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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHAWN CHADLEY RUSSELL, Defendant and Appellant.	A112325 (Mendocino County Super. Ct. No. SCUKCRCR0565778)

Appellant Shawn Chadley Russell was tried before a jury and convicted of reckless driving while evading a peace officer in violation of Vehicle Code section 2800.2.[1] He admitted a prior prison term allegation under Penal Code section 667.5, subdivision (b), and was sentenced to prison for the three-year upper term on the evading count plus an additional year for the special allegation. Appellant contends: (1) section 2800.2 is unconstitutional because it creates a mandatory presumption; (2) a new trial is required because the trial court did not give a unanimity instruction informing the jurors that they must agree on the acts underlying the offense; (3) it was prejudicial error to instruct the jury that flight could be considered as consciousness of guilt; and (4) the court's imposition of an upper term sentence violated the Sixth and Fourteenth Amendments because it was based on aggravating factors not found true by the jury. We affirm.

[1] Statutory references are to the Vehicle Code unless otherwise indicated.

FACTS

Mendocino County Sheriff Patrol Sergeants Edwards and Van Patten went to a local U-Haul facility with Deputy McBride to serve an arrest warrant on John Hutchens. All three of them were in uniform. They saw Hutchens talking to appellant, who was sitting parked in a gold Honda. Sergeant Edwards approached Hutchens, told him they had a warrant, and placed him in handcuffs. He noticed that appellant's eyes were bloodshot and saw him make a motion as though he were hiding something between the seat and center console of the Honda. Edwards told appellant to stop and show his hands, but appellant put the car into gear, peeled the tires, and drove away.

Deputy McBride got into his marked patrol car and began following appellant with the lights and siren activated. He pursued him down several streets in a residential neighborhood and estimated that appellant was traveling between 35 and 70 miles per hour in zones that were marked between 25 and 30 miles per hour. McBride reached speeds of 80 miles per hour during the chase. During the pursuit, appellant ran two stop signs.

Appellant drove into a cul-de-sac and attempted to turn around. As he was doing so, he hit Deputy McBride's patrol car and bent the patrol car's bumper. Appellant got out of his Honda and ran into a nearby yard. McBride followed on foot and apprehended appellant by pushing him into a swimming pool. A records check showed that appellant was on active parole at the time of his arrest. No drugs, contraband or other items of interest were found inside the Honda when it was searched.

Appellant testified that he had driven to the U-Haul facility to rent a truck but did not notice any law enforcement personnel while he was there. He drove away, but did not realize he was being pursued by a patrol car. He did not recall speeding or failing to stop at any stop signs. When he reached the cul-de-sac and attempted to leave, he saw a patrol car with its lights activated. He stopped because he was scared due to his prior contacts with police. McBride got out of the patrol car, but apparently did not put it in park, because it rolled into appellant's car. Appellant ran because he realized he had just been in an accident with an officer and was afraid. He was on parole at the time.

DISCUSSION

Constitutionality of Section 2800.2

Appellant argues that his conviction under section 2800.2 must be reversed because the statute creates an improper mandatory presumption that relieves the prosecution of its burden of proof on the "willful and wanton" element of the offense. We disagree.

Section 2800.1 makes it a misdemeanor for a driver to attempt to evade a peace officer in a distinctively marked patrol vehicle. Under section 2800.2, subdivision (a), the offense is elevated to a felony "[i]f 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. . . ." Section 2800.2, subdivision (b), provides, "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 three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."

A mandatory presumption tells the trier of fact that it must find an element of the offense has been proved when it finds a specified predicate fact to be true. (*People v. Williams* (2005) 130 Cal.App.4th 1440, 1444-1445.) "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. [Citations.]" (*Id*. at p. 1445.)

We reject appellant's contention that section 2800.2 creates an impermissible mandatory presumption because a jury must find willful and wanton conduct upon a determination that three traffic offenses or property damage occurs. A law that defines in precise terms the conduct establishing an element of the offense is not a presumption at all, because there is nothing to rebut. " 'Wherever from one fact another is said to be conclusively presumed, in the sense the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a

rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.' [Citations.]" (*People v. McCall* (2004) 32 Cal.4th 175, 185; see also *id.* at pp. 187-188 [statute deeming possession of red phosphorus and iodine with intent to manufacture methamphetamine to be possession of hydriodic acid with intent to manufacture methamphetamine was rule of law rather than impermissible presumption].)

