

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE CARLOS VILLANUEVA,

Defendant and Appellant.

D057712

(Super. Ct. No. SCS228201)

APPEAL from a judgment of the Superior Court of San Diego County,  
Stephanie Sontag, Judge. Affirmed.

A jury convicted Jose Carlos Villanueva of assault with a deadly weapon and by means of force likely to cause great bodily injury, and two counts of felony child endangerment. The jury also found true that Villanueva personally used a deadly weapon (a voltage meter) in the commission of the assault. He appeals, contending: (1) the evidence was insufficient to establish felony child endangerment; (2) the trial court abused its discretion by denying his request to reduce the child endangerment

convictions to misdemeanors; and (3) the prosecutor committed prejudicial misconduct. We reject Villanueva's contentions and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *People's Case*

Villanueva had two children with X.R. and dated her for several years, but the couple separated in 2007. That same year, X.R. entered into a romantic relationship with Villanueva's cousin, Osvaldo Flores. In February 2009, Villanueva, who did not know that X.R. was dating Flores, approached her car in a parking lot. X.R. was in the car orally copulating Flores at the time. After Villanueva opened the door and attempted to punch Flores, Flores put the car in reverse and tried to drive off. Villanueva tried to hold on to the car, but eventually fell to the ground and was injured.

Two months later, Villanueva contacted X.R. to make arrangements to pick up his children. Flores used X.R.'s car and brought the children to the park where Villanueva agreed to pick them up. The children, who were two and four years old at the time, were seated in a car seat and booster seat in the back of the car. Villanueva approached Flores's vehicle, opened the rear door on the driver's side, and started to unbuckle the seat belt on one child. Villanueva then suddenly started stabbing Flores with a voltage meter that had a probe over six inches long.

Villanueva first stabbed Flores in the hand as Flores attempted to protect his neck and face. As Villanueva continued to stab Flores, Villanueva's brother, Luis, entered the car through the front passenger door. Luis also tried to stab Flores and

attempted to prevent Flores from putting the car into gear. Flores was able to put the car into gear and accelerated to try to get the men off of him. As the car moved forward, Villanueva continued to stab Flores in the neck, back and head. The car went onto the grass in the park and then down into a ditch.

Upon impact, Villanueva was thrown toward Luis and the car's air bag deployed. Flores got out of the car and ran toward the street to try to get away. As he looked back, Flores saw that Villanueva was chasing him. Villanueva caught up to Flores and the men had another confrontation in the middle of the street. Villanueva got Flores to the ground and continued to stab him.

Multiple people witnessed parts of the altercation. Marsha Downs was at the park when she saw a car go down into the ravine. She observed two men running from the ravine and two children following one of the men. The children were on the sidewalk jumping up and down and crying. Mari Beth Meyers was at her house overlooking the park when she saw two men fighting in the street. She saw the children standing "just off the curb in the street" facing the fight. Migdalia Monroy was driving her car when she saw two children going on and off the sidewalk. Monroy was alarmed because there was nobody with the children and they were running in and out of the street. Monroy eventually observed a man motion to a parked car to come over. The man grabbed the children and put them in the back seat. After the man got into the car, he made a gesture to the driver indicating that they should go.

Chula Vista Police Officer Elman Gashymov responded to the scene. Officer Gashymov saw Flores stumbling and then eventually lay down in the grass. Flores was covered in blood and had 10 to 15 puncture wounds on his back. He told Officer Gashymov that he had been stabbed with a voltage meter.

### *Defense Evidence*

Villanueva testified on his own behalf. He stated that he made arrangements with X.R. to pick up his children so that he could take them fishing. Villanueva and Luis drove to the park and backed into a parking spot. A few minutes later, Villanueva saw X.R.'s car approach. As Villanueva walked up to X.R.'s car, he noticed that Flores was the driver. Villanueva opened the back car door and proceeded to unbuckle one child's seat belt. When Villanueva started to unbuckle the second child, Flores accelerated the car and Villanueva jumped in. The car hit the embankment, Villanueva was thrown to the front, and Flores started punching him. As he blocked Flores's punches, Villanueva noticed a tool underneath Flores's legs on the driver's side of the vehicle and grabbed it. Villanueva started swinging the tool and it caught Flores in the arm.

Flores got out of the car and Villanueva told him to "come back and fight like a man." The men proceeded to the street where they punched at each other. At this point, Villanueva's children were standing in the grass next to the street. Villanueva went over to his children, his brother pulled up in a car, and they all left together, leaving Flores behind.

X.R. testified that she recognized the voltage meter and had previously seen one like it in her car. She also stated that the voltage meter was in the backseat of her car when Flores took the car to the park.

## DISCUSSION

### I. *Sufficiency of the Evidence*

Villanueva argues the evidence was insufficient to support his convictions for felony child endangerment because there was no evidence that either child was harmed or put in circumstances or conditions that were likely to produce great bodily injury or death. We disagree.

