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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN ALLEN ASHBAUGH,

Defendant and Appellant.

F047880

(Super. Ct. No. F03905454-5)

# OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Gary Hoff, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Martin Allen Ashbaugh led California Highway Patrol officers on a pursuit. He was convicted of two counts of evading a law enforcement officer and causing injury, one count of child endangerment, and one count of transportation of a controlled substance. The jury was unable to reach a verdict on one count of second degree murder.[1] Defendant appeals and raises numerous issues. We affirm, except to strike one of the evading counts.

## FACTS

At approximately 6:30 p.m. on August 13, 2003, California Highway Patrol (CHP) officer Perry Miller saw defendant driving a car in the area of Clinton and Blackstone Avenues in Fresno. He decided to stop the car after defendant violated several traffic laws. Defendant was attempting a three-point turn when he saw Miller; Miller signaled to him to pull over. There was a female in the passenger seat of the car. Defendant did not stop, and Miller followed him with his lights flashing and his siren on.

Defendant was pursued by Miller for over 14 minutes and 12 miles, on the streets and highways. Defendant failed to stop at numerous stop lights, exceeded the speed limit, and violated several other traffic laws. In the beginning of the pursuit it appeared that defendant was driving somewhat cautiously.

The manner of defendant's driving changed when he was exiting Freeway 41 at the Herndon Avenue exit. He drove onto the shoulder of the road to avoid the cars on the off-ramp. He accelerated and turned south on Fresno Street. Miller continued to follow defendant, and the pursuit was also being monitored by a CHP helicopter overhead. When defendant reached the intersection of Sierra Avenue and Fresno Street, the light was red. He went through the red light without slowing or braking.

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[1] Defendant was found not guilty of being a felon in possession of a firearm.

Andrea Brown, the flight officer in the helicopter, advised the sergeant monitoring the pursuit that defendant's car was speeding at approximately 80 miles per hour and that the defendant "blew" the light at Sierra Avenue and Fresno Street. Defendant continued to drive down Fresno Street and went through the intersection at Escalon Avenue. As Miller approached Escalon and defendant approached Bullard Avenue, approximately a quarter of a mile away, the sergeant monitoring the pursuit told the helicopter officer to call off the pursuit. The helicopter officer told Miller to call off the pursuit. Miller heard the pursuit being canceled when he reached Escalon and defendant was at the red light at Bullard. Miller turned off his lights and sirens at or near the time defendant ran the red light at Bullard and crashed into a red vehicle driving across the intersection.

Stephanie Dougan, defendant's passenger and the mother of his children, was partially ejected from the car. She died. The driver of the red vehicle was severely injured and the passenger was also injured. When Miller was at defendant's car attempting to aid Dougan, defendant's two-year-old son popped up from the back seat. He was not injured. Several other cars were damaged as a result of the collision, and one small girl in one of the other cars received a large bump to her forehead.

Officers found methamphetamine in a fanny pack in the car.

Former reserve deputy sheriff Jesse Marquez testified that he engaged in a pursuit of a car driven by defendant in 1991. During the pursuit defendant drove 60 to 65 miles per hour in a 40-mile-per-hour zone. He failed to stop at intersections when the light was red. He drove over a curb and eventually ran into a tree. He fled the scene. He was convicted of eluding a law enforcement officer during a pursuit.

**Defense**

Defendant testified on his own behalf. He said that he did not stop when Miller tried to pull him over because Dougan panicked and told him to go. In addition, defendant was afraid of losing his car because he, his son and Dougan had been living in the car. Dougan was smoking crack cocaine during the pursuit and continued to tell

defendant to flee. Also, defendant was shot on two separate occasions in 1994 and had been diagnosed with post-traumatic stress disorder. He has a lot of fears and anxieties. When defendant approached the intersection of Fresno and Bullard, he looked in his mirror and saw his son's face; he froze because he had forgotten that his son was in the car. At that time he went through the red light, he tried to brake, but it was too late to avoid the collision. He did not intend to hurt anyone.

