Filed 1/15/04 P. v. Hudson CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ODELL HUDSON, Defendant and Appellant.	B162812 (Los Angeles County Super. Ct. Nos. BA226321)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anita H. Dymant, Judge. Affirmed.

Jeffrey Allen Needelman, 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, Joseph P. Lee and Jeffrey A. Hoskinson, Deputy Attorneys General, for Plaintiff and Respondent.

Gregory Odell Hudson appeals from the judgment entered following his convictions by jury of transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a)), possession of cocaine base for sale (Health & Saf. Code, § 11351.5), and evading an officer in willful disregard of safety of persons or property (Veh. Code, § 2800.2, subd. (a)). He was sentenced to prison for four years eight months.

In this case, we find that there was sufficient evidence that appellant committed evading an officer in willful disregard of safety of persons or property, including sufficient evidence that the pursuing police car (1) was "distinctively marked" and (2) "exhibit[ed] at least one lighted red lamp visible from the front and [appellant] either [saw] or reasonably should have seen the lamp" within the meaning of Vehicle Code sections 2800.1, subdivision (a) and 2800.2, subdivision (a).

We hold the trial court did not err by (1) giving to the jury CALJIC No. 12.85 (1999 rev.), or (2) failing to give CALJIC No. 12.87, each of which instructions pertains to the meaning of phrase "distinctively marked." We also hold that neither Vehicle Code section 2800.2, subdivision (a), nor CALJIC No. 12.85, as given by the trial court, created unconstitutional mandatory presumptions.

In addition, we conclude that the evidence of appellant's prior conviction for possession of cocaine base for sale was properly admitted. We hold the trial court did not impermissibly restrict appellant's closing argument nor improperly admit in evidence of a photograph of a black ashtray. Finally, we reject appellant's contention that cumulative error requires reversal of the judgment.

FACTUAL SUMMARY

1. *People's Evidence*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that, as of his July 2002 trial testimony, Los Angeles Police Officer Andrew Buesa had been a police officer for 12 years and, for about three years, had been assigned to the Metropolitan Division. On January 4, 2002, Buesa was assigned to 77th Division.

At about 10:40 p.m. on January 4, 2002, Buesa and his partner, Los Angeles Police Officer Ludwig, were on patrol in the area of 54th Street and Wilton. Buesa testified that the officers were in a gray Crown Victoria "dual purpose" car that Buesa was driving. Buesa also testified that the car was not a "marked vehicle" but was "a plain car with a forward-facing interior red light and a blue amber blinking light in the back." Buesa further testified that he believed that "black-and-whites [were] Crown Victorias also[.]"

Buesa turned from 54th Street onto northbound Wilton. As Buesa proceeded northbound on Wilton at about 20 miles per hour with his car's headlights on, he observed a Ford Expedition parked northbound in the middle of Wilton. Buesa testified he believed the back windows of the Ford were tinted, but Buesa did not know whether its side windows were tinted. Buesa observed the driver of the Ford, later determined to have been appellant,[1] conversing with a male who was standing in the street next to the driver's door of the Ford. Buesa observed the male give appellant money in exchange for an object wrapped in cellophane. Buesa opined at the time that he had observed a narcotics transaction. The male looked at the officers and fled.

After Buesa testified that the male fled, the following occurred: "Q. . . . So what did you and your partner do at that point? [¶] A. At that point I activated my emergency lights and attempted to pull over the defendant. [¶] Q. . . . Now, your emergency light, is that a red forward-facing light? [¶] A. Yes.[2] [¶] Q. And where is that located in the car? [¶] A. The rearview mirror. [¶] Q. Right underneath the rearview mirror? [¶] A. Yes." Buesa had not yet activated his siren.

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1 Buesa first observed that appellant was the driver after the herein described pursuit ended and appellant was detained.

2 We note Buesa earlier testified he had a forward-facing interior red light *and* "a blue amber blinking light in the back." (Italics added.) Buesa testified he activated his emergency "lights." The prosecutor's subsequent question focused on a single emergency light, that is, the red light, but Buesa's previous testimony evidenced that he activated the forward red light, and the blue amber blinking light in the back.

Buesa testified that, after the male fled, appellant "accelerates, rounds the corner, going eastbound on 52nd, losing traction, and I'd say approximately 25 to 30 miles an hour." Buesa pursued appellant. Buesa activated his siren, and appellant abruptly pulled to the south curb of 52nd, just east of Wilton.

Buesa, who was in uniform, exited his car and ordered appellant more than five times to get out of his vehicle. Appellant did not comply. Buesa testified he then observed "the brake lights come on," and appellant accelerate eastbound on 52nd.

Buesa reentered his car and pursued appellant. Buesa's red light was still on, and Buesa activated his siren again. Buesa also called for backup units. Appellant turned from eastbound 52nd onto southbound Gramercy. The area of Wilton, 52nd, and Gramercy was a residential area. As appellant proceeded down Gramercy, Buesa was 30 to 40 feet behind him. Appellant was traveling about 50 miles per hour in a 25 miles per hour zone. Appellant slowed, but failed to stop, for a stop sign at 54th and Gramercy, and continued into the intersection at 25 to 30 miles per hour. Appellant nearly collided with a vehicle which was traveling eastbound on 54th, causing that vehicle to brake sharply and honk its horn.

Appellant turned from southbound Gramercy onto eastbound 54th. When appellant turned, Buesa observed appellant "manipulating his fingers with his left hand as if he was crumbling items."[3] Appellant's hand was "outside." As appellant proceeded on eastbound 54th, he failed to stop for a stop sign at Ruthelen. Buesa was following appellant with his red light and siren on. Appellant continued eastbound on 54th through a red light at Western, and accelerated to about 60 miles per hour with Buesa behind him. Appellant turned from eastbound 54th onto southbound Normandie. At some point

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[3] At one point during the pursuit, Ludwig said that "a window [is] open[.]" After appellant was detained, Buesa and Ludwig retraced the route of the pursuit but Buesa found no contraband.

during the pursuit, other units joined Buesa.[4] Appellant proceeded to Slauson, where he turned onto eastbound Slauson. Buesa continued to follow with his red light and siren sounding. Appellant drove into a shopping center at Slauson and Vermont, stopped, and was detained.

Buesa searched the Ford and recovered from it a few crumbled off-white solids resembling rock cocaine in the driver's seat, an electronic scale with white residue, a black ashtray with white residue, a box containing a plastic baggy, and a bottle labeled hydrochloride. Buesa testified that Ludwig recovered "most of the crumbled up white solids" from the "side of the door, the floorboard and I believe a few items off the seat." Ludwig also recovered $50 dollars from the Ford's center console, and $800 in cash from appellant's pants pocket. Buesa observed, on the "driver's side of door," white residue on the electronic buttons for the window and locks, and white residue on the outside of the door and rear door. There was a lot of white residue on appellant's hands, especially on his left hand. The white solids recovered from the floorboard on the "inside of the" Ford, and from its "seat," were .67 grams net weight and contained cocaine in base form. A police narcotics expert opined the cocaine base was possessed for sale.

2. *Defense Evidence*.

Appellant, who had twice been convicted of crimes of moral turpitude,[5] denied that he had been on Wilton, that he had stopped in the middle of that street, or that a male stood next to his car. He testified he drove to 52nd, turned onto eastbound Van Ness, and saw a silver or white Crown Victoria. Appellant did not see its occupants. Appellant

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[4] The prosecutor asked Buesa if he knew at what point the other units joined Buesa. Buesa replied "[i]t would be a guess. I would say either when we passed Western or when we approached Normandie." There were additional dual purpose Metropolitan Division units.

[5] During cross-examination, appellant testified that both convictions were felonies. The first occurred in 1996 and was for possession of cocaine for sale, and the second occurred in 2000.

denied knowing that the occupants of the Crown Victoria were police.[6] Appellant testified he was traveling eastbound on 52nd, and ". . . I was pulled over. I heard a siren, I pulled over, . . . "[7]

During cross-examination, appellant denied he saw "a red light in the rear window." When appellant heard the siren, that was "enough for [him]" to pull over. Appellant testified he pulled over when he heard the siren because ". . . I wasn't sure if it was another patrol car in the area or maybe a paramedic. You know, you hear a siren, you usually yield or kind of, you know, look around and see what is going on." Appellant testified he did not see a paramedic, but he "wasn't sure what it was. I wasn't sure if it was a fire truck, paramedic. It could have been a number of things." Appellant testified he looked around when he heard the siren, checked his rearview mirror, but "couldn't see the red light." Appellant did not see an ambulance, fire truck, or "black-and-white[.]"

