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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NORMAN J. DOLLY, Defendant and Appellant.	B169971 (Los Angeles County Super. Ct. No. YA046623)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jessie Rodriguez, Judge. Affirmed.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan and Peggie Bradford Tarwater, Deputy Attorneys General, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 976(b) and 976.1, only the Introduction, Facts, part I of the Discussion, the Disposition, and the Dissent are certified for publication.

INTRODUCTION

In case No. YA052124, a jury convicted appellant Norman J. Dolly of one count of possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1).[1] In a bifurcated proceeding, the trial court found true the allegation that appellant had suffered a prior strike conviction. The trial court sentenced appellant to the midterm of two years, doubled to four years because of the strike conviction.

In case No. YA046623, appellant's probation on a Health and Safety Code section 11359[2] violation was revoked after a hearing. The court sentenced him to one-third the middle term of eight months, to be served consecutively to his sentence in case No. YA052124.

Appellant appeals on the grounds that: (1) appellant's motion to suppress the gun found in the car should have been granted; (2) the trial court should have excluded appellant's statements at the sheriff's station, which were made after an arrest warrant had been issued, under coercive circumstances, and without *Miranda*[3] warnings; (3) the prosecution improperly used a peremptory challenge to exclude one African-American woman from the jury after the only other African-American had been excused for cause and no others remained on the jury; (4) the prosecutor's misconduct during closing argument requires reversal of appellant's conviction; and (5) under *Blakely v. Washington* (2004) 542 U.S. ___ , 124 S.Ct. 2531 (*Blakely*), appellant's right to a jury trial was violated when the trial court imposed a consecutive eight-month term in case No. YA046623.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

[2] Health and Safety Code section 11359 prohibits the possession of marijuana for sale.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

FACTS

Officer Frank Dominguez and his partner, Officer Goldstein, of the Los Angeles Police Department were on patrol on April 17, 2002, at approximately 3:30 p.m. when they received a radio call. A redacted tape recording of the 911 call was played to the jury at appellant's trial. The recording indicated that the caller had seen a man with a gun. The radio call described a male Black with a light complexion and a bandage on his left arm sitting inside a Nissan Maxima, which was possibly gray. The man had the gun in his pocket. The caller said he did not want to be identified at the scene. The caller telephoned again to say that the Nissan was black.

The officers arrived at the location described by the caller, Ninth Avenue and Jefferson Boulevard, in two to three minutes. When he arrived, Officer Dominguez saw appellant seated in the driver's seat of a black Nissan Maxima. Appellant wore a cast on his left arm. The officers conducted a felony stop by pulling behind the car and, with guns drawn, told the occupants to exit the car. In addition to appellant, a front seat passenger and a rear passenger were inside the car. Neither of the passengers wore a cast. While the occupants were getting out of the car, two backup units arrived. A search of the car yielded a loaded blue steel revolver, which was found under the front passenger seat. Appellant was arrested, as was the front passenger (on a different charge).

Detective Delicia Hernandez of the Los Angeles County Sheriff's Department interviewed appellant at the Lennox sheriff's station on June 10, 2002. Hernandez testified at appellant's trial that she asked appellant about the gun that was found on April 17, 2002, inside the car. Although he initially denied having the gun, appellant stated "that he had, in fact, had possession of the gun at one time and that the gun had belonged to him." He said he bought it on the street through friends and had it at his home for safety reasons. He said that, prior to the arrival of the police, he had given it to a man who was in the car with him. Later in the interview, he said he had sold it to the man the evening before. The interview was videotaped, and a transcript was prepared. Portions of the transcript were read during the questioning of Hernandez.

DISCUSSION

I. Motion to Suppress

A. Appellant's Argument

Appellant argues that the trial court committed reversible error in denying his motion to suppress the gun found inside the car as part of a warrantless search because the uncorroborated 911 call was not a valid basis to search the car, which was legally parked.

B. Proceedings Below

At the hearing on the motion to suppress, Officer Dominguez testified that he and Officer Goldstein responded to a radio call at Ninth Avenue and Jefferson Boulevard. The call gave a description of a male Black wearing a cast on his left arm sitting "in a possible gray Nissan Maxima." The caller said the car was parked on the north side of the street. When asked if the dispatcher told him how the caller knew that the male Black had a gun, Dominguez stated that the caller said he had been threatened with a gun. Dominguez arrived at Ninth Avenue and Jefferson Boulevard within two or three minutes after the call and saw appellant sitting in the driver's seat of a black Nissan Maxima wearing a cast on his left arm. The officers proceeded with the felony traffic stop, which led to the discovery of the gun as related in the facts section of this opinion. Dominguez testified that the caller did not wish to be identified, and Dominguez was unaware if the caller was a male or female or where the call originated from. He knew that the call was created at 3:20 p.m., and that he arrived a few minutes after that. Unlike appellant, neither of the passengers had a bandage or cast. After Dominguez concluded his testimony, the prosecutor entered the tape recording of the 911 call into evidence and played it for the court.

