People v. Phillips

2007 | Cited 0 times | California Court of Appeal | November 29, 2007

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Defendant Miguel Rene Phillips was convicted of seven criminal violations arising from an incident of drunk driving and flight from law enforcement.[1] On appeal, defendant challenges his conviction for reckless evasion of a peace officer, asserting insufficient evidence and instructional error. Defendant also claims two sentencing errors, first arguing that the trial court should have stayed punishment on his conviction for resisting arrest, and also asserting that an excessive restitution fine was imposed. For reasons explained below, we modify the judgment to reduce the fine, and we affirm the judgment as modified.

BACKGROUND

The incident that gave rise to these convictions took place shortly after midnight on February 1, 2006. Defendant had been driving on the Southwest Expressway in San Jose, when he made a screeching stop at a red light at Fruitdale, ending up partially in the intersection. San Jose police officers present at the intersection followed defendant in their patrol car. A high-speed chase ensued, ending when defendant crashed into a parked car. The officers then pursued defendant on foot. Defendant was caught and arrested. He was charged with seven criminal counts and a special allegation, as described in footnote 1. Trial and Conviction

In May 2006, the charges against defendant were tried to a jury.

San Jose Police Officer Stella Cruz-Foy, called by the prosecution, testified about the events preceding defendant's arrest. She and her partner, Officer Jason Herr, were at the intersection of Southwest Expressway and Fruitdale just past midnight on February 1, 2006. Foy was standing outside her patrol car in full uniform, talking to a pedestrian. She heard brakes screeching and looked into the intersection. She saw a red BMW with two occupants, a driver and a passenger.

Prior to trial, defendant admitted the special allegation that he had been convicted and imprisoned for a prior felony DUI conviction. (Pen. Code, § 667.5, subd. (b).)

Defendant was driving. The BMW had stopped suddenly, beyond the limit line. Because the car was partially in the intersection, Foy concluded that the driver had run a red light. She and her partner got into their patrol car, with Foy driving. When the traffic light turned green, defendant continued southbound on Southwest Expressway. The officers followed. Foy turned on her siren and red lights. Defendant drove at high speed, made an illegal U-turn, and eventually entered a residential neighborhood, where he crashed into a Suzuki parked near an apartment complex. Defendant then ran off on foot, and the officers gave chase. Officer Herr apprehended defendant, who showed signs of intoxication. Defendant refused to submit to field sobriety tests or preliminary alcohol screening. He complained of leg pain, and was taken to a nearby hospital.

In addition to Officer Foy's testimony, the prosecution presented other evidence against defendant. A criminologist testified that a blood sample taken from defendant at the hospital showed his blood alcohol level to be 0.15 percent at 2:15 a.m., indicating that he had probably consumed six to eight drinks shortly before driving. In addition, records from the Department of Motor Vehicles were admitted, which showed that defendant's driver's license was revoked at the time of the incident.

Defendant offered no witnesses at trial, but he did submit documentary evidence, including photographs of the intersection where police first saw him. After the presentation of evidence, closing arguments were given. Both the prosecutor and defense counsel focused on Officer Foy's identification of defendant as the driver of the BMW, with each attorney framing it as the only disputed issue in the case. The court then instructed the jury. The jury deliberated, returning less than two and half hours later with guilty verdicts on all charges.

Sentencing

A sentencing hearing was conducted in June 2006. For the felonies, the court imposed an aggregate prison term of three years and eight months, calculated as follows: On count 1, for driving under the influence, two years (the midterm); on count 2, the other DUI violation, two years (the midterm), stayed under Penal Code section 654; on count 3, reckless evasion of a peace officer, eight months (one-third the midterm), imposed as a consecutive sentence based on defendant's extensive criminal history and lack of remorse; and for the enhancement for defendant's prior conviction and prison sentence, one additional year. For the misdemeanor convictions on counts 4, 5, 6, and 7, the court denied probation and it ordered defendant to serve six months in jail, concurrent with his prison sentence. Punishment was stayed as to count 5, which had been asserted as an alternative to count 6. At the hearing, defendant was ordered to pay a restitution fund fine of $1,800, calculated pursuant to the formula set forth in Penal Code section 1202.4, subdivision (b). But the minute order reflects a fine of $1,980, with the notation "1800 + 10%." The abstract of judgment likewise reflects the imposition of a restitution fund fine in the amount of $1,980, together with a suspended parole revocation fine in the same amount, imposed under Penal Code section 1202.45.

