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Court of Appeal, Fourth District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,

v.

Jose Ricardo VARGAS, Defendant and Appellant.

No. G041999.
(Super.Ct.No. 05NF3453).
June 23, 2010.

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed as modified.
Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

IKOLA, J.

*1 A jury convicted defendant Jose Ricardo Vargas of, among other offenses, first degree murder (Pen.Code, § 187, subd. (a)) [FN1] with the special circumstance of the murder being committed for a criminal street gang purpose (§ 190.2, subd. (a)(22)). The court sentenced defendant to state prison for life without the possibility of parole on the murder conviction and additional terms for defendant's other crimes. Defendant makes four distinct contentions on appeal: (1) the admission into evidence of defendant's incriminatory statements during his post-arrest interrogation was prejudicial error because such statements were unconstitutionally coerced and came after he requested the officers to cease the interrogation; (2) the court prejudicially erred by allowing a police officer to opine on the guilt of defendant; (3) the prosecutor engaged in prejudicial misconduct by asserting to the jury during closing argument that the presumption of innocence had been "removed"; and (4) there is insufficient evidence to affirm defendant's conviction of receiving stolen property (§ 496, subd. (a)). Other than ordering a trivial modification to defendant's sentence,[FN2] we affirm the judgment.

FN1. All statutory references are to the Penal Code unless otherwise stated.

FN2. Defendant claims, and the People concede, that the court shortchanged him by one day with regard to its calculation of presentence actual custody credits. We will order the appropriate modification in the disposition below.

FACTS

Defendant, a member of the Orange County Criminals, a criminal street gang, rode his bicycle in an Anaheim neighborhood on the evening of September 9, 2005. Eduardo Ceja and Juan Mendoza, members or former members of Los Crooks (another criminal street gang), visited friends that night in the same neighborhood.

Defendant pulled out a gun and walked toward a group of individuals (including Mendoza and Ceja) gathered outside. Standing five to 10 feet away, defendant asked Mendoza and Ceja: "Where are you from?" Without waiting for an answer, defendant fired four to six shots. Ceja died of a gunshot wound to the head. No one else was injured. Defendant, abandoning the bicycle, ran away from the scene of the crime toward a nearby apartment building. Defendant was arrested shortly thereafter; he was found crouching on the floor of an apartment after an individual complained to the police that someone (defendant) would not leave her apartment.

The defense presented at trial was that the wrong man had been arrested and charged with the crime. A variety of evidence supported the jury's conclusion that defendant in fact committed the crimes charged.

First, DNA evidence linked defendant to the crime. Testing indicated defendant's DNA matched that of the "major contributor" of DNA to the handlebar grips of the bicycle abandoned at the crime scene. Testing also suggested defendant's DNA was present on two shirts (one of which was a plaid-patterned shirt) found on the floor of the apartment where he was arrested. When defendant entered the apartment breathing heavily, he grabbed clothing from a pile and went into the bathroom to take a shower and change his clothes. Several witnesses to the shooting noted the gunman wore a "plaid" or "flannel" shirt; one witness identified the plaid shirt recovered in the apartment as the one worn by the gunman and another witness testified it was "like the shirt" worn by the gunman.

*2 Second, defendant was linked to the murder weapon. Police found a nine-millimeter semiautomatic handgun (without any bullets) under a bush by a gate in the backyard of a residence near the crime scene. Five shell casings recovered at the scene were fired from the handgun, as testified by an expert witness. An acquaintance of defendant testified defendant had shown him the murder weapon prior to the shooting. The acquaintance knew defendant as a gang member with the moniker "Shadow."

Third, according to police officer testimony, several eyewitnesses identified defendant at the crime scene. The same acquaintance of defendant mentioned in the previous paragraph [FN3] told a police officer he saw defendant behind a security screen after the acquaintance heard gunshots. According to the police officer, defendant asked the acquaintance, "Where are the cops?" After the acquaintance answered, defendant borrowed the acquaintance's bicycle and rode away.

FN3. This individual testified only under a grant of immunity.

