell phone, but appellant tried to stop him, appearing to chase Hermes as the latter tried to use his phone. Appellant said to Hermes, per Morin's testimony, that Hermes did not "have to make any phone calls" and that they could "work this out between ourselves."

A third eye-witness, Ruben Carrera, who lived at the intersection involved, also witnessed the encounter from the front porch of his house; his testimony was essentially consistent with that of Deluca and Morin.

Hermes testified that he first noticed appellant's car when he saw it being driven erratically up the hill on Congdon Street. That car, per Hermes' testimony, stayed at the Congdon/Ney intersection for "a very long time," and was effectively blocking the whole road because it partially projected into the downhill lane. Hermes, who had "three or four" cars behind him on Congdon, blew his car's horn at appellant, whereupon appellant opened his car door, leaned out, and said: "Do you think beeping is going to make this any faster?" Hermes said he answered, politely, that he was trying to get to his girlfriend's house further up the grade and wanted appellant to move his car out of the way so he could do so. Appellant then got back into his car, and reversed it so it backed into Hermes' car. Hermes testified that he knew this was how the first collision happened, because he had seen the reverse lights on the back of appellant's Taurus go on. The damage to his car at that point, Hermes admitted, was not major, because appellant had backed up his car less than a car length.

Appellant then tried to drive away, Hermes testified, and was apparently trying to turn left. Hermes pulled his car around the passenger side of appellant's car, and thus

"boxed [appellant] in" with his driver's side door facing the front bumper of appellant's Taurus. Hermes exited his car, stood in front of the driver's door of appellant' car, yelled an obscenity at him, and demanded to know why appellant had hit his car. But after just a few seconds, appellant then "drove his car into me," Hermes testified. The bumper of appellant's car hit Hermes' left shin and propelled him backward, so that he was pinned against the open driver's side door of his Acura. Hermes then fell to the ground, where, for a few seconds, his leg was caught between his own car's door and appellant's car. Appellant then apparently shifted into reverse and again appeared to turn onto Ney Street. Hermes got up and "kind of limped to his passenger side window" and reached in and removed appellant's keys from the ignition and put them in his pocket.

Appellant got out of his car and two started arguing very loudly. Hermes conceded that he may even have threatened to harm appellant. Appellant opened his wallet and offered Hermes money, which the latter declined. Both Hermes and others in the area called the police on 911.

Hermes testified that he sustained a scrape on his left shin and bruising on his back calf muscle from the brief time he was pinned between the two cars. At the direction of a responding paramedic, he went to the UCSF hospital, but only after having a sandwich with his brother at a nearby cafe and smoking some marijuana at the latter's house.[1] The hospital gave Hermes some Vicodin and Motrin. His injury healed in a week or so, during which he limped; however, his car was "totaled" because both the driver's door and the frame were badly damaged.

The prosecution also called one of the police officers who had been summoned to the scene of these events. Officer Darren Wong testified that he saw no skid marks at the intersection in question, but did observe several indicia of appellant's apparent intoxication, i.e., bloodshot eyes, slurred speech, and a "very strong odor of alcohol"

[1] Hermes admitted that he used marijuana regularly for "stomach migraines," but had not used it the day of the accident (until, as noted, afterwards). At trial, he also admitted that, in January 2009, he had been arrested and charged with possession of marijuana for sale, but had not been convicted of that crime thereafter.

around his person. Another officer, Kevin Horan, asked appellant, in Wong's presence, to undertake field sobriety tests, but appellant declined, stating that he would not perform any such without his lawyer being present. Wong also stated that appellant had been taken to a nearby police station and tested for alcohol in his blood at about 7:45 that day; the tests showed a blood alcohol content of .22 percent.

A San Francisco Police Department criminalist, after being qualified as an expert regarding blood alcohol content, testified that the average male weighing in appellant's range burns off blood alcohol at the rate of .015 percent per hour. Thus, she concluded, appellant's blood alcohol level two hours before his blood was tested, i.e., at the time of the events described above, would have been about .25 percent. She also testified about the normal consequences of such a level of blood alcohol content, i.e., increased drowsiness, lessened balance and impulse control, and blurred vision and disorientation.

A custodian of records and a 911 dispatcher testified regarding the authenticity of tape recordings of three 911 calls received shortly after 5:45 p.m. on the day in question. The prosecution moved to admit those recordings; the defense objected, but the court allowed them into evidence and they were played to the jury. Two of the 911 calls were from witnesses who had testified at the trial, i.e., Deluca and Carrera. The third was from an unknown person identified only as "Jesus," who did not testify at trial and was not otherwise identified there.

In brief, Carrera's 911 call simply related that there had been a traffic accident in front of his house at the Congdon/Ney intersection wherein "the guy hit another guy in a car." Deluca's call provided a description of both cars and their drivers, but also included some colorful language, e.g., "these two dudes came to a stop sign and the dude's drunk, and he backed into him and then the guy got out of the car, and then he ah, tried to kill him, basically." He explained: "he didn't crush him, but he bent his whole door back and he tried to basically run him over."

The otherwise unidentified Jesus' 911 call included a description of appellant and his car, including the license plate number. It also included the statement that the "guy" who was driving that car had been "drinking and driving" and that that "guy . . . just like

nearly took him out like . . . he try to pin with . . . another car in front of him" and that the same "guy" had hit a pedestrian, who might need an ambulance.

