Filed 7/11/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BRANDON CHARLES WILLIAMS, Defendant and Appellant.	C042763 (Super. Ct. No. 01F08475)

APPEAL from a judgment of the Superior Court of Sacramento County, James L. Long, Judge. Affirmed in part and reversed in part.

George L. Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Matthew L. Cate, Laura Wetzel Simpton and Maggy Krell, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III, and IV.

Late at night, while driving a car that was stolen in a carjacking, defendant Brandon Williams attempted to elude a peace officer who was following him. When defendant ran a stop light, the officer activated the patrol car's red lights and siren, and pursued him onto a freeway. Defendant turned off the lights of the stolen car and drove it at over 120 miles per hour in the dark, weaving in and out of traffic. In an off ramp, he lost control of the car, which rolled over and came to rest in a field. The car caught fire and Venus Foster, a passenger trapped in the front seat, was killed. Defendant, who was able to get out of the burning car, was found hiding nearby.

A jury convicted defendant of second degree murder (Pen. Code, § 187, subd. (a)) and causing the death of another while fleeing in a vehicle from a pursuing peace officer (Veh. Code, § 2800.3; further section references are to the Vehicle Code unless otherwise specified). The prosecutor tried the murder charge on two theories, implied malice and second degree felony murder based on a violation of section 2800.2, driving "in a willful or wanton disregard for the safety of persons or property" while attempting to elude a pursuing peace officer. The verdict does not disclose which theory the jury adopted. Sentenced to a term of 15 years to life in state prison, defendant appeals.

In an opinion filed on March 15, 2004, we rejected defendant's contention that the judgment must be reversed because section 2800.2 employs an impermissible mandatory presumption. However, we agreed that section 2800.2 cannot serve as a basis for second degree murder

because the statute is not an inherently dangerous felony for purposes of the second degree felony-murder rule.

The California Supreme Court granted review and deferred further action in this cause pending that court's decision in another case, which it later filed on January 27, 2005. (*People v. Howard* (2005) 34 Cal.4th 1129 (hereafter *Howard*).) In *Howard,* the Supreme Court concluded, as we had done in this cause, that section 2800.2 is not an inherently dangerous felony for purposes of the second degree felony-murder rule. On June 8, 2005, the Supreme Court transferred this cause to us with directions to vacate our decision and reconsider the cause in light of *Howard*. We have done so.

In the published part of this opinion, we again reject defendant's claim that section 2800.2 employs an impermissible mandatory presumption. As we will explain, it simply establishes a rule of substantive law by setting forth the Legislature's definition of what qualifies as a violation of that section.

In the unpublished parts of our opinion, we address defendant's additional claims of error. Among other things, we again conclude the conviction for second degree felony murder, based on his violation of section 2800.2, cannot stand. Although overwhelming evidence supports a finding of second degree murder on the basis of implied malice, we must reverse the conviction because it is conceivable that the conviction was based only on the erroneous theory of second degree felony murder. And once again, we quote the astute observation of Justice George Hopper in *People v. Houts* (1978) 86 Cal.App.3d 1012. "The lesson to be learned" is in their zeal to obtain convictions, prosecutors must be extremely careful to not advance an alternate

theory of guilt that turns out to be erroneous; "[t]he use of a well aimed and finely honed blade, rather than the scattergun with its dangerous spray effect, is often the most effective method of assuring a successful and final victory." (*Id*. at pp. 1021-1022; see also *People v. Sanchez* (2001) 86 Cal.App.4th 970, 981-082.)

DISCUSSION

I

Section 2800.1 provides that when, with the intent to evade, the driver of a motor vehicle willfully flees or attempts to elude a pursuing peace officer's motor vehicle or bicycle under circumstances specified in section 2800.1, the person is guilty of a misdemeanor.[1]

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[1] 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 . . . and that peace officer is wearing a distinctive uniform."

