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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES DAVID WILLIAMS, Defendant and Appellant.	E033166 (Super.Ct.No. FSB30957) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Phillip M. Morris, Judge. Affirmed in part; reversed in part with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Sharon L. Rhodes, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of second degree robbery (count 1; Pen. Code, § 211), unlawful taking and driving of a vehicle (count 2; Veh. Code, § 10851, subd. (a)), and

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A. and II.B.1.

evading an officer (count 3; Veh. Code, § 2800.2, subd. (a)). As to count 1, the jury found defendant was armed with a firearm during the commission of the offense. (Pen. Code, § 12022, subd. (d).) The jury also found defendant had two prior serious felony convictions (Pen. Code, §§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)) and one prior prison term conviction (Pen. Code, § 667.5, subd. (b)). Pursuant to the three strikes law, the court sentenced defendant to 50 years to life.

On appeal, defendant claims the prosecutor committed misconduct by referring to facts outside the record. He also claims the trial court erred in failing to apply Penal Code section 654 to stay the terms imposed for counts 2 and 3. We agree with defendant that the term imposed for count 2 should have been stayed. We reject his remaining contentions.

I

FACTS

At 12:40 p.m. on June 13, 2002, two men entered Shahzad Khan's liquor store. One of them pointed a gun at Khan, while the other man jumped over the counter. The man who jumped over the counter, later identified as defendant, took about $86 from the cash register and some other items, including cigarettes and lottery tickets. The two men demanded that Khan open the safe and give them the cash, "or we'll bust you." Although a surveillance camera captured the incident, both men were wearing baseball caps and masks.

Within a minute or two, Officer Anthony Garcia arrived at Khan's store and noticed a black Nissan car screech into the apartment complex behind the store. Garcia

saw only the driver, a heavy-set, African-American man, inside the Nissan. Two patrol cars, including Garcia's, pursued the Nissan into the parking lot of a nearby strip mall. After the officers activated their lights, the Nissan stopped. While the driver remained in the car, two African-American males exited the car and ran through the parking lot in different directions.

Garcia pursued one of the men, who was not wearing a shirt, but was unable to locate him. Officer Mike McCoy, who arrived in a third patrol car, pursued the other man as he ran down the street and into a car wash. At the car wash, McCoy observed the man, who was later identified as defendant, getting into and driving away in a white Lexus.

Another officer, Sergeant Steve Davis, who was driving an unmarked vehicle, continued the pursuit of the white Lexus. He noticed defendant trying to exit a parking lot into a row of cars that were stopped at a red light. Defendant accelerated into the row of cars and collided with a green van, pushing the van out of the way. After getting out of the parking lot, defendant drove onto the on-ramp going north on Interstate 215.

The officers in pursuit of defendant at this time included Officers Davis, McCoy, Briones, and Vogelsong. At some point, Officer Briones took the lead in the pursuit. There was a lot of traffic on the road during the pursuit.

On the interstate, defendant drove in and out of traffic at excessive speeds. As he exited the interstate at the Mill Street off-ramp, defendant skidded off the road into an adjacent field. Defendant then exited the car and ran toward "I" Street. As defendant attempted to cross the road onto "I" Street, he collided with Davis's car, causing

defendant to fall. Davis placed defendant under arrest. Defendant had $86.95 in his right front pants pocket.

Officers found nineteen $1 bills scattered inside the white Lexus. During a search of the Nissan, the officers found clothing, lottery tickets from the liquor store, cigarettes, and a loaded handgun.

During the booking process, an officer overheard defendant saying that he had robbed a store, jumped into a Lexus, got into a high-speed chase, crashed, and was taken into custody.

By their clothing, both the driver and defendant were identified from the liquor store surveillance video. Defendant's clothing matched that worn by the man shown jumping over the counter in the video.

II

DISCUSSION

A. *Prosecutorial Misconduct*

Defendant claims the prosecutor committed misconduct during his rebuttal argument when he discussed the reasonable doubt standard. He argues that the prosecutor's comments suggested the existence of additional facts outside the record concerning defendant's case.