Appeal

Defendant filed this timely appeal. As noted above, he challenges his conviction on the charge of reckless evasion of a peace officer, asserting both insufficient evidence and instructional error. Defendant also asserts two sentencing errors. First, he contends that punishment for resisting arrest should have been stayed under Penal Code section 654, since it was part of a single course of conduct with the reckless evasion conviction. Additionally, defendant asserts judicial error in the calculation of the restitution fund fine and in the imposition of an additional 10 percent surcharge, as well as ineffective assistance of counsel for failure to object to those errors.

In response to defendant's challenges to his reckless evasion conviction, the People defend the sufficiency of the evidence to support that conviction. Addressing the related instructional error claim, they concede error but argue that it was harmless beyond a reasonable doubt. Concerning defendant's sentencing claims, the People refute defendant's contention that punishment for resisting arrest should have been stayed under Penal Code section 654. But they agree with his arguments concerning the fine and surcharge and they support the reduction to $1,200 sought by defendant.

DISCUSSION

We first address defendant's claims concerning his reckless evasion conviction. We then turn to the sentencing issues.

I. Conviction for Reckless Evasion[2]

"Any person, who, while driving a car, intentionally flees from or tries to elude a pursuing police car, is guilty of a misdemeanor. (§ 2800.1, subd. (a).)" (People v. Acevedo (2003) 105 Cal.App.4th 195, 197.) "The offense becomes a felony when the defendant drives in a willful or wanton manner with disregard for the safety of persons or property. (§ 2800.2, subd. (a).)" (Ibid.)

To establish the crime of reckless evasion, "the statute requires four distinct elements, each of which must be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform."

(People v. Hudson (2006) 38 Cal.4th 1002, 1008; see § 2800.1, subd. (a)(1)-(4).) "The prosecution must prove each statutory element -- the corpus delicti -- beyond a reasonable doubt." (People v. Acevedo, supra, 105 Cal.App.4th at pp. 197-198.)

A. Sufficiency of the Evidence

In this case, defendant challenges the sufficiency of the evidence to establish the third element of the evasion charge -- a distinctively marked vehicle. (§ 2800.1, subd. (a)(3).)

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1. Statutory Requirement of Distinctive Marking

As recently construed by the California Supreme Court, the statute "requires the pursuing police vehicle not only to have a red light and a siren but also to be 'distinctively marked.' " (People v. Hudson, supra, 38 Cal.4th at p. 1010.) To satisfy that statutory requirement, "a vehicle must have, in addition to a red light and siren, one or more distinguishing physical features that are reasonably visible to other drivers during the pursuit." (Id. at p. 1013.) For purposes of the statute, "a peace officer's vehicle is distinctively marked if its outward appearance during the pursuit exhibits, in addition to a red light and a siren, one or more features that are reasonably visible to other drivers and distinguish it from vehicles not used for law enforcement so as to give reasonable notice to the person being pursued that the pursuit is by the police." (Id. at p. 1006.)

The statute does not require "distinctively painted vehicles.." (People v. Mathews (1998) 64 Cal.App.4th 485, 489, disapproved in People v. Hudson, supra, 38 Cal.4th at p. 1011, fn. 3, as to its holding that a red light and siren suffice to distinctively mark a police vehicle.) "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." (People v. Mathews, at p. 489; see also, People v. Hudson, supra, 38 Cal.4th at p. 1013; People v. Estrella (1995) 31 Cal.App.4th 716, 722.) The courts thus take "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." (People v. Estrella, at p. 723.)

2. Appellate Review

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence- evidence that is reasonable, credible and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (People v. Kraft (2000) 23 Cal.4th 978, 1053.) Under that standard, "an appellate court must draw all inferences in support of the verdict that reasonably can be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (People v. Estrella, supra, 31 Cal.App.4th at pp. 724-725.) " 'Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.' [Citation.]" (People v. Kwok (1998) 63 Cal.App.4th 1236, 1245.)

