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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN H. VILLEGAS, Defendant and Appellant.	B163953 (Los Angeles County Super. Ct. No. BA225497)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed with modifications.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Jaime L. Fuster, Supervising Deputy Attorneys General, April S. Rylaarsdam, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Christian H. Villegas, appeals from his convictions for second degree murder (Pen. Code,[1] § 187, subd. (a)) and evading an officer with willful disregard for the safety of persons or property. (Veh. Code, § 2800.2, subd. (a).) Defendant argues the trial court improperly failed to instruct the jury on any form of manslaughter and gave inadequate instructions on second degree felony murder.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-320; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On December 11, 2001, Los Angeles Police Officers Ken Lew and Kathy McAnany were patrolling near Staples Center in a black and white marked cruiser. At approximately 9 p.m., the officers were waiting at a red light. After the light turned green, Officer McAnany proceeded into the intersection. However, Officer McAnany stopped suddenly as a white Chevy Tahoe truck drove through a red light into the intersection at a high rate of speed. Officer McAnany activated her overhead lights, used the siren to make "chirp" like sounds, and turned left to follow the Tahoe truck which was being driven by defendant. The Tahoe truck continued through another red light, causing cross traffic to brake suddenly.

At the next intersection, the Tahoe truck stopped behind another car, which was at a red light. Officer Lew was able to see the license plate of the Tahoe truck and entered it into the computer in the police car. The Tahoe truck moved to the right lane and proceeded through the red light. The drivers of cross traffic were forced to brake to avoid a collision. At each intersection, Officer McAnany activated the siren continuously. The

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Tahoe truck then accelerated to a high rate of speed. Officer Lew broadcast over the police radio that they were in pursuit of the Tahoe truck. The Tahoe truck continued traveling at a high rate of speed through a red light at the next intersection. The drivers of cars in cross traffic slammed on their brakes, causing smoke to come from the tires. Officer McAnany continued through the intersection with lights and siren activated. The Tahoe truck appeared to be traveling 60 to 70 miles per hour.

The Tahoe truck was approximately one-half block ahead of the police car. As the Tahoe truck approached the intersection of Flower Street and Adams Boulevard, there were cars stopped for a red light ahead of it. The Tahoe truck moved into the lanes of opposing traffic into the intersection through the red light. As the Tahoe truck entered the intersection at a high rate of speed, it struck a blue compact car being driven on Adams Boulevard. The officers saw the collision and heard the sound of it over the sirens. After the collision, the Tahoe truck continued southbound on Flower Street. Eventually, the Tahoe truck stopped. Defendant got out of the driver's side and ran. The passenger, Mauricio Enriquez, also jumped out and fled. Officer Lew got out of the police car and ran after them. They did not initially heed Officer Lew's order to stop. However, after running approximately one block, defendant and Mr. Enriquez stopped and laid on the ground. They were arrested. The posted speed limit on Flower Street between Venice Boulevard and Adams Boulevard is 35 miles per hour.

Norman Grundy had been waiting for a stop signal at the corner of Adams Boulevard and Flower Street when he heard sirens and saw flashing red lights in his rear view mirror. Mr. Grundy saw a dark sports utility vehicle approach his car from behind him. Mr. Grundy believed he was going to be "rearend[ed]." The sports utility vehicle passed Mr. Grundy on the left and struck a small car traveling on Adams Boulevard. Mr. Grundy saw the sport utility vehicle slide for approximately 20 feet. Mr. Grundy saw one man get out of the driver's seat and another from the passenger side. Both men ran. Thereafter, the police car stopped. The officers looked into the sports utility vehicle and then ran after the two men. Mr. Grundy approached the small car, where he saw the

driver was unconscious. The driver had been knocked over to the passenger side of the car.

Officer Lew returned to the accident site. The driver of the blue car, later identified as Nathaniel Kendrick, was being treated by a paramedic. Mr. Kendrick was not moving, his body was twitching, and he had major head lacerations. Kenneth Wigchert, one of the paramedics that responded to the accident, saw that the door of the blue car was pushed halfway into the driver's seat. Although Mr. Kendrick was still alive, he did not respond to any commands and could not speak. Mr. Kendrick died at 9:56 p.m. on December 11, 2001, as the result of blunt force injuries to his chest cage, which tore vessels and his spleen.

