Filed 2/8/13 P. v. Riley CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAVID LEON RILEY, Defendant and Appellant.	D059840 (Super. Ct. No. SCD226240)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

A jury convicted defendant David Riley of one count of shooting at an occupied vehicle (Pen. Code, § 246,[1] count 1), one count of attempted murder (§§ 664/187, subd. (a), count 2) and one count of assault with a semi-automatic firearm (§ 245, subd. (b),

1 All further statutory references are to the Penal Code unless otherwise specified.

count 3), and found true numerous enhancements appended to counts 1 through 3.[2] The court sentenced Riley to 15 years to life.

On appeal, Riley contends (1) the court erred when it denied his motions to suppress evidence obtained in the search of his vehicle and the later search of his cell phone; (2) the prosecution of the current offenses violated the *Kellett*[3] rule, and (3) the prosecutor engaged in prejudicial misconduct when questioning a witness.

I

FACTS

A. Prosecution Evidence

The Shooting

Riley belonged to the Lincoln Park gang. Around 2:30 p.m. on August 2, 2009, an Oldsmobile belonging to Riley was parked in front of the Urias family home near an intersection in the Skyline neighborhood of San Diego. Riley's girlfriend, Jazmin McKinnie (who lived down the street from the Uriases' house), was standing and talking with three men near Riley's car.

Mr. Webster, a member of a rival gang), drove his car through the intersection. The three men standing near Riley's car fired numerous shots at Webster's car. Webster's

---

2 The jury found two firearm enhancements (under § 12022.53, subds. (b) & (e)(1)) in connection with count 2 to be true, and found true that he personally used a firearm within the meaning of section 12022.5, subdivision (a), in connection with count 3, and found true the allegation (as to each count) that he committed the offenses for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b).

3 *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*).

car crashed into something. The shooters got into Riley's Oldsmobile and drove away. Numerous shell casings from at least two different guns (a .40 caliber handgun and a .45 caliber handgun) were found at the scene. Police found Riley's Oldsmobile the next day in a Lincoln Park gang area. It was almost completely hidden under a car cover. The three eyewitnesses to the shooting declined to give a positive identification of Riley as one of the shooters, although one of those witnesses said Riley could have been one of the shooters.[4]

The Stop and Search

On August 22, 2009, Riley was driving his other car (a Lexus) when he was stopped by police. A search of the car found a .40 caliber handgun and a .45 caliber handgun hidden in a sock inside the engine compartment.[5] Ballistics testing confirmed these two weapons were used in shooting at Webster's car. DNA testing confirmed Riley and two other men were possible contributors for the samples taken from one of the handguns, and Haynes and two other men were possible contributors to the sample taken from the other handgun.

Riley was arrested as a result of this stop and police seized his cell phone. Cell phone records showed Riley's phone was used near the place of the shooting at around the time of the shooting, and was used about 30 minutes later near the location where

---

4 Mr. Haddock was identified as being involved based on a positive identification from an eyewitness, and another man belonging to Riley's gang (Mr. Haynes) was tied to the shooting by DNA evidence found on the gun used in the shooting.

5 The facts surrounding the stop and search are more fully discussed below.

police found Riley's Oldsmobile. The cell phone contained pictures of Riley making gang signs.

Riley's Jailhouse Statements

While in jail, Riley made several phone calls that were recorded and played to the jury. In an August 24, 2009, phone call, Riley asked the other person (an unidentified female) about "what exactly did my charges say?" When she responded there were "gun charges," he asked, "But did it have--did it have any shooting stuff? It just had gun charges[,] right?" When she told Riley it was limited to gun charges and driving without a license, he asked, "No type of shooting or any . . ." and she replied, "it had some other stuff. I don't know what it means though," and Riley stated, "it would say like attempted something or something like that." In another phone call two days later, he mentioned "like no way that that shit is, it's gonna come back to me like no matter what, the ballistics, it's gonna show . . . ." In another call that day, he told McKinnie his "main focus" was getting bailed out and "[t]he reason why I'm trying to get bailed out is because I know what they got and I know what's [going to] hit eventually." During that same call, after telling her he was "trying to hit third world countries . . . [bec]ause I'm trying to get, really," Riley stated, "I'm waiting for these . . . mother fuckin' whoopties[6] to come back . . . and it's a rap, so before then, I'm trying to be 5000, 50, 50 world states up out [of] this mother fucker though."