One woman who saw the shooting identified the shooter to the police as "Shadow." At a field show-up after defendant was arrested, this witness initially said defendant "looked like [the gunman], but [she] couldn't give him 100 percent." When the witness got closer, she said defendant was not the gunman. A second woman also saw the shooting. At the field show-up, she said defendant "looks like him" and she was "pretty sure" defendant was the gunman. Neither of these witnesses identified defendant as the gunman at trial. An expert witness testified that, in cases involving criminal street gang defendants, witnesses often testify differently from what they initially tell the police. He attributed this to "fear of the gang, fear of the individual [defendant], fear of being labeled a rat."

Fourth, defendant made several admissions during his lengthy interrogation. After denying any involvement for most of the interrogation, defendant ultimately made various incriminatory statements. Defendant admitted being at the scene of the crime and shooting. "[Detective]: Why did it happen? [¶] [Defendant]: Cause I guess it was meant to be, that's why it happened. That's just how it goes (sniffle). [¶] [Detective]: Okay, but why did you pull the trigger? [¶] [Defendant]: (sniffle). Ca[use] they pulled it on me.

So they pulled, what the fuck, what the fuck am I supposed to do? [¶] [Detective]: I understand. Explain it to me. Did they pull a gun out first? [¶] [Defendant]: Well, that's what I fuckin' see. I see plenty of 'em, you know. [¶] [Detective]: Okay. [¶] [Defendant]: There's plenty of mother fuckers. They see guys, what the fuck am I supposed to do?" Defendant also admitted running and tossing the gun. "[Detective]: After the shooting where did you go? [¶] [Defendant]: I fuckin' ran. [¶] [Detective]: Okay, where did you run to? [¶] [Defendant]: I don't fuck. You know, I ran and there's a fuckin' a shit and fuckin', and that's all I remember. [¶] [Detective]: Where did you toss the gun at? [¶] [Defendant]: I don't know. I just tossed it. I tossed it. I don't know."

DISCUSSION

Admissibility of Admissions Obtained at Interrogation

*3 Defendant claims: (1) he was unconstitutionally coerced into a false confession by repeated promptings (over the course of four hours) by his interrogators that it was his "last chance" to explain his actions, which purportedly implied he would not have an opportunity to testify at trial and/or that the police would provide benefits to him if he confessed to shooting in self-defense; and (2) the detectives unconstitutionally ignored defendant's request to end the interrogation prior to his incriminating statements.

The detective conducting the interrogation encouraged defendant to talk about what happened. Defendant points to numerous statements by the interrogator, which, in their totality (the statements were spaced throughout the interrogation), supposedly comprise unconstitutional coercion through express or implied promises of leniency for cooperation (and express or implied threats of negative consequences for non-cooperation): "You might not get another chance to tell your story"; "And then you say, well, well, time out. Here's what happened. Here's why I had to do what I had to do-too late by then, too late by then. Too bad, so sad. You rot in prison." "But you, you realize, Jose, that when your fingerprints and DNA come back from this gun that you will be convicted of it." "And you won't get a chance to tell your side of the story"; "Here we are right now. You don't get another chance"; "What is it? Last chance man"; "And you're gonna sit in a jail cell, and you're gonna ... think to yourself, man, I wish I would have told them my side of the story"; "I think you defended yourself tonight. I'd like to be able to explain that to a judge and to a jury." "But I can't, you know why? Cause you're not letting me. And you will never have this opportunity again, I guarantee you"; "He's dead. He's dead. This is your one and only chance to tell me what happened and you're gonna pass it up? He's dead"; and "You're gonna be charged with murder unless you tell me your side of the story."

Defendant also cites other factors that purportedly contributed to the involuntary nature of his incriminating statements. For one, the detective's ruses about the state of the evidence misled defendant into thinking he had no way out other than to confess. It is uncontested that, despite statements to the contrary made during the interrogation: (1) test results did not find gunshot residue on defendant's hands; (2) Ceja had not yet died at the time of the interrogation (although he was expected to die); and (3) the detectives did not yet (at the time of the interrogation) have any DNA or fingerprint evidence linking defendant to the crime. Secondly, the interrogation took place in the middle of the night and defendant was tired (as indicated by the fact he fell asleep or attempted to fall asleep each time the detectives left the interrogation room).