## DISCUSSION

### I. Substantial Evidence

Defendant was convicted in counts 2 (driver of red vehicle) and 4 (passenger in red vehicle) with the willful flight or attempt to elude a pursuing peace officer that proximately caused serious bodily injury to any person. (Veh. Code, § 2800.3)[2] In order to be convicted of section 2800.3, a felony, one must have met the requirements of violating section 2800.1. When the violation of section 2800.1 "proximately causes serious bodily injury to any person" the crime is elevated to a felony under section 2800.3.

Section 2800.1 provides in pertinent part:

"(a) 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 punishable by imprisonment in a county jail for not more than one year 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.

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[2] All future code references are to the Vehicle Code unless otherwise noted.

"(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."

Defendant made a motion for acquittal at trial, claiming that the pursuit had ended before the collision occurred; therefore he could not properly be convicted under section 2800.3. The court denied the motion.

Defendant contends that the evidence is undisputed that at the time the collision occurred the peace officer was no longer in pursuit; thus he was not fleeing from or attempting to elude a pursuing peace officer and he cannot properly be convicted under section 2800.3. He argues that a traffic collision that occurs after the pursuit has ended is not the proximate result of the pursuit and thus is not a violation of section 2800.3. He claims that the trial court erroneously denied his motion for acquittal on the above grounds.

Although defendant characterizes his argument as an error by the trial court in failing to grant his motion for acquittal, he agrees that the standard of review is the same on appeal as the standard of review for sufficiency of the evidence. On appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that 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." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing from the evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

Although the prosecutor argued that the pursuit may have ended seconds before the collision, we find the evidence reasonably susceptible to the interpretation that the collision occurred at or before the time Miller ended his pursuit.

Miller testified that his sergeant said to cancel the pursuit as he (Miller) reached the intersection of Escalon. He testified that he was reaching for his radio to advise

dispatch that he heard the sergeant cancel the pursuit and he was canceling the pursuit when defendant went through the intersection. He saw the collision before he got his mouth to the microphone to say he was canceling the pursuit.

Leticia Castaneda, a witness called by the defense, testified that she saw the police lights going on, she could tell they were in pursuit, and that is when she saw the accident occur. Joan Hemming, another witness called by the defense, was pumping gas at the intersection of Bullard and Fresno. She heard the sirens and almost immediately thereafter heard the crash.

From the above evidence, the jury could reasonably have found that the collision occurred before the pursuing peace officer had ended the pursuit. Even if the collision occurred within seconds of the cancellation of the pursuit, it is inescapable that the defendant's willful flight from Miller in violation of section 2800.1 proximately caused serious bodily injury to the occupants of the red vehicle.[3]

There is no dispute that defendant was in violation of section 2800.1; all of the elements of that crime had been met before the collision occurred. When that flight proximately causes serious bodily injury to any person, the defendant is guilty of a violation of section 2800.3. Cause was defined for the jury: "A cause of serious bodily injury is an act that sets in motion a chain of events that produces as a direct natural and probable consequence of the act a serious bodily injury and without which the serious bodily injury would not occur."

"'In general, "[p]roximate cause is clearly established where the act is directly connected with the resulting injury, with no intervening force operating."' [Citation.]" (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1325.)

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[3] We need not and do not decide if a defendant may properly be convicted of violating section 2800.3 when the pursuit is canceled after the defendant has met all of the elements of section 2800.1 but before the defendant has reached a place of safety.

Defendant's act of eluding Miller directly resulted in defendant's driving into the intersection through a red light at an excessive speed and colliding with the red vehicle. Miller's act of turning off the siren and lights was not an intervening force operating sufficiently to absolve defendant of liability.

Sufficient evidence supports counts 2 and 4, eluding a police officer and causing serious bodily injury.

**II. Instruction on Attempt**

Section 2800.3 requires "willful flight or attempt to elude a pursuing peace officer." Because the statute can be satisfied by actual flight or an attempt to elude, the court gave an attempt instruction.

The court instructed the jury on attempt pursuant to CALJIC No. 6.00. It stated:

"As it applies to Count 1, second degree felony murder, and as it applies to Counts 2 and 4, flight from a pursuing peace officer causing serious bodily injury, an attempt to commit a crime consists of two elements; namely, a specific intent to commit the crime and a direct but ineffectual act done toward its commission.