During argument, the defense relied on the case of *Florida v. J.L.* (2000) 529 U.S. 266 (*J.L.*), which held that the police must have independent corroboration of an

anonymous tip before a suspect can be detained for an investigatory *Terry* stop.[4] (*J.L.*, at pp. 270-272.) The trial court ruled that the issue of the anonymous tipster need not be reached because appellant had a search and seizure condition as a term of probation.

C. Relevant Authority

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The guiding principle for evaluating the actions of police officers is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." (*Terry*, *supra*, 392 U.S. at p. 19.) "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." (*Id*. at p. 22.) There must be "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Id*. at p. 21, fn. omitted; *People v. Glaser*, *supra*, 11 Cal.4th at p. 363.)

D. Motion to Suppress Properly Denied

We first recognize, as does respondent, that the trial court's reason for justifying the search is invalid, since the responding officers were not aware of appellant's probation status or condition. After the ruling in this case, the California Supreme Court held in *People v. Sanders* (2003) 31 Cal.4th 318 that an otherwise unlawful search of an adult parolee could not be justified by a parole search condition of which the police were unaware at the time of the search. (*Id*. at p. 335.) Appellate courts have subsequently held that otherwise unlawful probation searches cannot be justified by a search condition when the officer is unaware of the individual's probation status. (See *People v. Hester*

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4 *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*).

(2004) 119 Cal.App.4th 376, 402-405; *People v. Bowers* (2004) 117 Cal.App.4th 1261, 1270-1271.)

On appeal, as in the trial court, appellant relies on the aforementioned case of *J.L.*, *supra*, 529 U.S. 266. In that case, the United States Supreme Court held that an anonymous tip communicated by telephone was insufficient justification for a temporary detention and patdown search. The tipster in *J.L.* identified the person alleged to be carrying a gun only as a Black male in a plaid shirt at a particular bus stop. (*Id*. at pp. 268, 274.)

The entire summation of facts in *J.L.* was as follows: "On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. [] So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip--the record does not say how long--two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males 'just hanging out [there].' [] One of the three, respondent J.L., was wearing a plaid shirt. [] Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. [] One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing." (*J.L.*, *supra*, 529 U.S. at p. 268.)

In finding the search was invalid, the Supreme Court explained, "All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." (*J.L.*, *supra*, 529 U.S. at p. 271.) The Supreme Court distinguished *J.L.* from its prior decision in *Alabama v. White* (1990) 496 U.S. 325, 329-333 (*White*), where it held that there was sufficient corroboration of information provided by an unknown informant to permit a temporary detention. (*J.L.*, at p. 270.) The Supreme Court stated, "As we have recognized, . . . there are situations in which an

anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' [Citation]. The question we here confront is whether the tip pointing to J.L. had those indicia of reliability. [¶] In *White*, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. [Citation.] Standing alone, the tip would not have justified a *Terry* stop. [Citation.] Only after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine. [Citation.] Although the Court held that the suspicion in *White* became reasonable after police surveillance, we regarded the case as borderline. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. We accordingly classified *White* as a 'close case.' [Citation .]" (*J.L.*, *supra*, 529 U.S. at pp. 270-271.) The court stated that the tip in *J.L.* "does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*Id.* at p. 272.)

In *People v. Saldana* (2002) 101 Cal.App.4th 170 (*Saldana*), Division Four of this court followed *J.L.* and found that an uncorroborated anonymous tip was insufficient to justify the search and seizure of the defendant. (*Saldana*, at p. 172.) In that case, a deputy sheriff was informed that an anonymous tipster calling from a pay phone had said that a gray Ford Taurus station wagon with a license ending in "319" was parked in a certain restaurant's parking lot, and the driver was carrying a gun and a kilo of cocaine. The same report had been made from the same telephone to the San Gabriel Police Department 30 minutes earlier. (*Ibid.*) The deputy located the wagon in the described parking lot and determined that Saldana was the registered owner. He also ascertained that a person at Saldana's address was wanted on a misdemeanor warrant. The deputy

waited until he saw the defendant exit the restaurant and enter the station wagon, whereupon a felony stop was executed. (*Id*. at p. 173.) Saldana denied there was a gun in his car. Police found a plastic trash bag containing marijuana under one of the station wagon's seats, but no gun. (*Saldana*, at p. 173.)

The *Saldana* court stated that the defendant's case was like that of *J.L.* The tip was anonymous and contained no internal indicia of the basis for, or the reliability of, the information given by the tipster. There was no predictive information susceptible to corroboration. The corroboration of the car type and its location was not sufficient, since the criminal element of the tip was not corroborated. In addition, the existence of the four-year-old warrant for a person with a different name than Saldana was not corroboration of the anonymous tip. (*Saldana, supra*, 101 Cal.App.4th at p. 175.) The court concluded that the felony stop that led to the search of the wagon and seizure of the evidence was not justified because the tip was uncorroborated by any observations or information available to the deputies. (*Id*. at p. 176.)

Although the instant case is also a close one, we discern sufficient differences between appellant's case and those of *J.L.* and *Saldana*, and we conclude that the search based on the anonymous tip was justified here.