Appellant's counsel argued that the tapes should not be played for the jury because the jury had heard both Deluca's and Carrera's testimony and should not have listened to their 911 tapes, and further that the playing for the jury of the tape from "Jesus" precluded counsel from cross-examining him. The court rejected these arguments, ruling that the tapes were not testimonial in nature, but "excited utterances" from percipient witnesses trying to secure assistance for an emergency situation.

The final witness for the prosecution was a representative of the Department of Motor Vehicles, who testified that appellant's driver's license had been suspended as of the day of the events described, and appellant previously notified thereof.

Appellant presented two witnesses at trial. The first was Toby Gloekler, who was qualified as an expert on accident reconstruction. On the basis of his examination of the police reports and photographs, and his own trip to the site of the events, he opined that appellant's Taurus was traveling at less than five miles an hour when it struck Hermes car the second time. This opinion was based principally on the minor injuries suffered by Hermes, the absence of skid marks at the location, and the lack of damage to appellant's car. He also opined that, inasmuch as the grade of Congdon Street was 12 percent at the point of the first impact, that impact could have been caused by the Taurus sliding backward while in neutral, or even while in drive depending on how fast the engine was idling and what gear the car was in.

Appellant's second witness was one Nikolas Lemos, the chief forensic toxicologist at the San Francisco Medical Examiner's office, who was duly qualified as an expert in toxicology. He essentially agreed with the prosecution's expert that a person such as appellant who had a measured blood alcohol content of .22 would have had a content of .25 percent two hours earlier. He then opined that such a person might well be unable to comprehend, much less properly react to, his environment and could well be unable to react correctly, drive a car correctly, or even be aware that he was at a street intersection

or stop sign. He also testified that such a person could well have "tunnel vision" and not be able to see another car parked in an intersection ahead of him.

Lemos also testified regarding a "Debrowski chart," which the defense sought to admit into evidence, but the admission of which the court denied on hearsay grounds.[2]

On October 8, 2009, the jury found appellant not guilty of misdemeanor assault as alleged in count 1 on the information, but guilty of the lesser included offense of simple assault (Pen. Code, § 240) and also guilty of the other counts charged. The jury also found true the over .15 percent blood alcohol content allegation in counts 3 and 4.

Appellant was sentenced on March 1, 2010. As to the one felony count on which he was convicted (count 2, felony assault with a deadly weapon), the court suspended imposition of a sentence for a period of three (3) years and granted appellant probation, conditioned upon his serving 136 days in county jail, with credit for time already served. As to the remaining counts, the court did not grant probation, but instead sentenced appellant to the time already served in county jail.

Appellant filed a timely notice of appeal one week later.

III. DISCUSSION

We will first deal with two evidentiary issues noted above, i.e., the "Debrowski chart" issue and the admission of the three tapes of 911 calls.

Regarding the chart, defense counsel was permitted to show it to the jury and question his expert, Lemos, regarding it because, as the trial court specifically noted, such experts "can rely on hearsay information to form their opinion. However, it does not mean that hearsay is admissible." This ruling was correct, especially because such a ruling is reviewed under the abuse of discretion standard of review. (See, e.g., *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 765-768.)

The court was also clearly correct in allowing the three 911 tapes into evidence and permitting the jury to see the transcripts thereof. (See Evid. Code, § 1240; *People v.*

[2] That chart ostensibly correlates blood alcohol levels with physical and mental impairments.

Roybal (1998) 19 Cal.4th 481, 515-517; 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, §§ 173, 174, 178, 180, 181.)

The only other possibly arguable issue in the record before us relates to several "pinpoint instructions" requested by appellant's counsel, but rejected by the trial court.

The trial court of course gave CALCRIM No. 915, which defines the lesser-included offense of simple assault, a violation of Penal Code section 240. After defining that crime in some detail, that instruction concluded with the following sentence: "Voluntary intoxication is not a defense to assault." Further, this was not the only instruction given by the trial court containing that sentence. It was also included in the version of CALCRIM No. 875 also given by the trial court, the instruction defining the assault with a deadly weapon charges encompassed by counts 1 and 2 in the information.

Defense counsel proposed no fewer than six (6) "pinpoint instructions," each modifying or qualifying that specific sentence in CALCRIM No. 915. These were given the numbers of 915-A, B, C, D, E, and F. Each started with the sentence quoted above regarding voluntary intoxication, but then added the pregnant word "but" and continued in a manner which said, e.g., that if the jury found that appellant did not "willfully drive his vehicle in reverse," or "willfully fail to stop his vehicle before striking Mr. Hermes," or that he was "unaware of the fact that his automobile would travel in reverse," it must find him not guilty of one or the other of the charged counts.

These proposed pinpoint instructions were argued to the trial court on October 7, 2009. In the course of that argument, the trial court correctly pointed out why and how these six "pinpoint instructions" were either argumentative, incorrect as a matter of law, or both. It specifically told defense counsel that he could argue his client's alleged "unawareness" of what was happening to the jury, but that the court itself was "not going to comment on the evidence, nor am I going to misstate the law." This ruling, and the bases of it, were clearly correct.

We find no issues deserving of further briefing.

IV. DISPOSITION

The judgment appealed from is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

_____
Richman, J.

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