

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALONZO ELMER JACKSON,

Defendant and Appellant.

C054954

(Super. Ct. No.
04F05043)

APPEAL from a judgment of the Superior Court of Sacramento County, Michael T. Garcia, J. Affirmed.

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of sections IA, IB, ID, II, and III.

Defendant Alonzo Elmer Jackson was convicted by a jury of two counts of kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1)),¹ two counts of rape (§ 261, subd. (a)(2)), three counts of sexual battery by restraint (§ 243.4, subd. (a)), and one count of sexual penetration with a foreign object. (§ 289, subd. (a)(1).) With respect to the rape counts, the jury found true allegations that defendant kidnapped the victims within the meaning of section 667.61, subdivision (e)(1) and that defendant committed the offense against multiple victims within the meaning of section 667.61, subdivision (e)(5). With respect to the sexual penetration with a foreign object count, the jury found true the allegation defendant kidnapped the victim within the meaning of section 667.61, subdivision (e)(1). The court found defendant had been previously convicted of two strike prior offenses (§§ 667, subs. (b)-(i); 1170.12) and one prior serious offense. (§ 667, subd. (a).)

The trial court sentenced defendant to an aggregate prison sentence of 160 years to life, composed of a 25-years-to-life term on the first rape conviction, tripled by virtue of the three strikes law, plus a five-year serious felony enhancement, plus a consecutive identical term on the second rape conviction. The trial court imposed 30-years-to-life prison terms for the sexual battery and penetration by foreign object convictions to run concurrently. The trial court imposed but stayed under

¹ Hereafter, undesignated statutory references are to the Penal Code.

section 654 prison terms on the kidnapping to commit rape convictions.

On appeal, defendant claims (1) the trial court prejudicially erred by allowing introduction of deoxyribonucleic acid (DNA) evidence in a cold hit case without a *Kelly*² hearing; (2) the trial court prejudicially erred by allowing introduction of DNA evidence obtained with the Identifiler test kit without a *Kelly* hearing; (3) the 1993 collection of his DNA sample violated the Fourth Amendment; (4) the trial court erred in denying his *Batson-Wheeler*³ motion; and (5) prejudicial prosecutorial misconduct. Rejecting these claims, we shall affirm the judgment.

FACTUAL BACKGROUND

The Sexual Assault of J.O.

In January 2002, J.O. was 18 years old and a participant in a training program with the Job Corps living on the Job Corps campus in Sacramento. On January 20, 2002, she and another Job Corps participant, M.M., rode a Job Corps shuttle bus to the Florin Mall. After going to the mall, M.M. bought some type of strong alcohol, which both women drank before going back to the shuttle bus stop at around 8:00 p.m. The shuttle was running late.

² *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

³ *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

While the women were waiting, a man drove up in a white Dodge Neon. M.M. approached the man and they spoke briefly. M.M. told J.O. the man said he was looking for his niece who was in the Job Corps program and he offered to give them a ride back to the Job Corps campus. The women accepted his offer. M.M. got into the front passenger seat and J.O. got into the back seat.

M.M. and the man flirted and conversed while J.O. looked out the window. M.M. suggested J.O. massage the man's shoulders and J.O. did so, although she felt uncomfortable. J.O. heard M.M. say something about spending the night with the man for money, but J.O. thought M.M. was joking. The man said he knew where there was a party and there was some discussion about going to it. J.O. told M.M. they should go back to the Job Corps.

After driving a couple of miles, the man pulled over on a residential street because M.M. said she needed to urinate. M.M. got out of the car and went over to a bush. The man climbed into the back seat of the car with J.O. He started to flirt with her and was "trying to feel [her] up[.]" J.O. kept asking where M.M. was and said they needed to get back to the Job Corps. The man got back into the driver's seat, reached over, pulled the door closed, and drove off. When J.O. asked him what he was doing, the man replied that he was going to rape her as it had always been a fantasy of his. He said he had a gun and gestured next to him, although J.O. did not see any weapon.

The man drove to a darker area where he stopped and moved quickly into the back seat. The man forcibly pushed J.O. down, got her pants off, licked her neck, and fondled her breasts and vagina. He put a condom on and put his penis inside her vagina for about two minutes. Afterwards the man handed J.O. a shirt and said something about washing the car windows. J.O. got out of the car and started running away. The man drove away. J.O. walked to a commercial street, found a pay phone and called Job Corps, telling the Job Corps' security officer she had just been raped.

Job Corps officials brought J.O. back to campus and called law enforcement. Sacramento Sheriff deputies arrived and took a statement from J.O., including a description of the rapist. J.O. drove with the officers to the area of the rape, but she could not find the location exactly. The officers took her to the hospital where she underwent a sexual assault medical exam.

The nurse practitioner at the hospital noticed bruising on J.O.'s neck and a small microscopic tear at the entry of her vaginal opening, injuries which were consistent with rape. The nurse collected blood, urine and hair samples from J.O. She took several swabs from J.O.'s body, including one from her neck where saliva might have been left by the rapist. The samples taken from J.O. were preserved and screened by a criminalist with the biology unit of the Sacramento County District Attorney's Laboratory of Forensic Services. Subsequent analysis of J.O.'s urine tested positive for chemicals associated with

the drug Ecstasy, although J.O. denied she had ever taken Ecstasy that night or any prior night.

In June 2004, the Sacramento Sheriff's Department was notified a "cold hit" from the state's DNA database identified defendant as a suspect in J.O.'s case. At trial, reference to the cold hit was not allowed and Sheriff Detective Christopher Joachim testified before the jury that an "investigative lead" was received. Based on that information, Joachim compiled a photo lineup and met with J.O. J.O. identified defendant's photo as the most likely to be the rapist. She told Joachim she was pretty sure it was him. He had the right look, which she described as a dopey or sad look. J.O. identified defendant in court as the man who raped her.

Joachim determined defendant's address and found a white Dodge Neon belonging to defendant parked by the apartment. Defendant was arrested the next day at his place of employment, the Good Guys store located on Florin Road. Joachim took four buccal swabs from defendant's cheek, mouth and gums for DNA analysis pursuant to an authorizing court order. When shown defendant's car, J.O. identified the Dodge Neon as identical to the car in which she was raped. A package of condoms was found in the trunk, as well as two bottles of lotion.

The DNA

A criminalist expert in DNA extraction and analysis testified the neck swab taken from J.O. contained a mixture of DNA from two persons. The major contributor had a DNA profile that matched defendant's DNA profile at all 16 genetic markers

that were tested. The minor contributor's profile was consistent with J.O.'s profile. The expert testified the major contributor's profile would be expected to occur randomly among unrelated individuals one in 400 quintillion of the African-American population, one in 23 sextillion of the Caucasian population and one in 6 sextillion of the Hispanic population. Defendant is African-American.

The Sexual Assault of O.T.

On February 18, 2002, O.T. and her boyfriend, J.B., walked to a bus stop at 47th Street and Stockton Boulevard in Sacramento. J.B. left when a bus pulled up. When it turned out to be the wrong bus, O.T. was left waiting by herself. A man drove up and asked O.T. if she wanted a ride home. O.T. thought he looked familiar and the man acted like he knew her too. O.T. decided to go with him and got into the front passenger seat. O.T. gave the man directions to her mother's house.

The man initially drove towards O.T.'s mother's house, but then made a couple of turns unfamiliar to O.T. He told O.T. he was taking a short cut. A short time later, he started to touch O.T., rubbing her breast and neck. O.T. brushed him away and told him she had a boyfriend. The man then stopped the car. O.T. tried to get out, but he grabbed her, locked the doors, and got on top of her. O.T. was unable to push him off.