First, unlike in *J.L.*, there was an audio recording of the 911 call, which this court has heard. During the tape, an obviously upset man told the 911 dispatcher that he had been threatened with a gun. He said, "A guy just pulled a gun on me. I want to remain anonymous," and "He's not a police, he shouldn't be walking around here having fucking guns and pulling them on people." Furthermore, the fact that the call was made to the 911 emergency line is itself distinct from the situation in *J.L.* In that case, the anonymous caller merely telephoned the Miami-Dade police. As stated in *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170 (*Terry-Crespo*), a 911 call is "entitled to greater reliability than a tip concerning general criminality because the police must take 911 emergency calls seriously and respond with dispatch. . . . Police delay while attempting to verify an identity or seek corroboration of a reported emergency may prove costly to public safety and undermine the 911 system's usefulness. We do not believe that the

Constitution requires that result." (*Id*. at p. 1176.) In *Terry-Crespo*, as in the instant case, the 911 caller reported that a man had threatened him with a .45-caliber handgun three minutes earlier, and he described the suspect and the area in which the threat had occurred. (*Id*. at p. 1172.)

Additionally, as in *Terry-Crespo*, the call "evidenced first-hand information from a crime victim laboring under the stress of recent excitement." (*Terry-Crespo*, *supra*, 356 F.3d at p. 1176.) Here, the urgency in the caller's tone was evident on the recording. The caller said the man had a gun in his pocket, and "he just pulled it on me right now, man." He added that the man mentioned a gang name and he felt the man was going to shoot him "right there that minute." He said that he knew it was not right for him to "snitch" as far as the streets were concerned, but he was not from the area and had no one to defend him. He did not want to talk to the police because "if they find out I am snitching they're gonna kill me around here." The caller called back to say he had driven by the car again to make sure it was still there, and he realized it was black rather than gray. He reiterated that he wanted to remain anonymous, but he gave his name as "Drew." Thus, the 911 caller in this case, like the caller in *Terry-Crespo*, sought immediate police assistance and gave a description of his assailant. "[P]olice may ascribe greater reliability to a tip, even an anonymous one, where an informant 'was reporting what he had observed moments ago,' not stale or second-hand information." (*Terry-Crespo*, *supra*, at p. 1177; see also *Illinois v. Gates* (1983) 462 U.S. 213, 233-234 [in determining overall reliability of a tip, a deficiency in one factor may be compensated for by a strong showing in another--a detailed description of wrongdoing observed firsthand gives greater weight to an unknown informant's tip].)

Also different from *J.L.* is that the police response time to the tip is known, and it was very brief--two or three minutes. In addition, the 911 caller explained *how* he knew the man had a gun. The man had threatened him with it, and the caller had feared for his life. The basis of the informant's knowledge is a relevant factor to be weighed in assessing whether the totality of the circumstances generates reasonable suspicion. (*White*, *supra*, 496 U.S. at p. 329.) Moreover, the details of the car, its location, and the

description of the man in the driver's seat, who had pulled the gun, were precise. The caller stated the car was parked on the north side of Jefferson Boulevard at Ninth Avenue near the can recycling center. He described the car as a gray Nissan Maxima. He said that the person who pulled the gun was light-skinned, wore a bandage on his hand, and was in the driver's seat. This information provided the police with specific, articulable facts that supported "'a man of reasonable caution in the belief'" that the action he took was appropriate. (*Terry*, *supra*, 392 U.S. at p. 22.)

It is true that the caller in this case was unable to provide the predictive behavior that corroborated the illegality of the suspect's actions and that was deemed so important in *White* and *J.L.* We believe, however, that it would be unreasonable to require a person such as the caller here--who was a victim rather than an informant or tipster in the usual sense--to predict the future actions of the man who had pulled a gun on him, except to verify and tell police that the man was still sitting in the car. (See *J.L.*, *supra*, 529 U.S. at pp. 271-272; *White*, *supra*, 496 U.S. at pp. 331-332.) The caller, although he wished to be anonymous, had stayed in the area and driven by the Nissan again to verify the car was still where he had reported it to be. As stated in *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722 (*Wheat*), "[*Alabama v.*] *White* did not create a rule *requiring* that a tip predict future action, [citation], and neither did *J.L.* As we have previously acknowledged, '[s]uch a rule would be contrary to the line of cases holding that reasonable suspicion must be judged on the totality of the circumstances.'" (*Wheat*, *supra*, at p. 734.) *Wheat* went on to say that "an anonymous tip conveying a contemporaneous observation of criminal activity whose innocent details are corroborated is at least as credible as the one in *White*, where future criminal activity was predicted, but only innocent details were corroborated."[5] (*Wheat*, at p. 735.) As Justice Kennedy remarked in his concurring

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[5] In *Wheat*, the district court's denial of a motion to suppress was affirmed in a case where an anonymous motorist called 911 to report erratic driving, and the suspect's car was stopped by a police officer who had not observed any incidents of erratic driving. (*Id*. at pp. 724-725.) Wheat was a passenger in the car and was charged with possession of cocaine with intent to distribute. He moved to suppress the evidence based on the

opinion in *J.L.*, "a tip might be anonymous in some sense yet have certain features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." (*J.L.*, *supra*, 529 U.S. at p. 275.) Despite the lack of predictions, the tip in this case had "certain features" in support of its reliability, which made it more trustworthy and reliable than the anonymous tip in *J.L.*

