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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DANIEL GARDNER, Defendant and Appellant.	B283873 (Los Angeles County Super. Ct. No. KA109665)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

After drinking heavily at a friend's home on the evening of May 7, 2015, Michael Daniel Gardner (Gardner) stole his friend's Mercedes Benz E350 and drove while intoxicated. While evading the police, Gardner accelerated to 127 miles per hour and collided with Marissa Vasquez's Honda Civic, killing her. On appeal, Gardner contends there was insufficient evidence of Vasquez's death as well as her cause of death. Gardner also argues that the trial court committed reversible error by refusing to suppress the evidence from his warrantless blood draw. We affirm.

BACKGROUND

I. Charges

The Los Angeles County District Attorney's Office charged Gardner with murder (Pen. Code, § 187, subd. (a); count 1)[1] as well as gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a); count 2), driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a); count 3), fleeing a police officer causing serious bodily injury (Veh. Code, § 2800.3, subd. (a); count 4), and driving when privilege suspended/revoked (Veh. Code, § 14601.2, subd. (a); count 5). Gardner pleaded not guilty and proceeded to trial.[2]

II. Prosecution Evidence

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[1] All further statutory references will be to the Penal Code, unless otherwise specified.

[2] On the first day of trial, September 28, 2016, Gardner said he wanted to represent himself and the trial court relieved the public defender's office as counsel of record. Trial did not actually take place until April 11, 2017, at which time Gardner was represented by deputy public defender Joseph Kang.

Gardner and Denman Gambill (Gambill) were longtime friends. Gambill owned a 2014 Mercedes Benz E350, which he occasionally allowed Gardner to drive. However, Gambill did not allow anyone to drive the car unless he was also in it. The keys to the Mercedes were on a hook in Gambill's kitchen.

On May 7, 2015, Gardner drank alcohol in Gambill's home. Gambill believed Gardner had too much to drink. At 9:00 p.m. or 9:30 p.m. that night, Gambill told Gardner to go home. Gambill thought that Gardner would walk home given that he only lived across the street. When Gardner left, his path took him in the direction of the car port where Gambill's Mercedes was parked. Later that same evening, Claremont Police Sergeant Robert Ewing was inside his marked police car when he noticed a Mercedes E350 traveling on Towne Avenue. The vehicle's headlights were off although it was about 10:45 p.m. and raining.

Sergeant Ewing followed the Mercedes and tried to initiate a traffic stop. The Mercedes began to yield by driving into a gas station. However, the Mercedes then quickly accelerated away from the gas station. Sergeant Ewing did not continue his pursuit because his police car was unable keep up with the Mercedes.[3] He radioed dispatch to notify Pomona police about the Mercedes. Moments later, Sergeant Ewing saw a large flash of light, which he initially thought was caused by a blown electrical transformer. Believing it might have something to do with the Mercedes, Sergeant Ewing turned his police car around and travelled west on Arrow Highway. As he approached the

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[3] Sergeant Ewing's police car was equipped with a dash cam and the video of the attempted traffic stop was played for the jury at trial.

intersection of Arrow Highway and Garey Avenue, Sergeant Ewing saw debris on the road. He turned on his overhead lights which again activated his police car's video camera.

Sergeant Ewing soon saw that the Mercedes had collided with a 2010 Honda Civic at the intersection of Arrow Highway and Mariposa. The Honda was overturned and severely damaged. The Mercedes was also heavily damaged. The sole occupant of the Honda—Vasquez—was in the driver's seat. She was wearing her seat belt. Sergeant Ewing's dash cam recorded him saying, "You in there? You okay? Hello? Can you hear me? Can you hear me? Hey? [Unintelligible] vehicle's upside down, we've got one person trapped inside."[4] Sergeant Ewing continued calling out to Vasquez by saying, "Can you hear me? Hey, can you hear me? Inside the car. Hey, come on. Stay with me."