The man kissed O.T.'s breast, neck and back. He inserted his fingers inside her vagina and tried to put his finger in her anus, but O.T. squirmed away. The man grabbed her hand and put it on his penis. O.T. pulled her arm away. The man then put

his penis inside her vagina. O.T. was not sure if he ejaculated. He was not wearing a condom. Afterwards O.T. tried to put her clothes back on. The man drove to another location, stopped, and told her to get out. O.T. got out of the car. The man sped off before she could retrieve her sweatshirt.

O.T. went to a nearby phone booth and called the police. When they arrived, she gave them a description of the rapist and his car. Police searching for the rapist found O.T.'s sweatshirt in the road at the intersection of Emerson and Fruitridge Road.

O.T. was taken to the hospital where she was given a sexual assault medical exam. O.T. told the examining nurse practitioner that the rapist had put body lotion on his hand, chest, and penis. O.T. said the man had ejaculated on her thigh and she had wiped it off with a towel. The nurse detected suspected semen on O.T.'s chest, abdomen, and thigh. She collected samples from those areas. She also swabbed O.T.'s breast area for possible saliva as O.T. indicated the rapist's mouth had made contact there. The evidence collected from the sexual assault medical exam was preserved and inventoried at the Sacramento County District Attorney's Laboratory of Forensic Services. Subsequent testing of O.T.'s blood and urine samples detected the presence of marijuana consistent with use of the drug sometime in the previous day.

In February 2005, law enforcement received an "investigative lead" focusing attention on defendant as a suspect in O.T.'s rape case. Sacramento Police Detective Jimmy

Vigon contacted O.T. and met with her on March 8, 2005 to show her a photo lineup. O.T. very quickly pointed to defendant's photograph and said, "That's him." Vigon went to the Sacramento County jail two days later and arrested defendant on additional charges involving O.T. O.T. identified defendant at trial as the man who raped her.

The DNA

The prosecution's criminalist expert in DNA extraction and analysis testified she was able to develop a DNA profile from the samples collected from O.T.'s chest and thigh. The sperm portion of the chest sample came from a single source with a DNA profile that matched defendant's DNA profile at each of 16 genetic markers. The non-sperm portion of the chest sample was a mixture of at least three people. The expert determined the DNA profiles in the non-sperm mixture were consistent with the profiles for O.T., her boyfriend J.B., and defendant. The swab from O.T.'s thigh also contained a slight mixture; the major contributor was consistent with defendant's DNA profile and the minor contributor was consistent with O.T.'s profile. The expert gave the same random match probability for the samples matching defendant's DNA profile as before in J.O.'s rape case.

It was stipulated in front of the jury at trial, that on September 20, 1989, defendant was convicted of felony assault with intent to commit rape in violation of section 220.

The Defense

Defendant testified he was married and lived with his wife and daughter in January and February 2002. Defendant told

investigating detectives he was happily married with an active sex life. At trial, however, defendant admitted he was unfaithful to his wife during this time and that they had not had sexual intercourse for nine years. Defendant testified he picked up prostitutes along Stockton Boulevard three or four times a week after work. He kept lotion and condoms in his car for that purpose.

Defendant testified he picked up M.M. and J.O. at a bus stop near the store where he worked after M.M. approached his car and asked for a ride. As he was driving them to Job Corps, M.M. was acting "really friendly," rubbing his thigh and groin area. J.O. was rubbing his shoulder and chest. They talked to him about a sexual threesome and how much it would cost. Defendant stopped his car and let M.M. out when she said she needed to go to the restroom. J.O. suggested he pull around the block to give her some privacy and defendant did so. When he stopped again, M.M. was still "using the restroom" in the bushes. Defendant climbed into the backseat with J.O. who flirted some more with him. They began kissing. J.O. took her pants down. Defendant put on a condom and they had sex. J.O. never indicated she did not want sex; the way she was kissing indicated to defendant it was okay to do more. After they had sex, J.O. got quiet and wanted to leave without M.M. Defendant told her he did not want to leave M.M. J.O. got out of the car, slammed the door and walked away.

Defendant testified he met O.T. at a gas station near the bus stop at which O.T. was waiting. O.T. asked him for a ride

to her friend's house and defendant agreed. According to defendant, O.T. was dressed "slutty" and he thought she was a prostitute. He asked her if she "dated[,]" which is a normal way of asking if she wanted to have sex for money. O.T. told him it would cost \$20 for half and half, but as all defendant wanted was "a hand job[,]" they agreed on \$10. Defendant pulled over and O.T. gave him a hand job. Defendant did not wear a condom and he did ejaculate. O.T. then wanted \$20. Defendant gave her \$10, which was all he had, and she got out of the car. After he drove off, defendant found a sweatshirt in his car and he threw it out the window.

Defendant admitted at trial he lied to the investigating detectives when he denied knowing J.O. or O.T. He lied when he told detectives things were fine between him and his wife. He "probably lied about the whole thing" with J.O.

DISCUSSION

I.

DNA Issues

Defendant became a suspect in these cases when the evidentiary DNA samples, taken from J.O. and O.T. during their sexual assault medical exams, were compared to profiles in the state DNA database of known offenders resulting in "cold hits" on defendant's 1993 DNA profile. After defendant was arrested, new DNA samples were obtained from defendant, developed, analyzed and compared with the evidentiary samples from J.O. and O.T.

Defendant challenged the admission of DNA evidence at trial in a series of pretrial motions. As relevant on appeal, defendant moved to exclude the DNA evidence under prong one of the *Kelly* rule (*Kelly, supra*, 17 Cal.3d 24) for cold hit statistics. Defendant moved to exclude the DNA evidence because the evidence was "based on the 'Identifiler' DNA test which has not been demonstrated to be generally accepted as reliable and reproducible in the scientific community per the *Kelly* rule." Defendant moved to suppress the DNA evidence pursuant to section 1538.5, claiming the 1993 collection and testing of his DNA violated the Fourth Amendment of the United States Constitution.

The trial court denied defendant's motion regarding cold hit statistics. The trial court ruled the use of the Identifiler test did not require a full *Kelly* hearing, but offered an Evidence Code section 402 hearing for a prong-three *Kelly* hearing. The trial court denied defendant's motion to suppress, concluding collection of defendant's blood sample did not violate defendant's constitutional rights. Defendant challenges these rulings on appeal. We first briefly describe the process of DNA analysis used in this case and then reject defendant's claims.

A. DNA

"DNA analysis . . . is a process by which characteristics of a suspect's genetic structure are identified, are compared with samples taken from a crime scene, and, if there is a match, are subjected to statistical analysis to determine the frequency with which they occur in the general population.' [Citation.]

'[O]nce analysis and comparison result in the declaration of a "match," the DNA profile of the matched samples is compared to the DNA profiles of other available DNA samples in a relevant population database or databases in order to determine the statistical probability of finding the matched DNA profile in a person selected at random from the population or populations to which the perpetrator of the crime might have belonged.'

[Citation.]" (*People v. Wilson* (2006) 38 Cal.4th 1237, 1242.)

Kristie Abbott, the prosecution's expert on DNA extraction and analysis, explained DNA identification to the jury. She explained DNA is present in all the nucleated cells in the body. DNA is often referred to as the blueprint of life because it determines who you are and how you are going to develop. Over 99 percent of all human DNA is the same; DNA testing looks at the 1 percent that differs between individuals who are not identical twins.

Humans have 23 pairs of chromosomes, which are the packages that actually contain the DNA strands. DNA testing looks at different places called short tandem repeats (STR) that are on specific identified areas of different chromosomes. STR's are sets of four nucleotide units of base pairs on the DNA strand. People have different numbers of repeats. In this case 15 STR areas were examined.

The first step of DNA testing is extraction of the DNA from an oral swab of the person's mouth or from material that has a potential blood stain or semen stain.

Once extraction of the DNA is done, the next step is quantitation. Quantitation is a method for estimating approximately how much DNA is in the extract prepared from the sample. It is necessary to be successful in the amplification process.