During his closing argument, defense counsel made the following remarks about the prosecution's burden of proof: "Reasonable doubt. He danced around it. He danced around it. He talked briefly about it. Well, let me give you the law. Now, the judge already read you the law, but some things are so important it's worth seeing again. And

some things -- it requires a defense term to illuminate for you, because he's not going to do this for you. He doesn't care about it. He'd love this to go away."

In his rebuttal, the prosecutor responded to defense counsel's remarks by explaining: "He says I'd love to do away with the reasonable doubt instruction. I'll address it. I'll tell you after this is all over and I will stop and talk with you. I'll tell you about that."

Defense counsel objected to the prosecutor's statement, but the court overruled his objection.

The prosecutor continued: "There's absolutely no evidence of what I want to do with reasonable doubt. None whatsoever. Now, he told you -- and it kills me when they do this -- he told you I don't give you facts. I don't give you facts. But he tells you I'd love to get rid of reasonable doubt. I'll talk to you afterwards."

Contrary to defendant's arguments, the prosecutor's comments did not refer to facts outside the record.

Well-settled rules apply to a claim of prosecutorial misconduct. "Under the federal Constitution, to be reversible, a prosecutor's improper comments must '"so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.] '"But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citations.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000; see also *People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) One such method that

constitutes misconduct is to refer to matters outside the record. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948; *People v. Hill* (1998) 17 Cal.4th 800, 828.) When a claim of misconduct focuses upon the prosecutor's comments to the jury, the question is whether there is a reasonable likelihood that the jury construed the challenged comments in an objectionable manner. (*Ayala,* at p. 284.) In making this determination, we are mindful that a prosecutor exercises wide discretion during summation to present vigorous argument. (*People v. Welch* (1999) 20 Cal.4th 701, 752-753; *People v. Williams* (1997) 16 Cal.4th 153, 221.) We must also consider the challenged remarks in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

In reviewing the context of the prosecutor's comments, it is apparent that the prosecutor was responding to defense counsel's accusation that the prosecutor wanted the reasonable doubt standard to "go away." "'"[A] prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to argument of defense counsel and are based on the record." [Citation.]' [Citations.]" (*People v. Daya* (1994) 29 Cal.App.4th 697, 715.)

It is also apparent that both defense counsel and the prosecutor were referring to the prosecutor's own opinion of the criminal standard of proof, rather than to any specific facts concerning defendant's case. During his comments, the prosecutor took issue with defense counsel's remarks concerning what the prosecutor wanted "to do with reasonable doubt." The prosecutor also mentioned defense counsel's accusation that he would "love to get rid of reasonable doubt." None of the prosecutor's comments implied that he had additional facts concerning defendant's case.

Moreover, in responding to defense counsel's accusations, the prosecutor's comments indicated that his personal opinions should not have been discussed during closing argument. As he admitted, there was no evidence of his opinions. His opinions were not relevant to defendant's case. And, therefore, he told the jury that he would talk to them about his view on the reasonable doubt standard after the trial.

After responding to defense counsel's accusations, the prosecutor continued his rebuttal by discussing the evidence, reviewing a few instructions, and presenting his arguments. In the context of the prosecutor's entire rebuttal, there is no reasonable likelihood that the jury construed the comments in an objectionable manner. We conclude defendant has failed to show that the prosecutor committed misconduct by referring to facts outside the record.

B. *Penal Code Section 654*

Defendant's sentence of 50 years to life consisted of 25 years to life for robbery (count 1), a consecutive term of 25 years to life for unlawfully taking a vehicle (count 2), and a concurrent term of 25 years to life for violating Vehicle Code section 2800.2 (count 3). Defendant claims the court erred in failing to stay the terms imposed for counts 2 and 3 under Penal Code section 654 (section 654).

Subdivision (a) of section 654 provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct

committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" *People v. Harrison* (1989) 48 Cal.3d 321, 335.

There is a multiple victim exception to section 654. "The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent." (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784.)

In this case, the court imposed separate terms for robbery, taking a vehicle, and evading an officer. We will consider in turn the vehicle taking and evading counts, to determine whether, as defendant contends, section 654 barred separate punishment for those counts.

1. *Unlawful taking and driving*

Vehicle Code section 10851, subdivision (a) provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to

or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment."

