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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANTE YMAINE WASHINGTON, Defendant and Appellant.	A109989 (Solano County Super. Ct. No. 212976)

I. INTRODUCTION

Dante Washington was convicted by a jury of evading an officer with willful disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a) [count one]), unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a) [count two]), carjacking (Pen. Code, § 215, subd. (a) [count three]), and assault with a deadly weapon, to wit, an automobile (Pen. Code, § 245, subd. (a)(1) [count four]). The jury also found true allegations that Washington personally used a firearm when he unlawfully took a vehicle and committed the carjacking. Washington was sentenced to an aggregate term of 19 years in prison.

On appeal, Washington contends (1) the carjacking charge should have been dismissed because this alleged offense was committed in a different county, (2) the prosecutor used peremptory challenges to exclude African-Americans from the jury in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), (3) the trial court committed prejudicial error by admitting evidence of an uncharged crime and (4) he is entitled to a new sentencing hearing. We reject these claims and, therefore, affirm.

II. STATEMENT OF FACTS

A. *Events of December 31, 2003*

On the afternoon of December 31, 2003, Maceo Wiggins was driving his father's black 1994 BMW. At some time between 4:00 and 4:30 p.m., Wiggins parked in a residential area in Berkeley near the corner of Seventh and Hearst Streets. Holding a cup of coffee, Wiggins exited the car and locked it. While standing on the sidewalk near the car, Wiggins noticed a man cross the street and walk toward him. As he approached, the man grabbed Wiggins and pointed a gun at his face, only a few inches from his head. The man said, "Give me the keys, nigga." Wiggins, who was shocked and scared, handed over the keys and then complied with the man's order to turn over his wallet. The man then unlocked the BMW, got inside and drove away. Wiggins called 911 on his cell phone, gave a detailed description of the carjacker, and reported he was driving up University Avenue.

Berkeley Police Officer Van Huynh was patrolling in West Berkeley when he heard a radio report that Wiggins had been carjacked. Huynh was a few miles from University Avenue when he spotted and began to follow a black BMW proceeding toward an on-ramp to Interstate 80. The license plate of the vehicle matched that of the car that had just been carjacked and Huynh was able to see the driver who also matched the description of the carjacker. Once on the freeway, the driver of the BMW accelerated and swerved and weaved around traffic. Huynh, who was driving a marked police cruiser, activated his emergency lights and siren. As the BMW approached the junction for Interstate 580, the driver was weaving through traffic at about 85 miles per hour. He swerved abruptly onto the 580, headed toward Richmond, driving recklessly at approximately 120 miles per hour.

The BMW stayed on Interstate 580 for approximately four miles during which time the driver used the right shoulder of the highway to pass vehicles and appeared to begin to exit at several off-ramps but would then swerve back into traffic. Finally, the BMW driver exited the freeway at Harbor Way, driving approximately 100 miles per

hour and then braking hard. Officer Huynh followed the car off the freeway but lost sight of it after the driver made a series of quick turns.

B. ***The January 2, 2004, Incident***

On the afternoon of January 2, 2004, Highway Patrol Officer Kerri Alleman noticed a black BMW make an unsafe lane change while driving westbound on Interstate 80 in Fairfield. Alleman, who was in uniform and driving a white patrol car, maneuvered behind the BMW and activated her red spotlight and her red and blue LED lights. When the driver of the BMW declined to pull over and stop, Alleman activated her regular siren and her very high-pitched on-and-off siren. Still the car did not stop. Nor did the driver stop when a second Highway Patrol officer pulled in behind Alleman and activated his lights and siren. As the BMW passed Highway 37 a Highway Patrol helicopter reported that it was overhead. A third Highway Patrol officer joined the pursuit in Vallejo.

Erratically and without signaling, the BMW driver cut back and forth across the freeway and reached speeds in excess of 100 miles per hour. Other drivers were forced to brake and swerve to avoid the BMW. The BMW almost hit several cars, repeatedly forced vehicles out of their lanes and drove on the shoulder of the highway at dangerously high speeds. As the car approached Georgia Street, it appeared as though the driver was going to exit. Instead, he drove on the shoulder at about 85 to 90 miles per hour, swerved back onto the roadway, lost control and crashed into the center divide just west of the Interstate 780 interchange. Another car was damaged and sat in the center divide of the highway.

