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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CONRADO RAMOS CASTRO, Defendant and Appellant.	F046915 (Super. Ct. No. BF107186A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John I. Kelly and John L. Fielder, Judges.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and William K. Kim, Deputy Attorneys General, for Respondent.

The main question presented in this case is whether an anonymous 911 call was constitutionally sufficient to support the traffic stop that led to defendant Conrado Ramos

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, and IV.

Castro's arrest and conviction for possession of a firearm by a person with a qualifying prior conviction. We hold in the published part of this opinion that an exigent circumstance—the anonymous caller's allegation of a threat by defendant against the life of defendant's wife—rendered the tip sufficient even if it was not sufficient otherwise.

Defendant's remaining contentions pertain to jury instructions and the trial court's comments to the jury. Perceiving no prejudicial error, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

Christine Achen, a Kern County Sheriff's Department dispatcher, took a 911 call at 10:23 p.m. on July 30, 2004. A caller who did not give his name spoke to the dispatcher.[1] The caller gave defendant's name and said defendant came to the caller's house and stated he was going to shoot his (defendant's) wife. The caller said defendant had a "steel colored" revolver and that it was "strapped to his back." He described defendant as about 40, thin, Hispanic, and wearing a white shirt and dark pants. The caller was calling from his car and indicated that he had been following defendant's truck, although he could no longer see it. He described the truck as a full-size white Ford with a green stripe and a long bed and "the letters GTO painted on the side." He gave defendant's wife's address and claimed that defendant was driving toward her street. He also gave the wife's name, described her as Hispanic and in her forties, and stated that she was then at home with her daughters. The caller's wife had just called defendant's wife to warn her. The dispatcher asked whether defendant and his wife were "going through a divorce or something." The caller replied that "apparently they were split up," but he did not "know the whole details about it." When the dispatcher asked for the caller's name, he declined to give it and said, "I just don't want her hurt and I don't want to get involved."

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[1] A transcript of the 911 tape is attached to this opinion as Appendix A.

The contents of the call were relayed to deputy sheriffs. Achen testified that in an "officer safety situation" like this one, the California Highway Patrol (CHP) would also normally receive the dispatch.

Shortly after the information was dispatched, CHP officers located and stopped defendant's truck. Deputy sheriffs arrived after the stop had taken place. Defendant had been driving with two passengers, Debra Walker and Felix Marrufo. The three were ordered out of the truck. Officers then saw the butt of a .22 caliber handgun protruding from Walker's purse, which she had left inside. They also found 10 rounds of .22 caliber ammunition in defendant's pocket. The ammunition was later found to fit the gun.

The District Attorney filed an information charging defendant with one count of possession of a firearm by a person with qualifying prior offenses. (Pen. Code, § 12021, subd. (c)(1).) As qualifying offenses, the information alleged two convictions of willful infliction of corporal injury on a spouse or cohabitant causing a traumatic condition. (Pen. Code, § 273.5, subd. (a).)

Defendant filed a motion pursuant to Penal Code section 1538.5 to suppress all the fruits of the traffic stop, arguing that the stop was unreasonable under the Fourth Amendment because it was based solely on the anonymous tip. At the suppression hearing, the dispatcher testified and the tape was played. The CHP officers who executed the traffic stop, however, were not present at the hearing. The only law enforcement testimony was by a deputy sheriff who arrived at the scene after the truck had been pulled over. The deputy testified that he responded to a dispatch describing defendant and his truck and stating that defendant had "a firearm strapped to his back …." He also said he believed the dispatch included defendant's name. When he arrived, he saw that the truck the CHP had pulled over was a white pickup with a green stripe, like the one described in the dispatch, and that both Marrufo and defendant matched the description of the suspect. The prosecutor asked the deputy whether the CHP officers said they had heard the

dispatcher's description before pulling the truck over, but the court sustained defendant's hearsay objection.

The magistrate denied the suppression motion. He said:

> "The Court's going to make a finding that there certainly was a reasonable suspicion. And to get an anonymous call that somebody has a weapon, that certainly would provide some kind of reasonable suspicion on the part of the officer to make the stop. And the vehicle description is in the report and has been corroborated by the officer who was there and had--at the scene. So the--there was not an unlawful detention and, therefore, the stop was correct and proper, reasonable under the circumstances.
>
> "In today's world when you start having weapons involved in this sort of thing, especially in matters involving domestic problems, such as apparently was the case here, it's important that the police agencies carry out their responsibilities in the manner in which the circumstances dictate, and that's what occurred in this matter.
>
> "There's no reasonable basis for this Court to support in any way your--your motion, Counsel. The Defendant's Motion to Suppress the Evidence Pursuant to Penal Code Section 1538.5 is--is, therefore, denied."

At trial, Walker testified that the gun found in her purse belonged to defendant. She said that when the police pulled the truck over, defendant reached down to the floor and fumbled with her purse and appeared to be putting something in it. Defendant also testified, denying that the gun belonged to him. He also denied that police found any ammunition in his pocket.

The jury found defendant guilty of the firearm possession charge and the court sentenced him to the middle term of two years.