In addition, we note that the officers were justified in requiring the passengers to leave the car and lie on the ground while the car was searched in order to ensure the officers' safety. An officer may conduct a limited, warrantless search for weapons on a detained individual if the officer has an objectively reasonable suspicion that the person is armed and dangerous. (*Terry*, *supra*, 392 U.S. at p. 27.) The officer does not have to be "absolutely certain that the individual is armed;" the standard is whether a reasonably prudent person in the totality of the circumstances would be warranted in the belief that his or her safety was in danger. (*Ibid.*) The "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." (*Maryland v. Wilson* (1997) 519 U.S. 408, 414.) Here, there were specific, articulable facts provided by the informant, and the officers acted reasonably in extracting the occupants of the car as they did.

Under the totality of the circumstances discussed *ante*, we affirm the trial court's denial of the suppression motion, although we base our conclusion on different grounds. The "touchstone of the Fourth Amendment is reasonableness." (*Florida v. Jimeno* (1991) 500 U.S. 248, 250.) Reasonableness is in turn measured by balancing the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. (*Maryland v. Buie* (1990) 494 U.S. 325, 331; *Terry, supra,* 392 U.S. at pp. 20-21.) We conclude that the government's interest in tracking down the person who was armed with a gun and had threatened the caller with the gun was strong and outweighed the intrusion on the occupants of the car. The intrusion caused by the police extracting the occupants of the car and searching the car was diminished by the

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claim that the anonymous 911 call could not give rise to reasonable suspicion sufficient

fact that occupants of a car have a lesser expectation of privacy than occupants of a home. "'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.' [Citation.]" (*United States v. Knotts* (1983) 460 U.S. 276, 281.) The anonymous tip in this case provided sufficient justification for the investigative stop, and the detention and subsequent search did not violate the Fourth Amendment.

II. Admission of Appellant's Statements During His Interview With Detective Hernandez

A. Appellant's Argument

Appellant contends that his videotaped interview occurred under coercive circumstances and without the benefit of *Miranda* warnings. Therefore, he maintains, his rights under the Fifth and Sixth Amendments to the federal Constitution were violated, and the trial court committed reversible error in both appellant's probation violation case and the jury trial by denying his motion to suppress his statements under Evidence Code section 402.

B. Proceedings Below

The videotape of appellant's interview with Hernandez was played for the court. The court found that the questioning was not custodial until the moment when appellant was handcuffed at the end of the interview. The court noted that appellant had visited the sheriff's station of his own volition, and he indicated he was aware he did not have to say anything. The court noted that any subjective belief on the detectives' part of appellant's guilt was not relevant to the issue of whether appellant was in custody. The trial court also commented that appellant seemed relaxed during the interview. The court denied the motion.

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to justify the stop. (*Id*. at p. 726.)

C. Relevant Authority

In *Miranda*, *supra*, 384 U.S. 436, the United States Supreme Court held that a person questioned by the police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Id*. at p. 444.) "Custody" in the *Miranda* context includes both actual custody and any situation in which a person is deprived of his freedom of action in any significant way. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) If a suspect invokes his right to counsel at any time before or during questioning, all interrogation must cease until a lawyer is made available or until the suspect reinitiates the conversation. (*Davis v. United States* (1994) 512 U.S. 452, 458; *People v. Crittenden* (1994) 9 Cal.4th 83, 128-130 [noting California's adoption of federal standard, requiring invocation of right to counsel to be unambiguous and unequivocal].)

In reviewing a claim that statements are inadmissible because they were obtained in violation of a defendant's rights under *Miranda*, we accept the trial court's resolution of disputed factual issues and credibility determinations when they are supported by substantial evidence. (*People v. Wash* (1993) 6 Cal.4th 215, 235.) Although we determine independently from undisputed facts whether the challenged statement was obtained illegally, we "'"give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*Id*. at p. 236; accord, *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

D. No Custodial Interrogation or Coercion

In the instant case, the record shows that appellant went to the police station of his own accord. The video recording, which this court has reviewed, reveals that Detective Hernandez, occasionally accompanied by her partner, Detective Jimenez, interviewed appellant largely about the accusations made by his ex-girlfriend, Chantelle Partee. Hernandez took notes while appellant explained the situation between himself and Partee. Partee had filed a complaint against appellant alleging he made terrorist threats to her and

her children. The question of the existence of the gun arose because one of the complaints Partee made was that appellant allegedly threatened her with a gun while saying it had three bullets, two for her and one for him. Appellant told Hernandez he did not have a gun.

Hernandez then asked appellant if he had been arrested, and appellant admitted that he had, and that a gun had been found under the passenger seat. He said that the case had been thrown out, and the gun was never in his possession. He said he had not had a gun since he got out of jail in 1998. He said he did not know whose gun was found in the car. He had told his probation officer about the incident.