Los Angeles Police Officer Michael Jolicoeur, a member of the specialized collision investigation unit, investigated the accident. Officer Jolicoeur looked at the cars, the physical evidence at the scene, and tire marks and took measurements. Another investigative officer interviewed witnesses. Officer Jolicoeur determined there was nothing in the roadway and the weather was unremarkable. The traffic signals at the intersection of Adams Boulevard and Flower Street were functioning and in working order. Failing to stop for a red light is a violation of Vehicle Code section 21453. Speeding is a violation of Vehicle Code section 22350. Driving on the wrong side of the road is a violation of Vehicle Code section 21650. Defendant violated all of these Vehicle Code sections.

Los Angeles Police Detective Josephine Mapson also participated in the accident investigation. She arrived at the scene of the accident, contacted Mr. Kendrick's family members, and interviewed defendant. The interview was tape recorded. The tape was played for the jury at trial. Transcripts of the tape recording were given to the jurors solely for use when the tape was played. Defendant was advised of his constitutional rights and agreed to give a statement without the presence of an attorney. Defendant admitted that he was driving the truck of a friend, identified only as "Celeste." Defendant had borrowed Celeste's car at her home in San Dimas and returned to Los

Angeles with Mr. Enriquez, the passenger, in order to pick up some clothing. Defendant was taking Mr. Enriquez home and planned to return to San Dimas. Defendant said he then got on the wrong freeway. Defendant got off the Harbor Freeway. Defendant attempted to find the Interstate 10 freeway. Defendant was distracted as he was looking for the freeway and ran a red light. Defendant saw the police car follow him. Defendant "panicked" because he was on probation and thought he would go to jail. Defendant had a condition of probation precluding association with gang members. Mr. Enriquez was a gang member. Defendant did not have a driver's license. Defendant believed the police followed him one block. The police had activated their lights and sirens. Defendant did not stop. Mr. Enriquez was asleep. Defendant crashed into a car at an intersection. Defendant did not see a red light at Adams Boulevard when he hit the other car. The truck spun around several times. Defendant got out of the truck because he believed it might explode. Defendant ran a short distance and threw himself to the ground. Defendant also laid down because he did not want the police to shoot him. Defendant told Detective Mapson: "I'm sorry for what I did to that person. [¶] . . . [¶] I wouldn't—no right person would ever wanted [*sic*] that to happen." Defendant said, "I'm sorry, you know, I messed up big time."

III. DISCUSSION

A. Manslaughter Instructions

Defendant argues the trial court improperly failed to instruct the jury on any form of manslaughter.

1. Factual and Procedural Background

Defendant was initially charged with murder, vehicular manslaughter, and evading a police officer with willful disregard. However, the prosecutor dismissed the vehicular manslaughter charge. At that time, the trial court stated, "That's probably a lesser-included, isn't it?" The prosecutor responded: "Actually I think there might be an issue as to whether that is a lesser-included. The case law that I found indicates that vehicular manslaughter is not a lesser-included of murder." The trial court responded, "Manslaughter would be, though." The prosecutor clarified: "Correct. [¶] However, the case law that I found does indicate that vehicular manslaughter is not a lesser. It has been granted review, so it is not citeable, but the same argument would apply here." The trial court then stated: "All right. We'll cross that bridge when you get to it. [¶] Obviously, the prosecution charges at its discretion, so I assume there is no objection." Defense counsel answered, "No, Your Honor."

