Filed 10/16/09; part. pub. and mod. order 11/12/09 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MILAN PAKES, Defendant and Appellant.	H032734 (Santa Clara County Super. Ct. No. CC131032)

Defendant Milan Paul Pakes appeals from a judgment of conviction entered after a jury found him guilty of child endangerment (Pen. Code, § 273a, subd. (a)), evading a police officer (Veh. Code, § 2800.2), and hit and run causing property damage (Veh. Code, § 20002, subd. (a)). In a bifurcated proceeding, defendant admitted the allegations that he had two prior strike convictions (Pen. Code, §§ 667, subds. (b) - (i), 1170.12) and served a prior prison term (Pen. Code, § 667.5, subd. (b)). The trial court sentenced defendant to an indeterminate term of 25 years to life to run consecutive to a determinate term of four years. On appeal, defendant raises several issues relating to the sufficiency of the evidence, jury instructions, and sentencing. We conclude that the four-year term imposed on the Vehicle Code section 2800.2 conviction should have been stayed

pursuant to Penal Code section 654. Accordingly, we reverse the judgment and remand for resentencing.[1]

I. Statement of the Case

In October 2002, defendant entered into a plea agreement in which he pleaded guilty to child endangerment and admitted the allegations that he had two prior strike convictions and a prior prison term. The trial court sentenced him to 26 years to life in prison. This court affirmed the judgment of conviction and denied defendant's petition for writ of habeas corpus. The California Supreme Court denied review from the habeas corpus petition. In June 2007, the federal district court granted a writ of habeas corpus on the ground that trial counsel rendered ineffective assistance in advising defendant to plead guilty. Defendant's guilty plea was vacated and criminal proceedings were reinitiated. After a jury found defendant guilty on all charges, and defendant admitted the enhancement allegations, the trial court sentenced him to a total term of 29 years to life. Defendant has filed a timely notice of appeal.

II. Statement of Facts

Sometime during the summer of 2001, 12-year-old Adrienne F., who lived with her family in a mobile home park, met defendant. Defendant then became a friend to the F. family, and would spend time "24/7" with Adrienne, her father, and her sister at their home. He was at their home every day when he was not working, and he would also occasionally spend the night there.

Defendant drove a pickup truck. In late 2001, he was teaching Adrienne how to drive. He allowed her to drive the truck around the mobile home park on more than 10

---

[1] Defendant has also filed a petition for writ of habeas corpus, which we have considered with this appeal. We dispose of his habeas corpus petition by separate order.

occasions. Adrienne did not wear a seatbelt, because defendant told her that the clips did not work.

On December 14, 2001, defendant spent the night at the F. home. The following day, he invited Adrienne to go with him on a chimney sweeping job. After her parents gave her permission to go with defendant, Adrienne and defendant left the mobile home park at 2:30 p.m. Defendant and Adrienne left the job site after a couple of hours. At about 5:00 or 6:00 p.m., defendant was driving his truck on Highway 87. Adrienne was not wearing a seatbelt. When the traffic became heavier near Curtner Avenue, defendant suddenly slammed on his brakes and hit the SUV in front of him.

David Gonzalez, an off-duty police officer, was driving the SUV. Officer Gonzalez, who had been driving slowly in the left lane at the time of the collision, pulled over to the center shoulder and rolled down his passenger window as defendant pulled abreast of the SUV. Defendant also rolled down his window. Officer Gonzalez asked defendant to pull over so they could exchange information, because his vehicle had been damaged. Defendant agreed to do so.

Defendant drove onto the left shoulder in front of Officer Gonzalez. However, he did not stop. Instead, he drove "[r]eally fast" on the shoulder.[2] Officer Gonzalez "didn't want to go too fast on the shoulder, but [he] stayed where [he] could see him, less than a quarter mile." When traffic cleared, defendant swerved back into the left lane and continued to go north on Highway 87. He was weaving in and out of traffic, and he cut off at least five cars, forcing them to slam on their brakes to avoid him. Officer Gonzalez used his cell phone to report to the police dispatcher that defendant had failed to stop after an accident. Officer Gonzalez could see Adrienne sliding from side to side inside defendant's truck. Adrienne was "really scared." She screamed at defendant to take her

---

[2] Officer Gonzalez estimated that defendant was driving on the shoulder at 40 to 50 miles per hour.

home and to stop and pull over. She also told him that it would just get worse if he kept going. Defendant told her to "shut up and duck down so they don't see you."

Defendant exited Highway 87 onto southbound Highway 280, and cut off two or three cars. Defendant continued to weave between lanes before he exited onto Sixth Street.[3] Officer Gonzalez exited the highway about 20 seconds after defendant and followed him on surface streets until he saw a marked police car at Second or Third Streets and Keyes Street.

Sergeant Robert St. Amour was driving a marked police car at around 5:45 p.m. when he heard the dispatch to be on the lookout for defendant's truck. As Sergeant St. Amour was driving on First Street, he saw defendant's truck driving west on Humboldt Street. Humboldt is one-way in the other direction. Defendant then turned north on Second Street which is one-way southbound. Three or four cars were traveling south on Second Street at that time. According to Adrienne, one of the cars was forced to swerve out of the way. Sergeant St. Amour was able to watch defendant, because First and Second Streets are separated by a park that is no more than 30 feet wide.

As Sergeant St. Amour turned from First Street onto Keyes Street and headed to Second Street, he activated his red lights and siren. The officer reached the intersection of Second Street and Keyes Street before defendant, who was 75 to 100 feet from the intersection. He positioned his patrol car across the end of Second Street, thereby blocking the center lane and portions of the right and left lanes. Defendant continued driving the wrong way towards the patrol car. There was just enough room between the end of the patrol car and the curb for defendant to turn right on Keyes Street. Sergeant St. Amour started to follow defendant on Keyes Street. However, his glasses slipped off as he reached for the radio to report the chase, and he was delayed momentarily while he put them back on.