An expert in the field of interrogation techniques, Professor Richard Leo, was called to testify by defendant during the pretrial hearing to determine the admissibility of defendant's statements during the interrogation. Leo concluded the interrogation was psychologically coercive and the detectives "went over the line." Leo testified: "I can't get inside [defendant's] head, but the structure of the interrogation is ... 'we have all this evidence, it is irrefutable, this is your only chance. Here is an account, here is the explanation that we will get you a misdemeanor and is relatively painless. But, if you avoid this opportunity, you are looking at rotting in jail and getting charged with one, two, or three serious felonies.' [¶] So the logic of it is 'if you don't do anything, you are going to be in the worst possible situation.' "

*4 The trial court denied defendant's motion to exclude the interrogation tape and transcript from evidence. "[I]t just appears to the court that these implied promises and threats are of such a nature that they do flow naturally from these exhortations [to tell the truth] from the police." The court explained the

facts appeared to present the possibility of a self-defense claim or an imperfect self-defense claim. The court continued: "The best evidence ... is looking at the video. I mean, I think there is a lot of credibility with Dr. Leo over here. I don't think he puffed and expanded because the best evidence for the prosecution is the video in and of itself. [¶] Because Mr. Vargas, even though it is the middle of the night and he is a little bit tired, he is not having any problems whatsoever communicating with the police. It is not an issue." "I don't think there was anything untoward. I don't think the exhortation rose to the level that Mr. Vargas couldn't exercise his free will. [¶] And, because of the court's totality of the circumstances analy[sis], the court finds that the statements were, in fact, voluntary and the motion to suppress them are denied."

" 'The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] [These provisions] require[ ] the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary.... [¶] Under both state and federal law, courts apply a "totality of the circumstances" test to determine the voluntariness of a confession.' " (*People v. Holloway* (2004) 33 Cal.4th 96, 114 (*Holloway*).) " 'When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.' " (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

"A statement is involuntary if it is 'not " 'the product of a rational intellect and a free will.' " ' [Citation.] The court in making a voluntariness determination 'examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession.' [Citation.] Coercive police tactics by themselves do not render a defendant's statements involuntary if the defendant's free will was not in fact overborne by the coercion and his decision to speak instead was based upon some other consideration." (*People v. Rundle* (2008) 43 Cal.4th 76, 114 (*Rundle*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

" 'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.... Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if ... the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible...." ' " (*Holloway, supra*, 33 Cal.4th at p. 115.)

*5 Accurately describing the possible consequences of a murder conviction is permissible. (*Holloway, supra*, 33 Cal.4th at pp. 115-116.) Suggesting possible justifications for a homicide (such as self-defense) is not coercive; this tactic instead suggests "possible explanations of the events and offer[s] defendant an opportunity to provide the details of the crime." (*People v. Carrington* (2009) 47 Cal.4th 145, 171 (*Carrington*).) Although it is a factor potentially supporting a finding of involuntariness, deceiving a defendant by inaccurately describing the existence of physical evidence linking defendant to the crime does not necessarily invalidate a confession. (*People v. Thompson* (1990) 50 Cal.3d 134, 166-167, 170 [confession voluntary even though interrogators falsely told defendant that tire tracks, soil samples, and rope fibers linked him to crime]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 [confession voluntary even though defendant falsely told his fingerprints were found on the getaway car]; see *Carrington, supra*, 47 Cal.4th at p. 172 ["The use of deceptive statements during an interrogation ... does not invalidate a confession unless the deception is ' " 'of a type reasonably likely to procure an untrue statement' " ' "].)

