Filed 6/1/07 P. v. Lebron CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO JOSE LEBRON, Defendant and Appellant.	F049642 (Super. Ct. No. F05906878-4) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Peter J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, John G. McLean and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Roberto Jose Lebron was convicted after jury trial of carjacking, unlawfully taking or driving a vehicle, receiving a stolen vehicle and driving a vehicle with a suspended or revoked license. The court found true a probation violation in another case. (Pen. Code,[1] §§ 215, subd. (a) & 496d, subd. (a); Veh. Code, §§ 10851, subd. (a) & 14601, subd. (a).) He was sentenced to an aggregate term of nine years' imprisonment.

Appellant challenges the sufficiency of the evidence proving the carjacking. He also contends that the trial court infringed his due process protections by failing to exclude all evidence pertaining to the carjacking or to instruct the jury that "the government had lost important evidence" as sanctions for the police's pretrial loss of a piece of evidence. Additionally, appellant argues that the court improperly admitted statements that he made to a police officer before his arrest. Finally, he challenges imposition of the aggravated term for count 1 as prejudicial *Blakely/Cunningham* error.[2] None of these arguments are persuasive; we will affirm.

FACTS

On the evening of September 5, 2005, Jesus Gonzalez Rayas drove his father's white 1995 Honda Accord (the Honda) to his job at Fresno Beef Packers in Fresno.[3] Rayas locked the car and went inside to work. Sometime between 11:30 p.m. and midnight, he noticed that the car was missing. He telephoned the police but was unable to make a full report because he did not have all the necessary vehicle information.

---

1 All further statutory references are to the Penal Code unless otherwise specified.

2 *Blakely v. Washington* (2004) 542 U.S. 296; *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856].

3 Epifanio Gonzalez testified that on September 5, 2005, he owned the Honda and that he permitted his son to drive the car. The Honda was registered to Gonzalez.

On the evening of September 6, 2005, Rayas was driving to work in a different vehicle when he saw the Honda parked at a convenience store. He pulled into the parking lot and parked. He recognized the Honda because it had a unique tailpipe tip. The Honda was unlocked and Rayas opened one of the doors and saw a photograph of his child and some of his clothing items. He also noticed that the airbags were missing, which was consistent with his father's vehicle.

Appellant exited the store and approached the Honda. Rayas told him not to get into the car because it was stolen. Appellant shoved Rayas aside and got into the Honda. Appellant cursed at Rayas and yelled, "This is my car." Appellant said that he had owned the Honda for a year. As appellant got into the Honda, Rayas grabbed his leg. Appellant kicked Rayas in the stomach, leaving a footprint on his white shirt. Rayas tried to talk to appellant, but appellant continued to curse and yell at him. Rayas grabbed appellant's leg a second time and appellant got out of the vehicle. Rayas and appellant began arguing about the car. Rayas pointed out the picture of his child and his belongings inside the Honda. Appellant swore and yelled at Rayas. Appellant shoved Rayas in the chest and Rayas fell to the ground. Appellant got into the Honda and sped away, almost running over Rayas. Rayas got into his vehicle and chased after the Honda but lost sight of it after a few minutes.

Rayas returned to the store and obtained the store's surveillance videotape from the clerk. Rayas watched the videotape later that evening. It was difficult to view because the image moved between multiple cameras very quickly. Using a slow motion feature on his VCR, Rayas was able to observe appellant on the videotape. He saw appellant enter and exit the car. He also saw images of himself and appellant standing in the parking lot. The videotape showed appellant leaving in the Honda.

Around midnight on September 7, 2005, Rayas was driving to work when he saw the Honda. He followed it until he spotted a California Highway Patrol (CHP) vehicle.

He informed the CHP officers that the Honda was stolen. The officers pursued and stopped the Honda, which was being driven by appellant.

Rayas approached the CHP officers and related the events from the convenience store and his prior attempt to report the vehicle stolen. Rayas identified the Honda by pointing out the tailpipe tip, the absence of airbags and his personal items inside the vehicle. Rayas said that appellant had kicked him in the stomach and he pointed out what appeared to be a large footprint on his shirt.

Appellant told the officers that the Honda belonged to a person named Jaime. Jaime's last name was either Madrigal or Marcy. Appellant said that Jaime owned the Honda for about 18 months and that he borrowed it about four days earlier. Appellant could not provide an address for Jaime. He provided a telephone number for Jaime but, when CHP Officer Todd Clausen tried calling this number, he received a message saying that it was no longer in service. Appellant then provided another phone number. When Clausen called this number, the person who answered the telephone told him that no one named Jamie lived there.