3. Analysis

Defending the sufficiency of the evidence, the People rely on two factors: the "overall testimony" of Officer Foy and an asserted defense concession that the police vehicle's appearance was not in dispute.

a. Prosecution Evidence

According to respondent, the testimony of Officer Foy makes clear that she was driving a standard, marked police car.

First, the People observe, Foy testified that she was on "patrol" duty at the time of the incident. In respondent's view, the activities comprising that duty -- patrolling the neighborhoods, responding to calls for service, and assisting the community -- "would not reasonably be conducted in an unmarked car." Defendant disagrees, characterizing that argument as "speculative."

As the California Supreme Court has observed, "evidence leading only to speculative inferences is irrelevant." (People v. Kraft, supra, 23 Cal.4th at p. 1035.) But an inference is not speculative when the proffered evidence has "a sufficient nexus with some aspect or aspects of the particular case to be relevant and admissible." (Ibid.; see People v. Babbitt (1988) 45 Cal.3d 660, 681-682.) Here, we conclude, the evidence of Officer Foy's patrol duties has some "tendency in reason" to show that her vehicle was distinctively marked. (Evid. Code, § 210.) In other words, "the evidence tends 'logically, naturally, and by reasonable inference' to establish" that fact. (People v. Garceau (1993) 6 Cal.4th 140, 177.)

More directly concerning the police car itself, Foy described it repeatedly during her testimony as a "patrol car" or "patrol vehicle." According to the People, absent any contrary evidence, "the jurors inescapably would have inferred that Cruz-Foy was driving a standard police car bearing distinctive markings." Defendant disagrees, arguing that Foy's description of the vehicle as a patrol car "was clearly insufficient to establish the 'distinctively marked' element of the charge" and that it was "meaningless because it was not accompanied by a description or photograph of the car."

In attacking the sufficiency of the prosecution evidence, defendant relies on the California Supreme Court's recent decision in People v. Hudson, supra, 38 Cal.4th 1002. But that case is factuallydistinguishable. There, the record contained affirmative evidence that the police vehicle was "not a 'marked vehicle' but 'a plain car with forward-facing interior red light and a blue amber blinking light in the back.' " (People v. Hudson, at p. 1006.) Apart from its red light and siren, the only device distinguishing it from any other vehicle was its blue amber light. Based on that description, the court concluded, "the jury could have found that the police vehicle here was not distinctively marked." (Id. at p. 1014.) Here, by contrast, there was no affirmative evidence that the police car was unmarked or that it lacked distinctive features, and its description as a "patrol" vehicle could suggest otherwise to a reasonable juror.

Thus, as with the other prosecution evidence, the description of Officer Foy's car as a "patrol" car supports an inference -- however weak -- that the vehicle in question was distinctively marked.

Moreover, as we now explain, the prosecution evidence is buttressed by defendant's actions at trial, which amount to a concession on this element.

b. Defense Concession

In her opening statement, defendant's attorney told the jury that her client "was not driving the car that night. And that's the only issue in dispute in this case." In her closing argument, defense counsel focused solely on Foy's testimony, attacking the credibility of the officer's identification of defendant as the driver. In the People's view, these actions are tantamount to a defense concession concerning the element of the police pursuit vehicle's distinctive marking. We agree.

The concession doctrine is not new. As the Court of Appeal said more than fifty years ago: "In a criminal case a defendant is not called upon to make explanation, to deny issues expressly (his plea of not guilty does that for him), nor is he required to point out to the prosecution its failure to make a case against him or to prove any link in the required chain of guilt. On the other hand, he cannot mislead the court and jury by seeming to take a position as to the issues in the case and then on appeal attempt to repudiate that position." (People v. Peters (1950) 96 Cal.App.2d 671, 676.) In that case, the court found that the defendant had effectively conceded a disputed issue, cause of death. The court said: "A reading of the proceedings at the trial, including defendant's statement at the opening of his case and his argument to the jury at the end of the case, clearly shows . that defendant was conceding the cause of death." (Ibid.) In light of the implied concession, the court upheld the conviction, saying: "It would be a miscarriage of justice to set aside a verdict found by the jury on all issues which defendant at the trial believed necessary ., because defendant contends there was no proof of a fact which he had conceded, not by express word, but by conduct." (Id. at p. 677.)

