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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNIEL GARRETT et al.,

Defendants and Appellants.

B267689

(Los Angeles County
Super. Ct. No. BA433337)

APPEALS from judgments of the Superior Court of
Los Angeles County, Craig J. Mitchell, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of
Appeal, for Defendant and Appellant Berniel Garrett.

Ava R. Stralla, under appointment by the Court of Appeal,
for Defendant and Appellant Precious Reed.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Senior Assistant
Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy
Attorneys General, for Plaintiff and Respondent.

Berniel Garrett and Precious Reed were convicted at a joint trial of evading an officer with willful or wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a)).¹ On appeal Garrett contends the trial court committed prejudicial error when it failed to instruct the jury on the lesser included offense of misdemeanor evading. Reed’s appointed counsel, after reviewing the record, identified no meritorious issues. Our own independent review of the record similarly found no error. We affirm both judgments.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Evidence at Trial

On the evening of July 3, 2013 a middle-aged man flagged down Los Angeles Police Officers Adaniz Cook and John Hackman in a residential neighborhood near the intersection of Martin Luther King Jr. Boulevard and Coliseum Street. The man reported he had been robbed at gunpoint by men who arrived and then fled the scene in a tan Buick or Cadillac and a silver BMW. One of the robbers, subsequently identified as Telvin Breaux, had declared during the robbery that the neighborhood was “40 Crip”—that is, territory of the Rollin’ 40s Neighborhood Crips, a criminal street gang located in South Los Angeles. The victim said there were four individuals in the BMW, which was being driven by a woman, and two individuals in the second car. The officers, who were in uniform in a marked patrol car, began to search the area for the perpetrators.

¹ Statutory references are to this code unless otherwise stated.

a. *The pursuit of Garrett*

When the officers turned onto August Street, they noticed a tan Buick and silver BMW approaching in tandem. Officer Cook made a U-turn and began to follow the BMW. Both suspect vehicles quickly drove around an SUV in front of them. The Buick, driven by Garrett, continued to accelerate and, running a stop sign, turned onto Stevely Avenue. The BMW, driven by Reed, sped through the intersection without turning. Cook radioed a description of Reed and the BMW to other officers, activated her patrol car's lights and siren and followed Garrett onto Stevely Avenue.

Garrett, who was already at the next intersection, again increased his speed. Officer Cook could see "how fast the Buick was going by the dust it was kicking up." Garrett turned right onto Coliseum Street, veering into the opposing lane of traffic, before moving to the paved center median. He continued traveling on the center median, outpacing cars in the adjacent traffic lane. Garrett then moved into the traffic lane without signaling, cutting off a car driving in the same direction. Cook testified her speed may have been in excess of 50 miles per hour, and the patrol car and Buick remained approximately the same distance apart during the pursuit.

When Garrett reached Martin Luther King Jr. Boulevard, the light for Coliseum Street traffic was red. All traffic had stopped for emergency vehicles on the boulevard. Garrett disregarded the red light, accelerated through the intersection and turned left onto Chesapeake Avenue, the first street past Martin Luther King Jr. Boulevard.

On Chesapeake Avenue Garrett stopped to allow Breaux to get out of the Buick. Breaux ran into a nearby apartment

complex. Officer Cook sounded her horn to signal Garrett to pull over. Garrett proceeded to the next intersection, turned right and stopped at the curb in the middle of the block. The officers took him into custody.

The pursuit lasted approximately two minutes, commencing at approximately 7:30 p.m. The officers' dashboard camera (dash cam) recorded the pursuit, and the video recording was played for the jury. Garrett testified in his defense and acknowledged that during the police pursuit he was "driving fast," "45 to 50" miles per hour, and had "crossed the red light." Garrett explained he was attempting to evade the officers at the time because his passenger Breaux had outstanding warrants and had urged Garrett to quickly leave the area.

Breaux, who was tried jointly with Garrett and Reed, also testified at trial. Breaux denied having committed a robbery, asserting that the victim had sold him adulterated cocaine several days earlier, Breaux had confronted him on the street and demanded his money back, and he took the victim's phone and a chain to ensure he would be repaid. With respect to the ensuing police pursuit, Breaux confirmed Garrett's account, explaining he had panicked when he saw the patrol car because he had outstanding warrants and asked Garrett to immediately leave the area even though it meant speeding through a red light.

b. *The pursuit of Reed*

Los Angeles Police Officer Brian Richardson and his partner were assisting in the vehicle search following the robbery report. Both officers were in uniform, and Richardson was driving a marked patrol car.

At Martin Luther King Jr. Boulevard Richardson noticed Reed's BMW and realized it matched the description of a vehicle

used in the robbery. When he pulled behind Reed, she “immediately took off through the red light.” Richardson activated his patrol car lights and siren and gave chase. Reed drove at a high rate of speed, “much faster” than other vehicles in the area. She ignored all red lights and stop signs and weaved between traffic lanes without signaling.

Six or seven minutes into the pursuit, Officer Richardson requested a helicopter and back-up patrol car assistance. Reed came to a stop at 67th Street and 11th Avenue, fled into an apartment complex and was taken into custody. A video recording of the pursuit from Richardson’s dash cam was played for the jury.