DISCUSSION

I. Anonymous tip

Defendant argues that the magistrate erred in denying his motion to suppress evidence. He relies on the Supreme Court's discussion of stops based on anonymous tips in *Florida v. J. L.* (2000) 529 U.S. 266. We reject defendant's argument. As we will explain, even if the other information in the anonymous tip was insufficient on its own, it

did suffice in combination with the caller's additional assertion that defendant was on his way to shoot his wife.

A defendant moving to suppress evidence because it was obtained via an unreasonable, warrantless search or seizure has the initial burden of raising a Fourth Amendment issue by showing that the search or seizure was conducted without a warrant and explaining why it was unreasonable. The burden then shifts to the prosecution to prove reasonableness by a preponderance of the evidence. (*People v. Williams* (1999) 20 Cal.4th 119, 127-129; *People v. James* (1977) 19 Cal.3d 99, 106.) In reviewing the denial of a motion to suppress, we view the evidence in the light most favorable to the magistrate's ruling, and we defer to the court's factual findings if supported by substantial evidence. We then independently review the determination of whether the search or seizure was reasonable in light of those facts. (*People v. Woods* (1999) 21 Cal.4th 668, 673-674; *People v. Memro* (1995) 11 Cal.4th 786, 846.)

Our review of the suppression ruling is based solely on the facts before the court when it ruled, not on any additional evidence developed during the trial. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, fn. 18.) If the record of the hearing supports the ruling on any grounds, however, we must sustain the ruling even if the magistrate did not rely on the proper grounds. (*People v. Gurley* (1972) 23 Cal.App.3d 536, 539, fn. 1.)

Preliminarily, we conclude that the magistrate must have inferred that the CHP officers who pulled defendant over did so on the basis of information from the anonymous tip that was dispatched to them, as opposed to some other cause. This inference was adequately supported by the dispatcher's testimony that the CHP would normally receive a dispatch of this kind and because the officers pulled defendant's truck over a short time after the tip was received and dispatched. Defendant does not challenge the inference and we have no reason to disturb it.

We must answer two questions. First, did the officers know specific and articulable facts that gave rise to a reasonable suspicion of criminal activity? (*United*

States v. Sokolow (1989) 490 U.S. 1, 7-8; *United States v. Hensley* (1985) 469 U.S. 221, 226 [applying reasonable-suspicion standard to investigative stop of automobile]; *Terry v. Ohio* (1968) 392 U.S. 1, 30 [establishing reasonable-suspicion standard for stop and frisk].) Second, even if the information the officers possessed would not give rise to a reasonable suspicion, was the stop justified by exigent circumstances? (See, e.g., *People v. Superior Court (Meyer)* (1981) 118 Cal.App.3d 579, 585 ["[T]he exigency of the situation may justify action on information of less than ideal quality"].)

With respect to the first question, because the stop was based on an anonymous tip, we address whether the tip had sufficient indicia of reliability and was sufficiently corroborated to support a reasonable suspicion. The Supreme Court considered the sufficiency of an anonymous tip to support a *Terry* stop in *Florida v. J. L., supra,* 529 U.S. 266. In *Florida v. J. L.*, an anonymous caller informed police that a young Black man wearing a plaid shirt and standing at a certain bus stop had a gun. Officers immediately went to the bus stop, found a man fitting the description, frisked him, and found a gun. He was convicted of being a minor in possession of a firearm and carrying a concealed firearm without a license. (*Id.* at pp. 268-269.) The Supreme Court held unanimously that the tip did not justify the stop and frisk. (*Id.* at p. 268.)

The court explained that anonymous tips present a special problem in determining whether a stop is supported by the reasonable suspicion required in *Terry*. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, [citation], 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,' [citation]." (*Florida v. J. L., supra,* 529 U.S. at p. 270.)

An anonymous tip can, however, support a *Terry* stop if it has "'sufficient indicia of reliability'" and is "suitably corroborated." (*Florida v. J. L., supra,* 529 U.S. at p. 270.) The court in *J. L.* cited *Alabama v. White* (1990) 496 U.S. 325 as an example. There, an anonymous tipster said a woman carrying cocaine would "leave an apartment

building at a specified time, get into a car matching a particular description, and drive to a named hotel." The police had a reasonable suspicion after these predictions came true, corroborating the tip. After police watched the woman behave as predicted, "it [became] reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine." (*Florida v. J. L., supra,* 529 U.S. at p. 270.) Even with this corroboration, the court classified *White* as a close case. (*Florida v. J. L., supra,* at p. 271.)

Unlike the tip in *White*, the tip in *J. L.* was insufficient because it "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." (*Florida v. J. L., supra,* 529 U.S. at p. 271.) The court rejected Florida's argument that the tip was reliable because it accurately described the suspect and his location. "Such a tip … does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*Id.* at p. 272.) Further, reliability was not shown because the claim about the gun proved true: "The reasonableness of official suspicion must be measured by what officers knew before they conducted their search." (*Id.* at p. 271.) In sum, "[a]ll the police had to go on … was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L." (*Ibid.*)

The court concluded by rejecting the state's argument that there should be a special firearms exception to the standard *Terry* analysis:

> "[A]n automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to an allegation involving firearms [because people carrying drugs also often have guns, so a tip about drugs would also fall within the exception]." (*Florida v. J. L., supra,* 529 U.S. at pp. 272-273.)

