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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ZEDRICK B. DYER,

Defendant and Appellant.

2d Crim. No. B271843  
(Super. Ct. No. MA067466)  
(Los Angeles County)

Zedrick B. Dyer was driving with a suspended license when he ran a stop sign and collided with another vehicle. The accident injured Dyer's 14-year-old passenger. An investigation at the accident scene indicated that Dyer had been drinking. He was charged with felony child endangerment (count 1); driving under the influence (DUI) causing injury to the driver of the other vehicle (count 2); and driving on a suspended license for a prior refusal to take a chemical test (count 3). (Pen. Code, § 273a, subd. (a); Veh. Code, §§ 23153, subd. (a), 14601.5, subd. (a).)

A jury convicted Dyer on counts 1 and 3 but acquitted him of the DUI, count 2. He contends that count 1 lacks substantial evidence because the prosecution relied on the theory that the

child was endangered due to his driving under the influence yet he was acquitted of that charge. As we shall explain, a jury may reach inconsistent verdicts inasmuch as each count stands upon its own merit. (*People v Lewis* 2001) 25 Cal.4th 610, 656.) We also conclude that the court did not err in admitting evidence of Dyer's prior refusal to take a chemical test and that the prosecution did not commit prosecutorial misconduct in its closing argument. We affirm.

### FACTS

On October 10, 2015, Dyer caused an automobile accident at an intersection in Lancaster. His car landed on the sidewalk, with a large dent in the driver's side doors. His passenger Nailah M., a 14-year-old cousin, suffered a sprained elbow and bruised nose.

Dyer collided with Scott Bowman, who was driving just under the speed limit of 50 miles per hour on northbound 50th Street at around 10:00 p.m. As Bowman entered the intersection with Avenue J-8, a car "zoom[ed]" right in front of him, and he was unable to avoid a collision. Bowman sustained head and leg bruises, and his car was irreparably damaged. The driver of the car Bowman struck approached and asked if he was all right. Bowman identified Dyer as the driver of the car that crossed in front of him.

Bowman had the right-of-way because there is no stop sign for cars traveling on 50th Street. Conversely, motorists traveling east or west on Avenue J-8 must halt at 50th Street. A sign affixed to the stop sign on Avenue J-8 warns drivers that cross-traffic on 50th Street does not stop.

Dyer told a sheriff's deputy that he was travelling north on 50th Street. The deputy testified, however, that based on the

positions of the damaged vehicles, skid marks, and the debris on the roadway, Dyer's claim made no sense and "wasn't possible." Dyer told a second deputy that he was travelling east on Avenue J-8. The deputy testified that this made no sense because the passenger side of Dyer's car would have been damaged, not the driver's side. It was apparent from the wreckage that Dyer was driving westbound on Avenue J-8 and ran through the stop sign at a high rate of speed.

Dyer showed signs of intoxication at the accident scene, according to Deputy Sheldon Sherman, who is trained in drug and alcohol recognition. Sherman observed that Dyer's eyes were extremely bloodshot and watery; his words were slow, slurred and mumbled; he swayed and staggered a bit; and his breath and body emitted a weak odor of alcohol. Dyer denied injury, illness, disability, medication use or fatigue.

Dyer initially denied consuming alcohol; then said he was drinking earlier; then he again denied drinking. His perception of time was awry: he believed that it was 1:20 a.m., when in fact it was 10:58 p.m. He refused to take a field breathalyzer test and performed poorly on five field sobriety tests. Sherman arrested Dyer on suspicion of DUI, based on his training and experience, and on Dyer's performance on the tests.

In a recorded interview, Dyer refused to take a chemical test. During booking at the sheriff's station, Dyer fell asleep where he was sitting and could not be awakened.

Dyer was not carrying a driver's license at the time of the accident. His license was suspended owing to a prior refusal in 2014 to test for alcohol when he was suspected of DUI. In that incident, Dyer was in an idling car, glassy eyed and emitting a heavy alcohol odor. Deputy Jilberto Borrueal, a trained DUI

investigator, noted that Dyer had red, bloodshot, watery, droopy eyes. Based on Dyer's objective symptoms and poor performance on field sobriety tests, Borrueal arrested Dyer for DUI. Dyer refused to submit to chemical tests.