Claremont Police Officer Garrett Earl joined Sergeant Ewing at the collision site. Sergeant Ewing was recorded telling Officer Earl, "I can't tell if I got a pulse or not." Officer Earl replied, "Okay." Later on, unidentified voices could be heard discussing how Vasquez had no pulse. Sergeant Ewing saw that Vasquez's body had been placed on the side of the street and told his captain that, "[I]t's probably going to be fatal." Sergeant Ewing subsequently told his captain that Vasquez was dead: "And they just covered her up, so I believe they called it. Uh, yeah. She didn't make it. So I wanted to give you a heads up on that, and I'll keep you posted if anything else comes up. [¶] No, I'm fine . . . I shut it down, because as soon as he was taking off, I was like 'He's going to kill somebody.' Well, obviously, he did."

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[4] The post-collision recording from Sergeant Ewing's dash cam was transcribed and played for the jury at trial.

Later, Sergeant Ewing can be heard saying, "I've got the [driver's license] for the . . . deceased driver they pronounced. I don't know exactly what time, but she's covered with a sheet right now."

In the meantime, the police searched the area for the driver of the Mercedes based on a description provided by witness Jennifer McLeary (McLeary). Although McLeary did not see the actual collision, she saw what appeared to be a huge electrical spark and a Mercedes. She saw a man, who looked clearly dazed, get out of the Mercedes using the driver's side door and walk toward the sidewalk. She said the man ran northbound on Mariposa and wore either blue jeans with no shirt, or dark pants and a light-colored shirt. During the search, Claremont Police Officer Nicholas Martinez spotted a person wearing blue jeans and a light-colored shirt running away from him. The person, later identified as Gardner, was not wearing shoes or socks. Officer Martinez pointed his gun at Gardner and yelled, "Police. Stop" and Gardner complied. When Officer Martinez spoke with Gardner, the officer noted that Gardner smelled of alcohol and that Gardner's speech was slow and slurred. Gardner had a small amount of blood on his lip or mouth area and the key to the Mercedes was in his front pocket.

Officer Earl questioned Gardner at the scene.[5] Gardner said he was in shock as a result of a collision and admitted he had stolen the Mercedes from a friend. Officer Cesar Rivera, who also noted that Gardner smelled of alcohol, administered a horizontal gaze nystagmus test. Based on the results of that test,

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[5] Officer Earl's recorded interview with Gardner was played for the jury.

Officer Rivera believed Gardner was impaired. Gardner was taken to an ambulance, where McLeary identified him as the man she saw running from the Mercedes.[6] Inside the Mercedes, police found a checkbook, an EBT card, and mail with Gardner's name on it. Gardner's passport was in a bag on the floor. The Mercedes' headlights were found in the "off" position.

Gardner was transported to the hospital about an hour after the collision. Gardner's speech was still slurred but he indicated to Officer Rivera that he understood he was being arrested for driving under the influence. Officer Rivera explained to Gardner that because they were in a hospital, the officer could not offer him a breath test and his blood would need to be drawn instead. Officer Rivera thought that Gardner nodded his head, or engaged in some kind of affirmative conduct, which the officer interpreted as Gardner's consent to the blood draw. At 12:25 a.m., Gardner's blood was drawn and then booked into evidence. By the time Officer Rivera returned to the hospital and read Gardner his *Miranda*[7] rights, Gardner's speech was clear and he spoke without difficulty. Gardner waived his rights and agreed to speak with the officer. Gardner admitted that he had "a lot" to drink that evening, including gin and a box of wine. Gardner also admitted that he was involved in a traffic collision and said he had fled because he was afraid and panicked. Gardner then said he no longer wanted to speak and the interview ended.

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[6] In addition to identifying Gardner at the field show-up, McLeary also identified Gardner at trial.

[7] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Officer Martinez spoke with Gambill, the owner of the Mercedes. Gambill said that Gardner had been drinking in Gambill's home that night. Officer Martinez went into Gambill's kitchen where there were bottles of alcohol on the counter. Gambill said Gardner drank from those bottles. Gambill said Gardner did not have permission to take the Mercedes and that he had noticed one of the keys to the car was missing.

