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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON LEE CORYELL et al., Defendants and Appellants.	E030693 (Super.Ct.No. RIF91190) O P I N I O N

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. As to Coryell, affirmed, with directions to modify abstract of judgment; as to Darden, affirmed in part, reversed in part, and remanded with directions.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Jason Lee Coryell.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Telesforo Joseph Darden.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Elizabeth A. Hartwig and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Jason Lee Coryell and Telesforo Joseph Darden appeal after they were convicted of numerous assault, attempted murder, weapons discharge, and other crimes, arising out of a series of gang-related episodes. Defendant Coryell contends his convictions should be reversed because he was deprived of the constitutional right to a representative jury, and because the evidence is insufficient to sustain the charges. We reject these contentions and affirm the judgment as to defendant Coryell.

Defendant Darden raises claims of insufficient evidence, instructional error, improper dual conviction, and other matters. We agree with defendant Darden that he could not be convicted both of carjacking and of unlawful taking and driving a vehicle, and that his sentence for assault should be stayed under Penal Code section 654.

Finally, we also agree with the People's assertion that the trial court's failure to impose a mandatory parole revocation fine under Penal Code section 1202.45 was an unauthorized sentence requiring correction.

[footnote continued from previous page]

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of a portion of Facts and Procedural History, as noted, and parts I, II.E., F., and III.

FACTS AND PROCEDURAL HISTORY

[The following is not to be published.]

Hugo Raymond Barragan had belonged to a Los Angeles-based street gang, the Marijuano Locos. He had moved to the Lake Elsinore area in 1999. While living in Lake Elsinore, Barragan associated with other former gang members he knew from Los Angeles. Barragan became familiar with some members of the local Lake Elsinore gangs, including defendant Coryell. Defendant Coryell was a member of the Elsinore Young Classics, or EYC, gang, and went by the moniker, "Drifter." Barragan had met defendant Coryell a couple of times in March of 2000. He had also seen codefendant Rigoberto Vargas "around."

Barragan was living in an apartment on Mountain View Avenue in Lake Elsinore, with his wife, his son, his mother and his sister. On the afternoon of March 24, 2000, Barragan was inside his apartment. As Barragan was standing near a window, ironing some clothes, he saw a white car pass by. Barragan recognized the passenger as defendant Coryell. Codefendant Vargas was the driver, and two other young men were in the back seat. Barragan went outside to see "what's happening." The car had gone, so Barragan went back inside.

A few minutes later, Barragan saw the same white car pass by again. Barragan again went out to "'see what's going on.'" When Barragan reached the mailbox at the street, the four EYC members, including Vargas and Coryell, got out of the car. Barragan saw that they had guns. Defendant Coryell started shooting at Barragan.

Barragan saw codefendant Vargas raise his gun. Barragan turned and ran back toward his apartment. He heard one bullet whiz past his head. Another struck the building. A third bullet struck a nearby mobile home. Coryell, Vargas, and their two companions returned to their car and drove away.

The March 24, 2000, shooting was the basis for counts 5 (against Coryell and Vargas for attempted murder of Barragan), 6 (against Coryell and Vargas for assault with a semi-automatic weapon), and 7 (against Coryell and Vargas for shooting at an inhabited dwelling).

[The following two paragraphs are to be published.]

On April 12, 2000, Omar Garcia and his girlfriend, 16-year-old Iman O., drove to a liquor store in Lake Elsinore. Iman remained in Garcia's car while Garcia used a pay telephone. While Iman was waiting, another car pulled up and parked in the store parking lot. Four young men got out. Three of the men went into the store. The fourth, defendant Darden, approached Garcia at the telephone kiosk. Darden asked Garcia where he was from (i.e., his gang affiliation). He pushed Garcia's shoulder and punched him in the face. Garcia tried to get away as Darden pulled out a knife and tried to stab him.

Garcia ran away; Darden gave chase. Fearing that either she or Garcia would be hurt, Iman fled from Garcia's car. Darden, having chased Garcia away, returned to Garcia's car. Iman had left the car with the keys in the ignition. Darden got in, started the car, and drove away.

[The remainder of the facts and procedural history are not to be published.]

A few hours later, at approximately 1:00 a.m. on April 13, 2000, Jesse Madrid was outside talking to friends at his apartment complex, on Joy Street in Lake Elsinore. Defendants Darden and Coryell pulled a blue pickup truck into the driveway. Both defendants flashed EYC gang hand signals and then parked the truck. A few minutes later, they both ran up to Madrid and demanded to know, "'Where is Psycho?'" Madrid denied knowing anyone named "Psycho." Darden told Madrid to relay a message, that "'EYC was looking for [Psycho].'" Darden and Coryell then left.

Barragan's gang name was "Cyco," apparently pronounced identically to the word "psycho"; Barragan said the name meant "psycho" or "crazy," and he had been given that appellation because "[w]hen I was younger, I used to do some crazy things."

A few minutes after the incident with Jesse Madrid, Darden and Coryell parked their truck outside another apartment complex on Joy Street. Barragan was staying with some friends at an apartment there. When Barragan went downstairs, defendants Darden and Coryell were waiting. Coryell pulled out a semi-automatic weapon. He shouted, "'Drifter [his moniker], Young Classics, fool,'" and fired two shots. Barragan ran back up the stairs. Someone called the police.

Coryell and Darden drove away in their truck. A short distance away, on Clement Street, Coryell fired more shots. Two bullets shattered the windows of a car parked on the street; the car belonged to Thomas Clyne, a rival gang member. Another bullet struck the home of Thomas and Virginia Geck.

Darden and Coryell drove on, stopping at Heald and Ellis Streets. Defendant Coryell alighted from the truck, retrieved a toolbox from the back, and took a gun out of the toolbox. He walked up to an apartment, yelled, "'F--- 18th Street [a rival gang],'" and returned to the truck. He replaced the gun in the toolbox, and defendants drove away.

Riverside County Sheriff's officers received broadcast calls of "shots fired," as well as descriptions of Coryell, Darden, and their truck. Deputy Dan Kelly spotted the truck on Wilson Street. He activated his lights and siren. The truck stopped by the side of the street. Defendant Coryell opened the passenger door and got out. He pointed a gun at Deputy Kelly and fired once. Darden also got out of the truck, and both defendants ran away. Defendant Darden was found hiding behind a planter; defendant Coryell was apprehended when he was found hiding under a vehicle.

