Filed 10/28/19 P. v. Kabutha CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. FRANCIS WILSON KABUTHA, Defendant and Appellant.	B296125 (Los Angeles County Super. Ct. No. VA147729)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Francis Kabutha of felony reckless evasion of a peace officer; resisting, delaying, or obstructing a peace officer; driving without a license; and driving a vehicle without consent. On appeal, he contends the trial court erred by failing to instruct the jury on the lesser included offense of misdemeanor evasion of a peace officer. He also seeks a limited remand to allow the trial court to determine his ability to pay the fines and fees imposed at his sentencing. We reject these arguments and affirm.

PROCEDURAL HISTORY

On August 10, 2018, the Los Angeles County District Attorney ("the People") filed an information charging appellant with fleeing a pursuing peace officer's motor vehicle while driving recklessly, a felony (Veh. Code, § 2800.2; count one); resisting, delaying, or obstructing an officer, a misdemeanor (Pen. Code, § 148, subd. (a)(1); count two)[1]; driving a motor vehicle without a valid license, a misdemeanor (Veh. Code, § 12500, subd. (a); count three); and driving or taking a vehicle without consent, a felony (Veh. Code, § 10851, subd. (a); count four).

A few days before trial, the court granted appellant's request to represent himself. The court also appointed stand-by defense counsel. Appellant represented himself throughout his trial and at sentencing.

The jury found appellant guilty on all counts. The court sentenced appellant to the upper term of three years in state prison on count one, and stayed the sentences on counts two through four. The court also imposed a $40 court operations

---

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

assessment under section 1465.8, subdivision (a)(1) and a $30 criminal conviction assessment under Government Code section 70373 for each count, as well as a $300 restitution fine under section 1202.4, subdivision (b). Appellant timely appealed.

FACTUAL BACKGROUND

The People presented the following evidence at trial.

Douglas Wiand testified that on the evening of May 14, 2018, he parked his 1997 green Toyota Land Cruiser outside his home in West Los Angeles. As was his custom, he did not lock the car and left the keys inside. The next morning, he discovered his car was gone, so he called the police. Wiand did not give anyone permission to drive or take his car and had never met appellant.

Officer Brent Estrada of the California Highway Patrol (CHP) testified that he was on duty on May 15, 2018 in a marked CHP patrol vehicle. Around 1:07 p.m., he was approaching an on-ramp to the I-5 freeway. He saw a green Toyota Land Cruiser in front of him enter the on-ramp and go through the red traffic meter light onto the freeway without stopping. Estrada activated his lights and chirped his siren to signal the Land Cruiser to stop. When it did not stop, Estrada used his vehicle's public address system to tell the driver, whom he later identified as appellant, to pull to the right shoulder and stop.

The CHP vehicle's mobile video audio recording system (MVARS) recorded footage of the Land Cruiser running the light and entering the freeway with Estrada in pursuit. The footage was played for the jury. As displayed in the video footage and testified to by Estrada, the Land Cruiser failed to stop as directed, but instead accelerated on the right shoulder of the freeway, passed several cars, then cut off a car to merge into the

right lane. Next, appellant crossed three freeway lanes to the left, from the number four to the number one lane. At this point, Estrada activated his full siren. Once in the far left lane, Estrada testified that appellant accelerated to approximately 70 miles per hour. The maximum speed limit at the time was 55 miles per hour as that portion of the freeway was a construction zone, due to ongoing construction. Appellant continued to weave between the number two and three lanes to pass slower traffic, then crossed over double white lines to a transition ramp between the I-605 and the I-5 freeways.