The anonymous tip in the present case was in some important respects stronger than the tip in *J. L.* It did not consist only of an accurate description of defendant, his truck, and his approximate location. The caller "explained how he knew about the gun" and "supplied [a] basis for believing he had inside information about" defendant (*Florida v. J. L., supra,* 529 U.S. at p. 271): He said defendant came to his house with the gun and issued the threat; he appeared to be intimate enough with defendant's family to know that he and the wife were separated; he claimed that his wife had recently spoken with defendant's wife and knew she and her daughters were at home; and he indicated he knew defendant was heading for his wife's house because he followed defendant part of the way there.

On the other hand, we cannot say the stop was supported by the "predictive information" (*Florida v. J. L., supra,* 529 U.S. at p. 271) the Supreme Court prized so highly in *White* and *J. L.* The caller's claim that defendant was going to his wife's house was predictive information, but there was no evidence at the suppression hearing that the information received the corroboration the Supreme Court held essential. (*Florida v. J. L., supra,* at p. 270.) The CHP officers who pulled defendant over did not testify, and the sheriff's deputy who arrived later did not say where defendant was pulled over in relation to the wife's house, which way he was driving, or anything else relevant to where defendant had been going. The record shows that the stop was based on the descriptions of defendant and his truck and the fact that the truck was in a place described by the deputy only as "the area," not on any confirmation that it was proceeding toward the house of defendant's wife.

On the reliability issue, consequently, this case falls between *J. L.* and *White*. Putting the alleged emergency to one side, it is difficult to say whether the tip passes the Supreme Court's test. Consider a hypothetical case in which the anonymous tip and the degree of corroboration are the same as here. The only difference is that the suspect has a few dollars worth of marijuana and is going to his estranged wife's house to sell it to

her—not that he has a gun and is going there to shoot her. Would the tip support a *Terry* stop then? Because the caller asserted a foundation for his knowledge, the tip would be more "reliable in its assertion of illegality" (*Florida v. J. L., supra,* 529 U.S. at p. 272) than the tip in *J. L.*, but because of the lack of corroborated predictive information, it would be less reliable than the tip in *White.* *White*, remember, was a "close case" (*Florida v. J. L., supra,* at p. 271).

The borderline nature of the reliability determination in this case highlights the importance of the second question: Did the caller's report that defendant threatened his wife's life constitute an exigent circumstance that rendered the anonymous tip sufficient even if it would not be sufficient otherwise? The *J. L.* court expressly left open the question of whether the inclusion of an alleged emergency in the tip would call for a different result: "The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability." (*Florida v. J. L., supra,* 529 U.S. at p. 273.) The court used "a report of a person carrying a bomb" as an example of the kind of situation it was not addressing. (*Id.* at pp. 273-274.)

We believe the caller's allegation that defendant was driving to his wife's house to shoot her is an exigent circumstance, although the exigent-circumstances doctrine was not developed in the context of *Terry* stops. The Supreme Court's exigent-circumstances jurisprudence consists of cases that explain when the warrant requirement for searching premises or effecting an arrest can be excused by a combination of exigent circumstances and probable cause. (See, e.g., *Mincey v. Arizona* (1978) 437 U.S. 385, 392; *Michigan v. Tyler* (1978) 436 U.S. 499, 509; *Warden v. Hayden* (1967) 387 U.S. 294, 298-99.) The doctrine is applied to justify a search or arrest based on probable cause alone even though a warrant would be required if not for the emergency. It applies when there is "compelling need for official action and no time to secure a warrant." (*Michigan v.*

Tyler, supra, 436 U.S. at p. 509.) We conclude that the application of a similar approach to *Terry* stops is justified.

We recognize that in some ways the exigent-circumstances doctrine may be ill-suited for application to *Terry* stops. For instance, one branch of the doctrine holds that if probable cause exists, the warrant requirement can sometimes be dispensed with if speed is necessary to prevent evidence from being destroyed. (See, e.g., *U.S. v. Robles* (7th Cir. 1994) 37 F.3d 1260, 1263 ["the appropriate inquiry is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured"].) We need not decide whether this could ever be applied to a *Terry* situation involving an anonymous tip—i.e., whether an anonymous tip with insufficient indicia of reliability could ever justify a *Terry* stop if the caller also said the suspect was about to destroy evidence.

The branch of the doctrine pertaining to imminent threats to the safety of persons, however, can properly be adapted to the *Terry* situation. That branch holds that the warrant exception applies where there is "'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property ….'" (*People v. Frye* (1998) 18 Cal.4th 894, 989; see also, e.g., *U.S. v. Hardy* (7th Cir. 1995) 52 F.3d 147, 149 [exception applies "when police reasonably believe that their safety or the safety of others may be threatened"].) It is as sensible in a danger-to-life situation to relax the reliability requirement for an anonymous tip prompting a *Terry* stop as it is to relax the warrant-plus-probable-cause requirement (by foregoing the warrant) for an arrest or a search of premises. The relaxation of requirements increases the likelihood of an innocent person's privacy being invaded, but the effort to prevent imminent injury or death justifies that increased risk.

We acknowledge the lack of authority squarely supporting this proposition in the *Terry* context. Although one federal case, at least, has explicitly applied the doctrine of exigent circumstances in an anonymous-tip case, the issue there was whether a house was

properly searched without a warrant, not whether a *Terry* stop was justified. (*U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1338-1339.) We have found no United States Supreme Court case or citable California case applying the doctrine of exigent circumstances to reduce the quantum of reliable information needed to justify a *Terry* stop.