#### A. *Standard of Review*

When a defendant challenges the sufficiency of the evidence on appeal, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Pugh* (2002) 104 Cal.App.4th 66, 72.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

The determination of a witness's credibility and the truth or falsity of the facts upon which such determination depends is within the exclusive province of the

jury. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) If the circumstances reasonably justify the jury's findings, our opinion that the circumstances might also be reasonably reconciled with a contrary finding does not warrant reversal of a conviction. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

#### B. *Analysis*

"Public policy supports the protection of children against risks they cannot anticipate. The felony child abuse statute 'was enacted in order to protect the members of a vulnerable class from abusive situations in which serious injury or death is likely to occur.'" (*People v. Toney* (1999) 76 Cal.App.4th 618, 622.)

Felony child endangerment occurs when "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, . . . willfully causes or permits the person or health of [any] child to be injured, or 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), undesignated statutory references are to this code.)

Although section 273a, subdivision (a), uses the word "willfully," the crime is one of general criminal intent or criminal negligence and does not require malice or specific intent. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1224; *People v. Hansen* (1997) 59 Cal.App.4th 473, 478.) "Criminal negligence 'means that the defendant's conduct must amount to a reckless, gross or culpable departure from the ordinary

standard of due care; it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life.'" (*People v. Odom* (1991) 226 Cal.App.3d 1028, 1032; see also *People v. Valdez* (2002) 27 Cal.4th 778, 788, 791 (*Valdez*)). A finding of criminal negligence is made by applying the objective test of whether a reasonable person in defendant's position would have been aware of the risk involved. (*Valdez*, at pp. 790-791.) If a reasonable person in defendant's position would have been aware of the risk involved, defendant is presumed to have had such an awareness. (*Ibid.*) "Criminal negligence may be found even when a defendant acts with a sincere good faith belief that his or her actions pose no risk." (*People v. Rippberger* (1991) 231 Cal.App.3d 1667, 1682; *Valdez*, at p. 785 [approving cases that require only proof of criminal negligence].)

Here, the jury could have concluded that Villanueva committed felony child endangerment by either stabbing Flores in a moving vehicle or leaving his children unsupervised in the street. Viewed in the light most favorable to the judgment, the evidence showed that Villanueva unbuckled the children's seat belts and then stabbed Flores with a voltage meter. Even after the car started to move forward, Villanueva continued his attempts to stab Flores in the neck, back and head. The car then crashed into a ditch. A reasonable person in Villanueva's position would have been aware of the risks involved in stabbing the driver of a moving vehicle. (*Valdez, supra*, 27 Cal.4th at pp. 790-791.) Moreover, Villanueva was aware of Flores's propensity to accelerate vehicles to try to get away because a similar situation

occurred in February 2009, resulting in injury to Villanueva. By stabbing the driver of a moving vehicle, Villanueva willfully placed his unrestrained children who were in the backseat of the car at risk of great bodily harm. Thus, even without considering Villanueva's conduct of leaving his children unsupervised in the street, we conclude substantial evidence supports Villanueva's convictions for felony child endangerment.

## II. *Denial of Request to Reduce Child Endangerment Offenses to Misdemeanors*

### A. Background

Prior to sentencing, Villanueva requested that the child endangerment convictions be reduced to misdemeanors. Villanueva argued that there was no showing that he acted in a reckless manner that would likely result in death or great bodily injury because he did not drive the car down into the ditch and the jury found the stabbing took place at the bottom of the hill. The trial court disagreed with Villanueva's characterization of when the stabbing took place and also noted that it was particularly troubled that after the crash, Villanueva chased after the victim rather than attending to his children who were unrestrained in the street and in "grave danger." The trial court then denied Villanueva's request.

### B. Analysis

Villanueva asserts the trial court abused its discretion when it refused to reduce his "wobbler" offenses of child endangerment to misdemeanors. Specifically, he contends that allowing his children to be in the street does not constitute felony

child endangerment; thus, the court erred in using that fact to deny his request to reduce the crimes to misdemeanors. We disagree.

The decision whether to reduce a "wobbler" to a misdemeanor is one of the sentencing choices within the trial court's broad discretion. (§ 17, subd. (b).) The party attacking the sentence must show that the decision was irrational or arbitrary; in the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) A sentence will not be reversed because reasonable people might disagree with the trial court's decision. (*Ibid.*) In deciding whether to exercise its discretion, the trial court should consider several factors, including the nature and circumstance of the current offense, and the defendant's attitude, traits or character and history. (*Id.* at pp. 981-982, 978.)

Applying these standards, we find no abuse of discretion. Villanueva's argument is premised on the notion that leaving his children unsupervised in the street as he chased after and continued to fight with Flores does not constitute felony child endangerment. However, the trial court found that such conduct put the children in "grave danger." Based on the evidence, we agree with the trial court that Villanueva put his children at risk of great bodily injury. At least two witnesses saw the children unsupervised in the street. One of the witnesses was particularly concerned because the children were running in and out of the street, which was busy at the time. Villanueva displayed no regard for his children's safety; rather, he focused on chasing after Flores and continuing the fight. We conclude this conduct

put the children at risk of great bodily harm. Thus, Villanueva failed to meet his burden of showing that the trial court's decision was irrational and arbitrary, and we find no abuse of discretion.