More recently, in People v. Flood, the California Supreme Court revisited the concession principle, albeit in the context of jury instructions. (People v. Flood (1998) 18 Cal.4th 470, 505.) At issue there was the fourth element of section 2800.1, which requires that the person operating the pursuit vehicle be a peace officer in a distinctive uniform. (§ 2800.1, subd. (a)(4).) In Flood, the trial court had "informed the jury-in conformity with the uncontradicted evidence that had been presented at trial-that the police officers in that vehicle were peace officers, thus effectively removing this element of the crime from the jury's consideration." (People v. Flood, at p. 475.) The defendant appealed, asserting instructional error. (Id. at p. 479.) The court rejected the argument, saying: "Defendant never referred to this element of the crime during the trial and did not argue to the jury that the prosecution had failed to prove this element beyond a reasonable doubt; indeed, he did not ask that the issue even be considered by the jury. Furthermore, defendant presented no evidence regarding the peace officer element, and failed to dispute the prosecution's evidence regarding the issue. Although a defendant's tactical decision not to 'contest' an essential element of the offense

does not dispense with the requirement that the jury consider whether the prosecution has proved every element of the crime [citation], in our view defendant's actions described above are tantamount to a concession" on the point. (Id. at p. 505; see also People v. Richie (1994) 28 Cal.App.4th 1347, 1356 [same].) "Moreover, because the . requirement is an expressly enumerated element of the crime, defendant does not (and could not) contend that he lacked notice of the element or that he did not have a full opportunity to present any evidence relevant to the issue." (People v. Flood, at p. 505; People v. Richie, at p. 1355.)

Contrary to defendant's assertion, the record in this case supports the People's claim of concession. In that respect, our case differs from People v. Acevedo, supra, 105 Cal.App.4th 195. In that case, the court rejected the contention that the defendant "effectively conceded at trial the elements of the section 2800.2 charge (other than identity)." (Id. at p. 200, fn. 8.) The court stated -- without elaboration -- "the record is too ambiguous to permit application of that doctrine." (Ibid.) The same cannot be said in this case.

Here, the record as a whole unambiguously supports a defense concession. That includes defendant's opening statement, his evidence, and his closing argument. (See People v. Peters, supra, 96 Cal.App.2d at p. 676 [specifically citing the defendant's opening statement and closing argument in finding a concession].)

First, as noted above, defendant's opening statement explicitly declared that his identity was "the only issue in dispute in this case." As defendant correctly observes, an opening statement is not evidence. (See People v. Arnold (1926) 199 Cal. 471, 486.) But that does not necessarily prevent its consideration as part of the whole record. (People v. Peters, supra, 96 Cal.App.2d at p. 676.)

Moreover, the narrow framing of the issues described in defendant's opening statement carried through to defendant's trial evidence. Both in cross-examination and in the presentation of the defense exhibits, the sole focus was the reliability of Officer Foy's identification of defendant as the driver, with emphasis on such factors as distance and lighting.

As for closing arguments, they too reflect that identification was the sole issue in dispute. In her initial summation for the People, the prosecutor observed: "The only thing that's in dispute in this case: was he the driver?" Describing the crime of reckless evasion, the prosecutor recited the elements, including that the "vehicle was distinctively marked, and the peace officer was wearing a distinctive uniform." She continued: "So, I don't believe that [the] defense contested any of these. They didn't contest that the police officer didn't follow proper procedure, and didn't have the right light on, didn't have the siren on. All of that stuff they seemed to agree . took place. [¶] They are just saying the defendant wasn't the driver."