Bridgette Pitcher, a criminalist with the Los Angeles County Sheriff's Department, testified that most people with a .05 percent blood alcohol level are too mentally impaired to safely operate a motor vehicle, while all people with a .08 percent blood alcohol level and above are too mentally impaired to do so. Based on her gas chromatography analysis, Pitcher determined that Gardner's blood sample contained a 0.27 percent blood alcohol level. She testified that anyone with an alcohol concentration of 0.27 was definitely unsafe and mentally impaired to safely operate a motor vehicle.

Detective Michael Vandenberg was assigned to the Major Accident Investigation Team of the Pomona Police Department and was trained in advanced accident reconstruction. Based on the damage he observed, Detective Vandenberg determined that the front end of the Mercedes collided with the rear of the Honda. Detective Vandenberg also downloaded the data from the Mercedes' on-board computer that monitored the airbags. According to the data, the Mercedes was traveling 126 miles per hour five seconds before the collision, and at one point reached a speed of 129 miles per hour. The data also showed the pedal was pressed to the floor and at full throttle. At the time of the collision, the Mercedes' speed was approximately 127 miles per

hour. At no time during this five-second period were the brakes activated.

The speed limit at the crash site was 45 miles per hour. The Honda was traveling at about 40 to 45 miles per hour at the time of the collision. The force that the 3,700 pound Mercedes exerted on the Honda was equivalent to almost two million pounds of kinetic energy.[8] The force from the collision caused the Honda's trunk compartment to collapse into the rear passenger seat, tore the metal skin from its rivets, and caused the Honda to shear off a wooden power pole. The Honda skidded into some bushes and rolled for 30 feet before coming to a stop and landing on its roof. The force of the impact collapsed the driver's door approximately three feet into the Honda's interior and pushed Vasquez so far to the right that her seat-belted body was almost in the passenger area. The jury viewed surveillance video that showed the collision and the speed of the cars. The jury also heard evidence of a prior incident in which Gardner was speeding, led police on a high speed pursuit, crashed into another car, and was found to be intoxicated. The defense did not seek a judgment of acquittal at the close of the prosecution's case in chief pursuant to section 1118.1.[9] Nor did the defense present any evidence at trial.

III. Verdict and Sentencing

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[8] In comparison, a .45-caliber bullet fired from a gun produces only 369 pounds of kinetic energy.

[9] Prior to sentencing, the defense filed a motion for a new trial based on the trial court's admission of Gardner's statements to the police. This was the only ground noted in the motion. Gardner's statements are not at issue on appeal.

The jury convicted Gardner on all counts. The trial court sentenced Gardner to 18 years to life in state prison, calculated as life in prison for count 1 (§ 187, subd. (a)), plus a consecutive prison term of 3 years for count 3 (Veh. Code, § 10851, subd. (a)). The trial court imposed and stayed prison terms for count 2 (§ 191.5, subd. (a)) and count 4 (Veh. Code, § 2800.3, subd. (a)) pursuant to section 654. The court imposed a concurrent term of six months in jail for count 5 (Veh. Code, § 14601.2, subd. (a)). The court also ordered that Gardner pay $40,136.87 in victim restitution.

STANDARDS OF REVIEW

We review a sufficiency of the evidence claim under the familiar and deferential substantial evidence standard of review. (See *People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In reviewing for substantial evidence, we presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (See *People v. Lee* (2011) 51 Cal.4th 620, 632.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

"When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on

the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion." (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) Whether the evidence presented at trial is direct or circumstantial, the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (See *People v. Manibusan* (2013) 58 Cal.4th 40, 92.) Furthermore, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. (See *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1356.)

"The standard of review on a motion to suppress is well established. The appellate court views the record in the light most favorable to the ruling and defers to the trial court's factual findings, express or implied, when supported by substantial evidence. But in determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, the appellate court exercises its independent judgment. [Citations.] Appellate review is confined to the correctness or incorrectness of the trial court's ruling, not the reasons for its ruling. [Citation.]" (*People v. Superior Court* (*Chapman*) (2012) 204 Cal.App.4th 1004, 1011.)