In Dyer's defense, his family members testified that they did not observe him drinking alcohol on October 10, though they were not with him the entire day. At the accident scene, they did not smell alcohol on him and he was speaking normally. Nailah M. testified that Dyer did not smell of alcohol and halted at the stop sign before entering the intersection.

On his own behalf, Dyer testified that he attended two social gatherings on the day of the accident. He denied consuming alcohol at either event or at any time during the day. He often has bloodshot watery eyes from dust and allergies.

Dyer agreed that he was driving west on Avenue J-8. He denied telling deputies otherwise. Dyer claimed that he stopped at 50th Street, then drove into the intersection because he did not see any oncoming traffic. He was struck by Bowman, and his car spun several times.

Dyer willingly completed the field sobriety tests because, in his words, "I knew I wasn't drinking," so he anticipated passing the tests. Deputy Sherman seemed to have it in for Dyer because Dyer has a prior DUI conviction. Dyer refused to take a breath test because he felt that he was being singled out for his prior conviction.

The jury found Dyer guilty of count 1 (felony child endangerment) and count 3 (misdemeanor driving with a suspended license after refusing a chemical test). He was acquitted of count 2, DUI. The trial court denied Dyer's motions to grant judgment notwithstanding the verdict, for a new trial, or

to reduce the felony conviction to a misdemeanor. Imposition of sentence was suspended on count 1 and Dyer was placed on three years' probation including a term that he serve 364 days in the county jail. He received a concurrent sentence of 30 days in county jail on count 3.

## DISCUSSION

### 1. *Sufficiency of the Evidence*

Dyer challenges the sufficiency of the evidence supporting his conviction for child endangerment. We review the record in the light most favorable to the judgment to locate substantial evidence that the jury could rely upon to find the defendant guilty beyond a reasonable doubt; we presume the existence of every fact the jury could reasonably deduce from the evidence, and do not reevaluate witness credibility or reweigh evidentiary conflicts. (*People v. Brown* (2014) 59 Cal.4th 86, 105-106.)

Felony child endangerment occurs when a person “under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered[.]” (Pen. Code, § 273a, subd. (a); *People v. Valdez* (2002) 27 Cal.4th 778, 783.)

The statute protects a child from an abusive situation that poses a great probability of serious injury; it does not require the actual result of great bodily injury. (*People v. Valdez, supra*, 27 Cal.4th at p. 784.) The mens rea required for endangerment is criminal negligence, meaning ““[t]he negligence must be

aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . or an indifference to consequences.” [Citation.]” (*Id.* at p. 788.) Criminal negligence is evaluated objectively, and does not turn upon the defendant’s subjective intent. If a reasonable person in defendant’s position would have been aware of the risks, defendant is presumed to have had such awareness. (*Id.* at p. 783; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 136-137.)

Substantial evidence supports Dyer’s conviction for child endangerment. (*People v. Valdez, supra*, 27 Cal.4th at p. 788.) A deputy trained in alcohol recognition observed signs of intoxication and smelled alcohol coming from Dyer at the accident scene. Dyer did not successfully complete field sobriety tests.<sup>1</sup> He repeatedly changed his story about consuming alcohol and the direction he was traveling; refused to take a field breathalyzer test; and refused to take a chemical blood test or breath test. Given his insistence at trial that “I knew I wasn’t drinking,” Dyer did not offer the jury a plausible explanation for refusing a test of his blood alcohol, which would have definitively established that he did not consume alcohol before driving.

The jury heard about Dyer’s watery, bloodshot eyes, slurred speech, lack of balance, and poor performance on field sobriety tests. Jurors learned that Bowman had the right-of-way on 50th

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<sup>1</sup> Dyer does not challenge the admissibility of the field sobriety tests as circumstantial evidence of intoxication. (See *Coffey v. Shiimoto* (2015) 60 Cal.4th 1198, 1212-1214.)

Street. A deputy testified that Dyer drove past a stop sign at a high rate of speed, in front of oncoming traffic, causing a collision that scattered debris widely. Bowman stated that Dyer “zoom[ed]” in front of him, which is not descriptive of a car starting out from a stop sign. From this, the jury could rationally find Dyer guilty of recklessly placing a child in a situation endangering her person or health, under circumstances likely to produce great bodily injury or death, because a reasonable person would not have transported a child while so impaired by alcohol as to run a stop sign bearing a warning that cross-traffic does not stop. The evidence supports the verdict.