Appellant saw two people exit the Crown Victoria but did not see any uniforms. He testified, "It's like 10 to 11:00. You couldn't see. I am thinking the officers was maybe seven, eight feet behind me." Two persons had flashlights pointed so appellant could not see who they were. Appellant testified he was ordered out of his car at gunpoint, and "each time they got a little more aggressive in terms of telling me to get out."

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[6] During cross-examination, appellant testified he got up to 52nd and was on Van Ness when he saw the "cops" heading eastbound on 52nd. Appellant did not then testify whether he knew at the time he saw them that they were officers, or whether he was referring to them as such because he later learned they were officers.

[7] At one point during cross-examination, appellant testified that "initially when the officers stopped me, it was off the record." Appellant may have been suggesting that the stop was not recorded on the audiotape of the pursuit. We also note appellant did not then testify whether he knew at the time he was stopped that the persons were officers, or whether he was referring to them as such because he later learned they were officers.

Appellant testified he was not certain that the persons stopping him were police officers. Appellant was very concerned. However, appellant did not have any reason to believe that anyone was "after" him, no one was "after" him, and he had not "gotten anybody mad[.]" The Crown Victoria was no different than ones civilians drove. At the time of the stop, appellant was on 52nd between Van Ness and Cimarron. There was a street light on Van Ness and another on Cimarron, but appellant was between them.

Appellant testified he had money and was in a dark area, so he drove away for his safety.[8] Appellant was trying to drive to a safe and lit area, and intended to stop at the shopping center at Slauson and Vermont. Appellant denied throwing anything out of the window.

Appellant at one point testified he was on 54th. The following then occurred: "Q. Did you see a red light in the car behind you? [¶] A. I was looking out of my rearview mirror that's located on the door of the car. . . . , I am looking out to the left of me, and I can see, . . . , the car there, but the red light is located at the -- underneath the rearview mirror in their car, and it's at night. And you also -- it has tint that's at the top of the windshield; so you couldn't visibly see it, . . . , from that angle, but I knew the car was there."

Appellant testified that as he drove eastbound on Slauson he was aware he was being followed by "this car." Appellant was not "sure" whether at some point other cars followed him.

During the entire pursuit, the officers were within a car length of appellant. Appellant violated no traffic laws. The car that was following appellant never tried to overtake appellant and always stayed behind him. Shortly before he reached Slauson and Vermont, black and white units joined the car following appellant. Prior to that time,

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[8] During cross-examination, the prosecutor asked appellant why, if he had been concerned for his safety, he did not stop closer to a street light than in the middle of the block. Appellant replied he was not too far from the street light. He also testified, however, that he could not see uniforms.

appellant had not suspected that police were behind him. Appellant denied ever seeing a red light activated on the car that followed him.

Appellant denied there were narcotics or contraband in the Ford, or narcotics on his hands or on the driver's door of the Ford. Appellant testified there was no way for him to know that there was cocaine in the vehicle, because he "had access to the truck maybe . . . two hours at the time I was stopped." He denied knowledge of the scale, ashtray, or hydrochloride.

Police recovered $63 from his front pants pocket and $800 in an envelope from his back pocket. Appellant testified he had collected the $800 from family members to assist the burial of a relative. There was never $50 in the center console of the Ford.

CONTENTIONS

Appellant contends: (1) "[t]here was insufficient evidence that the police vehicle was [distinctively] marked to support appellant's conviction in count three for willfully evading a police vehicle in violation of Vehicle Code section 2800.2, subdivision (a)"; (2) "[t]here was insufficient evidence that the red light in the police vehicle was clearly visible by appellant from the front of the vehicle to support appellant's conviction in count three for willful evasion of police in a motor vehicle under Vehicle Code section 2800.2, subd. (a)"; (3) "[t]he trial court reversibly erred when it gave the jury a special instruction that misstated the definition of 'distinctively marked,' a material and disputed element of the charged and lesser included offenses under Vehicle Code sections 2800.1 and 2800.2, subds. (a)"; (4) "[t]he trial court reversibly erred when it failed to instruct the jury with CALJIC No. 12.87 on the definition of 'distinctly marked'"; (5) "[t]he trial court reversibly erred and violated appellant's rights under the Fourteenth Amendment to the United States Constitution when it instructed the jury with CALJIC No. 12.85, an instruction that endorses two unconstitutionally mandatory presumptions in Vehicle Code section 2800.2, subd. (a)"; (6) "[t]he trial court erred in admitting the nature of appellant's prior conviction of possession of cocaine base for sale pursuant to Evidence Code section 1101, subd. (b), because appellant never contended he was unaware of the appearance of cocaine base"; (7) "[t]he trial court impermissibly

restricted closing argument of appellant's trial counsel in violation of appellant's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution"; (8) "[t]he trial court erred in admitting a photograph of a black ashtray seized from appellant's vehicle because a white glare resembling cocaine covered most of the photograph rendering it highly prejudicial and lacking in probative value"; and (9) "[t]he cumulative error doctrine warrants reversal of counts one and two: transportation and possession for sale of cocaine base."

DISCUSSION

1. *There Was Sufficient Evidence That Appellant Violated Vehicle Code Section 2800.2*.

We reject appellant's related claims that there was insufficient evidence that Buesa's police car (1) was "distinctively marked" and (2) "exhibit[ed] at least one lighted red lamp visible from the front and [appellant] either [saw] or reasonably should have seen the lamp" within the meaning of Vehicle Code sections 2800.1, subdivision (a) and 2800.2, subdivision (a).

a. *Applicable Law*.

Vehicle Code section 2800.2, subdivision (a), states, in relevant part, "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, or by confinement in the county jail for not less than six months nor more than one year." (Italics added.)

Vehicle Code section 2800.1, subdivision (a), states, in relevant part, "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." (Italics added.)

In *People v. Estrella* (1995) 31 Cal.App.4th 716 (*Estrella*), the appellate court was presented with a sufficiency challenge to the above condition number three (the former Vehicle Code section 2800.1, subdivision (c)). In *Estrella*, an officer was "driving a 1989 white Chevrolet Caprice with a light bar inside the windshield on the front passenger side. Its siren was not visible from the outside. It had alternating headlights (called 'wigwag' lights) and warning lights to the rear. The light bar was eighteen inches long and four or five inches from top to bottom. It had a steady red light in the middle, a flashing blue light on one side, and a flashing red light on the other. It was permanently mounted in the vehicle behind the windshield pointing forward, in the vicinity of the passenger side sun visor." (*Estrella*, *supra*, 31 Cal.App.4th at pp. 719-720.) "There was no writing or sign on the vehicle or anything else to indicate what agency owned the vehicle." (*Id*. at p. 720.)

Construing Vehicle Code section 2800.2, subdivision (a)'s requirement that the vehicle be "distinctively marked," *Estrella* reviewed dictionary definitions of the terms "distinctive," "marked," and "mark,"[9] and concluded that "a vehicle is distinctively marked if *it bears* a symbol or device that identifies it as a peace officer's vehicle." (*Estrella*, *supra*, 31 Cal.App.4th at p. 722, italics added.) *Estrella* noted, "While initial reaction to the term 'distinctively marked' may be to construe a requirement of insignia

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9 *Estrella* stated, "Something is distinctive if it serves to distinguish or set apart. (See Webster's Third New Internat. Dict. (1986) p. 659.) The adjective 'marked' means having a mark of a specified kind, or having a distinctive or strongly pronounced character. (See *id*. at p. 1383.) A 'mark' is a character, device, label, brand, seal, or other sign put on an article, especially to show the maker or owner, to certify quality, or for identification. (See *id*. at p. 1382.) The word is used here in the context of a list of conditions relating to the appearance of officers and their vehicles." (*Estrella*, *supra*, 31 Cal.App.4th at p. 722.)

or logo, we note the absence of an express requirement of the same in section 2800.1, thereby lending credence to a liberal (and less literal) interpretation of the term." (*Ibid*.)