---

6 McKinnie testified a "whooptiwopper" or "whooptiwham" is slang that can mean a gun.

Gang Evidence

A gang expert testified to Riley's membership in the Lincoln Park gang, the rivalry between Riley's gang and the gang to which the shooting victim belonged, and why the shooting could have been motivated to further the Lincoln Park gang.

II

ANALYSIS OF RILEY'S SEARCH AND SEIZURE CLAIM

Riley contends the trial court erred when it denied his motions to suppress the evidence obtained in the search of his car, which yielded the handguns, and the search of his cell phone, which yielded videos and photographs showing Riley's gang affiliation.

A. Relevant Facts from the Suppression Hearing

The Stop and Impound Decision

About three weeks after the shooting, San Diego Police Officer Dunnigan stopped Riley because the registration tags on Riley's Lexus had expired. After learning Riley was driving with a suspended driver's license, Dunnigan asked him to get out of the car because he intended to impound it. Just before Riley got out of the car, he started to reach into his pocket and Dunnigan warned Riley not to do so. Riley replied he was reaching for his cell phone. Dunnigan decided to impound Riley's car because, with few exceptions, the policy of the police department is to impound and tow a vehicle when the driver who is stopped is driving without a valid license, because police want to ensure the person with the suspended license cannot return to the car and drive away.

Discovery of the Guns

Dunnigan testified that, when an officer decides to impound a vehicle, departmental policy requires that police conduct an inventory search of the vehicle. The primary reason for an impound inventory search is to limit the City's liability by protecting against claims that items in the car at the time of the impound were missing when the car is returned to the owner. The list of items on the impound slip includes items under the hood of the car, including the battery and the alternator, that are to be inventoried.

Dunnigan was standing on the curb with Riley, issuing the citation for driving with a suspended license, when Officer Ruggerio arrived to assist Dunnigan with the stop and the impound and inventory search. Ruggerio conducted the inventory search, which included looking under the hood. He normally checks under the hood because the impound sheet requires the officer to check off that none of the pieces are missing, and because he has found contraband under the hood on prior occasions. When Ruggerio found the guns under the hood, he showed the guns to Dunnigan, who decided to place Riley under arrest.

At the time of the stop, impound and inventory search, Dunnigan did not know who Riley was or anything about the shooting incident. The decision to stop the car was based on the registration violation, and the decision to impound the car (and the concomitant inventory search) was motivated by Dunnigan's adherence to departmental policy after he learned of Riley's invalid driver's license.

The Cell Phone

After finding the guns and some other gang paraphernalia, and placing Riley under arrest based on the guns, Dunnigan contacted Detective Malinowski, a detective specializing in gangs. Dunnigan contacted Malinowski because of the presence of the loaded guns and because Dunnigan saw several indicia of gang affiliation. One of those indicia was that, when Dunnigan looked at Riley's cell phone, he noticed all of the entries starting with the letter "K" were preceded by the letter "C," which gang members use to signify "Crip Killer."

Detective Malinowski went to the police station in response to Dunnigan's call. At the station, the arresting officers gave the cell phone to Malinowski when he asked for any property found on Riley. Malinowski looked through the phone and found some video clips of young men street boxing and heard Riley's voice in the background encouraging the fighters. He also found some photographs.

The Ruling

The trial court first evaluated the motion to suppress the guns. It found credible the testimonies of Dunnigan and Ruggerio that they did not know Riley when Dunnigan stopped him, and the officers did not know anything about the shooting investigation or that Malinowski was looking for guns. The trial court also found credible that neither the initial stop (based on the expired registration) nor the decision to impound the car (when Dunnigan learned of the invalid driver's license) were pretextual, and the decision to impound was based on Dunnigan's ordinary practice rather than being motivated by an

improper investigatory purpose. It also found the officers were following the police department procedures when they conducted the inventory search, which includes a checklist that specifies looking under the hood, and there were legitimate reasons (including protecting the department against later claims of liability) underlying that general procedure. Accordingly, the court denied the motion to suppress the fruits of the inventory search.