The shooting at Deputy Kelly resulted in allegations of attempted murder of a peace officer against both Coryell and Darden (count 1). Count 2 charged both Coryell and Darden with assault with a semi-automatic firearm on Deputy Kelly. Count 3 charged both defendants with attempted murder of Barragan, for the shooting at the Joy Street apartment complex. Count 4 alleged Darden and Coryell used a semi-automatic firearm in assaulting Barragan.

As noted, counts 5, 6 and 7 arose out of the incident at Barragan's residence on March 24, 2000, and alleged offenses against defendant Coryell and codefendant Vargas. Defendant Darden was not named in those counts.

Count 8 charged defendants Darden and Coryell with discharging a firearm at an unoccupied vehicle (i.e., Thomas Clyne's car) and at an uninhabited dwelling, count 9 charged Darden with carjacking Garcia's car, count 10 charged Darden with unlawfully taking or driving the vehicle of another (Garcia's car), count 11 alleged Darden had assaulted Garcia with a deadly weapon (a knife), count 12 charged Darden with misdemeanor battery on Jane Doe (i.e., Iman O.), and count 13 charged Darden with misdemeanor brandishing a weapon. The misdemeanor counts (counts 12 and 13) against Darden were eventually dismissed.

As to all counts, it was alleged that each of the defendants and codefendants had committed the offenses in association with a criminal street gang. As to counts 7 (against Coryell and Vargas for shooting at an inhabited dwelling), and 9 (against Darden for carjacking Garcia's car) it was alleged the offenses were committed at the direction of, and in association with, a criminal street gang. As to counts 1, 2 and 3 (against Coryell and Darden for attempted murder of Deputy Kelly, assault with a semi-automatic firearm on Deputy Kelly, and attempted murder of Barragan), it was also alleged that Coryell and Darden had personally and intentionally discharged a firearm, and that they acted as principals for the benefit of a criminal street gang. As to count 5 (against Coryell and Vargas for attempted murder of Barragan), it was alleged that Coryell and Vargas had personally and intentionally discharged a firearm, and that they acted as principals for a criminal street gang. As to counts 4 (against Darden and Coryell for assaulting Barragan with a semi-automatic weapon) and 8 (against Coryell and Darden for discharging a

weapon at an unoccupied vehicle and an uninhabited dwelling), it was alleged that Coryell and Darden had personally used a semi-automatic firearm.

As to defendant Coryell, the prosecution alleged a prior prison term enhancement. As to defendant Darden, the prosecution alleged one prior serious felony conviction under Penal Code section 667, subdivision (a), and one prior serious or violent "strike" conviction, under Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d).

As to defendant Coryell, the jury found him guilty of attempted murder of Deputy Kelly (Apr. 13, 2000) in count 1, without premeditation and deliberation, assault with a semi-automatic weapon on Deputy Kelly (Apr. 13, 2000) in count 2, willful, deliberate and premeditated attempted murder of Barragan (Apr. 13, 2000) in count 3, assault on Barragan (Apr. 13, 2000) with a semi-automatic weapon in count 4, willful, deliberate and premeditated attempted murder of Barragan (Mar. 24, 2000) in count 5, assault on Barragan (Mar. 24, 2000) with a semi-automatic weapon in count 6, shooting at an inhabited dwelling (Mar. 24, 2000) in count 7, and shooting at an unoccupied vehicle (Apr. 13, 2000) in count 8. The jury also found true all the applicable gang and firearm findings.

As to defendant Darden, the jury acquitted Darden of attempted murder of Deputy Kelly in count 1, and of assault with a semi-automatic weapon on Deputy Kelly in count 2. The jury found defendant Darden guilty of willful, deliberate and premeditated attempted murder of Barragan in count 3, assault on Barragan with a semi-automatic

weapon in count 4, shooting at an unoccupied vehicle in count 8, carjacking in count 9, unlawfully taking or driving a vehicle in count 10, and assault on Garcia with a deadly weapon in count 11. The gang and weapons allegations were found true, except that, with respect to count 3, the jury found not true the allegation that defendant Darden acted as a principal while a principal personally discharged a firearm for the benefit of, at the direction of, and in association with a criminal street gang under Penal Code section 12022.53, subdivision (e).

Defendants each admitted their prior conviction allegations.

The court sentenced defendant Coryell to two terms of life with the possibility of parole, plus a consecutive term of 45 years. The court sentenced defendant Darden to two terms of life imprisonment with the possibility of parole, plus a consecutive term of 50 years. Codefendant Vargas, who was 17 years old, received probation on his convictions.

Defendants Coryell and Darden appeal. (Codefendant Vargas did not appeal.)

ANALYSIS

I. Defendant Coryell's Appeal

Defendant Coryell raises two matters on appeal. He contends that the prosecutor improperly used peremptory challenges at voir dire to exclude racial minorities from the

jury (alleged *Wheeler/Batson* error).[1] He asserts that he was deprived of his constitutional rights to a fair jury. Defendant Coryell also contends that the evidence was insufficient to support his convictions.

A. No *Wheeler/Batson* Error Occurred

Defendant Coryell complains that the trial court erred in denying his motion under *Wheeler* and *Batson* to dismiss the second venire. The trial court had actually granted an earlier *Wheeler/Batson* motion, and dismissed the first venire. Defendant claims that the court erred in failing to find a prima facie case of discriminatory peremptory challenges to several prospective jurors; as to the one prospective juror as to whom the trial court found a prima facie case, defendant urges that the court erred in accepting the prosecutor's explanation for the challenge.

1. Relevant Legal Principles

In *People v. Wheeler*,[2] the California Supreme Court "' . . . held that the 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 I, section 16, of the California Constitution. Subsequently, in *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [90 L.Ed.2d 69, 79-83, 106 S.Ct. 1712] . . . the United States Supreme Court held that such a

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[1] *People* v. *Wheeler* (1978) 22 Cal.3d 258; *Batson* v. *Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Wheeler/Batson*).

practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. . . .'"[3]

Both African-American prospective jurors and Hispanic jurors constitute cognizable groups for purposes of *Wheeler* and *Batson*.

