

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,	C058800
Plaintiff and Respondent,	(Super. Ct. No. 07F02778)
v.	
TODD HOVDA,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Sacramento County, Michael T. Garcia, Judge. Affirmed.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, J. Robert Jibson, Deputy Attorney General, for Plaintiff and Respondent.

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\* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II of the Discussion.

Defendant Todd Hovda had five convictions for driving under the influence and finally killed someone. A jury found him guilty of gross vehicular manslaughter while intoxicated (a felony) and driving on a license suspended for driving under the influence (DUI) (a misdemeanor), and it found he had a prior DUI conviction. The trial court found he had five prior DUI convictions. The court sentenced him to prison for 15 years to life on the felony and a concurrent 30 days on the misdemeanor.

In the published part of our opinion, we conclude the trial court did not err in failing to instruct the jury that gross negligence -- one of the elements of gross vehicular manslaughter while intoxicated (see Pen. Code, § 191.5, subd. (a)) -- requires conscious indifference to consequences. No such instruction was necessary because CALCRIM No. 590, the pattern instruction on gross vehicular manslaughter while intoxicated the trial court gave here, conveys the equivalent of "conscious indifference" by informing the jury that gross negligence exists only if "[a] reasonable person would have known that acting in that way would create" "a high risk of death or great bodily injury."

In the unpublished part of our opinion, we conclude the trial court did not improperly impose two restitution fines, but we nonetheless order minor corrections to the abstract of judgment relating to the fines the court imposed.

## DISCUSSION

### I

#### *Gross Vehicular Manslaughter*

The underlying facts are not material to our decision. Suffice it to say that in January 2006, defendant was speeding while intoxicated and crashed his car into another car, killing his passenger. On appeal, he contends CALCRIM No. 590 -- the pattern instruction on gross vehicular manslaughter while intoxicated given in this case -- "failed to advise the jury that it [had to] find that [he] was consciously indifferent to the consequences of his conduct," which he contends is an "essential element of gross negligence." We find no merit in this argument.

As relevant here, the trial court instructed the jury as follows: "Gross negligence involves more than ordinary carelessness, inattention, or mistaken judgment. [¶] A person acts with gross negligence when, one, he or she acts in a reckless way that creates a high risk of death or great bodily injury; and two, a reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation, that his or her act amounts to disregard [f]or human life or indifference to the consequence of that act."

Defendant faults this instruction because the word "indifference" in the final sentence set forth above is not

qualified with the word "conscious." He contends such qualification is necessary because "it alone demarcates the distinction between ordinary and gross negligence." Not so.

It is true gross negligence "has been defined as the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences." (*People v. Watson* (1981) 30 Cal.3d 290, 296.) As defendant himself acknowledges, however, what the phrase "conscious indifference" is intended to express is the concept that "gross negligence requires an objective level of awareness of the risk involved." In *Watson*, our Supreme Court expressed this requirement in a different manner when it stated that "[a] finding of gross negligence is made by applying an objective test: if a reasonable person in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness." (*Ibid.*, italics omitted.) Nearly the same expression appears in the part of CALCRIM No. 590 that tells the jury gross negligence exists if "[a] reasonable person would have known that acting in that way would create" "a high risk of death or great bodily injury."

If a person acted in a way that a reasonable person would have *known* would create a high risk of death or great bodily injury, then that person acted with *conscious* indifference to the consequences. Thus, CALCRIM No. 590 *does* convey the concept defendant contends is missing, and defendant's claim of instructional error is without merit.

## II

### *Restitution Fine*

Defendant next contends the trial court improperly imposed restitution fines for the felony and for the misdemeanor. Again, he is mistaken. At sentencing, the trial court imposed a \$10,000 restitution fine, a \$10,000 parole revocation fine, and an otherwise unidentified \$200 fine. Defendant contends this \$200 fine was a restitution fine imposed for the misdemeanor. Not so. The court's recitation of the \$200 fine occurred when it was pronouncing judgment for the felony. Penal Code section 672 authorizes such a fine because the statute defining the crime of gross vehicular manslaughter while intoxicated does not prescribe any fine as punishment. (See Pen. Code, § 191.5; *People v. Allen* (2001) 88 Cal.App.4th 986, 999 ["section 672 authorizes a fine for any crime 'in relation to which no fine is herein prescribed'"].)

Our reading of the record is confirmed both by the probation report, which has a hand-written notation of a \$200 fine for the felony count and the minute order of sentencing, which states the \$200 fine consistent with the oral pronouncement of judgment for the felony.

There are, however, two errors in the abstract of judgment summarizing the fines. The abstract incorrectly omits the \$200 fine for the felony count and incorrectly states that the court imposed a "\$100 restitution fine purs to 1202.4 as to Count 2." These errors must be corrected.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment: (1) adding reference to the \$200 fine imposed pursuant to Penal Code section 672 as to count one; and (2) omitting reference to a \$100 restitution fine as to count two. The trial court is further directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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ROBIE, J.

I concur:

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CANTIL-SAKAUYE, J.

I concur in the result.

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BLEASE, Acting P. J.