The court reserved ruling on the issue of the cell phone search to consider additional legal authorities. After reading additional authorities, the court stated "the cell phone, which as I understand it was on [Riley's] person at the time of the arrest, would fall into the category of a booking search, the scope of which is very broad," and was therefore inclined to uphold the search. The trial court offered the parties the opportunity to "see if there's anything else you want me to consider" before it ruled on the cell phone search, and stated it would wait a few days to issue its ruling. When court resumed, it ruled the search of the cell phone was lawful, concluding the reasoning in *People v. Diaz* (review granted October 28, 2008, S166600), an appellate decision then on review before the California Supreme Court and subsequently affirmed and superseded by *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*), made sense and would permit a search of the cell phone found on Riley's person when he was arrested.

B. Applicable Law

Inventory Searches

The Fourth Amendment to the United States Constitution protects people from unreasonable government intrusions into their legitimate expectations of privacy and, when a warrantless search is involved, the burden is on the prosecution to justify the search by proving the search fell within a recognized exception to the warrant requirement. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 76, disapproved on other grounds by *In re Jaime P.* (2006) 40 Cal.4th 128, 139.)

"[A] law enforcement officer may, consistent with the Fourth Amendment, briefly detain a vehicle if the objective facts indicate that the vehicle has violated a traffic law. The officer's subjective motivation in effecting the stop is irrelevant." (*People v. White* (2001) 93 Cal.App.4th 1022, 1025.) If the officer determines, during an otherwise lawful stop, that the driver is driving on a suspended license, the officer has justification to impound that vehicle. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1019; *People v. Benites* (1992) 9 Cal.App.4th 309, 326 [impoundment proper where neither driver nor passenger had valid driver's license]; *People v. Burch* (1986) 188 Cal.App.3d 172 [impoundment proper where car's registration tag was expired and driver's license was suspended]; *South Dakota v. Opperman* (1976) 428 U.S. 364, 368-369 (*Opperman*) [as part of their " 'community caretaking functions,' " police officers may constitutionally impound vehicles that "jeopardize . . . public safety and the efficient movement of vehicular traffic].)

When an officer is warranted in impounding a vehicle, a warrantless inventory search of the vehicle pursuant to a standardized procedure is constitutionally reasonable. (*Opperman, supra*, 428 U.S. at pp. 371-372.) When an inventory search is conducted based on a decision to impound a vehicle, we "focus on the purpose of the impound rather than the purpose of the inventory," because an inventory search conducted pursuant to an unreasonable impound is itself unreasonable. (*People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053.) The language in several United States Supreme Court decisions has suggested that, when considering the validity of an inventory search, the officer's motive for the decision to impound the vehicle can invalidate the inventory search if the decision to impound was subjectively motivated by an improper investigatory purpose. (See, e.g., *Opperman,* at p. 376; *Colorado v. Bertine* (1987) 479 U.S. 367, 372, 376.) Accordingly, California courts have concluded that "[t]he relevant question is whether the impounding was subjectively motivated by an improper investigatory purpose." (*People v. Torres* (2010) 188 Cal.App.4th 775, 791 (*Torres*).)

Searches of Property Taken from the Defendant's Person Incident to Arrest

The California Supreme Court has recently confirmed that a delayed search of an item immediately associated with the arrestee's person may be justified as incident to a lawful custodial arrest without consideration as to whether an exigency for the search exists. (*Diaz, supra,* 51 Cal.4th 84.) In *Diaz*, as here, police conducted a postarrest search of a cell phone found on the defendant's person. (*Id*. at p. 89.) On appeal from the denial of his motion to suppress, the defendant argued the search of his cell phone " 'was

