Filed 11/30/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDGAR LANCE OLIVER, Defendant and Appellant.	A105042 (Sonoma County Super. Ct. No. SCR-33225)

Edgar Lance Oliver was convicted of vehicle theft (Veh. Code, § 10851, subd. (a)),[1] driving in willful and wanton disregard for the safety of others while fleeing a police vehicle (§ 2800.2, subd. (a)), and a misdemeanor count of resisting arrest (Pen. Code, § 148, subd. (a)(1)). The court granted the prosecution's motion to strike an alleged prior "strike" conviction (Pen. Code, § 1170.12), and sentenced defendant to the upper term of three years in prison for the vehicle theft, and a consecutive term of eight months for the violation of section 2800.2, subdivision (a).

On appeal, defendant contends that the section 2800.2 conviction must be reversed because the prosecution failed to offer any evidence that the pursuing vehicle (1) had a lighted red emergency lamp visible from the front; and (2) was "distinctively marked." (See §§ 2800.2, 2800.1.) We shall hold that substantial evidence supports the conviction, and shall affirm the judgment.

[1] All subsequent statutory references are to the Vehicle Code unless otherwise indicated.

FACTS[2]

On July 18, 2003, at approximately 5:00 p.m., Tom Steinbroner, a Santa Rosa police detective assigned to the Auto Theft Task Force, spotted a parked Mustang that had been reported as stolen. He saw defendant get inside and start to drive away at normal speed. Steinbroner followed a short distance in his unmarked vehicle, but because he was undercover, he "radioed for marked units."

Officers Barr and Yaeger responded to the call. They were dressed in full uniform, and were driving a black patrol vehicle. Officer Barr testified that the vehicle was equipped with "emergency lighting, spot lights, and sirens." The jury viewed the car Barr was driving, and Barr testified that it had the same emergency equipment as it did on July 18. The emergency equipment consisted of a "red light that is facing forward near . . . the rearview mirror area, multiple red or blue strobe lights. . . . Also on the . . . sides of the vehicle, there's strobe lights on there as well. [T]he headlights are also—when activated are wig-wag effect when the siren and lighting equipment is activated."

Officers Barr and Yaeger followed the Mustang for a short distance, while they waited for additional units to position themselves so that they could safely stop the stolen vehicle.[3] When Officers Barr and Yaeger were approximately 20 feet behind the Mustang, they "initiated [the] lights . . . and siren." Instead of pulling over, defendant immediately sped up, and without using a turn signal, made a "hard, fast right turn onto Benicia Drive." Barr and Yaeger chased defendant at speeds between 80 to 90 miles per hour through a residential area, running through at least one stop sign, and past an area where children were playing.

The Mustang eventually came to a sideways skidded stop, positioned diagonally, abutting the corner of an intersection. Defendant exited the vehicle and started running. Officer Yaeger ordered him to stop, and began chasing him. Defendant climbed over a

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[2] We summarize only the facts relevant to the section 2800.2 conviction.

[3] Officer Kohut, who drove one of the assisting units, testified that he was trying to catch up, but did not see the pursuit, and arrived on the scene only after the Mustang stopped.

fence, and fell to the ground, hitting his head. He was apprehended as he attempted to climb over another fence, and was taken to a hospital. After giving a *Miranda* warning (*Miranda v. Arizona* (1966) 384 U.S. 436), Barr interviewed defendant at the hospital. Defendant stated that he realized he was being pursued by the police, but did not stop because he was scared.

ANALYSIS

Section 2800.2 is violated if a person drives in "willful or wanton disregard for the safety of persons or property" and "flees or attempts to elude a pursuing peace officer in violation of Section 2800.1." The prosecution must prove, among other things, that the pursuing officer was wearing a "distinctive uniform" (§ 2800.1, subd. (a)(4)), and that the officer's vehicle: (1) exhibited at least one lighted red lamp visible from the front and the defendant either saw, or reasonably should have seen, the lamp (§ 2.800.1, subd. (a)(1)); (2) sounded a siren (§ 2800.1, subd. (a)(2)); and (3) is "distinctively marked" (§ 2.800.1, subd. (a)(3)). Defendant challenges only the sufficiency of the evidence to support a finding that Officer Barr's vehicle (1) displayed a lighted red lamp and (2) was "distinctively marked."

" 'The 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.] On appeal, we 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.]' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, italics added, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.) " 'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, *not whether the evidence proves guilt beyond a reasonable doubt*. [Citation omitted.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained

its burden of proving the defendant guilty beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576, italics added.)