DISCUSSION

I. Sufficiency of the Evidence Claim

Gardner first contends that insufficient evidence supports his convictions for murder, gross vehicular manslaughter, and

evading a police officer. Specifically, Gardner argues that although Vasquez's death was an element of three of his charges, the prosecution failed to present any evidence that Vasquez actually died. Gardner also claims that even assuming there was evidence of Vasquez's death, "the prosecution failed to present any evidence of her cause of death." We hold that the prosecution presented substantial evidence from which the jury could reasonably infer that Vasquez died and that the collision caused her death.

A. *Vasquez's Death*

On the record here, we conclude that substantial evidence supported the jury's determination that Vasquez died and that the collision caused her death. "It is elementary that in a homicide case the fact that the deceased met his death through the act or agency of the defendant must be proved. It may, of course, be proved by circumstantial evidence." (*People v. Peters* (1950) 96 Cal.App.2d 671, 675 (*Peters*).) Nevertheless, the cause of death is a fact, which, like every other fact, need not be proved, even in a criminal case, if admitted or conceded by [the] defendant." (*Ibid.*) Further, as noted above, the only question for our consideration is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

That standard has been satisfied in this case. We first note that defense counsel expressly conceded that Vasquez had died. For example, during his cross-examination of Sergeant Ewing, defense counsel specifically referred to Vasquez as "[t]he decedent." When beginning his closing argument, defense counsel plainly acknowledged that Vasquez had died by telling

the jury, "I can't help but to think that . . . Easter just passed, and it is a celebration of rebirth. And I think that people forget that it's not just about chocolates or eggs and the money; that before that rebirth, that someone suffered and died. And this part, I just want to say that I have no doubt that Ms. Vasquez—her spirit will live on and that she is at a better place."[10] Indeed, Gardner's defense was not that the prosecution had failed to prove Vasquez died. Rather, defense counsel argued that the prosecution had failed to prove that Gardner demonstrated implied malice; that he intentionally disregarded human life.[11]

As Gardner correctly notes, when proving that Vasquez died, the prosecution did not use testimony from paramedics at the scene, or the pathologist who conducted Vasquez's autopsy, and did not admit Vasquez's death certificate into evidence.

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[10] Gardner correctly observes that statements made by attorneys are not evidence and that the jury was so instructed. However, a defense attorney has "broad authority to stipulate to factual and procedural matters on his client's behalf." (*People v. Palmer* (2013) 58 Cal.4th 110, 118.) Even at trial, counsel may stipulate to the existence or nonexistence of essential facts. (See *People v. Adams* (1993) 6 Cal.4th 570, 574, 577-583.) To that end, evidentiary stipulations have long been recognized as tactical trial decisions which counsel has discretion to make without the express authority of the client. (See *Linsk v. Linsk* (1969) 70 Cal.2d 272, 277.) Here, defense counsel's concession was tantamount to a stipulation.

[11] Conversely, defense counsel appeared to argue that the prosecution failed to prove Gardner actually drove the Mercedes that evening. Gardner does not re-raise this claim on appeal. Furthermore, neither argument posits that Vasquez did not die or that the collision did not cause her death.

Rather, the prosecution relied on contemporaneous recordings from the police officers who responded to the collision. Sergeant Ewing was recorded telling Officer Earl, "I can't tell if I got a pulse or not." Later on, unidentified voices could be heard discussing how Vasquez had no pulse. Sergeant Ewing saw that Vasquez's body had been placed on the side of the street and told his captain that, "[I]t's probably going to be fatal." Sergeant Ewing subsequently told his captain that Vasquez was in fact dead: "And they just covered her up, so I believe they called it. Uh, yeah. She didn't make it. So I wanted to give you a heads up on that, and I'll keep you posted if anything else comes up. [¶] No, I'm fine . . . I shut it down, because as soon as he was taking off, I was like 'He's going to kill somebody.' Well, obviously, he did." Later, Sergeant Ewing could be heard saying, "I've got the [driver's license] for the . . . deceased driver they pronounced. I don't know exactly what time, but she's covered with a sheet right now."[12] Gardner counters that although Vasquez was covered up with a sheet at the collision site, such evidence was insufficient to show Vasquez died because it was "raining at the