At the time the trial court discussed jury instructions with counsel, defense counsel requested that the jurors be instructed with a lesser offense of misdemeanor evading an officer, Vehicle Code section 2800.1. Defense counsel also requested an instruction on a "lesser of involuntary manslaughter." The trial court indicated, "I think that's well-taken." Defense counsel continued: "I guess the only real legal issue, and I would certainly be requesting the lesser of vehicular manslaughter . . . . [¶] . . . [¶] There seems to be some conflict in the case authority regarding whether a straight vehicular manslaughter would be considered a lesser. [¶] . . . [¶] As lesser-included offense of murder." The prosecutor then argued that involuntary manslaughter is not a "lesser" as set forth in *People v. Watson* (1983) 150 Cal.App.3d 313. The prosecutor stated: "The two charges that the court would be able to consider as lessers possibly are vehicular manslaughter and voluntary manslaughter. [¶] I would agree that voluntary manslaughter is a lesser in this case. [¶] I disagree, however, that vehicular manslaughter is a lesser simply because vehicular manslaughter requires an unlawful act

not amounting to a felony, or a lawful act that is tantamount to being reckless, and in this case we've alleged [Vehicle Code section] 2800.2 as a felony. [¶] If the jury were to find the defendant guilty of [Vehicle Code section] 2800.2 as a felony, then I simply don't think vehicular manslaughter applies."

The trial court inquired: "Why wouldn't it be here? [¶] You have all sorts of unlawful acts not amounting to a felony, blowing red lights, driving fast and on the wrong side of the street. Seems like the shoe fits, doesn't it?" The prosecutor explained that the prosecution's theory was that the felony evading charge was the course of conduct that would result in a murder conviction. The prosecutor further explained, "Because vehicular manslaughter specifically calls for either an unlawful act not amounting to a felony, or a lawful act that basically shows recklessness, and there is nothing about running stop lights or entering lanes of opposing traffic that's lawful." Defense counsel argued, "I think the problem, though, Your Honor, is that there are many different permutations of the facts that the jury might accept, and if any of them are reasonable, based upon what has been put forth, I think we're entitled to the instruction, if it is in fact the lesser-included." Defense counsel indicated that under *People v. Watson* (1981) 30 Cal.3d 290, 295-301, he believed voluntary manslaughter or involuntary manslaughter applied as a lesser offense. The prosecutor argued that *Watson* specifically held, "'[A]lthough murder can be committed using a vehicle as the instrument, the definition of involuntary manslaughter in subdivision 2 of section 192 specifically excludes homicides committed by means of a vehicle.'" Following further discussion, the trial court indicated its agreement with the deputy district attorney.

The court also noted that the facts of this case did not suggest voluntary manslaughter because there was no intent to kill. Defense counsel responded, "No, and I was not going to suggest a voluntary manslaughter, unless it is required, and I don't think it is." The court concluded, "Looks like we have . . . second degree on a felony-murder, second degree on an implied malice, and vehicular." The prosecutor then noted, "I just wanted the record to reflect the People's position that we believe that vehicular

manslaughter may not apply, but given the court's reasoning for wanting to include it, the People would not be opposed." The trial court explained the elements of vehicular manslaughter: "One, the driver of the vehicle committed with gross negligence an unlawful act not amounting to a felony, which under the circumstances of its commission was dangerous to human life, namely, a violation of [Vehicle Code section] 2800.1, or blowing red lights, and/or speeding, and/or driving on the wrong side of the road. [¶] Those are all the things you fill in there, right? Am I right on that or wrong on that?" The prosecutor indicated the trial court was right.

Later the same day, the prosecutor informed the court that she had found authority in *People v. Sanchez* (2001) 24 Cal.4th 983, 990-992, that held vehicular manslaughter is not a lesser included offense of murder. The trial court noted: "Well, that's clearly what the holding in Sanchez is, that because our crime here involves a vehicle, which is not part of a murder, Sanchez is right on point. But now, the question is: Is there no manslaughter charge in this?" The trial court continued, "I mean, the statute [section] 192(b) clearly says: [¶] . . . ['F]or involuntary manslaughter, this subdivision shall not apply to acts committed in the driving of a vehicle.[']. [¶] Clearly this act was committed by driving a vehicle, obviously. Sanchez says—so garden variety involuntary manslaughter is not available to us. Sanchez is right on point that vehicular manslaughter is not available to us." The trial court concluded that no lesser included instructions could be given, including manslaughter in the course of a misdemeanor. The trial court allowed defense counsel additional time to do further research on the issue. The trial court suggested that the verdict form include a special finding: "'We find that this murder was committed while in the commission of a felony.' And they say true, not true." The trial court explained that would clarify whether the jurors relied on implied malice or felony murder. The trial court further explained that such a special finding would clarify on appeal whether a lesser offense of manslaughter instruction should have been given. The court noted: "I just find it bizarre that in a case like this which seems to cry out for [a manslaughter instruction], that the code prohibits it. We have Sanchez and