Subdivision (b) 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 bicycle, is guilty of a misdemeanor if the following conditions exist: [¶] (1) The peace officer's bicycle is distinctively marked. [¶] (2) The peace officer's bicycle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform. [¶] (3) The peace officer gives a verbal command to stop. [¶] (4) The peace officer sounds a horn that produces a sound of at least 115 decibels. [¶] (5) The peace officer gives a hand signal commanding the person to stop. [¶] (6) The person is aware or reasonably

Section 2800.2, subdivision (a), provides that when a person drives "in a willful or wanton disregard for the safety of persons or property" while fleeing or attempting to elude a pursuing peace officer in violation of section 2800.1, the person is subject to prosecution for either a felony or a misdemeanor. (§ 2800.2, subd. (a).)

In subdivision (b) of section 2800.2, the Legislature has specified that, "[f]or 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 [specified traffic] violations . . . occur, or damage to property occurs."

Defendant contends that subdivision (b) of section 2800.2 "employ[s] a constitutionally prohibited mandatory presumption" "by describing [the willful or wanton disregard for the safety of persons or property element] of the offense in terms of specific Vehicle Code violations . . . ." We disagree.

A mandatory presumption tells the trier of fact that if a specified predicate fact has been proved, the trier of fact *must* find that a specified factual element of the charge has been proved, unless the defendant has come forward with evidence to rebut the presumed connection between the two facts. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157 [60 L.Ed.2d 777, 792]; *People v.*

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should have been aware of the verbal command, horn, and hand signal, but refuses to comply with the command to stop."

McCall (2004) 32 Cal.4th 175, 182.) In criminal cases, a mandatory presumption offends constitutional principles of due process of law because it relieves the prosecutor from having to prove each element of the offense beyond a reasonable doubt. (*Ulster County Court v. Allen, supra,* 442 U.S. at p. 157 [60 L.Ed.2d at p. 792]; *People v. McCall, supra,* 32 Cal.4th at p. 183-184; *People v. Roder* (1983) 33 Cal.3d 491, 496-498.)

For example, in *Carella v. California* (1989) 491 U.S. 263 [105 L.Ed.2d 218], Eugene Carella was accused of grand theft for failing to return a rented car. Applying statutory presumptions, the trial court instructed the jury that (1) a person is presumed to have embezzled a vehicle if it is not returned within five days of the expiration of the rental agreement (§ 10855), and (2) the intent to commit theft by fraud is presumed if a person fails to return rented property to its owner within 20 days of demand (Pen. Code, § 484, former subd. (b)). Concluding that the instructions violated the Fourteenth Amendment, the United States Supreme Court explained: "These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses with which Carella was charged. The instructions also relieved the State of its burden of proof articulated in [*In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368]], namely proving by evidence every essential element of Carella's crime beyond a reasonable doubt." (*Carella v. California, supra,* 491 U.S. at p. 266 [105 L.Ed.2d at p. 222]; see also *People v. Forrester* (1994) 30 Cal.App.4th 1697, 1700-1702.)

However, there is no impermissible mandatory presumption when a statute creates a rule of substantive law by defining in precise terms conduct that establishes an element of the offense as a matter of law. (*People v. McCall, supra,* 32 Cal.4th at pp. 185-186, 187-188; *People v. Dillon* (1983) 34 Cal.3d 441, 474.)

For example, former subdivision (f) of Health and Safety Code section 11383, which stated that possession of red phosphorous and iodine with the intent to manufacture methamphetamine "shall be deemed" to be possession of hydriodic acid with the intent to manufacture methamphetamine, did not create an unconstitutional mandatory presumption. It "simply created a rule of substantive law." (*People v. McCall, supra,* 32 Cal.4th at p. 188.) Indeed, it "contained no presumption at all. Instead, [the statute] was nothing more than a definitional section that specified the conduct 'deemed' criminal . . . . Substantive due process allows lawmakers broad power to select the elements of crimes, and to define one thing in terms of another." (*Id*. at p. 189.)