Hernandez then told appellant that she would "cut to the chase," and she related to appellant that Partee had described the gun found in the car "to a T." Hernandez said she might believe appellant's statements that he had not beaten or threatened Partee if he would "cop out" to the gun. Hernandez said she knew the gun was his because the "person" (the 911 caller) described him, and the only reason the case was thrown out was because the person would not testify. Appellant said he did not want to incriminate himself about the weapon, and he could not explain how Partee knew about the gun without incriminating himself. Appellant asked Hernandez if it would go in "the report" if he admitted to having this weapon, and Hernandez replied that it would.

After a substantial period of thought, appellant told Hernandez that Partee knew about the gun because it was in the house. Appellant said he had purchased it on the street, but the gun was not in his possession. After a long pause, appellant said he was hesitating because he did not want to put himself in a deeper hole, and he hoped the officers understood that he wanted to get to the bottom of the charges made by Partee. Appellant and Hernandez then discussed appellant's relationship with Partee at length and appellant related how Partee had fabricated her accusations and vandalized his new girlfriend's car.

At one point, Detective Jimenez interrupted to tell appellant he sounded believable and said, "Let's talk about the gun." Appellant replied, "All right." When Jimenez asked appellant if he had shown the gun to Partee, appellant said it was the house gun,

purchased for safety. Appellant said the only reason he lied about the gun was because he was on probation and did not want to incriminate himself with a gun charge. When asked how he got the gun, appellant said he bought it. When asked for names, appellant hesitated for a time. He then told Hernandez that the only problem he had in giving her the information was that he needed to know if this would come back and bite him. Hernandez said she would be honest with him and she told him there was going to be a gun charge because of what Partee had said. Hernandez told appellant it would help appellant to relate how he got the gun because the gun was actually stolen, and appellant could be "looking at" a burglary. Appellant was silent for a time. Hernandez candidly told appellant that she had been planning on arresting him on the threat charges the following day, and it was helpful to appellant that he came in, although not as helpful as he may have wanted.

Hernandez left the room for a time, and then returned and told appellant she had called his probation officer. She said she was not going to arrest him that day. She again asked him where he got the gun. Before appellant replied, Hernandez was called out of the room and Jimenez entered. Appellant stated to Jimenez that it seemed they were going to hold him. Jimenez said that they did not want to hold him, but it depended on appellant's probation officer. Appellant then, of his own accord, began speaking about the gun, saying it was half his and half Partee's. Appellant said he got rid of it and gave it to the guy in the car. He said he was "kind of" incriminating himself.

Jimenez left the room, and after a prolonged period of time, he returned to tell appellant, quite gently, that he was being held for a probation violation based on being arrested at Partee's home. Upon seeing appellant's distress, Jimenez told him to "be strong." Jimenez handcuffed appellant. Hernandez returned and informed appellant that his probation officer had found him in violation of probation that morning. She explained that the police had to arrest appellant because if something happened to his girlfriend, the police could be sued. Hernandez said she had wanted to let him go because he had voluntarily come in, but the probation officer had a responsibility to fulfill as well. Appellant was very distressed at being arrested. Appellant again spoke

about the gun, but the trial court held that appellant was in custody at that point because he was handcuffed and arrested.

As stated previously, *Miranda* advisements are required only when a person is subjected to "custodial interrogation." (*Miranda*, *supra*, 384 U.S. at p. 444; *People v. Mickey*, *supra*, 54 Cal.3d 612, 648.) To determine the issue, "[d]isregarding the uncommunicated subjective impressions of the police regarding defendant's custodial status as irrelevant, we consider the record to determine whether defendant was in custody, that is, whether examining all the circumstances regarding the interrogation, there was a '"formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citation.] As the United States Supreme Court has instructed, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.' [Citation.]" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

Among the factors to be considered in determining whether a suspect was in custody are: (1) whether the suspect was formally arrested; (2) the length of the detention; (3) the location of the interrogation; (4) the officer-suspect ratio; and (5) the demeanor of the officer and nature of the questioning. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) When determining whether a suspect was in custody, "it is the totality of circumstances that is relevant; 'no one factor is dispositive.' [Citation.]" (*People v. Forster*, *supra*, at p. 1754.)

We agree with the trial court that the questioning was not custodial. Appellant arrived at the police station of his own accord. He was never told that he was not free to leave, and he was not forced to answer any questions he was reluctant to answer. Appellant stated several times that he could go home for receipts to substantiate his claims that Partee had vandalized his new girlfriend's car, indicating he believed he was free to leave. The police officers did not attempt to dominate the conversation and allowed appellant to speak freely and at length about matters other than the gun--specifically, his problems with Partee. The officers did not pressure appellant during his silences. The officers expressed their belief that there were two sides to the story with

Partee and spoke of their plan to pursue the matter further to arrive at the truth of the allegations. The police were the opposite of aggressive, confrontational, and accusatory, and they did not pressure appellant in any way, except to say that he could help himself by explaining where he got the gun.