"[A]lthough we agree that a *red light and siren alone* do not distinctively mark a police vehicle, we conclude that under the circumstances presented here, the *additional 'devices' . . . consisting of wigwag lights and the flashing blue and clear lights* adequately identified [the] vehicle as a police vehicle. [Fn. omitted.] We find it incredible to believe or even seriously argue that a reasonable person, upon seeing a vehicle in pursuit with flashing red and blue lights, wigwag headlights and hearing a siren, would have any doubt that said pursuit vehicle was a police vehicle." (*Estrella*, *supra*, 31 Cal.App.4th at p. 723, italics added) [10]

"We consider this interpretation of the statute to be far more consistent with legislative intent than the alternative interpretation which would require some letter marking or insignia expressly designating the vehicle as a police vehicle. While on its face also reasonable, this 'requirement' is less cogent when one considers the unlikelihood of a fleeing felon in the nighttime being able to distinguish any writing or insignia on the side or rear of a police vehicle in pursuit. [¶] Accordingly, we adopt a commonsense approach to this question, one which looks at the *indicia identified with* the pursuit vehicle which are *supplemental* to a red light and siren, to ascertain *whether a person fleeing is on reasonable notice that pursuit is by a peace officer. Stated somewhat differently, under section 2800.1, does the person know or reasonably should* [*sic*] *know that a police vehicle is in pursuit?* [¶] Here, the defendant was on such notice." (*Estrella*, *supra*, 31 Cal.App.4th at p. 723, italics added.)

People v. Mathews (1998) 64 Cal.App.4th 485 (*Mathews*), also presented a sufficiency challenge to the above mentioned "distinctively marked" requirement. In that

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10 We might add that satisfaction of the "distinctively marked" requirement results in a vehicle that notifies (1) the *public* that the vehicle is a police vehicle, thereby reducing the risk of unwarranted public interference with police functions, and (2) *other police* officers will recognize the police vehicle, thereby assisting police functions. Buesa's "blue amber blinking light in the back" would have served these purposes.

case, the officer was "driving an unmarked police vehicle equipped with a siren, a red light mounted on the front dashboard, and headlights which flashed in an alternating, 'wigwag' pattern." (*Mathews*, *supra,* 64 Cal.App.4th at p. 487.) The siren, red light, and wigwag lights were activated during the pursuit. (*Id*. at p. 488.) The defendant, convicted of Vehicle Code section 2800.2, subdivision (a) (*id*. at p. 487), contended there was insufficient evidence that the officer's vehicle was "distinctively marked," "because it had fewer distinctive marks than the vehicle found sufficiently marked" in *Estrella*. (*Id*. at p. 488.) The defendant also sought "to distinguish *Estrella* because it involved a larger, three-color light bar permanently affixed near the passenger sun visor, instead of the somewhat smaller red light affixed with 'Velcro' to the dashboard." (*Id*. at p. 489.) *Mathews* did not indicate that the police car in that case had flashing blue and clear lights.

Finding "the logic of *Estrella* to be sound," (*Mathews*, *supra,* 64 Cal.App.4th at p. 489) and "adopt[ing] the commonsense approach of *Estrella* [,]" (*id*. at p. 490), *Mathews* rejected the defendant's sufficiency challenge and "conclude[d] that red lights, siren, and *wigwag headlights* were sufficiently distinctive markings to inform any reasonable person he was being pursued by a law enforcement vehicle." (*Id*. at p. 490, italics added.) *Mathews* also rejected a claim by the defendant that, by the "distinctively marked" requirement, the Legislature "intended to require distinctively *painted* vehicles." (*Id*. at p. 489, italics added.)[11] We note that, because *Mathews* relied upon multiple devices, including, but not limited to, a red light and siren to conclude that the vehicle

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11 *Mathews* stated, "As to defendant's contention the Legislature intended to require distinctively *painted* vehicles, legislative history reveals the opposite. Section 2800.1 originally contained a requirement that the officer's vehicle be 'painted a distinctive color,' but that requirement was eliminated one year later. (Stats. 1977, ch. 1104, § 1, p. 3527; Stats. 1978, ch. 504, § 1, p. 1649.) Moreover, there is no express statutory requirement of a logo or insignia, and since pursuits may occur at night or in other low-visibility conditions, light or sound-emitting devices may also serve to identify law enforcement vehicles. Had the Legislature intended to specify logos, insignia, light sizes or other particulars, it could have done so." (*Mathews*, *supra,* 64 Cal.App.4th at p. 489, italics added.)

was "distinctively marked," *Mathews* did not *hold* that a red light and siren alone could not distinctively mark a vehicle. (*Mathews* reversed the judgment on the ground that there was insufficient evidence of the previously enumerated condition number four, that is, that the officer was "wearing a 'distinctive uniform.'")

People v. Chicanti (1999) 71 Cal.App.4th 956 (*Chicanti*), was also presented with a sufficiency challenge regarding the "distinctively marked" requirement. In that case, the People presented evidence that the defendant and his accomplices robbed persons who were in a vehicle on a freeway. The robbers then left in two vehicles which exited the freeway. An officer observed the robberies and pursued the vehicle the defendant was driving. The officer's vehicle was a "brown, dual-purpose police car, an unmarked car with a red light in front facing forward and equipped with a siren. The red light and siren were activated during the pursuit." (*Chicanti, supra,* 71 Cal.App.4th at p. 959.) *Chicanti* observed that the pursuit went "through downtown Los Angeles. Defendant drove through two or three red lights, traveled at speeds of 50 to 60 miles per hour and passed cars on the left in the center divider. The [pursued vehicle] had paper over the rear license plate, preventing [the officer] from reading the license number. [The officer] saw the [pursued vehicle] almost cause a traffic accident while negotiating a dangerous left turn." (*Ibid*.)

In *Chicanti*, the defense presented evidence that the defendant had been involved in a traffic accident on the freeway, and left because he feared a fight would ensue with the occupants of the other vehicle. While driving after he exited the freeway, the defendant knew he was being followed by police, but failed to stop because he had unpaid tickets and warrants. (*Chicanti*, *supra,* 71 Cal.App.4th at p. 959.)

After discussing *Estrella* and *Mathews*, *Chicanti* "conclude[d] the appropriate test is whether there is substantial evidence in the record from which a reasonable trier of fact could conclude the red light and siren were sufficient 'distinctive markings to inform any reasonable person he was being pursued by a law enforcement vehicle.' (*People v. Mathews*, *supra*, 64 Cal.App.4th at p. 490.)" (*Chicanti*, *supra,* 71 Cal.App.4th at p. 962.)

Chicanti stated, "In construing Vehicle Code sections 2800.1 and 2800.2, the court in *Estrella* was concerned that an interpretation of the statutes allowing for conviction upon a finding a police vehicle was distinctively marked based on the presence of a red light and siren would render the requirement that the vehicle be 'distinctively marked' mere surplusage. 'Therefore, to construe "distinctively marked" to mean simply exhibiting a red light and sounding a siren would result in [then Vehicle Code] section 2800.1, subdivision (c) (requiring the vehicle to be "distinctively marked") being considered as mere surplusage.'" (*People v. Estrella*, *supra*, 31 Cal.App.4th at p. 723.)

"We respectfully disagree with the *Estrella* concern that the 'distinctively marked' requirement would be rendered 'mere surplusage' if the red lamp and siren could be used as the basis for a finding the vehicle was distinctively marked. The requirements are separate elements, and a reasonable trier of fact which found the red lamp was lighted and siren was on *may or may not* also conclude under the circumstances of a particular case that the red lamp and siren satisfy the distinctive marking element.

"We are unwilling to conclude, *as a matter of law*, that a lighted red lamp and sounded siren on an unmarked police car can never constitute substantial evidence of a symbol or device that distinctively marks it as a police vehicle. In our opinion, the appropriate approach is to apply the traditional substantial evidence test where the sufficiency of the evidence is challenged on appeal, rather than ruling as a matter of law that a particular set of facts can never constitute substantial evidence. . . . Depending on the totality of circumstances, there is no reason to conclude, as a matter of law, that a lighted red lamp and siren reasonably sounded cannot serve to identify an unmarked car as a distinctively marked police vehicle." (*Chicanti*, *supra,* 71 Cal.App.4th at p. 962.)