Likewise, *People v. Pinkston* (2003) 112 Cal.App.4th 387 held: "Subdivision (b) of Vehicle Code section 2800.2 does not state a mandatory presumption. Rather, it sets out the Legislature's *definition* of what qualifies as willful and wanton conduct under subdivision (a). Although Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof of that the defendant committed three Vehicle Code violations. Thus, section 2800.2, subdivision (b)

establishes a rule of substantive law rather than a presumption apportioning the burden of persuasion concerning certain propositions or varying the duty of coming forward with evidence. [Citation.] In other words, evasive driving during which the defendant commits three or more specified traffic violations *is* a violation of section 2800.2 '*because of the substantive statutory definition of the crime*' rather than because of any presumption. [Citation.] Since there is no presumption, due process is not violated. [Citation.]" (*Id.* at pp. 392-393, orig. italics.)

We agree. Subdivision (b) of section 2800.2 bears no resemblance to the scheme considered in *Carella v. California, supra,* 491 U.S. 263 [105 L.Ed.2d 218]. It simply defines the element of "a willful or wanton disregard for the safety of persons or property" as behavior that includes driving while fleeing or attempting to elude a pursuing peace officer, during which time three or more specified traffic violations occur or damage to property occurs. "[I]t is emphatically the role of the Legislature, within constitutional limits, to define offenses and prescribe punishments. [Citations.]" (*People v. Penoli* (1996) 46 Cal.App.4th 298, 306, fn. 6.)

Because subdivision (b) of section 2800.2 establishes a rule of substantive law rather than a presumption that varies the burden of proof, we reject defendant's claim that the trial court erred by instructing the jury in accordance with the statute.

II*

In another attack on his murder conviction, defendant contends the judgment must be reversed because the trial court erred by

instructing the jury on the theory of second degree felony murder based upon a violation of section 2800.2, driving "in a willful or wanton disregard for the safety of persons or property" while fleeing or attempting to elude a pursuing peace officer. This is so, he argues, because section 2800.2 is not a felony inherently dangerous to human life. We agree.

We begin by observing that the trial court's decision to give the challenged instruction is understandable because prior to the trial in this case, published Court of Appeal decisions had held that section 2800.2 is an inherently dangerous felony for purposes of the second degree felony-murder rule. (*People v. Sewell* (2000) 80 Cal.App.4th 690, 694 (hereafter *Sewell*); *People v. Johnson* (1993) 15 Cal.App.4th 169, 173 (hereafter *Johnson*).)

In our prior opinion in this case, the majority disagreed with the analysis and holdings in *Sewell* and *Johnson*, and we instead held that section 2800.2 cannot serve as a basis for second degree murder because the statute is not an inherently dangerous felony for purposes of the second degree felony-murder rule.

After granting review in this case, a majority of California's Supreme Court reached the same conclusion in *Howard, supra,* 34 Cal.4th at pages 1132 and 1135-1139. Hence, the Supreme Court disapproved *Sewell* to the extent *Sewell* held that a murder conviction under the second degree felony-murder rule can be based on a violation of section 2800.2. (*Howard, supra,* 34 Cal.4th at p. 1139, fn. 5.) Because the statute was amended after the decision in *Johnson*, the Supreme Court decided it need not address whether *Johnson* was correct. (*Howard, supra,* 34 Cal.4th at p. 1137.)

Since section 2800.2 is not an inherently dangerous felony for purposes of the second degree felony-murder rule, the trial court in this case erred in instructing the jury on that theory of liability. (*Howard, supra,* 34 Cal.4th at p. 1139.) Consequently, defendant's murder conviction must be reversed unless we are able to conclude beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*People v. Swain* (1996) 12 Cal.4th 593, 607; *People v. Sanchez, supra,* 86 Cal.App.4th at pp. 980-981; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1238.) "Such a reasonable doubt arises where, although the jury was instructed on alternate theories, there is no basis in the record for concluding that the verdict was based on a valid ground." (*People v. Smith, supra,* 62 Cal.App.4th at p. 1238, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1122.)