The pursuit continued for approximately 1.5 miles. Estrada testified that appellant committed four violations of the Vehicle Code after the officer turned on his lights and sirens: first, driving on the shoulder and unsafe passing on the right; second, unsafe lane changes; third, accelerating up to approximately 70 miles per hour in a 55 mile per hour zone; and fourth, crossing a divided section of the freeway marked by double-parallel lines. When asked to describe appellant's driving, Estrada testified that appellant was "trying to get away from me. And in doing so, he was driving recklessly and without any kind of due regard . . . for any other motorists on the freeway." Estrada also testified that at one point, where the number four lane was wider due to the transition from another freeway, appellant tried to pass a car on the right within the same lane, and that car had to steer to the left to avoid a collision as the lane narrowed.

Estrada testified that the traffic on the freeway was moderate when the pursuit began and then became very heavy. Once the Land Cruiser was stuck in traffic, appellant stopped the car on the right side of the freeway. As the car was stopping,

Estrada heard from dispatch that it had been reported stolen. Estrada exited his car and drew his pistol. He saw appellant get out of the Land Cruiser, drop the car keys, look at Estrada, and begin to run away. Estrada yelled at him to stop. Appellant jumped over a barrier and continued to run off the freeway into a construction area. After briefly trying to catch up to appellant, Estrada returned to the vehicles and called CHP dispatch to report appellant's description and location.

Other CHP officers responded and pursued appellant through a construction area and into a residential area. As CHP officer George Perez began to search the neighborhood, a homeowner came out and began waving and pointing to her backyard. When Perez approached the yard, he saw someone peek briefly over a low wall. Perez pulled out his service weapon and yelled for the individual, whom he identified as appellant at trial, to show his hands, jump over the wall, and come toward him. Perez then detained appellant.

Officer Estrada interviewed appellant following his arrest and waiver of his *Miranda*[2] rights. An audio recording of the interview was played for the jury. Appellant told Estrada that he did not notice that the traffic light was red and did not see the police car behind him until he heard someone say "Stop. You in the Land Cruiser." He then looked behind him and saw the police car with lights activated. Appellant stated that he fled from the police because he did not have his driver's license and thought he would "get into trouble." He stopped once there was too much traffic to keep going. Once he pulled over, he ran because he saw the gun pointed at him and was scared that he might be killed. Regarding his possession of the car, appellant

---

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

said that he was unemployed, and was walking down the street when someone pulled up in the Land Cruiser and asked if he needed cash. This person offered to pay appellant $100 if he would go to Walmart and buy some groceries for him. The man told appellant to take the Land Cruiser and come back with the groceries to the same spot. Appellant agreed because he needed the money.

Appellant did not present any evidence and did not testify.

DISCUSSION

I. *Instruction on Lesser Included Offense*

Appellant contends the trial court erred by failing to instruct the jury on misdemeanor evading a peace officer as a lesser included offense of felony evading. We conclude there was no error.

A. *Factual Background*

After the close of evidence, outside the presence of the jury, the prosecutor informed the court that she had received a note from stand-by defense counsel regarding requesting jury instructions on lesser included offenses. The prosecutor stated that she had not requested instructions on any lesser included offenses and did not feel it was appropriate for the court to instruct the jury as to any such offenses. She noted that an instruction for a misdemeanor charge of evading a police officer was appropriate "if there is evidence that the defendant did not drive with wanton disregard." The court responded, "Under the circumstances of this case, I'm not going to give it. The jury has seen the video. It's not just a question of testimony. They have seen the video and the recklessness of which the car is moved in the course of the pursuit."

B. *Governing Principles*

"[A] trial court must instruct on an uncharged offense that is less serious than, and included in, a charged greater offense, . . . whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present. [Citations.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) "[T]his does not mean that the trial court must instruct sua sponte on the panoply of all possible lesser included offenses. Rather, . . . "'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.'" [Citation.]" (*Ibid.*; see also *People v. Breverman* (1998) 19 Cal.4th 142, 162.)