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[12] Gardner contends that Sergeant Ewing's "hearsay statements captured on the dash cam recorder are not proof beyond a reasonable doubt that [Vasquez] died from injuries received in the traffic collision with [the Mercedes]." Although defense counsel raised a "general [Evidence Code section] 352 objection" to the post-collision recording from Sergeant Ewing's dash cam, Gardner does not cite any instance where counsel raised a hearsay objection at trial. Thus, any hearsay claim Gardner may be raising now is waived. (See *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726.) Further, the recordings were not inadmissible hearsay. (Evid. Code, § 1241; *People v. Perez* (1978) 83 Cal.App.3d 718, 725-726.)

time the driver was covered." Even if we assume Gardner's hypothesis on appeal is reasonable, as noted above, "when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury." (*People v. Brown*, *supra*, 150 Cal.App.3d at p. 970.) "It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion." (*Ibid*.)

The jury also heard evidence that the Mercedes was traveling at 127 miles per hour when it collided with Vasquez's Honda. The force from the collision was equivalent to almost two million pounds of kinetic energy. In comparison, a .45-caliber bullet fired from a gun produces only 369 pounds of kinetic energy. The force caused the Honda's trunk compartment to collapse into the rear passenger seat and caused the Honda to shear off a wooden power pole. The Honda rolled for 30 feet before coming to a rest on its roof. The impact collapsed the driver's side door approximately three feet into the Honda's interior and pushed Vasquez so far to the right that her seat-belted body was almost in the passenger area. Pomona Police Department Officer Jorge Aleman, who had participated in hundreds of traffic collision investigations, testified that the Honda was one of the most severely damaged vehicles he had seen in his career. The jury also saw photos of the overturned Honda and crash site.

Although, as noted by Gardner, the prosecution could have proven Vasquez's death in several different ways, it is not for us to decide which form of evidence was the superior choice. Nor do we decide if the prosecution was required to present all the evidence at its disposal. (See *People v. Tuthill* (1947) 31 Cal.2d

92, 98 ["There is no compulsion on the prosecution to call any particular witness . . . so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial"]; *People v. Smith* (1959) 174 Cal.App.2d 129, 134.) Rather, we must determine whether the evidence ultimately used by the prosecution sufficiently supported the jury's finding. Based on the recordings capturing police confirming the fatal nature of the collision, as well as the testimony regarding the collision's overwhelming and crushing force, we conclude that the prosecution presented substantial evidence from which the jury could reasonably infer that Vasquez did not survive the collision.

B. *The Collision Caused Vasquez's Death*

It is well established that the principles of causation as they apply to tort law are equally applicable to criminal law and, as in tort law, the defendant's act must be the proximate cause of the injury, death, or other harm constituting the crime. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46-47.) Whether the defendant's conduct was a proximate, rather than remote, cause of death is ordinarily a factual question for the jury unless undisputed evidence reveals a cause so remote that no rational trier of fact could find the needed nexus. (See *People v. Brady* (2005) 129 Cal.App.4th 1314, 1326.) A jury's finding of proximate causation will be not disturbed on appeal if there is "evidence from which it may be reasonably inferred that [the defendant's] act was a substantial factor in producing" the death.[13] (*People v. Scola* (1976) 56 Cal.App.3d 723, 726.)

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[13] Thus, although Gardner queries whether Vasquez "die[d] of a punctured lung, blood loss, heart attack, [or] a preexisting condition," there is substantial evidence from which the jury

That standard has been satisfied in this case. Viewing the evidence in the light most favorable to the prosecution, the evidence established that Vasquez's death would not have occurred but for the collision. The evidence also established that Gardner's conduct was a substantial factor contributing to Vasquez's death. This is not a case in which undisputed evidence revealed a cause so remote that no rational trier of fact could find the needed nexus between Gardner's conduct and Vasquez's death. Therefore, the jury's finding of proximate causation will not be disturbed on appeal.