"In determining whether this act was done, it is not -- it is necessary to distinguish between mere preparation on the one hand and the actual commencement of the doing the criminal deed on the other. Mere preparation which may consist of planning the offense or devising, obtaining or arranging the means for its commission. However, acts of a person who intends to commit a crime will constitute an attempt where an those [*sic*] clearly indicate a certain, unambiuous [*sic*] intent to commit the specific crime. These acts must be an immediate step in the present of the criminal design, the progress of which would be completed unless interrupted by circumstances not intended in the

original design. A person who intends to commit a crime will constitute an attempt when those acts clearly indicate a certain unambiguous intent to commit that certain crime."[4]

Defendant contends that the attempt instruction should not have been given in this case to define "attempt to elude" and that the giving of the instruction permitted a conviction even though the elements of the substantive offense have failed. He argues that the instruction allowed the jury to convict him of the offense even if the jury found that the pursuing patrol car was not properly marked, or that it was not operated by a "peace officer," or that the officer was not in a uniform, or that a red light was not activated.

We believe the "attempt to elude a pursuing peace officer" requirement in section 2800.1 is straightforward and does not require further definition. The attempt instruction was thus not necessary and furthermore was not used in the appropriate fashion. Even though the attempt instruction was erroneous, it did not result in the harm now claimed by the defendant. The instructions as given to the jury on evading a pursuing peace officer stated:

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[4] Either the court misread the instruction or the reporter did not transcribe it accurately. The instruction as it appears in the clerk's transcript provides: "As it applies to Count One, Second Degree Felony Murder, and as it applies to Counts Two and Four, Flight form [*sic*] a Pursuing Peace Officer Causing Serious Bodily Injury, an attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. [¶] In determining whether this act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design." Defendant does not raise an issue concerning the variance of the instruction in the reporter's transcript.

"In order to prove a violation of section 2800.3 *each* of the following elements must be proved: One, a person, while operating a motor vehicle, willfully fled or otherwise attempted to elude a pursuing peace officer; two, the person did so with the specific intent to evade the pursuing peace officer; three, the peace officer's vehicle exhibited at least one lighted red lamp visible from the front; four, the person saw or reasonably should have seen the red lamp; five, the peace officer's vehicle sounded a siren as reasonably necessary; six, the peace officer's motor vehicle was distinctively marked; seven, the peace officer's motor vehicle was operated by a peace officer wearing a distinctive uniform; and eight, the flight from or the attempt to elude a pursuing peace officer was the cause of serious bodily injury to another person." (Italics added.)

The instruction clearly set forth that in order for the jury to find that defendant committed a violation of section 2800.3 it was required to find each of the listed elements. The instruction on attempt related only to the first element and did not, as defendant contends, allow a conviction without a finding that each of the elements of the crime was present.

**III. Single Course of Conduct Resulting in Multiple Convictions**

Defendant was convicted in count 2 and count 4 of felony evading and causing serious bodily injury.

In *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 the California Supreme Court held that one instance of driving under the influence that causes injury to several persons is chargeable as only one count of driving under the influence. This is so because, "In contrast to the crimes of murder, manslaughter, administering poison, robbery and sex offenses--all of which are defined in terms of an act of violence against the person--the act prohibited by [Vehicle Code] section 23153 is defined in terms of an act of driving: the driving of a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle. The actus reus of the offense does not include causing bodily injury. Rather, where bodily injury *proximately results* from the prohibited act, the

offense is elevated from a misdemeanor to a felony. [¶] Defendants are not chargeable with a greater *number* of offenses simply because the injuries proximately caused by their single offense are greater. Rather, the Legislature may provide for increased *punishment* for an offense that has more serious consequences by, for instance, raising the statutory prison terms, adding enhancements, or upgrading the offense from a misdemeanor to a felony. The number and severity of injuries proximately caused by an offense may also be considered by a trial court in sentencing." (*Id.* at p. 352; see also *People v. Garcia* (2003) 107 Cal.App.4th 1159.)

Defendant contends and respondent concedes that defendant could properly only be convicted of one count of felony evading and causing serious bodily injury under section 2800.3. The conviction in count 4 must be dismissed. Because the sentence on this count was stayed, it is not necessary to remand the matter to the trial court for a resentencing hearing; the court merely needs to correct the abstract of judgment and forward the corrected abstract to the appropriate authorities.