The approach we take here is supported by a number of post-*J. L.* out-of-state cases involving anonymous reports of reckless driving leading to *Terry* stops. (See *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722, 724-725, 729, 736-737 [although officer could corroborate only innocent details of tip, anonymous 911 call correctly describing appearance and location of car and claiming erratic operation sufficed to support stop partly because "[a]n erratic and possibly drunk driver poses an imminent threat to public safety"]; *State v. Walshire* (Iowa 2001) 634 N.W.2d 625, 630 [imminent danger posed by possible drunk driving "might call for a relaxed threshold of reliability"]; *State v. Rutzinski* (Wis. 2001) 623 N.W.2d 516, 526 [tip sufficed in part because allegation, if true, meant driver "posed an imminent threat to the public's safety"]; *State v. Boyea* (Vt. 2000) 765 A.2d 862, 867 ["a drunk driver is not at all unlike a 'bomb,' and a mobile one at that"].)

At the same time, however, some courts have rejected this reasoning in post-*J. L.* reckless-driving-tip cases. (*Commonwealth v. Lubiejewski* (2000) 49 Mass.App.Ct. 212 [729 N.E.2d 288, 291-292]; *State v. Boyle* (La.App. 2001) 793 So.2d 1281, 1284; *Washington v. State* (Ind.Ct.App. 2000) 740 N.E.2d 1241, 1243, 1246.) The issue is unsettled in California. Our Supreme Court has granted review in *People v. Wells* (2004) 122 Cal.App.4th 155, review granted December 15, 2004, No. S128640, an anonymous-tip/reckless-driving case involving a *Terry* stop. In that case, we upheld the denial of a suppression motion, following the approach of *U.S. v. Wheat, supra*, 278 F.3d 722.

We also acknowledge that the allegation of gun possession, by itself, cannot compensate for a tip that is insufficiently reliable. As we have noted, the United States

Supreme Court rejected any "automatic firearm exception to our established reliability analysis" in *Florida v. J. L., supra,* 529 U.S. at page 272. A pending case in the California Supreme Court, *People v. Dolly* (2005) 128 Cal.App.4th 1354, review granted August 10, 2005, No. S134505, presents a similar issue.

We believe, however, that even if allegations of reckless driving or gun possession alone can never reduce the threshold of reliability needed to justify a *Terry* stop based on an anonymous tip, we are dealing with a higher order of danger in this case: an alleged threat to deliberately kill a specified individual. This is qualitatively different from gun possession, which may be legal and in itself does not imminently threaten anyone, and from reckless driving, which may result in great harm but does not constitute purposeful violence directed at an identified victim. An alleged imminent threat to kill is an exigent circumstance even if reckless driving and simple gun possession alone are not.

In reaching this decision, we do not mean to suggest that an alleged threat to a person's safety is enough to justify a stop no matter how unreliable the tip in which the allegation is made. As noted above, the tip in this case had some indicia of reliability beyond the accurate description of the suspect and his car and location because the caller provided some basis for his knowledge. The deficiency was the lack of corroborated predictive information. Consequently, the facts of this case require us to hold only that an anonymous tip that includes some basis for the tipster's knowledge and an alleged threat to a person's safety suffices to justify a *Terry* stop even if it lacks corroborated predictive information. We also do not hold that a threat anonymously reported via a tip with lesser indicia of reliability than were present here necessarily would fail to justify a *Terry* stop.

Finally, we distinguish this case from our recent decision in *People v. Jordan* (2004) 121 Cal.App.4th 544. There, we held that an anonymous telephone tip describing the appearance and location of a man with a gun was insufficient under *J. L.* to support the *Terry* stop that led to the man's conviction for being a felon in possession of a

firearm. (*People v. Jordan, supra,* at p. 547.) After concluding that the tip lacked sufficient indicia of reliability, we also held that there was no basis for reversing on grounds of public safety or exigent circumstances. (*Id.* at pp. 558, 562-564.) Although the anonymous tip included an allegation that the subject was "'threatening to shoot people,'" we reasoned that this allegation could not support the stop because the 911 dispatcher did not relay it to officers in the field. (*Id.* at pp. 549, 560, fn. 8 & 564, fn. 12.)

Here, there was sufficient evidence at the suppression hearing that the threat information was included in the dispatch to the officers. After playing a tape of the call, the prosecutor asked the 911 operator "if that information was dispatched to officers," and the operator replied, "Yes, it was." The operator did not dispatch the call herself, and the person who did was not present at the hearing. The operator was asked about the standard process, however. She testified that if, following the process, she had dispatched the call, she would have said the suspect "has a firearm strapped to the back of himself, possibly en route to kill his wife …." Further, the trial court said the need for the stop was underscored because the situation involved weapons and a domestic dispute, and the officers had exercised appropriate judgment in light of the circumstances. These comments constituted an implicit finding that the threat information was dispatched. The evidence, though circumstantial, sufficed to support the finding. Defendant did not argue at the suppression hearing, and does not argue now, that any pertinent information from the tip was not dispatched.

For these reasons, we conclude that the evidence presented to the magistrate showed that the traffic stop in this case was reasonable within the meaning of the Fourth Amendment. The motion to suppress was properly denied.