Three published decisions by our sister courts have held that section 2800.2, subdivision (b), permissibly establishes a substantive rule of law under which the commission of three traffic offenses or the occurrence of property damage is the legal equivalent of willful or wanton disregard. (*People v. Laughlin* (2006) 137 Cal.App.4th 1020, 1027-1028; *People v. Williams, supra,* 130 Cal.App.4th at p. 1446; *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392-394.) We agree with the reasoning of those cases and likewise conclude that section 2800.2 is constitutional.

Unanimity Instruction

The California Constitution gives a criminal defendant the right to a unanimous verdict. (Cal. Const., art. I, § 16.) Appellant argues that the jurors might have found willful or wanton conduct based on either the commission of three or more traffic offenses (speeding, two incidents of running a stop sign) or the occurrence of property damage when he hit the police car, and that consequently, the court was required to give a unanimity instruction sua sponte.[2] We are not persuaded.

A unanimity instruction is generally required when jurors could have reasonably disagreed about the acts committed by the defendant, yet still have convicted him of the offense. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539.) But, "where a statute

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[2] The standard unanimity instruction is CALJIC No. 17.01 (Apr. 2006 ed.), which provides in relevant part: "The prosecution has introduced evidence for the purpose of showing there is more than one [act] [or] [omission] upon which a conviction . . . may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty . . ., all jurors must agree that [he][she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]."

prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed so long as all the members of the jury are agreed that the defendant has committed the offense as it is defined by the statute. It follows that even though the evidence establishes that the defendant employed two or more of the prescribed alternate means, and the jury disagrees on the manner of the offense, there is no infirmity in the unanimous determination that the defendant is guilty of the charged offense." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 613.)

Under section 2800.2, willful or wanton conduct can be based on the commission of three traffic violations as provided in subdivision (b), or on the infliction of property damage. The statute is analogous to that considered in *People v. Mitchell* (1986) 188 Cal.App.3d 216, which penalized driving under the influence and committing an act forbidden by law that causes injury to another person. (*Id*. at p. 218.) The court held that unanimity was not required as to whether the defendant had committed a particular act forbidden by law (in that case, violating the basic speed law or engaging in a speed contest): "[T]he jurors need not be instructed that to return a verdict of guilty they must all agree on the specific theory–it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged as it is defined by the statute." (*Id*. at pp. 221-222.) So too here, the jurors were not required to agree whether appellant committed three traffic violations or caused property damage, so long as it agreed he had engaged in willful and wanton conduct as defined by section 2800.2.

Flight Instruction

The trial court gave CALJIC No. 2.52, which advised the jury, "The flight of a person immediately after commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." Appellant contends this instruction should not have been given because there was nothing

about his flight from the police on foot to show that his driving had been reckless enough to support a conviction of felony rather than misdemeanor evasion. We reject the claim.

CALJIC No. 2.52 is appropriate when the evidence shows the defendant left a crime scene under circumstances suggesting a consciousness of guilt. (*People v. Smithey* (1999) 20 Cal.4th 936, 982.) Its cautionary nature benefits the defense, by admonishing the jury to circumspectly consider evidence that might otherwise be considered decisively inculpatory. (*People v. Boyette* (2002) 29 Cal.4th 381, 438.) The instruction is a correct statement of the law (see Pen. Code, § 1127c), and it does not invite the jury to draw irrational or impermissible inferences about a defendant's mental state during the commission of an offense. (*People v. Jurado* (2006) 38 Cal.4th 72, 125-126.)

Appellant testified that he did not realize he was being pursued by Deputy McBride after he drove away from the U-Haul yard. He claimed that he did not hit the patrol car with his Honda, but that the patrol car rolled into his when Deputy McBride took his foot off the brake. Appellant's flight on foot from the scene tended to show that he *was* aware of the pursuit, and was not simply the victim of an accident that was not his fault. The flight instruction was legally correct and supported by the evidence, and it supplies no basis for a reversal of the judgment.

Imposition of Upper Term Sentence

The trial court imposed a three-year upper term sentence for the section 2800.2 violation after determining that there were no mitigating circumstances and the following factors in aggravation applied: (1) appellant's prior convictions were numerous and of increasing seriousness, and (2) appellant's prior performance on probation or parole was unsatisfactory. (See Cal. Rules of Court, rule 4.421(b)(2) & (5).) Appellant claims the case must be remanded for resentencing because these factors were neither found true by a jury nor proved beyond a reasonable doubt. We conclude that remand is not required.