A robbery may continue long after the robber leaves the initial scene of the taking. "Robbery is a crime which is frequently spread over distance and varying periods of time. It is generally committed in three phases, which are assault of the victim, seizure of the victim's property, and the robber's escape to a location of temporary safety. [Citation.] The crime of robbery is not confined to the taking of property from the victim, and the crime is not completed until the robber has won his way to a place of temporary safety. [Citation.]" (*People v. Irvin* (1991) 230 Cal.App.3d 180, 185.) In recognition of this principle, the California Supreme Court has held that when a defendant unlawfully takes a car during the commission of a robbery for the purpose of facilitating escape, the two crimes constitute one indivisible course of conduct justifying a single punishment. (*People v. Bauer* (1969) 1 Cal.3d 368, 372; *Irvin*, at pp. 184-185; *People v. See* (1980) 109 Cal.App.3d 76, 84-85.)

In *People v. Bauer*, *supra*, 1 Cal.3d 368 (*Bauer*), two men, including the defendant, robbed three elderly women in the home they shared and then drove away in the car that was parked in the garage. The Supreme Court held that the trial court erred in imposing punishment for both the robbery and the car theft. (*Id.* at p. 378.) The court

rejected the People's argument that the robbery was complete before the defendant stole the car. The court noted that, even if the second crime was an afterthought, a court may not impose punishment for both crimes if they were part of an indivisible transaction. (*Id.* at p. 377.)

The court also rejected the People's attempt to invoke the multiple victim exception to section 654. The court held that "[t]he crime of automobile theft is not a crime of violence but is a violation of property interests," and therefore the multiple victim exception did not apply. (*Bauer*, *supra*, 1 Cal.3d at p. 378.)

In this case, the record did not show that defendant had reached a location of temporary safety when he took the Lexus. The record also did not show that defendant harbored a separate criminal purpose or committed a separate act of gratuitous violence in taking the car. (But see *People v. Green* (1996) 50 Cal.App.4th 1076, 1085 [robbery and car theft separated in time and place by defendant's intervening acts of kidnapping and raping the victim]; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 529 [defendant threw hatchet at victim for separate purpose of preventing victim from reporting crime].) The record instead showed that defendant robbed the liquor store and drove away in the Nissan; after the Nissan had crashed, he continued on foot and then stole the Lexus from the car wash.

Throughout, defendant was still fleeing the scene of the crime and avoiding capture. The robbery and the vehicle theft constituted an indivisible course of action. *Bauer* therefore compels the conclusion that section 654 barred separate punishment for the vehicle theft. The court should have stayed the term imposed for count 2.

2. *Evading an officer*

Vehicle Code section 2800.2 (section 2800.2) provides in part: "If a person flees or attempts to elude a pursuing peace officer in violation of [Vehicle Code] 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." (*Id*., subd. (a).)

In this case, it is evident from the record that defendant drove the Lexus in an effort to escape from the scene of the robbery. The robbery and evasive driving therefore were part of an indivisible course of conduct for purposes of section 654. Accordingly, they could be punished separately only if the multiple victim exception applied.

The victims of the two offenses were different. Khan was the victim of the robbery; the victims of the evasive driving were the pursuing police officers and other motorists who were endangered by defendant's actions. Hence, the applicability of the multiple victim exception depends upon whether robbery and violating section 2800.2 are crimes of violence for purposes of the exception.

It is settled that robbery is a crime of violence for purposes of the multiple victim exception. (*People v. Deloza* (1998) 18 Cal.4th 585, 592; *People v. Miller* (1977) 18 Cal.3d 873, 886; *People v. Centers* (1999) 73 Cal.App.4th 84, 99; *People v. Anderson* (1990) 221 Cal.App.3d 331, 338-339.) The remaining question, therefore, is whether a violation of section 2800.2 also is a crime of violence for purposes of that exception.

In *People v. Garcia* (2003) 107 Cal.App.4th 1159 (*Garcia*), the defendant was convicted of three counts of violating section 2800.2, based on one incident of evasive driving. The trial court ruled the multiple convictions were proper because each count named a different police officer. The Court of Appeal reversed, stating: "'A defendant may properly be convicted of multiple counts for multiple victims of a single criminal act only where the act prohibited by the statute is centrally an "act of violence against the person.". . . [¶] [F]elony evading, as defined by the Legislature, is not a crime of violence." (*Garcia*, at p. 1163.)