Washington emerged from the BMW and began walking eastbound in the westbound center divide away from the BMW. Highway Patrol officers drew their guns and instructed Washington to stop and put his hands in the air. Washington raised his hands but kept asking things like "What did I do? What's wrong? Why are you doing this to me? I just got in an accident." Washington kept walking notwithstanding that an officer who was facing him repeatedly yelled at him to stop and get on the ground. It appeared Washington was inching closer to the center divider, which was only about three feet high, and might try to flee. At that point, the officer holstered his weapon and

he and another officer ran up to Washington, forced him to the ground and handcuffed him.

C. *Police Investigation*

Washington told police that, although he may have been driving fast, he did not realize that the Highway Patrol officers were following him and he was not trying to flee from them. Washington stated he did not commit a carjacking and he did not have a gun. He claimed he did not steal the BMW and did not know it had been stolen. Washington told police that he bought the BMW for cash and that the registration and pink slip, which were in the car, proved that the car was his. Washington refused to provide the name of the person who allegedly sold him the car. He also gave inconsistent information about when he purchased the car.

On January 5, 2004, Maceo Wiggins selected Washington's picture from a photo lineup, identifying him as the man who had committed the carjacking on December 31, 2003.[1]

On January 6, 2004, police searched the homes of Washington's mother and sister. They did not find any property that had been taken from Wiggins or any clothing that matched the description of the carjacker's clothes. The police did find a .25 caliber bullet in the home of Washington's sister, Tameka Washington. Tameka told police that the bullet was not hers and that she did not know whose it was. Tameka said that Washington stayed with her on occasion and that he had access to her home. She told police that Washington had no money and no job and that, when she asked Washington how he obtained the BMW, he responded that it was none of her business.

D. *The Gun Evidence*

Wiggins testified at trial that there was no doubt in his mind that the gun Washington pointed at him on December 31, 2003, was real. He described it as "not a huge gun, about maybe six-inches long, silver or nickel-plated, automatic handgun. It wasn't a revolver, moderate to small caliber. It wasn't anything big like a .45 or a 9-

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[1] Wiggins also identified Washington at trial.

millimeter handgun." Wiggins thought that the gun was a .25 caliber pistol or maybe a .38 but not larger than that. He was sure that the gun was an automatic weapon and not a revolver. Wiggins testified that the gun fit comfortably into Washington's hand, and did not extend more than an inch or two beyond his fingers.[2]

The prosecution presented evidence that, on December 30, 2003, Washington was seen with a handgun matching the description of the gun that Wiggins had provided. On the afternoon of December 30, at around 4:00 p.m., two 15-year-old boys and their friend were walking down the street in Berkeley not far from where Wiggins was carjacked the next day. A man approached them and pointed a gun at one of the friends. Both teenagers identified Washington as the man who they saw with a gun on December 30. At trial, one boy, who was certain the gun was real, described Washington's gun as a small, silver automatic weapon with curved edges. He said the gun fit in Washington's hand and extended only about an inch or two beyond his fingers. The other boy, who also believed the gun was real, described it as small and silver.

III. DISCUSSION

A. *Motion to Dismiss Carjacking Charge*

Prior to trial, Washington filed a motion to dismiss the carjacking charge on the ground that Solano County did not have jurisdiction to hear the charge because the acts supporting it occurred outside the county. Initially, the court ruled that the events relating to the carjacking were not sufficiently interconnected to the events in Solano County and that the "proper county for the carjacking would be Alameda County." However, after reconsidering the matter and reviewing the pertinent authority, the court changed its original ruling and denied Washington's motion.

Washington contends his motion to dismiss should have been granted because the only proper venue for the carjacking charge was Alameda, the county where the alleged offense occurred. We disagree. "Although under [Penal Code] section 777 the county in

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[2] Wiggins had obtained knowledge about guns from the Boy Scouts, from reading about weapons and from having handled handguns before.

which a felony was committed is, in the absence of another statute, the locale designated as the place for trial, in California numerous statutes—applicable to particular crimes or in specified circumstances—long have authorized the trial of a criminal proceeding in a county other than the county in which the offense itself occurred." (*People v. Simon* (2001) 25 Cal.4th 1082, 1094.) In the present case, Penal Code section 786, subdivision (a) (section 786(a)) authorized the trial of the carjacking charge in Solano County.