**IV. Error in Instructing on Second Degree Felony Murder**

The People proceeded on the second degree murder count on two theories: that defendant committed the killing with implied malice, and that section 2800.2 is an inherently dangerous felony supporting a second degree felony murder conviction. The jury was instructed on both of these theories. Subsequent to trial, the California Supreme Court held that section 2800.2 is not an inherently dangerous felony and cannot be used to support a second degree felony murder conviction. (*People v. Howard* (2005) 34 Cal.4th 1129.)

Defendant is correct that the court erroneously instructed the jury on the inherently dangerous felony theory of second degree murder. Because the jury was hung on the murder count and the court declared a mistrial on this count, this erroneous instruction clearly had no impact detrimental to defendant on the murder charge. Defendant claims that the felony murder instruction was prejudicial because it impacted the child

endangerment conviction. Defendant's argument is based on the theory that the felony murder instruction set forth a formula for "willful or wanton disregard" and that somehow may have influenced the jury in determining if the defendant "willfully cause[d] or, willfully and as a result of criminal negligence, permit[ted] the child to be placed in a situation where his or her person or health was endangered." (CALJIC No. 9.37.) Defendant claims that the fact that the "willful or wanton disregard" definition appears in a different instruction is of no moment because individual instructions are not viewed in isolation but are to be read as a whole.

Although defendant is correct that "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction" (*People v. Burgener* (1986) 41 Cal.3d 505, 538), there is nothing in the record here to demonstrate that the jury might have mixed up or confused the mental state for second degree felony murder with the mental state for child endangerment. In fact the record shows the opposite. The court explicitly stated before it gave instructions on each count that the set of instructions it was giving applied to that particular count. Defendant has failed to demonstrate a reasonable likelihood that the jury misapplied the instructions. (*People v. Dunkle* (2005) 36 Cal.4th 861, 900.) Thus there is no reason for us to depart from the presumption on appeal that the jury understood and followed the instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

**V. Instructions on Consideration of Prior Conviction of Defendant**

As previously set forth, the court allowed the People to present evidence of defendant's prior conviction and the circumstances surrounding the conviction for eluding a peace officer. At the time the evidence was being presented, the court made the following statement to the jury: "Ladies and gentlemen of the jury, this evidence that's coming in at this time, the specific of evidence of the defendant's conduct in '92, is for the specific purpose to prove a conduct in this case; in other words, conduct, or

knowledge of the defendant's conduct in this case. It's being admitted for a limited purpose. You'll be getting instructions in the law for the limited purpose for which this evidence can be considered."

During formal instructions to the jury, the court instructed the jury on how they were to view the prior crime evidence. The court stated: "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he had a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show a characteristic, method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged."

In closing argument the People argued that defendant's prior criminal behavior was relevant to show that he specifically intended to evade Officer Miller.

Defendant now claims that the court's initial statement to the jury during the testimony was erroneous because it allowed the jury to consider defendant's prior offense to prove his conduct in the current case. He asserts the error was compounded by the formal instructions to the jury because the instruction as given was not tailored to limit consideration of the prior offense to the specific issues for which the evidence was admitted, i.e., knowledge of danger as relevant to prove implied malice murder and specific intent to evade as relevant to prove felony evasion. Defendant argues that he was prejudiced because the prior would be used to infer he had a propensity to do so. He contends the prejudice applies to the evading counts as well as the child endangerment, because his prior showed he drove in a wanton disregard for the safety of others and implied that he would disregard the safety of the child in the car.

To the extent that the initial statement to the jury about how to view the prior crime evidence can be understood, it clearly implied that the evidence was relevant to show defendant's "knowledge", i.e. his specific intent in the current case. In any event, the court told the jurors they would be instructed on the limited purpose they could consider the evidence.