Appellant's statements were also voluntary. In deciding if a statement is voluntary, we look at the totality of circumstances (*People v. Clark* (1993) 5 Cal.4th 950, 968, fn. 10), including background, experience, and conduct of the person being questioned. (*People v. Kelly* (1990) 51 Cal.3d 931, 950.) The videotape of appellant's interview shows no coercion on the part of the detectives. Appellant was nervous, but the questions he answered about the gun were answered after much hesitation and thought on appellant's part. The detectives did not rush him. The detectives treated appellant respectfully throughout the interview, and were neither confrontational nor accusatory. We discern no insincerity on their part regarding their desire to allow him to leave prior to learning his probation officer had found him in violation of probation that morning. Appellant is a bright individual, as shown by his efforts in acting as his own attorney. He went to see the police of his own accord, and he had sufficient experience with the criminal justice system so as not to have his will overborne.

III. Finding of No Prima Facie Case of **Batson/Wheeler** *Error*

A. Appellant's Argument

Appellant argues that the trial court erred in denying his *Batson/Wheeler* motion based on the prosecutor's peremptory challenge of the only remaining African-American on the jury.[6] According to appellant, this peremptory challenge violated appellant's right to a trial by a jury drawn from a representative cross-section of the community under the state Constitution, and his federal constitutional right to equal protection. He contends reversal is required.

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[6] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

B. Relevant Authority

The use of peremptory challenges to remove prospective jurors solely because of group bias violates the state and federal Constitutions. (*Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Accordingly, peremptory challenges may not be used in order to exclude jurors based on their race or ethnic background. If one party believes the other is violating this rule, he must raise a timely challenge and make a prima facie case of such discrimination. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.)

To establish a prima facie case under *Wheeler* and *Batson*, the moving party must make as complete a record as the circumstances permit, must establish that the challenged prospective jurors are members of a cognizable group, and must raise a reasonable inference that they were challenged because of their group association. (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.) It is presumed that the prosecutor has used peremptory challenges in a constitutional manner. This presumption is rebutted only when the defense establishes a prima facie case that jurors were challenged only on the basis of their presumed group bias. (*People v. Williams* (1997) 16 Cal.4th 153, 187.)

When the trial court finds no prima facie case of group bias, we consider the entire record of voir dire for evidence to support the trial court's ruling. The trial court's ruling that no prima facie case has been established is entitled to """'considerable deference'""" on appeal, since it is based upon the court's personal observations. Where the record suggests grounds on which the prosecutor might reasonably have challenged the prospective jurors, we will affirm. (*People v. Crittenden*, *supra*, 9 Cal.4th 83, 116-117.)

C. Proceedings Below

The record shows that defense counsel told the court in sidebar that "[t]he defense is going to make a *Wheeler* motion based upon the fact that the prosecution has exercised a peremptory against prospective juror number one. The last peremptory which was exercised I believe she was an African-American female. And also the prosecution made a challenge for cause against a prior juror number five. I believe that juror number was 2661, who was previously excused for cause. I believe he also was African-American. I

believe he indicated on the record that he was African-American. [¶] . . . [¶] And the last peremptory that the prosecution exercised was as to juror number 8783, and I believe he was also African-American. I don't believe there are any other African-Americans on the panel. And it's based upon that that the defense is making a *Wheeler* motion."

The court made the following findings for the record: "Juror seat number five which was excused for cause purposes to the People's request was an African-American. And the court indicated that reluctantly I was going to excuse him because I was attempting to rehabilitate him and I couldn't to the best of my abilities. [¶] And at this time, as to Juror No. 8783, the lady that prospective juror -- that Mr. Cain has made the *Wheeler* motion, she was either African-American and/or Hispanic or a Hispanic-American or Hispanic and African-American. She has a Spanish last name. She had an accent which I did not associate with sort of a Jamaican, Caribbean accent. And of course the court has an accent, and the court is fully aware of different accents. She appeared to have more of an Hispanic accent than a Jamaican accent. However, people make different opinions. [¶] Basically from what I've heard at this time, I'm not going to make a prima facie case for a *Wheeler*." The court noted that there were no other African-Americans on the balance of the panel.

D. Court Did Not Abuse Its Discretion

Having reviewed the record on appeal, we find substantial evidence supports the trial court's finding. First, appellant failed to make a record suggesting the possibility of purposeful discrimination. For example, he did not attempt to show, except for their race, how the two potential jurors were otherwise similar to jurors the prosecutor chose to retain. Appellant's only showing in support of his *Wheeler* motion was his statement that the prosecutor had removed all of the African-American potential jurors. This single observation, standing alone, is insufficient to establish a prima facie case of group bias.

Moreover, appellant points to nothing in the record, nor have we found anything in our review of the entire record, to support his claim that the prosecutor's challenges were racially motivated. First, the trial court's record indicates that prospective Juror No. 8783, a female, had an accent and was more likely Hispanic than of Caribbean or

Jamaican extraction. Second, during voir dire, this juror indicated she had problems with the concept of constructive possession. When the prosecutor explained actual and constructive possession to the jurors, he asked if anyone felt that "in order to find somebody guilty, they must actually have it on their person before they could find it?" Juror No. 8783 (Juror No. 18) replied, "they should have it in their possession." When the prosecutor asked her, "You don't think if I set this pen down, it's not in my possession?" She replied, "No."