### III. *Alleged Prosecutorial Misconduct*

#### A. Background

At trial, Villanueva claimed that he found the tool he used to defend himself underneath Flores's legs on the driver's side of the vehicle. To support this claim, Villanueva intended to introduce photographs establishing that the fuse box in the car was open. The prosecution, however, argued that the photographs were misleading because the initial pictures taken of the car during processing showed the fuse box closed. Villanueva's counsel complained that she was not previously shown the photographs with the closed fuse box. Thereafter, David Garber, a forensic specialist with the Chula Vista Police Department, testified that he processed the car after it was recovered from the park. Garber stated that the cover to the fuse panel was closed when the vehicle first came to him and that he later opened it.

During closing argument, the prosecutor argued:

"[D]efense [Exhibit] A pretty much shows what I'm showing you now, the little, for lack of a better term, instrument dangling out of the fuse box. Okay. And the defense has this picture and they're going to come up here and tell you this thing was out. The victim was working on the car with that fuse tester. That's why this thing was out and that's why the weapon was right there in the car. They're going to say the -- the defendant didn't introduce it. It was in the car all along. That's what they're

going to say and they have this picture to try to argue that fact to you.

"Well, let's talk about that. We heard testimony from Mr. Garber that when the car was taken to the station -- to the impound lot -- I'm sorry -- not the impound lot, but the place where it got processed, not where it was stored, but the place where it was processed, this little box was closed. That's what he said. And then he said I opened it. And he took pictures of him opening it."

Villanueva objected to the argument and the court deferred discussion about the objection. The prosecution then argued that although defense counsel would argue that Garber was biased or not reliable, the jury should believe Garber because the evidence supported his claim that the fuse box was closed.

At a break in the prosecutor's argument, the trial court addressed Villanueva's objection. Villanueva argued that the defense did not realize the fuse box was closed during the incident until trial because certain photographs were not provided by the prosecution. Thus, Villanueva argued that it was improper for the prosecution to suggest that the defense would claim the fuse box was open because the evidence now demonstrated it was closed. The court stated that it was not sure why the prosecution made the argument concerning the defense's stance on the fuse box because it was clear that the defense had abandoned its position that the fuse box was open at the time of the incident. Villanueva moved for a mistrial, but the court denied it and instead decided to admonish the jury that closing argument is not evidence. In that regard, before the prosecution finished its closing argument, the trial court made the following statement to the jury:

"I just want to remind you before we get started, again, ladies and gentlemen, that argument is just that. It's just what the different sides believe the evidence shows and how the law I gave you applies to the evidence. It is not -- don't listen to the argument and then expect that the other side is going to -- to -- let's say there is -- was this morning an argument that made mention of an anticipated argument by the defense. It is not necessarily going to be made. We're going to wait. We're going to hear whether there is an argument being made. But don't anticipate that argument has to be made because it was suggested by the prosecution. Don't expect it to have to be refuted by the defense just because it was suggested by the prosecution that it might be made. Just listen to each side, what they say they believe the evidence shows, how the law affects the evidence, and, of course, it's ultimately your determination."

After the jury's verdicts, Villanueva moved for a new trial, contending the prosecutor committed misconduct by failing to disclose relevant photographs and by arguing that the defense would claim the fuse box was open when it was irrefutably closed. The court denied the motion, stating that although the discovery issue was troubling, the error did not result in a miscarriage of justice because the photographs were not exculpatory. The court also noted that Villanueva was acquitted on an attempted murder charge and that there was not a reasonable probability that the outcome would have been different had the photographs been disclosed because there was overwhelming evidence that Villanueva used a voltage meter to stab Flores. As to the prosecution's argument concerning the fuse box, the trial court stated that its admonition to the jury was sufficient.

#### B. Analysis

Villanueva argues the prosecution committed prejudicial misconduct by attributing an argument to defense counsel that was irrefutably false. We disagree.

Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Earp* (1999) 20 Cal.4th 826, 858; *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) The defendant need only show the prosecutor's misconduct prejudiced his right to a fair trial, regardless of whether the misconduct was intentional or inadvertent. (*People v. Hill* (1998) 17 Cal.4th 800, 822.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) When the claim focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284; *People v. Frye* (1998) 18 Cal.4th 894, 970.) The defendant has the burden of showing the existence of prosecutorial misconduct. (*People v. Price* (1991) 1 Cal.4th 324, 430.)

Here, even after Villanueva abandoned his claim that the fuse box in the car was open at the time of the incident, the prosecutor commented that defense counsel would raise that argument and that the evidence showed it was false. While a prosecutor must not cast aspersions on defense counsel (*People v. Hill, supra*, 17 Cal.4th at p. 832), the argument at issue in this case does not rise to the level of error under state or federal law. The prosecutor's argument was not "'so egregious'" as to render the trial fundamentally unfair, nor was there "a reasonable likelihood" the jury

construed or applied the remarks in an objectionable way. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) Rather, the jury convicted Villanueva of assault with a deadly weapon, a crime of which there was overwhelming evidence. Moreover, the court adequately admonished the jury regarding its consideration of counsel's arguments and that those arguments are not determinative. We presume the jurors understood and followed the court's admonishment. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

#### DISPOSITION

The judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.