During defendant's closing argument, counsel made no attempt to refute that understanding. To the contrary, counsel spoke only to Officer Foy's reliability as a witness in identifying defendant as the

driver. The defense closing argument began: "Officer Foy did not see who was in the driver's seat that night." Counsel argued that it was not the defense's job "to find out who was actually driving the car. That is the prosecutor's job." Counsel stressed the jury instruction on witness credibility, noting that it discusses "lighting, distance, and duration of the observation. And we have all of those factors at play here." Addressing those factors, counsel attempted to cast doubt on Officer Foy's ability to see that defendant was driving, given the circumstances.[3] Counsel also attacked the officer's credibility on other grounds, claiming that she made inconsistent statements while testifying and that she had conducted an inadequate investigation. The appearance of the police vehicle was not even mentioned.

On this record, "defendant's actions . are tantamount to a concession" on the distinctive marking element of section 2800.1. (People v. Flood, supra, 18 Cal.4th at p. 505.) As in the Flood case, "Defendant never referred to this element of the crime during the trial and did not argue to the jury that the prosecution had failed to prove this element beyond a reasonable doubt.. Furthermore, defendant presented no evidence regarding the . element, and failed to dispute the prosecution's evidence regarding the issue." (Ibid.)

c. Conclusion

Taken together, the prosecution evidence and its reasonable inferences plus the defense concession provide substantial evidence in support of the verdict. Viewing the evidence most favorably to the prosecution, and drawing all reasonable inferences in support of the judgment, we conclude that a "rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (People v. Estrella, supra, 31 Cal.App.4th at p. 725.)

B. Jury Instruction

Defendant argues that the jury instruction on reckless evasion "was clearly an incorrect statement of the law." The People concede error but not prejudice.

1. Instructional Error

The challenged instruction given here reads in pertinent part: "A vehicle is distinctively marked if it has a red lamp and siren. The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle."

Respondent acknowledges that the first sentence of the instruction is erroneous, in light of People v. Hudson, supra, 38 Cal.4th 1002. We agree.[4] As the Hudson court said: "The challenged instruction was wrong in two respects. It allowed the jury to determine that the police car was distinctively marked based only on the car having a red light and siren. It also embodied the view that the jury could consider circumstances other than the physical features of the pursuing police vehicle in

determining whether the vehicle met the statutory requirement of being 'distinctively marked.' " (Id. at p. 1012.)

In this case, the first type of error is in play, but not the second. As in Hudson, the instruction challenged here "allowed the jury to determine that the police car was distinctively marked based only on the car having a red light and siren." (People v. Hudson, supra, 38 Cal.4th at p. 1012.) But unlike the defective instruction in Hudson, the second sentence of the instruction given here does not invite the jury to "consider circumstances other than the physical features of the pursuing police vehicle.." (Ibid.) Rather, it properly focuses the jury on "the physical features of the vehicle itself that distinguish it from vehicles not used for law enforcement." (Id. at p. 1013.)

In sum, to the extent that the challenged instruction permitted the jury to find the distinctive marking element based solely on the vehicle's red light and siren, it misstates the law.

2. Appellate Review

Generally speaking, "an instructional error that improperly describes or omits an element of an offense . is not a structural defect in the trial mechanism" requiring automatic reversal. (People v. Flood, supra, 18 Cal.4th at pp. 502-503.) Therefore, in the face of such errors, "harmless error analysis may be appropriate." (People v. Richie, supra, 28 Cal.App.4th at p. 1354.)

"In deciding whether a trial court's misinstruction on an element of an offense is prejudicial to the defendant, we ask whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (People v. Hudson, supra, 38 Cal.4th at p. 1013, internal quotation marks, italics, and citations omitted.)

3. Analysis

The question before us is whether the conceded error in instruction was harmless beyond a reasonable doubt. In Hudson, the court found both error and prejudice. (People v. Hudson, supra, 38 Cal.4th at pp. 1013-1014.) As the court explained: "The instructional error prejudiced defendant because the jury could have found that the police vehicle here was not distinctively marked. The model of the car [a Ford Crown Victoria] does not qualify as a distinctive mark because . there was no evidence at trial that this model was used exclusively by the police and not by other motorists. The blue amber lights might be a distinctive mark, but under the circumstances a jury could have determined that this feature was not reasonably visible to other drivers." (Id. at p. 1014.)