Dyer posits that the jury could not rationally find that he endangered a child’s life by driving into an intersection while intoxicated, because the same jurors acquitted him of DUI. “Consistency in the verdict is not necessary.” (*Dunn v. United States* (1932) 284 U.S. 390, 393; *People v. Lewis, supra*, 25 Cal.4th at p 656 [“inherently inconsistent verdicts are allowed to stand”].) An inconsistent verdict does not show that the jury was unconvinced of the defendant’s guilt; rather, it may be a sign of lenience or compromise. (*Dunn* at pp. 393-394; *Lewis* at p. 656; *People v. Covarrubias* (2016) 1 Cal.5th 838, 890-891.)

Each count in an information stands upon its own merit. “[A] verdict of either conviction or acquittal upon one count has no bearing upon the verdict with respect to another count. A verdict of conviction on one count which appears inconsistent with a verdict of acquittal on another count shall afford no basis for a reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stands convicted, regardless of how similar the facts underlying each count are.” [Citation.]” (*People v. Lara* (1996) 43

Cal.App.4th 1560, 1568, fn. 4; Pen. Code, § 954 [“An acquittal of one or more counts shall not be deemed an acquittal of any other count”]; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657.)

For example, a defendant may be convicted of contributing to the delinquency of a child, but acquitted of lewd conduct with the same child, though both charges are based on the same act. (*People v. Codina* (1947) 30 Cal.2d 356, 360-361.) Despite the inconsistency, the guilty verdict is not a nullity because “each count must stand upon its own merit[.]” (*Id.* at p. 361) Quite simply, “defendant has had the advantage of the jury’s leniency in the disposal of the . . . charges[.]” (*Ibid.*)

The inconsistent verdicts form no basis for reversal in this case. The evidence is sufficient to support the conclusion that Dyer is guilty of the offense of which he stands convicted, child endangerment, even if he was acquitted of the DUI charge.

2. *A Lesser Included Offense Instruction Was Not Required*

Dyer contends that the trial court should have instructed the jury, sua sponte, on misdemeanor child endangerment. The court “must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) The obligation arises “when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Unlike felony child endangerment, a misdemeanor charge does not require evidence that the defendant placed the child in a



situation likely to produce great bodily harm or death.<sup>2</sup> (*People v. Burton* (2006) 143 Cal.App.4th 447, 454, fn. 4.) The question is whether the defendant acted “‘under circumstances or conditions likely to produce great bodily harm or death,’ i.e., under conditions ‘in which the probability of serious injury is great.’ [Citations.] If so, the crime is punishable as a felony; if not, solely as a misdemeanor.” (*People v. Sargent* (1999) 19 Cal.4th 1206, 1223.)

Here, the evidence showed only that Dyer placed Nailah M. in a dangerous situation likely to produce great bodily harm or death. While impaired, Dyer entered an intersection at full speed, ignoring a stop sign and a written warning that cross-traffic would not stop, crossing into the path of a car travelling near the speed limit of 50 miles per hour. A reasonable person in defendant’s position would have been aware of the great probability that a collision was likely to result in death or serious injury. Dyer affirmed at trial that driving under the influence “is extremely dangerous to human life.”

Contrary to Dyer’s claims, there is ample evidence that he was intoxicated, and not merely careless. He gave conflicting accounts about his alcohol consumption and the direction he was travelling. He showed signs of intoxication and failed sobriety tests. His refusal to test for alcohol and prove his sobriety

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<sup>2</sup> “Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, . . . [while] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.” (Pen. Code, § 273a, subd. (b).)

evidenced his intoxication. The trial court had no duty to instruct the jury on misdemeanor child endangerment because the evidence established aggravated, culpable, gross or reckless behavior. Even if the jury had been so instructed, it is not reasonably probable that Dyer would have achieved a more favorable result, given the compelling evidence at trial of circumstances showing a great probability of serious injury.

3. *Evidence of Dyer's Prior DUI Arrest*

By pretrial motion, the prosecution asked to introduce evidence that Dyer was convicted of DUI in 2004 and arrested on suspicion of DUI in 2014. In both instances, Dyer refused a chemical test. Over objection, the court ruled that these are “prior acts . . . introduced for the purposes of motive” and to show Dyer’s knowledge that the test results “could be used against him.” The court found that “the probative value of these prior acts to show knowledge and motive outweigh any prejudice to the defendant[.]”