Section 786(a) states: "*When property taken in one jurisdictional territory by burglary, carjacking, robbery, theft, or embezzlement has been brought into another*, or when property is received in one jurisdictional territory with the knowledge that it has been stolen or embezzled, and the property was stolen or embezzled in another jurisdictional territory, *the jurisdiction of the offense is in any competent court within either jurisdictional territory*, or any contiguous jurisdictional territory if the arrest is made within the contiguous territory, the prosecution secures on the record the defendant's knowing, voluntary, and intelligent waiver of the right of vicinage, and the defendant is charged with one or more property crimes in the arresting territory." (Italics added.)

The italicized language above applies squarely to the facts presented here and expressly authorized the trial of the carjacking charge in Solano County. Washington does not share our straightforward reading of this statute. Instead, he maintains that section 786(a) authorizes the trial of a carjacking charge in a county other than the county where the crime was committed *only* if the defendant waives his right of vicinage,[3] which Washington did not do in this case. In other words, Washington interprets the language in the later part of section 786(a) requiring a waiver of vicinage rights as applying to the

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[3] "The right to a jury of the vicinage is distinct from venue: vicinage refers to the geographical area from which the jury is summoned whereas venue is the place of trial. [Citation.] However, '[a]s a practical matter, vicinage usually follows venue.' [Citation.] In California, the boundaries of vicinage are conterminous with the boundaries of the county. [Citation.] Although the vicinage right is assertable by a defendant in a criminal trial, it also protects the right of the offended community to pass judgment in criminal matters. [Citation.]" (*People v. Tamble* (1992) 5 Cal.App.4th 815, 819-820 (*Tamble*).)

entire statute and not just to the prosecution of offenses in a "contiguous jurisdictional territory." This proposed interpretation of section 786(a) was rejected in *Tamble, supra*, 5 Cal.App.4th 815.

Tamble held that a defendant accused of committing burglary and theft in San Luis Obispo and of taking stolen property into Santa Barbara could properly be prosecuted for the burglary and theft in Santa Barbara County pursuant to section 786(a). (*Tamble, supra*, 5 Cal.App.4th at pp. 818-821.) In reaching this decision, the court rejected the defendant's argument that section 786(a) required that he waive his right to vicinage. The court based its holding on a thorough analysis of the history and purpose of section 786(a) which we only briefly summarize here.

Before it was amended in 1990, section 786(a) stated: "When property taken in one jurisdictional territory by burglary, robbery, theft or embezzlement has been brought into another, or when property is received in one jurisdictional territory with the knowledge that it has been stolen or embezzled and such property was stolen or embezzled in another jurisdictional territory, the jurisdiction of the offense is in any competent court within either jurisdictional territory." (See *Tamble, supra*, 5 Cal.App.4th at p. 818.) The 1990 amendment added language which expanded the trial court's venue for these property crimes into contiguous jurisdictions and the condition that the defendant waive the right of vicinage.[4] Construing the new language in light of the legislative purpose of both the statute and the amendment, the *Tamble* court concluded that the Legislature did not intend to require a waiver of vicinage in a jurisdictional territory in which such a wavier was not required prior to the amendment. (*Id*. at pp. 818, 820-821.)

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[4] The 1990 amendment inserted " 'or any contiguous jurisdictional territory if the arrest is made within the contiguous territory, the prosecution secures on the record the defendant's knowing, voluntary, and intelligent, waiver of the right of vicinage and the defendant is charged with one or more property crimes in the arresting territory.' " A nonsubstantive change was also made. (See Historical and Statutory Notes, 50 West's Ann. Pen. Code (2006 supp.) foll. § 786, p. 38.)

Since *Tamble* was decided, section 786(a) was amended again in 1993 to add carjacking to the list of offenses subject to this statute. (Historical and Statutory Notes, 50 West's Ann. Pen. Code (2006 supp.) foll. § 786, p. 38.) However, the *Tamble* court's analysis and interpretation of the language relating to a waiver of vicinage remains sound and convinces us that Washington was not required to waive his vicinage rights before he could be tried for the carjacking in Solano County, the jurisdictional territory into which the defendant allegedly took the property he acquired by committing the carjacking.