---

[3] The exit is labeled Seventh Street, but it actually leads to Sixth Street.

Defendant turned left on Third Street. He was driving 35 miles per hour when the posted speed limit was 30 miles per hour. With his lights and siren activated, Sergeant St. Amour continued to chase defendant. Defendant turned left on Virginia, then turned left on Second Street, heading southbound. It was dark, and defendant was driving 35 miles per hour on Second Street when the posted speed limit was 30 miles per hour. There was an unsecured ladder in the bed of defendant's truck. The ladder was hanging over the tailgate and sliding with each turn. According to the officer, defendant's speed was unsafe for the conditions, time, and location. Defendant then turned left in the middle of the block without signaling and drove onto the curb. Both tires were up on the curb and the truck was sticking out into the street. Defendant told Adrienne to get out of the truck so he could leave. When Sergeant St. Amour pulled up next to defendant's truck, another patrol car arrived. As defendant ran towards his father's house, Sergeant St. Amour ordered him to stop. Defendant was eventually arrested.

The parties stipulated that "the first on-duty police officer in a marked police car to encounter the defendant after the defendant's collision with off-duty Officer Gonzales's vehicle was Sergeant St. Amour. There were no marked police cars behind the defendant's truck as he drove the wrong way on Second Street." The parties also stipulated that "the defendant admits that he intended to flee following the traffic accident with another vehicle because he reasonably believed that if he was apprehended by the police, he would be sent to state prison."

Milan Pakes, defendant's father, testified for the defense. After defendant was arrested, defendant's brother drove the truck while Pakes was in the passenger seat. Pakes used the seatbelt, which was functional.

III. Discussion

A. Child Endangerment

1. Sufficiency of the Evidence

Defendant claims that when "liability is imposed based on negligent conduct which merely creates a danger to a child, it is not so clear that moral opprobrium can be visited on the adult. For this reason, the Legislature has required that there must be a specific *legal* relationship between the adult and the child . . . ." Thus, he contends that his conviction for child endangerment must be reversed, because there was insufficient evidence that Adrienne was in his "care or custody."

Generally, "[t]he proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) We also review "the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028.)

A person commits child endangerment when, "under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, . . . [he or she] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . . ." (Pen. Code, § 273a, subd. (a).)[4]

---

[4] Penal Code section 273a, subdivision (a) provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

Defendant first directs our attention to *People v. Heitzman* (1994) 9 Cal.4th 189 (*Heitzman*). In *Heitzman*, the California Supreme Court interpreted Penal Code section 368, which was modeled on Penal Code section 273a and criminalizes elder abuse. In that case, the decedent lived with his two sons and three grandsons, and his death was caused by malnutrition, dehydration, and neglect. (*Heitzman*, at p. 194.) The defendant, who was the daughter of the decedent, did not live with the decedent, but she visited his home and was aware of his condition. (*Heitzman*, at p. 195.) At issue was whether the defendant could be convicted under the elder abuse statute for her failure to prevent the abuse of the decedent. (*Heitzman*, at p. 197.) The court held that "the statute may properly be upheld by interpreting its imposition of criminal liability upon '[a]ny person who . . . permits . . . any elder or dependent adult . . . to suffer . . . unjustifiable pain or mental suffering' to apply only to a person who, under existing tort principles, has a duty to control the conduct of the individual who is directly causing or inflicting abuse on the elder or dependent adult." (*Heitzman*, at p. 194.) The court also noted that "[i]n every published case arising under section 273a involving a failure to act, rather than active abuse, the defendant was the *parent* of the child victim. [Citations.]" (*Heitzman,* at p. 205, fn. 14.) However, there was no discussion of the meaning of the term "care or custody" in *Heitzman.* "'It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.'" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680, quoting *Chevron U.S.A., Inc. v. Worker's Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.) Thus, *Heitzman* does not support defendant's position that a Penal Code section 273a conviction requires a legal relationship between the defendant and the child.

Relying on the definitions of a caregiver in Health and Safety Code section 11362.5, subdivision (e)[5] and Welfare and Institutions Code section 4362.5, subdivision (e),[6] defendant also argues that he was not a caregiver. There is no merit to this argument. Neither of these statutory definitions apply in the present case, because the Legislature noted that each definition applied only to that section or chapter. (See Health & Saf., § 11362.5, subd. (e) [noting definition is "[f]or the purposes of this section"]; Welf. & Inst. Code, § 4362.5 [noting the definitions provided are for words "[a]s used in this chapter"].)

We now consider relevant case law. Courts that have interpreted the term "care or custody" have not required that the defendant have a legal duty to the child. In *People v. Malfavon* (2002) 102 Cal.App.4th 727 (*Malfavon*), the defendant's girlfriend Elizabeth went to retrieve some items from her apartment and left her seven-month-old daughter Kendra in the car. (*Malfavon*, at p. 731.) The defendant was sitting in the car next to Kendra when Elizabeth left, though he told her he was going to get out of the car to smoke a cigarette. (*Ibid.*) A few minutes later, the defendant carried Kendra, who was spitting up blood, to the top of the stairs. (*Ibid.*) Kendra later died due to the severe head injuries inflicted by the defendant. (*Malfavon*, at p. 733.) The defendant was convicted of assault resulting in the death of a child under the parallel statute of Penal Code section 273ab.[7] The defendant argued that "the evidence failed to show a sufficiently

---

[5] Health and Safety Code section 11362.5, subdivision (e) defines a "'primary caregiver'" as one "who has consistently assumed responsibility for the housing, health, or safety" of another person.

[6] Welfare and Institutions Code section 4362.5, subdivision (e) defines a caregiver as "any unpaid family member or individual who assumes responsibility for the care of a brain-impaired adult."

[7] Penal Code section 273ab provides: "Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing

substantial relationship between Kendra and him to establish care or custody." (*Malfavon.*, at p. 736.)