Despite the prosecutor's use of double negatives, this exchange shows that Juror No. 8783 did not agree with the concept of constructive possession or did not understand it, and this concept was critical to the prosecution's case. The record also shows that the juror who could not be rehabilitated, Juror No. 2726, professed his mistrust of police officers and believed there was "a lot of racism within the police system." He himself stated he did not believe he could give the prosecution a fair trial.

Given the above characteristics of the excused jurors, we conclude that the trial court acted within its discretion in determining that no prima facie case had been made with respect to Juror No. 8783 and appellant suffered no violation of his rights under the federal Constitution due to the court's ruling.

IV. Prosecutor's Remarks During Closing Argument

A. Appellant's Argument

Appellant contends the prosecutor committed misconduct during closing argument by suggesting that the defense was required to present evidence. According to appellant the prejudice he suffered resulted in a denial of due process.

B. Proceedings Below

During final argument, the prosecutor stated , ". . . Then [defense counsel] talks about, well, we don't have those two other people in the car. [¶] Ladies and Gentlemen, [defense counsel] has the exact same subpoena power as I do. If he wanted to bring one of those people in, he would come up with that story he is trying to have you guys buy. He could have brought one of those people in the car. Of course not." The prosecutor was apparently referring to that portion of defense counsel's argument during which he

pointed out that there were other people in the car where the gun was found, and it was found under the passenger seat rather than the driver's seat. Defense counsel objected to this argument, stating, "[t]hat shifts the burden," and the court sustained the objection.

After argument, outside the presence of the jury, defense counsel moved for a mistrial based on the prosecutor's comment, saying that the argument shifted the burden to the defense in terms of producing witnesses. The court denied the mistrial, noting that the objection was sustained and the People did not make that statement again. When the prosecutor interjected that his comment was reasonable rebuttal, the court stated, "You may have that right, but in the way you phrased it, it didn't come across the way it was supposed to be. There are other ways to make that statement or make that argument, but in the court's mind you didn't make it in the appropriate way. That is why I sustained the objection."

C. Waiver; No Prejudice Resulted From Prosecutor's Remarks

It is well settled that, in order to preserve on appeal the issue of prosecutorial misconduct, the defendant generally must object at the time the misconduct occurs on that specific ground and request a curative admonition to the jury. (*People v. Avena* (1996) 13 Cal.4th 394, 442.) This requirement is waived only when a prompt admonition would not have cured the harm caused by the misconduct or objection would have been futile. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Contrary to appellant's assertion, a request for admonition would not have been futile and would have cured any harm caused by the remark. Had the trial court been given the opportunity to admonish the jury regarding the allusion to absent witnesses, the harm could have been cured. Accordingly, appellant cannot raise this issue for the first time on appeal. (*People v. Avena*, *supra*, at p. 442.)

In any event, we would conclude that the prosecutor's brief, solitary remark did not constitute misconduct. "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due

process.''' [Citations.] 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 court or the jury.''' [Citation.]''' (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) Here, there was no egregious pattern of conduct and there was no use of deceptive methods. The prosecutor's single allusion to the absence of the other occupants of the car was objected to, and the objection was sustained. The prosecutor's remark did not so infect the trial with unfairness so as to result in a denial of due process.

Even if a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (*People v. Arias* (1996) 13 Cal.4th 92, 161.) And, "[t]o prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the `most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

Here, the jury was well aware that defense counsel had objected to the remark and that the objection had been sustained. The jury was properly instructed, and among the instructions were those informing it that statements of attorneys were not evidence, and that it must decide the facts based upon the evidence adduced at trial, and from no other source. (CALJIC Nos. 1.00, 1.02.) The court instructed the jury that neither side was required to call as witnesses all persons who might have been present at the events or who might have knowledge of the events. (CALJIC No. 2.11.) The jury was informed that appellant could choose to rely on the state of the evidence presented by the People and upon the failure, if any, of the People to prove every element of the crime beyond a reasonable doubt. The court told the jury that "no lack of testimony on defendant's part will make up for a failure of proof by the People. . . ." (CALJIC No. 2.61.) The jury was told that a defendant is presumed to be innocent and the People have the burden of

proving him guilty beyond a reasonable doubt. (CALJIC No. 2.90.) We assume the jurors followed the court's instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 714.)

We conclude that no prejudice resulted from the prosecutor's comments, which did not constitute misconduct, and appellant's argument is without merit. The evidence of appellant's guilt was substantial, and it is not reasonably probable he would have obtained a result more favorable in the absence of the prosecutor's brief remark. (*People v. Arias*, *supra*, 13 Cal.4th at p. 161.)

