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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM MICHAEL VENEGAS,

Defendant and Appellant.

A130495

(Solano County  
Super. Ct. No. FCR277013)

A jury convicted appellant Adam Michael Venegas of unlawful driving or taking of a vehicle and receiving stolen property. (Former Pen. Code,<sup>1</sup> § 496, subd. (a); former Veh. Code, § 10851, subd. (a).)<sup>2</sup> Sentenced to two years in state prison, he appeals. Venegas’s primary claim of error on appeal is that (1) insufficient evidence supports his conviction for unlawful driving or taking of a vehicle. He also contends that (2) he was deprived of notice of the nature of this charge against him; (3) the denial of his motion for severance resulted in gross unfairness at trial; and (4) various instructional errors were made. We affirm the judgment.

<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Section 496 and subdivision (a) of Vehicle Code section 10851 have been amended since the date of the June 2010 offenses, but the versions of these provisions currently in force are substantially the same as they were on the date of the charged crimes. (See § 496; Veh. Code, § 10851, subd. (a); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 23; Stats. 1995, ch. 101, § 4, pp. 462-463.)

## I. FACTS

### A. *Pretrial*

On Thursday, June 10, 2010,<sup>3</sup> Louis Dupont left his Suisun City home for a long weekend. He spent most weekends at his home in Nevada, living at the Suisun City house only during the work week. When he returned home on Sunday, June 13, he discovered that his 1996 GMC Yukon truck was missing from his driveway and that his home had been ransacked. Among the items missing from his home were his Arnold Palmer brand golf clubs, some power tools, a Kodak digital camera, a remote garage door opener, a black motorcycle helmet and keys to the Yukon.<sup>4</sup> A locking mechanism on his Harley Davidson motorcycle had been broken, but the motorcycle was not taken.

Dupont reported the losses to Suisun City Police Officer Jonathan Platzner and Police Sergeant Ted Stec that evening. A garage door opener mechanism had been broken, suggesting the point of entry. Latent fingerprints were lifted from the motorcycle and some areas of the garage. Sergeant Stec also learned that the Yukon bore Nevada license plates.

On the afternoon of June 14, Sergeant Stec saw what looked like the missing truck waiting at a Suisun City intersection. As the Yukon moved through the intersection, it came closer to him, allowing the sergeant to see two Caucasian men sitting in the truck. The truck had Nevada plates, prompting him to confirm with his dispatcher that they in fact matched those on Dupont's stolen vehicle. Sergeant Stec followed the Yukon, without activating his lights or siren. After about a half-mile, the Yukon sped up dramatically and the officer gave chase.

The Yukon pulled into the driveway of an apartment complex, where the two men—later identified as appellant Adam Michael Venegas and Bobby Joe Brewer III—fled from the still-moving truck. As the two men ran together into the apartment complex, Brewer's progress was briefly interrupted when as he left the vehicle he fell to

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<sup>3</sup> All dates refer to the 2010 calendar year unless otherwise indicated.

<sup>4</sup> Dupont kept the truck keys inside his residence. These keys were later recovered with the Yukon.

his knees. Sergeant Stec lost sight of the men while he made sure that the truck stopped safely, but within 30 minutes, he located them inside one of the apartments. Brewer was in a locked bathroom off the master bedroom and Venegas was found in the bedroom's walk-in closet. Both men were arrested. Brewer had fresh red marks on his knees.<sup>5</sup>

Police searched the apartment. One bedroom in the apartment had two mattresses in it and a photograph of Brewer. Venegas and Brewer conceded that the bedroom was theirs. The belongings in the small room appeared to be commingled, with indicia belonging to both Brewer and Venegas found there. In that room, the police found a small black nylon bag containing a Kodak digital camera, a remote garage door opener and mail bearing Venegas's name. Later, when police searched the truck, they found a black motorcycle helmet<sup>6</sup> and the Yukon keys inside. Latent fingerprints were taken from the truck and some of its contents.

Venegas and Brewer were interviewed by police. Each gave a statement. Venegas was cooperative. He admitted being a passenger in the Yukon, running from it and being chased by police. He fled "home" to the apartment, where he changed clothes. Venegas admitted that the camera was in his bag, but did not admit that the camera belonged to him.