The *Malfavon* court rejected the defendant's contention, stating: "Malfavon relies on five cases, each of which involved a defendant who was 'substantially' more related to the child than he was to Kendra. In *People v. Cochran, supra,* 62 Cal.App.4th 826, the defendant was the 'surrogate father,' providing the home for the victim and the victim's mother. (*Id.*, at p. 833.) In *People v. Culuko* (2000) 78 Cal.App.4th 307, the mother of the victim-infant and the cohabiting boyfriend were convicted of the child's homicide. The evidence, much like that in Malfavon's case, consisted of testimony that the mother's boyfriend had babysat the child and had admittedly taken the responsibility for watching him the day of his death. Similarly, in *People v. Stewart* (2000) 77 Cal.App.4th 785, the victim lived with his mother and her boyfriend, who babysat the child while the mother worked. In *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, the defendant was the licensed daycare provider with whom the child victim was placed. Finally, in *People v. Albritton, supra,* 67 Cal.App.4th 647, the defendant was the natural father of the victim-child, and the child and its mother resided with him. Based on the established, long-term nature of the relationships in these cases, Malfavon jumps to the conclusion that his relationship is insufficient to come within the penumbra of the child abuse statute. However, his argument fails to provide any authority to conclude that care or custody may not be established on a *less* substantial relationship. [¶] The record supports the jury's determination that Malfavon had the care or custody of Kendra. . . . Malfavon admitted that he had the responsibility for watching Kendra while Elizabeth went upstairs to the apartment. Moreover, Elizabeth testified that she had left Kendra in Malfavon's

---

in this section shall be construed as affecting the applicability of subdivision (a) of Section 187 or Section 189."

care in the past; he had babysat for her when she suffered injuries before. The evidence was sufficient." (*Malfavon*, *supra*, 102 Cal.App.4th at pp. 736-737.)

Defendant's interpretation of "care or custody" was also rejected in *People v. Perez* (2008) 164 Cal.App.4th 1462 (*Perez*). In *Perez*, numerous bindles of heroin and two loaded syringes were found in the defendant's house where he was living with his sister, his niece, and her son. (*Perez*, at p. 1466.) His niece's four-year-old daughter slept at the house a couple of nights per month. (*Ibid*.) The defendant challenged the sufficiency of the evidence that he had care or custody of his grand niece within the meaning of section Penal Code 273a. The *Perez* court rejected his contention, stating that "[t]he language of the statute clearly covers not only parents, guardians, and babysitters, but also individuals who do not necessarily have as substantial a relationship to a child as a parent, guardian, and/or babysitter, but who nevertheless have been entrusted with the care of a child, even for a relatively short period of time." (*Perez*, at p. 1469.)

The *Perez* court acknowledged that the defendants in *People v. Cochran* (1998) 62 Cal.App.4th 826, *People v. Culuko* (2000) 78 Cal.App.4th 307, and *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, had more substantial relationships to their victims than the defendant had. (*Perez*, *supra*, 164 Cal.App.4th at pp. 1469-1470.) However, the court reasoned that those cases did not require a finding that "the phrase 'having the care or custody of a[] child' (§ 273a) is intended to apply *only* to individuals whose relationship with the victim child is as substantial as the relationship between the defendant and victims in those cases . . . , and the language of the statute does not suggest care or custody may *not* be premised on a less substantial relationship than that between a parent or guardian and a child." (*Perez*, at p. 1470.) Thus, the court rejected the defendant's claim that a conviction under Penal Code section 273a required a "relationship akin to that of a parent, guardian, or babysitter . . . ." (*Perez*, at p. 1471.) The *Perez* court further found that there was substantial evidence that the defendant had the "care or custody" of his grand niece, because "there were times when Perez was the

only adult in the house who was not asleep while [the child] was present in the home, and thus, that [the child] was left in his care on such occasions." (*Ibid*.)

Defendant argues that *Malfavon* and *Perez* are factually distinguishable from the present case. He asserts that the defendant in *Malfavon* was "involved in an intimate, quasi-family relationship with the [child's] mother" and thus "had assumed a duty akin to that of a father," while the defendant in *Perez* was related to the child's mother and occasionally lived in the same home. These distinctions are not persuasive. As in the present case, the defendants in *Malfavon* and *Perez* did not have a legal duty to assume care or custody of the children. Since we agree with the reasoning of *Malfavon* and *Perez*, we conclude that a defendant may be held criminally liable under Penal Code section 273a even when he or she does not have a legal duty to the child, but "nevertheless [has] been entrusted with the care of a child." (*Perez, supra,* 164 Cal.App.4th at p. 1469.)

Here, there was sufficient evidence to support the jury's finding that defendant had care or custody of Adrienne. Defendant was a close family friend, who was at the the home every day and occasionally spent the night. He supervised Adrienne on at least 10 occasions when he gave her driving lessons. On the day of the incident, the parents gave their permission for defendant to take Adrienne with him on the chimney sweeping job. In assuming sole responsibility for Adrienne for several hours, defendant had the care or custody of Adrienne within the meaning of Penal Code section 273a. Accordingly, we reject defendant's contention.

2. Jury Instructions

a. Care or Custody

Defendant next contends that the trial court erred in failing to instruct sua sponte on the meaning of the term "care or custody." He asserts that the jury should have been instructed that "'[c]are or custody of a minor means that the defendant has a legal relationship with the minor such as being a parent, guardian, or foster parent of that the

adult has assumed the responsibility of providing for the housing, health or safety of the minor.'"

A trial court has the duty to "'give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law. [Citation.]'" (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

First, as previously discussed, Penal Code section 273a does not require that the defendant have a legal duty to the child. Second, "[t]he words 'care or custody' are commonly understood terms that have no particularized meaning." (*Perez, supra,* 164 Cal.App.4th at p. 1475.) Thus, there was no error.

b. Likely to Produce Great Bodily Injury or Death

Defendant also contends that the trial court provided an erroneous definition of the "likely to produce great bodily harm or death" element of Penal Code section 273a in its instructions to the jury. He asserts that liability under this statute cannot be imposed unless "the probability of serious injury is great."

