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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY FLORES,

Defendant and Appellant.

C069455

(Super. Ct. No. 10F05774)

Following a jury trial, defendant Anthony Flores was convicted of recklessly evading a peace officer (Veh. Code, § 2800.2, subd. (a)—count one),¹ evading a peace officer by driving against the flow of traffic (*id.*, § 2800.4—count two), assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (c)—count three), and misdemeanor assault on a peace officer (Pen. Code, § 241, subd. (c)—count four). Defendant admitted prior strike and serious felony allegations (Pen. Code, §§ 667.5,

¹ Undesignated statutory references are to the Vehicle Code; all statutory references are to those in effect at the time of defendant's September 6, 2010 crimes, unless otherwise indicated.

subd. (b), 1170.12), and the trial court sentenced him to 16 years four months in state prison.

On appeal, defendant contends the trial court's instructions on sections 2800.2 and 2800.4 denied him due process of law, and the prospective application of California's 2011 Realignment Legislation (hereafter Realignment Act; Stats. 2011, ch. 15) violates his right to equal protection of the law. We shall affirm.

FACTUAL BACKGROUND

The Prosecution Case

On September 6, 2010, at about 10:00 a.m., California Highway Patrol (CHP) Officer Ehren Dreisbach was merging onto eastbound Highway 50 at Sunrise Boulevard when a Nissan Pathfinder driven by defendant sped by him at around 80 miles per hour (mph). Dreisbach, in full uniform and driving a marked patrol car, caught up as defendant exceeded 100 mph. Defendant swerved across the freeway and passed between vehicles until he reached the number four lane, behind a large rental truck. Dreisbach activated his lights and sirens. Within five seconds, defendant leaned out the window, simulated a gun with his left hand, and made a fist and an obscene gesture visible to Dreisbach.

Defendant cut across to the number one lane; at the last minute, he cut across traffic and exited the freeway on the Prairie City Road off-ramp. At the bottom of the off-ramp, defendant turned left from a right-turn-only lane, cutting in front of several cars. Officer Dreisbach continued the pursuit through the city of Folsom by heading north onto Prairie City Road. A Folsom police officer, in full uniform and driving a marked patrol car with lights and sirens activated, took over the lead in the pursuit through Folsom, where defendant reached speeds up to 105 mph.

Defendant drove 70 mph in a 40-mph zone, slowing to about 40 mph as he ran a red light at the intersection of Iron Point Road. He turned right on Blue Ravine Road at about 25 mph while going through a red light, and then reached 80 mph in a 45-mph zone. Defendant made an illegal left turn in the middle of the intersection at East Bidwell Street, cutting directly in front of the cars waiting in the left-hand turn lane at the red light.

Defendant could not maintain his speed on East Bidwell Street because of traffic stopped at a red light. Unable to pass, defendant slowed to less than 5 mph. When the vehicles moved out of the way in response to Officer Dreisbach's directive, defendant crossed the intersection against a red light. He then ran another red light at Wales Drive, crossing the intersection at about 60 mph. Defendant ran yet another red light and made a left turn onto Riley Street at about 25 mph. He then accelerated to 70 mph as he passed by Riley Park and the Folsom Aquatic Center.

Defendant continued down Riley Street, switching lanes and cutting off other vehicles. He turned onto Oak Avenue Parkway, driving 50 mph in a 25-mph zone. Defendant managed to stop at one intersection for a short time.

Defendant turned back onto East Bidwell Street, where he ran a red light. He momentarily tapped his brakes at the intersection, but then ran a red light at about 75 mph in a 45-mph zone. Defendant then drove onto westbound Highway 50, where CHP Officer Michael Sullivan took over as the lead, with CHP Officer Colby Hemm joining in a second vehicle. Both officers were in uniform and activated the lights and sirens on their marked patrol cars.

Defendant drove between 90 to 100 mph on Highway 50 as he swerved in and out of traffic and cut off multiple vehicles. He exited the freeway at the Power Inn Road/Howe Avenue off-ramp and drove around a spike strip. As defendant slowed at the bottom of the off-ramp, Officer Sullivan employed a "pursuit immobilization technique"

(PIT) maneuver in an attempt to stall the vehicle. The maneuver failed; defendant's car spun over 360 degrees but did not stall out. Defendant mouthed an obscenity at the officer as his vehicle spun, and then continued driving south on Power Inn Road. Bouncing around inside the vehicle as if he was dancing, defendant held his hand out the window in the shape of a gun, and then made an obscene gesture at the officer.

Once on Power Inn Road, defendant, swerving in and out of traffic, drove in the opposing lane for a short distance. Officer Sullivan tried a second PIT maneuver after defendant drove into a residential area. The PIT maneuver failed to stop defendant, but broke the steering wheel in Sullivan's car.