A reviewing court presumes that a prosecutor uses his or her peremptory challenges in a constitutional manner.[4] The burden is on the defendant to establish a prima facie case of purposeful exclusion. If the defendant does make out a prima facie case, the burden shifts to the prosecution to show a genuine, nondiscriminatory reason for the challenge.[5]

To establish a prima facie case of group bias, the defendant must raise the issue in a timely fashion, make as full a record as is practicable, establish that the excluded prospective jurors are members of a cognizable group, and show a "strong likelihood," of group, rather than individual, bias.[6] "[I]n California, a 'strong likelihood' means a 'reasonable inference.'"[7]

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[2] *Wheeler*, *supra*, 22 Cal.3d 258.

[3] *People v. Catlin* (2001) 26 Cal.4th 81, 116.

[4] *Wheeler*, *supra*, 22 Cal.3d 258, 278.

[5] *People v. Alvarez* (1996) 14 Cal.4th 155, 193; *People v. Montiel* (1993) 5 Cal.4th 877, 909.

[6] *People v. Boyette* (2002) 29 Cal.4th 381, 422.

[7] *People v. Box* (2000) 23 Cal.4th 1153, 1188, footnote 7.

"The trial court's determination that no prima facie showing of group bias has been made is subject to review to determine whether it is supported by substantial evidence. (*People v. Alvarez*, *supra*, 14 Cal.4th at pp. 196-197.) We examine the record of the voir dire and accord particular deference to the trial court as fact finder, because of its opportunity to observe the participants at first hand. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155.)"[8]

"The United States Supreme Court has given this explanation of the process required when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges: '[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.'"[9]

The appellate court must exercise "'great restraint'" when reviewing the trial court's determinations of the sufficiency of the prosecutor's justifications for exercising a peremptory challenge.[10] "'The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular

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[8] *People v. Jenkins* (2000) 22 Cal.4th 900, 993-994, footnote omitted.

[9] *People v. Silva* (2001) 25 Cal.4th 345, 384, citing *Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769, 1770-1771, 131 L.Ed.2d 834].

case being tried. [Citations.] The justification need not support a challenge for cause, and even a "trivial" reason, if genuine and neutral, will suffice. [Citations.] [¶] "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.]'"[11] In addition, "[t]he determination whether substantial evidence exists to support the prosecutor's assertion of a nondiscriminatory purpose is a 'purely factual question.'"[12]

Defendant Coryell places much emphasis on the trial court's granting of an earlier *Wheeler/Batson* motion, as a result of which the court dismissed the venire and began jury selection anew. That is to say, he argues that this court must take the earlier finding of discriminatory challenges into consideration in evaluating his claim that the prosecutor "never stopped" making discriminatory peremptory challenges.

We caution, however, against placing undue emphasis on the earlier voir dire. Up to the point of the successful *Wheeler/Batson* motion, the prescribed procedures operated as they should: The trial court found that defendant had (step one) made out a prima facie case, the court called upon the prosecutor (step two) to provide a nondiscriminatory

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[10] *People v. Ervin* (2000) 22 Cal.4th 48, 74, citing *People v. Arias* (1996) 13 Cal.4th 92, 136.

[11] *People v. Ervin*, *supra*, 22 Cal.4th 48, 74-75, citing *People v. Arias*, *supra*, 13 Cal.4th 92, 136.

justification for the challenge, and it ultimately concluded (step three) that the prosecutor's explanation was not sufficient to overcome the defendant's showing of group bias. The court then implemented the appropriate remedy, dismissing the venire and beginning jury selection anew.[13]

How else can jury selection begin "anew," unless it truly begins "anew"? The quashing of the original venire denotes a mistrial, and the impaneling of a new one effectively begins a new trial. The presumption that peremptory challenges are properly exercised reasserts itself when the new venire is called. Absent some unusual circumstance, such as multiple venire dismissals for *Wheeler/Batson* violations,[14] we do not think that, if a *Wheeler/Batson* motion is once sustained, the presumption must be otherwise as to any succeeding voir dire. We cannot simply assume that an officer of the court would, once cautioned, continue to act with unconstitutional bias. A new prima facie case must be met, new explanations called for (if the proper prima facie case is made), and new rulings independently made.

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12 *People v. Ervin*, *supra*, 22 Cal.4th 48, 75, citing *People v. Alvarez, supra,* 14 Cal.4th 155, 197.

13 See *People v. Willis* (2002) 27 Cal.4th 811, at pages 821-824, discussing other potential remedies.

14 Cf., e.g., *People v. Willis*, *supra*, 27 Cal.4th 811 [defense counsel's discriminatory challenges caused two successive mistrials].

Upon appeal, therefore, we also review the matter as if the voir dire had begun anew; the prima facie case as to each prospective juror must be properly established, and the rulings reviewed in the light of the record of the new voir dire.

2. Facts Relating to the Prospective Jurors

Defendant Coryell complains that the prosecutor improperly excluded African-American jurors D., R. and H. The court found no prima facie case as to these prospective jurors. When defendant renewed his *Wheeler/Batson* objection after the prosecutor had excused juror B., another African-American, the court did find a prima facie case and asked the prosecutor to justify his challenge to juror B. The court apparently accepted the explanation, however, and denied the defense *Wheeler/Batson* motion.

Defendant Coryell also raised *Wheeler/Batson* concerns to the excusal of three Hispanic jurors, S.G., N.V. and R.R. He contends that the trial court erred in failing to find he had established a prima facie case of discriminatory exclusion as to these three Hispanic jurors.

The Hispanic Jurors

S.G. Prospective juror S.G. indicated in her voir dire that her brother was serving time in jail or prison for a drug offense. She had not investigated the matter sufficiently or received enough information to determine whether she believed law enforcement authorities had treated her brother fairly, though she did agree that his punishment was fair for what he was alleged to have done.

N.V. Prospective juror N.V. lived with his parents, he was unmarried, he had no children, and worked as a stocker in a discount store. He had never served in the military, nor served as a juror in a trial.