In his statement, Brewer first denied everything, including driving the Yukon. He said that Venegas stole the car. He first said that Venegas was driving the Yukon at the time of the June 14 incident; later, Brewer admitted that he was the driver on that date. He acknowledged seeing a police officer behind the Yukon, which he and Venegas left. He told police that before the incident at the apartment complex, he had driven the Yukon to a casino. He also identified the bag in which the camera was found as belonging to Venegas, noting that his papers were also in the bag. He admitted that his fingerprints

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<sup>5</sup> Brewer later testified that he acquired these marks by leaning his arms on his knees while using the bathroom.

<sup>6</sup> When police showed Dupont photographs of items found in the Yukon, he identified the motorcycle helmet as his.

and those of Venegas would be found on the camera, but asserted that his prints would not be found at Dupont's residence.

In July, Venegas was charged by information with the unlawful driving or taking and receiving stolen property. In the same information, Brewer was charged with these two counts as well as one count of first degree residential burglary. (§ 459; former § 496, subd. (a); former Veh. Code, § 10851, subd. (a).) Venegas was alleged to have suffered three prior convictions—two for forgery and one for cultivation of marijuana.<sup>7</sup> (Former § 667.5, subd. (b);<sup>8</sup> see § 470, subd. (d); see also former Health & Saf. Code, § 11358 [Stats. 1976, ch. 1139, § 72, p. 5082].) The information also alleged that Brewer had suffered numerous prior convictions. (See §§ 666.5, 667.5, subd. (b).) Venegas pled not guilty and denied the prior prison terms allegation. He moved to sever his trial from Brewer's trial, without success.

#### B. *Prosecution Case-in-chief*

At trial, Dupont testified about the missing truck and the various items that were taken from his home. He told the jury that when his truck was returned to him about a week after police recovered it, the Yukon's odometer suggested that it had been driven about 400 miles since he had left it. He testified that the keys returned to him with his truck were his keys. Dupont identified the camera taken from Venegas's bag as his from photographs stored in it.<sup>9</sup>

Sergeant Stec told the jury about taking the Dupont burglary report, sighting the Yukon the next day, and following it to the apartment complex where it was abandoned.

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<sup>7</sup> The information alleged that all three of these prior convictions occurred in October 2004. After the jury reached a verdict on the charges, the prosecution moved to amend the allegation to state the actual dates of conviction—September 2004 and September 2006. When the trial court denied the motion to amend, the prior conviction allegation was dismissed at the prosecution's request.

<sup>8</sup> Although aspects of section 667.5 have been amended since the date of the June 2010 offenses, the former version of this provision is substantially the same as current law for purposes of the issues raised in this appeal. (See § 667.5, subd. (b); Prop. 83, § 9.)

<sup>9</sup> The serial number on the camera also matched the one Dupont gave police for his stolen camera.

In court, he identified Brewer as the driver and Venegas as the passenger of the Yukon. He told the jury that the Yukon was still running when the two men fled from it. The keys—not some other device to start the truck—were in the ignition when he found the truck.

A Fairfield pawnbroker testified that on the afternoon of June 12, one of his employees purchased a set of Arnold Palmer golf clubs and a power saw. The transaction required the seller to provide photo identification and a thumbprint. A fingerprint expert testified that the thumbprint on the pawnbroker's records belonged to Venegas.

Another fingerprint expert testified that fingerprints found on Dupont's motorcycle saddlebag and on the Yukon belonged to Brewer. No latent fingerprints were linked to Venegas. The jury also heard parts of Brewer's interview with police.

At the close of the prosecution's case, Venegas moved for acquittal on both charges—receiving stolen property and unlawful driving or taking of a vehicle. (§ 1118.1.) Defense counsel argued that there was no evidence that Venegas ever drove the Yukon and insufficient evidence that he participated in its taking to warrant a conviction of unlawful driving or taking of a vehicle. She also reasoned that there was no evidence that Venegas aided and abetted Brewer's unlawful driving or taking of the vehicle. The prosecutor countered that there *was* evidence of Venegas's involvement in the underlying burglary, such that a reasonable jury could find that he aided and abetted the initial taking of the vehicle. Acknowledging that this theory might not persuade the trial court, the prosecutor also argued that there was evidence that, while Venegas was a passenger in the Yukon, he knew that it had been stolen. He cited Venegas's act of fleeing from the vehicle when the police were in sight as evidence tending to support an inference of his knowledge that the vehicle had been stolen. The trial court denied the motion to acquit. On the unlawful driving or taking of a vehicle count, it reasoned that the prosecution had offered circumstantial evidence that Venegas constructively possessed stolen goods—including the vehicle—and that his conduct evidenced a consciousness of guilt.