For amplification, a specific amount of extracted DNA is placed in a thermocycler instrument. Chemicals, including primers and nucleotides are added. Through a process known as polymerase chain reaction (PCR), copies of the DNA are produced when the thermocycler instrument goes through a temperature program, heating up and cooling down. By the time the instrument goes through 28 cycles, millions of copies of the DNA are made.

A portion of the amplified DNA is then genetically typed through a process of capillary electrophoresis. Basically, a charge is applied to the capillary in which the amplified DNA has been placed, causing the charged DNA to flow through the capillary. The smaller fragments traveling faster go through first, while the larger fragments go through last. A camera takes photographs of the separated DNA fragments utilizing fluorescent tags that have been placed on the DNA. The final results are displayed on what is called an electropherogram that can be analyzed by an expert.

The expert examines the electropherogram, develops a DNA profile and determines if there is a match with reference samples. The expert determines the statistical significance of any match.

Abbott testified that at every step of the process the laboratory uses quality control samples and reagent controls to ensure the process is working properly. The STR process is widely accepted in the scientific community and the kits used go through both validation by the manufacturer and by the Sacramento laboratory.

In this case, Abbott used a test kit called "Identifiler." This kit examines 15 STR locations as opposed to the 13 different STR locations examined under the combination of the prior "Cofiler" and "Profiler Plus" kits. The Sacramento laboratory began using the first version of the Identifiler kit in 2002. The analysis of the evidence in J.O.'s case was done using this first version. The manufacturer then released a second version of the kit that changed a couple of the chemicals in the kit itself to get rid of artifacts (areas of results that are not within the typing region for most of the colors of the fluorescent tags and which are different shapes than the DNA) showing up in the first kit. The second Identifiler kit was used to analyze the evidence and reference samples in O.T.'s case. The process for the STR form of DNA analysis is the same regardless of the kit used.

B. The Trial Court Did Not Err In Denying Defendant's Motion To Exclude DNA Evidence In A Cold Hit Case

Defendant filed a pretrial motion to exclude the introduction of DNA evidence at trial, claiming the "appropriate calculation of the statistical significance of a 'cold hit' match to a suspect discovered through a database search has

never been endorsed by an appellate court as passing muster under Prong One of [] *Kelly*, [*supra*], 17 Cal.3d 24" and the DNA evidence could not meet such requirements "[b]ecause no statistical method is generally accepted for expressing the significance of a cold hit."

The trial court rejected defendant's claim, reasoning the use of the convicted offender data base really just provided an investigative tool for law enforcement. In this case, the cold hit from such data base was not evidence relevant to the determination of guilt or innocence, but was simply the investigative lead that focused attention on defendant. The trial court stated what would be relevant to guilt or innocence is defendant's profile and that of the perpetrator and the calculation of the frequency of such profiles in the relevant population. "And that particular population is the population of the possible perpetrators, not the population of the convicted offenders whose DNA is in [the data base]." We agree with the trial court's analysis.

The *Kelly* rule "requires the proponent of expert testimony based on the application of a new scientific technique to satisfy three criteria: (1) the technique or method is sufficiently established to have gained general acceptance in its field; (2) testimony with respect to the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures have been used in the particular case. [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 242; see *Kelly*, *supra*, 17 Cal.3d at p. 30.)

Generally "DNA evidence consists of two distinct elements: the *match evidence*--evidence that the defendant could be the perpetrator; and the *statistical evidence*--evidence that a certain number of people in the population could be the perpetrator." (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 541, overruled in part by *People v. Wilson, supra*, 38 Cal.4th at pp. 1250-1251.)

In this case the statistical calculation was reached by application of the "product rule," which multiples together the statistical frequency of how often a particular genetic type will occur at each of the tested locations. This is expressed as a random match probability, that is, the probability that the DNA of an unrelated person selected at random from the relevant population would match the evidentiary sample at all tested genetic locations. Defendant does not dispute the product rule is generally accepted in the scientific community "for use in cases where a suspect is identified through traditional investigative techniques and is then compared one to one with an evidentiary sample" (see *People v. Venegas* (1998) 18 Cal.4th 47, 84-90 [modified product rule]; see *People v. Soto* (1999) 21 Cal.4th 512, 515, 541 [unmodified product rule]; see *People v. Reeves* (2001) 91 Cal.App.4th 14, 41-42 [unmodified product rule in PCR analysis]). However, defendant contends random match probability is not an accurate measure of probability where the suspect is identified through a DNA databank (cold hit).

In this case, the cold hit on defendant's DNA in the state offender databank rendered defendant a suspect in the rape

investigations for J.O. and O.T. Thereafter, defendant was identified by both J.O. and O.T. through photo lineups as their rapist. The investigating detective determined defendant owned a car matching the description given by J.O. of the car in which she was raped. Defendant was arrested. New DNA samples were obtained from defendant based on an authorizing court order. Defendant's DNA profile reference was taken from such new samples. Abbott testified to a match between defendant's reference sample and the evidentiary samples taken as a result of the sexual assault medical exams of J.O. and O.T. The statistical calculation evidence admitted on the question of defendant's guilt was entirely based on the DNA evidence sample obtained from defendant after his arrest. Thus, defendant's 1993 data base sample was not used by the expert in the statistical calculation leading to the random match probability evidence presented to the jury.

In this situation, we agree entirely with the court in *People v. Johnson* (2006) 139 Cal.App.4th 1135 (*Johnson*), that a *Kelly* hearing is not required for the statistical significance of the cold hit match. (*Johnson, supra*, at pp. 1150-1155.)⁴

⁴ This court has previously concluded a DNA databank search to identify a potential candidate does not implicate the concerns addressed in *Kelly*. (*People v. Robinson* (2007) 156 Cal.App.4th 508, review granted Feb. 13, 2008, S158528; *People v. Nelson* (2006) 142 Cal.App.4th 696, 722-723, review granted Nov. 15, 2006, S147051.) While we recognize the issue is pending before the California Supreme Court, we continue to be persuaded by *People v. Johnson, supra*, 139 Cal.App.4th at pages 1150-1155, that a *Kelly* hearing is not required where the cold hit DNA

Here, there was no evidence before the jury of a cold hit match. The trial court excluded any reference to the cold hits on defendant's DNA sample in the offender's databank. The only oblique reference allowed was to the receipt of an "investigative lead." Therefore, the relevant population for the determination of the probability of a random match between defendant's DNA and that of the perpetrator was not the population of the offenders whose DNA is included in the state databank, but the entire population of possible perpetrators expressed by reference to representative populations in conformity with *People v. Wilson, supra*, 38 Cal.4th 1237.

C. The Trial Court Did Not Err In Ruling The Use Of The Identifiler Test Kit Did Not Require A Full Kelly Hearing

Defendant filed a pretrial motion to exclude DNA evidence at trial on the grounds that the Identifiler test kit used by the prosecution had not undergone *Kelly* scrutiny. The trial court ruled the use of the Identifiler test did not require a full *Kelly* hearing, but offered to conduct a prong-three *Kelly* hearing, that correct scientific procedures have been used in the particular case. (*Kelly, supra*, 17 Cal.3d at p. 30.) Defendant chose to handle the "prong-three aspect" through cross-examination.

Defendant claims on appeal the trial court prejudicially erred by admitting DNA evidence obtained with the Identifiler

match is not admitted as evidence of the defendant's guilt, but was simply used to identify defendant as a suspect for investigation in the case.

test kit without a *Kelly* hearing to determine scientific acceptance (a prong-one hearing). We disagree.

The DNA amplification in this case was performed by the PCR-STR method. This methodology has been found to be generally accepted in the scientific community. (*People v. Hill* (2001) 89 Cal.App.4th 48, 57 (*Hill*); *People v. Allen* (1999) 72 Cal.App.4th 1093, 1100.) In addition, capillary electrophoresis, the procedure used to analyze the amplified DNA fragments, has been found to have gained general acceptance in the scientific community. (*People v. Henderson* (2003) 107 Cal.App.4th 769, 789.)