C. *People v. Peters*

In *Peters*, *supra*, 96 Cal.App.2d 671, a jury convicted the defendant of involuntary manslaughter, despite that fact that, although it was undisputed the defendant stabbed the victim, the prosecution allegedly failed to prove a fact it was required to prove; namely, that the defendant's act caused the victim's death. (*Id*. at p. 675.) Nevertheless, the appellate court affirmed the conviction, holding that the defendant effectively conceded this particular fact. (*Ibid*.) "It is not a matter of failure of proof (in spite of the fact that the district attorney offered no evidence of the cause or time of death), but of assumption by all concerned in the trial[]—judge, jury, prosecution and defense[]—that deceased died from the knife wound inflicted by [the] defendant, and that so far as the cause of death was concerned, it really was not an issue in the case. The only issue was whether [the] defendant could be excused from the stabbing of [the victim], under the claim of self-defense, or under the claim of accident." (*Ibid*.) The

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could conclude that the collision was a substantial factor in Vasquez's death.

appellate court acknowledged that the prosecution had the burden of proving the defendant caused the victim's death; that the defendant was not required to point out to the prosecution its failure to make a case against him; and that the defendant "may sit back and require the prosecution to prove its case and then, and only then, be required to set up his defense." (*Id.* at p. 676.) However, the defendant "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." (*Ibid.*)

The record in *Peters* demonstrated that the defendant had raised self-defense and accident as defenses, but "did not avail himself of the fact that when the prosecution closed its case, it had not proved the cause of death, nor did the defendant avail himself of the defense [that he did not cause the victim's death]." (*Peters*, *supra*, 96 Cal.App.2d at p. 676.) Moreover, "[i]n the instructions which [the] defendant requested, no hint is given that he was not conceding the cause of death." (*Id.* at p. 677.) And in closing argument, defense counsel stated that "[the defendant's] actions, although resulting in disaster to [the victim] as we have all admitted, were in defense of his life and that of [the victim]." (*Id.* at p. 678, italics omitted.) Thus, "[a] reading of the proceedings at the trial . . . clearly shows that at no time was [the defendant] questioning either that the knife wound caused [the victim's] death, or that that fact had not been established or was an issue to be resolved by the jury. It also shows that [the] defendant was conceding the cause of death." (*Id.* at p. 676.) Under these circumstances, the appellate court concluded: "It would be a miscarriage of justice to set aside a verdict found by the jury on all issues which [the] defendant at the trial believed necessary to be submitted to the jury. After all, a criminal case

or court proceeding is not a game in which participants may be misled by a defendant's attitude and conduct at the trial, and then the verdict be set aside on appeal, because [the] defendant contends there was no proof of a fact which he had conceded, not by express word, but by conduct." (*Id.* at p. 677.)

Here, Gardner expressly conceded a fact essential to the prosecution's case. Although statements made by counsel are not evidence (*People v. Arnold* (1926) 199 Cal. 471, 486), that does not necessarily prevent its consideration as part of the whole record. (*Peters*, *supra*, 96 Cal.App.2d at p. 676 [specifically citing defense counsel's opening statement and closing argument in finding a concession].)[14] Furthermore, it is "well established that the defendant is bound by the stipulation or open admission of his counsel and cannot mislead the court and jury by seeming to take a position on issues and then disputing or repudiating the same on appeal." (*People v. Pijal (*1973) 33 Cal.App.3d 682, 697.) While a criminal defendant is entitled to the benefit of every reasonable doubt, the record here shows that neither Gardner, nor any other participant at trial, expressed *any* doubt that the collision had caused Vasquez's death. (See *Peters*, *supra*, 96 Cal.App.2d at p. 678.) Rather, defense counsel argued that Gardner's conduct did not reveal an intentional disregard for human life. Taken together, the prosecution evidence and its reasonable inferences, in addition to the defense concession,

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[14] On appeal, Gardner contends *Peters* is distinguishable because, unlike Gardner, the defendant in *Peters* put on an affirmative defense and thus supplied the requisite proof. However, the holding in *Peters* did not hinge solely upon the defendant's decision to testify. Rather, the appellate court considered the record as a whole, as we do here.

