

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EDWARD FOSTER,

Defendant and Appellant.

H038491

(Santa Clara County

Super. Ct. No. C1120562)

Defendant James Edward Foster¹ was charged by first amended information filed in April 2012, with driving under the influence of alcohol (DUI) with a prior specified felony (Veh. Code, §§ 23152, 23550.5, subd. (a);² count 1), and misdemeanor driving with a license suspended due to a prior DUI conviction (§ 14601.2, subd. (a); count 2). The information further alleged that defendant had served seven prior prison terms (Pen. Code, § 667.5, subd. (b)). A jury found defendant guilty of both counts and, following a court trial, the court found true the allegations that defendant had served seven prior prison terms. The court sentenced defendant to 10 years in prison. On appeal, defendant's appointed counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

¹ The record on appeal contains documents that also refer to defendant as "James Edward Wilkins."

² All further statutory references are to the Vehicle Code unless otherwise indicated.

The Pretrial Motions

Prior to trial, the trial court granted defendant's motion to bifurcate trial on the alleged prison priors. The parties also stipulated that, as to count 1, DUI with a prior specified felony (§§ 23152, 23550.5, subd. (a)), defendant "committed within ten years of the present offense a prior violation of 23152/23550.5 on or about February 1st, 2004, which was punished as a felony in case number CC441932."

Also prior to trial, defendant filed a motion for substitution of appointed counsel.³ At the in camera hearing on the motion, defendant stated that the "discovery packet" he had received from counsel contained only two pieces of paper, and that his counsel had failed to file a *Pitchess* motion.⁴ Defendant also stated that his counsel was a "good lawyer," but he did not think counsel was ready for trial and he wanted more time to talk to counsel. In response, counsel stated that defendant had been provided with copies of all the discovery obtained in the case and identified those documents to the court. Counsel also set forth the discussions that he had had with defendant regarding the strategic reasons for not filing a *Pitchess* motion and indicated that defendant had agreed with counsel. Counsel further identified the dates on which he and defendant had communicated regarding the case, explained the extent of the investigation that had been conducted by the defense, and stated that "we're ready for trial today." The court denied defendant's motion to substitute counsel.

The Prosecution's Case

On November 20, 2011, Alberto Aguilar Hernandez was on the front porch of his house when he saw a car pass by slowly and then stop in the middle of the street. The car was about 100 feet from Hernandez's house and was blocking traffic. Other vehicles behind the car "were honking for [the driver] to move." The driver had his head or chin

³ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

⁴ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

down. A dog was barking loudly in the car, but the driver was not responding to the dog. Hernandez thought the driver was passed out. Hernandez estimated that approximately seven minutes passed between the time he saw the car stopped in the road and the arrival of the police.

Melanie Yvonne Torres was driving with her husband when she approached a red car from behind. The car was stopped on the road and blocking her travel. It was early afternoon and raining, and Torres could not see who or what was in the car. After waiting a few seconds, Torres drove around the car. She and her husband saw a person and a dog inside the car. Torres pulled to the side of the road, and she and her husband got out and approached the red car. Torres saw a male sitting motionless in the driver's seat with his head forward and chin down. A dog was barking loudly in the backseat. Torres's husband repeatedly knocked on the window of the car and yelled, "Are you okay?" The driver did not initially respond, so Torres called the police. Torres eventually saw the driver lift up his head but "then he went back to sleep." At trial, Torres identified defendant as the driver of the car. The police department, the fire department, and an ambulance eventually arrived at the scene.