Although Washington does not question the *Tamble* court's reasoning, he attempts to distinguish this case by arguing that the crime at issue here, carjacking, is substantively different from robbery, the crime at issue in *Tamble*, because carjacking "is complete at the time and place of the taking, relates to that location, and does not involve transitory considerations." This argument misses the mark. Nothing in the language of section 786(a) or in the *Tamble* opinion supports Washington's proposal that the waiver requirement be applied to certain types of offenses listed in the statute but not to others. The sound interpretation of this statute, as explained in *Tamble*, is that a waiver of the right of vicinage is required when a defendant is prosecuted in a contiguous jurisdictional territory for any of the offense specified in the statute.

Washington argues that, even if a waiver of vicinage was not required, the trial court abused its discretion by changing its original ruling and finding that Solano County was the proper venue for this trial. According to Washington, the trial court changed its ruling in order to facilitate the prosecutor's nefarious plan to deprive Washington of a jury of his peers by having the case against him tried in a county with a significantly smaller African-American population. Because we find nothing in the record before us to support this accusation, we summarily reject it.

B. *The Wheeler Motion*

1. *Background*

During jury selection, the prosecutor used a peremptory challenge to excuse a prospective alternate juror and defense counsel responded with a request to make a motion. The trial court acknowledged the request and indicated the matter would be

addressed later. After jury selection was complete, the court excused the jury and met with counsel. Defense counsel argued that the prosecutor violated *Wheeler, supra,* 22 Cal.3d 258, because at least three of the six peremptory challenges that the prosecutor exercised were used to excuse African-Americans and, in defense counsel's view, there was no valid basis for excluding those potential jurors relative to other non-African-Americans who were left on the jury.

The court responded to the motion by expressing an intention to clarify the record. It stated that the prosecutor had used four peremptories during selection of the main jury panel and two more challenges when selecting the alternates. The court noted that one of the alternates the prosecutor excused was Raquel O., who was African-American, and then stated: "And let me ask the People as to the reason for the peremptory on Raquel [O.]."

The prosecutor replied that, before he was required to supply a reason, the defendant had to make a prima facie showing that the prosecutor was removing potential jurors because of their race or that he was targeting some specific group of people and that such a showing had not been made. The prosecutor noted, among other things, there were at least three African-American jurors on the jury panel and that some of the jurors he had challenged were other races besides African-American.

The trial court stated that it "tend[ed] to agree" with the prosecutor that a prima facie case had not been made. Defense counsel responded that half or more of the persons the prosecutor excluded were African-American. The court countered that there were reasons for the challenges and defense counsel disagreed. After further discussion, the court stated: "Well, let me do this, my feeling is there hasn't been a prima facie showing. But to protect the record, let me ask [the prosecutor] why you knocked off Raquel O. as an alternate?"

The prosecutor stated that he excused Raquel O. for two reasons, first, because she said she was thinking about being a police officer, and second because she said she had bad experiences with police. As to the second reason, the prosecutor noted that Raquel O. shared that she had been pulled over in a neighborhood in which she lived and she

could not understand why she was pulled over. The prosecutor went on to provide reasons for excusing two African-American people from the main jury panel. The first potential juror, Ms. J., was excused because she said she thought police reports she had seen in the past were inaccurate. The prosecutor interpreted her comments as admitting that she did not have faith in the way the police did their job. The other African-American that the prosecutor excused, Mr. J., shared an experience when he was falsely accused of a crime. The prosecutor said the situation was similar to the present case and it struck him that this person "was not a good person to leave on this jury."

At that point, the court made the following ruling: "Yeah, I think—you know, I don't see any *Wheeler* violation, whatsoever. But I did want to protect the record so that it does show that the persons who were peremptories by the People, Simona [J.] for the reasons just stated, Brandon [J.] for the reason stated, and Raquel O. So the record will so reflect."