too remote in time' to qualify as a valid search incident to his arrest. In making this argument, he emphasize[d] that the phone 'was exclusively held in police custody well before the search of its text message folder.' " (*Id*. at p. 91, fn. omitted.) In rejecting this argument, the *Diaz* court focused on one key question: "whether defendant's cell phone was 'personal property . . . immediately associated with [his] person' [citation] . . . ." (*Id.* at p. 93.) As the court explained, "[i]f it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest. If it was not, then the search, because it was ' "remote in time [and] place from the arrest," ' 'cannot be justified as incident to that arrest' unless an 'exigency exist[ed].' " (*Id*. at p. 93, fn. omitted.) Ultimately, the *Diaz* court held the cell phone was immediately associated with the defendant's person and, therefore, the warrantless search of the cell phone was valid, stating that "[b]ecause the cell phone was immediately associated with defendant's person, [the officer] was 'entitled to inspect' its contents without a warrant [citation] at the sheriff's station 90 minutes after defendant's arrest, whether or not an exigency existed." (*Id*. at p. 93, fn. omitted.)

Standard of Review

In ruling on a motion to suppress, the trial court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual inferences. We will uphold the court's express and/or implied findings on such matters if they are supported by substantial evidence, but we independently review the application of the relevant law to the facts. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

C. Analysis

The Inventory Search

There is substantial evidence to support the conclusion that both the initial stop and the subsequent decision to impound the car were based on legitimate motives rather than as a ruse to conduct an investigatory search. Dunnigan testified, and the trial court found credible, that he did not know Riley (and was unaware Riley might have been involved in the shootings) when he decided to impound the vehicle, and that his decision to impound was based on the fact Riley did not have a valid driver's license and was consistent with Dunnigan's ordinary practice. There was also substantial evidence that the scope of the inventory search was based on legitimate reasons rather than being motivated by an improper investigatory purpose: the officers were following police department procedures when they conducted the inventory search, which includes a checklist that specifies looking under the hood to assess what was present under the hood, and there was evidence that legitimate reasons (e.g., protecting the department against later claims of liability when the impounded vehicle is returned to the owner) underlay that general procedure.

The cases cited by Riley do not undermine our conclusion. In *People v. Williams* (2006) 145 Cal.App.4th 756, a driver was stopped and presented a valid driver's license; however, the driver could not present a registration or proof of insurance for the car, which was validly registered to a car rental company and had not been reported stolen. The officer arrested the defendant based on an outstanding warrant and impounded the

car. The court concluded the impound was invalid because, after noting the police department had no written policy addressing when a car should be impounded and such decision was left entirely to each officer's discretion, it reasoned:

> "The prosecution, which had the burden of establishing that impounding appellant's car was constitutionally reasonable under the circumstances, *made no showing that removal of the car from the street furthered a community caretaking function*. Morton admitted that the car was legally parked in front of appellant's residence, appellant had a valid driver's license, the car was properly registered to a car rental company, the car had not been reported stolen, and he had no reason to believe appellant was not in lawful possession of the car. [¶] . . . [¶] No community caretaking function was served by impounding appellant's car. The car was legally parked at the curb in front of appellant's home. . . . *Because appellant had a valid driver's license and the car was properly registered, it was not necessary to impound it to prevent immediate and continued unlawful operation*." (*Id.* at pp. 762-763, italics added.)

In contrast, the prosecution here *did* satisfy its burden of establishing that impounding appellant's car was constitutionally reasonable under the circumstances by showing removal of the car from the street furthered a community caretaking function: Riley did not have a valid license, and the car did not have a valid registration. Impounding was necessary to prevent the immediate and continued unlawful operation of the car.