San Jose Police Officer Brian Chevalier received a call for service shortly after 1:00 p.m. and responded to the scene within minutes. Officer Chevalier had worked in law enforcement since 1983, and he testified as an expert in recognizing impairment due to alcohol. When Officer Chevalier arrived at the scene, he saw a red car stopped on the portion of the roadway where cars traveled. The car's engine was off. Inside the car was a large dog that was agitated and barking, and a male, who the officer identified as defendant at trial. Defendant was sitting in the driver's seat in a "relaxed position," "leaning back against the seat and off to his left a little bit next to the window." The fire department and an ambulance were already present. Fire department personnel had the driver's side door slightly ajar and were trying to get defendant out of the car to assess his medical needs without the dog getting in their way and possibly biting them. As Officer

Chevalier approached the car, defendant raised his head and appeared to become more alert and engaged in what was occurring around him. The officer asked defendant his name, and defendant responded “James.” The officer asked defendant to get out of the car but defendant did not make any attempt to open the door. Officer Chevalier saw a key, later determined to be the ignition key for the car, in defendant’s right hand, and he saw an empty bottle of vodka in the front passenger seat. The officer smelled alcohol in or about the vehicle or on defendant while the officer was in close proximity to the car door and trying to talk to defendant. Eventually, two firefighters distracted the dog on the passenger side of the car. At the same time, Officer Chevalier and others opened the driver’s side door, lifted defendant out, and placed him on a gurney before closing the door.

A paramedic assessed defendant for medical problems. The assessment included checking defendant’s vital signs, mental status, blood sugar level, and whether he was in pain. “[E]verything . . . was within normal limits.” The paramedic found defendant to have a faint odor of alcohol and to appear a little disoriented or confused about what was going on and why everyone was there. Defendant had no medical complaints, however, and did not want to go to the hospital.

While defendant was being assessed by the paramedic, Officer Chevalier observed that defendant’s eyes were red, glassy, and bloodshot. When the officer spoke with defendant, the officer smelled alcohol on defendant’s breath, his speech was slurred, and he seemed a little disoriented or confused as he spoke. After verifying with the ambulance personnel that defendant did not have “any real medical problems that were emergent,” Officer Chevalier decided to proceed with a drunk driving investigation. Defendant was lifted off the gurney to his feet and directed to walk to the sidewalk, about 12 or 15 feet away, in order to perform field sobriety exercises. As defendant walked towards the sidewalk, Officer Chevalier observed that defendant “had a slight stagger”

and was in an “unbalanced position,” so the officer assisted defendant to prevent him from falling.

Prior to conducting any field sobriety exercises, Officer Chevalier confirmed with defendant that he did not have any physical problems that would prevent him from doing the tests. The officer then instructed defendant regarding a “standing modified position,” which required defendant to stand with his arms hanging naturally at his sides, head tilted back, and eyes closed for 30 seconds. Defendant instead put his hands behind his back and kept his eyes open. The officer continuously reminded defendant regarding what to do, but defendant did not follow the instructions correctly. Officer Chevalier believed defendant was under the influence of alcohol and arrested him for DUI.

Officer Chevalier decided at some point that he wanted a preliminary alcohol screening (PAS) test administered. San Jose Police Officer Julio Morales administered the PAS device at the scene. Officer Morales testified that, prior to administering the PAS device, he informs the person about the right to refuse to take the PAS test. Officer Morales further testified that defendant “was cooperative and made attempts to blow into the sample” Defendant did not, however, provide an adequate breath sample despite five attempts. He was not exhaling enough air into the PAS device and/or not making a good enough seal with his mouth around the mouthpiece of the device. During the testing, Officer Morales noticed that defendant smelled strongly of alcohol, his eyes were red and glassy, his speech was slurred, and he was unsteady on his feet. Officer Morales believed defendant was impaired due to alcohol.

At some point, Officer Chevalier advised defendant that he was required by law to submit to a chemical test, which may be either a breath or blood test, to determine the alcohol and/or drug content of his blood. Defendant indicated that he would not listen to the officer and used profanity towards the officer. Defendant ultimately did not provide a blood or breath sample.

Officer Chevalier transported defendant to jail. At the jail, defendant was evaluated by Rodora Amat, a nurse, before being booked. The nurse cleared defendant medically, which meant he did not have an “urgent” need to go to the hospital. Defendant told the nurse that he consumed alcohol on a daily basis and that he had had one drink that day. Defendant denied being in withdrawal but indicated that he was “detoxing” from alcohol.