A key was in the Honda's ignition. It was attached to a key ring containing three other car keys and an alarm activator. Three of the keys on the ring appeared to be ignition keys. Each of the keys on the ring corresponded to a different automobile manufacturer. The alarm activator pertained to a fourth automobile manufacturer. The key that was in the ignition appeared to have been "shaved." Car thieves shave car keys so that they can be used to start the ignition of cars for which they were not intended. The key that was in the Honda's ignition would not open the trunk.

Appellant was arrested. During a search incident to arrest, two additional ignition keys were found in the pockets of his pants. One of the keys appeared to have been shaved. Appellant professed ignorance of these keys and stated that he was wearing his brother's pants.

The Honda sustained damage that was not present when it was stolen. There were pry marks on one of the doors and the door lock was missing. The ignition area was broken. The stereo was damaged.

A CHP officer obtained the videotape from Rayas. The officers tried to view the tape but, due to the speed that the tape switched from camera to camera, they were not able to discern any meaningful information. The tape was booked into evidence. The officers attempted a second time to view the tape but were not successful. The tape was returned to the evidence locker. Despite attempts to locate the tape, it could not be found at the time of trial.

In March 2002, the Department of Motor Vehicles notified appellant by mail that his driver's license was suspended. The license remained suspended through the time of trial.

DISCUSSION

I. The carjacking conviction is supported by substantial evidence.

A. Standard of Review.

When assessing the sufficiency of the evidence, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People. v. Hawkins* (1995) 10 Cal.4th 920, 955.) The reviewing court presumes in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Tran* (1996) 47 Cal.App.4th 764, 793.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

B. Elements of the offense of carjacking and applicable legal principles.

"'Carjacking is a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large.' [Citations.]" (*People v. Hill* (2000) 23 Cal.4th 853, 859-860 (*Hill*).) "Legislative history … indicates that the carjacking statute was enacted to address a specific problem -- the taking of a motor vehicle directly from its occupants. The Legislature sought to impose a severe penalty on those who created a specific risk by directly confronting a vehicle's occupants. [Citations.]" (*People v. Coleman* (2007) 146 Cal.App.4th 1363, 1369 (*Coleman*) [petn. for review filed Mar. 5, 2007].)

Subdivision (a) of section 215 defines the crime of carjacking as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) Five elements must be shown to prove this crime: "(1) taking a vehicle possessed by another; (2) from the presence of the possessor or a passenger; (3) 'against his or her will'; (4) with intent to deprive possession; (5) and, by means of force or fear." (*Hill, supra,* 23 Cal.4th at p. 862.)

The elements and language of the carjacking statute are similar in key respects to the elements of the robbery statute, section 211. (*People v. Alvarado* (1999) 76 Cal.App.4th 156, 160; *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131.) Therefore, principles applicable to robbery also are relevant to carjacking. (*People v. O'Neil, supra*, 56 Cal.App.4th at pp. 1131-1132; *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1142.) "[C]ourts have analogized the [carjacking] statute's requirements of 'possession'

and the taking of a motor vehicle 'from his or her person or immediate presence' to the same requirements appearing in the robbery statute." (*Coleman, supra*, 146 Cal.App.4th at p. 1369.)[4]

C. The record contains substantial evidence establishing the possession and immediate presence elements.

The carjacking count was based on the incident at the convenience store during which Rayas unsuccessfully attempted to stop appellant from driving away in the Honda. Appellant argues that this count must be reversed because the record lacks adequate proof of the possession and immediate presence elements. He reasons that the vehicular theft was completed prior to his arrival at the convenience store. Since Rayas did not have the key to the Honda on his person, he lacked means to exercise control over the vehicle. Therefore, Rayas was not in possession of the Honda and it was not stolen from his immediate presence.

We are not convinced. As will be explained, Rayas regained possession of the Honda in the parking lot. Appellant removed the Honda from Rayas's immediate presence when he knocked Rayas to the ground and drove away in the vehicle over Rayas's objection.

i. Rayas regained possession of the Honda at the convenience store.

Possession may be actual or constructive.[5] (*Coleman, supra*, 146 Cal.App.4th 1363 at pp. 1369-1370.) Actual possession exists where a person has direct physical

---

[4] Yet, "[b]y extending carjacking to include a taking from a passenger, even one without a possessory interest (assuming the other elements of the crime are present), the Legislature has made carjacking more nearly a crime against the person than a crime against property." (*Hill, supra*, 23 Cal.4th at p. 860; see also *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1304 (*Coryell*).)