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* (1995) 31 Cal.App.4th 716, 725.) Indeed, to set aside the jury's verdict under the circumstances present in this case would allow Gardner to treat the court proceeding like a game and result in a miscarriage of justice.

II. Motion to Suppress Claim

Gardner also argues the trial court committed reversible error by refusing to suppress the evidence from his warrantless blood draw. We disagree. The trial court's finding that Gardner freely and voluntarily consented to the blood draw is supported by substantial evidence.

A. *Motion Hearing*

Gardner moved to suppress evidence resulting from a warrantless blood draw while the prosecution argued that a warrant was unnecessary because Gardner consented to the draw. Officer Rivera testified at the suppression hearing. Officer Rivera testified that Gardner was taken to the Los Angeles County-USC Medical Center, where he was arrested. By the time Officer Rivera arrived at the hospital, Gardner had been there for about 30 minutes and was on a gurney.

Officer Rivera told Gardner that because they were at a hospital, the only choice they had to take his blood sample was a blood draw. Officer Rivera asked Gardner if that was "okay," and Gardner did not object. Officer Rivera could not remember if Gardner verbally communicated his consent but said that Gardner had "[a]bsolutely" consented to the draw. Officer Rivera

believed that Gardner had indicated his consent by nodding his head, although the officer could not actually confirm this was how Gardner had physically demonstrated his consent.

A nurse then drew Gardner's blood into a vial. According to Officer Rivera, Gardner was awake at this time but offered no resistance to the blood draw. Gardner neither commented on the blood draw nor made any movements to resist it. Officer Rivera testified that he was familiar with the DS-367 form, which is a Department of Motor Vehicles form a law enforcement officer completes when arresting an individual for driving while under the influence of alcohol or drugs. If the arrestee refuses to have his or her blood drawn, then the officer reads the "chemical refusal admonishment" portion of the form to that person. If the arrestee does not so refuse, then the officer fills out the front of the form.

Officer Rivera testified that he was also familiar with the Los Angeles County "consent to a blood draw" form. Officer Rivera advised Gardner of his implied consent to the blood draw. A box was checked on the consent form indicating that Officer Rivera had advised Gardner about the blood draw, although Gardner did not sign this, or any other, form presented to him by Officer Rivera.[15] Although Officer Rivera could not remember

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[15] At trial, Officer Rivera acknowledged that he had checked the box labeled "Patient verbally consented to blood draw." However, Officer Rivera also testified that Gardner did not say anything after he was advised a blood draw was necessary but rather physically demonstrated his consent. As described by Officer Rivera at trial: "I believe it was a head nod or—I don't recall, but it was some sort of indication to me that he was not objecting to the blood draw."

whether Gardner provided verbal consent, the officer believed that, in DUI cases, consent to a blood draw could be given verbally or by "body behavior" or a "body motion." Officer Rivera confirmed he did not obtain a search warrant for the blood draw. However, had Gardner refused or not submitted to the blood draw, Officer Rivera said he would have considered this an exigent circumstance and sought a search warrant.

The trial court found that Gardner had consented to the blood draw. "[Gardner] was awake. He was advised of the desire of this officer to get a blood sample for him to measure the alcohol content of his blood. There is nothing in the record to indicate a denial of that consent or any resistance to the draw. He appears to have been compliant, and there's nothing to suggest that the taking was anything other than with his consent. The motion to preclude the presentation of the evidence relating to the draw and its introduction, it is overruled."