then we have the Penal Code. It seems to prohibit giving a manslaughter [instruction] under these facts." The trial court again gave counsel additional time to research the possibility of instructing the jury on vehicular manslaughter.

The issue was revisited prior to closing arguments. The prosecutor reported that despite additional research and consultation, her position remained the same. Defense counsel reported: "I agree with the court's preliminary analysis. I think as far as we're concerned, the issues regarding the lessers would be whether or not the implied malice theory in and of itself would lend itself to a lesser, forgetting about the felony murder and the evading. [¶] And I think there is an argument that I can construct to present to the court that because the implied malice theory in and of itself does not necessarily involve a vehicle, those prohibitions in sections 191.5 and 192 may not be applicable. [¶] In addition, I think I would like to formulate an argument that the references in [sections] 191.5 and 192 to a vehicle are in some sense unconstitutionally vague, given the fact that the wording appears to be while using or while driving a vehicle, which could encompass so many different situations."

The trial court again reviewed the status of the research on the issue on the next day of trial. The prosecutor reiterated that her position remained that, "[T]here are no lesser-includeds to count 1 in this case, based on the holding of Sanchez." The trial court responded, "I think you're right." Defense counsel argued he was relying on *People v. Howard*, a case where review had been granted by the Supreme Court. Defense counsel noted that the Supreme Court granted review on two issues involved in this case: "One being whether or not [Vehicle Code section 2800.2] is in fact an inherently dangerous felony. [¶] . . . [¶] And the second is whether or not the fact that [Vehicle Code section] 2800.3 proscribes evading police officers and causing injury or death. The fact that that statute exists precludes the prosecution from pursuing a second degree theory, because it's a specific statute, not a general statute." The trial judge noted that he believed the Supreme Court would find, "[A] felony evading is an inherently dangerous felony, because by the elements of evading, it's hard to conclude otherwise, because it does

include a willful and wanton disregard of public safety." Thereafter, defense counsel requested lesser instructions on vehicular manslaughter and involuntary manslaughter. Defense counsel argued: "[T]o prohibit me from having [a lesser involuntary manslaughter] instruction simply because a vehicle is involved, I don't think that's necessarily what the Legislature intended, and from their theory, they're not necessarily saying there is a use of a vehicle. [¶] [But t]here just happens to be a use of a vehicle here, but I would think whenever they put forward an implied malice theory, I should at least be able to have involuntary manslaughter as to that theory, maybe not as to the evading felony-murder theory." In refusing to so instruct, the trial court noted there was decisional authority to the contrary of the position advanced by defense counsel.

Thereafter, the trial court instructed the jury on second degree murder based on two theories. The first theory was second degree felony murder premised on a violation of Vehicle Code section 2800.2, subdivision (a). The second theory was implied malice second degree murder. The jury was also instructed on the lesser included offense of violating Vehicle Code section 2800.1, subdivision (a). In her closing argument, the prosecutor argued that defendant was guilty of second degree murder on two possible theories. First, she argued defendant was liable on a felony murder theory based on his evading a pursuing peace officer with a willful and wanton disregard for safety within the meaning of section 189 and Vehicle Code section 2800.1, subdivision (a). The other theory was that defendant committed second degree murder based on implied malice. The trial court instructed on these two second degree murder theories. Defense counsel argued that defendant's acts were motivated by his fear of being stopped by police rather than a conscious disregard for human safety. Defense counsel asked the jury to find defendant guilty of the lesser offense of misdemeanor evading an officer.