R.R. Prospective juror R.R. indicated that he was married and worked for an aerospace company. His wife worked for a school district. He had two adult children and one child still in school. He had served on a jury in the past, on a molestation case, but the jury had been unable to reach a decision. Upon the prosecutor's further inquiry, R.R. stated that his service on that jury had been a "positive" experience, explaining that, "what I found is that we didn't dwell into trying, at lunch time or something, come up with who was guilty, who was innocent. Everybody pretty much -- we did what was asked of us, and that was -- actually pretty surprised that everybody did exactly what was asked of them." He denied that it was at all frustrating to sit on a jury and yet be unable to reach a verdict.

The African-American Jurors

Juror D. Juror D. indicated that her mother was a court administrator. Juror D. was unmarried and had no children. She was a full-time student and lived with her parents. She had never served in the military nor served on a jury.

Juror R. Juror R. was also a full-time student. He jocularly remarked that he was unmarried, without "any kids that I know about." He lived with his parents. He had never served on a jury and had not been in the military service.

Juror H. The voir dire of juror H. revealed that he had a brother in prison for breaking a plate over someone's head. Juror H. believed his brother had been treated fairly by the criminal justice system, and he stated that his brother's incarceration would not affect his ability to make a decision in the instant case.

Juror H. also indicated that he had once been arrested for possession of dangerous drugs; the case was later dismissed without pursuing the charges. Juror H. related that he was detained with a group of others. The police found one of his companions had the drugs, and all those present were arrested. Ultimately, no one was charged. Juror H. explained that "[i]t went to court, and they just -- we gave them a piece of paper and they stamped the paper and said that's it."

Then, in the 1990's juror H. was involved in a boating accident. He was tried for manslaughter and acquitted.

In addition to being charged with crimes, juror H. had been a victim of burglary in the 1980's. In his business, he had also dealt with contractors; one of the firms with which juror H.'s company did business was investigated by the Los Angeles County District Attorney. Juror H. was subpoenaed as a witness in the case against the contractors' firm, but the case never went to trial.

Otherwise, juror H.'s voir dire showed that he was married with a teenage daughter. He managed software engineers for a technical company. He had never served in the military, but he had served on juries three times in the 1970's and 1980's; each jury reached a verdict.

The court did find a prima facie case had been made as to prospective juror B.

Juror B. Juror B. said that her cousin was a lawyer. The cousin had been a deputy prosecutor in Los Angeles County before entering private practice. Juror B. was a graduate student in English at a local university. Before entering graduate school, juror B. had worked as an editorial assistant for a professional medical journal. Earlier still, she had been a research assistant for a medical doctor, as well as a receptionist at an AIDS clinic.

Juror B. was unmarried and had no children. She had never served on a jury, and had not served in the military.

The court at one point urged juror B. to speak up so everyone could hear her answers; the prosecutor also cautioned juror B.: "We're losing you."

3. No Prima Facie Case as to Hispanic Jurors

The trial court found that no prima facie case had been made that the prosecutor was exercising peremptory challenges to Hispanic prospective jurors in a discriminatory fashion. The court noted that several jurors with Hispanic names remained on the panel. The court did not require the prosecutor to articulate reasons for challenging S.G., N.V., and R.R. Nonetheless, substantial evidence on the record supports the court's finding that no prima facie case had been made. As to S.G., she had a close relative who was incarcerated, and appeared confused by the court's questioning as whether she believed her brother had been treated fairly. As to N.V., he was a young, single person, living at home with his parents. A party may legitimately excuse a prospective juror on the basis

of lack of life experience.[15] R.R. had served on a jury in the past, but that jury had been unable to reach a verdict. R.R.'s explanation for the "positive" quality of his jury experience was limited to the jury's ability to follow the court's admonition not to discuss the case during breaks, such as at lunch time. A prosecutor may well decide that a potential juror who values conviviality more than perseverance to a decision is not the kind of juror he or she wants on the panel. Legitimate, race-neutral reasons were patent on the record for excusing S.G., N.V. and R.R.

4. No Prima Facie Case as to Jurors D., R. and H.

Jurors D. and R., like N.V., were young, single persons living at home with their parents. They were students and had neither served in the military nor done prior jury service. As already explained, an absence of significant life experience is a legitimate basis upon which to excuse a prospective juror. Juror H. had been once arrested, and once prosecuted, for matters which resulted in the dropping of all charges or in acquittal, respectively. A prosecutor might well believe that juror H. would view his two encounters with the criminal justice system as unjustified intrusions onto his liberty. Again, the record on its face reveals legitimate, race-neutral, reasons for excluding these prospective jurors.

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[15] *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 ["Limited life experience is a race-neutral explanation"].

5. Substantial Evidence Supports the Trial Court's Finding That the Prosecutor Rebutted the Prima Facie Case as to Juror B.

The trial court did find a prima facie case of racial exclusion as to juror B. and called upon the prosecutor to explain his reasons for challenging her. The prosecutor stated first of all that, like some of the other challenged jurors, juror B. was "single, no children, and she's a student. . . . [I]n my experience, and cases have shown, that typically students are a lot more liberal. This woman's life experience essentially consists of going to school and graduate school. She's indicated she was an English major -- a graduate English major. My opinion is that someone who is a graduate student in English is going to have a lot more liberal views on the world and on the evidence. And liberal jurors are not the kind of people I want on my jury. I want conservative jurors. And I want people that have a stake in the community by -- typically by way of the fact they've got a family, children, et cetera.

"She also indicated that she worked for -- I believe she was a secretary and worked at an AIDS clinic. Now, I think there's a lot of secretarial jobs one can get. I think I -- someone who finds themselves working in an AIDS clinic is probably someone who's -- might have some sympathy for the cause. And by virtue of that, I think it indicates more of a liberal leaning than I would care to have on my jury."

Juror B.'s experience as an editorial assistant for a medical journal also affected the prosecutor's assessment of her: "I have found that, typically, people involved with the press, particularly by the way of being editors, tend to be much more liberal. Liberal

jurors I don't believe are, I think, good prosecution jurors in the sense I think they will tend to be more sympathetic with the defendant, biased against prosecution in that the prosecution represents the system. And perhaps the government -- and I know that a lot of times newspaper people are very critical of the government. [¶] And so that's essentially it."