### *C. Defense, Verdict and Sentence*

Brewer testified in his own defense. He admitted being at Dupont's house with Dupont's tenant on the weekend of the burglary. Brewer had been to the house many times—always on a weekend—and believed that it belonged to Dupont's tenant. He suggested that the tenant had burglarized the house. Dupont himself suspected that the tenant might have been involved in an earlier spate of burglaries.<sup>10</sup> Brewer admitted driving the Yukon, but told the jury that he did not know the Yukon was stolen. Brewer told the jury that Dupont's tenant led him to believe that the Yukon belonged to the tenant, who loaned the truck to Brewer on June 11. The tenant gave Brewer keys to the Yukon. At the house, Brewer had admired a motorcycle, touching parts of it, including a saddlebag. He found the camera in the Yukon. His nephew brought the camera into the apartment.

Brewer also testified that he and Venegas were cousins. Sometimes, he slept at his grandmother's apartment in Venegas's room. He kept a few things in a bag in the room. On June 12, he let Venegas drive the Yukon to Fairfield. Brewer rode along with him. Venegas had some power tools in the back of the truck that he left at a coworker's apartment, so he could use them at work. When Brewer asked where he got the tools, Venegas said that he had taken them from the garage of the home where Dupont's tenant lived. Venegas also told Brewer that he pawned several items, including a skill saw and a set of golf clubs. Brewer saw the pawn slips.

Brewer testified that on June 13, he and Venegas went to a casino. He told the jury that he fled from Sergeant Stec on June 14 because he had been smoking marijuana and was driving with a suspended license. When the police entered the apartment, he was not hiding—he was using the bathroom. When Officer Platzner interviewed him after his arrest, Brewer denied driving a stolen vehicle. He did not know Dupont and did not learn that his tenant was not the owner of the burglarized house until the preliminary

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<sup>10</sup> Dupont testified that he evicted his tenant soon after a March 2010 burglary and that he immediately changed all the locks.

hearing. He denied breaking into Dupont's house, stealing anything from it, or placing the camera in Venegas's bag.

Venegas's counsel cross-examined Brewer. She reiterated evidence brought out during direct examination that Brewer had suffered three prior felony convictions. Brewer denied going with Venegas to the pawnshop to pawn stolen goods.

The trial court instructed the jury on the elements of unlawful driving or taking of a vehicle. It also explained to the jurors that Venegas could be guilty of unlawful driving or taking of a vehicle as an aider and abettor. Even if Brewer were the perpetrator, Venegas would be equally guilty of the offense if he knew that Brewer intended to commit that crime; if before or during the commission of the crime, Venegas intended to aid and abet Brewer's commission of it; and if Venegas's words or conduct did in fact aid and abet Brewer's commission of the offense.

During closing argument, the prosecution offered different theories of why Venegas was guilty of unlawful driving or taking. Although he acknowledged that Venegas had not been charged with burglary, he asserted that there was enough evidence to convict Venegas of that offense if he had been so charged. Under this theory, Venegas would be guilty of the unlawful taking of the Yukon because he actually participated in the burglary. Second, the prosecution also reasoned that Venegas would be guilty of unlawful taking of a vehicle if he aided and abetted Brewer's taking of the Yukon. If Venegas was in the truck with Brewer, the two men obtained joint possession of the vehicle. Even if as a passenger, Venegas had sufficient control over the Yukon to be guilty of unlawful taking of the vehicle. Venegas's flight from police suggested that he had a reason to flee—i.e., because he knew he was guilty of the vehicular offense.

Venegas argued that there was no evidence of unlawful driving or taking of a vehicle—that the prosecution offered no evidence that he actually drove the Yukon. Defense counsel dismissed Brewer's initial testimony that Venegas was driving the truck at the time of the June 14 incident, as this witness later admitted that he had been

driving.<sup>11</sup> She focused on the prosecution’s unlawful taking theory—that Venegas aided and abetted Brewer in the taking of the truck. She reasoned that there was no evidence that Venegas encouraged Brewer to steal the Yukon. To imagine a scenario in which Venegas was guilty under such a theory would be mere speculation, defense counsel argued.