2. Involuntary Manslaughter

A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Wims* (1995) 10 Cal.4th 293, 303, limited on another point in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Grant* (1988) 45 Cal.3d 829, 847.) When the evidence is minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1232; *People v. Flannel* (1979) 25 Cal.3d 668, 684; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) The California Supreme Court recently reiterated: "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, quoting *People v. Flannel*, *supra*, 25 Cal.3d at p. 684, fn. 12, original italics, and *People v. Carr* (1972) 8 Cal.3d 287, 294; see also *People v. Birks* (1998) 19 Cal.4th 108, 118.) An offense is lesser included to a greater offense if the greater offense cannot be committed without also committing the lesser offense. (*People v. Birks, supra,* 19 Cal.4th at p. 117; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.)

Section 192, subdivision (b), defines involuntary manslaughter and provides: "This subdivision shall not apply to acts committed in the driving of a vehicle." Under the plain meaning of this statutory language, involuntary manslaughter cannot be charged as a matter of law in cases involving allegedly unlawful homicides committed through the use of an automobile. Moreover, in *People v. Sanchez, supra,* 24 Cal.4th at page 991, the California Supreme Court held: "Although it long has been held that manslaughter is

a lesser included offense of murder, this tradition has not explicitly included offenses requiring proof of specific elements unique to vehicular manslaughter. Unlike manslaughter generally, vehicular manslaughter while intoxicated requires proof of elements that are not necessary to a murder conviction. The use of a vehicle while intoxicated is not merely a 'circumstance,' but an element of proof when the charge is gross vehicular manslaughter while intoxicated. Gross vehicular manslaughter while intoxicated is not merely a degree of murder, nor is it a crime with a lengthy pedigree as a lesser included offense within the crime of murder." Likewise, in this case, the felonious use of an automobile to evade officers with willful disregard involves separate elements that must be proven independently of a murder conviction. The murder could be accomplished by means other than by using an automobile. The trial court correctly ruled that a careful reading of the Supreme Court's findings in *Sanchez,* coupled with the provisions of section 192, subdivision (b), precluded instructions on the lesser included offenses of involuntary manslaughter and vehicular manslaughter.

3. Vehicular Manslaughter

Defendant alternatively argues that the jury could have considered both murder and vehicular manslaughter charges if the prosecutor had agreed to such instruction. Defendant reasons, "[A]t no time did the prosecutor specifically object to an instruction on a lesser related offense of vehicular manslaughter, and she never argued such an offense was not supported by the evidence." The California Supreme Court held in *People v. Birks, supra,* 19 Cal.4th at page 136, that a defendant has no right to instructions on uncharged lesser *related* offenses over the prosecution's objection. This is true even if the evidence discloses that the accused is at most guilty of the lesser crime. A trial court may not instruct on lesser related offenses. (*People v. Nguyen* (Aug. 13, 2003, A091576) ___ Cal.App.4th ___, ___; *People v. Steele* (2000) 83 Cal.App.4th 212, 217-218.)

In this case, defendant requested lesser included instructions of vehicular and involuntary manslaughter. But he did not request a lesser *related* instruction for vehicular manslaughter. Contrary to defendant's argument, the prosecutor's silence regarding any lesser related instructions cannot be deemed an implied consent where no request had been made. Moreover, the prosecutor dismissed the vehicular manslaughter charge. The dismissal was evidence that the deputy district attorney would have opposed a lesser related vehicular manslaughter instruction. As the trial court repeatedly pointed out, the prosecutor has the discretion to charge offenses they believe the evidence supports, "If a [prosecutor] chooses not to file a vehicular manslaughter—and charging is under the discretion of the [prosecutor]—if they choose not to file it, a Watson murder is a Watson murder, or it's a not guilty." (See *People v. Birks, supra,* 19 Cal.4th at p. 134 ["prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring"]; *People v. Eubanks* (1994) 14 Cal.4th 580, 588-589.) No lesser related instruction on vehicular manslaughter was warranted.