As the prosecutor pointed out, courts in other cases have permitted challenges to students based upon the perception, or the (presumptive) "fact that young students tend to lack practical experience and hold more liberal views."[16]

If we give proper deference, as we must, to the trial court's determination that the prosecutor's reasons were bona fide, we can discern no reason for reversal. The trial court properly denied defendant Coryell's *Wheeler* motion respecting juror B., as well as the other African-American and Hispanic jurors.

B. Substantial Evidence Supports Defendant Coryell's Convictions

Defendant Coryell devotes extensive briefing to the substantial evidence question; in essence, he argues that the eyewitness identifications were untrustworthy because Hugo Barragan had a motive to lie, Deputy Kelly's identification was rendered unreliable by other discrepancies in his testimony and the physical evidence, and none of the other eyewitnesses were able to identify defendant Coryell, or their physical descriptions

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[16] *Latimore v. Spencer* (D. Mass. 1998) 994 F.Supp. 60, 65.

constructively ruled Coryell out as one of the participants in the various crimes with which he was charged.

Defendant Coryell's challenge is subject to the substantial evidence standard of review. That is, this court must review the entire record in the light most favorable to the judgment, to determine whether there is substantial evidence -- evidence that it reasonable, credible, and of solid value -- from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.[17]

Defendant Coryell argues, e.g., that Deputy Kelly was mistaken about being fired upon by a gun, inasmuch as no gun and no shells were found and the defense provided evidence that the pickup truck tended to backfire, that Barragan was biased because of his plea bargain on another case, that Barragan's testimony had other discrepancies, that some eyewitnesses' descriptions varied from those of Barragan, and that eyewitness identification testimony is inherently unreliable.

These matters were for the jury, however. It decided the issues of credibility and weight of the evidence adversely to defendant; this court will not undertake to redecide these issues.[18] Insist as he might that a reasonable trier of fact must have entertained some doubt as to Barragan's and Deputy Kelly's identification testimony, Coryell has, in our assessment, merely pointed out the conflicts in the evidence. We are bound to

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[17] *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.

resolve all such conflicts in favor of the judgment.[19] The evidence tying defendant Coryell to the crimes was not "inherently improbable,"[20] or otherwise unworthy of belief. The evidence was sufficient to support the verdicts.

II. Defendant Darden's Appeal

Defendant Darden makes several attacks upon his conviction for carjacking, including sufficiency of the evidence, various instructional errors, deprivation of due process, and alleged cumulative error. He also argues he was improperly convicted of both carjacking and vehicle theft. He further contends he was improperly sentenced.

A. Substantial Evidence Supports the Carjacking Conviction

Carjacking, in violation of Penal Code section 215, subdivision (a), is defined 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."

[footnote continued from previous page]

[18] *People v. Mercer* (1999) 70 Cal.App.4th 463, 466.
[19] *People v. Poe* (1999) 74 Cal.App.4th 826, 830.
[20] *People v. Franz* (2001) 88 Cal.App.4th 1426, 1439.

Defendant Darden argues that the evidence failed to establish the element that Garcia's car was taken "from the person or immediate presence of a victim," because neither Garcia nor his girlfriend, Iman O., were in the car when he drove it away.

Defendant Darden contends that the evidence did not show a carjacking as to Garcia, because "Garcia had run down the street to a point over a block away and was nowhere near his vehicle when it was taken. . . . Therefore, he was neither in possession of the car at the time, nor was it in his 'immediate presence . . . ." The argument proves too much: Of course Garcia was no longer near the car -- Darden's knife-wielding was sufficient to drive him away from it. Darden accosted Garcia near the car, made a gang challenge, grabbed him, punched him, and threatened him with a knife. The force and fear accomplished the taking from Garcia.

As to Iman O., defendant Darden argues the car could not have been taken from her, because she abandoned the car before he took it. He further contends that Iman cannot have been in possession of the car, for purposes of the carjacking statute. We disagree.

Iman also witnessed the vicious attack on Garcia. She immediately feared for her safety, as well as that of Garcia. Defendant Darden's violence was sufficient to frighten Iman into fleeing from the car, leaving Darden in possession of the field, as it were. Darden entered the car and drove away.

As the court instructed in *People v. O'Neil*,[21] "[s]ection 215 'does not require that the victim be inside or touching the vehicle at the time of the taking.'" Iman in fact *was* inside the vehicle when she witnessed defendant Darden beat Garcia, threaten him with a knife, and chase him away. Iman reasonably feared for her own safety; defendant's acts directly caused her to abandon the vehicle. Darden promptly took the car.

Carjacking is not necessarily "confined to those cases where the perpetrator uses force or fear 'in order to gain possession of the vehicle.'"[22] Nonetheless, the evidence here reasonably shows that defendant Darden did use force or fear to gain possession of the vehicle, by frightening both Garcia and Iman away.

We also reject defendant Darden's suggestion that Iman was not in "possession" of the vehicle for purposes of the carjacking statute. More particularly, he analogizes to robbery cases, in which it has been held, for example, that a visitor to a business could not be the victim of a robbery of the goods of that business, because the business visitor was not in actual or constructive possession of the property taken from the business.[23] The analogy to the robbery cases is inapt. The customer of a business who happens to be on the premises when the perpetrator robs the business of its goods has no right to the business's goods. The passenger in an automobile, however, is in some measure in

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[21] *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131, quoting *People v. Medina* (1995) 39 Cal.App.4th 643, 650.

[22] *People v. O'Neil*, *supra*, 56 Cal.App.4th 1126, 1132.

[23] Citing *People v. Nguyen* (2000) 24 Cal.4th 756, 763-764.

"possession" of the vehicle. Indeed, he or she is physically inside the "goods" in question. The passenger does have a right to be present, and, if left in the car alone by the owner, has ostensible control over it, at least to a limited extent.