According to defendant, "the erroneous instruction was even more prejudicial than in Hudson." As he sees it, "the evidence in Hudson permitted at least conflicting inferences as to whether the

pursuing car was 'distinctively marked.' "

In our view, Hudson does not compel a finding of prejudice here. As noted above, in that case, the vehicle was "not a 'marked vehicle' but 'a plain car with forward-facing interior red light and a blue amber blinking light in the back.' " (People v. Hudson, supra, 38 Cal.4th at p. 1006, italics added.) Here, by contrast, the only evidence specifically portraying the vehicle was its description as a patrol car. As we have explained, a rational inference from that evidence is that the vehicle carried the markings of a typical patrol car, i.e., that it was distinctively marked. (Cf., People v. Flood, supra, 18 Cal.4th at p. 491 [error was harmless beyond a reasonable doubt, where "no rational juror, properly instructed, could have found that these police officers were not peace officers"].)

Furthermore, as already discussed, there was a defense concession here. "One situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element." (People v. Flood, supra, 18 Cal.4th at p. 504.) That situation obtains here.

For these reasons, we conclude, the instructional error here is harmless beyond a reasonable doubt.

II. Sentencing Claims[5]

As noted above, defendant challenges his sentence, first asserting improper multiple punishment and then attacking the restitution fine as excessive. We consider each sentencing claim in turn.

A. Multiple Punishment

In this case, the trial court imposed a one-year prison sentence for felony reckless evasion (count 3) and a concurrent six-month jail term for misdemeanor resisting arrest (count 7). In defendant's view, the imposition of concurrent terms on counts 3 and 7 violates Penal Code section 654. The People disagree.

1. Prohibition Against Multiple Punishment

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (People v. Deloza (1998) 18 Cal.4th 585, 591.) As judicially interpreted, it applies where " 'all of the offenses were incident to one objective'.." (People v. Latimer (1993) 5 Cal.4th 1203, 1208, quoting Neal v. State of California (1960) 55 Cal.2d 11, 19.) Section 654 is intended "to insure that a defendant's punishment will be commensurate with his culpability." (People v. Perez (1979) 23 Cal.3d 545, 552.) The statute operates "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime." (People v. Liu (1996) 46 Cal.App.4th 1119, 1135.) "Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences." (People v. Deloza, at p. 592.)

Rather, "the trial court may impose sentence for only one offense-the one carrying the highest punishment." (People v. Liu, at p. 1135.)

Conversely, the statute does not apply where the defendant's objectives or conduct are divisible. Thus, "if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (People v. Perez, supra, 23 Cal.3d at p. 551.) As the California Supreme Court recently noted, the "cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted." (People v. Britt (2004) 32 Cal.4th 944, 952.) Just as a defendant's objectives may be divisible, so too may his conduct. "Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately." (People v. Kwok, supra, 63 Cal.App.4th at p. 1253.)

Moreover, there is an exception to section 654 when there are multiple victims of a single violent act by defendant. Under the multiple victim exception, "even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim." (People v. Centers (1999) 73 Cal.App.4th 84, 99, internal quotation marks and citations omitted; see People v. Deloza, supra, 18 Cal.4th at p. 592.) The availability of this exception "depends upon whether the crime ... is defined to proscribe an act of violence against the person." (People v. Martin (2005) 133 Cal.App.4th 776, 782, internal quotation marks omitted.)

2. Appellate Review

Whether a defendant's objectives or acts were divisible is primarily a question of fact for the trial court. (People v. Martin, supra, 133 Cal.App.4th at p. 781; People v. Kwok, supra, 63 Cal.App.4th at pp. 1252-1253.) "Each case must be determined on its own circumstances." (People v. Hutchins (2001) 90 Cal.App.4th 1308, 1312.) "The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination." (Ibid.)

On appeal, we review the trial court's determination for substantial evidence. (People v. Martin, supra, 133 Cal.App.4th at p. 781; People v. Hutchins, supra, 90 Cal.App.4th at p. 1312; see also People v. Osband (1996) 13 Cal.4th 622, 730-731 ["substantial evidence sustains the court's implicit determination that [defendant] held more than one objective when he committed the crimes"].) Under that deferential review standard, "we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence." (People v. Martin, at p. 781.)