Over defense objection, the trial court gave the following portion of CALJIC No. 9.37: "Likely means the circumstances or conditions are such that they present a substantial danger; that is, a serious and well-founded risk of great bodily harm or death."

In *People v. Wilson* (2006) 138 Cal.App.4th 1197 (*Wilson*), the court analyzed the definition of "likely" as it is used in Penal Code section 273a by turning to *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, in which the California Supreme Court conducted "an in-depth review of the troublesome word 'likely' . . . in the context of the Sexually Violent Predators Act." (*Wilson,* at p. 1202.) The *Wilson* court observed: "[t]he [*Ghilotti*] court first noted that while it is true the word 'likely' in dictionaries of general English usage is often defined as '"having a better chance of occurring than not,"' the legal use of the term is broader." (*Wilson,* at p. 1202, quoting *Ghilotti* at p. 916.) The *Wilson* court further acknowledged that the *Ghilotti* court referred to the wide variety of legal definitions of the term, noting that "'California decisions indicate a

varied contextual understanding of the word 'likely.'" (*Wilson*, at p. 1203, quoting *Ghilotti* at p. 917.) The *Wilson* court also focused on *Ghilotti's* discussion of child endangerment cases: "'In *People v. Sargent* (1999) 19 Cal.4th 1206, we said in passing that the felony child endangerment statute, which punishes a caretaker's willful abuse or neglect of a child under "'"circumstances . . . likely to produce great bodily harm or death"'" (Pen. Code, § 273a, subd. (a)) is "'intended to protect a child from an abusive situation in which the probability of serious injury is great.'" (*Sargent, supra*, 19 Cal.4th at p. 1216, quoting *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.) But *People v. Hansen* (1997) 59 Cal.App.4th 473 indicated this statute is satisfied when the child is placed in a situation where a serious health hazard or physical danger is "reasonably foreseeable" (*id.* at p. p.479), as where the caretaker stores a loaded gun in a home occupied by children without denying the children access to the weapon (*id.* at p. 480).' [Citation.]" (*Wilson*, at p. 1203.)

The *Wilson* court pointed out that the Supreme Court in *Ghilotti* "concluded that the mere use of the word 'likely' in any given context was not proof the Legislature intended to mean 'more likely than not.' The court stated it was necessary to look to the context of legislation to determine what meaning the Legislature intended in using the term 'likely.' [¶] . . . The court concluded that in the SVPA context, 'likely to reoffend' meant more than a mere possibility of reoffense but did not require that the chance of reoffense be better than even. Rather, the test was whether the person presented a '*substantial danger*—*. . . a serious and well-founded risk*—of [reoffense].'" (*Wilson, supra,* 138 Cal.App.4th at pp. 1203-1204, quoting *Ghilotti, supra,* 27 Cal.4th at pp. 916, 922.)

In interpreting Penal Code section 273a, the *Wilson* court followed the *Ghilotti* approach, stating: "We conclude that given the interest protected, i.e., the lives of highly vulnerable children, the definition of 'likely' in the context of section 273a is not that death or serious injury is probable or more likely than not. While we understand it was

developed in a different legal context, we nonetheless believe that adaptation of the definition of 'likely' as used in the SVPA context is appropriate here. We thus conclude that 'likely' as used in section 273a means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death. We believe in the context of child endangerment this definition of the term 'likely' draws a fair balance between the broad protection the Legislature intended for vulnerable children and the level of seriousness required for a felony conviction." (*Wilson, supra*, 138 Cal.App.4th at p. 1204.)

Defendant, however, asserts that the *Wilson* holding is inconsistent with dicta in *People v. Valdez* (2002) 27 Cal.4th 778 (*Valdez*) and *People v. Sargent* (1999) 19 Cal.4th 1206, 1216 (*Sargent*), and thus erroneous. Both *Valdez* and *Sargent* cited *People v. Jaramillo* (1979) 98 Cal.App.3d 830 (*Jaramillo*). In *Jaramillo*, the defendant challenged the sufficiency of the evidence to support her conviction under Penal Code section 273a on the ground that her children's injuries did not constitute great bodily injury. (*Jaramillo*, at p. 835.) The *Jaramillo* court stated that a defendant may be held criminally liable even when a child does not suffer any injury, because the statute "is intended to protect a child from an abusive situation in which the probability of serious injury is great." (*Ibid*.) In both *Sargent* and *Valdez*, the Supreme Court quoted this language from *Jaramillo* for the general principle that great bodily injury is not required for a conviction under Penal Code section 273a. (*Sargent*, at p. 1216; *Valdez*, at p. 784.) The issue of the legal definition of "likely" was not considered in *Jaramillo*, *Sargent*, and *Valdez*. As the Supreme Court observed in *Ghilotti*, the *Jaramillo* quote in *Sargent* was made only "in passing." (*Ghilotti, supra*, 27 Cal.4th at p. 917.) Thus, the dicta in *Sargent* and *Valdez* does not persuade us that *Wilson* is incorrect.

Defendant also claims that Penal Code section 273a "provides felony liability for passive conduct," and thus he argues that "[g]iven this unusual and harsh punishment, it is reasonable to conclude that the Legislature did not intend to create liability without ample protection for the potentially innocent." We reject this argument. This statute

imposes criminal liability on a defendant who "willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . . ." (Pen. Code, § 273a, subd. (a).) In our view, by requiring that the defendant "willfully causes or permits," that is, "when he or she does it willingly or on purpose," the Legislature provided sufficient protection to the "potentially innocent."