The California Supreme Court cases also caution us not to follow in lockstep with the interpretation of the robbery and larceny statutes when interpreting the carjacking statute.[24] In *People v. Hill*,[25] for example, the court noted that, "'[i]n the usual case of carjacking involving multiple occupants, all are subjected to a threat of violence, all are exposed to the high level of risk which concerned the Legislature, and all are compelled to surrender their places in the vehicle and suffer a loss of transportation. All are properly deemed victims of the carjacking.'" Given the purpose of the statute and the legislative intent, we see no reason to conclude that Iman, as a passenger, was not in sufficient possession of the vehicle to be a victim of the carjacking.

The evidence was sufficient to support the carjacking conviction.

B. There Was No Instructional Error

Defendant Darden urges that the instruction on carjacking (CALJIC No. 9.46) was erroneous because it was "overly broad." He further contends that the trial court was

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[24] See *People v. Ortega* (1998) 19 Cal.4th 686, 693, [in which the California Supreme Court found that "neither carjacking nor theft is a necessarily included offense of the other, because it is possible to commit either offense without committing the other"].

[25] *People v. Hill* (2000) 23 Cal.4th 853, 859.

required to instruct, sua sponte, with CALJIC Nos. 1.24 (on "possession") and 17.01 (unanimity instruction).

1. CALJIC No. 9.46

Defendant Darden complains that the carjacking instruction was "overly broad" because it included in the definition of "immediate presence," an area within the victim's "observation." He claims that the instructional language could permit the jury to find a defendant guilty if the car owner "merely sees" the perpetrator take the car, and that the instruction omits any "further requirement of reasonable ability to exercise control over the vehicle."

The area included within the concept of "observation" is not so broad as defendant suggests. First, the instruction clearly provides that the area is that from which the victim "could, if not overcome by violence or prevented by fear, retain possession of the subject property."

Second, both Garcia and Iman had remained within an area in which they had control, and not merely observation, of the vehicle. Garcia had testified that the telephone he was using was approximately five feet away from his car. Iman remained in the car while Garcia used the telephone, and when defendant Darden initiated his attack on Garcia.

Third, the required element of force and fear obviates the concern that a defendant could be found guilty of the offense merely by watching the defendant drive the vehicle away. Here, defendant Darden punched Garcia and threatened him with a knife. Iman

witnessed this attack and threat. Darden's violent acts manifested sufficient force and fear to overcome Garcia's and Iman's ability to maintain control of the vehicle. Darden accomplished the taking by means of force and fear.

Defendant Darden further argues that any instructional error must have been prejudicial in light of the jury's asserted "struggle" to reach a verdict. He notes that the jury "[took] a long time and sen[t] out several questions. Deliberations took almost two whole days and . . . [a]t one point the jury reported it was 'hopelessly deadlocked' on two counts [and] [i]t wondered if it could 'compromise.'"

The prejudice argument is not well taken. As the People point out, none of the jury's concerns related to the carjacking count. The jury sent out seven notes. The first asked for the prosecutor's "count chart" used in closing argument. The court denied the request, as the chart was not in evidence. The second and fourth notes addressed scheduling matters. The third note asked to view the video tape of the truck backfiring. In the fifth note, the foreperson reported that the jury was deadlocked as to two of the counts. The foreperson told the court that the jury was deadlocked on counts 1, 2 and 5, none of which was the carjacking count. The sixth request related to the attempted murder counts, and the seventh asked if "compromise [is] part of the deliberation process," to which the court responded with an emphatic, "NO!" None of the jury's questions related to, or showed that the jury had any difficulty with, the carjacking count.

Defendant Darden has failed to demonstrate any reasonable probability that the jury would have reached a different verdict in the absence of the alleged error.[26]

2. CALJIC No. 1.24

Defendant Darden next complains that the trial court should have instructed with CALJIC No. 1.24, concerning actual and constructive possession.[27] He argues that the jury might have misunderstood the word "possession," as used in CALJIC No. 9.46. We disagree.

CALJIC No. 1.24 normally applies to contraband cases; the term "possession," for purposes of establishing criminal culpability for possessing an item, "has a specialized meaning"[28] in that context. Here, no "specialized meaning," with a resultant criminal culpability for possessing a contraband item, was implicated. The ordinary, familiar meaning of the word "possession" applied here.

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[26] *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.

[27] CALJIC No. 1.24 states:

"There are two kinds of possession: actual possession and constructive possession.

"Actual possession requires that a person knowingly exercise direct physical control over a thing.

"Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons.

"One person may have possession alone, or two or more persons together may share actual or constructive possession."

[28] *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1703.

The jury could not have failed to understand that Garcia was the driver/owner of the vehicle, and that Iman was the passenger/occupant of the vehicle. "Possession," in its ordinary sense, means to own or occupy property.[29] Garcia still owned the vehicle as he parked it and stood five feet away at a telephone kiosk. Iman still occupied the vehicle until Darden's violent acts caused her to flee. Neither victim relinquished the property voluntarily.

A trial court "'has no sua sponte duty to give amplifying or clarifying instructions . . . where the terms used in the instructions given are "commonly understood by those familiar with the English language." [Citation.]' [Citation.]"[30] The words of the statute, and the defining instructions, were here used in their ordinary sense. There was no error in failing to instruct in the language of CALJIC No. 1.24.

3. CALJIC No. 17.01

Defendant Darden next contends that the trial court should have given a unanimity instruction in connection with the carjacking count because there were two potential victims, Garcia and Iman. No unanimity instruction was required.

A unanimity instruction is required when a defendant commits more than one act which might constitute the charged crime. "Thus, if the evidence shows more than one

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[29] See, e.g., Webster's Ninth New Collegiate Dictionary (1991) page 918, defining "possess" as "to have and hold as property: OWN," or to "enter into and control firmly," and defining "possession" as "control or occupancy of property without regard to ownership."

instance of the charged crime—'two or more discrete criminal events'—a unanimity instruction is required."[31]

Here, of course, there was only one discrete carjacking offense. If the evidence shows only one instance of the charged crime, no unanimity instruction need be given.[32]

C. Due Process Was Not Implicated by the Pleading and Proof of the Carjacking Count

Defendant Darden maintains that he was denied due process of law because the "victim" alleged in the carjacking count was not the same "victim" as argued to the jury by the prosecutor. The contention is without merit.