1. Sufficiency of the Evidence that Officer Barr's Vehicle Exhibited a Lighted Red Lamp

Defendant argues that, because Officer Barr testified only that he activated the "lights," there was no substantial evidence to support a finding that the lights activated included a *red* light. He concludes that, in the absence of any evidence that the condition set forth in section 2800.1, subdivision (a)(1) existed, his conviction must be reversed.

Defendant relies upon two cases that are factually distinguishable. In *People v. Brown* (1989) 216 Cal.App.3d 596 (*Brown*), the pursuing officer testified that her squad car could display three possible light signals, depending on which position the switch was in: a flashing amber light to the rear, or blinking blue and white lights to the front and rear, or rotating red, blue and white lights. The officer testified that she "activated [her] overhead signals" but could not recall whether the switch was in the second or third position. (*Id.* at p. 599.) Although other witnesses testified that the squad car lights were on at the time of the pursuit, their testimony also did not specify the color of the lights. (*Id.* at p. 600.) On appeal, the People *conceded* that this evidence was insufficient to support the conviction. (*Id.* at p. 599.) Consequently, the court's analysis of the sufficiency of the evidence in *Brown* was cursory, and essentially dicta. Apparently relying upon the officer's uncertainty regarding the position of the switch when she activated the lights, the court reasoned that the officer's testimony "[gave] equal support to two inconsistent inferences" regarding which color lights were activated, and therefore "neither is established." (*Id.* at p. 600.) The court concluded that there was substantial evidence that the "lights were on, but not whether any of them were red," and reversed the conviction. (*Ibid*.)

In *People v. Acevedo* (2003) 105 Cal.App.4th 195, 197 (*Acevedo*), the pursuing officer testified he " 'activated [his] overhead emergency lights with the siren,' " but no evidence was presented to the jury to establish that the vehicle was equipped with a red light visible to the front, or specifying the color of the vehicle's emergency lights. (*Id*. at

p. 199.) The court rejected the suggestion that this evidentiary gap could be filled by relying upon section 25252, which requires all authorized emergency vehicles to be equipped with a red light visible from the front, and a presumption that an official duty has been regularly performed (see Evid. Code, § 664), because the issue was not raised below, and the jury had not been instructed on such a presumption.[4] (*Acevedo, supra*, at pp. 198-199.) Also, following the reasoning of *Brown*, the court held that even if the jury could rely on its "common knowledge" that police vehicles are equipped with red lights, "it is equally well known that police cars [can] display . . . amber, white, or blue lights," and therefore the jury's common knowledge would only give rise "to the competing inferences of different colored lights which called for a reversal in *Brown*." (*Id.* at p. 199.) Noting that the evidentiary gap could easily have been filled by simply asking a few more questions, the court reluctantly reversed the conviction, because to bend the rules would only " 'place a premium upon the district attorney's indolence [and] would be a dangerous precedent.' " (*Id.* at p. 200.)

It is unnecessary, in this case, to resort to a presumption that a legal duty was performed, or to the "common knowledge" of jurors, because, unlike *Acevedo, supra*, 105 Cal.App.4th 195, defendant acknowledges that Officer Barr's testimony, and that of Detective Steinbroner, constitutes substantial evidence that Barr's vehicle *was* equipped with at least one red emergency light visible from the front. Defendant, nonetheless, broadly construes *Acevedo* to establish a general rule that, unless the police officer, or another witness, explicitly states that a *red* light was activated, the evidence is

[4] When the pursuit involves chases in violation of the speed limit, running stop signs, or other violations of the rules of the road, and a pursuing officer testifies that the vehicle was equipped with a red forward-facing light as required by section 25252, but cannot recall, or is uncertain as to whether the red light and/or siren was activated, the prosecution might also rely upon the Evidence Code section 664 presumption that the officer performed the condition specified in section 21055 for exemption from the rules of the road, i.e., that the driver "sounds a siren" and lights a "red lamp visible from the front" as a warning to other drivers and pedestrians (§ 21055, subd. (b).) As we shall explain, there is no need to resort to any such presumption in this case because there was substantial evidence that the red light was activated when Officer Barr turned on his lights and siren.

insufficient to support the conviction. Since Barr and Yeager stated only that they activated the "lights" and siren, he concludes there was no substantial evidence that a *red* lamp was lit. In *Acevedo, supra*, it was the *absence of any evidence that the vehicle was even equipped with a red forward-facing light* that rendered the officer's testimony that he turned on his "emergency lights" insufficient to support an inference that "emergency lights" included a red forward-facing light. In the absence of some evidence that the vehicle was equipped with a red forward-facing light, the court reasoned that testimony that the emergency lights were activated could not support any inference that the red light was one of them. Here, that "evidentiary gap" was filled by the testimony of Officer Bar and Detective Steinbroner. Thus, when Barr stated that he activated the "lights" and siren, it was inferable that the lights activated included the red forward-facing lamp.