After defendant's Pathfinder stopped spinning, he drove forward and hit CHP Officer Mike McGinity's patrol car. Defendant reversed the Pathfinder, and then drove directly at Officer Sullivan, who was standing in front of his disabled car. Sullivan drew his firearm and ordered defendant to stop. When defendant was 10 to 15 feet from Sullivan, who was about to pull the trigger, Officer Hemm and another CHP officer drove their patrol cars into the side of defendant's Pathfinder, pushing it away and boxing it in.

Officer Sullivan drew his Taser, approached the now disabled Pathfinder, and ordered defendant out of the vehicle. Defendant was laughing and still trying to accelerate his vehicle as he ignored Sullivan's order. Sullivan "Tasered" defendant, who stopped laughing, but said he could not get out of the Pathfinder. After getting Tasered a second time, defendant left the Pathfinder and was apprehended. He never complained about being unable to control his vehicle.

Defendant did not display any symptoms of drug or alcohol intoxication. The pursuit lasted 26 minutes and covered 32.3 miles.

The Defense

Automotive mechanic Moyses Baldizan testified he worked on defendant's Pathfinder. He bypassed the ignition because it did not work, wired the instrument panel so the ignition would operate, and installed a pushbutton starter. According to Baldizan, "There was so much wrong with it, everything was unusual about that darn car."

Defendant's friends Luis Fernandez and Janelle Willhite testified they saw the Pathfinder malfunction and accelerate on its own. Willhite said that there were "wires everywhere" in the Pathfinder, which at times "accelerated and then slowed down on its own."

Defendant testified that when he bought the Pathfinder, he thought it needed only minor work. However, it needed significant repairs, including drilling holes inside the fire wall so he could start the Pathfinder from the inside.

Defendant was late for work on the day of the incident, so he did not check the wiring before leaving. The Pathfinder started "jerking, like it wouldn't stop." He had control over the steering, but could not control the speed, and the braking was "real stiff." Defendant did not try to stop the car because he thought it would soon run out of gas and stop on its own. He planned to drive the car to his home and crash it into his property.

Defendant denied making obscene or other inappropriate gestures to officers, and did not laugh during the incident. Instead, defendant was merely putting his hands out the window to inform the officer that the Pathfinder would not stop. He did not mouth any obscenities, but was trying to say that the Pathfinder would not stop. He admitted swerving into oncoming traffic, but did so when there were no oncoming cars. Defendant claimed the Pathfinder accelerated and decelerated on its own, reaching speeds up to 110 mph. He did not drive at Officer Sullivan, as his Pathfinder was pushed towards the officer by other CHP cars.

DISCUSSION

I. Instruction on Section 2800.4

Defendant contends the trial court's instruction on evading an officer by driving against the flow of traffic (§ 2800.4) in count two violated his due process rights by failing to define the term "willfully."

A. Background

During the discussion on jury instructions, the trial court told the attorneys that since there was no standard jury instruction for the section 2800.4 offense, it fashioned one on its own. The trial court and defense counsel then engaged in the following colloquy:

"THE COURT: What I did was take out all the wanton stuff, because I think all the other elements are the same. [¶] You know, we can probably take out all this stuff that redefines willfully and distinctive. Are you guys good with that?"

"[DEFENSE COUNSEL]: Actually, Your Honor, seeing as though you are using that terminology in there, I would ask it remain.

"THE COURT: But I have used it, I have already given those definitions in the preceding instruction. So I am already telling them that a person is a peace officer, is a CHP officer.

"[DEFENSE COUNSEL]: That's fine.

"THE COURT: And I've already defined the terms."

The trial court, without objection from either party, gave the following modified version of CALCRIM No. 2181 as instruction on section 2800.4: "The defendant is charged in Count Two with evading a peace officer while driving in the opposite direction of traffic in violation of Vehicle Code section 2800.4. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. A peace officer

driving a motor vehicle was pursuing the defendant; [¶] 2. The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer; [¶] 3. During the pursuit, the defendant drove on a highway in a direction opposite to that in which traffic lawfully moves upon that highway; and [¶] 4. All of the following [are] true: [¶] (a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle; [¶] (b) The defendant either saw or reasonably should have seen the lamp; [¶] (c) The peace officer's vehicle was sounding a siren as reasonably necessary; [¶] (d) The peace officer's vehicle was distinctively marked; and [¶] (e) The peace officer was wearing a distinctive uniform.”