The decision in *Torres, supra,* 188 Cal.App.4th 775 is even less apposite. In *Torres*, the deputy pulled the defendant over for an unsafe lane change and failure to signal a turn. The defendant driver parked in a stall in a public parking lot and got out of the truck, and told the officer he did not have a valid driver's license. The deputy decided to impound the truck. (*Id*. at p. 780.) The defendant contended the search was a

prohibited, "pretextual" inventory search because the deputy conceded at the suppression hearing that narcotics officers had asked him to manufacture a reason to detain and search the truck, and the deputy agreed he decided to impound the truck " 'to facilitate an inventory search' to look 'for whatever narcotics-related evidence might be in the [truck].' " (*Id*. at p. 786.) The court concluded the impound and inventory search were unreasonable, noting:

> "The relevant issue is the deputy's motive for impounding the truck--did he impound the truck to serve a community caretaking function or as a pretext for conducting an investigatory search? The record on that motion--namely, the preliminary hearing transcript--shows an investigatory motive. The deputy testified he decided to impound the truck "in order to facilitate an inventory search' because narcotics officers had asked him to 'develop some basis for stopping' defendant. The deputy agreed he 'basically us[ed] the inventory search as the means to go look for whatever narcotics-related evidence might be in the [truck].' (Cf. *Opperman, supra*, 428 U.S. at p. 376 [inventory search may not be 'a pretext concealing an investigatory police motive']; *Bertine, supra*, 479 U.S. at p. 376 [inventory search improper when police officers impound vehicle 'in order to investigate suspected criminal activity'].) [¶] . . . The deputy did not claim defendant's lack of a license was the sole motivation for the impounding. [Citation.] . . . And he did not offer any community caretaking function served by impounding defendant's truck. The prosecution failed to show the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or pedestrians, or could not be driven away by someone other than defendant." (*Torres, supra*, 188 Cal.App.4th at pp. 789-790.)

In contrast, the officer here testified he did not even know who Riley was when he stopped him. Moreover, the officer explained he was motivated to impound the car because Riley did not have a valid license, not because the officer was instructed to develop a basis to conduct an inventory search, and the unregistered status of the vehicle

precluded someone other than the defendant from simply driving it away. *Torres* has no application here.

The Cell Phone Search

Diaz controls the present case, and the key question is whether Riley's cell phone was "immediately associated" with his "person" when he was stopped. (*Diaz, supra*, 51 Cal.4th at p. 93.) Relying on the evidence introduced at the suppression hearing, the trial court found "the cell phone, which as I understand it was on [Riley's] person at the time of the arrest, would fall into the category of a booking search, the scope of which is very broad," and on this basis upheld the search. This finding, supported by the evidence, establishes that Riley's cell phone was immediately associated with his person when he was arrested, and therefore the search of the cell phone was lawful whether or not an exigency still existed. (*Diaz, supra*, 51 Cal.4th at p. 93.)

Riley argues *Diaz* is not controlling because there was some evidence, subsequently introduced at trial, showing he had taken the cell phone from his pocket and placed it on the seat of the car, and therefore the phone was not "immediately associated" with his "person" when he was arrested. However, the People correctly point out that an appellate challenge to a ruling on a pretrial evidentiary motion to suppress and exclude evidence "must be reviewed on the record as it existed when the court decided the motion" (*Torres, supra*, 188 Cal.App.4th at p. 780; cf. *People v. Welch* (1999) 20 Cal.4th 701, 739), not on evidence later introduced at trial.

III

THE "*KELLETT*" CLAIM

Riley argues the current prosecution is barred by the *Kellett* rule.

A. Background

In the first filed case (the weapons case), Riley was charged with carrying concealed firearms in a vehicle (former Pen. Code, § 12025, subd. (a)(1)) and carrying loaded firearms in a public place (former Pen. Code, § 12031, subd. (a)(1)). The weapons case was apparently filed based on the guns found during the August 22, 2009, stop and search of his vehicle. Riley pleaded guilty to those charges on October 8, 2009. The probation and sentencing hearing on those convictions was trailed to the present case, and he was ultimately sentenced on the weapons case at the same hearing sentence was imposed in the present case.