3. Analysis

Defendant argues that he had a single objective in committing the two offenses -- eluding capture. He observes that "both the reckless evasion and resisting arrest were committed within minutes of each other.."

As case law explains, "close temporal proximity, . although not determinative on the question of whether there was a single objective, is a relevant consideration." (People v. Martin, supra, 133 Cal.App.4th at p. 781.) But in an evolving trend, courts have "narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but consecutive objectives permitting multiple punishment." (People v. Latimer, supra, 5 Cal.4th at pp. 1211-1212.) Where offenses are "divisible in time," separate sentencing is permissible. (People v. Kwok, supra, 63 Cal.App.4th at p. 1254.) That is especially true where the "defendant had an opportunity to reflect between offenses" and where "each successive offense created a new risk of harm.." (Id. at p. 1255; see also People v. Felix (2001) 92 Cal.App.4th 905, 915; People v. Trotter (1992) 7 Cal.App.4th 363, 368.)

The Trotter case is instructive. There, the defendant was punished separately for two of three gunshots fired on a pursuing officer. On appeal, the court rejected the defendant's claim of a single objective -- "to avoid apprehension" -- concluding that it was proper to punish him separately for the first two shots, which were fired "within one minute" of each other. (People v. Trotter, supra, 7 Cal.App.4th at pp. 366, 367.) In the court's words, "even under the long recognized 'intent and objective' test, each shot evinced a separate intent to do violence.." (Id. at p. 368.) Moreover, as the court observed: "Defendant's conduct became more egregious with each successive shot. Each shot posed a separate and distinct risk to [the officer] and nearby freeway drivers. To find section 654 applicable to these facts would violate the very purpose for the statute's existence." (Ibid.)

In this case, we find substantial evidence to support separate punishment for reckless evasion and resisting arrest. A reasonable trial judge could conclude that defendant entertained "consecutive even if similar" criminal objectives in this case. (People v. Britt, supra, 32 Cal.4th at p. 952.) Furthermore, defendant's course of conduct is readily divisible into two parts. The first phase occurred during the vehicle pursuit, which ended only when defendant crashed into a parked car. The second phase, the foot chase, commenced shortly thereafter. Though temporally close, the two offenses nevertheless "were separated by periods of time during which reflection was possible." (People v. Trotter, supra, 7 Cal.App.4th at p. 368.) Moreover, each offense created a new risk of harm. (Ibid.) Under these circumstances, section 654 does not prohibit separate punishment for each offense.[6]

B. Restitution Fund Fine

Defendant challenges the amount of the restitution fund fine as well as the imposition of an additional 10 percent surcharge, claiming both judicial and attorney error. He seeks a reduction in

the fine from $1,980 to $1,200. The People support defendant's request.

We agree that the requested reduction is proper. As we explain, the fine should have been set at $1,200 using the statutory formula, and the surcharge is unauthorized. The proper remedy is to modify the judgment accordingly.

1. The Fine

As a general rule, the court is required to impose a restitution fund fine. (§ 1202.4, subd. (b).) An equivalent parole revocation fine is imposed but suspended. (§ 1202.45.) For felony convictions, the fine ranges from a minimum of $200 to a maximum of $10,000. (§ 1202.4, subd. (b)(1).) The amount is subject to the trial court's discretion. (Ibid.; People v. Lytle (1992) 10 Cal.App.4th 1, 5.) If the court decides to impose a fine in excess of the statutory minimum, it may use a statutory formula to calculate the amount, which involves multiplying $200 by the number of years of imprisonment and then by the number of counts. (§ 1202.4, subd. (b)(2).)

When the statutory formula is employed, section 654 compels the court to disregard counts for which punishment has been stayed. (People v. Le (2006) 136 Cal.App.4th 925, 933-934.) As this court said in Le, "the section 654 ban on multiple punishments is violated when the trial court considers a felony conviction for which the sentence should have been stayed pursuant to section 654 as part of the court's calculation of the restitution fine under the formula provided by section 1202.4, subdivision (b)(2)." (Id. at p. 934.)