Moreover, even assuming that the trial court erred in failing to instruct the jury that "likely to produce great bodily harm or death" required the prosecutor to prove that the "probability of serious injury is great," any error was harmless. Here, the prosecutor was also required to prove that defendant acted with criminal negligence. Thus, the trial court instructed the jury that in order to convict defendant of felony child endangerment, it was required to find that defendant acted "in a reckless way that creates a high risk of death or great bodily harm" which meant that he acted with "disregard for human life or indifference to the consequences of that act." By convicting defendant of felony child endangerment, the jury necessarily found that defendant's acts "created a high risk of death or great bodily harm" and "disregard for human life." This finding involved a higher standard than that presently advocated by defendant. Consequently, defendant suffered no prejudice.

B. Vehicle Code Section 2800.2[8]

Defendant raises several challenges to his conviction for violating section 2800.2.

1. Background

Section 2800.2 states in relevant part: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in state prison, or by

---

[8] All further statutory references are to the Vehicle Code unless otherwise stated.

confinement in the county jail for not less than six months nor more than one year. . . . [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."[9]

Here, the trial court instructed the jury on the two alternative theories pursuant to CALCRIM No. 2181.[10] Thus, the trial court instructed the jury that defendant could be convicted of violating section 2800.2 on the basis of either driving with willful or wanton disregard for public safety or the commission of at least three traffic violations. The trial court also specified five possible traffic violations: (1) driving the wrong way on a one-way street (§ 21657); (2) exceeding the posted speed limit (§ 22351, subd. (b)); (3) driving with a child under 16 who is not wearing a seatbelt (§ 27360.5, subd. (b)); (4)

---

[9] Section 2800.1 sets out the requirements for a finding of flight from a pursuing peace officer. As relevant here, subdivision (a) of section 2800.1 states: "Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor . . . if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform."

[10] The trial court instructed the jury: "A person acts with wanton disregard for safety when: one, he or she is aware that his or her actions present a substantial and unreasonable -- unjustifiable risk of harm; and two, he or she intentionally ignores that risk. A person does not, however, have to intend damage. [¶] Driving with willful or wanton disregard for the safety of persons or property includes, but is not limited to, causing damage to property while driving or committing three or more violations that are each assigned a traffic violation point."

failing to drive in the right hand lane without leaving the roadway (§ 21650); and (5) improper turning (§ 22107, subd. (a)).

2. Willful and Wanton Disregard for the Safety of Persons or Property Theory

Defendant argues that the trial court erred in instructing the jury that he could be convicted on the theory that he drove with willful and wanton disregard for public safety or property, because he did not drive dangerously after Sergeant St. Amour began following him.

Defendant's first argument is based on his interpretation of "pursuing," and he asserts that "'a *pursuing* peace officer'" must be "behind the suspect's vehicle." Defendant points out that section 2800.1, subdivision (a)(1) requires the pursuing officer to illuminate a "red lamp visible from the front and the [suspect] 'either sees or reasonably should have seen the lamp.'" He claims that "this requirement makes no sense unless the officer is directly behind the driver." Defendant also asserts that since, "as a matter of custom, virtually all traffic stops are made by the use of flashing or colored lights when an officer gets directly behind the offending driver," "[t]he Legislature surely took this custom into consideration when it used the term 'pursuing.'"

"'Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous.'" (*People v. Arias* (2008) 45 Cal.4th 169, 177.)

"Pursue" is defined as "to follow in order to overtake, capture, kill, or defeat." (Merriam-Webster's Collegiate Dict. (10th ed. 1999) at p. 950 (*Webster's*).) A synonym for "pursue" is "chase." (*Ibid.*) There are distinctions between the words "chase," "pursue," "follow," and "trail." "CHASE implies going swiftly after and trying to overtake something fleeing or running <a dog *chasing* a cat>. PURSUE suggests a continuing effort to overtake, reach, or attain <*pursued* the criminal through narrow

streets>. FOLLOW puts less emphasis on speed or intent to overtake <friends *followed* me home in their car>. TRAIL may stress a following of tracks or traces rather than a visible object <*trail* deer> <*trailed* a suspect across the country>." (*Webster's*, at p. 193.)

In our view, the statutory language at issue is not ambiguous. The word "pursue" encompasses the concept of overtaking for capture, which does not necessarily require that the pursuing individual place himself or herself behind the suspect. Though the peace officer's vehicle will most often be behind the suspect's vehicle, this will not always be the case. As the facts before us demonstrate, an individual may reasonably be aware of being pursued by a peace officer even when the officer is not behind him or her. Here, Sergeant St. Amour testified that he saw defendant driving the wrong way on Second Street towards Keyes Street. The officer, who was driving on First Street, was able to view defendant, because there was a narrow park between First and Second Streets. Sergeant St. Amour activated his red lights and siren as he turned from First Street onto Keyes Street. At that point, defendant "reasonably should have seen" the red lights, and, given that he was driving the wrong way on a one-way street, been aware that the officer was pursuing him. The officer drove the short distance to Second Street and partially blocked the left and right lanes to prevent defendant, who was 75 to 100 feet from the intersection, from driving further. Under these circumstances, the pursuit began before the officer was behind defendant's vehicle.

We next consider defendant's challenge to the willful disregard of public safety theory of liability under section 2800.2. In determining whether the trial court properly allowed the jury to consider this issue, "[w]e review the whole record in the light most favorable to the judgment below to determine whether there is evidence which is reasonable, credible and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. This inquiry does not require the reviewing court to ask itself whether *it* believes the evidence established guilt beyond a reasonable doubt but whether, after viewing the evidence in the light most favorable to the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Dalerio* (2006) 144 Cal.App.4th 775, 780.) Based on our conclusion that the pursuit began when Sergeant St. Amour activated his red lights and siren while driving to block defendant at the intersection, there was sufficient evidence to support the theory. Sergeant St. Amour saw three or four cars traveling towards defendant as he drove the wrong way on a one-way street. According to Adrienne, one of the cars was forced to swerve out of the way to avoid defendant. Thus, there was sufficient evidence that the jury could have found that defendant's conduct constituted willful and wanton disregard for the safety of Adrienne and the other driver as well as the other driver's car.