In the present case, filed approximately five months after he entered his guilty plea--but before sentencing--in the weapons case, Riley was charged with (among other things) shooting at an occupied vehicle, attempted murder, and assault with a semi-automatic firearm. Riley subsequently filed a motion in the present case arguing prosecution was barred under the *Kellett* rule. His motion asserted the prosecution was, or should have been, aware that all of the offenses charged in the weapons case and the present case were ones in which the same act or course of conduct played a significant part, within the meaning of section 654, which barred the second prosecution. The prosecution's written opposition argued *Kellett* applies only when the offenses arise out

of the same act, incident, or course of conduct within the meaning of section 654, but does not apply when the acts are distinct, and the charges in the weapons case involved criminal conduct distinct from that underlying the charges in the present case. The prosecution also asserted *Kellett* applies only when the prosecution knows or should have known of the separate offenses, and argued *Kellett* was therefore inapplicable because the evidence demonstrated the prosecution lacked forensic evidence tying Riley to the current offenses until after he had already pleaded guilty to the weapons case.

B. Applicable Law

Section 654 prohibits both multiple punishment and multiple prosecution. In *Kellett, supra,* 63 Cal.2d 822, the Supreme Court, construing section 654 in the context of the legislative policy of section 954, explained the different purposes of the two clauses of section 654. The prohibition against multiple punishment is designed "to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal.4th 331, 341.) Multiple prosecution, on the other hand, is prohibited to avoid "needless harassment and the waste of public funds . . . ." (*Kellett*, at p. 827.) The prohibition does not come into play unless "the prosecution is or should be aware of more than one offense *in which the same act or course of conduct plays a significant part* . . . ." (*Id*. at p. 827, italics added.) Under *Kellett*, if these criteria are met *and* the first proceeding "culminate[s] in either acquittal or conviction and sentence," the later prosecution can be barred. (*Id*. at p. 827.)

C. Analysis

We conclude Riley's *Kellett* claim must be deemed forfeited. The court in *People v. Jones* (1998) 17 Cal.4th 279, 313 noted a claim based on *Kellett* may not be raised on appeal if not preserved at trial, an application of the general rule that a defendant may not raise on appeal an argument not pursued at trial. (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) This prohibition has particular force when the argument involves disputed factual issues not resolved below. (See, e.g., *People v. Zito* (1992) 8 Cal.App.4th 736, 742.)

Although Riley did file a motion raising *Kellett*, the record contains no information that, once the prosecution filed its opposition pointing out the defects in the motion, Riley ever sought a ruling on his motion. It is not enough to merely file a motion, because a "defendant may forfeit the issue for appellate review by failing to press for a hearing or by acquiescing in the court's failure to hear the . . . motion." (*People v. Braxton* (2004) 34 Cal.4th 798, 814; accord, *People v. Brewer* (2000) 81 Cal.App.4th 442, 459-462.) Here, Riley's apparent abandonment of his *Kellett* motion leaves a crucial evidentiary vacuum, because there was no opportunity for the trial court to make the factual determination of whether the prosecution knew (or in the exercise of reasonable diligence should have known) there was enough evidence to prosecute Riley for the present case at the time it filed the weapons case. (Cf. *Barriga v. Superior Court* (2012) 206 Cal.App.4th 739, 748 [whether the government exercised due diligence is a question

of fact].) Indeed, in the specific context of a *Kellett* claim, our Supreme Court in *People v. Davis* (2005) 36 Cal.4th 510 noted there is a "recognized . . . exception to the multiple-prosecution bar where the prosecutor ' " 'is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.' " ' [Citations.] . . . But this exception applies only when the government 'acted with due diligence at the outset but was unable to discover the additional facts necessary to sustain the greater charge.' [Citation.] Whether the government exercised due diligence is a question of fact." (*Id*. at p. 558.) We conclude that, having deprived the prosecution of the opportunity to have dispositive factual issues resolved in a manner that could have been fatal to Riley's *Kellett* motion, Riley has forfeited his *Kellett* claim.[7]