B. Analysis

Section 2800.4 states, in pertinent part: “Whenever a person willfully flees or attempts to elude a pursuing peace officer in violation of Section 2800.1, and the person operating the pursued vehicle willfully drives that vehicle on a highway in a direction opposite to that in which the traffic lawfully moves upon that highway, the person upon conviction is punishable by imprisonment for not less than six months nor more than one year in a county jail or by imprisonment in the state prison”²

Defendant notes that the term “willfully” was defined in the instructions for the specific intent crime of recklessly evading an officer in count one, and the general intent crime of assault on an officer with a deadly weapon in counts three and four, but that term was not defined in the instruction on section 2800.4 in count two. Defendant also points out that the jury was instructed to use the instructions for an offense without reference to the instructions for other offenses. In addition, the instruction on recklessly evading an officer defined the similar term “willful.” From this, defendant concludes that

² Section 2800.1 makes it a misdemeanor for any driver to “willfully flee[] or otherwise attempt[] to elude a pursuing peace officer’s motor vehicle” with an “intent to evade.” (§ 2800.1, subd. (a).)

the jury was necessarily confused as to the meaning of the term “willfully” in count two, a violation of his due process rights.

Although defendant initially mentioned that the term “willfully” was not defined by the instruction for section 2800.4, he acquiesced when the trial court stated that the term was defined in the instruction on recklessly evading in count one. This forfeits defendant’s claim unless the instruction affected his substantial rights. (Pen. Code, § 1259; *People v. Christopher* (2006) 137 Cal.App.4th 418, 426-427.) Substantial rights are equated with a miscarriage of justice, which results if it is reasonably probable the defendant would have obtained a more favorable result had the instruction been given. (*Christopher, supra*, 137 Cal.App.4th at pp. 426-427; *People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

“In general the trial court has a sua sponte duty to give amplifying or clarifying instructions ‘ “where the terms used [in an instruction] have a technical meaning peculiar to the law.” ’ ” (*People v. Richie* (1994) 28 Cal.App.4th 1347, 1360 (*Richie*)). “When a term is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, an instruction as to its meaning is not required in the absence of a request.” (*People v. Williams* (1988) 45 Cal.3d 1268, 1314.)

In *Richie*, the defendant was convicted of violating section 2800.2, which prohibits evading a pursuing peace officer with “a willful or wanton disregard for the safety of persons or property.” (§ 2800.2, subd. (a); *Richie, supra*, 28 Cal.App.4th at pp. 1351, 1353.) The jury was given a modified version of the standard instruction at the time, CALJIC No. 12.85, which stated that the People must prove the defendant “drove the vehicle in a willful and wanton disregard for the safety of persons or property,” but did not further define willful or wanton. (*Richie*, at p. 1354, fn. 1.) Defendant argued on appeal the trial court committed reversible error by failing to define the terms “willful” and “wanton.” (*Id.* at p. 1360.)

The Court of Appeal rejected the contention. (*Richie, supra*, 28 Cal.App.4th at p. 1362.) The dictionary defined “willful” as: “ ‘1: obstinately and often perversely self-willed 2: done deliberately: Intentional’ ”; and “wanton” as: “ ‘3a: Merciless, Inhumane . . . b: having no just foundation or provocation: Malicious.’ ” (*Richie*, at p. 1361, quoting Webster’s New Collegiate Dict. (1977) pp. 1341, 1318.) There was no different technical legal definition of those terms. CALJIC No. 12.85 defined “willful and wanton” as “ ‘an intentional and conscious disregard for the safety of . . . persons or property. It does not necessarily include an intent to injure.’ ” (*Richie*, at p. 1361, quoting CALJIC No. 12.85.) This definition was taken from a decision that defined “ ‘willful’ . . . as ‘intentional’ ” and “ ‘wanton’ as . . . ‘includ[ing] the elements of consciousness of one’s conduct, intent to do or omit the act in question, . . . and reckless disregard of consequences.’ ” (*Richie*, at p. 1361.)

The *Richie* court found no meaningful difference between “Webster’s definitions and those applicable to Vehicle Code section 2800.2.” (*Richie, supra*, 28 Cal.App.4th at p. 1361.) The court also rejected the defendant’s argument that “willful” and “wanton” were technical legal terms because they were defined in the instruction for reckless driving, CALJIC No. 16.840, and the term “willfully” was defined in Penal Code section 7. (*Richie*, at p. 1362 & fn. 4.) The court reasoned: “Appellant’s logic is flawed. The issue is not whether the terms have been defined, but how. Neither CALJIC No. 16.840 nor Penal Code[] section 7 supplies definitions of these terms that are foreign to common usage. As we have stated, neither term as used in Vehicle Code section 2800.2 embraces a technical legal meaning.” (*Richie*, at p. 1362.)

We agree with the *Richie* court’s holding that the common meaning of the term “willful” is no different from how the term is used in the law. The only difference between “willful” and the term “willfully” at issue here is grammatical—“willful” is an adjective while “willfully” is an adverb. (Merriam Webster’s Collegiate Dict. (11th ed.