The court in *Garcia* did not discuss, or even mention, two previous decisions in which different Courts of Appeal held that a violation of section 2800.2 *is* an "inherently dangerous felony" for purposes of the second degree felony murder doctrine.[1] In *People v. Johnson* (1993) 15 Cal.App.4th 169 (*Johnson*), the court concluded a violation of section 2800.2 is inherently dangerous because "[t]he offense is committed by one who 'flees or attempts to elude a peace officer' while driving his pursued vehicle 'in a *willful or wanton disregard for the safety of persons or property*' [citation]. It would seem clear as a matter of logic that any felony whose key element is 'wanton disregard' for human life necessarily falls within the scope of 'inherently dangerous' felonies." (*Johnson*, at p. 173.) The court further noted that "[a]ny high-speed pursuit is inherently dangerous to the lives of the pursuing police officers." (*Id*. at p. 174.)

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[1] We note the Supreme Court has granted review of two decisions addressing this question. (*People v. Howard* (Cal.App.) review granted September 11, 2002, S108353; *People v. Williams* (Cal.App.) review granted June 9, 2004, S123910.)

In *People v. Sewell* (2000) 80 Cal.App.4th 690 (*Sewell*), the court, citing *Johnson*, again held that a violation of section 2800.2 is an inherently dangerous felony for purposes of second degree felony-murder. (*Sewell*, at p. 697.) The *Sewell* court observed that the legislative history of section 2800.2 supported its conclusion. The Legislature presumably was aware of *Johnson*'s holding that a violation of section 2800.2 is an inherently dangerous felony but did not seek to counteract that decision in any way. In fact, the Legislature *increased* the penalties for violating section 2800.2 after *Johnson* was decided. It would be anomalous to conclude the Legislature would seek to increase the deterrent effect of the statute if it disagreed with *Johnson*'s conclusion that section 2800.2 defines an inherently dangerous felony. (*Sewell*, at p. 695.)

We recognize that whether a violation of Vehicle Code section 2800.2 is an "inherently dangerous felony" for purposes of felony-murder is, technically speaking, a different question than whether it is a "crime of violence" for purposes of the multiple victim exception to Penal Code section 654. But the definitions of the two terms closely resemble one another. An inherently dangerous felony is "an offense carrying 'a high probability' that death will result." (*People v. Patterson* (1989) 49 Cal.3d 615, 627.) A crime of violence for purposes of the multiple victim exception is "an act of violence against the person, that is . . . an act of violence committed 'with the intent to harm' or 'by means likely to cause harm' to a person. [Citations.]" (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1089.) It is difficult, if not impossible, to imagine that an offense could carry "'a high probability' that death will result" (*Patterson*) but *not* be committed

"'by means likely to cause harm' to a person." (*Hall*.) *Garcia*'s failure to discuss or even acknowledge *Johnson* or *Sewell* therefore is puzzling.

Moreover, the only authority *Garcia* cited in support of its conclusion was *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 (*Wilkoff*.) As *Garcia* noted, the Supreme Court in *Wilkoff* stated: "A defendant may properly be convicted of multiple counts for multiple victims of a single criminal act only where the act prohibited by the statute is centrally an 'act of violence against the person.' [Citation.]" (*Wilkoff*, at p. 351.) However, that language cannot be construed to mean that "an 'act of violence against the person'" only includes acts which involve the *direct* application of force to the person of another individual.

As noted *ante*, robbery is a crime of violence for purposes of the multiple victim exception. (*People v. Deloza*, *supra*, 18 Cal.4th 585, 592.) Yet, as this court pointed out in *People v. Centers*, *supra*, 73 Cal.App.4th at page 99, robbery "may be committed by fear as well as actual force. [Citation.]" No direct application of force against the person of the victim is required.

Similarly, the court in *People v. Solis* (2001) 90 Cal.App.4th 1002 held that making a terrorist threat in violation of Penal Code section 422 is a crime of violence for purposes of the multiple victim exception, even though it entails no *physical* injury to the victim, and the defendant need not even intend to carry out the threat. (*Solis*, at pp. 1023-1024.) The court explained: "In this instance, the injury is the sustained fear." (*Id*. at p. 1024.) Thus, making a terrorist threat "constitutes a crime of psychic violence which, if

directed at separate listeners (victims) who each sustain fear, can be punished separately." (*Ibid*.)