[5] The jury was instructed on constructive possession and appellant does not cite the giving of this instruction as error.

control over an item, whereas constructive possession exists where a person has a right to control the property, either directly or through another person. (CALJIC No. 1.24.) Actual possession is generally determined by a victim's physical relationship to the property, while constructive possession generally depends on a victim's intangible relationship to the property. A person need not own or have a legal right to the property to have possession of it, and several persons may have simultaneous possession. Constructive possession encompasses the knowing right to exercise control over the thing that is being taken. Constructive possession of property may be shown even though the victim did not have immediate physical control over it. (*People v. Miller* (1977) 18 Cal.3d 873, 881; *People v. Galoia* (1994) 31 Cal.App.4th 595, 597.)

Here, the evidence amply supports the jury's implied conclusion that Rayas regained possession of the Honda in the parking lot and that Rayas constructively possessed the Honda when appellant knocked him to the ground and drove away in it. Rayas recognized that the Honda belonged to his father and he exerted control over the vehicle by telling appellant not to leave in it because it had been stolen. Rayas argued with appellant, attempting to prevent appellant from leaving in the vehicle. He even grabbed appellant's leg in an effort to remove appellant from the vehicle. Although Rayas lacked a key to operate the Honda, he had dominion and control over the vehicle. Carrying a car key is not the sine qua non of possession. One may reasonably infer that Rayas did not take the Honda key with him to work on September 6 because appellant had already stolen the Honda and Rayas was not expecting to find it parked in a convenience store parking lot. Rayas was exercising his right to control the Honda when he told appellant not to get into it and fought with appellant over it. This sufficiently establishes the possession element. (See, e.g., *People v. Gray* (1988) 66 Cal.App.4th 973, 985.)

ii. The Honda was removed from Rayas's immediate presence.

We turn to the sufficiency of the evidence proving the immediate presence element. Immediate presence includes the area within the victim's reach, observation or control, such that he could retain possession of the property if not deterred by fear or violence. The victim is not required to be in or next to the vehicle at the time of the taking. (*Coleman, supra*, 146 Cal.App.4th at pp. 1372-1373.) Here, the Honda was within Rayas's sight and he actively exerted control over the vehicle. Rayas directed appellant not to drive away in it and physically attempted to prevent appellant from leaving in the Honda. Appellant was only able to drive away in the Honda after he knocked Rayas to the ground.

While not fully analogous, *Coryell, supra*, 110 Cal.App.4th 1299 is instructive. There, Garcia drove to a liquor store. While his girlfriend, Iman, remained in the car, Garcia exited the vehicle and went into a telephone kiosk. While he was in the kiosk, defendant punched and attempted to stab him. Garcia and Iman both fled. Defendant got in the car, started it and drove away. He was convicted of two counts of carjacking. In relevant part, defendant challenged the sufficiency of the evidence proving the possession and the immediate presence elements because Garcia had run over a block away from the car when it was taken. The appellate court rejected this argument, explaining that Garcia was not near the car when it was stolen because defendant had forced him to flee. (*Id*. at p. 1303.)

In this instance, Rayas spotted the Honda in the parking lot and regained possession of the car by asserting dominion and control over it. Appellant assaulted Rayas by kicking and shoving him so that he could drive away in the Honda over Rayas's objection. As in *Coryell*, the evidence is sufficient to prove all the elements of the crime of carjacking. (*Coryell, supra*, 110 Cal.App.4th at pp. 1302-1304.)

II. Appellant's due process rights were not infringed.

A. Facts

The convenience store surveillance videotape was lost before trial while in police custody. Appellant motioned in limine to impose sanctions on the prosecution for the loss of this videotape. The trial court reviewed testimony given at the preliminary hearing by Rayas and CHP Officer Clausen. Afterward, it denied the motion on the basis that there was no showing of bad faith and no evidence that the police were aware that the videotape had exculpatory value when it was lost or destroyed. The trial court characterized the videotape as potentially useful, but not exculpatory. Therefore, it crafted a sanction that was less harsh than dismissal. It determined that the defense would be permitted to argue that the police investigation was sloppy and incomplete. Also, the defense would be permitted to cross-examine the officers about the contents of the lost tape.