II. Penal Code section 1111

Defendant argues that the trial court committed prejudicial error by failing to instruct the jury sua sponte pursuant to Penal Code section 1111. We hold that, although an instruction might have been appropriate, any error was harmless.

Penal Code section 1111 provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Applying this statute, our Supreme Court has held:

> "'[W]henever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies,' the court should sua sponte instruct the jury as follows: '"To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case." Such a pretailored instruction is applicable regardless which party called the accomplice.' (*People v. Guiuan* (1998) 18 Cal.4th 558, 568 ….)" (*People v. Box* (2000) 23 Cal.4th 1153, 1208-1209.)

Defendant contends that the court should have given the jury an instruction of this kind.

We will assume for the sake of argument that the jury rationally could have determined that Debra Walker was an accomplice. Although she could not have been convicted as a direct perpetrator of possession of a firearm by a convict (there is no evidence that she was a convict), she could have been charged with that crime as an aider and abettor on the theory that she helped defendant by concealing the gun for him.[2] (See

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[2]The People's assertion, based on *People v. Sully* (1991) 53 Cal.3d 1195, 1227, that the instruction was unnecessary because Walker could only have been charged as an

Pen. Code, § 31 [one who aids and abets in the commission of a crime is guilty as a principal].) Under this assumption, the court ought to have given the instruction.

We hold that any error in the court's omission of instructions on this subject was harmless, however, because Walker's testimony was sufficiently corroborated. The erroneous omission of accomplice instructions is harmless if "there was ample evidence corroborating the witness's testimony," (*People v. Arias* (1996) 13 Cal.4th 92, 143) and "it is not reasonably probable that the jury would have reached a result more favorable to defendant" if the instructions had been given (*People v. Box, supra,* 23 Cal.4th at p. 1209). The evidence of the bullets in defendant's pocket "tend[ed] to connect the defendant with the commission of the offense" and did not "merely show … the commission of the offense or the circumstances thereof." (Pen. Code, § 1111.) We conclude that the bullets and the police testimony about them were "ample" evidence that the gun belonged to defendant and that his own testimony that he knew nothing about it was false. There is no reasonable probability that the jury would have found differently if the court had given the instructions at issue.

III. CALJIC No. 2.11.5

Defendant argues that when the court read CALJIC No. 2.11.5 to the jury, it should have added that the instruction applied only to Felix Marrufo and not to Debra Walker because Walker testified and the instruction is inapplicable to a coparticipant in the crime who is also a witness. Again, we hold that any error was harmless.

The instruction the court gave was as follows:

> "There have been--there has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which … defendant is on trial.

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accessory after the fact is without merit. A convict's possession of a firearm—and his commission of the crime of possession—does not terminate just because the convict gives the gun to another person when the police arrive. The convict may still have constructive possession, in which case the other person's assistance is not "after the fact."

> "There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your sole duty is to decide whether the person--the People have proved the guilt of the defendant on trial."

The Use Note to CALJIC No. 2.11.5 directs: "Do not use this instruction if the other person is a witness for either the prosecution or the defense." The Supreme Court endorsed the Use Note, as applied to an earlier version of the instruction, in *People v. Marks* (1988) 45 Cal.3d 1335, 1346-1347. It has explained, also in reference to the earlier version, that the instruction "'should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 226.) In this case, defendant's two passengers, Walker and Marrufo, "may have been involved in the crime." (CALJIC No. 2.11.5.) Marrufo did not testify, so the instruction was given properly as to him. Walker did testify, however, so *Marks* and *Williams* appear at first glance to mean the instruction was not applicable to her, and the court should have informed the jury.

CALJIC No. 2.11.5 has, however, been changed since it was used by the trial courts in *Marks* and *Williams.* In *People v. Fonseca* (2003) 105 Cal.App.4th 543, 550, we stated that a newer version of CALJIC No. 2.11.5, which is substantially the same as the current version at issue here, "is not erroneous when given in a trial where an unjoined coperpetrator testifies."

The versions of CALJIC No. 2.11.5 given in *Fonseca* and this case differ from the versions in *Marks* and *Williams* primarily in that they contain the following new sentences: "There may be many reasons why that person is not here on trial.… Your sole duty is to decide whether the People have proved the guilt of the defendant on

trial."[3] In *Fonseca*, we opined that the addition of this material "has removed any lingering possibility that a reasonable juror would misunderstand his or her duty to consider all relevant factors bearing on witness credibility," and that therefore there is no risk of prejudice in giving the instruction even when a person involved in the crime testifies. (*People v. Fonseca, supra,* 105 Cal.App.4th at p. 550.) The current version of the instruction also substitutes "do not speculate or guess as to why the other person is not being prosecuted," for "[d]o not discuss or give any consideration to why the other person is not being prosecuted …." (*Id.* at p. 547.) This substitution was made pursuant to our suggestion in *Fonseca*. (Com. to CALJIC. No. 2.11.5 (Oct. ed. 2005) p. 43; *People v. Fonseca, supra,* at p. 550.) As given in this case, we conclude that CALJIC No. 2.11.5 did not encourage the jury to ignore credibility issues related to Walker's possible involvement in the crime and was not erroneous.