2. *Guiding Principles and Standard of Review*

"[T]he use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article 1, section 16 of the California Constitution." (*People v. Alvarez* (1996) 14 Cal.4th 155, 192; see also *Wheeler, supra*, 22 Cal.3d at p. 272.) Discrimination in the exercise of peremptory challenges also violates the defendant's federal constitutional rights to equal protection. (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-89.)

There is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner. (*Wheeler, supra*, 22 Cal.3d at p. 278; *People v. Alvarez, supra,* 14 Cal.4th at p. 193.) Therefore, a defendant who believes the prosecutor is using peremptory challenges to strike prospective jurors on the ground of group bias alone carries the burden of establishing a prima facie case of purposeful discrimination. (*People v. Arias* (1996) 13 Cal.4th 92, 134-135; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; *People v. Alvarez, supra,* 14 Cal.4th at p. 193.)

A three-step procedure applies "when a defendant objects at trial that the prosecution exercised its peremptory challenges discriminatorily. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' " (*People v. Johnson* (2006) 38 Cal.4th 1096, 1099 quoting from *Johnson v. California* (2006) 545 U.S. ___[125 S. Ct. at p. 2416], fn. omitted.)

"When a trial court denies a *Wheeler* motion with a finding that the defendant failed to establish a prima facie case of purposeful discrimination, we review the record on appeal to determine whether there is substantial evidence to support the ruling." (*People v. Griffin* (2004) 33 Cal.4th 536, 555.)

If the defendant establishes a prima facie case, the burden shifts to the prosecution to provide non-discriminatory reasons for the peremptory challenges in question. "The prosecutor need only identify facially valid race-neutral reasons why the prospective jurors were excused. [Citations.] The explanations need not justify a challenge for cause. [Citation.] 'Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citation.]' " (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1122.) "The determination whether substantial evidence exits to support the prosecutor's assertion of a nondiscriminatory purpose is a 'purely factual question.' " (*People v. Ervin* (2000) 22 Cal.4th 48, 74-75.)

"The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.)

"' ' "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. . . ." [Citation.]' " (*People v. Ervin supra,* 22 Cal.4th at p. 75.)

3. *Analysis*

Washington's first contention is that the trial court erred by making an implicit finding that Washington waived his *Wheeler* claim as to the main jury panel by failing to object until the selection of alternates. We reject this contention because the court did not make a finding that the *Wheeler* claim was waived. When first asked to respond to the *Wheeler* motion, the prosecutor stated that he had never seen a case where the motion was brought after the main jury was impaneled. The court responded "[y]eah, I don't know about that either." Then, the prosecutor returned to his primary point which was that the defendant had not made a prima facie case. The prosecutor did not limit his argument to the alternate, and the court's ruling that a prima facie case had not been made expressly referenced the two African-Americans who had been excused by the prosecutor from the main jury panel.

Washington next contends that the trial court inferentially found that Washington did make a prima facie case under *Wheeler* as to the alternate juror, Raquel O. He maintains that the court impliedly made this finding by asking the prosecutor why he challenged Raquel O.

A reviewing court may infer that the trial court made an implied finding on the prima facie issue when the court solicited explanations from the prosecutor without first indicating its views on the prima facie issue. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1217; *People v. Fuentes* (1991) 54 Cal.3d 707, 716-717.) However, a finding that a prima facie case has been made should not be inferred when the circumstances negate such an inference. (*People v. Arias, supra,* 13 Cal.4th at p. 135.) For example, if a trial court expresses that it doubts a defendant has made a prima facie showing, its subsequent request that the prosecutor provide an explanation will not be construed as an implied finding that a prima facie case has been established. (*Ibid.*)

The circumstances presented here negate any inference that the trial court made an implied finding that Washington established a prima facie case. The court's initial inquiry as to why the prosecutor excused Raquel O. was part of its effort to "clarify" the record and was made before there had been any discussion of the defense obligation to make a prima facie showing. Once the court was reminded of that defense obligation, its remarks consistently reflected the view that Washington did not make a prima facie case.

Washington also contends that he did make a prima facie showing of purposeful discrimination in the trial court. In order to establish a prima facie case, " 'the totality of the relevant facts' " must support an inference of discriminatory purpose. (*Johnson v. California, supra,* 125 S.Ct. at p. 2416.) As noted above, we review the trial court's finding that Washington did not make a prima facie case under the substantial evidence standard of review. (*People v. Griffin, supra*, 33 Cal.4th at p. 555.) We find substantial evidence does support the trial court's ruling.