3. Traffic Violations

a. Section 21657

Defendant argues that the trial court erred in allowing the jury to consider his act of driving the wrong way on a one-way street (§ 21657) as one of the qualifying violations under section 2800.2, because he was not being pursued by Sergeant St. Amour when he committed this violation. As previously discussed, the pursuit began when the officer activated his red lights and siren as defendant was driving the wrong way on Second Street. Since defendant continued to drive the wrong way after he reasonably was aware of Sergeant St. Amour's pursuit, the jury could properly consider this violation as a predicate for liability under section 2800.2.

b. Section 21650

Defendant also contends that the trial court erred in allowing the jury to consider a violation of section 21650 as one of the qualifying traffic violations.

Section 21650 provides in relevant part that "[u]pon all highways, a vehicle shall be driven upon the right half of the roadway, except as follows: [¶] . . . (d) Upon a roadway restricted to one-way traffic."[11]

Here, the prosecutor maintained that a violation of section 21650 occurred when defendant, who was in the left hand lane on a one-way street, suddenly turned left in the middle of the block, and drove his truck over the curb with the front two tires. There was a space of four or five feet between the curb and the sidewalk where defendant's truck came to a stop. The rear portion of the truck was "[s]ticking out in the roadway."

Defendant argues that "[t]he introductory phrase of section 21650 limits its ambit to conduct performed '[u]pon all highways[,]'" and "[b]y definition, the act of driving onto a curb is not conduct committed on a 'highway.'"

The Legislature's definitions of "highway," "roadway," and "sidewalk" refute defendant's arguments. A "highway" is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street." (§ 360.) "A 'roadway' is that portion of a highway improved, designed, or ordinarily used for vehicular traffic." (§ 530.) "'Sidewalk' is that portion of a highway, other than the roadway, set apart by curbs, barriers, markings or other delineation for pedestrian travel." (§ 555.) Since the statutory definition of "sidewalk"

---

[11] Section 21650 states in full: "Upon all highways, a vehicle shall be driven upon the right half of the roadway, except as follows: [¶] (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement. [¶] (b) When placing a vehicle in a lawful position for, and when the vehicle is lawfully, making a left turn. [¶] (c) When the right half of a roadway is closed to traffic under construction or repair. [¶] (d) Upon a roadway restricted to one-way traffic. [¶] (e) When the roadway is not sufficient width. [¶] (f) When the vehicle is necessarily traveling so slowly as to impede the normal movement of traffic, that portion of the highway adjacent to the right edge of the roadway may be utilized temporarily when in a condition permitting safe operation. [¶] (g) This section does not prohibit the operation of bicycles on any shoulder of a highway, where the operation is not otherwise prohibited by this code or local ordinance."

includes the entire "portion of a highway . . . set apart by curbs," the area between the roadway and the paved portion of the sidewalk, where defendant drove his truck, was part of the highway.

Relying on San Jose Municipal Code, section 13.08.020,[12] which allows a homeowner to construct or repair the curb or sidewalk in front of his or her property, defendant also asserts that curbs in San Jose "are not necessarily 'publicly maintained,'" and thus he did not violate section 21650.

As previously stated, a "highway" is "publicly maintained and open to the use of the public for purposes of vehicular travel." (§ 360.) The purpose of the public maintenance requirement in the statutory definition is to exclude private roads from traffic regulation. (See *Nunnemaker v. Headlee* (1956) 140 Cal.App.2d 666, 668-669.) Given this purpose, the public maintenance requirement applies to those portions of the highway on which vehicles travel, that is, the roadway or street. It does not apply to sidewalks or curbs. To construe the definition otherwise would result in the inability to enforce traffic violations that occur on sidewalks.

Noting that the purpose of section 21650 is to regulate driving, defendant also argues that he was not driving. Instead, he claims that he parked his truck on the curb. This argument is without merit. Here, defendant suddenly turned left in the middle of the block and drove over the curb with his front tires, but did not reach the sidewalk that was

---

[12] San Jose Municipal Code, chapter 13.08, section 13.08.020 provides: "No cement or artificial stone sidewalk, driveway, curb or gutter shall be constructed until the person proposing to construct the same shall have procured from the superintendent of streets a permit which shall contain the name of the owner of the premises abutting on the proposed sidewalk, driveway, curb or gutter, the width and length of said sidewalk, driveway, curb or gutter, and the name of the contractor, or in case said work is to be done by day labor, the name of the person who is to have actual charge of said work."

four to five feet from the curb. The act of traveling over the curb was sufficient to constitute driving.[13]

Defendant next argues that "if section 21650 was construed to include driving performed other than on the roadway," it would render section 21663, which proscribes driving on a sidewalk, superfluous. We disagree. First, subdivision (f) of section 21650 expressly contemplates driving other than on the roadway. (See *People v. Smylie* (1963) 217 Cal.App.2d 118.) Second, section 21650 does not proscribe the same conduct as does section 21663, because the former includes different exceptions than the latter.

Defendant further claims that his conduct fell within one of the exceptions to section 26150, that is, that a driver may move from the right side of the road to make a lawful left turn. (§ 26150, subd. (b).) This exception does not apply to the facts of this case. Here, defendant was not making a lawful left turn. He turned left in the middle of the block and drove over the curb towards the sidewalk.

c. Section 22107

Defendant next contends that he was deprived of the effective assistance of counsel when trial counsel failed to object to an instruction on section 22107 on the ground that the violation was not proven at the preliminary hearing.