---

7 Riley asserts that we should nevertheless reach the issue to forestall a claim of ineffective assistance of counsel. However, that claim requires, among other things, a showing there was "a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) We have substantial doubt Riley can satisfy that showing, because the prosecution presented significant reasons for why it neither knew nor should have known of the present case at the time it filed the weapons case. More importantly, *Kellett's* bar applies only when "the initial proceedings culminate in either acquittal or *conviction and sentence*." (*Kellett, supra*, 63 Cal.2d at p. 827, italics added.) Here, the probation and sentencing hearing on the convictions in the weapons case was trailed to the present case, and he was ultimately sentenced on the weapons case at the same hearing sentence was imposed on the present case. Under those circumstances, it appears *Kellett* would *not* bar the second prosecution. (See *In re R.L.* (2009) 170 Cal.App.4th 1339, 1343-1344; cf. *People v. Andrade* (1978) 86 Cal.App.3d 963, 971; *People v. Tideman* (1962) 57 Cal.2d 574, 586; *People v. Hartfield* (1970) 11 Cal.App.3d 1073, 1080; *People v. Winchell* (1967) 248 Cal.App.2d 580, 588.)

IV

THE PROSECUTORIAL MISCONDUCT CLAIM

Riley contends an implied reference at trial to his custodial status requires reversal on appeal because it was so inflammatory it denied him a fair trial.

A. Background

Riley's sister was called as a defense witness to testify that Riley often loaned his Oldsmobile to friends. On cross-examination, she conceded she had not told police of this fact until sometime in early 2011, and had told the defense of this fact in December 2010. In an attempt to show this claim was a recent fabrication planted by Riley, the prosecutor asked if she had first told the defense investigator of this fact on January 21, 2011, just one day after she had met with her brother. When Riley's sister responded, "I don't remember the date I visited [Riley]," the prosecutor asked, "If I showed you the visitor['s] log, would it refresh your recollection?" The court interrupted and, after an unreported sidebar conference, the prosecutor rephrased the question to ask whether she had talked to Riley before she spoke with the investigator, and she responded "[y]es."

After testimony concluded, the court made a record of the unreported sidebar. The court stated the visitor's log referred to by the prosecutor was likely a jail log, and the court had required the prosecutor to rephrase the question because the jury had not been told Riley was in custody and steps had been taken to avoid alerting the jury to Riley's custodial status. Riley, arguing the jury could "glean" that the log referred to a jail log,

moved for a mistrial. The court, noting it did not believe there was intentional conduct by the prosecutor to bring the jail issue before the jury, denied the motion for a mistrial.

B. Legal Framework

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." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) 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." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) However, to preserve a claim of misconduct on appeal, a defendant must both object and request a curative admonition (*People v. Montiel* (1993) 5 Cal.4th 877, 914), and not doing so forfeits the claim of misconduct. (*People v. Silva* (2001) 25 Cal.4th 345, 373.)

C. Analysis

Although Riley apparently objected to the reference, he did not request a curative admonition. Accordingly, the claim is forfeited. Riley argues, relying on *People v. Hill* (1998) 17 Cal.4th 800, a defendant is excused from that requirement when a request for a curative instruction would have been futile. However, the court's observation in *People v. Dykes* (2009) 46 Cal.4th 731 requires that we reject Riley's argument that he was excused from the requirements of objection and request for an admonition:

> "Defendant contends that his failure to object to various asserted instances of misconduct should not stand as a barrier to appellate review of his claims. He argues that an objection and admonition would have been futile, because the misconduct was pervasive and created a 'hostile trial atmosphere.' As our discussion has demonstrated, the prosecutor did not engage in pervasive misconduct. Defendant's reliance upon *People v. Hill, supra*, 17 Cal.4th 800, is misplaced. Unlike that case, which we have characterized as representing an 'extreme' example of pervasive and corrosive prosecutorial misconduct that persisted throughout the trial [citation], the present case did not involve counsel experiencing--as did counsel in *Hill*--a 'constant barrage' of misstatements, demeaning sarcasm, and falsehoods, or ongoing hostility on the part of the trial court, to appropriate, well-founded objections." (*Id.* at pp.774-775.)

Here, the alleged misconduct was a single question that only briefly and indirectly alluded to the possibility Riley had been in custody several months earlier. "The isolated reference to [a defendant's custodial status] was not so grave that a curative instruction would not have mitigated any possible prejudice to defendant." (*People v. Valdez* (2004) 32 Cal.4th 73, 125.) We conclude Riley's claim of misconduct is forfeited.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.