Chicanti concluded that the officer's vehicle in that case was "distinctively marked," noting the officer had observed the robberies and vehicles involved and had followed the defendant's car; a reasonable trier of fact could conclude that the red lamp and siren were not routinely present on civilian vehicles but distinctly marked the car as a police vehicle; and appellant told police he knew police were following him. *Chicanti* observed, "Clearly there was something sufficiently distinctive in the devices of the

police vehicle which allowed defendant to conclude he was being chased by the police, rather than by rogue civilians." (*Chicanti*, *supra,* 71 Cal.App.4th at p. 963.)

We view *Chicanti* as concluding that the determination of whether a vehicle is "distinctively marked" must be based on the totality of the circumstances and the entire record, including, but not limited to, the facts that the only identifying *devices* were an exhibited red light and a sounded siren.

b. *Application Of Law To This Case*.

There is no dispute that there was sufficient evidence that appellant violated Vehicle Code section 2800.2, subdivision (a), except to the extent appellant claims there was insufficient evidence of the previously italicized condition numbers one and three of Vehicle Code section 2800.1, subdivision (a).

As to appellant's sufficiency contention regarding condition number three, that is, the "distinctively marked" condition, there was substantial evidence as follows. Buesa was driving a plain Crown Victoria, *but the Crown Victoria was the same model used for black-and-white police cars*. As a matter of devices, Buesa's car had a "forward-facing interior red light and a blue amber blinking light in the back." (See fn. 2, *ante*.) The red light was located in the car under the rearview mirror. The car also had a siren.

Buesa observed what he opined at the time was appellant selling narcotics to a male from appellant's car. After the male fled, Buesa activated his car's red light. We note Buesa did not testify that he affixed the light to the windshield and then activated it; this at least suggests that the light already had been affixed there, if not permanently. Appellant drove around the corner with Buesa in pursuit, and Buesa activated his siren. Appellant then abruptly stopped at the curb. A *"red lamp and siren are features which a reasonable trier of fact could conclude are not routinely present on civilian vehicles, and which distinctly mark the car as a police vehicle*. Indeed, it would be highly unusual for a civilian car to have these features." (*Chicanti*, *supra,* 71 Cal.App.4th at p. 963, italics added.)

There is no dispute that appellant was transporting cocaine base and possessed cocaine base for sale. Appellant was thus committing felonies. It was only after Buesa's

observation of what he believed was a narcotics transaction that he activated his red light and later his siren. Thus, this is not a case in which appellant was an innocent driver inexplicably confronted with a car behind him that had an activated red light and activated siren, or a case in which appellant had no reason to believe that the car behind him was anything other than a civilian car driven by a rogue civilian. Appellant, by his felonious activities that had just preceded the initial stop, had reason to believe that the activated red light and activated siren that immediately followed his activities were from a police car.

Moreover, as mentioned, appellant initially *stopped* after Buesa activated his red light and siren. "Clearly there was something sufficiently distinctive in the devices of the police vehicle which allowed defendant to conclude he was being chased by the police, rather than by rogue civilians." (*Chicanti*, *supra,* 71 Cal.App.4th at p. 963.)

Further, once appellant initially stopped, Buesa exited his car and, *wearing a uniform*, ordered appellant five times to exit appellant's car. Appellant did not comply but sped away. Buesa's red light was still on, he activated his siren, and the red light and siren remained activated during the entirety of this new pursuit until it ended at Slauson and Vermont. Even if appellant had not seen Buesa's uniform before Buesa exited his car, once Buesa did and appellant was later pursued anew by the *uniformed* Buesa, appellant knew or reasonably should have known that Buesa's car was a police vehicle in pursuit. Appellant's subsequent traffic violations and evasive driving evidenced consciousness of guilt, and there was evidence that appellant was using his flight to discard narcotics from his window to avoid being apprehended therewith by police.

The renewed pursuit was lengthy. The *longer* that pursuit continued with Buesa's red light activated and siren sounding, the less reason appellant had (if any he had) for believing that a rogue civilian was following him in a civilian car, since the longer such a pursuit continued the more likely a person illegally impersonating an officer driving a police car would be caught. Nothing in the language of Vehicle Code section 2800.1, subdivision (a), precludes us from considering the *length* of the exhibition of the lighted

red lamp or *length* of the sounding of the siren when determining whether a vehicle was "distinctively marked."

Appellant testified that the pursuing car *never tried to overtake him and always stayed behind him*; in appellant's mind, this should have militated against appellant's pursuer being a robber or criminal. Yet, despite this fact and the other evidence discussed above, appellant testified that, before black and white units joined the pursuit shortly before Slauson and Vermont, *appellant had not even suspected that police were behind him.* The jury reasonably could have found that testimony of appellant, a twice-convicted felon, to be a fabrication evidencing consciousness of guilt and that Buesa's car was a "distinctively marked" police car. We note in this regard that appellant admitted during recross-examination that he neither believed, nor had reason to believe, that anyone was after him.

We hold there was sufficient evidence of condition number three of Vehicle Code section 2800.1, subdivision (a), that is, that Buesa's car was "distinctively marked," and, therefore, there was sufficient evidence that appellant violated Vehicle Code section 2800.2, subdivision (a). (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206; *Chicanti*, *supra,* 71 Cal.App.4th at pp. 958-963; *Mathews*, *supra,* 64 Cal.App.4th at pp. 487-490; *Estrella*, *supra*, 31 Cal.App.4th at pp. 718-723.)[12]

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12 *Estrella* observed that "It may reasonably be concluded that a vehicle is distinctively marked if *it bears* a symbol or device that identifies it as a peace officer's vehicle." (*Estrella*, *supra*, 31 Cal.App.4th at p. 722, italics added.) *Estrella* later observed, "we adopt a commonsense approach to this question, one which looks at the *indicia identified with* the pursuit vehicle which are supplemental to a red light and siren, to ascertain whether a person fleeing is on *reasonable notice that pursuit is by a peace officer*. Stated somewhat differently, under section 2800.1, does the person know or reasonably should know [*sic*] that a *police vehicle* is in pursuit?" (*Id*. at p. 723.) Whether a vehicle "bears" a symbol or device is arguably a different issue than whether indicia identified "with" a vehicle places a person on notice. And phrasing the issue as whether a person "reasonably should know" that a police vehicle is in pursuit, arguably does not necessarily require that the vehicle "bear[]" a symbol or device, or have indicia identified "with" the vehicle. In any event, we conclude, under any of these formulations, that there was sufficient evidence that Buesa's vehicle was "distinctively marked."

We emphasize that we are not concluding that Buesa's vehicle was "distinctively marked" based *solely* on the facts that it exhibited a lighted red lamp and sounded a siren. Even if we focused, not on the totality of the circumstances (upon which our holding rests), but on what Buesa's vehicle *itself* revealed (apart from its lengthy operation in pursuit of appellant), there was evidence that Buesa's vehicle (1) exhibited a lighted red lamp; (2) sounded a siren; (3) had a blue amber blinking light in the back;[13] and (4) was a Crown Victoria, the same model used for black-and-white police cars.

As to appellant's sufficiency contention regarding condition number one, that is, whether there was sufficient evidence that Buesa's car was "exhibiting at least one lighted red lamp visible from the front and [appellant] either [saw] or reasonably should have seen the lamp[]" (Vehicle Code section 2800.1, subdivision (a)(1)), Buesa testified that his car had a "forward-facing interior red light . . . ." The red light was located in the car under the rearview mirror. Fairly read, Buesa's testimony provided evidence that he first activated the red light when the male fled from appellant's parked car, and that the red light remained activated until the renewed pursuit ended at Slauson and Vermont.

Moreover, it was after Buesa first activated the red light that appellant, who was transporting cocaine base and possessing it for sale, accelerated and turned onto 52nd, evidencing his awareness of the light and consciousness of guilt. After appellant initially stopped, Buesa repeatedly called to him, which would have directed appellant's attention to the rear of appellant's car and in the direction of the activated red light. Appellant saw two persons behind his vehicle with guns drawn, and thus would have been looking in the direction of the activated red light. After the pursuit resumed, Buesa followed appellant during the entirety of the pursuit. There was evidence appellant discarded contraband, further evidence of consciousness of guilt. Appellant testified at one point that, during the entire pursuit, the officers were within a car length of appellant.