Also, unlike the testimony of the pursuing officer in *Brown*, *supra*, 216 Cal.App.3d 596, Officer Barr's testimony that he activated his "lights . . . and siren" did not include any details that suggested it was possible that he might *not* have activated the red light. Defendant argues that Barr's description of the lighting equipment included lights that were not red. Therefore, he reasons, Barr's testimony that he activated the "lights . . . and siren" did not *exclude* the possibility that he only activated lights which were not red. Yet, unlike, *Brown*, *supra*, there was no evidence that a switch in the vehicle activated different sets of lights, only some of which were red, or that Officer Barr was unsure as to which lights were activated. Barr's testimony described the lighting equipment on the vehicle he was driving as consisting of a "red light that is facing forward near . . . the rearview mirror area, multiple red or blue strobe lights. Also on the . . . sides of the vehicle, there's strobe lights on there as well. [T]he headlights are also—when activated are wig-wag effect *when the siren and lighting equipment is activated.*" Consequently, when Officer Barr testified that he "initiated [the] lights . . . and siren," the jury could reasonably infer that he meant *all* the lights he had described were activated, *which included the forward-facing red light.*

Moreover, unlike either *Acevedo*, *supra*, 105 Cal.App.4th 195, or *Brown*, *supra*, 216 Cal.App.3d 596, the jury in this case *viewed the vehicle and observed a*

demonstration of the activation of its lights and siren. Since it is defendant's burden to demonstrate error on appeal, and the record provides no information concerning this demonstration other than Officer Barr's description of the lights, and testimony that the vehicle the jury observed was the same one he drove on the day he pursued defendant, we must presume that this demonstration also showed the jury that activation of the lights and siren *includes* the red forward-facing light. All of the foregoing constitutes substantial evidence that the "lights" Officer Barr turned on, when he attempted to pull defendant over by activating his "lights and siren," included the red forward-facing light.

In addition to being distinguishable on their facts, the decisions in *Acevedo, supra*, 105 Cal.App.4th 195 and *Brown*, *supra*, 216 Cal.App.3d 596, relied, in part, upon "the equally probable inference rule" stated in *Penna. R. Co. v. Chamberlain* (1933) 288 U.S. 333, 339 (*Chamberlain*), which required that where the proven facts give equal support to two conflicting inferences, the inference that goes against the party with the burden of proof must be drawn.[5] This aspect of *Chamberlain, supra*, was later implicitly disapproved in *Lavender v. Kurn* (1946) 327 U.S. 645, 652 (*Kurn*). In *Kurn*, the court explained that on review, if there is a reasonable basis for drawing an inference that supports the plaintiff's case, the jury's verdict must be upheld *even if there is equal support for an inconsistent inference*, because it is the jury's duty "to settle the dispute by choosing what seems to them to be the most reasonable inference." (*Kurn, supra,* at p. 653; see also *Daniels v. Twin Oaks Nursing Home* (1982) 692 F.2d 1321, 1324-1325 [the "rule of equally probable inferences is no longer sound"]; 9A Wright & Miller, Federal Practice and Procedure (1994) § 2528, pp. 288-296 [explaining that equally probable inference rule has been rejected by most federal courts because it is impossible to determine whether two or more reasonable inference are equal without some weighing

[5] In *Brown*, *supra*, 216 Cal.App.3d at p. 600, the court cited *People v. Allen* (1985) 165 Cal.App.3d 616, 626 (*Allen*), which in turn cited *Chamberlain, supra*, 288 U.S. at p. 339, for the proposition that " 'where proven facts give[] equal support to each of two inconsistent inferences . . . neither [is] established.' " (*Allen*, *supra*, at p. 626.) In *Acevedo*, *supra*, 105 Cal.App.4th at pp. 198-199, the court cited *Brown* for the same principle.

of the evidence, which is exclusively the province of a jury].) By invoking the equally probable inference rule, the *Brown* and *Acevedo* courts incorrectly injected a principle which, under California law, is applicable *to the trier of fact* in a criminal case based upon circumstantial evidence, into the substantial evidence standard of review that an appellate court applies when a verdict is challenged on the ground of insufficient evidence. In *People v. Farnum* (2002) 28 Cal.4th 107, 143, the court explained the distinction as follows: " 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.' [Citation.] Simply put, if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." Thus, even if defendant were correct that Barr's testimony could also reasonably be construed to support the inference that, when he activated his lights and siren, he activated only some of the lights, not including the red light, as the appellate court, we would have to presume the jury instead drew the reasonable inference that, when Barr testified he activated the "lights and siren," he meant he activated all the lights with which his vehicle was equipped, including the red light.