Defendant argues that the formal instruction to the jury on how to view the prior-crime evidence was flawed because it did not identify the crime to which it pertained and defendant was charged with several offenses. We do not find prejudicial error from the failure to pinpoint which crimes the prior-crime evidence pertained to. It was obvious that the prior evading evidence was relevant to the question of whether defendant drove with a willful or wanton disregard relating to the murder charge, or drove willfully for the evading charges. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053.) Because the only logical reason for introducing the evidence related to the evading and murder charges, the failure to limit the evidence to only these charges in the instruction did not have any impact on the child endangerment charge or the unlawful possession of drugs charge.

Defendant claims the instruction on prior crimes was erroneous because it allowed the jury to use other-crime evidence for an inadmissible purpose; as evidence of a common plan or scheme. He argues that his prior was not relevant for consideration of the question of a common plan or scheme because there could be no claim that the prior and current offenses were manifestations of a common design or plan.

"Evidence of a common design or plan … is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394.)

There was no question here that defendant engaged in the conduct alleged to constitute the charged offense; the only question was his intent while he engaged in the conduct. Similarity of instances may be utilized to prove intent; the instruction informed

the jury that if they found that the prior criminal activity of the defendant showed a characteristic method, plan or scheme similar to the current crime it could utilize the evidence on the question of determining his intent. "'[T]he recurrence of a similar result … tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal intent accompanying such an act….' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.)

The instruction was clear in requiring similarity of events to prove intent.

**VI. Ineffective Assistance of Counsel**

Defendant testified that he was shot on two separate occasions in 1994. On the first occasion he was shot through his front door. On the second occasion he was walking home from the store with someone else. The person he was walking with was "running off with the mouth" at the store. The group of Asians from the store came by and did a drive-by shooting, shooting defendant in the hip and leg. He testified that because of these shootings his mental state was not right at the time of the car chase.

On cross-examination, the prosecutor asked defendant some questions about the second shooting. The prosecutor asked if the group of Asians were in a gang. The defendant said they looked like gang members. Defendant was asked if he said anything to the group; he said he did not say anything to them. He then said that he said, "What's up?" in a friendly way. He was asked if he said certain things to Officer Rios after the shooting. He denied saying things and denied wearing a red Bulldog sweatshirt at the time of the shooting. He was asked if he was ever a Bulldog gang member. He said no but he did hang around with some gang members and he had a Bulldog tattoo.

On re-direct examination defense counsel asked defendant if he had ever been charged or convicted with anything related to gangs in his life. Defendant said no and also said, "I never been charged with no violence. I've never been convicted for no guns, nothing like that." He admitted to hanging out with gangs when he was younger, but said he is a born-again Christian now and does not represent a gang.

The People called Fresno police officer Jaime Rios in rebuttal. He testified that he spoke to defendant after the second shooting in 1994. Defendant told Officer Rios that he said, "what's up, cuz." Rios testified that defendant was wearing a red Bulldog sweatshirt when he was interviewed just after the shooting. He told Rios that he was a member of the East Side Bulldog gang. Rios testified that "What's up" is a confrontational gang response. Most of this evidence came in without objection.

Defendant claims his counsel was ineffective in failing to object to the gang evidence. He claims the gang evidence was not relevant to the current offense, it did not rebut his claim that he had been shot and was paranoid, his gang affiliation was not relevant to impeach his credibility, and the evidence should have been excluded under Evidence Code section 352.

"To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. [Citation.] To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. [Citation.] '"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's

decisionmaking must be evaluated in the context of the available facts." [Citation.]' [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.)

In closing argument, defense counsel stated that defendant wanted him to express how defendant's life had changed since 1993, to consider who he is and how he got to where he is now. He argued that the prosecutor was ludicrous to suggest that defendant's actions in saying something to a gang banger somehow made him deserving of getting shot. Defense counsel argued that defendant is a changed man. Defense counsel argued that the sole reason the People brought up questions about the second shooting was to bring in evidence about gangs because everyone hates gangs. Defense counsel pointed out that defendant was never arrested, charged, or convicted of a gang crime nor was he ever arrested, charged or convicted of a violent crime. Defense counsel asked the jury to put the evidence in perspective.

By his re-direct examination of defendant, his cross-examination of Rios, and his closing argument, defense counsel was able to show and argue that defendant was a changed man and he had never been arrested, charged or convicted of a gang crime or a violent crime. Defense counsel was able to better tell his story of defendant's life and how he got to the point he was at trial. Thus defense counsel's reason for failing to object may have been based on a sound tactical decision and does not amount to ineffective assistance of counsel.