We hold there was sufficient evidence of condition number one of Vehicle Code section 2800.1, subdivision (a), that is, that Buesa's car was "exhibiting at least one

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13 See footnotes two and ten, *ante*.

lighted red lamp visible from the front and [appellant] either [saw] or reasonably should have seen the lamp[,]" and, therefore, there was sufficient evidence that appellant violated Vehicle Code section 2800.2, subdivision (a). (Cf. *People v. Ochoa, supra,* 6 Cal.4th at p. 1206; Veh. Code, §§ 2800.1, subd. (a)(1), 2800.2, subd. (a).)

None of the cases cited by appellant compels a contrary conclusion. This includes *People v. Acevedo* (2003) 105 Cal.App.4th 195, and *People v. Brown* (1989) 216 Cal.App.3d 596, each a case in which there was evidence that a police car's overhead lights had been activated, but no evidence that any activated light was red.

2. *The Trial Court Did Not Err By Giving CALJIC No. 12.85 (1999 Rev.)*

The court gave CALJIC No. 12.85 (1999 rev.) to the jury.[14] That instruction stated, inter alia, "The term 'distinctively marked' does not necessarily mean that the

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14 Appellant notes the prosecutor requested a special instruction regarding the meaning of "distinctively marked" for purposes of Vehicle Code sections 2800.1, subdivision (a), and 2800.2, subdivision (a). The court did not give that instruction, so there is no need to quote or discuss it. CALJIC No. 12.85, which the court did give, stated, in relevant part, "Defendant is accused in Count 3 of having violated section 2800.2, subdivision (a) of the Vehicle Code, a crime. [¶] A person is guilty of a violation of Vehicle Code section 2800.1, subdivision (a), a misdemeanor, if the person, while operating a motor vehicle and with the specific intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer, and [¶] 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, and [¶] 4. The peace officer's motor vehicle is operated by a peace officer wearing a distinctive uniform. [¶] Every person who flees or attempts to elude a pursuing peace officer in violation of Vehicle Code section 2800.1, subdivision (a) and drives the pursued vehicle in a willful or wanton disregard for the safety of persons or property is guilty of a violation of Vehicle Code section 2800.2, subdivision (a), a felony. [¶] A willful or wanton disregard for the safety of persons or property also includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving violates three or more Vehicle Code sections, such as speeding, failure to stop at a stop sign, or failure to stop at a red light. [¶] 'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure. [¶] In order to prove a violation of Vehicle Code section 2800.2, subdivision (a), each of the following elements must be

police vehicle must be marked with an insignia or logo. *The jury is to determine whether the circumstances, which may include evidence of a siren and red lamp, are sufficient to inform any reasonable person that he was being pursued by a law enforcement vehicle*."[15] (Italics added.)

Appellant claims the above italicized portion of CALJIC No. 12.85 was erroneous because "[t]he trial court's instruction, . . . suggested that the jury could find that the

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proved: [¶] 1. A person, while operating a motor vehicle, willfully fled or otherwise attempted to elude a pursuing peace officer; [¶] 2. The person did so with the specific intent to evade the pursuing peace officer; [¶] 3. The peace officer's vehicle exhibited at least one lighted red lamp visible from the front; [¶] 4. The person saw or reasonably should have seen the red lamp; [¶] 5. The peace officer's vehicle sounded a siren, as reasonably necessary; [¶] 6. The peace officer's motor vehicle was distinctively marked; [¶] 7. The peace officer's motor vehicle was operated by a peace officer wearing a distinctive uniform; and [¶] 8. The driver of the pursued vehicle drove the vehicle in a willful or wanton disregard for the safety of persons or property. [¶] The term 'distinctively marked' does not necessarily mean that the police vehicle must be marked with an insignia or logo. The jury is to determine whether the circumstances, which may include evidence of a siren and red lamp, are sufficient to inform any reasonable person that he was being pursued by a law enforcement vehicle."

15 At one point during discussions concerning CALJIC No. 12.85, the court stated, "It seems to me that what the jury, maybe, should be told is that the term 'distinctive' -- 'distinctively marked' does not necessarily require that there be -- that the police vehicle be marked with some kind of insignia or logo. Rather, the jury is to determine whether or not it was distinctively marked under all of the circumstances they find to be present. [¶] I don't want to -- since there is a dispute here as to whether there was a red light or not, I don't want to presume that in the instruction. It seems to me that they need to consider all of the circumstances, and I can say 'including whether there was a siren or whether there was a red light.'" The prosecutor agreed but appellant objected. Appellant complained it was error to instruct the jury that a vehicle was "distinctively marked" based on a red light and siren *alone*. However, during later discussions, appellant's counsel stated, "I think you should give the instruction just as the court presented it. I think the court is absolutely correct." Appellant thus arguably conceded that the giving of CALJIC No. 12.85 was proper. We need not reach the issue of whether appellant made such a concession or whether, therefore, any error in giving the instruction was invited.

pursuing police vehicle was 'distinctively marked,' *based on the presence of the red light and siren alone*." (Italics added.)

"In deciding whether an instruction is erroneous, we ascertain at the threshold what the relevant law provides.[**16**] We next determine what meaning the charge conveys in this regard. Here the question is, how would a reasonable juror understand the instruction. [Citation.] In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly." (*People v. Warren* (1988) 45 Cal.3d 471, 487.)

A reasonable jury would have *understood* the italicized portion of the instruction to focus on whether the *circumstances*, *whether or not they included evidence of a red light or siren*, were sufficient to inform any reasonable person that he was being pursued by a law enforcement vehicle, although said circumstances *might have included* evidence of a red light or siren. The fact that the italicized portion of the instruction stated that the "circumstances" might "include" evidence of a red light and siren at least suggested that such evidence would only have been a part of a larger whole of other "circumstances." Certainly, no reasonable juror would have understood the italicized portion of the instruction to *state* that evidence of a siren and red lamp *alone* was sufficient to inform any reasonable person that he was being pursued by a law enforcement vehicle.

Appellant does not claim that the above italicized portion of the instruction would have been erroneous if it had simply stated, "The jury is to determine whether the circumstances are sufficient to inform any reasonable person that he was being pursued by a law enforcement vehicle." The previously italicized portion of the instruction stated that and more, namely, that the circumstances might include evidence of a red light or siren, but that addition did not render the otherwise valid instruction erroneous.

Moreover, even if the instruction were error, there was, as we have discussed in part 1, *ante*, substantial evidence that Buesa's vehicle was "distinctively marked," and

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16 We have discussed the relevant law in part 1, *ante*.

not merely because that vehicle had an activated red light and sounding siren. Any error in giving the italicized portion of CALJIC No. 12.85 (1999 rev.) was harmless under any conceivable standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

3. *The Trial Court Did Not Err By Failing To Give CALJIC No. 12.87.*

Appellant did not request, and the court did not give, CALJIC No. 12.87. That instruction reads, in pertinent part: "A vehicle, operated by a peace officer is 'distinctively marked' when in addition to a lighted red lamp and activated siren, the vehicle is of such appearance that a reasonable person would be able to recognize it as a peace officer's vehicle, and a person fleeing is on reasonable notice that pursuit is by a peace officer."

Appellant claims the phrase "distinctively marked" is a technical term requiring definition, therefore, the court reversibly erred by failing to give sua sponte CALJIC No. 12.87. We disagree.

"In general the trial court has a sua sponte duty to give amplifying or clarifying instructions '"where the terms used [in an instruction] have a technical meaning peculiar to the law."' [Citations.] Conversely, '[a] trial court has no sua sponte duty to give amplifying or clarifying instructions . . . where the terms used in the instructions given are "commonly understood by those familiar with the English language." [Citation.]' [Citation.]" (*People v. Richie* (1994) 28 Cal.App.4th 1347, 1360 (*Richie*).) A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning. Thus, terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575.)