Alice King, a supervising criminalist at the county crime laboratory, testified as an expert in the areas of forensic alcohol analysis and the correlation between the amount of alcohol in a person’s blood and the effects of alcohol in the body. King described different “phases” and “some of the symptoms you would expect” in a person based on increasing levels of alcohol in the body. In phase one, the person tends to be overconfident when driving and tends to be less attentive to road conditions. In phase two, the person has poor judgment with respect to, for example, reacting to an accident in the road. The person’s vision is affected, the ability to do many things at the same time is affected, and it takes longer to react to a situation. Fine muscle coordination is also impaired, which affects a person’s ability to stay in a particular driving lane, for example. In phase three, problems occur with large muscle coordination, which affects the ability to walk in a straight line. The person also tends to have slurred speech. In phase four, the person cannot walk or stand. The person drives on the wrong side of the street, is confused, and may fall asleep at the wheel. King testified that the effects of alcohol are cumulative, meaning that as a person drinks more alcohol, each symptom gets worse, and a person exhibiting symptoms associated with phase three would also have the impairments associated with phases one and two. King further testified that a person is too impaired to drive by phase two.

The parties stipulated, and the jury was informed, that defendant's driving privilege was suspended or revoked on November 20, 2011,⁵ and that defendant had knowledge of the suspension or revocation.

The Defense Case

A neighbor who lived next door to Hernandez testified that there was a dwarf orange tree in her yard. Hernandez subsequently testified that he had a "clear view" of the events involving the car on November 20, 2011, and that his view of the car was not blocked by a tree.

The Verdicts and Findings on the Priors

The parties stipulated that, as to count 2 (driving with a license suspended due to a prior DUI conviction), the basis of the suspended license was a prior DUI conviction. Defendant also waived his right to a jury trial on the alleged prison priors. On May 1, 2012, the jury found defendant guilty of DUI (§§ 23152, 23550.5, subd. (a); count 1), and misdemeanor driving with a suspended license (§ 14601.2, subd. (a); count 2). On May 18, 2012, following a court trial, the court found true the allegations that defendant had served seven prior prison terms (Pen. Code, § 667.5, subd. (b)).

The Sentencing

On June 15, 2012, the date of the sentencing hearing, defendant filed a motion for new trial, which the trial court construed as a motion for substitution of appointed counsel. In the motion, defendant stated that counsel failed to move for a mistrial which resulted in the denial of an impartial jury, failed to request an instruction on "[l]esser . . . offenses," refused to present information concerning the side effects of medications defendant had taken, refused to call an expert to explain those side effects, failed to

⁵ During deliberations, the jury sent a note to the court asking, "Is there a 'stipulation' that the license was revoked before Nov[ember] 20, 2011?" After a telephone conference with counsel regarding the note, the court responded "yes" to the jury.

“investigate carefully all defenses,” refused to inform the court that two jurors were sleeping during trial, refused to give defendant a copy of every investigator’s report, refused to investigate the prosecution’s witnesses regarding medication or alcohol use, memory loss, and wearing glasses, refused to object to a prosecution witness concerning an investigator’s failure to audiotape or videotape an interview, and took “on the role within the interest of a surrogate prosecutor [*sic*] that deprived [defendant] a proper defense.” At the in camera hearing on the motion, defense counsel stated that the prospective jurors who had made statements concerning their inability to be fair were removed for cause, there were no lesser offenses in this case, defendant could be prosecuted for being under the influence of alcohol or drugs, the facts did not support an involuntary intoxication defense, the defense investigation “was pursued zealously,” he watched a juror “for some time” and the juror closed her eyes briefly but did not appear to be sleeping, defendant received copies of investigation reports prior to trial and was informed by counsel of the contents of reports concerning investigations conducted during trial, grounds did not exist for investigating the prosecution’s witnesses concerning certain matters and those witnesses were cross-examined thoroughly, there was no requirement that statements made to the police or to district attorney investigators be recorded, counsel’s office had defendant’s “interests at heart and was certainly not colluding or cooperating with the prosecution in any untoward way,” and the issue of whether a *Pitchess* motion should have been filed was addressed at the hearing on defendant’s prior *Marsden* motion before trial. Regarding defendant’s assertion that jurors were sleeping, the trial court stated that the court was “constantly monitoring the jurors to ensure that they are awake,” the court did this “scrupulously because that is a potential issue in any trial,” the court had observed all the jurors during the trial and determined that “they were all paying attention,” and therefore the court did “not agree” with defendant that juror numbers two and three were sleeping. The court ultimately denied defendant’s motion to substitute counsel.