B. *Applicable Law*

On appeal, the prosecution argues that the blood draw was conducted with Gardner's consent, citing the principle "that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219 [93 S.Ct. 2041, 36 L.Ed.2d 854]; see also *People v. Panah* (2005) 35 Cal.4th 395, 466 [search warrant not needed when voluntary consent to search has been given].) Whether consent was voluntarily given is a question of fact, which depends on the "totality of the circumstances" of the individual case. (See *U.S. v. Drayton* (2002) 536 U.S. 194, 206-207 [122 S.Ct. 2105, 153 L.Ed.2d 242]; *Schneckloth*, *supra*, at pp. 248-249; *People v. James* (1977) 19 Cal.3d 99, 106.) A court determines whether an

officer's belief that he or she had consent to a search or seizure is objectively reasonable under the circumstances; the inquiry is what a reasonable person would have understood by the exchange between the officer and the person providing consent. (*Florida v. Jimeno* (1991) 500 U.S. 248, 251-252 [111 S.Ct. 1801, 114 L.Ed.2d 297]; *People v. Jenkins* (2000) 22 Cal.4th 900, 974-976.)

Consent may be express or implied by conduct, including nonverbal conduct. Evidence Code section 125 defines " '[c]onduct' " to include "all active and passive behavior, both verbal and nonverbal." Evidence Code section 225 defines a " '[s]tatement' " as "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." Nonverbal conduct may qualify as a "statement" if the conduct was intended by the declarant as a substitute for oral expression.[16] (*In re Dorinda A.* (1992) 10 Cal.App.4th 1657, 1663; see *People v. Meza* (1987) 188 Cal.App.3d 1631, 1646.)

Nevertheless, consent cannot be implied from a defendant's mere failure to object to a search. (*People v. Superior Court* (1970) 10 Cal.App.3d 122, 127.) Therefore, when the prosecution relies on consent to justify a warrantless search or seizure, it bears the "burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority."

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[16] See, e.g., *People v. Harrington* (1970) 2 Cal.3d 991, 995-997; *People v. Guyette* (1964) 231 Cal.App.2d 460, 464 [subject tossed police officer key to enter premises, implying consent to enter].

(*People v. James*, *supra*, 19 Cal.3d at p. 106; see *People v. Zamudio* (2008) 43 Cal.4th 327, 341.)

Thus, our analysis here involves distinguishing consent from assent. (See *People v. Fields* (1979) 95 Cal.App.3d 972, 977.) " ' "Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another [while] [Assent] means mere passivity or submission, which does not include consent." ' " (*Ibid.*) Consequently, lack of vocal or physical resistance cannot constitute consent, especially when it reveals mere acquiescence to lawful authority. (See, e.g., *Florida v. Royer* (1983) 460 U.S. 491, 497 [103 S.Ct. 1319, 75 L.Ed.2d 229]; *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at pp. 229-230; *Bumper v. North Carolina* (1968) 391 U.S. 543, 548-549 [88 S.Ct. 1788, 20 L.Ed.2d 797].)

Here, however, the trial court was presented not with passive acquiescence but rather with affirmative physical conduct demonstrating Gardner's consent. According to Officer Rivera, before the blood draw, Gardner indicated his consent by nodding his head in response to the officer's statements or by engaging in some kind of visibly demonstrative conduct with the officer. Officer Rivera's description of Gardner's seemingly passive behavior applies only to his conduct *after* the blood draw had begun, when Gardner neither commented on the draw nor made any movements to resist it. Whatever the precise physical gesture used to indicate consent, Officer Rivera testified that Gardner "[a]bsolutely" consented to the blood draw. The trial court was entitled to, and did, credit the officer's testimony and we do not reevaluate this determination on appeal. (See *People v. Reed* (2018) 4 Cal.5th 989, 1006-1007.) " ' "Conflicts and even

testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.". . .' [Citation.]" (*People v. Harris* (2013) 57 Cal.4th 804, 849.) Thus, substantial evidence supports the trial court's determination that Gardner freely and voluntarily consented to the blood draw.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.