2006) p. 1433.) Since “willfully” is not a technical legal term, the trial court had no duty to define it, and the failure to give any further definition of the term did not constitute a miscarriage of justice. Accordingly, defendant’s contention is forfeited.

II. Section 2800.2 Instruction

Defendant contends the trial court’s instruction on the willful or wanton element of recklessly evading an officer in count one violated his due process rights.³

The trial court instructed the jury on the willful and wanton element of section 2800.2 as follows: “Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] A person acts with *wanton disregard for safety* when: (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, (2) and he or she intentionally ignores that risk. The person does not, however, have to intend to cause 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.” (CALCRIM No. 2181.)

Defendant claims the trial court erred by failing “to determine as a preliminary matter whether there were offenses meeting the legal definition of section 12810 and

³ Section 2800.2 states, in pertinent 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 the state prison, or by 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.”

instructing the jury accordingly.” Defendant claims there was no evidence in the record to support a point count instruction. Since the prosecutor argued the point count theory of liability, defendant concludes the instruction constituted reversible error.

Defendant did not object to the instruction and did not seek a clarifying instruction on the point count theory of liability. As previously noted, his contention is forfeited unless the instruction affected his substantial rights. (Pen. Code, § 1259.)

Whether traffic offenses can satisfy the willful and wanton element of section 2800.2 is a question of law and therefore must be determined by the trial court. (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 641.) The trial court should have determined whether the evidence supported liability under a point count theory, identified the relevant offenses supported by the evidence, and instructed the jury on those offenses. (See *People v. Hannon* (1977) 19 Cal.3d 588, 597 [trial court must determine if evidence supports a particular inference before allowing the jury to draw the inference].) However, the court’s error is not reversible per se. (See *Hannon* at p. 603 [finding the error prejudicial under *People v. Watson, supra*, 46 Cal.2d 818].)

The evidence provided overwhelming proof of defendant’s guilt under any theory of establishing willful and wanton conduct. The prosecution presented evidence from multiple witnesses showing that defendant committed numerous one-point violations during the extended pursuit. The evidence establishes that defendant ran five red lights and exceeded the posted speed limit or the statutory maximum speed limit on eight separate occasions. These violations—running a red light, exceeding the speed limit, and exceeding the statutory maximum speed limit—are one-point offenses under section 12810. (§§ 12810, subd. (f), 21453, 22349, 22350.)

Defendant drove at speeds up to 100 mph, weaved in and out of traffic, drove through residential areas and commercial districts at speeds nearly twice the posted limit, cut off cars, ran through numerous red lights, hit a CHP car, continued driving after three

attempts to disable his vehicle, and drove straight at an officer before other officers pushed his vehicle away. His conduct during the 32.6-mile chase is compelling evidence of a willful and wanton disregard for the safety of persons or property.

Defendant did not dispute the evidence establishing how he drove. Instead, he claimed that his evasion was not intentional and the driving was not willful because it was a product of a vehicle he could not control.⁴ In light of the overwhelming evidence of defendant's guilt, defendant's substantial rights were not affected by the error and his claim is thereby forfeited.

III. Realignment Act

Defendant committed his crimes on September 6, 2010. He was sentenced on September 23, 2011.

Under the law in effect at that time, a defendant with a current or prior serious or violent felony conviction was entitled to two days of conduct credit for every four days of presentence custody. (Pen. Code, § 4019.) Defendant admitted to a prior conviction for robbery, a serious felony. (Pen. Code, § 1192.7, subd. (c)(19).)

The Realignment Act amended the law, entitling defendants to two days of conduct credits for every two days of presentence custody. (Pen. Code, § 4019, subs. (b), (c), (f).) The award of credits is not reduced by a defendant's prior conviction for a serious or violent felony. This provision applies prospectively, to defendants serving

⁴ This inherently implausible defense was rejected by the jury. By convicting defendant of violating section 2800.4, the jury found that defendant intended to evade the officers and that he drove on the wrong side of the road willfully. Likewise, in order to find defendant guilty under section 2800.2, the jury had to find that defendant intended to evade officers. Since defendant's testimony presented an all-or-nothing defense—his car either was or was not under his control—the verdict shows that the jury rejected his entire defense.

presentence incarceration for crimes committed on or after October 1, 2011. (Pen. Code, § 4019, subd. (h).)

Defendant argues that the prospective application of the conduct credit provisions of the Realignment Act violates his right to equal protection under the law. This claim was rejected by the California Supreme Court in a case decided after the conclusion of briefing. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) Applying *Lara*, we reject defendant's claim.

DISPOSITION

The judgment is affirmed.

_____ BUTZ _____, Acting P. J.

We concur:

_____ MURRAY _____, J.

_____ DUARTE _____, J.