Defendant argues that his Sixth and Fourteenth Amendment rights to present a defense was restricted by the trial court's refusal to instruct on vehicular manslaughter. Defendant suggests that the trial court should have amended the information pursuant to section 1009 to include a charge of vehicular manslaughter. However, defendant did not request such an amendment or even interpose a constitutionally based objection. Therefore, this entire issue has been waived. (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Williams* (1997) 16 Cal.4th 153, 250.) Moreover, since defendant was not entitled to a lesser related instruction on voluntary manslaughter, his constitutional rights were not infringed in any way. Defendant was able to present a defense. Defense counsel argued that the jury should find defendant guilty of the lesser charge of misdemeanor evading a peace officer without wanton disregard for property or persons. Defense counsel also argued: "I would indicate to you that the evidences shows that [defendant] did not intend to kill anyone, that he did not exhibit conscious disregard

for human life, that he did not exhibit conscious disregard for safety of persons. He's not charged with manslaughter or anything, he's charged with murder, and that's what you must decide. [¶] So, if you have a reasonable doubt in your mind that all those elements have been proven, then it is your obligation—and not your choice, but your obligation—to return a verdict of not guilty. [¶] . . . I ask you to find [defendant] guilty only of the lesser offense of evading and to find him not guilty of the crime of murder." No constitutional violation occurred.

4. Voluntary Manslaughter

Defendant further argues the trial court should have instructed the jury on voluntary manslaughter as a lesser included offense of implied malice murder. Defendant argues that voluntary manslaughter would have been an appropriate finding in this case even without provocation or imperfect self-defense. Defendant relies on the Supreme Court's holding in *People v. Rios* (2000) 23 Cal.4th 450, 469-470, that: "[A] conviction of voluntary manslaughter may be sustained upon proof and findings that the defendant committed an unlawful and intentional homicide. Provocation and imperfect self-defense are not additional elements of voluntary manslaughter which must be proved and found beyond reasonable doubt in order to permit a conviction of that offense." However, in *Rios*, the defendant was convicted of voluntary manslaughter rather than murder. As a result, no malice finding was returned by the jury. In this case, defendant was charged with murder only, thereby putting the presence of implied malice at issue. (*People v. Rios, supra,* 23 Cal.4th at p. 469.) Implied malice is defined in section 188 in pertinent part as follows: "Such malice may be express or implied. . . . It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. [¶] When it is shown that the killing resulted from the intentional doing of an act with . . . implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought.

Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." (See *People v. Martinez* (Aug. 18, 2003, S108353) ___ Cal.4th ___, ___; *People v. Lasko* (2000) 23 Cal.4th 101, 107.) The trial court properly denied defendant's request that the jury be instructed regarding voluntary manslaughter.

B. Inherently Dangerous Felony Second Degree Murder

Defendant argues that because a violation of Vehicle Code section 2800.2 is not an inherently dangerous felony, he was improperly convicted of second degree murder. He further argues the instructions removed from jury consideration the question of whether a violation of Vehicle Code section 2800.2 was an inherently dangerous felony. As was noted at trial, the question of whether Vehicle Code section 2800.2 is a felony inherently dangerous to human life for purposes of the second degree felony-murder rule is pending before the California Supreme Court. (*People v. Howard* (2002) 99 Cal.App.4th 43, review granted Sept. 11, 2002, S108353.) The California Supreme Court has restricted second degree murder convictions based on felony-murder theory to those felonies that are "'inherently dangerous to human life.'" (*People v. Hansen* (1994) 9 Cal.4th 300, 308, quoting *People v. Ford* (1964) 60 Cal.2d 772, 795.) The *Hansen* court held: "In determining whether a felony is inherently dangerous, the court looks to the elements of the felony *in the abstract,* 'not the "particular" facts of the case,' i.e., not to the defendant's specific conduct." (*People v. Hansen, supra,* 9 Cal.4th at p. 309, quoting *People v. Williams* (1965) 63 Cal.2d 452, 458, fn. 5, original italics; see also *People v. Sewell* (2000) 80 Cal.App.4th 690, 693.)