Defendant complains, however, that the specific test kits used by the Sacramento laboratory, i.e., the first and second versions of the Identifiler test kit, use quantitatively and qualitatively different procedures from the previous test kits and therefore, the Identifiler test kit requires analysis under *Kelly's* first prong, that the technique or method is sufficiently established to have gained general acceptance in its field (*Kelly, supra*, 17 Cal.3d at p. 30).

Defendant points to seven distinct changes made in the Identifiler test from the previous Cofiler and Profiler Plus tests: (1) the Identifiler test expands the number of loci examined from 13 to 15; (2) the Identifiler test includes a new ingredient called a "non-nucleotide linker" in the test kit; (3) the Identifiler uses a five-dye system to label DNA fragments instead of the four-dye system used previously; (4) the five-dye system increases the spectral range by 50 nanometers; (5) the

software has been altered to read a five-dye system and detect the two new loci; (6) the Identifiler uses half the reaction volume previously required; and (7) the Identifiler reduces the amount of template DNA required under the previous tests.⁵

In *Hill, supra*, 89 Cal.App.4th 48, defendant challenged the use of the Profiler Plus test kit without a prong-one *Kelly* hearing. (*Hill, supra*, at p. 55.) The Profiler Plus test kit examined 10 loci instead of 4, required 20 primers instead of 8, used fluorescent tagging instead of reverse dot blot to visually identify the targeted gene, and required new computer software. (*Id.* at pp. 57-58.) The Court of Appeal "reject[ed] the argument that each new PCR/STR test kit must, as a matter of law, be subjected to a *Kelly* prong one analysis to determine scientific reliability." (*Id.* at p. 58.) It found the trial court reasonably concluded that concerns regarding the changes in the new test kit "went to prong three of *Kelly*, i.e., whether the procedures utilized by the forensic lab were in compliance with PCR/STR methodology." (*Ibid.*) It concluded the Profiler Plus test kit "uses the PCR and STR testing methods, which are generally accepted by the scientific community. It is just more sophisticated[.]" (*Id.* at p. 60.)

⁵ In his written motion filed below, defendant contended there were eight changes between the Identifiler test kits used in this case and the former Cofiler and Profiler Plus test kits. By failing to include the eighth purported difference in his argument on appeal, defendant has forfeited the claim that such change is significant. (9 Witkin, Cal. Proc. (4th ed. 1997) Appeal, § 594, pp. 627-629.)

Likewise, the Identifiler test kit uses the PCR/STR testing methods, which have been generally accepted by the scientific community. Although defendant has identified seven changes in the Identifiler kit from the previous test kits, defendant has not shown that these differences change the *methodology* of the testing of the DNA. The changes, although more numerous than those identified by *Hill* for the Profiler Plus test kit, appear to increase the accuracy and efficiency of the same methodology of PCR/STR testing. The Identifiler test kit appears to be a more sensitive test, able to use less template DNA and reaction volume to genetically type more loci using a broader range of fluorescent color dyes. Although defendant, and apparently the trial court, seemed most concerned about the introduction of "non-nucleotide linkers" in the test kit, defendant admits to not knowing what the substance is and merely speculates the non-nucleotide linkers might interfere with the evaluation of mixed samples. Defendant has not shown the use of non-nucleotide linkers makes the Identifiler test a materially distinct scientific technique. Rather, it appears Identifiler is a new and improved version of the same scientific procedure already generally accepted by the scientific community.

The trial court properly found a prong-one *Kelly* hearing was not required. Defendant's concerns were properly addressed through the trial court's offer of a third-prong *Kelly* hearing to challenge whether the test was correctly conducted by the laboratory.

D. The Trial Court Did Not Err In Denying Defendant's Motion To Suppress

Since 1983 California has had a statutory program for the collection of blood and saliva samples from specified criminal offenders to be utilized for DNA testing and data banking. (Former § 290.2; §§ 295, 296 (DNA Act).) Defendant moved to suppress the DNA evidence in this case as the fruit of an unlawful seizure of his blood on January 27, 1993, at the California Men's Colony, San Luis Obispo, pursuant to the DNA Act in violation of the Fourth Amendment. DNA results from his blood sample had been entered into the state offender DNA databank, which yielded the cold hits identifying defendant as a suspect in the cases of J.O. and O.T. The trial court found no constitutional violation and denied defendant's motion.

On appeal, defendant argues the trial court erred as former section 290.2, as well current sections 295 and 296, are unconstitutional on their face and the collection of his blood sample violated his constitutional right to be free of unreasonable searches and seizures under the Fourth Amendment. Disagreeing with the numerous cases that have rejected this contention, defendant claims United States Supreme Court precedent, primarily *Indianapolis v. Edmond* (2000) 531 U.S. 32 [148 L.Ed.2d 333] (*Edmond*) and *Ferguson v. City of Charleston* (2001) 532 U.S. 67 [149 L.Ed.2d 205] (*Ferguson*), make it clear that California's routine collection of criminal offender blood samples for DNA data banking is unconstitutional as a warrantless, suspicionless search and seizure designed to

produce ordinary evidence of criminal wrong-doing for use by law enforcement. Defendant contends collection of blood samples cannot be justified by a simple balancing test weighing privacy interests against legitimate governmental objectives unless there is first a "special need" for the intrusion divorced from law enforcement.

Defendant is wrong.

It is beyond dispute that the compulsory, nonconsensual extraction of biological samples constitutes a search and seizure subject to Fourth Amendment protection. (See *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 616 [103 L.Ed.2d 639, 659]; *Schmerber v. California* (1966) 384 U.S. 757, 767 [16 L.Ed.2d 908, 918]; *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 867.) However, "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652 [132 L.Ed.2d 564, 574].) "[W]hether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" [Citation.]" (*Id.* at pp. 652-653 [132 L.Ed.2d at p. 574].)

As defendant recognizes, it has repeatedly and consistently been held that extraction of biological samples from a convicted felon is not an unreasonable search and seizure within the meaning of the Fourth Amendment. (See, e.g., *Johnson, supra*, 139 Cal.App.4th 1135, 1168; *People v. Adams* (2004) 115

Cal.App.4th 243, 255-259 (*Adams*); *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-512 (*Alfaro*.) As this court explained in *Alfaro*, "We agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy and the intrusions authorized by the [DNA] Act are minimal; and (3) the [DNA] Act serves compelling governmental interests. Not the least of the governmental interests served by the [DNA] Act is 'the overwhelming public interest in prosecuting crimes accurately.' [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest. We agree with the decisional authorities that have gone before and conclude that the balance must be struck in favor of the validity of the [DNA] Act." (*Alfaro, supra*, at pp. 505-506.)

Edmond, supra, 531 U.S. 32 [148 L.Ed.2d 333], and *Ferguson, supra*, 532 U.S. 67 [149 L.Ed.2d 205], do not cast doubt on the foregoing authorities. As the court in *Adams, supra*, 115 Cal.App.4th 243, explained in response to an argument identical to defendant's: "Defendant's assertion that this court must identify a "special needs" beyond the normal need for law enforcement' before undertaking a balancing analysis overlooks the fact that the class of persons subject to the [DNA] Act is convicted criminals, not the general population. . . .

[C]onvicted criminals do not enjoy the same expectation of privacy that nonconvicts do." (*Adams, supra*, 115 Cal.App.4th at p. 258.) Unlike the general public subject to the searches in *Edmond* and *Ferguson*, the DNA Act applies only to those who have been convicted of a crime and thereby have a reduced expectation of privacy. (*Adams, supra*, at p. 259.)