Defendant asks this court to follow *Com. v. Novo* (Mass.2004) 812 N.E.2d 1169 (*Novo*). In *Novo,* the Supreme Judicial Court of Massachusetts affirmed the trial court's suppression of a confession because it was secured through coercive police conduct. (*Id.* at p. 1171.) The interrogators, echoing the theme approximately 20 times, presented what the court characterized as a " 'now-or-never' " choice to Novo: explain why you killed the victim or you will go to prison for life. (*Id.* at pp. 1171-1172, fn. 2.) Twelve of

the officers' statements "explicitly made reference to the jury never hearing Novo's story unless he told it to the officers." (*Id*. at p. 1172, fn. 2.) The officers also "falsely told Novo" his girlfriend was giving a statement against him and fingerprint evidence from the victim confirmed Novo harmed the two-year-old victim. (*Id*. at p. 1172.) The *Novo* court found defendant's subsequent confession to be involuntary. "The misrepresentation of Novo's right to defend himself at trial, repeated incessantly, is a particularly egregious intrusion on [fundamental rights]. It is different in degree from false statements regarding the strength or existence of incriminating evidence, which we have criticized, [citation], but not always found to be determinative of voluntariness, [citation]. It is conduct that casts substantial doubt on the voluntariness of a subsequent confession and on the integrity of the interrogation process leading up to it." (*Id*. at p. 1175, fn. omitted.)

This case bears some surface resemblance to *Novo,* although there are no explicit statements by the interrogators that defendant could not tell his side of the story *to the jury*. Indeed, the text (and context) of the interrogators' statements here suggest they were referring to defendant's last chance to tell *the interrogators* his side of the story. The line between a permissible and impermissible interrogation " 'can be a fine one.' " (*Holloway, supra*, 33 Cal.4th at p. 117.) Although the interrogators in this case came close to the line of coercive questioning, they did not cross it. Having viewed the videotaped interrogation and considered the totality of the circumstances depicted therein, we independently conclude defendant's confession was voluntary.

*6 Although defendant did not raise the issue at trial, he now claims he invoked his right to silence during the interrogation. Just after the detective informed defendant (inaccurately) that the victim had died, but before defendant began providing clearly incriminating statements, the following exchange occurred. "Do you want me to stop talkin' to you? I swear to you that he is dead. [¶] [Defendant]: Nah, nah, nah. [¶] [Detective]: Do you want me to bring somebody else in here? They'll tell you the same thing. I'll step out of the room. [¶] [Defendant]: *Can I just fuckin' talk to ya' some other day? Fuck, I don't wanna. Like, not so many days, just* ... [¶] [Detective]: I swear to you that he is dead, Jose. [¶] [Defendant]: Nah, fuck that. [¶] [Detective]: This is your last chance. [¶] [Defendant]: Fuck that shit, he ain't dead." (Italics added.) Defendant claims the italicized statement represented an unequivocal assertion of his right to end the interrogation.

Even assuming defendant has not forfeited this issue, we find no error. " 'In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect "must *unambiguously* " assert his right to silence or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required ... either to ask clarifying questions or to cease questioning altogether. [Citation.]' [Citation.] A defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning." (*Rundle, supra*, 43 Cal.4th at pp. 114-115.) Defendant's statement was ambiguous. Absent a clearer expression of a desire to remain silent or consult with counsel, the interrogator was entitled to continue his dialogue with defendant.

Testimony on Ultimate Issue of Guilt

Next, defendant contends the court committed prejudicial error when it allowed a police officer to testify to his "firm belief" in defendant's guilt. The People concede error but claim the error was harmless.

After the jury viewed the taped interrogation of defendant, the prosecutor called Detective Catlin Panov to testify. Panov was one of the individuals who interrogated defendant. Panov testified that, despite statements to the contrary made during the interrogation to defendant: (1) test results did not find gunshot residue on defendant's hands; (2) Ceja had not yet died at the time of the interrogation; and (3) the detectives did not yet (at the time of the interrogation) have DNA or fingerprint evidence linking defendant to the crime. The following testimony ensued: "Q. So why did you ... use those ruses during the course of your interview? [¶] A. Again, based on the totality of the evidence that we had, I firmly believed that Mr. Vargas was the shooter. [¶] [Defense counsel]: Objection. Calls for speculation. Lacks foundation. [¶] THE

COURT: No. Overruled. [¶] THE WITNESS: In addition to that, Mr. Vargas gave several clues throughout the course of our interview that suggested he was the shooter, yet he refused to tell us the truth about what occurred. [¶] Q. BY [Prosecutor]: And was it those clues that you referred to that kept you being so persistent during the course of the interview? [¶] A. Yes."