Reed did not testify and did not present any witnesses in her defense.

2. The Charges, Verdicts and Sentencing

Breaux, Garrett and Reed, as well as three other individuals, were charged in an amended information with second degree robbery with special allegations a firearm had been used and the offense had been committed to benefit a criminal street gang. Garrett and Reed were also each charged with evading an officer with willful or wanton disregard for the safety of persons or property.

Breaux was convicted of robbery. The jury found true the special allegation he had personally used a firearm in the commission of the offense but not true the criminal street gang enhancement allegation.² Garrett and Reed were found not guilty on the robbery charge. Each was found guilty of felony

² Breaux appealed his conviction but requested dismissal of the appeal before filing an opening brief.

evasion. The jury found not true the special allegation the offense had been committed to benefit a criminal street gang.

In a bifurcated proceeding Garrett waived his right to a trial and admitted he had suffered a prior serious or violent felony conviction within the meaning of the three strikes law. (Pen. Code, §§ 667, subds. (b)-(j), 1170.12.) The trial court sentenced Garrett to a state prison term of 32 months (the lower term of 16 months doubled under the three strikes law) for felony evading. The trial court sentenced Reed to the middle term of two years in state prison for felony evading.

DISCUSSION

Garrett's Appeal

Garrett contends the trial court erred by failing to instruct the jury, sua sponte, on misdemeanor evading, a lesser included offense of the charge of felony evading.

1. *Standard of Review*

“An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.’ [Citation.] The ‘substantial evidence requirement is not satisfied by “any evidence . . . no matter how weak,” but rather by evidence from which a jury . . . could conclude ‘that the lesser offense, but not the greater, was committed.’” [Citation.] ‘On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense.’” (*People v. Nelson* (2016) 1 Cal.5th 513, 538; accord, *People v. Brothers* (2015) 236 Cal.App.4th 24, 29-30.)

2. *Felony Evading and the Lesser Included Offense of Misdemeanor Evading*

It is a misdemeanor to willfully flee in a motor vehicle from a uniformed peace officer who is in a marked patrol car with lights flashing and siren sounding. (§ 2800.1, subd. (a).)³ The offense is elevated to a felony if the “pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property.” (§ 2800.2, subd. (a).) “‘Wantonness’ is defined as having ‘consciousness of conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of the consequences.’ [Citation.] In the context of reckless driving, the term ‘willful’ refers to the intentional disregard for safety.” (*People v. Dewey* (1996) 42 Cal.App.4th 216, 221-222.)

The jury was instructed pursuant to CALCRIM No. 2181 as to all elements for felony evading, including that “[s]omeone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] A person acts

³ Vehicle 2800.1, subdivision (a), provides: “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 . . . 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. [¶] (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.”

with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm [and] (2) he or she intentionally ignores that risk. The person does not, however, have to intend to cause damage.” The trial court did not instruct the jury that it could find Garrett guilty of the lesser included offense of misdemeanor evading.

3. *The Trial Court Did Not Err in Failing To Instruct on the Lesser Included Misdemeanor Offense*

Garrett argues the trial court erred in failing to instruct on the lesser included offense of misdemeanor evading, because the state of the evidence raised the question whether the element of driving with a willful or wanton disregard for public safety had been proved. However, the issue is not whether there was sufficient evidence to prove Garrett drove recklessly in violation of section 2800.2, but whether there was sufficient evidence from which a jury could reasonably have concluded Garrett committed misdemeanor evading, but not felony evading.

In *People v. Springfield* (1993) 13 Cal.App.4th 1674, upon which Garrett relies, the court of appeal reversed the defendant’s felony evading conviction because the trial court had failed to instruct the jury on the lesser included offense of misdemeanor evading. In that case, however, “there was conflicting evidence concerning the manner [the defendant] drove the pursued vehicle. While there was substantial evidence to support a finding, based on the officers’ testimony, that [the defendant] drove with a willful and wanton disregard for the safety of other persons and property, there was also evidence, based largely on [the defendant’s] testimony, that he did not drive in such a manner.” (*Id.* at pp. 1680-1681.)

Here, in contrast, there was no evidence that Garrett attempted to evade police without driving recklessly. As the officers testified and the dash cam video recording showed, Garrett drove at a high rate of speed through a residential area while failing to remain in the proper lane or to obey stop signs and red lights, among other traffic violations. Garrett's testimony did not dispute this evidence. To the contrary, Garrett admitted he had evaded the officers as depicted in the video, explaining he felt compelled to help Breaux escape from the police. Breaux also testified that Garrett changed his manner of driving and ran a red light when Breaux urged him to flee the area. Where, as here, there was no evidence the offense was less than that charged, the trial court was not obligated to provide a lesser included instruction.

Reed's Appeal

We appointed counsel to represent Reed on appeal. After an examination of the record, counsel filed an opening brief raising no issues. On December 30, 2016 we advised Reed she had 30 days to submit any arguments or raise any issues she wanted us to consider. We have not received a response.

We have examined the record and are satisfied appellate counsel for Reed has complied with her responsibilities and that there are no arguable issues. (See *Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441-442.)

DISPOSITION

The judgments are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

MENETREZ, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.