More recently, in *Johnson, supra*, 139 Cal.App.4th 1135, the Court of Appeal followed *Adams* and concluded the taking of a biological sample from a convicted offender is different from a search of a member of the general public. According to the court: "When the search and seizure challenged here took place, appellant was not a member of the general population--someone who is generally free to go about his or her business, unsubjected to governmental interference--but instead was imprisoned following his conviction for a serious offense. '[W]hile persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights. [Citation.]' [Citation.]" (*Johnson, supra*, at p. 1168.)

In *People v. Travis* (2006) 139 Cal.App.4th 1271 (*Travis*), the Court of Appeal upheld a recent amendment to the DNA Act making the biological specimen requirement applicable to those convicted of any felony. After extensively reviewing the reasoning of *King*, *Alfaro*, and *Adams* (*Travis, supra*, at pp. 1283-1289), the court declined "to depart from the overwhelming weight of authority in this state and other

jurisdictions that has given universal approval to DNA collection statutes." (*Id.* at p. 1290.)

Although the U.S. Supreme Court has yet to address DNA databases specifically, we note the Court has provided more guidance regarding searches absent individualized suspicion or a warrant in *Samson v. California* (2006) 547 U.S. 843 [165 L.Ed.2d 250]. The Court there held that suspicionless searches of California parolees pursuant to section 3067, subdivision (a), do not violate the Fourth Amendment. (*Samson, supra*, at pp. 846, 856-857 [165 L.Ed.2d at pp. 255, 262].) The Court stated in *Samson*: "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court's jurisprudence has often recognized that 'to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,' [citation], we have also recognized that the 'Fourth Amendment imposes no irreducible requirement of such suspicion,' [citation]. Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be 'reasonable' under the Fourth Amendment." (*Id.* at p. 855, fn. 4 [165 L.Ed.2d at p. 261, fn. 4].)

We conclude the trial court did not err in denying defendant's motion to suppress.

II.

The Trial Court Did Not Err In Denying Defendant's Batson/Wheeler Motion

Defendant claims the prosecutor violated his constitutional right to equal protection by exercising peremptory challenges in a racially discriminatory fashion during jury selection.

(*Batson, supra*, 476 U.S. 79 [90 L.Ed.2d 69]; *Wheeler, supra*, 22 Cal.3d 258.)

We begin with some background as to the two prospective jurors at issue.

A. Voir Dire of Prospective Juror M.K.

Prospective juror M.K. told the trial court she had heard all the questions previously asked of the other jurors, but she had no specific answers to offer to those questions. M.K. confirmed that she currently worked for the Department of Motor Vehicles (DMV) in the registration process unit. As part of her work, she had never come to court to testify. She had not served in the military, had no prior jury service, and did not know anybody employed in law enforcement. She confirmed she would have no problem setting aside group or lifestyle feelings. She stated she would be able to follow the law the court gave to the jury.

The prosecutor questioned M.K. further. Looking at her juror questionnaire, the prosecutor suggested "it sound[ed] like you have some family members that have gotten off track?" M.K. agreed. M.K. said she had three male cousins, children of M.K.'s mother's sister, who had gotten into trouble for

possession of firearms, counterfeiting money, and possibly possession of narcotics, "things like that." One was incarcerated in Reno, one was, she thought, in Sacramento, and she did not know where the third one was. Asked if she had ever come to court to provide moral support for any of these cousins, M.K. stated: "We're close but not close like that." She said, "[t]here was talk about it through the family, but I never outright asked what's going on with everything." When asked if any of her cousins had gone through a jury trial, M.K. said she was not too sure. "They are all older than me. They are in, like, their 30s." M.K. denied feeling that they had been unfairly prosecuted. She said they knew "the difference between right and wrong so" She denied there had been any family gossip about the cousins "getting a bad shake in the courthouse."

The prosecutor confirmed M.K. was a student. M.K. said she was a part-time student since she just started her job with the DMV. The prosecutor asked M.K. what her long-term goal was "as far as your getting an education or --[?]" M.K. responded that she was "[i]ndecisive right now." She was finishing up "prereqs for nursing[.]"

B. Voir Dire of Prospective Juror G.A.

The court confirmed with G.A. that she shared a residence with her dad who was a lieutenant with the Sacramento Sheriff's Department. There was nothing about his employment that would have an impact on how she viewed law enforcement witnesses. The court noted G.A.'s questionnaire indicated she had a relative

that was accused of sexual assault. G.A. said her ex-boyfriend had been accused of sexual assault about six years earlier and that the incident did not involve her. He went to court and the case was dismissed. She thought the matter had been handled appropriately. She thought she could be fair and impartial to both sides.

The prosecutor asked G.A. if the incident involving her ex-boyfriend happened while they were dating. G.A. responded that it did not. She thought it was after they stopped dating. She heard about it from him later. She said they were still friends.

The prosecutor also asked G.A. about her comment on her questionnaire suggesting she had relatives with drug problems. G.A. said "[t]here is one uncle who's got a little bit of an issue, but he's incarcerated right now." When asked, G.A. said her father had not worked with detectives in the sexual assault unit. He did not really share war stories with her, "only when he has to deal with bad kids."

Defense counsel asked G.A. whether she recognized anybody in the court from her work at a credit union. G.A. said she did not. She worked at a credit union office located in a state building, which served people in the building, not the general public.

The prosecution used a peremptory challenge to excuse G.A. As part of subsequent questioning of the prospective jurors, the prosecutor briefly discussed the deliberations process and then asked if there were any prospective jurors who had never had

experience working or making decisions in a small group.

Without waiting for an answer, she explained juries had to make important decisions every day and asked if everybody felt up for that process. The prosecutor noted for the record that everyone nodded in the affirmative.

After several other peremptory challenges were made by the parties, the prosecutor excused M.K. Defense counsel asked to approach the bench.

C. Defendant's Batson/Wheeler Motion

Defense counsel noted G.A. "appeared to be of a cognizable group, [B]lack female." As defense counsel recalled, "she did have a boyfriend or some person that was -- she believed falsely accused of something, but the charges were eventually resolved in his favor. [¶] She held no animosity towards the prosecution, and, in fact, knew a large number of policemen; and her father was a lieutenant or is a lieutenant at the branch, and she was excused by the People as a peremptory challenge."

Defense counsel continued: "We had the jury almost seated yesterday, and [M.K.], number ten, as just presently seated, was part of the jury yesterday. She's now been excused. She is also of the same class, a female [B]lack juror; and I looked over at my notes, and I can't see anything obvious that she would be excused. And I'd like to make a Batson/Wheeler motion in that regard. [¶] The pool, from what I've seen, comes almost up to the percentage of [B]lacks in this community, but we've had to let a couple go for various reasons. I would note

[defendant] is [B]lack. One of the victims is [W]hite. The other, I believe, is [B]lack as well."

The trial court found a prima facie case had been made and asked the prosecutor for an explanation of the reasons for his exercise of the peremptory challenges.

The prosecutor stated she had removed G.A. from the jury "based on her having an ex-boyfriend that she still maintains a friendship with who had been accused of a sexually assaultive crime, in her opinion was falsely accused. That was the primary reason."