In the present case, appellant proffers no *technical* definition of the term "distinctively marked", nor does he cite authority for the proposition that it carries a *technical* meaning. (Cf. *Richie*, at p. 1360.) *Estrella's* "commonsense approach" (*Estrella*, at p. 723), relied upon by *Mathews*, *Chicanti*, and CALJIC No. 12.87, reviewed

common parlance dictionary definitions of the terms "distinctive," "marked," and "mark" (see fn. 9, *ante*), before determining what evidence would be sufficient to establish that a vehicle was "distinctively marked."

Moreover, it is a matter of common sense that proof of one indispensable element of an offense cannot be proof of another such element unless one is rendered surplusage, thus, the fact that CALJIC No. 12.87 both (1) indicates that a vehicle is "distinctively marked," when *certain circumstances exist in addition* to the exhibition of a lighted red lamp and the sounding of a siren, and (2) phrases *those circumstances* in straightforward language that "the vehicle is of such appearance that a reasonable person would be able to recognize it as a peace officer's vehicle, and a person fleeing is on reasonable notice that pursuit is by a peace officer," does not make the phrase "distinctively marked" a *technical* term. The fact that CALJIC No. 12.87 states "when" a vehicle is "distinctively marked" does not invest that statement with technical meaning.

Indeed, we might question whether that statement is even a definition; it states that a vehicle is "distinctively marked" "when" certain circumstances exist, but does expressly state that "when" those circumstances do not exist, a vehicle is not "distinctively marked." We conclude the phrase "distinctively marked" is not a technical term. Accordingly, appellant waived the issue of whether the trial court erred by failing to give CALJIC No. 12.87, since he failed to request clarification or amplification of the term "distinctively marked." (Cf. *People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

Finally, even if "distinctively marked" were a technical term and the court erred by failing to give CALJIC No. 12.87, there was ample evidence, which we have discussed in part 1, *ante*, that Buesa's vehicle was "distinctively marked" for purposes of any definition of that phrase contained in CALJIC No. 12.87. The court gave CALJIC No. 12.85 (1999 rev.) to the jury. Any error in failing to give CALJIC No. 12.87 was harmless under any conceivable standard. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

4. *Neither Vehicle Code Section 2800.2, Subdivision (a), Nor CALJIC No. 12.85, Creates Unconstitutional Mandatory Presumptions*.

Appellant claims CALJIC No. 12.85 "endorses two unconstitutional mandatory presumptions in Vehicle Code section 2800.2, Subd. (a) [*sic*] . . . ."[17] (Some capitalization omitted.) We disagree.

Vehicle Code section 2800.2, subdivisions (a) and (b), state: "(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 . . . . [¶] (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 under Section 12810* occur, or *damage to property* occurs." (Italics added.)

It appears that the two alleged mandatory presumptions in Vehicle Code section 2800.2, subdivision (b), to which appellant refers are Vehicle Code, section 2800.2, subdivision (b)'s references to (1) "three or more violations that are assigned a traffic violation point count under Section 12810" or (2) "damage to property" as bases for a determination that a "willful or wanton disregard for the safety of persons or property" has occurred.

We have quoted at footnote 14, *ante*, CALJIC No. 12.85, as given by the court. That instruction set forth the substance of Vehicle Code section 2800.2, subdivision (a), then stated, similar to subdivision (b), "A willful or wanton disregard for the safety of persons or property also includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving violates *three or more Vehicle Code sections, such as speeding, failure to stop at a stop*

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[17] Appellant appears to be referring to Vehicle Code section 2800.2, subdivision (b).

sign, or failure to stop at a red light."[18] The instruction made no reference to "damage to property" as a basis for a determination that a "willful or wanton disregard for the safety of persons or property" had occurred.

To the extent appellant claims CALJIC No. 12.85, as given by the court, "endorses *two* unconstitutional mandatory presumptions *in* Vehicle Code section 2800.2, subd. (a) [*sic*] . . . ." (italics added, some capitalization omitted) by permitting proof of (1) "three or more violations that are assigned a traffic violation point count under Section 12810" and/or (2) "damage to property" to establish that a "willful or wanton disregard for the safety of persons or property" has occurred, we reject the claim. CALJIC No. 12.85, as given by the court, did not refer to "damage to property" as a basis to establish a "willful or wanton disregard for the safety of persons or property."

Moreover, to the extent appellant claims CALJIC No. 12.85, as given by the court, "endorses two unconstitutional mandatory presumptions" by permitting proof of (1) "three or more Vehicle Code sections, such as speeding, failure to stop at a stop sign, or failure to stop at a red light" and/or (2) "damage to property" to establish that a "willful or wanton disregard for the safety of persons or property" has occurred, no constitutional infirmity resulted from the giving of that instruction. We concluded in *People v. Pinkston* (2003) 112 Cal.App.4th 387, that "Subdivision (b) of Vehicle Code section 2800.2 does not state a mandatory presumption. Rather, it sets out the Legislature's *definition* of what qualifies as willful and wanton conduct under subdivision (a)." (*People v. Pinkston, supra,* 112 Cal.App.4th at p. 392.) CALJIC No. 12.85, as given by the court, was consistent with Vehicle Code section 2800.2, subdivision (b)'s definition of willful and wanton conduct.

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18 Appellant does not dispute that when a driver "violates three or more Vehicle Code sections, such as speeding, failure to stop at a stop sign, or failure to stop at a red light" for purposes of CALJIC No. 12.85, "three or more violations that are assigned a traffic violation point count under Section 12810 occur" for purposes of Vehicle Code section 2800.2, subdivision (b).

Finally, we have set forth in our factual summary what transpired during Buesa's pursuit of appellant. CALJIC No. 12.85, as given by the court, stated, "'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure." There is no dispute that this statement of the law was correct. There was overwhelming evidence that appellant's acts were "[w]illful or wanton" under the above quoted standard. Thus, any error in delivering to the jury CALJIC No. 12.85, as given by the court, was not prejudicial under any conceivable standard. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

5. *Evidence Of Appellant's Prior Conviction For Possession Of Cocaine Base For Sale Was Properly Admitted*.

After the case was called to trial, but prior to the presentation of the People's case-in-chief, the People indicated they intended to impeach appellant with, inter alia, his 1996 conviction for possession of cocaine base for sale. The People represented they were not proffering the prior conviction "as [Evidence Code section]1101(b)[]" evidence. Appellant asked to have the prior conviction sanitized.

The court asked the prosecutor if there were no objection to the prior conviction being sanitized as simply a felony conviction involving moral turpitude. The prosecutor replied, "No, there would be, especially if the defendant is going to testify and say, 'I didn't have any cocaine on me. That's not my scale. It's not my cash. I don't deal. I don't even know what it looks like.' [¶] . . . [¶] 'I didn't know it was cocaine. I thought it was baby powder.' I think then it all becomes relevant." The prosecutor thus indicated, inter alia, that evidence of appellant's prior conviction for possession of cocaine base for sale might be relevant to the issue of appellant's knowledge of the narcotic character of the cocaine base in the present case if appellant denied such knowledge.

Appellant's counsel represented that appellant would testify that "it wasn't his car and he didn't know there was any drug in that car." The court and appellant agreed that the matter did not have to be argued until after appellant testified. However, the court

told the prosecutor that he could not refer to the prior conviction during his opening statement or case-in-chief. The court also stated that if appellant testified, he would be impeached with the prior conviction, and the issue was whether he could be impeached with the substance of the prior conviction or whether it would be sanitized. The court also stated, "If [appellant] raises the issue in some way that . . . would be fair to allow it [the substance of the prior conviction] in, then the court will consider it, . . ."

Later, during the presentation of the People's case-in-chief but outside the presence of the jurors, the court and parties returned to the issue of the admissibility of the prior conviction. Appellant's counsel represented that appellant's defense was, inter alia, he was driving someone else's vehicle and, although there was cocaine inside, he did not know it was there. Appellant's defense thus raised the issue of whether appellant knew of the presence (and therefore had knowing possession) of cocaine base (whether or not he knew its narcotic character).

The court asked if the prosecutor wished to be heard, and the prosecutor commented that "it depends on the defendant's testimony . . . ." The court commented that it seemed that the prosecutor was agreeable to sanitizing the prior conviction (for purposes of impeachment), but that the prosecutor "might raise it with the court, if [the prosecutor] think[s] something happens during the defendant's testimony that opens the door in some way." The prosecutor replied, "That is one. [¶] I think I would also argue that I am not limited as to how to present 1101(b) evidence and that once the defendant takes the stand that would be 1101(b) evidence and I should be able to present it through him."