The record shows that the only actual fact defense counsel identified to support its *Wheeler* claim was that three of the six potential jurors and alternates that the prosecutor excused were African-American. To attempt to strengthen this fact, defense counsel also argued that the voir dire of these individuals did not disclose any race neutral explanations for excusing them.

The sole fact that challenges were used to excuse prospective jurors of a particular race is not sufficient, by itself, to state a prima facie case. (*People v. Box* (2000) 23 Cal.4th 1153, 1188-1189; *People v. Davenport* (1995) 11 Cal.4th 1171, 1201.) Indeed, even the removal of *all members* of a cognizable group, which did not happen here, is not, standing alone, dispositive on the question of whether a defendant has established a prima facie case of discrimination. (*People v. Young* (2005) 34 Cal.4th 1149, 1173, fn. 7.) Further, although also not dispositive, we note that the jury that was selected in this case included three African-American jurors.[5] This circumstance could properly be

[5] The presence of one or two members of a cognizable group on the panel does not preclude the defendant from establishing a prima facie case with respect to jurors who

viewed by the trial court as a strong indication of the prosecutor's good faith in exercising his peremptories. (*People v. Turner* (1994) 8 Cal.4th 137, 168; *People v. Snow* (1987) 44 Cal.3d 216, 225.) In addition, defense counsel's argument to the trial court that there were no race-neutral reasons for excusing the three African-American potential jurors could properly have been rejected by the trial court. As noted above, all three of these potential jurors had prior negative experiences with police that could have been perceived as affecting their ability to fairly evaluate the evidence against Washington.

Washington next contends that the removal of Raquel O. as an alternate juror shows that the prosecutor's proffered explanations were all pretextual. Initially, we note that the sufficiency of the prosecutor's reasons is not properly at issue on appeal since Washington failed to make a prima facie showing in the trial court.[6] In any event, we disagree with Washington on this point as well.

According to Washington, Raquel O. was an "ideal" juror from the prosecution's perspective except for the fact that she was African-American. We disagree. The prosecutor stated that he excused Raquel O. because she was thinking of becoming a police officer and because she had problems with police in the past. These reasons, which are consistent with the record of Raquel O.'s voir dire,[7] provide a racially neutral

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were excluded. (See, e.g., *People v. Motton* (1985) 39 Cal.3d 596, 607-608; *People v. Hall* (1989) 208 Cal.App.3d 34, 42-43.)

[6] "When a trial court expressly rules that a prima facie case was not made, but allows the prosecutor to state his or her justifications for the record, the issue of whether a prima facie case was made is not moot. [Citations.] Rather, 'when the appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges.' " (*People v. Box, supra,* 23 Cal.4th at p. 1188.)

[7] During voir dire, Raquel O. stated that she was in the process of earning her bachelor's degree in criminal justice and was thinking about becoming a police officer although she had not yet made that decision. Raquel O. stated that she did not believe her interest in the police force would sway her decision making one way or another because

explanation for exercising the peremptory challenge. The prosecutor was concerned that this individual's prior negative experience with police officers and her own interest in the criminal justice system might cause her to question or to be overly critical of the numerous law enforcement officers whose testimony was vital to the prosecution's case.

C. *The December 30 Incident*

Washington next contends that the trial court committed prejudicial error by admitting evidence relating to the December 30 incident in violation of Evidence Code section 1101 (section 1101). Rulings under section 1101 are reviewed under the abuse of discretion standard. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 (*Ewoldt*); *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

Section 1101, subdivision (a) (section 1101(a)) establishes a general rule excluding "evidence of a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." However, this provision expressly acknowledges there are exceptions to this rule which may make character evidence admissible. Furthermore, section 1101, subdivision (b) (section 1101(b)), clarifies that "this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt*, *supra*, 7 Cal.4th at p. 393.) Specific examples of such facts are set forth in section 1101(b). "The categories listed in section [1101(b)] are examples of facts that legitimately may be proved by other-crimes evidence, but, . . ., the list is not exclusive. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146; see also, 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 75, p. 411.)