2. Sufficiency of the Evidence that Officer Barr's Vehicle was "Distinctively Marked"

The courts, in construing the requirement of section 2800.1, subdivision (a)(3) that the pursuing vehicle be "distinctively marked," have consistently rejected any contention that a vehicle must bear a specific logo or insignia, or be painted in a specific style. (See, e.g., *People v. Estrella* (1995) 31 Cal.App.4th 716, 722; *People v. Mathews* (1998) 64 Cal.App.4th 485, 489.) There is, however, some disagreement on the question whether evidence that the pursuing vehicle had activated a red light visible from the front, and sounded a siren is, *by itself*, sufficient to support a finding that the vehicle was "distinctively marked." (Compare *People v. Estrella*, *supra*, at p. 723 ["a red light and siren alone do not distinctively mark a police vehicle"] and *People v. Chicanti* (1999)

71 Cal.App.4th 956, 962 [court disagreed with *Estrella* to the extent that it held that "a lighted red lamp and sounded siren on an unmarked police car can never constitute substantial evidence [that the vehicle is] distinctively mark[ed]"].) It is unnecessary for us to resolve this conflict, however, because, in this case, in addition to the evidence we have already summarized that Barr activated the red light and siren, there was substantial evidence that Officer Barr's vehicle was distinctively marked.[6] (§ 2800.1, subd. (a)(3).)

In *People v. Estrella*, *supra*, 31 Cal.App.4th 716, the case upon which defendant primarily relies, the court found substantial evidence that the vehicle was "distinctively marked," based upon "the additional 'devices'. . . consisting of wigwag lights and the flashing blue and clear lights." (*Id.* at p. 723.) The court went on to state: "We find it incredible to believe or even seriously argue that a reasonable person, upon seeing a vehicle in pursuit with flashing red and blue lights, wigwag headlights and hearing a siren, would have any doubt that said pursuit vehicle was a police vehicle." Similarly, in this case, Officer Barr testified that in addition to the forward-facing red light, his vehicle was equipped with "multiple red or blue strobe lights. Also on the . . . sides of the vehicle, there's strobe lights on there as well. [T]he headlights are also . . . wig-wag effect when the siren and lighting equipment is activated." The jury could reasonably conclude, based upon Barr's testimony that he activated his "lights and siren," and on the demonstration of the siren and lighting equipment, that activation of the siren and lighting equipment also triggered the wigwag headlights, and blue or red strobe lights, and that these additional devices would put a reasonable person on notice that the pursuing vehicle was a police vehicle. (*People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237 [activation of siren, red and blue strobe lights, and fixed red light, when uniformed officer made U-turn to pull over defendant, constitutes substantial evidence that vehicle was distinctively marked]; *People v. Mathews*, *supra*, 64 Cal.App.4th at pp. 488-490

[6] The jury was instructed, in accordance with CALJIC No. 12.87, that "[a] vehicle operated by a police officer is 'distinctively marked' when, in addition to a lighted red lamp and activated siren, the vehicle is of such appearance that a reasonable person would be able to recognize it as a peace officer's vehicle, and a person fleeing is on reasonable notice that pursuit is by a peace officer."

["red lights, siren, and wigwag headlights were sufficiently distinctive markings"].) Moreover, any doubt that a reasonable person, hearing the siren, and observing the red light, red or blue strobe lights and the wigwag headlights, would conclude he was being pursued by a police vehicle was removed by defendant's own statement made to Barr in the hospital that he realized he was being pursued by the police, but did not stop because he was scared. (See *People v. Chicanti*, *supra*, 71 Cal.App.4th at p. 963 [jury's conclusion that vehicle was "distinctively marked" was supported by totality of circumstances, including defendant's testimony that he knew the police were following him, but did not stop because he had outstanding tickets and warrants].)

Defendant does not challenge the sufficiency of the evidence that he drove in willful and wanton disregard for the safety of others, or of any of the other elements of a violation of section 2800.2. Therefore, having found that there was substantial evidence that the pursuing vehicle exhibited at least one lighted red lamp visible from the front (§ 2.800.1, subd. (a)(1)), and that the vehicle was "distinctively marked" (§ 2.800.1, subd. (a)(3)), we conclude that the conviction for violating section 2800.2 is supported by substantial evidence.

CONCLUSION

The judgment is affirmed.

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STEIN, J.

We concur:

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MARCHIANO, P.J.

_____
SWAGER, J.

Trial Court:	The Superior Court of Sonoma County
Trial Judge:	Hon. Cerena Wong
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