Even if giving the instruction without limitation were error, it would be harmless. The Supreme Court has stated that when CALJIC No. 2.11.5 is given in conjunction with other applicable instructions pertaining to witness credibility, any error arising from the fact that a person involved in the crime testified is harmless. (*People v. Lawley* (2002) 27 Cal.4th 102, 162-163.) In *People v. Fonseca, supra*, 105 Cal.App.4th at pages 549-550, we explained that "the Supreme Court has held that, in every case where the jury receives

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[3]The versions of CALJIC No. 2.11.5 at issue in *Marks* state: "'There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted.'" (*People v. Marks, supra*, 45 Cal.3d at p. 1346.) The version in *Williams* substituted "'[d]o not discuss'" for "'[y]ou must not discuss'" at the beginning of the second paragraph. (*People v. Williams, supra*, 16 Cal.4th at p. 225, fn. 5.) The version in *Fonseca* added to the second paragraph the sentences "'[t]here may be many reasons why that person is not here on trial'" and "'[y]our [sole] duty is to decide whether the People have proved the guilt of [the] defendant on trial.'" (*People v. Fonseca, supra*, 105 Cal.App.4th at p. 548.) The current version retains these changes.

all otherwise appropriate general instructions regarding witness credibility, there can be no prejudice from jury instruction pursuant to CALJIC No. 2.11.5." In this case, the jury was instructed pursuant to CALJIC No. 2.20, which states that, in determining a witness's credibility, the jury can consider "[t]he existence or nonexistence of a bias, interest, or other motive." In *People v. Williams, supra,* 16 Cal.4th at pages 226-227, the Supreme Court faced a situation similar to the one here: The trial court read the jury CALJIC No. 2.11.5 without any limiting instruction, even though two of four coparticipants in the crime testified. The Supreme Court held that this was harmless error largely because "[t]he jury was instructed in the words of CALJIC No. 2.20 on evaluating the credibility of witnesses generally, including the existence or nonexistence of a bias, interest or other motive for testimony." (*People v. Williams, supra,* at p. 227.)

Also, in telling the jury not to "speculate or guess," the instruction did not divert the jury's attention from evidence that Walker had a motive to lie to avoid prosecution. Walker testified that in addition to the gun, police found syringes in her purse. She was a drug user at the time and had used the syringes (which she said belonged to Marrufo) to inject drugs earlier in the day. She testified that she was arrested at the scene of the traffic stop for carrying a concealed weapon and that she decided to "take the charge" on a lesser offense, possession of drug paraphernalia. Walker denied, however, that she invented the story that defendant put the gun in her purse in exchange for an offer by the prosecution to charge the lesser offense and withdraw the greater. The jury could consider this evidence in weighing Walker's credibility without disobeying the instruction not to speculate or guess about why she was not charged with gun possession.

Without citation of any authority, defendant contends that the harmless-error standard applicable on this issue is the beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 because "there exists an encroachment on the defendant's constitutional rights to confront witnesses and present a defense regarding his or her motives in testifying." Walker was examined and cross-examined

and questioned about her motives in testifying. CALJIC No. 2.20 advised the jury to consider those motives. Defendant's rights to confront the witness and present a defense are not implicated. Our holding is that any error was harmless because there is no reasonable probability that the jury would have reached a different verdict if the limiting instruction had been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

For all these reasons, we conclude that the trial court did not commit prejudicial error in failing to instruct the jury sua sponte that CALJIC No. 2.11.5 did not apply to Walker.

IV. Court's comments to jury

Defendant contends that comments the court made to the jurors after the foreperson said they could not reach a verdict were prejudicially erroneous. We disagree.

In the afternoon of its first full day of deliberations, the jury sent the judge a note stating that it could not reach a unanimous verdict. The judge called the jurors into the courtroom and addressed them:

> "[THE COURT:] I'm going to ask you some questions on this. I will speak--or address at this point initially just the foreperson, Juror No. 11.
>
> "This is a pretty--evidentiary-wise this is a pretty straightforward case. Is there anything you can think we can do to assist you with regards to further explanation of the law or any additional evidence that you need read back at this point?
>
> "THE JUROR: There was not any additional request for anything.
>
> "THE COURT: Without telling me how you were split, will you tell me numerically what the [vote count] is[?]
>
> "THE JUROR: 10, 2. [¶] … [¶]
>
> "THE COURT: How long has it been at that point? [¶] … [¶]
>
> "THE JUROR: Oh, probably two hours.… [¶] … [¶]

"THE COURT: Is there any particular area that you think you need further explanation on? [¶] … [¶]

"THE JUROR: No.

"THE COURT: Can I see the hands of those of you that at this point … feel that further deliberations might result in some movement towards a decision?

"The record will reflect that no hands have been raised."

One juror did then raise a hand, however, and asked for an example of constructive possession, a definition of which was included in the jury instructions. The court replied:

"Three people rob a bank. They get in a get-away car. One of them is holding the bag of money. The other two are in the back seat. The other two are in the front seat. They're basically all constructively possessing that money.

"You don't have to be in physical possession to have that ability or the right to exercise control over the money in that case. Although clearly the guy in the front seat driving the car, who's involved in the bank robbery, has every bit of--as much control over the money in the back seat as the person holding it."

A few moments later, the court again attempted to determine whether further deliberations could be fruitful:

"[THE COURT:] Anyone here feels they're just wasting their time going back even with that further information?