Rayas testified that he used the slow motion feature to view the images on the videotape. He was able to view each picture on the videotape. Without the slow motion feature, the videotape rotates among images taken by cameras placed inside and outside the store "like every other second." Rayas saw images of appellant walking in and out of the store and an image of the Honda. The videotape captured an image of him standing near appellant. Finally, it captured an image of appellant driving away in the Honda. The videotape did not show appellant pushing or kicking Rayas. It did not show Rayas falling to the ground.

Clausen attempted to watch the videotape after Rayas gave it to him. He had difficulty viewing the videotape due to its speed and the different camera angles. It cycled between the different camera positions so fast that was hard to retrieve any information from it. His partner booked the tape into evidence. Later that evening, Clausen took the tape out of the locker and brought it to the robbery/burglary division of

the Fresno Police Department to see if they had equipment that could accommodate the tape. Their equipment was out of order. Clausen put the videotape back in the evidence locker and locked it. He searched for the videotape after he learned that it was not in the evidence locker. He and his partner checked their belongings and the patrol vehicles they drove on the night appellant was arrested and the following night.[6]

Defense counsel argued in closing that Rayas was inconsistent when he told Clausen that the videotape depicted the altercation but testified that it did not show the confrontation. Appellant suggested the police engaged in a sloppy investigation. Also, he argued that without the videotape there was not enough evidence to convict appellant of carjacking.

B. The trial court's ruling is supported by substantial evidence.

Appellant contends that the exculpatory nature of the videotape was evident on its face and therefore the trial court should have found that its loss "was a violation of the Due Process Clause" under the principles enunciated in *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 (*Youngblood*). Appellant further maintains the trial court should have excluded prosecution evidence concerning the incident at the convenience store or, at a minimum, "it certainly should have instructed the jury that the government had lost important evidence, and that if it believed that the failure to preserve was deliberate, it would have to acquit appellant on the carjacking count; and even if it did not conclude that the failure

---

6 This testimony is essentially consistent with testimony given by Rayas and Clausen at the preliminary hearing. Although Rayas initially testified at the preliminary hearing that the videotape depicted the incident in "its entirety," he clarified almost immediately that it "showed when [he] goes in the store and goes out of there and when we're having the conversation there." It did not show appellant pushing him or kicking him.

to preserve was deliberate, it should consider that loss in its evaluation of guilt." We are not persuaded.

Under *Trombetta* and *Youngblood*, "a defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. [Citation.] The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. [Citation.] 'The presence or absence of bad faith by the police … must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.' [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 943 (*Frye*).)[7]

When assessing a trial court's ruling on the issue of the failure to preserve evidence, the reviewing court examines the evidence in the light most favorable to the ruling to determine if it is supported by substantial evidence. When supported by substantial evidence, it will be upheld. (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

The record does not support appellant's assertion that the videotape constitutes exculpatory evidence. The videotape cycled between images taken from numerous cameras that were located inside and outside the store. Rayas testified that the videotape did not capture the entire incident. It contained images of appellant entering and leaving the store, of appellant standing by him and of the Honda leaving the parking lot. It did not show appellant shoving or kicking him. Since the videotape cycled between many cameras, it is not equivalent to a single camera recording of the parking lot. It did not

---

[7] To the extent appellant's characterization of the applicable legal standard contradicts *Frye*, it is rejected. We are obligated to follow the decisions of our Supreme Court and we accept its understanding of *Youngblood* and *Trombetta*, as expressed in *Frye*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

necessarily capture the entire series of events that occurred in the parking lot. Therefore, we agree with the trial court that the videotape was useful, but not exculpatory, evidence.

We turn to an assessment of the evidence supporting the trial court's determination that there was no showing of bad faith. "'The presence or absence of bad faith by the police ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.' [Citation.]" (*Frye*, *supra*, 18 Cal.4th at p. 943.) The evidence does not show that the videotape appeared to be exculpatory when it was lost or that the loss itself resulted from any bad faith. Rayas testified that he had to use the slow motion feature on his VCR in order to see the individual images. Clausen testified that he was unable to discern any useful images from the videotape when he watched it because it cycled so rapidly. He "couldn't adjust the speed on our VCR to accommodate" the speed of the images. The Fresno Police Department's equipment was broken and he was unable to view the videotape on one of their machines. There was nothing sinister or nefarious about the way the tape was lost. It was returned to the evidence locker and the key to the locker was placed in the drop slot. There was no evidence presented indicating how the videotape actually became misplaced. Upon realizing it was lost, Clausen and his partner conducted a reasonably diligent search for it.