The trial court sentenced defendant to 10 years in prison. The sentence consists of the upper term of three years on count 1 (§§ 23152, 23550.5, subd. (a)), with seven consecutive terms of one year for the prison priors (Pen. Code, § 667.5, subd. (b)). On count 2 (§ 14601.2, subd. (a)), the court imposed a concurrent 180-day jail term. The court imposed a general order of restitution.

This Appeal

Defendant filed a timely notice of appeal and we appointed counsel to represent him in this court. Appointed counsel has filed a brief in this court which states the case and facts but which raises no issues. We notified defendant of his right to submit written argument in his own behalf within 30 days. Defendant has exercised that right by filing a four-page handwritten letter, along with two documents entitled “INMATE REQUEST FORM” and a one-page letter to trial counsel dated June 21, 2012.

We understand defendant to contend that trial counsel failed to adequately represent him and that the trial court should have granted one or both of his *Marsden* motions. An appellate court should not find ineffective assistance of counsel unless all facts relevant to that claim have been developed in the record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) Further, defendant in this case has not shown either that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, or that it is reasonably probable a more favorable determination would have resulted in the absence of counsel’s alleged failings. (*People v. Price* (1991) 1 Cal.4th 324, 440 (*Price*); *Strickland v. Washington* (1994) 466 U.S. 668, 687-688, 694.) Regarding a motion for substitution of appointed counsel, a trial court properly denies the motion when there is an insufficient showing that the right to the assistance of counsel would be substantially impaired if the request is not granted. (*Marsden, supra*, 2 Cal.3d at p. 123.) Moreover, “[t]o the extent there was a credibility question between defendant and counsel at the hearing, the court was ‘entitled to accept counsel’s explanation.’ ” (*People v. Smith* (1993) 6 Cal.4th 684, 696.) Defendant fails to

show that the trial court abused its discretion in denying either of his motions. (See *id.* at p. 696.)

We understand defendant to also contend that the trial court erred by allowing testimony by Amat, the nurse, and by not striking some of the testimony by Torres, the driver of another vehicle.

By failing to object to the testimony during trial on the grounds now asserted, defendant has not preserved these claims for appeal. (Evid. Code, § 353; see, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 92 (*Benavides*); *Price, supra*, 1 Cal.4th at p. 440.)

We understand defendant to further contend that, on the issue of whether he was driving under the influence of alcohol, there were factual conflicts in a single witness's testimony or between the testimonies of multiple witnesses, or certain witnesses were otherwise not credible.

First, to the extent defendant's assertions are based on statements not admitted into evidence at trial, such as statements from the preliminary examination or statements purportedly from a fire department report, defendant fails to establish that the judgment should be reversed. Second, with respect to the trial evidence, “[o]n appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’” (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) “ ‘[W]e must 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 could reasonably deduce from the evidence. [Citation.] [¶] . . . Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not

substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) In this case, ample evidence supported a reasonable inference that defendant was driving under the influence of alcohol on November 20, 2011, including that he was found in the driver's seat of a car that was stopped and blocking traffic, he had the ignition key in his hand, there was an empty bottle of vodka next to him, and he exhibited symptoms of physical and mental impairment from alcohol consumption. Defendant fails to demonstrate that reversal of the judgment is warranted.

We understand defendant to also contend that that his right to a fair trial was prejudiced by the trial court's failure to "correct" both the prosecutor and defendant's trial counsel when each attorney on one occasion mistakenly addressed Hernandez as "Mr. Torres" during their questioning of Hernandez.