"All right. So--so you do feel you might be able to get some progress?

"THE JUROR: Maybe go back and try?"

The court sent the jurors back to the jury room with some further admonitions:

"First off, ladies and gentlemen, it's very important that I not do or say anything that's going to make you feel like you're being forced to reach a decision or a--that you don't feel the evidence supports. [¶] … [¶] [I]f you recall, I talked about in one of the jury instructions how important it is

that you not go back into the jury room when you first start deliberations and say, 'I'm voting for guilty,' or, 'I'm voting for not guilty.'

"The reason for that is that you immediately find yourselves in a situation where, if after further discussions you realize maybe that decision's wrong, pride is evoked, and that's true of all of us. Your sense of pride is aroused, and you don't want to be in a situation where you're saying, 'Well, maybe I was wrong,' or 'I was wrong.' So we don't want that situation.

"On the other hand, if after you have further discussions and you've gone over the things I've told you about, the--using the example of constructive possession, if you feel that in analyzing your perception of the evidence that previous position you were taking may be incorrect given that example, then you got to keep in mind, as I've said before, you're not partisans; you're not advocates. You're trying to get at what the law and the facts as you determine them require as a verdict one way or the other. [¶] … [¶]

"So what I want to make sure of is, if you're able to reach a decision with our assistance, we give you that. As to what the verdict is, the judge doesn't really have any stake one way or the other in that decision.

"I'll let you go back and talk a little further. If you still, after talking over constructive possession, have a problem with bringing on a decision, then you can simply send out another note."

After the jury again retired, defense counsel moved for a mistrial, objecting to the court's comment that the evidence was straightforward. The court denied the motion, but stated that it was "not going to let them stay out more than another 30 minutes …."

At 3:00 p.m., one hour and 20 minutes after the jury sent out its note, it returned its guilty verdict. Defendant now argues that the court's comments coerced the jury to find him guilty.

The trial court is permitted to comment on the evidence "so long as its remarks are accurate, temperate, and 'scrupulously fair.' [Citation.]" (*People v. Melton* (1988) 44 Cal.3d 713, 735.) It may not state a view on guilt or innocence or "otherwise 'usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses.'" (*Ibid*.) We review independently a claim that a trial judge's comments

coerced the jury and usurped its factfinding function, "noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 770.)

Defendant argues for reversal based on three aspects of the judge's comments: the description of the case as "pretty straightforward," the constructive possession hypothetical, and the inquiry into the jury's numerical division. The court did not commit error in any of these instances.

The assertion that the case was pretty straightforward did not coerce or mislead the jury. The key evidence on defendant's side of the case was his own testimony that the gun was not his, he knew nothing about it, and he had no ammunition in his pocket. The key evidence on the People's side was Walker's testimony that the gun was defendant's and he fumbled with her purse when the police pulled the truck over, plus the police testimony that bullets were found in defendant's pocket. It *was* a pretty straightforward case: The jury's main task was to decide whom it believed. In pointing that out, the trial judge did not tip his hand as to whom *he* believed.

Regarding the hypothetical, the strongest point to be made for defendant is that it could have caused the jurors to think that even if they *did* believe defendant was ignorant of and had no connection with the gun, he could still have been in constructive possession of it. This is because defendant was in the same car as a person who had actual possession, just like the back-seat passengers in the hypothetical. But there is no likelihood that the jurors adopted this view of the evidence. The hypothetical posited a group of people who had just robbed a bank together and carried the money out to their car. All three took the money, knew it was there, and were complicit in driving away with it. If the jury had believed defendant's testimony, which asserted that he never had anything to do with the gun, it could not rationally have analogized his situation to that of the front-seat robber in the hypothetical.

Finally, there was nothing improper in the court's question about the jurors' numerical division. Although the United States Supreme Court has exercised its supervisory power to forbid this practice in federal district courts (*Brasfield v. United States* (1926) 272 U.S. 448, 450), there is no similar rule in California state courts. The Superior Court had discretion to employ the practice as part of its effort to determine whether there was a reasonable probability that the jurors would reach agreement. (Pen. Code, § 1140; *People v. Johnson* (1992) 3 Cal.4th 1183, 1254; *People v. Breaux* (1991) 1 Cal.4th 281, 319.) Nothing in the record suggests that the court abused its discretion by employing the practice in a coercive manner.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Levy, J.

_____
Dawson, J.

APPENDIX A

The following is a transcript of the tape of the 911 call that led to defendant's arrest. It is a verbatim transcription of the transcript admitted at trial as exhibit 2A.

"Dispatcher: … Sheriff's Department.

"[Caller]: Yes. Uh there's a guy out here, um, corner of uh ▬ and ▬.

"Dispatcher: What's g--

"[Caller]: He's uh, he's driving a white pi-- Ford pick up. It's got the letters GTO painted on the side. He's uh, he's out here, he's got a gun out here.

"Dispatcher: What do you mean? Who was he showing the gun to?

"[Caller]: Um, he's got the gun strapped to his back. I believe he, he (unintelligible) under the influence.

"Dispatcher: What kind of car is he in?

"[Caller]: It's a white Ford truck.

"Dispatcher: Is he inside the truck?

"[Caller]: He's inside the truck now yes.

"Dispatcher: How do you know he has it strapped to his back?