V.* Blakely *and Consecutive Sentencing

Appellant relies on the recent decision of the United States Supreme Court in *Blakely*, *supra*, 542 U.S. ___, 124 S.Ct. 2531, to argue that the consecutive sentence imposed in this case was invalid because there were no factual findings by a jury or admissions by appellant justifying a consecutive sentence. We need not determine whether the issue raised by appellant has been forfeited by the absence of any objection in the trial court, since we conclude that, in any event, *Blakely* does not apply to consecutive sentencing.[7]

Section 669[8] provides that when a defendant is convicted of multiple counts, the trial court must determine whether the sentences on those counts are to run concurrently or consecutively. Thus, the act of imposing consecutive sentences is within the discretion of the court. (See *People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than

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7 The issue of the effect of *Blakely* on the imposition of consecutive sentences is currently before the Supreme Court in *People v. Black*, review granted July 28, 2004, S126182, and other cases.

8 Section 669 provides in pertinent part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. . . ."

consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) Subsequently, in *Blakely*, the Court clarified that the statutory maximum is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 542 U.S. at p. ___, 124 S.Ct. at p. 2537.)

Clearly, the principles expounded in *Blakely* and *Apprendi* affect the length of sentence that can be imposed in an individual count, not whether the charges found true beyond a reasonable doubt shall be served consecutively. Here, appellant was given a consecutive term for a violation of probation on an offense committed prior to, and completely separate from, the current conviction. The consecutive sentence imposed on the probation violation does not represent a penalty in excess of a statutory maximum, necessarily based on a fact neither found by the jury nor admitted by appellant. Therefore, appellant's rights under the Sixth Amendment were not violated.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

___________________, P. J.
BOREN

I concur:

________________________, J.
ASHMANN-GERST

DOI TODD, J., dissenting

I respectfully dissent and conclude that appellant's motion to suppress should have been granted. I believe that the Supreme Court opinions in *Alabama v. White* (1990) 496 U.S. 325 (*White*) and *Florida v. J.L.* (2000) 529 U.S. 266 (*J.L.*) compel reversal. Even under a "totality of the circumstances" view of this case, the fact remains that there was no corroboration of the criminality alleged in the anonymous tip.

The *J.L.* court harked back to its decision in *White* and reiterated that the facts surrounding the stop based on an anonymous tip in *White* presented a "'close case.'" (*J.L.*, *supra*, 529 U.S. at p. 271.) In *White*, the court explained that the telephonic tip standing alone provided no basis for concluding that the caller was honest or that his information was reliable, and it gave no indication of the foundation of the caller's predictions regarding White's criminal activities. (*White*, *supra*, 496 U.S. at p. 329.) A finding of reasonable suspicion of criminal activity was justified only because the police had independently corroborated the information (the predicted activities) by the time they stopped White's car. (*Id*. at p. 331.) The court stated it was important that the tip contained details not only of easily obtained facts, but also of future actions not easily predicted. (*Id*. at p. 332.) This demonstrated that the caller had inside information, and it was reasonable for police to believe that a person with access to such information is likely to have access to reliable information about the suspect's illegal activities as well. (*Ibid*.) The police verification of the predictions showed that the caller was honest and well-informed to a degree sufficient to justify a stop. (*Ibid*.)

In *J.L.*, on the other hand, the caller "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." (*J.L.*, *supra*, 529 U.S. at p. 271.) The court reiterated that the reliability needed for a justifiable investigative stop requires more than an accurate description of the subject and his location. (*Id*. at p. 272.) "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*Ibid.*)

The tip in the instant case is similar to the one transmitted in *J.L.* As in *J.L.*, the caller was an "unknown, unaccountable informant." (*J.L.*, *supra*, 529 U.S. at p. 271.) Neither his honesty nor the reliability of his information was corroborated in any significant way. The caller was unwilling to put his anonymity at risk and could "lie with impunity." (*Id.* at pp. 275, 276 (conc. opn. of Kennedy, J.).) Although the police were able to corroborate the location and description of appellant as provided in the tip, there was no basis for concluding that the tip was reliable in its "assertion of illegality." (*J.L., supra*, 529 U.S. at p. 272.) There was no predictive information, or any other information, with which the police could "test the informant's knowledge or credibility." (*Id*. at p. 271.)

None of the factors the majority regards as distinguishing this case from *J.L.*, such as the urgency in the caller's tone of voice or the fact the call was tape recorded, amount to corroboration in any way. It goes without saying that the fact that a gun was actually found in the car is not corroboration for the initial stop and search. (*J.L.*, *supra*, 529 U.S. at p. 271.) The police were able to corroborate only the information anyone on the street could have observed. The Supreme Court has stated in *J.L.* that more is required; specifically, some means of corroborating either the informant's credibility or his knowledge of the illegal activity. (*Id*. at pp. 271-272.)

Applicable to the instant case is the assessment of *J.L.* that, "[i]f *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line." (*J.L.*, *supra*, 529 U.S. at p. 271.) I conclude that the anonymous tip in this case did not provide sufficient justification for a lawful investigative stop. (*Id*. at p. 272.) Therefore, appellant's detention and the subsequent search and seizure violated the Fourth Amendment and the trial court erred in denying appellant's motion to suppress.

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Doi Todd, J.