The court replied "Well, the 1101(b) evidence, it has to go to an issue. I think that's the knowledge issue that [appellant's counsel] was raising." (The court was apparently referring to the issue of appellant's knowledge of the presence of cocaine base). The court ruled the prior conviction would be sanitized (for purposes of impeachment), "subject to counsel raising it after the defendant's direct testimony, and submitting to the court what basis there is to allow it in." The court also stated, "that's

my ruling, unless I hear grounds under 1101(b) or some other theory as to why it comes in, why it's not more prejudicial than probative." The People later rested.

Appellant subsequently testified as set forth in our factual summary *ante*. In particular, appellant denied there were narcotics or contraband in the vehicle, or narcotics on his hands or on the driver's door of the vehicle. During direct examination, appellant's counsel asked appellant if he knew there was cocaine in the vehicle. Appellant replied, "there was no way of me knowing, . . . what was in the truck. I had access to the truck maybe . . . two hours at the time I was stopped."

After the prosecutor began his cross-examination of appellant, but outside the presence of the jury, the prosecutor and court engaged in a discussion concerning the admissibility of the prior conviction. The prosecutor represented he was proffering the prior conviction "as 1101(b) to show knowledge[.]"[19] Appellant's counsel urged that appellant's testimony was "there wasn't anything in the car that he saw, not that there was powder." Appellant's counsel also urged that appellant was not denying "knowledge of the substance. He's denying the substance is anywhere to be seen in that car." The court asked if appellant were denying "knowledge that it's in the car[.]" Appellant's counsel replied, "He says it was not anywhere to be seen." Appellant complained that the proffered evidence was "very prejudicial, and it's not any issue that we've raised."

The court ruled the prior conviction was relevant, not to the issue of whether appellant knew of the narcotic nature of the substance, but to the issue of whether he knowingly possessed the substance.[20] The court indicated it would give a limiting instruction.

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[19] The discussion between the court and prosecutor is confusing because it is not clear from it whether the prosecutor was proffering the prior conviction as evidence that appellant knew the narcotic nature of the substance, or as evidence that appellant knew of its presence, and thus knowingly possessed the substance.

[20] The court observed that knowledge was an issue in the case, "not whether he knows what cocaine is," but "whether he knows what is in the car that he's driving." The court commented, "Assuming that the People's case is true and there was cocaine in the

Later during the prosecutor's cross-examination of appellant, appellant denied knowing what was in the vehicle. Appellant testified "There was no way for me to know that there was particles or crumbs of cocaine that was on the floorboard of the truck because, . . . these things is [*sic*] not visible, . . . "

Shortly thereafter, the court instructed the jury that it was about to hear certain evidence, and the jury was to receive it "for the limited purpose on the issue of whether or not the defendant had knowledge of the things that were allegedly found in his possession in this case, and you may consider this evidence for that purpose only."

The prosecutor's cross-examination of appellant continued, and the following occurred: "Q. [The Prosecutor]: Your '96 conviction, that was for the possession of cocaine for sale; isn't that right? [¶] A. Correct. [¶] Q. But you didn't know what was in the car? [¶] A. In this car? [¶] Q. Right. [¶] A. No." The court gave a limiting instruction during its final charge to the jury.[21]

Appellant claims "The ruling the trial court made prior to the rest of the prosecutor's case was one with which both the prosecutor and appellant concurred. This concurrence was the equivalent of a de facto stipulation . . . . The agreement was that, unless appellant were to testify contrary to his offer of proof, in other words, if he testified to the effect that he did not know cocaine base from 'baby powder' . . . then the prosecutor would not seek admission of the nature of the prior cocaine crime." Appellant thus suggests the alleged stipulation prohibited the admission in evidence of the nature of the prior conviction, not only on the issue of appellant's knowledge of narcotic character, but on the issues of knowledge of presence and intent to sell.

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car, he's in possession of it, and the question is: Does he know what he's in possession of is? [*Sic*.] Is it knowing possession? His knowledge is clearly in issue. The prior conduct is relevant to that issue."

[21] That instruction, CALJIC No. 2.09, was: "Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

As the Supreme Court noted in *People v. Daniels* (1991) 52 Cal.3d 815, 857-858, a "'defendant's plea [of not guilty] does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence [of uncharged crimes] under Evidence Code section 1101, unless the defendant has taken some action to narrow the prosecution's burden of proof.' (Fns. omitted.)" (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049, fn. 12.)

Appellant was convicted of transporting cocaine base, and of possession of cocaine base for sale. "An essential element of the offense of transportation is 'Knowledge by the defendant of both the presence of the drug and its narcotic character . . . ' [Citation.]" (*People v. Rogers* (1971) 5 Cal.3d 129, 133.) Similarly, "The elements of possession of narcotics are . . . possession thereof coupled with knowledge of the presence and narcotic character of the drug. [Citations.]" (*People v. Newman* (1971) 5 Cal.3d 48, 52.) Of course, intent to sell is an element of possession of cocaine base for sale. Accordingly, unless appellant took some action to narrow the prosecutor's burden of proof (*People v. Brandon, supra,* 32 Cal.App.4th at p. 1049, fn. 12), the elements of knowledge of the presence of cocaine base and knowledge of its narcotic character were in issue as to both offenses, and the element of intent to sell was in issue as to the offense of possession of cocaine base for sale.

Appellant claims, in essence, that appellant took action to narrow the prosecutor's burden of proof because, before the prosecutor ended his presentation of the People's case-in-chief, the parties stipulated that the prosecutor would not present evidence that appellant had suffered a prior conviction for possession of cocaine base for sale unless appellant, during his testimony, denied knowledge of the narcotic nature of the cocaine base at issue in the present case.

We note that appellant contends that "admitting the nature of appellant's prior conviction" (capitalization omitted) under Evidence Code section 1101, subdivision (b), was error because appellant never contended he was "*unaware* of the appearance of cocaine base[]" (italics added, capitalization omitted), that is, that he was unaware of the narcotic character of cocaine base. We have recited the pertinent facts, and note at the

outset that appellant also never *affirmatively conceded* below that he knew the narcotic character of the cocaine base at issue. Nor, for that matter, did he affirmatively concede below that he knew of the presence of the cocaine base (and therefore knowingly possessed it), or that he intended to sell it.

Moreover, it is true that, for whatever reason, the prosecutor did not intend to present evidence, during the People's case-in-chief, that appellant had suffered a prior conviction for possession of cocaine base for sale. Nonetheless, at no time did the prosecutor enter into the stipulation to which appellant refers.

Prior to the presentation of the People's case-in-chief, the prosecutor commented that the prior conviction would be relevant to show appellant's knowledge of the narcotic character of the substance if appellant, during his testimony, denied such knowledge. But that comment did not amount to a *stipulation* that the prosecutor would not proffer the prior conviction unless appellant denied such knowledge. Nor did it amount to a *stipulation* that the prosecutor would not proffer the prior conviction on the issues of knowledge of the presence of cocaine base, or intent to sell. In fact, the court and appellant agreed that the matter did not have to be argued until after appellant testified, and the court later stated, "If [appellant] raises the issue in some way that . . . would be fair to allow it [the substance of the prior conviction] in, then the court will consider it, . . . "

Later, during the presentation of the People's case-in-chief, but outside the presence of the jurors, appellant claimed his defense would be that there was cocaine in the vehicle but he did not know the cocaine was there. When asked to address the admissibility of the prior conviction, the prosecutor stated that it depended on appellant's testimony, and that once appellant took the stand, the prior conviction might be "1101(b) evidence." These comments did not constitute the stipulation referred to by appellant, nor did they preclude the prosecutor from proffering the prior conviction on the issues of knowledge of the narcotic character of the cocaine base, knowledge of its presence, or intent to sell. In fact, the court acknowledged that appellant had raised the issue of knowledge by appellant's counsel's representation that appellant would deny knowledge

that the cocaine base was there, that is, the court acknowledged that appellant was raising the issue of knowledge of the presence of the cocaine base. The court subsequently ruled the prior conviction would be sanitized for impeachment purposes, "unless I hear grounds under 1101(b) or some other theory as to why it comes in, why it's not more prejudicial than probative." These facts do not evidence that the prosecutor stipulated he would not proffer the prior conviction, or limit the issues to which he would proffer it.