The prosecutor then explained her concerns regarding M.K. related "to her youth, her lack of work history, which is based upon her youth, having the base of no/yes answers after coming up and sitting in the audience and not having much to provide, as far as her background or knowledge or thoughts about the case, which I think is, again, related to her youth and that's the reason why a number of jurors have been removed." The prosecutor noted the trial court's comments "as to the young gentleman who was having difficulty with the propensity evidence. Oftentimes, it is difficult with people who are young to make very important decisions, such as we'll be needing in this case. [¶] Ultimately, it was my recollection and noted on my juror form that she was a -- not on the top level for my jury ranking; possibly acceptable, but given the peremptories that I still have available, it is my preference not to have someone that young. Some of the concerns I have, I know she has a number of cousins she is not close to, but there are family

members in prison or charged with felonies, as indicated in her jury questionnaire form that -- it just concerns me that someone who is so young has -- [¶] I don't want to use cavalier because that is not the right word. . . . She's not cavalier about it, but it's as if it's no big deal that she's got cousins who were convicted felonies [sic] and in and out of prison and having all these problems related to the law." The prosecutor went on to explain other jurors seemed more serious about problems in the past and appeared to have more "life responsibility." The prosecutor gave Juror No. 9 as an example. He was young, single, and without children, but was working as an assistant manager, a position in which he had to participate and recommend hiring and firing decisions. The prosecutor stated she did not "get the impression [M.K.] is in that decision making point in her life at all."

The prosecutor noted there were nine women seated on the jury and that there was still one African-American woman on the panel.

Defense counsel responded that G.A. felt the matter with her ex-boyfriend had been handled appropriately. She felt no ill will towards either side and, "there was not a whole lot of follow up from the People in regards to that." G.A. had some relatives who had criminal background, but she did not express any concern about her ability to be fair. A great number of the remaining jurors had the same sort of issues. "There was a husband's relatives with various wet recklessnesses, DUIs, that kind of thing. That didn't seem to pose a problem. [¶] I

understand a sexual crime might be different, but she expressed no concern at all that that would be a problem. She was stable in the community. . . . Her father, whom she lives with, I believe, is a lieutenant out at the branch. And she said she would have no problem with that either. [¶] She seemed to be a fair and impartial juror for either side."

With respect to M.K., defense counsel was "not sure what counsel is saying in regard to her youth and employment issues, as someone who is younger has the same ability to sit on a jury as someone who is older, in fact, helps provide a cross-section of the community." Defense counsel argued, "[k]icking her off because of her youth would seem to be equally impermissible."

The trial court stated as to G.A. that "it is a very legitimate reason to exercise peremptory challenge because of the ex-boyfriend, which she is still friends with who she believes falsely was accused of a sexual assault." The court noted both M.K. and G.A. had relatives who had involvement with the law, and that as to M.K. "that portion of the explanation which deals with the fact she has cousins who have committed felonies or [are] in prison, again, is also an appropriate reason that the People can rely on to exercise a peremptory challenge." The trial court found these issues had not been "manufactured in any way but really are a genuine exercise and appropriate exercise of peremptory challenges." The court did not find that the challenges had been exercised because they were women or because they were African-American. Defendant's *Batson/Wheeler* motion was denied.

The prosecutor then asked to add a comment to the record. She stated: "As to the issue of age-based discrimination or the claim of age-based discrimination, I wanted to say that it's not the age of the person so much as it is due to age, and it could be due to other factors. [¶] You could have someone who lives in a bubble for the last 40 years and not be youthful but still be very inexperienced and not have had the life experiences necessary to -- that one party or another would want necessarily on their jury. So I would make that observation, as far as age, that this has far more to do with the lack of life experience than it is the numbers of the years.

D. Analysis

Defendant argues the trial court erred in denying his motion pursuant to *Wheeler, supra*, 22 Cal.3d 258 and *Batson, supra*, 476 U.S. 79 [90 L.Ed.2d 69]. He complains the trial court erred in finding adequate justification for the challenges based on reasons not stated by the prosecutor. He contends a comparative juror analysis demonstrates the prosecutor's stated reasons were pretextual. We find no error in the trial court's ruling.

"The applicable law is well settled. '[Under *Wheeler*,] [a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias--that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"--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 state Constitution. [Citations.] [Under *Batson*,] [s]uch a practice also violates the defendant's right to equal protection under the Fourteenth Amendment.

[Citations.]

"The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard trial courts should use when handling motions challenging peremptory strikes. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104 (*Zambrano*), quoting *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008-1009; see *Snyder v. Louisiana* (March 19, 2008) ___ U.S. ___, ___ [170 L.Ed.2d 175, ___, 2008 U.S. LEXIS 2708, opn. p. 9]; see *Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 138].) The same three-prong test has been endorsed by our Supreme Court for proof of state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)

On appeal, "[w]e review the trial court's ruling on purposeful racial discrimination for substantial evidence.

[Citation.] It is presumed that the prosecutor uses peremptory challenges in a constitutional manner. We defer to the court's ability to distinguish "bona fide reasons from sham excuses."

[Citation.] As long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal."'"

(*Zambrano, supra*, 41 Cal.4th at p. 1104, quoting *People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1009.)

Defendant complains here that the trial court improperly upheld the challenge to M.K. based on a reason not given by the prosecutor as her stated basis, that is, on the basis of her having relatives who had involvement with the law, who had committed felonies or were in prison. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252 [162 L.Ed.2d 196, 221].) In fact, the prosecutor did state that one of her concerns was that M.K. had "family members in prison or charged with felonies[.]" The prosecutor went on to express concern regarding M.K.'s somewhat flippant attitude towards these cousins and their problems with the law. We read the record, however, to reflect both concerns as part of the prosecutor's explanation of the reasons for her challenge. Thus, the trial court did not err in relying on an explanation not proffered by the prosecutor and the reason related was gender and race neutral. (*People v. Lancaster* (2007) 41 Cal.4th 50, 77-78.)

Moreover, the criminal history of M.K.'s family was combined with the primary basis for the prosecutor's challenge to M.K. -- her youth and lack of life experience, essentially

her immaturity. Although the trial court did not comment on this stated reason, it was not required to do so. “[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor’s race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.” (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) Youth and lack of life experience is a valid explanation for a peremptory challenge. (*People v. Sims* (1993) 5 Cal.4th 405, 429-430; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *United States v. Ferguson* (7th Cir. 1991) 935 F.2d 862, 865.)

According to defendant, however, a comparative juror analysis shows that M.K.’s youth and lack of experience was a pretext for the prosecutor’s challenge. In *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252 [162 L.Ed.2d at p. 221], the United States Supreme Court held that comparative juror analysis may be conducted in evaluating whether a prosecutor’s facially neutral reason conceals racial bias and the trial judge is required to “assess the plausibility of that reason in light of all evidence with a bearing on it.” The issue of whether an appellate court must perform a comparative juror analysis for the first time on appeal to evaluate the genuineness of the prosecutor’s reasons for peremptorily challenging prospective jurors is pending before the Supreme Court. (*People v. Lenix* (Jan. 2, 2007, F048115) [nonpub. opn.] review granted Jan. 24, 2007, S148029.) For purposes of this appeal, we will accept defendant’s claim that a comparative analysis must be conducted.

Defendant claims "the prosecutor's focus on [M.K.'s] youth was clearly a pretext because Redacted Juror No. 2, who remained on the jury unchallenged by the prosecutor, was a student at American River College who had been working at Arco Arena for five months and before that eight months at Safeway." According to defendant, there was no appreciable difference between this young juror and M.K. We disagree. Juror No. 2 stated that he was a student at American River College focusing on audio engineering with a long-term goal to work on his own music production team. He had been working in music for 11 years. The fact Juror No. 2 was pursuing a specific college major related to an identified long-term goal in an area that he had been working in for a substantial number of years indicates he had reached a certain level of maturity. It suggested he was capable of making important decisions. In contrast, M.K. stated she was "indecisive" about her long-term goals. She was finishing up her prerequisites for nursing, but had taken a job completely unrelated to the health field at the DMV. "[A] side-by-side comparison of the prospective jurors in question reveals that they were not 'similarly situated.'" (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1020, quoting *Miller-El v. Dretke, supra*, 545 U.S. at p. 247 [162 L.Ed.2d at p. 218].)