Several courts have held that Vehicle Code section 2800.2 is an inherently dangerous felony for second degree felony-murder purposes. (*People v. Jones* (2000) 82 Cal.App.4th 663, 669, fn. 3; *People v. Sewell, supra,* 80 Cal.App.4th at pp. 696-697; *People v. Johnson* (1993) 15 Cal.App.4th 169, 173-174.) Vehicle Code section 2800.2

provides 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 . . . . [¶] (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 . . . occur, or damage to property occurs." In *People v. Sewell, supra,* 80 Cal.App.4th at pages 694-695, the Court of Appeal explained: "[The 1996 amendment to section 2800.2] merely describe[s] a couple of nonexclusive acts that constitute driving with willful or wanton disregard for the safety of persons or property. The key elements of the crime remain: the offense is committed by one who, 'while fleeing or attempting to elude a pursuing peace officer,' drives his pursued vehicle in 'a willful or wanton disregard for the safety of persons or property.'" The *Sewell* court then explained, "'We must view the *elements* of the offense, not the particular *facts* of the instant offense. In viewing the elements our task is not to determine if it is *possible* (i.e. "conceivable") to violate the statute without great danger. By such a test no statute would be inherently dangerous. Rather the question is: does a violation of the statute involve a *high probability* of death? [Citation.] If it does, the offense is inherently dangerous.'" (*Id.* at pp. 695-696, quoting *People v. Morse* (1992) 2 Cal.App.4th 620, 646.)

Defendant argues that Vehicle Code section 2800.2 can be violated in a manner that is not inherently dangerous to human life. However, in *People v. Johnson, supra,* 15 Cal.App.4th at page 174, our colleagues in the Court of Appeal for the Fourth Appellate District held: "[G]iving the statutory language involving 'wanton disregard' for the safety of 'persons or property' a commonsense construction, it appears the 'wanton disregard' in question is total, rather than selective. That is, the disregard is for everything, whether living or inanimate. [¶] As the Attorney General also points out,

apart from the 'wanton disregard' element, one must also be engaged in the act of fleeing from a pursuing peace officer whose vehicle is displaying lights and sirens. Any high-speed pursuit is inherently dangerous to the lives of the pursuing police officers. In even the most ethereal of abstractions, it is not possible to imagine that the 'wanton disregard' of the person fleeing does not encompass disregard for the safety of the pursuing officers. In short, it does not appear that the phrase 'or property' may properly be construed to limit the mental state of the offender, and thus to make fleeing a pursuing police vehicle other than 'inherently dangerous.'" We agree with the reasoning of *Sewell* and *Johnson* and find a violation of Vehicle Code section 2800.2 is an inherently dangerous felony that supports defendant's second degree felony murder conviction. We further agree with the Attorney General that whether a Vehicle Code section 2800.2 violation is an inherently dangerous felony was a question of law or a mixed question of law and fact for the trial court rather than a determination for the jurors as defendant argues. (See *People v. Patterson* (1989) 49 Cal.3d 615, 625; *People v. James* (1998) 62 Cal.App.4th 244, 259.) No error occurred.

C. Correction of Abstract of Judgment

Following our request for further briefing, the Attorney General argues the abstract of judgment should be corrected to more accurately reflect the term imposed in count 3 and stayed pursuant to section 654, subdivision (a). California Rules of Court, rule 12(c) provides in pertinent part: "[O]n its own motion, the reviewing court[, on suggestion of any party or on its own motion,] may order the correction . . . of any part of the record." The trial court imposed specific sentence for count 3 of 2 years and stayed in pursuant to section 654, subdivision (a). But this prison term, even though it was stayed, should be reflected on the abstract of judgment. As a general rule, the record will be harmonized when it is in conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) The Court of Appeal has held: "'[A]

discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error.'" (*People v. Williams* (1980) 103 Cal.App.3d 507, 517, quoting the Los Angeles Superior Court Criminal Trial Judge's Bench Book at page 452; see also *In re Daoud* (1976) 16 Cal.3d 879, 882, fn. 1 [trial court could properly correct a clerical error in a minute order *nunc pro tunc* to conform to the oral order of that date if there was a discrepancy between the two]; § 1207.) The superior court clerk is to correct the abstract of judgment and forward a corrected copy to the Department of Corrections.

IV. DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect the sentence imposed and stayed in count 3 and forward it to the Department of Corrections. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.