A robber attempts to prevent the victim from resisting the taking of the property by creating a danger of harm to the victim or another person. (Pen. Code, § 212.) A defendant who makes a terrorist threat attempts to instill fear in the victim by creating an apparent danger of harm to the victim or his or her immediate family. (Pen. Code, § 422.) Similarly, a defendant who violates Vehicle Code section 2800.2 attempts to prevent the pursuing officers from completing the pursuit by creating a danger of harm to the officers or other motorists. If the pursuit becomes too dangerous, the officers will be forced to discontinue the chase.

If robbery accomplished by the creation of a danger of harm to one or more individuals, and making a terrorist threat by creating an apparent danger of harm to the victim or his or her family, are crimes of violence for purposes of the multiple victim exception, the same should be true of a violation of section 2800.2. We therefore are not persuaded by *Garcia*'s conclusion to the contrary.

In addition, *Wilkoff*, *supra*, 38 Cal.3d 345, on which *Garcia* relied, involved a crime that is readily distinguishable from a violation of section 2800.2. *Wilkoff* was a prosecution for driving under the influence and causing injury, in violation of Vehicle Code section 23153 (section 23153). Unlike section 2800.2, section 23153 does *not* require willful or wanton disregard for the safety of persons or property. "The elements of driving under the influence and causing injury are: (1) driving a vehicle while under the influence of an alcoholic beverage; (2) when so driving, committing some act which

violates the law or fails to perform some duty required by law; and (3) as a proximate result of such violation of law or failure to perform a duty, another person was injured. [Citations.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159-1160; see also § 23153, subd. (a).)

To satisfy the second element, it is *not* necessary to show the defendant acted in a willful or wanton manner. Rather, "the *unlawful act or neglect of duty* element of Vehicle Code section 23153 is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyaas* (1985) 173 Cal.App.3d 663, 669; accord, *People v. Weems* (1997) 54 Cal.App.4th 854, 858.)

As the Supreme Court has observed, "it is generally recognized that willful or wanton misconduct is separate and distinct from negligence, involving different principles of liability and different defenses. [Citations.] Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, willful misconduct is not marked by a mere absence of care. Rather, it ''''involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.'''' [Citations.]" (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th, 826, 853, fn. 19.) "In the context of reckless driving, the term 'willful' refers to the *intentional disregard for safety*. [Citation.]" (*People v. Dewey* (1996) 42 Cal.App.4th 216, 221, italics added.)

We believe this distinction between Vehicle Code sections 23153 and 2800.2 is significant in determining whether Penal Code section 654 should apply to the section 2800.2 conviction in this case. "'[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." [Citations.]'" (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) Committing an offense that requires intentional disregard for safety is manifestly a more culpable act than committing an offense that requires only ordinary negligence. Here, therefore, defendant's increased culpability for acting in willful or wanton disregard for safety militates in favor of imposing separate punishment.

We are not persuaded by any of the potential arguments against application of the multiple victim exception in this case. For instance, it might be argued that because section 2800.2 can be violated by driving with disregard for the safety of persons *or property*, a violation is not inherently dangerous to *human life* and therefore should not be considered a crime of violence for purposes of the multiple victim exception. The court in *People v. Johnson*, *supra*, 15 Cal.App.4th 169, however, rejected the argument that inclusion of the phrase "or property" means a violation of section 2800.2 is not inherently dangerous to human life, stating: "[G]iving the statutory language involving 'wanton disregard' for the safety of 'persons or property' a commonsense construction, it appears the 'wanton disregard' in question is total, rather than selective. That is, the disregard is for everything, whether living or inanimate." (*Johnson*, at p. 174.) The court continued: "In even the most ethereal of abstractions, it is not possible to imagine that the 'wanton disregard' of the person fleeing does not encompass disregard for the safety

of the pursuing officers. In short, it does not appear that the phrase 'or property' may properly be construed to limit the mental state of the offender, and thus to make fleeing a pursuing police vehicle other than 'inherently dangerous.'" (*Ibid*.)