The prosecutor introduced evidence of Dyer’s 2014 refusal to take a chemical test. The 2004 case was *not* raised in the prosecution’s case-in-chief. When Dyer testified, defense counsel inquired whether he “had a DUI in the past.” Dyer identified a DUI from 12 or 13 years earlier. On cross-examination, Dyer twice replied “no” when the prosecutor asked if he refused to take any tests when he was arrested 12 years earlier. The jury was given a limiting instruction on use of the evidence.<sup>3</sup>

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<sup>3</sup> The instruction states that the evidence of other crimes “may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show a motive for the defendant’s

Evidence of Dyer's 2014 refusal to take a chemical test was not introduced to show a disposition to drive while intoxicated or to prove his conduct in 2015. (Evid. Code, § 1101.) Rather, it showed his knowledge that taking the test would definitively prove intoxication, an element of the DUI charge. Dyer's conduct in 2004 did not come into play, because he firmly denied refusing any tests in that incident.

Dyer was charged in count 3 with driving while his license was suspended for refusing a chemical test, with knowledge of the suspension. (Veh. Code, § 14601.5, subd. (a).) He admitted that he refused a chemical test in 2014. In closing argument, defense counsel did not deny Dyer's refusal to test, challenging only Dyer's *knowledge* of the suspension. Dyer's refusal to take a chemical test was a necessary element of the crime charged in count 3, and was properly admitted to prove the crime.

#### 4. *Claims of Prosecutorial Misconduct*

Dyer claims prosecutorial misconduct during closing argument. The prosecutor may not use deceptive or reprehensible methods to persuade the jury, and the defendant's rights may be violated if improper remarks “infect[ ] the trial with unfairness[.]” (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Dyer forfeited his claim of impropriety by failing to object at trial. (*Ibid.*; *People v. Townsel* (2016) 63 Cal.4th 25, 52.) The argument lacks merit in any event.

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alleged refusal to submit to a chemical test and the defendant [had] knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged. . . . You are not permitted to consider such evidence for any other purpose.”

First, Dyer challenges the prosecutor's rhetorical question whether Deputy Sherman would "risk his career just to get a young man who did not want to cooperate with the government previously." The prosecutor was reacting to defense counsel's argument that Sherman "was out to get Mr. Dyer." Dyer testified that Sherman "was coming for me" and "I felt like I was being singled out for my priors[.]"

A prosecutor's "use of rhetorical questions, for example, why 'would [a witness] be making this stuff up,'" is permissible. (*People v. Frye* (1998) 18 Cal.4th 894, 972.) It is not improper vouching, but a proper comment on the evidence and the reasonable inferences flowing from it. (*Ibid.*; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1270-1271 [prosecutor's argument, "[w]hy would [the detectives] put their career on the line for this case," was proper rebuttal to defense counsel's charge that the detectives lied].) Dyer and his attorney asserted that Sherman was motivated by animus. The prosecution permissibly countered by asking, rhetorically, what conceivable incentive Sherman had to fabricate a reason for Dyer's arrest.

Second, Dyer points to the prosecutor's statement that "the objective of the defense in this case is . . . to cover up the truth." The prosecution may describe testimony harshly, as "lies" (*People v. Sandoval* (1992) 4 Cal.4th 155, 180), or characterize a defense as a "heavy, heavy smokescreen laid down . . . to hide the truth from you." (*People v. Marquez* (1992) 1 Cal.4th 553, 575-576; *People v. Frye, supra*, 18 Cal.4th at p. 978 [saying the defense was "ludicrous" and a "smoke screen"].) Here, the prosecutor recited its version of events, urged the jury to "consider the evidence in its entirety" and not pay heed to defense efforts to hide the truth (or create a smokescreen) about Dyer's

intoxication. Because the prosecutor's remark about "the truth" related to the credibility of the defense *case* (not the integrity of defense *counsel*), it was neither improper nor an attempt to shift the burden of proof.

There was no prejudicial misconduct by the prosecutor. Even assuming that some misconduct may have occurred, it did not infect the trial with unfairness amounting to a denial of due process, and there is no reasonable possibility that the jury would have reached a different result without the misconduct. (*People v. Farnam* (2002) 28 Cal.4th 107, 200-201.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Ronald S. Coen, Judge  
Superior Court County of Los Angeles

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