Furthermore, it is not reasonably possible that the loss of the videotape materially affected the verdict. The jury was informed of all of the material facts surrounding this videotape and its loss. Clausen testified that Rayas gave him the videotape and that Rayas "said that it shows him speaking with the Defendant and I guess getting kicked, punched." However, Rayas testified that the videotape did not show that he was kicked or pushed. During closing argument, defense counsel highlighted this inconsistency. Defense counsel also argued that the loss of the videotape demonstrated that the police investigation of this case was sloppy and it urged the jury to conclude that the carjacking had not been proved beyond a reasonable doubt.

Accordingly, we find that the trial court's findings are supported by substantial evidence and that its ruling is legally correct. The sanctions crafted by the trial court adequately dissipated any potential harm to the defense. Appellant's due process protections were not infringed. (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 166-167.)

III. Appellant's prearrest statements were properly admitted.

A. Facts

Appellant motioned in limine to exclude evidence of his prearrest statements because he did not receive the advisements required by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). An evidentiary hearing was held to determine the admissibility of these statements.

Clausen testified that Rayas contacted him at approximately 12:39 a.m. on September 7, 2005. Rayas told Clausen and his partner that the Honda he was following had been stolen. Based solely on this information, they effected a traffic stop of the Honda and pulled up just as appellant was exiting the car. They detained appellant and conducted a weapons check.

The officers placed appellant in the back of the patrol car for approximately 10 to 20 minutes while Clausen spoke with Rayas. Appellant "was advised that he's not under arrest, that he's just being detained."

Next, the officers spoke with appellant. Appellant was outside the patrol vehicle when this discussion occurred. Appellant was not handcuffed and no weapons were drawn. Appellant was not told that he was free to leave. During this discussion, the officers used a normal conversational tone and were not accusatory. After the officers were unable to confirm appellant's statements that he borrowed the car from a friend, he was arrested.

Citing *In re Joseph R.* (1998) 65 Cal.App.4th 954 (*Joseph R.*), the trial court concluded that the officers were conducting a field investigation when appellant made the

contested statements. Appellant was not in custody. Therefore, the officers were not required to provide him with *Miranda* advisements.

B. Appellant was not in custody when the statements were made.

Miranda advisements are required only when a person is subjected to custodial interrogation. When a formal arrest has not occurred, the applicable inquiry is how a reasonable person in the suspect's position would have understood his situation. When a formal arrest has not occurred, the applicable inquiry is how a reasonable person in the suspect's position would have understood his situation. No one factor is dispositive. The "most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning. [Citations.]" *People v. Boyer* (1989) 48 Cal.3d 247, 272.) Generally, custody does not normally encompass temporary investigative detentions. (*People v. Farnam, supra,* 28 Cal.4th at p. 180.) The trial court's determination that *Miranda* was not applicable is reviewed as follows: "the conclusion itself is examined independently, the underlying findings are scrutinized for substantial evidence." (*People v. Clair* (1992) 2 Cal.4th 629, 678.)

Appellant argues that he was in custody when the statements were made. He does not challenge the voluntariness of the statements. As will be explained, the trial court properly concluded that the investigative detention did not rise to the level of a custodial interrogation. The questioning occurred incident to a traffic stop in a public place. At no time was appellant handcuffed and the officers did not display their weapons. Appellant was told that he was not under arrest when he was placed in the patrol vehicle while the officers were speaking with Rayas. He remained in the patrol vehicle for 10 to 20 minutes. After the officers concluded their conversation with Rayas, appellant was permitted to exit the patrol vehicle. The officers conversed with appellant while he was standing outside the vehicle and they used a conversational tone of voice. Thus, when

the officers questioned appellant, he had been released from the temporary restraint he experienced while inside the patrol vehicle.