If a trial court has determined that evidence of a criminal defendant's uncharged conduct is not excluded by section 1101(a), it must then consider whether the evidence should nevertheless be excluded pursuant to Evidence Code section 352. (*People v.*

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she had both negative and positive experiences with police officers in the past. When asked about her negative experiences, Raquel O. stated that when she was in high school and had first obtained her driver's license, she was stopped by police for no reason and that happened a few times.

Balcom (1994) 7 Cal.4th 414, 426.) The evidence must be excluded if the probative value of the evidence is substantially outweighed by the probability that its admission would "(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

In the present case, the trial court found that evidence of the December 30 incident was admissible on two independent grounds that had been argued by the prosecutor. First, the evidence was not character evidence at all because it was independently relevant to the material disputed issue of whether Washington had a gun. Second, the court ruled that, to the extent section 1101 applied, the evidence was admissible pursuant to section 1101(b) as probative of identity, intent and means.

We agree with the trial court that the December 30 evidence was relevant to a material issue in this case, namely the two gun use allegations relating to the charges of carjacking and unlawful taking or driving of a vehicle. Whether Washington used a gun to commit these offenses was a material disputed issue. When interviewed by police, Washington not only denied that he stole the BMW, or knew that it was stolen, he also denied having a gun. Washington's defense at trial was that he was not the carjacker because, among other things, he did not have a gun. Under these circumstances, evidence that, on the day before and at approximately the same time of day that the carjacking was committed, Washington was seen a few blocks away from the location where the carjacking was committed with a gun that matched the description of the gun that Wiggins provided was relevant to prove the two gun use allegations in this case.

Washington contends that the December 30 incident was not sufficiently similar to the carjacking incident to be relevant to the issues of identity or intent. To support this contention, Washington points out that "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to suggest a rational inference of identity, common design, or plan or intent." (Citing *Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) Washington then concludes that evidence he displayed a gun on December 30 does not support a rational inference that he intended to or did in fact commit a carjacking.

In this case, evidence that an armed carjacking occurred was overwhelming and undisputed, a fact defense counsel conceded during closing argument. However, defense counsel did dispute that Washington was the individual who committed the carjacking. Aside from attempting to discredit the quite strong evidence that Washington was identified by Wiggins in both a photo line up and at trial, the only circumstance supporting Washington's defense was the absence of physical evidence of a gun. Counsel argued that someone other than Washington, someone who did possess a gun, committed the carjacking. Under these circumstances, evidence that Washington was seen with a gun that matched the description of the carjacker's gun, on the day before and at the same time of day that the carjacking occurred, in the neighborhood where the carjacking occurred did, in fact support a rational inference that Washington had and used a gun to commit the carjacking on December 31.

Washington next contends that the December 30 evidence was not sufficiently probative of a material issue to justify its admission under Evidence Code section 352 because it was cumulative of Wiggins's testimony and was extremely inflammatory. Again we disagree.

The probative value of this evidence was very high because Washington disputed the gun use allegations and there was no physical evidence of a gun. Further, evidence of the December 30 incident was not cumulative of Wiggins's testimony; it was independent proof that Washington possessed the gun that Wiggins described, that the gun was real, and that Washington used it to commit the offenses charged in counts two and three. Furthermore, this evidence was not particularly inflammatory in light of the other evidence that was presented to this jury and the charges Washington faced.

D. *Washington's Sentence*

Washington contends he is entitled to a new sentencing hearing because the trial court relied on a variety of improper factors when calculating Washington's sentence and because the court's comments during the hearing showed that it was biased against him.

1. *Background*

As noted in our factual summary, Washington was sentenced to an aggregate term of 19 years in prison. The trial court imposed an upper term sentence of nine years for the carjacking and a consecutive ten-year term for the gun use enhancement relating to that charge. The stated reason for this sentencing determination was that "the aggravating factors outweigh those in mitigation."

The court identified the following aggravating factors: (1) the victim was particularly vulnerable, (2) the defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences were imposed, (3) the manner in which the crime was committed indicated planning, sophistication or professionalism, (4) prior juvenile convictions were numerous and of increasing seriousness, and (5) prior performance on probation was unsatisfactory. The court found that no mitigating factors applied.