Here, the court expressly relied on the statutory formula in calculating the restitution fund fine. Working backward from the amount ordered in the court's oral pronouncement ($1,800), it appears that the court multiplied $200 by defendant's sentence of three years in prison and then by his three felony convictions on counts 1, 2, and 3. (See People v. Le, supra, 136 Cal.App.4th at p. 933.) But since punishment on count 2 was stayed under section 654, its inclusion in the formula was erroneous. (People v. Le,at p. 934.) Moreover, as the People effectively concede, trial counsel's failure to object was prejudicial, warranting a reduction in the amount of the restitution fine and the corresponding parole revocation fine. (Id. at p. 936.)

2. The Surcharge

As defendant correctly observes, where there are discrepancies between the oral and written judgment, the court's oral pronouncement controls over the minute order or abstract of judgment. (People v. Mesa (1975) 14 Cal.3d 466, 471.) In the words of our high court, "a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling." (Ibid.)

Here, as transcript of the sentencing hearing demonstrates, the trial judge did not order any

additions to the restitution fund fine. The minute order's inclusion of a 10 percent surcharge, which was incorporated into the abstract of judgment, therefore constitutes clerical error and it must be stricken. (People v. Mesa, supra, 14 Cal.3d at p. 472.)

SUMMARY OF CONCLUSIONS

1. Sufficient evidence supports defendant's conviction for reckless evasion.

2. The trial court erred in instructing the jury as to one element of that charge, but defendant was not prejudiced, given his implied concession on the point.

3. Substantial evidence supports the imposition of separate punishment for reckless evasion and resisting arrest.

4. The restitution fund fine and surcharge are erroneous and subject to correction on appeal.

DISPOSITION

The judgment is modified to reduce the restitution fund fine and the equivalent parole revocation fine from $1,980 to $1,200. The trial court shall (1) correct its minutes accordingly, (2) prepare an amended abstract of judgment reflecting this modification, and (3) forward a certified copy of the amended abstract to the Department of Corrections.

As modified, the judgment is affirmed.

WE CONCUR: Bamattre-Manoukian, Acting P.J., Duffy, J.

1. A jury found defendant guilty of the following charges: Count 1, felony driving under the influence of alcohol (DUI), with a prior felony DUI conviction within ten years (Veh. Code, §§ 23152, 23550.5, subd. (a)); Count 2, felony DUI with a blood alcohol level of 0.08 or greater and a prior DUI conviction within 10 years (Veh. Code, §§ 23152, 23550.5, subd. (a)); Count 3, felony reckless evasion of a peace officer (Veh. Code, § 2800.2, subd. (a)); Count 4, misdemeanor hit and run (Veh. Code, § 20002, subd. (a)); Count 5, misdemeanor driving with a suspended license (Veh. Code, § 14601.1, subd. (a)), with a prior conviction within five years for that offense; Count 6, misdemeanor driving with a license suspended for DUI (Veh. Code, § 14601.2, subd. (a)), with a prior conviction within five years for that offense; and Count 7, misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1)).

2. Further unspecified statutory references in this section of the opinion (section I) are to the Vehicle Code.

3. In that vein, defense counsel's argument included these statements: "It was dark outside. It was just a few minutes past midnight. And this intersection is lit by those yellow streetlights that cast sort of an eerie amber glow." "The officer told us that she was 30 to 40 feet away when she made this observation, and she's looking through the windows of this car. She

didn't remember if the car windows were tinted." "The duration of what she saw. She told us that she observed 30 seconds. . That can't possibly be true."

4. We note that our high court's decisionin Hudson had not been issued when defendant was tried in May 2006; the decision was filed in June 2006 and modified in August 2006. (People v. Hudson, supra, 38 Cal.4th 1002.) We further note that the applicable CALCRIM instructions were revised in August 2006 as to this point. (See Judicial Council of Cal. Crim. Jury Instns. (2006) CALCRIM Nos. 2180, 2181.) They now state in pertinent part: "A vehicle is distinctively marked if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used in law enforcement." (Ibid.)

5. Further unspecified statutory references in this section of the opinion (section II) are to the Penal Code.

6. Given the basis for our determination, we need not reach address the multiple victim exception, which both parties briefed.