In addition, the evidence against defendant was extremely strong with the exception of the question of whether he acted with a willful and wanton disregard of others or with implied malice. The jury did not reach a verdict on the question of murder, thus error in admitting the evidence did not have a prejudicial effect.

## VII. *Blakely/Black*

The court selected the aggravated term for all counts. The court found no circumstance in mitigation and, although there were numerous circumstances in aggravation presented in the probation report, the court based its imposition of the

aggravated term on the sole factor that the defendant has suffered numerous prior convictions.

Defendant contends that the imposition of the aggravated term was in error because the circumstance in aggravation was found true by the court and was not found true beyond a reasonable doubt by the jury. Defendant acknowledges that his argument has been rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238.

The issue is now before the United States Supreme Court (*Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329]); we remain bound to follow *Black* until such time, if ever, as that court rules otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

**VIII. The Remaining Murder Charge**

As previously set forth, the jury could not reach a verdict on the murder charge. The court asked defense counsel if he was moving for a mistrial on this count. Defense counsel said yes and the court declared a mistrial on the murder charge.

Although the People stated their intention to retry defendant on the murder charge, the retrial had not taken place at the time defendant was sentenced for the charges that resulted in convictions.

Defendant now claims that pursuant to *Kellett v. Superior Court* (1966) 63 Cal.2d 822 he may not be retried on the murder charge because it arises from the same course of conduct that has already resulted in sentence being pronounced.

In *Kellett*, "the defendant, who earlier had pled guilty to a misdemeanor offense of exhibiting a firearm in a threatening manner ([Pen. Code,] § 417), was charged with a felony of being a felon in possession of a firearm ([Pen. Code,] § 12021). Both charges arose out of the defendant's arrest on a public sidewalk while holding a pistol. We concluded that the second prosecution was barred: 'When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct

plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.' (*Kellett, supra,* 63 Cal.2d at p. 827, fn. omitted.)" (*People v. Davis* (2005) 36 Cal.4th 510, 557.)

Here the prosecution joined all charges in a single proceeding. *Kellett* is not applicable.

Penal Code section 1160 provides in pertinent part that "[w]here two or more offenses are charged in any accusatory pleading, if the jury cannot agree upon a verdict as to all of them, they may render a verdict as to the charge or charges upon which they do agree, and the charges on which they do not agree may be tried again."

Penal Code section 1160 expressly authorizes a retrial on one charge when the jury cannot reach a decision on that charge. (*People v. Culton* (1979) 92 Cal.App.3d 113, 117; *People v. Schulz* (1992) 5 Cal.App.4th 563, 568-569.) When the charges are all brought in one action, there is no violation of the rule against multiple prosecutions.[5]

If the People proceed on the murder charge and obtain a conviction where Penal Code 654 would apply and the conviction in the second proceeding is deemed to be the greater offense, the trial judge would be authorized to modify the judgment in this case, sentence defendant on his new and more serious conviction, and give him credit for the

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[5] This rule does not apply when the jury reaches a verdict of guilt on a lesser included charge but is unable to reach a verdict on the greater offense. If the prosecutor does not insist that the jury first reach a verdict as to the greater offense, and the jury goes on to convict the defendant of a lesser included offense, the conviction can be deemed an implied acquittal of the greater offense even though the jury had been unable to agree as to the greater offense. (*People v. Zapata* (1992) 9 Cal.App.4th 527, 532-534.) Defendant does not argue that willful evasion of a peace officer resulting in serious bodily injury is a lesser included offense of murder.

time he has already served in this case. (See *People v. Crowder* (2000) 79 Cal.App.4th 1365, 1371.)

**DISPOSITION**

The judgment in count 4, felony evasion pursuant to section 2800.3, is stricken. We direct the trial court to amend the abstract of judgment to reflect this change and forward the corrected abstract to the appropriate authorities. In all other respects, the judgment is affirmed.

_____
VARTABEDIAN, Acting P. J.

WE CONCUR:

_____
HARRIS, J.

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CORNELL, J.