Defendant finds evidence of the prosecutor's insincerity in her explanation of her challenge to M.K. in "her mention of a similar situation in the 'young gentleman who was having difficulty with the propensity evidence.'" Defendant asserts this was a reference to V.C. who was excused for cause because

he expressed an inability to be fair to the defendant once he heard the evidence of a prior sexual offense, defendant's section 220 conviction. Defendant asserts that while both M.K. and V.C. might have similar youth, there was no evidence M.K. would have been unduly influenced by the prior conviction or could not be fair to both sides. The prosecutor did not claim M.K. and V.C. were similar in all respects or that there was a basis to challenge M.K. for cause. She referenced the trial court's comments about V.C.'s youth only as part of her comments that "it is difficult [for] people who are young to make very important decisions, such as we'll be needing in this case." The prosecutor's mention of V.C. does not undercut her explanation of her challenge to M.K.

Defendant complains the prosecutor did not question M.K. about her decision-making and points us to the prosecutor's later question to the entire jury panel about whether there was anyone who had never had the experience working or making a decision in a small group and whether everybody felt up to that process, to which latter question all the jurors apparently nodded in the affirmative. We believe the prosecutor's lack of individual questioning of M.K. regarding her decision-making ability may be explained by the prosecutor's comment that she felt M.K. was "not on the top level for my jury ranking; possibly acceptable, but given the peremptories that [she] still [had] available, it [was her] preference not to have someone that young." That is, the prosecutor may have passed on further questioning and an early challenge of M.K., but later decided

she did not want someone with as little life experience as M.K. Also, it would have been entirely permissible for the prosecutor at that point to evaluate how the then seated prospective jurors would work together on such a serious case and then decide against keeping someone with unproven decisionmaking abilities such as M.K. The prosecutor was not required to accept M.K.'s apparent self-belief in her ability to deliberate and decide this case.

With respect to G.A., the trial court stated that "it is a very legitimate reason to exercise peremptory challenge because of the ex-boyfriend, which she is still friends with who she believes falsely was accused of a sexual assault." Defendant complains there was no evidence as to how close G.A. remained with her boyfriend, other than they were friends, and whether he had any residual influence on her. The accusation had been in the past when they were already apart. The charges were dismissed and G.A. thought it had been handled appropriately. Defendant compares G.A. to Juror No. 12 who had a sister who was physically and mentally abused by her husband and a "second cousin who was found guilty [of] murder for hire in a lover's triangle kind of issue."

G.A.'s continued friendship with an ex-boyfriend who she believed was falsely accused of a sexual assault is a valid gender and race-neutral reason for the prosecutor to exercise a peremptory challenge. (See *People v. Jordan* (2006) 146 Cal.App.4th 232, 258, and cases cited therein.) It was not unreasonable for the prosecutor to be concerned that G.A. might

be likely to view the victims' reports of rape in this case with skepticism in light of her ex-boyfriend's case and the victims' potential credibility issues. She might be sympathetic towards the defense of consent. Juror No. 12's situation was not comparable as it neither involved a sexual offense nor, more importantly, any hint that the charges had been inappropriately charged and prosecuted. We do not agree that the failure to explore how close G.A. remained with her boyfriend or his influence on her tends to show pretext: What the prosecutor already knew was enough for any rational prosecutor to challenge this juror.

We conclude none of the comparisons made by appellate counsel undermine the trial court's findings that the prosecutor's justifications were genuine.

Moreover, the jury included nine women, including one African-American woman. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 203.)

Defendant has failed to demonstrate that the prosecutor improperly exercised her peremptory challenges. We reject defendant's contention that the trial court erroneously denied his *Batson/Wheeler* motion.

III.

We Reject Defendant's Claims Of Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct by (1) suggesting in her cross-examination of defendant that he was a suspect in another case and (2) by eliciting testimony from the investigating detective that defendant did not provide information during his interview that corresponded to his trial testimony in violation of *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*). Defendant contends the trial court's admonitions did not cure the prejudice from the misconduct and the trial court should have granted his motions for new trial. We conclude the trial court's admonitions cured any prejudice from any prosecutorial misconduct in the cross-examination of defendant and that no *Doyle* error occurred. The trial court properly denied defendant's motion for mistrial.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

The prosecutor's good or bad faith is not at issue because the standard by which his or her conduct is evaluated is objective. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823; *People v. Alvarez* (1996) 14 Cal.4th 155, 213.) To obtain relief on appeal, defendant must also establish that prejudice resulted from the prosecutor's conduct. (*People v. Milner* (1988) 45 Cal.3d 227, 245; *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

The trial court should grant a mistrial when it becomes aware of prejudice incurable by admonition or instruction. (*People v. Cox* (2003) 30 Cal.4th 916, 953.) Whether a particular incident is incurably prejudicial requires a subjective analysis; therefore, the trial court retains considerable discretion in ruling on motions for a mistrial. (*Ibid.*) We review the denial of a motion for a mistrial under the abuse of discretion standard. (*Ibid.*) It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted and the party's chances of receiving a fair trial have not been irreparably damaged. (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 330.)

A. The Prosecutor's Cross-Examination Of Defendant

During the prosecutor's cross-examination of defendant, the following exchange occurred.

"[Defendant]: Before he [Detective Joachim] would tell me what I was charged with, he gave me Miranda, I think is what it was called.

"[Prosecutor]: And you agreed to talk to him, because you did, you talked to him, right?

"[Defendant]: Yes, we talked.

"[Prosecutor]: And Detective Joachim was professional with you, right?

"[Defendant]: Yes.

"[Prosecutor]: And he was courteous, correct?

"[Defendant]: Sometimes.

"[Prosecutor]: Sometimes. When was he not courteous to you?

"[Defendant]: There were times that I felt he was pressuring me, but most of the time he was nice.

"[Prosecutor]: When did you feel he was pressuring you?

"[Defendant]: When he brought the other officer in, and they were teaming up on me.

"[Prosecutor]: He brought another officer in who was teaming up on you. *Now, that other officer was talking to you about a matter unrelated to this trial today, correct?*

"[Defendant]: No.

"[Prosecutor]: A different case?

"[Defendant]: No." (Italics added.)

Defense counsel objected at this point and the trial court sustained the objection. Defense counsel asked to approach the bench and a sidebar was held during which defense counsel asked for a mistrial. Later, outside the presence of the jury, defense counsel argued the prosecutor's question regarding another matter unrelated to this trial told the jury defendant

was a suspect in other unsolved rapes and kidnappings. In response, the prosecutor contended the question was appropriate to show the detectives were not "teaming up" on defendant during the interview. She explained Detective Vigon of the Sacramento Police Department joined the interview to ask defendant about another rape with which defendant was originally charged in the same information as those of J.O. and O.T., but which had been dismissed because the victim was unavailable to testify.

The trial court rejected the prosecutor's argument, finding her reference to the second detective being present on another case was not relevant to dispel the claim the detectives were ganging up on defendant. The trial court ruled the prosecutor's question was misconduct, but found the prejudicial impact of the question was minimal. The trial court noted two victims were involved in this trial, defendant stipulated to a prior conviction, defendant testified he initially thought Detective Joachim wanted to question him about some traffic matters, and there was evidence his vehicle registration was not current. In light of these facts, the trial court ruled any harm could be cured by an admonition. The trial court denied defendant's motion for mistrial. The court offered to admonish the jurors if defendant so desired and invited counsel to propose language for such an admonition. The court later denied a renewed motion for mistrial filed by defendant.

Based on suggestions from both defendant and the prosecution, the court offered to admonish the jury with the following language: "Ladies and gentlemen of the jury,

disregard the statement by the district attorney regarding the second officer speaking about another matter. The district attorney did not intend to imply that there are other cases than those before you." The language was accepted, with the note that defendant was not waiving any issue on appeal that any admonition was inadequate. When the jury returned, the trial court read them the agreed instruction.⁶

On appeal, defendant points out that a prosecutor's reference to facts not in evidence is misconduct. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948; *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321].) Defendant contends here the prosecutor's reference to him being questioned in another similar crime "had a nuclear impact because it tended to confirm the picture of a serial rapist the prosecution was trying to paint at trial."