"'Before any accused person can be called upon to defend himself on any charge prosecuted by information, he is entitled to a preliminary examination upon said charge, and the judgment of the magistrate before whom such examination is held as to whether the crime for which it is sought to prosecute him has been committed, and whether there is sufficient cause to believe him guilty thereof. These proceedings are essential to confer jurisdiction upon the court before whom he is placed on trial.' [Citation.]"

---

[13] We also reject defendant's claim that he actually violated section 22502, subdivision (a), which requires that a vehicle must be parked parallel to the curb and no more than 18 inches from the curb, rather than section 21650. Section 22502, subdivision (a) is inapplicable when the driver's vehicle leaves the roadway.

(*People v. Burnett* (1999) 71 Cal.App.4th 151, 165.) "So long as the evidence presented at the preliminary hearing supports the number of offenses charged against defendant and covers the timeframe(s) charged in the information, a defendant has all the notice the Constitution requires. The defendant may demur if he or she believes the lack of greater specificity hampers the ability to defend against the charges." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342.)

"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, he must show prejudice flowing from counsel's performance or lack thereof. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

A defendant may violate section 22107 in two ways: (1) a defendant moves or turns from the roadway when it is not reasonably safe; or (2) even if the turn is safe, a defendant fails to use a turn signal.[14]

Here, the following colloquy occurred between the prosecutor and Sergeant St. Amour at the preliminary hearing: "Q. So at some point the defendant did pull the vehicle over? [¶] A. Yes, in front of -- referring to the police report, 868 South 2nd Street. He drove up onto the curb, parked the vehicle almost on the sidewalk. [¶] Q. Is that a Vehicle Code violation? [¶] A. Yes, it is." Sergeant St. Amour then testified that defendant was driving over the speed limit on the surface streets prior to making the left turn. Adrienne also testified that she was not wearing a seatbelt and that defendant was

---

[14] Section 22107 provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."

driving "very fast" on the surface streets. Thus, evidence that defendant was driving over the speed limit prior to making a left turn in the middle of the block over a curb with a passenger who was not wearing a seatbelt was sufficient notice to defendant that his turn was not made "with reasonable safety" and constituted a violation of section 22107. Accordingly, a reasonably competent counsel would have concluded that a notice challenge to the use of this violation at trial was unlikely to succeed. Thus, defendant has failed to demonstrate ineffective assistance of counsel.

d. Section 22351

Defendant also argues that the trial court erred by instructing the jury that he bore the burden of proving that his act of driving in excess of the posted speed limit was not violative of the basic speed law.

The trial court instructed the jury that "Vehicle Code section 22351(b) provides that the speed of any vehicle upon a street or highway in excess of the posted speed limit is unlawful *unless the defendant establishes by competent evidence* that the speed in excess of the posted speed limit did not constitute a violation of the basic speed law at the time, place and under the conditions then existing. The basic speed law is that no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for weather, visibility, traffic on and the surface and width of the street or highway, and in no event may the speed may [*sic*] be dangerous to the safety of persons or property." (Italics added.)

Pursuant to section 22351, subdivision (b), it is unlawful to drive in excess of the posted speed limit "unless the defendant establishes by competent evidence" that his speed was not violative of the basic speed law.[15] The basic speed law provides that a

---

[15] Section 22351, subdivision (b) provides: "The speed of any vehicle upon a highway in excess of the prima facie speed limits in Section 22352 or established as authorized in this code is prima facie unlawful unless the defendant establishes by

person may not drive "at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." (§ 22350.)

Defendant contends that "section 22351, subdivision (b) includes an affirmative defense to the crime of driving in excess of the posted speed limit. The affirmative defense is that the speed was reasonable within the terms of the basic speed law. If there is evidence supportive of the defense, it becomes the People's burden to disprove the defense beyond a reasonable doubt." Defendant also argues that "[t]his court should hold the People to the position" that it advocated in *People v. Mentch* (2008) 45 Cal.4th 274 (*Mentch*).

In *Mentch, supra*, 45 Cal.4th 274, the California Supreme Court asked the parties to brief the issue of whether "a defendant's burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower*, *supra*, 28 Cal.4th at p. 477) is a burden of production under Evidence Code section 110 or a burden of persuasion under Evidence Code section 115 . . . [and] whether the trial court should instruct the jury on a defendant's burden and, if so, how." (*Mentch*, at p. 292, fn. 12.) However, the court did not reach the issue. (*Ibid.*) Justice Chin, joined by Justice Corrigan, commented on this issue in a concurring opinion. "[The parties] agree that the defendant's burden is only to produce evidence under Evidence Code section 110, and that once the trial court finds the defendant has presented sufficient evidence to warrant an instruction on the defense, the defendant has fully satisfied this burden; accordingly, the court should not instruct the jury on any defense burden." (*Mentch*, at p. 293 (conc. opn. Chin, J.).) The concurring

---

competent evidence that the speed in excess of said limits did not constitute a violation of the basic speed law at the time, place and under the conditions then existing."

opinion also suggested that "trial courts might well be advised to be cautious before instructing on any defense burden." (*Id.*, at p. 294.)[16]

The People agree that section 22351 sets out an affirmative defense. Relying on *People v. Mower* (2002) 28 Cal.4th 457, 478-483, they argue that the "weight of this burden of proof placed upon the defendant by an affirmative defense is to raise a reasonable doubt." Focusing on the instructions regarding the prosecution's burden of proving defendant's guilt beyond a reasonable doubt, they also argue that "there is no reasonable likelihood the jury would have understood this instruction as placing a more onerous burden on the defendant than ensuring there was evidence raising a reasonable doubt as to whether the basic speed law was satisfied, or as obviating the requirement that the prosecution bore the burden of proving [defendant's] guilt beyond a reasonable doubt as to that charge."