"[Caller]: Uh, well, I just, I just know, I, I--

"Dispatcher: Well sir you're not making any sense. Did he show you the gun in a threatening manner?

"[Caller]: Uh, he's making threats.

"Dispatcher: What did he say to you exactly sir.

"[Caller]: He didn't say anything to me. I seen the gun and he's out here trying to hurt someone. I'm (unintelligible).

"Dispatcher: Who is he--sir who is he trying to hurt?

"[Caller]: Uh, he, his wife.

"Dispatcher: Where is his wife at?

"[Caller]: She's at home and I just, I just drove over here and he's over there and I just--

"Dispatcher: What's his name?

"[Caller]: Um, Conrad.

"Dispatcher: Conrad what?

"[Caller]: Ramos.

"Dispatcher: Is he white, black or Hispanic?

"[Caller]: He's Mex--Hispanic.

"Dispatcher: How old does he look?

"[Caller]: About 40.

"Dispatcher: Is he thin, medium or heavy?

"[Caller]: Thin.

"Dispatcher: What color shirt is he wearing?

"[Caller]: He's wearing a white shirt, uh some dark pants. I can't, I don't know if they're dark blue or black but--

"Dispatcher: And is he still inside the truck?

"[Caller]: Yes, he's riding around the block.

"Dispatcher: Which way is he going?

"[Caller]: Uh at the moment he's uh, looks like he's on ▬ Street. He's headed over back to, to ▬.

"Dispatcher: Do you know his license plate number?

"[Caller]: No. Uh, but I, here let me (unintelligible) and I'll, I'll get it for you.

"Dispatcher: What kind of car are you in?

"[Caller]: I'm in a burgundy van.

"Dispatcher: Which, which street are you on now sir?

"[Caller]: I'm headed over to ▬ right now.

"Dispatcher: So you're southbound on ▬?

"[Caller]: Uh, no I'm just--

"Dispatcher: Sir what did he say to his wife that makes you think that she or--she was in--

"[Caller]: He showed up at my house uh threatening to kill her and I guess he--he--he--

"Dispatcher: What did he say that he is going to do to his wife?

"[Caller]: He said that uh he was gonna shoot her. Heh. Uh, he (unintelligible) I know he's got a, it's a revolver (unintelligible). It's like a, it's uh like a, like a steel colored revolver. You know what I just, I can't find him now but he's around here somewhere.

"Dispatcher: What, where does his wife live?

"[Caller]: She lives on ▬. ▬ Street. But he's driving around. He hasn't, he hasn't stopped yet.

"Dispatcher: It was ▬ you said?

"[Caller]: Yes. ▬.

"Dispatcher: ▬. What's her name.

"[Caller]: Um, ▬.

"Dispatcher: Is she white, black or Hispanic?

"[Caller]: She's Hispanic.

"Dispatcher: How old is she?

"[Caller]: She's uh, I, I, I, about her forties I guess.

"Dispatcher: Is she home alone?

"[Caller]: Um, her and her daughters.

"Dispatcher: How old is her daughters.

"[Caller]: Um, I'm not sure.

"Dispatcher: When's the last time you saw the white Ford at?

"[Caller]: Uh I just seen it like uh five minutes ago on the corner of uh was it ——, —— and ——. He was heading over to, he, he's just turning the block between —— and, and uh ——.

"Dispatcher: Does he, are they going through a divorce or something?

"[Caller]: Um apparently they were split up. I don't know, I don't know the whole details about it. All I know is he showed up at my house (unintelligible).

"Dispatcher: Okay, what is your name?

"[Caller]: Now that, I just don't want, I just don't want her hurt and I don't want to get involved.

"Dispatcher: Are you gonna go over to the house on ——?

"[Caller]: No I'm not gonna go over. I just want to keep him out of my house and I want him off the streets.

"Dispatcher: Okay. Are you going to stay in the area or are you gonna go back home?

"[Caller]: Um, I'm going to stay in the area. I just want to make sure I get--

"Dispatcher: Okay. And you didn't see any part of the license plate. Is it a big truck or is it a small truck?

"[Caller]: It's a full size Ford truck, long bed.

"Dispatcher: What color is it? A white you said?

"[Caller]: It's white with a green stripe. (unintelligible)

"Dispatcher: Okay if you see the car, the car especially in front of —— ——, you call me immediately okay?

"[Caller]: Okay.

"Dispatcher: Th--do, do you know if ▬ wants contact?

"[Caller]: Excuse me?

"Dispatcher: Does she know that you [*sic*] made these threats?

"[Caller]: Yes. We, we just, we just called her right now.

"Dispatcher: Did she want contact?

"[Caller]: Excuse me?

"Dispatcher: Does she want contact?

"[Caller]: Uh no. Uh, well I don't know. I'm not sure what's, what's going on. Apparently they've had all kinds of problems but this lunatic--

"Dispatcher: Okay. What's the telephone number on ▬?

"[Caller]: I, I don't know. I don't--

"Dispatcher: Well what do you mean? How did you just contact her then?

"[Caller]: My wife contacted her.

"Dispatcher: And you have no idea what the telephone number is?

"[Caller]: Uh no, I don't. My wife--

"Dispatcher: Okay we'll get somebody over there.

"[Caller]: All right.

"Dispatcher: Thank you.

"[Caller]: Okay."