Assuming the question by the prosecutor was misconduct, it was not irreparably prejudicial. As the trial court noted, the jury already knew defendant was accused of being a serial rapist. Defendant stipulated to a prior conviction of assault with the intent to commit rape. Defendant was being tried in

⁶ The reporter's transcript of the instruction as read reflects a change in two words of the last sentence of the admonition. The transcript reflects the last sentence stated: "The district attorney did not intend to imply that there are other cases *that* go before you." We are confident the transcript reflects a reporter's error based on the fact no one at trial objected to the trial court's reading as differing from the agreed language and because the same court reporter made a number of other obvious reporter or transcription errors in the transcript.

this case for the kidnapping and rape of two victims in separate incidents. And contrary to defendant's argument on appeal, the prosecution did not reference defendant being questioned on another crime similar to those for which he was being tried. The prosecutor suggested the detective was asking defendant about another unrelated matter, which the jury could have reasonably understood to be the traffic matters defendant thought he had been brought in for questioning on.

Moreover, the trial court promptly sustained the objection made by defendant and gave the jury an admonition to disregard it. We "presume the jury heeded the admonition and that any error was cured." (*People v. Dickey* (2005) 35 Cal.4th 884, 914; see *People v. Millwee* (1998) 18 Cal.4th 96, 140.) As the trial court's corrective action cured any harm, the trial court did not abuse its discretion in denying defendant's motion for mistrial. (*People v. Cox, supra*, 30 Cal.4th at pp. 953-954; *People v. Eckstrom, supra*, 187 Cal.App.3d at p. 330.)

B. The Prosecutor's Questioning Of Detective Joachim In Violation Of Doyle

The prosecutor cross-examined defendant about statements he made to Detective Joachim. When the prosecutor asked defendant what happened when Joachim mentioned there could be some DNA in this case, defense counsel objected based on *Miranda*. Outside the presence of the jury, defense counsel claimed the questioning was improper because when the subject of DNA was raised during the interview, defendant told Joachim he had nothing more to say. Defense counsel argued any statements

defendant made after that point should be excluded as involuntary. The trial court reviewed the videotape of defendant's interrogation and agreed that defendant had invoked his right to remain silent during the course of the interview. The trial court ruled all of defendant's statements after he invoked his right to remain silent were inadmissible.

After defendant finished testifying, the prosecution recalled Detective Joachim to testify on rebuttal regarding his interview of defendant. Joachim testified he advised defendant of his *Miranda* rights and defendant agreed to talk with him. Joachim then advised defendant he was being accused of assaulting a woman. According to Joachim, defendant expressed shock and disbelief. Defendant told Joachim he had been married for 13 years and had "a happy marriage with a normal sex life." Defendant denied ever cheating on his wife during their marriage and denied he had ever sought the services of a prostitute. Defendant told Joachim he had only had sex with his wife since their marriage. Defendant portrayed himself as the kind of man who is home every night with his wife and family after work. Defendant was shown pictures of J.O. and M.M. Defendant told Joachim they had never been in his car and categorically denied ever being involved with them in a sex situation. He claimed he was faithful to his wife.

The prosecutor's questioning of Joachim continued as follows:

"Q. Did [defendant] tell you during your interview that his method of being unfaithful was going up and down

Stockton Boulevard looking for prostitutes or girls that wanted to have fun?

"A. Again, I asked him if he had ever been with a prostitute since he'd been married, and he said he had not.

"Q. Did he tell you he used to get hand jobs from other people out there than his wife or have sex?

"A. He did not tell me about that.

"Q. This is something he did three or four times a week?

"A. No, he did not tell me.

"Q. For years?

"A. Nothing like that.

"Q. Even in LA?

"A. Nothing like that.

"Q. Did he tell you that lotion that he had he used for sexual purposes in his car? There was lotion found in that car during the search warrant, were you aware?

"A. Yes, I am aware. I don't recall necessarily talking to him about the lotion, but he did not tell me the lotion was used for any sexual activity.

"Q. Did he tell you that those condoms were condoms he used for having sex with strangers, as opposed to his wife?

"A. No, ma'am. He said those condoms were just for safe, you know, birth control with sex with his wife.

"Q. Did he tell you he hasn't had intercourse with his wife in nine years? Did he tell you that?

"A. No, he did not."

At the conclusion of the evidence, defendant made a motion to dismiss based, in part, on a claim that the prosecutor's question as to whether defendant had told Joachim he had not had intercourse with his wife in nine years referred to matters occurring after defendant had invoked his right to silence and therefore constituted *Doyle* error (*Doyle, supra*, 426 U.S. 610 [49 L.Ed.2d 91]). The trial court reviewed, and invited counsel to review with the court, the testimony of Joachim on rebuttal. After such review, the trial court determined three questions posed by the prosecutor violated *Doyle*. As the subject matter of each of these questions was addressed in different ways in defendant's testimony and other testimony, the trial court found the prejudice from these three questions was "not so great that it cannot be corrected by an admonition to the jurors."

The trial court gave the following admonition to the jury:

"Ladies and gentlemen, you have now heard all the evidence in this case. I do want to give you one admonition before I give you the jury instructions. The admonition is as follows: A defendant has an absolute constitutional right to remain silent. A prosecutor is prohibited from using a defendant's exercise of this right for any purpose. The court has ruled that the prosecutor in this case has asked three questions during the examination of Detective Joachim, which violate this constitutional mandate. [¶] Question one refers to getting hand jobs from persons other than his wife. Question two refers to looking for sex outside his marriage three to four times a week. Question three refers to whether or not the defendant told the detective that he did not have sexual intercourse with his wife for nine years. [¶] The court is striking both the questions and the answers from the record. You must disregard the question and answer and must not consider either for any purpose. This applies only to those questions in regards to the People's rebuttal case of Detective Joachim."

On appeal, defendant reasserts his claim that the prosecutor committed *Doyle* error in this case.

The United States Supreme Court held in *Doyle, supra*, 426 U.S. 610 [49 L.Ed.2d 91], that once an accused has been given *Miranda* warnings, his or her postarrest silence may not be used to impeach an explanation subsequently offered at trial.

(*Doyle, supra*, at p. 619 [49 L.Ed.2d at p. 98].) Use of such silence violates due process under the Fourteenth Amendment because *Miranda* warnings carry an implicit assurance that the exercise of the right to be silent will carry no penalty.

(*Doyle, supra*, at p. 618 [49 L.Ed.2d at p. 98].)

In order to establish a violation of due process under *Doyle*, the defendant must show two things: (1) "the prosecution ma[de] use of a defendant's postarrest silence for impeachment purposes" and (2) "the trial court permit[ted] that use."

(*People v. Evans* (1994) 25 Cal.App.4th 358, 368; see *Greer v. Miller* (1987) 483 U.S. 756, 765-766 [97 L.Ed.2d 618, 630-631]; see *People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.)

"[P]ermission . . . will usually take the form of overruling a defense objection, thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate."

(*People v. Evans, supra*, 25 Cal.App.4th 358, 368.)

Far from giving the jury the impression that the prosecution's questioning of Detective Joachim regarding the defendant's silence regarding his sexless marriage and extramarital sex was legitimate, the trial court here informed the jury that such questions violated defendant's constitutional

rights. The court went on to strike both the questions and answers in Joachim's rebuttal testimony from the record, instructed the jury to disregard both the questions and answers, and instructed the jury not to consider either the questions or answers for any purpose. The trial court clearly did not permit the prosecution to make use of defendant's postarrest silence. Therefore, defendant has not shown any violation of due process under *Doyle*.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

DAVIS, Acting P.J.

MORRISON, J.