Given that the jury was able to see who was on the witness stand, and given that there was no male with the last name of Torres who testified during trial, we are not persuaded by defendant's arguments that the jury was somehow misled on these two occasions and that he was deprived of a fair trial as a result.

We understand defendant to further contend that his trial counsel filed a pretrial motion in limine seeking to exclude evidence of defendant invoking his right to refuse to take the PAS test, and that certain testimony should have been excluded as a result.

In *People v. Jackson* (2010) 189 Cal.App.4th 1461, the appellate court determined that it was improper for the jury to hear evidence that the defendant had exercised his statutory right to refuse the PAS test (§ 23612, subd. (i)). In this case, although it does not appear from the record whether the trial court ruled on the pretrial motion in limine, the jury was *not* presented with evidence that defendant had exercised a statutory right to refuse the PAS test. Rather, the jury heard testimony from Officer Morales that defendant "was *cooperative* and made attempts to blow" into the PAS device. (Italics added.) Further, as the pretrial motion in limine sought to only exclude evidence of

defendant invoking his right to refuse to take the PAS test, to the extent defendant claims on appeal that (1) certain testimony by Officer Morales on other matters concerning the PAS test, and (2) certain testimony by King, the county crime laboratory employee, concerning field sobriety exercises and other matters should have been excluded, defendant has failed to preserve these claims for appeal. (Evid. Code, § 353; see, e.g., *Benavides, supra*, 35 Cal.4th at p. 92; *Price, supra*, 1 Cal.4th at p. 440.)

We understand defendant to also contend that the trial court failed to instruct the jury on a lesser included offense.

Defendant does not identify a lesser included offense upon which the jury should have been instructed, and we determine that no such instruction was improperly omitted. (See *People v. Huggins* (2006) 38 Cal.4th 175, 215.)

Defendant next states in his letter brief that the trial court “[d]enied mandatory supervision.”

Defendant does not provide any argument as to why this constituted error by the trial court. We further observe that mandatory supervision is available only when a county jail sentence has been imposed pursuant to Penal Code section 1170, subdivision (h). (*Id.*, subd. (h)(5)(B).) In this case, a prison sentence was imposed pursuant to section 23550.5.

We understand defendant to next contend that a second violation of section 23152 is a misdemeanor, that a violation of section 23152 is a felony only if a defendant has three or more prior violations, and that the trial court erred in imposing a ten-year prison sentence in this case.

We determine that the trial court had the authority to impose the ten-year prison sentence. Defendant was convicted on count 1 of DUI with a prior specified felony (§§ 23152, 23550.5, subd. (a)), and the allegations that he had served seven prior prison terms were found true (Pen. Code, § 667.5, subd. (b)). For the conviction on count 1, section 23550.5, subdivision (a) authorizes “imprisonment in the state prison.” “A felony

is a crime that is punishable . . . by imprisonment in the state prison.” (Pen. Code, § 17, subd. (a).) Penal Code section 18, subdivision (a) generally provides that, “[e]xcept in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison” In this case, the trial court imposed the upper term of three years on count 1, with seven consecutive terms of one year for the prison priors pursuant to Penal Code section 667.5, subdivision (b), for a total prison term of 10 years.

Defendant next refers to “Restitution . . . by the impartial judge.”

Defendant does not articulate an argument as to why the general order of restitution was erroneous.

Lastly, we understand defendant to contend that the trial court erred by allowing King, the county crime laboratory employee, to testify as to certain matters, such as the effects of alcohol and the symptoms exhibited by a person, because “it was a [*sic*] unlawful arrest for D.U.I.” and “there wasn’t any test, or any . . . symptoms.”

We determine that the trial court did not err in admitting the testimony by King. One of the issues in the case was whether defendant was under the influence of alcohol. King testified about the effects of alcohol on the human body and the symptoms exhibited by a person. This testimony was admissible because it was relevant to whether defendant was under the influence of alcohol. (Evid. Code, §§ 210, 350, 351.)

Pursuant to *Wende, supra*, 25 Cal.3d 436, and *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the entire record and have concluded that there is no arguable issue on appeal.

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

GROVER, J.