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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LANCE ERNEST LAUMANN,

Defendant and Appellant.

A091588

(Sonoma County Super. Ct.
Nos. 28420 & 28620)

Defendant Lance Ernest Laumann moves to recall the remittitur. Several years after this appeal became final, the California Supreme Court clarified an aspect of the law of second degree felony murder that was central to defendant's case. As a result of that clarification, defendant stands convicted and sentenced under an invalid theory of felony murder. Under the unusual circumstances of this case, we grant the motion. We shall recall the remittitur, order that a new remittitur issue that reverses the second degree felony murder conviction and affirms defendant's remaining convictions, and remand the matter to the trial court for further proceedings.

I. PROCEDURAL BACKGROUND & FACTS

Defendant was convicted of second degree felony murder, vehicular manslaughter, evasion of a police officer, possession of a firearm by a convicted felon, and several drug offenses. The predicate felony of the second degree felony murder conviction was evasion of a police officer, i.e., driving in willful and wanton disregard for the safety of

persons or property while fleeing from the police. (Veh. Code, § 2800.2 (section 2800.2).)

Defendant's various crimes arose from two separate events, in late April and early May 1999. In the first event, police found a loaded sawed-off rifle and the components of a methamphetamine laboratory in a car linked to defendant. In the second event, defendant sped away from a traffic stop at 1:00 a.m. and evaded police pursuit on a rural road at speeds of 70 to 80 miles per hour. He crashed his car. His passenger, his girlfriend Sandra "May" Lyndall, was ejected from the car and suffered fatal injuries. Defendant was sentenced to 30 years to life: 15 years to life for second degree murder and 15 years for the other offenses.

On appeal, defendant challenged his conviction for second degree felony murder. He argued that violation of section 2800.2 was not an inherently dangerous felony under the felony murder rule, and thus could not be a predicate felony for second degree felony murder.

On July 23, 2001, we rejected defendant's contention and affirmed his felony murder conviction. (*People v. Laumann* (July 23, 2001, A091588 [nonpub. opn.]¹) We relied on the settled authority of *People v. Sewell* (2000) 80 Cal.App.4th 690, 693-697 (*Sewell*), and *People v. Johnson* (1993) 15 Cal.App.4th 169, 173-174 (*Johnson*), both of which held that driving in willful and wanton disregard for the safety of persons or property while fleeing from the police in violation of section 2800.2 is an inherently dangerous felony under the felony murder rule. The California Supreme Court had denied review in both cases. (*Sewell, supra*, at p. 698; *Johnson, supra*, at p. 179.)

Following our affirmance, defendant petitioned the California Supreme Court for review. That court denied review on September 26, 2001. We issued our remittitur on October 9, 2001.

¹ We also affirmed defendant's remaining convictions, which are not directly at issue here.

On March 15, 2004, the Third District filed *People v. Williams* (2004) 116 Cal.App.4th 1114 (*Williams*), which disagreed with *Sewell* and *Johnson* and held that section 2800.2 cannot be the predicate felony for second degree felony murder.

On June 1, 2004, defendant moved to recall the remittitur based on the *Williams* decision.

On June 9, 2004, the California Supreme Court granted review in *Williams* and deferred further action pending its disposition of a related issue in *People v. Howard*, S108353.

On June 21, 2004, we denied defendant's first motion to recall the remittitur.

On January 27, 2005, the California Supreme Court decided *People v. Howard* (2005) 34 Cal.4th 1129 (*Howard*). The *Howard* court interpreted section 2800.2 and concluded that the crime proscribed by that statute is *not* an inherently dangerous felony in the abstract, and thus cannot form the predicate for second degree felony murder. (*Howard, supra*, 34 Cal.4th at pp. 1135-1139.) The Supreme Court explicitly disapproved of the contrary holding in *Sewell*. (*Howard, supra*, at p. 1139, fn. 5.)²

On November 6, 2006, defendant filed a renewed motion to recall the remittitur based on the *Howard* decision. Defendant argued that in light of *Howard* his second degree felony murder conviction "cannot stand," and we should "recall the remittitur and reverse the second degree murder conviction." At our request, the Attorney General has filed a letter brief addressing two issues: (1) the legality of recalling the remittitur and (2) whether *Howard* affords defendant a remedy.

II. DISCUSSION

1. We have the power to recall a remittitur for good cause. (Cal. Rules of Court, rule 8.272(c)(2); see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 736-741, pp. 765-771.) But recall of a remittitur is "a step rarely taken" and, as a result, "the extent of the court's discretion in this area is poorly defined." (Appeals and Writs in

² The court concluded that it "need not decide . . . whether *Johnson* was correct" because of an amendment to section 2800.2 in 1996, three years after *Johnson* was decided. (*Howard, supra*, 34 Cal.4th at p. 1137.)