We agree with the trial court that *Joseph R., supra*, 65 Cal.App.4th 954 is analogous. There, an officer received a report of rock throwing by two boys. The officer spotted the boys and, with their consent, patted them down for weapons. The officer told the boys that that they did not have to talk to him but that he wanted to ask them a few questions. Joseph was cuffed and placed in the back of a patrol vehicle. About five minutes later, Joseph was released from the patrol vehicle and the handcuffs were removed. Thereafter, the officer questioned him about the rock throwing incident. The entire encounter lasted about 15 to 20 minutes. Joseph was arrested about six weeks later. The trial court concluded *Miranda* was inapplicable because Joseph was not subject to a custodial restraint when the questions were asked and the appellate court agreed with this conclusion. In relevant part, the court explained that "'[p]olice officers may sufficiently attenuate an initial display of force, used to effect an investigative stop, so that no *Miranda* warnings are required when questions are asked.'" (*Joseph R.*, *supra*, 65 Cal.App.4th at pp. 960-961.) The court pointed out that Joseph was cuffed and placed in the back of the patrol vehicle for only a short period of time. Furthermore, the officer questioned him after he was released from the police car and the handcuffs were removed. Also, Joseph was never told that he was under arrest and was informed that he was not under any obligation to cooperate with the officer's investigation.

Similarly here, appellant was questioned during an investigative traffic stop. He was told that he was not under arrest. Appellant was not handcuffed and no weapons were displayed. He was questioned outside the patrol vehicle. The entire investigative process was relatively brief, lasting 30 minutes or less. Following and applying *Joseph R.*, *supra*, 65 Cal.App.4th 954, we uphold the trial court's determination that *Miranda* does not apply because appellant was not in custody when he made the contested

statements. "'Absent "custodial interrogation," *Miranda* simply does not come into play.' [Citation.]" (*People v. Clair*, *supra*, 2 Cal.4th at p. 679.) Thus, admission of appellant's statements to the officers was not erroneous and did not infringe any of his constitutional rights or protections. (*Joseph R.*, *supra*, 65 Cal.App.4th at pp. 957-961.)[8]

IV. Resentencing is not required.

The court selected the upper term for the carjacking conviction based on numerous aggravating factors. The court explained this sentencing choice, as follows:

> "Aggravating factors here are accurately set forth by the probation officer at page 8. This crime involved a threat of bodily harm, and it involved facts disclosing a high degree of callousness …. This is violent conduct which indicates he's a serious danger to society. His prior convictions as an adult and sustained petitions as a juvenile are numerous and of increasing seriousness. He was on probation when the crime was committed, and his prior performance on probation has been unsatisfactory, specifically as a juvenile and here on this case, where he's on probation for just a few months before the commission of the present offense. I find that the offenses were committed on separate dates … but … I find it's appropriate because of the fact that all involved the same vehicle and the same victim, the sentencing concurrently as opposed to separately on those various offenses. But the fact that he could be sentenced consecutively and that I'm choosing to sentence him concurrently is another factor in aggravation …."

The court continued, "I see no sense of remorse or responsibility here. I see no sense of this [d]efendant that he plans to reform his conduct … [and he demonstrates] a complete lack of remorse and lack of social consciousness that warrants the imposition of the aggravated term." The court did not find any mitigating factors.

---

8 Having concluded that there was not a *Miranda* violation, we summarily reject appellant's challenge to the inclusion of CALJIC No. 2.03 in the jury charge. Appellant's challenge to the use of this instruction is premised on the assertion that his prearrest statements were obtained in violation of *Miranda*. Rejection of this foundational premise resolves the instructional challenge adverse to appellant's position.

The record demonstrates that the court relied upon two recidivism based factors: (1) appellant has suffered numerous prior convictions and sustained juvenile petitions; and (2) appellant was on probation when he committed the current offenses. Despite the presence of these recidivism-based factors, appellant challenges the constitutionality of imposing the upper term, arguing that it constitutes prejudicial *Blakely/Cunningham* error. We disagree.

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) held, "Other 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.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes 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. [Citations.]" (*Blakely v. Washington*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinant sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham v. California*, *supra*, 549 U.S. ___ [127 S.Ct. 856].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (1) a prior conviction; (2) facts reflected in the jury verdict; and (3) facts admitted by the defendant. (*Blakely v. Washington, supra*, 542 U.S. at pp. 301, 303.)

In this case, the court cited appellant's criminal history -- his prior convictions and probation status -- to justify selection of the upper term. This is constitutionally permissible. The trial court's error in considering additional factors not falling in one of the permissible categories identified in *Blakely* is harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18). Also, it is not reasonably probable that it impacted the outcome (*People v. Watson* (1956) 46 Cal.2d 818). Under California law, a

single factor is sufficient to justify imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The court relied, in substantial part, on appellant's recidivism to support the upper term. Under these circumstances, remand for resentencing is unnecessary.

DISPOSITION

The judgment is affirmed.

_____
Levy, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Harris, J.