*7 "A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant." (*People v. Torres* (1995) 33 Cal.App.4th 37, 46.) This is because "the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*Id.* at p. 47.) Moreover, opinion testimony about the veracity of statements by another is inadmissible because it likewise invades the province of the jury. (*People v. Melton* (1988) 44 Cal.3d 713, 744.) One potential danger of trial by jury is that jurors could defer to the implicit "expert" judgment made by the police officers who arrested the defendant. (See CALCRIM No. 220 ["The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because [he has] been arrested, charged with a crime, or brought to trial"].) Here, Panov made that judgment explicit through his testimony, suggesting both that he thought defendant was guilty and that he thought defendant was lying during the interrogation.

The People may have too hastily conceded error, as it is unclear whether the objections made by defense counsel (calls for speculation and lacks foundation) accurately communicated the basis for the testimony's objectionable nature or encompassed a request for the court to strike the offensive testimony provided by Panov. (Evid.Code § 353 ["A verdict ... shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].)

Assuming the court erred in not sustaining the objection and/or striking Panov's improper testimony, the question before us is whether the court committed harmless error. We will reverse the judgment only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The People cite two factors in support of their contention that any error was harmless: (1) considered in context, Panov's testimony was clearly offered to explain why the police lied to defendant about the evidence and not offered to convince the jury of defendant's guilt; and (2) the evidence of defendant's guilt was overwhelming (e.g., eyewitness identifications provided to investigating officers at the scene of the crime, defendant's DNA on the bicycle left at the scene of the crime, defendant's prior possession of the murder weapon, defendant's incriminating statements at the interrogation).

We agree with defendant that the People's first factor is beside the point. The prosecutor may have subjectively thought he was eliciting testimony for a proper purpose (to explain why the police deceived defendant at the interrogation). But the People fail to cite any authority for the proposition that a police officer may testify to his belief in a defendant's guilt if such testimony is provided to explain an interrogation ruse. And there is no reason to think the jury would be less likely to improperly defer to the opinion of a police officer in these circumstances than in a scenario where the officer was not trying to explain interrogation tactics. We explicitly decline to credit this asserted factor in our harmless error analysis.

*8 On the other hand, we agree the evidence of guilt in this action was overwhelming. Given the lack of any asserted instructional error and the overwhelming evidence of guilt, we find any error committed in allowing the officer's testimony to be harmless. (See, e.g., *People v. Jefferson* (2008) 158 Cal.App.4th 830, 845 ["The overwhelming proof from all the proper evidence means any error in admitting [other evidence] was harmless beyond a reasonable doubt"] .)

Prosecutorial Misconduct as to Presumption of Innocence

Despite having failed to object at trial, defendant posits the prosecutor committed prejudicial misconduct by stating the following in his closing argument: "In deciding whether the People have proved

their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty. [¶] Obvious. What's important there, folks, is this right here. *The defendant is presumed to be innocent. Every defendant in every criminal prosecution. That's until the fact-finder has been presented with evidence. At that moment in time, once the evidence has been established or presented, that presumption is removed.* [¶] *In this particular case, based on all the evidence that's been presented, I would submit to you that that presumption is now-has been removed.* The defendant is guilty of the murder of Eddie Ceja as well as the other charges for the reasons we will discuss in just a minute." (Italics added.)

Defendant rightly points out that the presumption of innocence does not end with the presentation of evidence by the prosecution. The presumption of innocence continues until the factfinder concludes the presumption has been rebutted by evidence of guilt beyond a reasonable doubt. (See § 1096 ["A defendant in a criminal action is presumed to be innocent until the contrary is proved"]; *People v. Morales* (1967) 252 Cal.App.2d 537, 545 [the presumption of innocence "must be weighed by the trier of fact along with all other evidence in arriving at a verdict or decision"].) Thus, defendant argues the prosecutor's comments amount to misconduct and entitle defendant to a new trial. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203 ["When the issue [of prosecutorial misconduct] 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion' "].)