On appeal, "[w]e review the trial court's failure to instruct on a lesser included offense de novo [citations] considering the evidence in the light most favorable to the defendant [citations]." (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

C. *Analysis*

Appellant challenges the trial court's failure to instruct on misdemeanor evasion of a peace officer under Vehicle Code section 2800.1, which is a lesser included offense of felony evasion of a peace officer under Vehicle Code section 2800.2. (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681 (*Springfield*).) "The only distinction between the two crimes is that in committing the greater offense the defendant drives the pursued vehicle 'in a willful or wanton disregard for the safety of persons or property.'" (*Id.* at p. 1680.) The Attorney General

asserts that the trial court was not required to instruct on the lesser offense because there was no evidence that appellant's offense was anything less than felony evasion. We agree.

Vehicle Code section 2800.2, subdivision (b) defines willful or wanton disregard as including, but not limited to, "driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." Here, Estrada testified that appellant committed four qualifying traffic violations: driving on the shoulder and unsafe passing on the right, unsafe lane changes, driving 70 miles per hour in a 55 mile per hour zone, and crossing parallel double white lines onto a transition road. In addition to this testimony, the video of the incident shows appellant engaging in this conduct.

Appellant concedes that there was substantial evidence from which the jury could find he committed felony evading. However, he argues that there was also substantial evidence in the record that, if believed by the jury, would support a finding of misdemeanor evading. He contends that two of the four alleged traffic violations—unsafe passing on the right and unsafe lane changes—were "highly subjective factual determinations" and the jury could have concluded he did not commit them. In support, he points to evidence that he "only" drove 70 miles per hour, the pursuit lasted just 1.5 miles, and he "drove safely enough not to collide into any cars" or cause any injuries or property damage.

We are not persuaded. Having reviewed the video of the incident, we find there is no evidence that could support appellant's contention that he drove "safely." Rather, the video supports Estrada's testimony that appellant accelerated through

moderate to heavy traffic, sped past the cars around him, and cut precipitously back and forth across multiple lanes. That he managed to avoid collision or injury does not provide substantial evidence that he was driving safely.

The case cited by appellant, *People v. Springfield, supra,* 13 Cal.App.4th 1674, is readily distinguishable. There, the defendant led police on a pursuit on surface streets lasting five to seven minutes. Officers testified that the defendant ran multiple stop signs, but appeared to slow down at each intersection to check for cross traffic, and also drove at an unsafe speed. (*Id.* at p. 1678.) The defendant testified to the contrary that he drove at the speed limit and did not run any stop signs. (*Ibid.*) On appeal, Springfield argued that the trial court erred in refusing to instruct the jury on the lesser included offense of misdemeanor evading. (*Ibid.*) The court agreed, finding that "there was conflicting evidence concerning the manner Springfield drove the pursued vehicle. While there was substantial evidence to support a finding, based on the officers' testimony, that Springfield drove with a willful and wanton disregard for the safety of other persons and property, there was also evidence, based largely on Springfield's testimony, that he did not drive in such a manner." (*Id.* at pp. 1680–1681.) As such, the evidence would have justified a conviction on the lesser included offense. (*Id.* at p. 1681.)

Here, by contrast, there is no evidence from which the jury could find that appellant drove in a manner to support a conviction on the lesser included offense. Instead, the police officer's testimony was bolstered by the video footage of the incident, and there was no evidence offered to the contrary. As

such, the trial court was not required to provide a lesser included offense instruction.[3]

II. *Remand to Determine Ability to Pay*

In supplemental briefing, appellant contends the trial court erred by requiring him to pay $580 in restitution fines and court assessment fees without finding that he had the ability to pay them. As support for this claim, appellant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Duñeas*).)

Because appellant failed to object to any fines or fees at sentencing, he has forfeited this challenge. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153; *People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our sister court in *Frandsen* that the holding in *Dueñas* was foreseeable and therefore appellant was required to raise an objection to the imposition of fines and fees, and demonstrate an inability to pay, at the time of his sentencing. (*Frandsen, supra,* 33 Cal.App.5th at pp. 1154-1155.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J. CURREY, J.

---

[3] Because we find no error, we need not reach appellant's argument that the court's error also violated his due process rights.