Assuming the instruction was erroneous, it was harmless under either the state or federal standard.[17] The evidence that defendant was driving "at a speed greater than [was] reasonable or prudent" and "at a speed which endanger[ed] the safety of" Adrienne was overwhelming. Defendant was driving his truck over the posted speed limit at night in a residential neighborhood with a minor, who was not wearing a seatbelt, in the front seat. There was also an unsecured ladder in the back of the truck, which shifted as he

---

[16] Defendant contends that the trial court was required to give the portion of CALCRIM No. 595 that states: "The People have the burden of proving beyond a reasonable doubt that the defendant's rate of travel was not reasonable given the overall conditions, even if the rate of travel was faster than the prima facie speed law. If the People have not met this burden, you must find the defendant did not violate the prima facie speed law."

[17] Defendant contends that the error was reversible per se. In *Mower*, *supra*, 28 Cal.4th at p. 484, the California Supreme Court rejected this contention, stating that an erroneous instruction regarding the burden of proof of an affirmative defense is evaluated under the standards stated in either *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836.

turned the truck.[18] Based on this evidence, any error in the instruction regarding defendant's affirmative defense was harmless beyond a reasonable doubt.

C. Penal Code Section 654

Defendant contends that the trial court violated Penal Code section 654 when it imposed a consecutive four-year term for the section 2800.2 conviction.

Penal Code section 654 provides, in relevant part, that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952, quoting *Neal v. State of California* (1961) 55 Cal.2d 11, 19.) The trial court's determination that a defendant maintained multiple criminal objectives is a question of fact that must be upheld if supported by substantial evidence. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The trial court stated: "Penal Code section 654 is not applicable to the offenses alleged in counts two and three because, in the court's view, they were independent of

---

[18] Defendant points out that the ladder had not fallen out while he was driving on the freeway, and thus its presence was irrelevant. However, the fact that the ladder had not fallen out previously or that there was not an accident while he was fleeing the police did not render his driving reasonable or prudent. (*People v. Don Carlos* (1941) 47 Cal.App.2d Supp. 863, 965 ["[I]t is clear that mere speed constitutes a violation of [the basic speed law], and the absence of an accident, actual or near, neither in law nor logic tends to prove that an excessive rate of speed was reasonable or prudent nor that it did not of itself endanger the safety of persons and property."].)

and not merely incidental to each other. The defendant entertained several criminal objectives, as follows: [¶] The defendant's conduct endangering Jane Doe as charged in count two began long before he attempted to elude the police as charged in count three. Even before the hit and run commenced on Highway 87, the defendant was transporting her in his truck on a freeway without having her seatbelted. [¶] After the hit and run commenced, the defendant drove several times on the left shoulder of the freeway, swerved in and out of traffic, still with Jane Doe not being seatbelted. After he left the freeway and still before the police pursuit began, the defendant turned and drove the wrong way on a one-way street."

Here, there is insufficient evidence to support the trial court's finding. The parties stipulated at trial that "the defendant admits that he intended to flee following the traffic accident with another vehicle because he reasonably believed that if he was apprehended by the police, he would be sent to prison." Thus, the prosecutor asserted in his closing argument to the jury, the "whole reason for the case" and the "motive for all these crimes" was defendant's fear of apprehension by the police. The People's argument on appeal that defendant's "intention of placing Adrienne's safety at risk in order to avoid civil responsibility for the accident was entirely apart from his intent of evading a pursuing police officer" has no merit. There is nothing in the record to indicate that defendant was concerned about his financial responsibility for the accident. Accordingly, the four-year term for the section 2800.2 conviction must be stayed.

We agree with the People that the matter must be remanded for resentencing. After imposing the consecutive four-year term for the section 2800.2 conviction, the trial court struck the additional one-year prior enhancement pursuant to Penal Code section 1385. The trial court gave as one of its reasons for striking this enhancement that it had already imposed a consecutive four-year term for the section 2800.2 conviction, so "there's really no meaningful policy of the sentencing law that would be furthered by imposing a one-year sentence for prison priors at this time." As long as the trial court

does not increase the aggregate prison term, it may reconsider its sentencing structure where a portion of the resulting sentence has been vacated by a reviewing court. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258-1259.)[19]

III. Disposition

The judgment is reversed and the matter is remanded for resentencing.

_____
Mihara, Acting P. J.

WE CONCUR:

_____
McAdams, J.

_____
Duffy, J.

[19] Defendant's reliance on *People v. Carrillo* (2001) 87 Cal.App.4th 1416 is misplaced. In *Carrillo*, this court held that a trial court did not have the discretion to conditionally dismiss strike allegations pursuant to Penal Code section 1385 in order to render the defendant eligible for commitment to the California Rehabilitation Center. (*Id.*, at p. 1418.) It is not authority for the proposition that the People were required to appeal from the dismissal of the prior prison enhancement in the event that this court held that Penal Code section 654 precluded a separate term for one of the counts.

Filed 11/12/09

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MILAN PAKES, Defendant and Appellant.	H032734 (Santa Clara County Super. Ct. No. CC131032) ORDER MODIFYING OPINION AND GRANTING REQUEST FOR PARTIAL PUBLICATION

BY THE COURT:

It is ordered that the opinion filed herein on October 16, 2009, be modified as follows:

1. On page 29, the section heading "III. Disposition" is changed to "IV. Disposition".

There is no change in the judgment.

The People have requested that the opinion filed on October 16, 2009, be certified for partial publication. Under California Rules of Court, rules 8.1105(c), 8.1110, and 8.1120, only the Introduction, section II. Statement of Facts, section III. B (1) and (2) of the Discussion, and section IV. Disposition are certified for publication.

Date:

_____
Mihara, Acting P. J.

_____
McAdams, J.

_____
Duffy, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Alden E. Danner
Attorney for Appellant:	Dallas Sacher Under Appointment of the Sixth District Appellate Program
Attorneys for Respondent:	Edmund G. Brown, Jr. Attorney General for the State of California Dane R. Gillette Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Stan Helfman Supervising Deputy Attorney General Jeffrey M. Laurence Deputy Attorney General