But even assuming this issue has not been forfeited, we find no misconduct. (*People v. Panah* (2005) 35 Cal.4th 395, 462-463 (*Panah*).) In *Panah,* the defendant contended "the prosecutor improperly appealed to the prejudices and passions of the jury, and denigrated the presumption of innocence, when he argued that the prosecution's evidence had 'stripped away' defendant's presumption of innocence." (*Id.* at p. 463.) The *Panah* court held "the prosecutor's references to the presumption of innocence were made in connection with his general point that, in his view, the evidence, to which he had just referred at length, proved defendant's guilt beyond a reasonable doubt, i.e., the evidence overcame the presumption." (*Ibid.*)

*9 Similarly, in this case, the prosecutor's statements came in the context of a general discussion of the applicable burden of proof as a preface to a detailed discussion of the evidence. In isolation, the prosecutor's statements could be interpreted as a claim that the presumption of innocence had already been removed prior to jury deliberations. But considered in context with the prosecutor's adjacent oratory, the statements pertaining to the presumption of innocence do not amount to prosecutorial misconduct. (See *People v. Cole, supra,* 33 Cal.4th at p. 1203 ["we must view the statements in the context of the argument as a whole"].)

Sufficiency of Evidence Supporting Receiving Stolen Property Conviction

Finally, defendant contends there is insufficient evidence in the record to uphold his conviction for receiving stolen property-to wit, the handgun used to kill Ceja. We will affirm if there exists substantial evidence in the record from which any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Chatman* (2006) 38 Cal.4th 344, 389.)

" '[P]roof of the crime of receiving stolen property requires establishing that the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen.' " (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984; see § 496, subd. (a).) It is undisputed that the gun was stolen in December 2003, when it was taken from a security guard's car. And there is clearly substantial evidence that defendant possessed the gun and fired it at Ceja. Defendant claims the prosecution failed to establish he knew the gun was stolen.

"Knowledge that property was stolen can seldom be proved by direct evidence and resort must often be made to circumstantial evidence." (*People v. Vann* (1974) 12 Cal.3d 220, 224.) "Although guilty knowledge may be proven by circumstantial evidence [citations][,] when challenged on appeal those circumstances must be shown to constitute substantial evidence." (*People v. Kunkin* (1973) 9 Cal.3d 245, 254.) "In routine circumstances, the knowledge element is inferred from the defendant's failure to explain

how he came to possess a stolen item or his offer of an unsatisfactory explanation or from suspicious circumstances attendant upon his possession of the item." (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019-1020 [affirming conviction based on no explanation from defendant and recovery of gun with other stolen property].)

The pertinent evidence is as follows: police found (after the September 2005 incident) a nine-millimeter semiautomatic handgun under a bush in the back yard of the residence near where defendant was taken into custody; the gun had been stolen in December 2003; defendant had shown the gun to an acquaintance before the shooting; defendant concealed the gun in his waistband while he was riding his bike before the shooting; and five shell casings recovered at the scene of the shooting were fired from the recovered handgun.

*10 Although defendant did not testify, his statements during the interrogation were entered into evidence. When asked how long he had the gun, defendant replied: "Shh, I don't know, five, like a week and a half. I, I don't know, like recently." The officer then asked defendant how he obtained the gun; defendant replied, "I bought it off a guy." When asked how much it cost, defendant answered, "I dunno. A hundred-something." As previously noted, defendant was a member of a criminal street gang.

The circumstances of defendant's possession, use, and disposal of the handgun amounts to substantial evidence supporting an inference defendant knew the gun was stolen.

DISPOSITION

The judgment is modified to reflect defendant's accrual of 1331 days of actual presentence credit, not 1330 days. The trial court is directed to prepare a corrected abstract of judgment reflecting the fact that defendant accrued 1331 days of actual presentence credit, not 1330 days. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.

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