Washington was sentenced to three years for the assault and two years for evading an officer. The court determined that both of these mid-term sentences were to run concurrently with the base carjacking sentence. The court also imposed a three-year upper term sentence for unlawful taking of a vehicle and a ten-year term for the gun use finding relating to that offense, and then stayed those sentences pursuant to Penal Code section 654.

2. *Analysis*

Washington contends that the trial court relied on two improper factors to support the upper term sentence for carjacking, (1) the defendant's lack of remorse, and (2) the particular vulnerability of the victim.

As noted above, the trial court expressly identified the aggravating circumstances supporting its sentencing decision and lack of remorse was not a factor that the court identified. Despite this fact, Washington asks us to infer that lack of remorse was an aggravating factor because, at one point during the hearing, the court observed that Washington "doesn't care about anybody except himself." Such an inference is

unwarranted and unreasonable since the court expressly listed the aggravating factors it relied on to support the upper term sentence.

The victim's particular vulnerability was an aggravating factor identified by the trial court. We do not find substantial evidence in the record to support this finding.[8] (See *People v. Downey* (2000) 82 Cal.App.4th 899, 917 [trial court's sentencing determination is reviewed for substantial evidence].) However, the court could have imposed the same sentence without this factor since a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) After reviewing the record of the sentencing hearing, we are convinced that the trial court would have imposed the upper term sentence had it realized that Wiggins was not a particularly vulnerable witness.

Washington next contends that the trial court abused or failed to exercise its discretion with respect to the sentence it imposed for unlawful taking of a vehicle and the accompanying gun use finding. The record shows that the court initially expressed an intention to impose a middle term sentence for this offense but was persuaded by the prosecutor to impose an upper term in order to be consistent with the upper term sentence for the carjacking.

Washington contends that there is no authority requiring that sentence choices be "consistent," and further posits that applying such a standard is "impermissible" because it precludes a court from exercising its discretion by making an individualized sentencing decision. We are not persuaded by this argument. The conviction for unlawfully taking a

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[8] The People's observation that Wiggins was young ("only" 28 years old), alone, and holding a cup of coffee does not supply us with the substantial evidence we would need to affirm this finding.

vehicle was supported by the same evidence that supported the carjacking conviction, the same factors in aggravation applied to both, and there were no mitigating factors applicable to either offense. Under these circumstances the trial court neither failed to exercise its discretion nor abused that discretion by imposing an upper term sentence for unlawfully taking a vehicle.

Finally, Washington contends he was denied his right to due process at the sentencing hearing because the trial court was biased against him. Washington waived this claim by failing to raise it in the lower court. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111; *People v. Seaton* (2001) 26 Cal.4th 598, 698.) In any event, we find insufficient evidence to support Washington's untimely claim of bias.

Washington relies primarily on two statements the trial court made at the beginning of the hearing when it shared with counsel the sentence it was thinking of imposing.[9] The court stated that, after reviewing the probation report and hearing the trial "I just think this conduct—I mean, we're one step away from about the most violent crime that you can have." Shortly thereafter, the court stated that "I have a real difficult time with this case . . . ." In Washington's view, these comments manifest the trial judge's "provincial" attitude, an attitude Washington attributes to the fact that Solano is a more "rural" county than Alameda. Washington further contends the trial judge's attitude precluded him from being impartial during sentencing. To illustrate his point, Washington argues that carjacking is not one step away from the most violent crime there is and surmises that the trial court's contrary opinion resulted in too harsh a sentence.

Even when viewed out of context, the two comments about which Washington complains do not show the trial judge was biased against Washington. Furthermore, since all of the court's sentencing decisions are adequately explained and amply

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[9] To buttress his judicial bias claim, Washington makes the unfounded accusation that the trial court predetermined a severe sentence and then worked backward to try to justify it. The record clearly demonstrates that the court gave an indicated sentence, stated reasons for that sentence, and then invited comments from both counsel which it took into consideration before announcing the actual sentence that was imposed.

supported by the record, Washington's subjective assessment of the trial court's "attitude" is simply irrelevant. We find no evidence in the record before us that the trial court was bias against Washington.

IV. DISPOSITION

The judgment and sentence are affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.