Criminal Cases (Cont.Ed.Bar 2d ed. 2006) Hearing and Determination of Appeal, § 1E.36, p. 252.) “Typical cases involve fraud or a mistake in fact that resulted in a miscarriage of justice.” (*Ibid.*)

We need not review all of the circumstances discussed in the case law under which a remittitur may be recalled. At issue in the present case is one rule and its exception. Generally, a court may not recall a remittitur because of an error of law. (9 Witkin, Cal. Procedure, *supra*, § 741, pp. 770-771; *People v. Randazzo* (1957) 48 Cal.2d 484, 488, 491 (*Randazzo*.) But “[a]n exception is made . . . when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. The remedy of recall of the remittitur may then be deemed an adjunct to the writ, and will be granted when appropriate to implement the defendant’s right to habeas corpus. [Citations.]” (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397 (*Mutch*.)

In *Mutch* the defendant had been convicted of kidnapping for the purpose of robbery (Pen. Code, § 209) in 1966. (*Mutch, supra*, 4 Cal.3d at p. 392.) Three years later the Supreme Court decided *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*), in which the court interpreted Penal Code section 209 in such a way that it did not apply to defendant’s conduct. Specifically, the *Daniels* court construed a 1951 amendment to Penal Code section 209 and concluded that the Legislature did not intend the statute to apply where, as in *Mutch*’s case, the movement of the victim was merely incidental to the commission of the robbery. (*Mutch, supra*, at pp. 393-399.)

The *Mutch* court concluded that under the *Daniels* interpretation of Penal Code section 209, defendant—who only incidentally moved his victims—was convicted of conduct which was not prohibited by the statute. (*Mutch, supra*, 4 Cal.3d at pp. 395-399.) The court observed that “a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. [Citations.]” (*Mutch, supra*, at p. 396.) Since habeas corpus would lie, defendant *Mutch* was entitled to a recall of the remittitur. (*Mutch, supra*, at pp. 396, 399.)

2. Under the reasoning of *Mutch*, the *Howard* decision provides defendant a remedy because it renders invalid the use of section 2800.2 as the predicate felony for second degree felony murder.

In opposing the renewed motion to recall the remittitur, the Attorney General attempts to distinguish *Mutch* because in the present case the defendant was not convicted under a statute, but under the judge-made doctrine of second degree felony murder. (See *Howard, supra*, 34 Cal.4th at p. 1135.) But this is a distinction without a difference. Whether under a statute or a judge-made rule, defendant stands convicted of an offense which does not exist—felony murder based on a violation of section 2800.2. The *Howard* court authoritatively interpreted section 2800.2 and concluded that the statute, in the abstract, does not define a felony inherently dangerous to human life and thus cannot be a predicate felony to second degree felony murder.

Simply put, this means that section 2800.2 *is not, and has never been*, a valid predicate felony for second degree felony murder—and that its valid use as such a predicate *is not, and has never been*, the law. Because section 2800.2 was used as the statutory basis for defendant’s second degree felony murder conviction, defendant’s conviction of felony murder is based on conduct which does not fall within the judge-made rule that second degree felony murder requires a felony inherently dangerous to human life. Defendant’s felony murder conviction is based on conduct, the violation of section 2800.2, that does not qualify for a murder conviction under the rule—for our present purposes this is essentially the same situation as a defendant convicted of conduct which is not prohibited by a statute.³

The present case is akin to *Mutch* and we cannot distinguish the two in a way that does not offend basic justice. Defendant was essentially convicted of a crime that does

³ Nothing in *Randazzo* changes this conclusion. While at first blush that case appears to involve a defendant convicted for an offense unknown to the law, and the case suggests that was a mere error of law not justifying recall of the remittitur, a close study of the case reveals the defendant was not in fact convicted of a nonexistent offense and the real issue was the sufficiency of the information and jury instructions. (*Randazzo, supra*, 48 Cal.2d at pp. 486-491.)

not exist and has never existed: second degree felony murder based on violation of section 2800.2. We conclude that defendant is entitled to a recall of the remittitur for reversal of his conviction for second degree felony murder. We recognize that the power to recall a remittitur must be used sparingly. In this case, we use that power to correct an injustice.