The jury was instructed properly on second degree murder based upon implied malice, and there is overwhelming evidence to support the murder conviction on that basis. Defendant, who had three passengers in his car, ran a red light and proceeded to weave in and out of traffic on the highway in the dark, with his lights off, at a speed of over 120 miles an hour, while ignoring his passengers' impassioned pleas for him to stop. Defendant's blatant disregard for the threat to human life did not end until he failed to negotiate an off ramp and rolled the car, causing it to catch fire and killing one of the passengers. There is no reasonable doubt such conduct demonstrates a wanton and conscious disregard for human life, i.e., implied malice, which justifies a conviction of second degree murder. (*People v. Watson* (1981) 30 Cal.3d 290, 300-301.)

However, the fact remains that the jury was given an erroneous alternative, second degree felony murder based on section 2800.2, upon which to return a verdict of guilt. The prosecutor emphasized this theory in closing argument, stating that defendant was guilty of second degree murder if he intended to violate section 2800.2 and the commission of that crime caused the death of another human being. Thus, the prosecutor pointed out that under the instructions given, if the jury found defendant had committed three enumerated moving violations, then "it is presumed that he has a wanton and willful disregard for the safety of others," which would support a second degree felony-murder conviction.[2]

Based on the instructions given and the prosecutor's argument, it is conceivable that the jury stopped deliberating after finding defendant guilty of second degree murder because he killed a human being while violating section 2800.2, an erroneous legal theory, and thus the jury did not attempt to determine whether the evidence supported a finding of implied malice. Nothing in the general verdict form rules out this possibility, and there simply is no legitimate basis in the record for us to conclude that the verdict necessarily was based on the valid legal ground of implied malice. (Cf. *People v. Swain, supra,* 12 Cal.4th at p. 607; *People v. Sanchez, supra*, 86 Cal.App.4th at p. 981; *People v. Smith, supra,*

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[2] The jury was instructed that four Vehicle Code sections may be applicable to this case: section 22349 [speeding]; section 22107 [turning without giving an appropriate signal and in an unsafe manner]; section 24409 [driving a car during darkness without its lights on]; and section 21453, subd. (a) [running a stop light].

62 Cal.App.4th at p. 1238; *People v. Houts, supra,* 86 Cal.App.3d at p. 1021 [“we cannot hold that the error did not affect the verdict because we simply have no way of telling”].)

Accordingly, despite overwhelming evidence that defendant is guilty of second degree murder based on implied malice, the trial court’s error in instructing the jury on the elements of second degree murder based upon the second degree felony-murder rule requires us to reverse his murder conviction and to remand for a retrial on that charge. (*People v. Swain, supra,* 12 Cal.4th at p. 607; *People v. Sanchez, supra*, 86 Cal.App.4th 970, 980-981.)

III*

Since we have determined that defendant may not be convicted of felony murder based on a violation of section 2800.2, we need not address his claim that section 2800.3 is a more specific offense than section 2800.2 and, thus, section 2800.3 precludes applying the felony-murder rule to a violation of section 2800.2.

IV*

Defendant contends, the People concede, and we agree that the trial court miscalculated the number of days defendant was in actual custody for purposes of presentence credits under Penal Code section 2900.5, subdivision (a), and that defendant is entitled to two additional days’ credit. Defendant may bring this error to the trial court’s attention upon resentencing after retrial.[3]

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[3] In addition to the murder conviction, defendant was convicted of violating section 2800.3 and sentenced to five years in state prison for this offense, stayed pursuant to section 654. In the highly unlikely event defendant is not tried again for murder or

DISPOSITION

Defendant's conviction for violating section 2800.3 is affirmed. The sentence imposed but stayed on that count pursuant to Penal Code section 654 is vacated. Defendant's conviction and sentence for second degree murder are reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

SCOTLAND, P.J.

We concur:

MORRISON, J.

ROBIE, J.

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is acquitted of that charge, the trial court will still need to resentence defendant on the section 2800.3 conviction.