Count 9 accused defendant Darden of the crime of carjacking, "in that on or about April 12, 2000, in the County of Riverside, State of California, he did willfully and unlawfully and by means of force and fear take a motor vehicle from the person, possession, and immediate presence of another, to wit: OMAR GARCIA, with the intent to deprive such other person of possession of the motor vehicle."

Both Garcia and Iman testified to the events constituting the carjacking. Darden accosted Garcia, made a gang challenge, grabbed his arm and punched him in the face. Darden then brandished a knife, threatening Garcia. Garcia, understandably alarmed,

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[30] *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.

[31] *People v. Strong* (1994) 30 Cal.App.4th 366, 374, footnote 6, citing *People v. Perez* (1993) 21 Cal.App.4th 214, 223.

tried to get away; Darden, knife in hand, chased him down the block. Iman gave a very similar account, and told how, fearing both for Garcia and for herself, she fled from the automobile, which Darden then took.

The evidence was sufficient to demonstrate that both Garcia and Iman were victims of the carjacking. The prosecutor argued that both Garcia and Iman were victims of the carjacking. Darden did not object, but directed his arguments to both Garcia and Iman as victims of the carjacking. The thrust of Darden's defense was that he had taken the car from Garcia as an "afterthought," though he acknowledged that, "[b]ased upon the evidence that you heard, *you could find the carjacking*." (Italics added.) He addressed a separate, brief, argument to Iman, stating, "Now, it also indicated that it could be a carjacking taken from the presence -- the immediate presence of the passenger. Well, it's up to you to determine. Ms. [O.] being in another car somewhere in the parking lot is from her immediate [presence]. You come to your own conclusions about that, and I'm going to move on."

There was no due process violation. The information alleged one count of carjacking, naming Garcia as the victim. Defendant Darden was well apprised of the evidence against him on that count, consisting of the evidence of Garcia, Iman, and witness Bruce Yost. All the accounts were consistent with one another.

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32 *People v. Perez*, *supra*, 21 Cal.App.4th 214, 223.

"[T]he due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them."[33] Defendant here was given more than adequate notice of the charge, and the facts underlying the charge.

There also was no "substitution," as defendant Darden claims, of one victim for another. Rather, the evidence showed that there was potentially an additional victim of the single crime charged. That evidence did not negate any proof of the offense as to the named victim, Omar Garcia.

Indeed, given the uncontradicted nature of the evidence, in the consistent accounts given by all the witnesses, if defendant Darden was guilty at all (the only question was, as defense counsel indicated, whether Darden formed the intent to steal the car as an "afterthought"), he was equally guilty as to each potential victim. Inasmuch as he was charged with, and convicted of, only a single count, he has no cause to complain simply because, as the evidence showed, there were two victims, rather than only one, of his criminal acts. As the People urge, "due process is satisfied," when "[t]here was no question which of defendant's acts was the basis for [the charge]."[34]

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[33] *People v. Seaton* (2001) 26 Cal.4th 598, 640.

[34] *People v. Griggs* (1989) 216 Cal.App.3d 734, 743 [naming of the particular victim is not an element of assault with a deadly weapon, and the absence of a named victim is not a denial of due process].

D. No Cumulative Error

Defendant Darden urges that his carjacking conviction must be reversed because of "cumulative error." We have found no error, and thus no cumulative error. Reversal is not required.

E. Defendant Darden Could Not Properly Be Convicted of Both Carjacking and Vehicle Theft

Defendant Darden asserts that his conviction of vehicle theft, in violation of Vehicle Code section 10851, must be vacated because it is a lesser included offense of carjacking.

There are two tests for determining whether one offense is necessarily included within another: the "elements" test, and the "accusatory pleading" test.[35]

Under the "elements" test, "if a crime cannot be committed without also necessarily committing a lesser offense, [looking strictly to their respective statutory provisions,] the latter is a lesser included offense within the former."[36]

"Under the accusatory pleading test," on the other hand, "a lesser offense is included within the greater charged offense '"if the charging allegations of the accusatory

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[35] *People v. Lopez* (1998) 19 Cal.4th 282, 288.
[36] *People v. Lopez*, *supra*, 19 Cal.4th 282, 288.

pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]'"[37]

We examine the question first under the elements test. Carjacking is "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."[38]

Vehicle Code section 10851 is violated if a person "drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle."[39]

The People argue that, while Vehicle Code section 10851 provides that a violation occurs if a person "drives or takes" a vehicle, the carjacking statute "does not mention 'driving.'" The import of this argument, upon which the People do not elaborate, is unclear. While Vehicle Code section 10851 can be violated either by "taking" or by "driving," a "taking" for purposes of the carjacking statute will necessarily satisfy one method of violating Vehicle Code section 10851. The distinctions in language between

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[37] *People v. Lopez*, *supra*, 19 Cal.4th 282, 288-289.
[38] Penal Code section 215.

the two statutes as to "taking" and "driving" thus do not preclude Vehicle Code section 10851 from being a lesser included offense of carjacking.

Both statutes also require the intent to permanently or temporarily deprive someone of possession of the vehicle. Although Vehicle Code section 10851 can be violated by depriving an owner of either possession or title to the vehicle, the carjacking statute requires a deprivation of possession; the deprivation of possession for purposes of carjacking will also necessarily contravene the same proscription in Vehicle Code section 10851.

The statutes do differ, however, in terms of the potential victims of each crime. The gravamen of a Vehicle Code section 10851 is the violation of ownership rights to the property taken, the vehicle. The victim of a violation of Vehicle Code section 10851 is the owner of the vehicle. By contrast, Penal Code section 215 provides that either an owner or a passenger in a vehicle may be the victim of a carjacking. "By 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."[40] In theory, even the owner of a vehicle, or someone at the owner's behest, may commit carjacking against a passenger of a vehicle; under such circumstances, it is possible to

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[39] Vehicle Code section 10851, subdivision (a).

commit the crime of carjacking without violating the vehicle theft statute, inasmuch as the taking will have been accomplished with the owner's permission. An objective evaluation of the elements of carjacking and vehicle theft shows, therefore, that vehicle theft is not a necessarily included offense of carjacking.