3. The Attorney General raises two procedural contentions in opposition to the renewed motion to recall—laches and harmless error.

a. The Attorney General relies on the equitable doctrine of laches and contends that defendant unreasonably delayed in bringing his motion from the date *Howard* was decided, January 27, 2005, until the filing of his renewed motion on November 6, 2006. It is true that a party seeking recall of a remittitur must promptly make his motion (*Ellenberger v. City of Oakland* (1946) 76 Cal.App.2d 828, 836), and generally must act “ “[a]s soon as he learns of the facts upon which the motion is based.’ ” (*Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 192.) Relief may be denied under the doctrine of laches if a party unreasonably delays and the delay prejudices his opponent. (*People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558, 1562.)

Defendant raised on direct appeal the issue whether section 2800.2 can be used as the predicate felony for second degree felony murder. He then sought review by the Supreme Court. Only two and one-half months after *Williams* was decided, defendant filed his first motion to recall the remittitur. True, there was some delay between the filing of *Howard* and the filing of the renewed motion, but we have no idea when defendant learned of the *Howard* decision. Defendant, let us remember, is in prison and may not have easy access to the California Advance Sheets. And we can see no prejudice to the People by the delay: defendant raises a purely legal issue which would have the same impact whether raised today, a year ago, or a year from now.

We decline to deny defendant relief based on the doctrine of laches.

b. Finally, the Attorney General argues that the use of section 2800.2 as the predicate felony is harmless error. The People cast their argument in terms of instructional error. They contend that instructing the jury on an invalid theory of second

degree felony murder (based on section 2800.2) is harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), because the jury necessarily found that defendant acted with implied malice when he fled from the police, crashed his car, and caused the death of his passenger.

Defendant's jury was not instructed on a valid theory of murder. The Attorney General agrees that defendant's jury was instructed only on second degree felony murder based on section 2800.2, and not on second degree murder based on implied malice. Indeed, felony murder based on section 2800.2 was the only theory of murder argued to the jury.

Since defendant's murder verdict is based on a legally invalid theory, the verdict must be reversed unless the jury *necessarily* found defendant guilty on a proper theory. (*People v. Lewis* (2006) 139 Cal.App.4th 874, 883, 891 (*Lewis*); see *People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

The Attorney General argues that on the evidence presented, the jury necessarily found that defendant acted with implied malice. We disagree for the following reasons.

The jury did not consider and was not instructed on the elements of implied malice for second degree murder. We have no way of determining how a jury would have decided the facts and applied the law to those facts in the absence of jury instructions on that issue. A *Chapman* error analysis requires a reviewing court to consider whether the guilty verdict actually rendered in this case was surely unattributable to the error. If there is any reasonable possibility that the error might have contributed to the conviction, reversal is required. (*Lewis, supra*, 139 Cal.App.4th at p. 887.)

At least two decisions have addressed the issue of harmless error in felony murder prosecutions involving section 2800.2, and have concluded that a jury finding that a defendant evaded police with a willful and wanton disregard for the safety of persons or property (as defined by section 2800.2, subd. (a)) is not necessarily a finding of implied malice, which requires a conscious disregard for human life. (*Lewis, supra*, 139 Cal.App.4th at pp. 891-893; *People v. Calderon* (2005) 129 Cal.App.4th 1301, 1308-1310 (*Calderon*).)

The willful and wanton disregard for the safety of persons is “not the same” as the conscious disregard for human life. (*Calderon, supra*, 129 Cal.App.4th at p. 1308.) “An act is dangerous to life, for purposes of implied malice, when there is a high probability it will result in death. [Citations.] Such an act is required before implied malice may be found. [Citations.] Yet an act may endanger a person’s safety without carrying such a risk. Moreover, a disregard for safety may encompass a disregard for life, but it need not do so. A person might be willing to risk causing minor injuries while attempting to evade police, yet might very well not be willing to risk causing serious injury or death.” (*Id.* at p. 1310.)

Accordingly, we conclude that when defendant’s jury found the necessary mental state for violation of section 2800.2 it did not *necessarily* find the mental state of implied malice. Thus, we cannot conclude beyond a reasonable doubt that the erroneous felony murder instruction did not contribute to the felony murder verdict. (See *Calderon, supra*, 129 Cal.App.4th at p. 1310.)⁴

III. DISPOSITION

The renewed motion to recall the remittitur is granted. We recall the remittitur, and order that a new remittitur issue reversing the second degree felony murder conviction and affirming defendant’s remaining convictions. This matter is remanded to the trial court for further proceedings, either retrial under a valid theory of murder or resentencing.

⁴ We also reject the Attorney General’s brief argument that defendant’s conviction of manufacturing methamphetamine “could have served as the underlying felony” for the second degree murder conviction under *People v. James* (1998) 62 Cal.App.4th 244. The jury was never instructed on manufacturing methamphetamine as a basis for felony murder, and we cannot say the jury necessarily would have linked the manufacturing offense to the car chase which led to the passenger’s death.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.