The burden is on appellant to demonstrate error from the record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) The record fails to demonstrate the stipulation to which appellant refers, therefore, the prosecutor's eliciting of testimony from appellant that he suffered the prior conviction was not an erroneous violation of any such stipulation. Indeed, the stipulation which appellant claims the prosecutor made would have been ill-advised since, even if the prosecutor had entered into the stipulation, the issues of appellant's knowledge of the presence, and narcotic nature, of the cocaine base, and intent to sell, still would have remained for proof. Appellant took no action to narrow the prosecution's burden of proof prior to the challenged admission in evidence of the prior conviction.[22]

Appellant's testimony was properly admitted to prove his knowledge of the presence (and thus knowing possession) of cocaine base. (Cf. *People v. Ewoldt* (1994) 7 Cal.4th 380, 390-405; *People v. Ellers* (1980) 108 Cal.App.3d 943, 953; *People v. Foster* (1974) 36 Cal.App.3d 594, 595-599; Evid. Code, §§ 210, 352.) Moreover, even if appellant's testimony were not properly admitted to prove appellant's knowledge of the presence of cocaine base, the testimony was admissible to prove appellant's knowledge of the narcotic character of the cocaine base, and intent to sell. (Cf. *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 390-405; *People v. Ellers*, *supra*, 108 Cal.App.3d at p. 953;

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[22] To the extent appellant claims that the introduction into evidence of appellant's prior conviction was prejudicial prosecutorial misconduct, the claim is unavailing since appellant first raised the issue in his reply brief. (Cf. *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873.) Moreover, based on our discussion above, we reject the claim on its merits.

People v. Foster, *supra*, 36 Cal.App.3d at pp. 595-599; Evid. Code, §§ 210, 352.) In light of that fact and the overwhelming evidence of appellant's guilt of transportation of cocaine and possession of cocaine base for sale, any error in admitting the testimony to prove appellant's knowledge of the presence of cocaine base was harmless under any conceivable standard. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

6. *The Court Did Not Improperly Restrict Appellant's Closing Argument*.

a. *Pertinent Facts*.

After jury instructions, and before jury arguments, the court, outside the presence of the jury, stated it wanted to conduct a hearing because the prosecutor "wanted to preclude the defense from making reference to, basically, cases in the headlines, like Rampart and Inglewood." The prosecutor replied in the affirmative.

Appellant indicated that police fabrication was the main issue in the present case. Appellant's counsel asked, "How can I not talk about what goes on in our community?" The court observed that appellant claimed "he didn't know they were police," not that he did not stop because he feared police brutality. Appellant suggested that the Inglewood case and the present case had, as a common point, that a false police report had been filed. The court observed, "I think we both know that's not the crux of it."

The court observed that jury argument was to be based on evidence, the law, and matters of common experience. The court ruled, however, that references to specific cases would be inappropriate.

During jury argument, the following occurred: "[Defense Counsel]: . . . We know about zillions of people -- not zillions, you know, a lot of people in this country who get convicted just like in cases like this -- [¶] [The People]: Your Honor, I am going to object. [¶] [Defense Counsel]: -- where police have lied. [¶] [The Court]: Sustained. You are not making reference to any specific cases. [¶] [Defense Counsel]: I am not talking about any specific case. I am talking about your experience as jurors living a life in this city and in this country. . . . you know, it happens. I mean, you can't be blind that it happens on an often basis. [¶] [The People]: I am going to object. [¶] [Defense

Counsel]: People get convicted when they didn't do anything wrong but police have lied. It happens. [¶] Is that not okay, your Honor? [¶] [The Court]: Can you just wait until I rule on the objection. The court has already ruled, no reference to specific cases. You made that reference, but let's move on. [¶] [Defense Counsel]: Yes, your Honor. [¶] I guess I have to just count on you to know what I am talking about."

Later, appellant referenced his testimony that he did not know "'if it was a paramedic or an ambulance or the police. I pull over, and then I see this car behind me with two guys getting out shining flashlights and pointing guns, saying "Get out of the car."'" Defense counsel argued, "Well, if I was a white man in Beverly Hills at 3 o'clock in the afternoon, [I'd] get out of the car. If I were a black man at 11 o'clock at night in South Central Los Angeles, I'd get a little scared. That's a reality. This prosecutor, he doesn't have that experience. It's easy to get up here and argue. [¶] [The People]: I am going to object. [¶] [The Court]: Objection sustained. [¶] No personal comments, please. [¶] [Defense Counsel]: None of us, I think, have this experience of 11 o'clock at night, black man stopped by the police, South Central, L.A., God knows what is going to happen, or maybe some people know. I don't know. It's not unreasonable for him to get scared."

"It is firmly established that a criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact. [Citations.] Nonetheless, it is equally settled that a judge in a criminal case 'must be and is given great latitude in controlling the duration and limiting the scope of closing summations.' [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.) It is improper, during jury argument, to state facts not in evidence, unless such facts were subject to judicial notice or are matters of common knowledge or illustrations drawn from experience, history, or literature. (*People v. Boyette* (2002) 29 Cal.4th 381, 463.) In *People v. Mendoza* (1974) 37 Cal.App.3d 717, the court stated that, during jury argument, counsel "may not dwell on the particular facts of unrelated, unsubstantiated cases." (*People v. Mendoza*, *supra*, 37 Cal.App.3d at p. 725.) Moreover, denigrating opposing counsel instead of the

evidence, and personal attacks on opposing counsel, are improper. (See *People v. Welch* (1999) 20 Cal.4th 701, 753.)

In light of the above authorities, we conclude the court properly sustained the prosecutor's objections to appellant's closing argument. Moreover, even if the trial court erred, there was overwhelming evidence of guilt, therefore, any such error was harmless under any conceivable standard. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

7. *The Photograph Of The Black Ashtray Was Properly Admitted In Evidence*.

Prior to the presentation of the People's case-in-chief, appellant observed that the black ashtray had "a couple of white grains of stuff" on it but, as a result of glare on a photograph of the ashtray, the photograph did not fairly depict the ashtray and made it look like it was full of cocaine. The court observed, "I don't know about that, . . ." then suggested ways to resolve the problem. This included marking the ashtray for identification, showing it to the jury, but not admitting it into evidence. The prosecutor commented that "the officer can testify as to what the actual ashtray looks like[,]" and the court replied, "Okay." The prosecutor observed he did not think it was an issue, and the court replied it thought "it can be cleared up."

During Buesa's direct examination, the ashtray, and a photograph thereof, were marked for identification. Buesa testified that the ashtray had white residue on it. The residue on the ashtray was "[t]owards the sides and the edges" of the ashtray. Buesa testified the photograph accurately depicted the ashtray, although there was glare on the photograph and there was no "type of powder that looks like the glare in the ashtray."

During cross-examination, Buesa testified that the ashtray did not look like it had "white stuff all over it[,]" and a person could tell "it's the glare." The ashtray contained no white material other than perhaps "little bits on a corner[.]" The photograph was later received in evidence without objection. The ashtray was not received in evidence.

Appellant claims he sought exclusion of the photograph under Evidence Code section 352. He asserts the glare on the photograph made it "completely lacking in probative value" and the photograph was prejudicial because his defense was that he was

unaware of the cocaine crumbs in his vehicle and the jury could have believed the glare was highly visible cocaine. Assuming appellant raised relevance and Evidence Code section 352 issues below, we reject appellant's arguments on their merits. The photograph was relevant to show appellant possessed cocaine base and the direct examination and cross-examination of Buesa adequately informed the jury about the glare distortion and that the glare was not cocaine base.

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including rulings concerning the relevance of evidence and whether it is excludable under Evidence Code section 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 724-725.) No abuse of discretion occurred here. Moreover, there was overwhelming evidence of guilt, therefore, any error in the admission into evidence of the photograph was harmless under any conceivable standard. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)[23]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We concur:

KITCHING, J. ALDRICH, J.

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[23] In light of our discussions concerning appellant's previous contentions, we reject his contention that cumulative error requires reversal of his convictions on counts one and two.