Similarly, it might be argued that the amendment of section 2800.2 in 1996 to provide that willful or wanton disregard may be shown by the occurrence of damage to property (§ 2800.2, subd. (b)) means that a violation of section 2800.2 is no longer necessarily dangerous to human safety. The court in *Sewell*, *supra*, 80 Cal.App.4th 690, rejected that argument, stating: "The 1996 amendment did not change the elements of the section 2800.2 offense, in the abstract, or its inherently dangerous nature. The amendment merely described a couple of nonexclusive acts that constitute driving with willful or wanton disregard for the safety of persons or property. The key elements of the crime remain: the offense is committed by one who, 'while fleeing or attempting to elude a pursuing peace officer,' drives his pursued vehicle in 'a willful or wanton disregard for the safety of persons or property.' [Citations.]" (*Id.* at pp. 694-695.)

In addition, the *Sewell* court emphasized that in deciding whether a statute defines an inherently dangerous felony, "'our task is not to determine if it is *possible* (i.e., "conceivable") to violate the statute without great danger. By such a test no statute would be inherently dangerous. Rather the question is: does a violation of the statute involve a *high probability* of death? [Citation.] If it does, the offense is inherently dangerous.'" (*Sewell*, *supra*, 80 Cal.App.4th 690, 695-696, quoting *People v. Morse* (1992) 2 Cal.App.4th 620, 646; see also *People v. James* (1998) 62 Cal.App.4th 244,

269-270 [court quoted above language in concluding manufacturing methamphetamine is inherently dangerous even though a skilled person can do so relatively safely].)

In determining whether a felony is inherently dangerous, a court looks to the elements of the felony "in the abstract . . . ." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 106.) In determining whether an offense is a crime of violence for purposes of the multiple victim exception, a court considers the offense as "defined by statute" (*People v. Hall*, *supra*, 83 Cal.App.4th 1084, 1089, italics omitted), essentially the same approach. Accordingly, the principle that a crime may be inherently dangerous even though it is "*possible*" to commit it without great danger (*Sewell*, *supra*, 80 Cal.App.4th 690, 695-696) should, by analogy, mean that even if it may be theoretically possible to violate section 2800.2 without endangering human safety, a violation should still be considered a crime of violence for purposes of the multiple victim exception. Only under the most fanciful set of circumstances could an act of willful or wanton driving in an attempt to evade pursuing police officers not pose a danger to human safety.

For these reasons, we conclude a violation of section 2800.2 should be considered a crime of violence to which the multiple victim exception applies. The court therefore did not commit error in not staying the term imposed for count 3.

C. *Remand for Resentencing*

The People contend that if this court determines the trial court improperly imposed the term for the unlawful taking count, it should remand the case to permit the court to exercise its discretion whether to impose a consecutive or concurrent term for the Vehicle Code section 2800.2 violation. As we have, in fact, determined that the term imposed for

the unlawful taking should have been stayed pursuant to Penal Code section 654, we must consider whether a remand for resentencing is appropriate.

Defendant contends the People cannot seek a remand for resentencing, because they did not cross-appeal from the judgment imposing a concurrent term for the violation of section 2800.2 and have not contended or shown that the concurrent term was an abuse of discretion. He is incorrect.

"The People have no right of appeal except as provided by statute. [Citation.]" (*People v. Douglas* (1999) 20 Cal.4th 85, 89.) Penal Code section 1238 sets forth the circumstances under which the People may appeal. The only sentence appeal authorized by section 1238 is an appeal from "[t]he imposition of an unlawful sentence." (Pen. Code, § 1238, subd. (a)(10).) An "unlawful sentence" occurs when there is "the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court . . . ." (*Ibid*.) Thus, section 1238 provides that the People may only appeal from the imposition of a concurrent term when "an applicable statute requires that the term be consecutive." (*Ibid*.)

The People have not contended that the term for the violation of section 2800.2 was required by statute to be consecutive. It seems at least arguable that they *could* have made that contention. The three strikes law provides: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . ." (Pen. Code, §§ 667, subd. (c)(6), 1170.12, subd. (a)(6).)