The Sixth and Fourteenth Amendments require that, subject to the recidivism exception discussed below, any factor increasing the penalty for a crime beyond the statutory maximum is akin to an element of the offense and must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466,

490; *Blakely v. Washington* (2004) 542 U.S. 296, 303-304.) In *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856, 127 S.Ct. 856]**(***Cunningham***),** the United States Supreme Court analyzed California's Determinate Sentencing Law (DSL) and concluded that under the three-tiered sentencing structure applicable to most offenses, the middle term was the statutory maximum because the upper term could not be imposed absent additional factual findings. (*Cunningham, supra*, 166 L.Ed.2d at pp. 873, 876, 127 S.Ct. at pp. 868, 871; see also Pen. Code, § 1170, subd. (b).) *Cunningham* held that the DSL ran afoul of the principles set forth in *Apprendi* and *Blakely* to the extent it allowed the imposition of an upper term sentence based on aggravating factors that were found true by the trial court using only a preponderance of the evidence standard. (*Cunningham, supra*, 166 L.Ed.2d at p. 876, 127 S.Ct. at p. 871, disapproving *People v. Black* (2005) 35 Cal.4th 1238, judg. vacated and cause remanded sub nom. *Black v. California* (2007) ___ U.S. ___ [167 L.Ed.2d 36].)

Recidivism has traditionally been considered a sentencing factor rather than an element of the offense, because it is unrelated to the commission of the charged crime and because prior convictions result from proceedings in which the defendant was already afforded substantial constitutional protections. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 487-488.) Accordingly, a sentencing court may rely on the fact of a prior conviction to increase the sentence even when it has not been submitted to a jury or proved beyond a reasonable doubt. (*Cunningham*, *supra*, 166 L.Ed.2d at p. 864, 127 S.Ct. at p. 860; *Blakely v. Washington*, *supra*, 542 U.S. at p. 301; *Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244.) The California Supreme Court is currently considering the scope of the recidivism exception, including whether it extends to the two aggravating factors in this case. (*People v. Towne*, S125677.) Regardless of what our Supreme Court ultimately concludes with respect to the recidivism exception generally, a remand is not warranted in this case.

The first aggravating factor relied upon by the court–that appellant's prior convictions were numerous and of increasing seriousness–actually had two components: (1) the number of prior convictions, and (2) their severity relative to each other. The first

component squarely falls within the recidivism exception referenced in *Cunningham* because it was based solely on appellant's convictions in six prior cases. If the trial court may itself determine "the fact of a prior conviction" without violating the defendant's right to a jury trial, it may also determine the fact of more than one prior conviction–that is, that appellant has suffered numerous prior convictions.

Nor did the court look beyond the fact of the prior convictions when it determined that they were of increasing seriousness. This determination was based on information in the probation report, which indicated that appellant's four earliest cases involved misdemeanor convictions of auto burglary, driving under the influence, providing false identification, resisting arrest and being under the influence of a controlled substance. Appellant's two most recent prior cases, by contrast, involved felony charges of possessing a controlled substance. Thus, while the court made a qualitative judgment as to how serious appellant's six prior offenses were relative to each other, it was clear that, as felonies, his two most recent offenses were more serious than his previous misdemeanor offenses. Because the court determined the severity of the prior offenses in the abstract and did not make any additional findings beyond the fact that appellant had suffered those particular convictions, *Cunningham* was not implicated.[3]

The second aggravating factor relied upon by the court–appellant's poor performance on probation or parole–requires findings beyond the bare fact of a prior conviction. Although it is related to appellant's recidivism and is arguably exempt from *Cunningham* (see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [recidivism exception

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[3] We express no opinion as to what the result would have been if the court had considered additional evidence about the facts of the underlying cases. In any event, even if we assume that the "increasing seriousness" factor as utilized here somehow implicated *Cunningham*, any error was harmless beyond a reasonable doubt where the trial court properly relied on the fact that those same convictions were numerous, which is itself sufficient to support the aggravating factor set forth in rule 4.421(b)(2) of the California Rules of Court. (See *Washington v. Recuenco* (2006) ___ U.S. ___ [165 L.Ed.2d 466, 473-474, 476, 126 S.Ct. 2546, 2550, 2553] [*Blakely* error not structural error]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320 [*Apprendi* error governed by harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24.)

broadly construed]), we will assume without deciding that parole performance can only be considered as an aggravating factor if it is determined by the jury or admitted by the defendant. Here, when appellant took the stand at trial, he testified that he was on parole for a prior offense on the date of his encounter with the police in this case. In light of appellant's admission regarding his parole status, the jury's determination that appellant was guilty beyond a reasonable doubt of violating section 2800.2 necessarily established that he had performed poorly by committing the present felony offense while on parole. The court did not err when it considered poor parole performance as an aggravating factor because in this case, the facts establishing that circumstance were either admitted by the defendant or encompassed within the jury's verdict. (See *Blakely v. Washington*, *supra*, 542 U.S. at p. 303.)

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Parrilli, J.

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Siggins, J.