Under the accusatory pleading test, however, the result is different. While it is theoretically possible to commit carjacking against a passenger of a motor vehicle, without also stealing the car from the owner, the pleading here alleged that the victim was the owner, Omar Garcia. The allegations of the accusatory pleading were such that defendant Darden could not have committed the carjacking offense against Garcia, the owner of the vehicle, without also committing a vehicle theft offense.

The trial evidence here did show that both Garcia, the owner, and Iman, the passenger, were victims of the carjacking, and thus that the offense could have been committed in a way that did not violate Vehicle Code section 10851. The particular evidence adduced at trial is not, however, a proper consideration in determining whether one offense is included within another.[41] "'[J]ust because, *in fact*, one indivisible act simultaneously violates two statutes . . . does *not* mean the two offenses are "necessarily" included. *Factual* inextricability does *not* equal "necessarily included."'"[42] By the same

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[40] *People v. Hill, supra,* 23 Cal.4th 853, 860.
[41] *People v. Ortega*, *supra*, 19 Cal.4th 686, 698.
[42] *People v. Ortega*, *supra*, 19 Cal.4th 686, 697.

token, if the trial testimony happens to show that the statute was violated in different ways, one of which does not meet the elements test for necessarily included offenses, but the allegations of the accusatory pleading were such that the defendant could not have committed the greater offense without also committing the lesser, the particular evidence adduced at trial should not be permitted to overturn the result of the accusatory pleading test. Otherwise, the vagaries of the testimony could, for example, defeat a defendant's request for jury instructions on lesser included offenses, as shown by the accusatory pleading test.

The People blithely assert that "auto theft would be a lesser-included offense only if the information included language describing the carjacking in such a way that if committed as specified, auto theft was necessarily committed as well. This was not the case here. Count 9 [carjacking] charged taking; count 10 [vehicle theft] charged driving or taking. . . . Count 9 charged Darden with 'the intent to deprive [Garcia] of possession of the motor vehicle.' . . . Count 10 charged Darden with 'intent to deprive the owner of title to and possession of [the] vehicle.' . . . [¶] . . . [S]ince counts 9 and 10 had different elements, were charged as such and, in fact, had different victims, Darden was properly convicted of both."

The People's facile argument utterly ignores the crux of the issue: That count 9 charged "taking," while count 10 charged "driving or taking," is of no consequence: the People fail to recognize that "taking" for purposes of the greater charge necessarily violates the "driving or taking" proscription of the lesser charge. Similarly, although

count 9 alleged that defendant had the intent to deprive Garcia, the owner, of possession of the vehicle, while count 10 charged him with intent to deprive the owner -- i.e., Garcia -- of title *or* possession of the vehicle, the People's argument does not address the substantive reality that, under these allegations, Darden could not be found guilty of count 9 (with intent to deprive Garcia of possession) without also necessarily committing the offense charged in count 10 (with intent to deprive the owner of . . . possession). As we have already noted, the proof at trial that there were two victims, both the owner and a passenger, does not obviate that the accusatory pleading specifically alleged the carjacking offense as to Garcia, the owner; of necessity, Darden could not be guilty of count 9 as pleaded without also violating Vehicle Code section 10851, describing an offense against the vehicle owner.

We therefore conclude that, under the accusatory pleading test, the vehicle theft offense in count 10 was a lesser included offense of count 9, carjacking. Defendant Darden could not properly be convicted of both. Accordingly, his conviction of vehicle theft in count 10 must be vacated.

F. Defendant Darden's Sentence on the Assault Count Must Be Stayed Under Penal Code Section 654

Penal Code section 654 provides in relevant part that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Here, the information pleaded that Garcia was the victim of the carjacking. The proof also showed that Garcia was a victim of the carjacking. Defendant Darden was convicted of one count of carjacking. Defendant Darden accomplished the carjacking, as to both Garcia and Iman, by brandishing a knife and threatening Garcia with it. The jury also found Darden guilty, under count 11, of assault with a deadly weapon (ADW) -- i.e., threatening Garcia with the knife. The use of the knife for purposes of the ADW offense constituted the identical act of "force or fear" by which defendant accomplished the carjacking. The use of the knife was a single act, for which defendant could be punished only once under Penal Code section 654.

"When two crimes are incident to one objective, the defendant may be punished for the [more] serious offense but not for both crimes."[43] The sentence on defendant Darden's ADW conviction must be stayed.

III. Defendants' Sentences Were Unlawful for Failure to Include a Parole Revocation Fine

The People separately raise the point that the trial court neglected to impose a mandatory portion of the sentence, concerning parole revocation fines. The failure to

[43] *People v. Rogers* (1981) 124 Cal.App.3d 1071, 1080.

impose the mandatory term constitutes an unauthorized sentence, and thus may be corrected in the appellate court in the first instance.[44]

Penal Code section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

The trial court has no discretion not to impose the parole revocation fine in the specified amount, i.e., an amount equal to that imposed as a restitution fine under Penal Code section 1202.4. Here, the trial court imposed restitution fines of $10,000 as to each defendant. The abstract of judgment must be amended accordingly, as to each defendant, to reflect imposition of the corresponding parole revocation fine.

DISPOSITION

As to defendant Coryell, none of the assignments of error on appeal has merit. The judgment is affirmed in its entirety. The abstract of judgment as to defendant Coryell must be modified, however, to reflect imposition of a parole revocation fine of

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[44] See *In re Ricky H*. (1981) 30 Cal.3d 176, 191; see also *People v. Smith* (2001) 24 Cal.4th 849, 853.

$10,000, pursuant to Penal Code section 1202.45. A copy of the amended abstract shall be forwarded to the Department of Corrections.

As to defendant Darden, the conviction under count 10, of vehicle theft in violation of Vehicle Code section 10851, must be reversed, with directions to dismiss that charge, together with any appurtenant enhancements. The matter must be remanded for resentencing in light of the reversal as to count 10. Upon resentencing, the court should stay the imposition of sentence as to count 11, assault with a deadly weapon, pursuant to Penal Code section 654. In addition, the court shall impose a parole revocation fine, in accordance with Penal Code section 1202.45, equal to the restitution fine imposed under Penal Code section 1202.4.

CERTIFIED FOR PARTIAL PUBLICATION

/s/ Ward
J.

We concur:

/s/ McKinster
Acting P. J.

/s/ Gaut
J.