Our conclusion, *ante*, that the three felonies of which defendant was convicted arose from an "indivisible course of conduct" for purposes of section 654 does *not* necessarily mean they were committed on the "same occasion," or arose from the "same set of operative facts," for purposes of the three strikes law. The Supreme Court held in *People v. Deloza*, *supra*, 18 Cal.4th 585 that "the analysis for determining whether [the three strikes law] requires consecutive sentencing is not coextensive with the analysis for determining whether section 654 permits multiple punishment." (*Id*. at p. 595.) In fact, the court stated, "[S]ection 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively." (*Id*. at p. 594.) "Rather, the term 'same occasion' refers at least to a close temporal and spatial proximity between the acts underlying the current convictions." (*Id*. at p. 595.)

It could be argued here that the robbery and the violation of Vehicle Code section 2800.2 did *not* share "a close temporal and spatial proximity," because they were committed in different locations and were separated by the time it took defendant to flee the store, try to escape in the Nissan, exit the Nissan and run to the car wash, and take the Lexus. If that argument were correct, the concurrent term for the violation of section 2800.2 would constitute an unlawful sentence from which the People could appeal pursuant to Penal Code section 1238, subdivision (a)(10).

However, the People were not *required* to appeal in order to seek a modification of the term for the violation of section 2800.2 based on the theory that the term was an unlawful sentence. "A claim that a sentence is unauthorized . . . may be raised for the first time on appeal, and is subject to judicial correction whenever the error comes to the

attention of the reviewing court. [Citations.]" (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; see also *People v. Scott* (1994) 9 Cal.4th 331, 354.) In fact, an unauthorized sentence is subject to judicial correction whenever the error comes to the attention of *either* the trial court or a reviewing court. (*People v. Serrato* (1973) 9 Cal.3d 753, 763, dictum on another point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 582, fn. 1.)[2] Thus, if the concurrent term for count 3 was unauthorized, the People were and are entitled to seek modification of that term at any time, whether on appeal or on remand, regardless of the fact they did not file their own appeal.[3]

If, on the other hand, the concurrent term was *not* unauthorized, the People had no right to appeal from the imposition of that term, because no appeal from a sentence that is not unlawful is authorized by Penal Code section 1238. However, even if the People could not appeal from the concurrent term, there is no impediment to their seeking a remand for resentencing on count 3. This is so because, when an appellate court determines that part of a sentence is erroneous, it is proper to remand for reconsideration of the *entire* sentence in light of the error.

As one Court of Appeal stated: "It is perfectly proper for this court to remand for a complete resentencing after finding an error with respect to part of a sentence and just as proper for the trial judge to reimpose the same sentence in a different manner. . . . A

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[2] Interestingly, in the trial court the People took the position that the terms for counts 2 and 3 could be imposed either consecutively or concurrently, while defense counsel stated he believed consecutive terms were mandatory.

[3] We express no view whether a consecutive term for count 3 was required under the three strikes law, as the issue has not been raised or briefed by either party.

determinate sentence is one prison term made up of discrete components. When one of them is invalid, the entire sentence is infected. [Citations.]" (*People v. Calderon* (1993) 20 Cal.App.4th 82, 88.) Thus, "upon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259; accord, *People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-614.)

As we have determined it was error not to stay the term imposed for count 2, a remand is appropriate to permit the trial court to consider what sentence should be imposed for the entire case in light of the error. The court may, if it deems it appropriate, impose the same overall sentence by adjusting one or more of the remaining terms, so long as the aggregate term does not exceed the original aggregate term. (*People v. Castaneda*, *supra*, 75 Cal.App.4th 611, 614.)

Finally, we reject defendant's contention that the People were required to show the original concurrent term for count 3 was an abuse of discretion in order to seek a remand for resentencing. As the authorities cited above demonstrate, when part of a sentence is found to be erroneous, the entire sentence may be reconsidered, whether or not any individual term would have been erroneous if considered in the context of the original sentence.

III

DISPOSITION

The imposition of an unstayed term for count 2 is reversed. The matter is remanded to the trial court with directions to stay execution of the term imposed for count 2, the stay to become permanent upon defendant's completion of the terms imposed for the remaining counts. The court may reconsider the entire sentence in view of this modification, in a manner consistent with this opinion. The court is directed to prepare and transmit a new abstract of judgment as may be appropriate, and to forward a copy of the amended abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.