During deliberations, the jurors asked for clarification about what items the defendants were charged with “taking.” The jury may have been asking only about the receiving stolen property count, but the discussion about the proper answer to give to the inquiry encompassed the unlawful driving or taking of a vehicle count, as well. Outside the presence of the jury, the prosecution argued that a taking was not required for either receiving stolen property or for unlawful driving or taking of a vehicle. On the latter charge, he argued that taking of the Yukon was not necessarily required for the defendants to be guilty of that offense.

Before the jury, the trial court explained that the item forming the basis of the receiving stolen property count was the camera. The trial court reread the instruction defining that offense, which was count 3 of the information. Then, it reread the jury instruction defining count 2, unlawful driving or taking of a vehicle. It added: “Count 2 relates to one thing: the Yukon. Neither defendant has to take it. If they drive it and they do it, it’s somebody else’s, and it’s without the owner’s consent and they intend[] to deprive the owner of possession or ownership of the vehicle for any period of time[, t]hat would be a violation of [Vehicle Code section] 10851. [¶] I’m not saying they did, but that’s the definition of Count 2.” The jury appeared satisfied with the trial court’s response to its question and returned to deliberations.

In September, the jury found Venegas guilty of both charges. (Former § 496, subd. (a); former Veh. Code, § 10851, subd. (a).) In November, he was sentenced to two years in state prison—a midterm of two years for the unlawful driving or taking and a

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<sup>11</sup> She did not mention Brewer’s testimony that Venegas drove the truck to Fairfield on June 12. The prosecution argued that Brewer lied on the stand and that his testimony could be disregarded.

concurrent midterm of two years for receiving stolen property. For his part, Brewer was convicted of the same two offenses, as well as first degree residential burglary. He received a seven-year prison sentence, which included three years for three prior prison term enhancements.<sup>12</sup>

## II. SUFFICIENCY OF EVIDENCE

### A. *Legal Standard*

Venegas's primary contention is that insufficient evidence supports his conviction for unlawful driving or taking of a vehicle.<sup>13</sup> He urges us to conclude that the prosecution proved only that he had been a passenger in the Yukon, not that he took or drove the vehicle. Thus, Venegas reasons that the trial court erred by denying his motion for acquittal on this charge. (Veh. Code, § 10851; see § 1118.1.) In making his argument, he conflates the denial of the motion for acquittal and the jury's ultimate verdict, although the evidence we must test differs for these two challenges. As such, we construe his argument to challenge both the denial of his motion to acquit and the verdict of guilt.

The standard of review of a sufficiency of evidence challenge is well settled. We determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant's guilt beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We must view the entire record in the light most favorable to the jury's verdict and presume in support of that verdict the existence of every fact that could be reasonably deduced from the evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739; *People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Johnson* (1980) 26 Cal.3d 557, 576; see *People v. Mincey* (1992) 2 Cal.4th 408, 432 fn. 2 [challenge to denial of motion for acquittal].) We determine whether substantial evidence supports the jury's verdict, not whether evidence proves the disputed issue beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People*

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<sup>12</sup> Brewer's appeal from his conviction is also before this court. (Case No. A130610.)

<sup>13</sup> Venegas does not challenge his conviction for receiving stolen property.

*v. Snow, supra*, 30 Cal.4th at p. 66; *People v. Crittenden* (1994) 9 Cal.4th 83, 139; *People v. Land* (1994) 30 Cal.App.4th 220, 228 [unlawful driving case.] The same standard of review applies when a conviction rests—as here—on circumstantial evidence. (See *People v. Snow, supra*, 30 Cal.4th at p. 66; *People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Park* (2003) 112 Cal.App.4th 61, 68.)

The unlawful driving or taking of a vehicle is defined as the driving *or* the taking of another’s vehicle without the owner’s consent and with the intent to temporarily or permanently deprive the owner of his or her title or possession. (Veh. Code, § 10851, subd. (a).) The statute states this offense in the alternative—one can violate section 10851 by *either* taking or driving a vehicle. Taking and driving are separate and distinct acts for purposes of this offense. (*People v. Barrick* (1982) 33 Cal.3d 115, 135.) Thus, we must determine whether the evidence before the jury could have shown that Venegas either drove or took the Yukon.

#### B. *Denial of Motion for Acquittal*

Venegas contends that the trial court erred in denying his motion for acquittal on the charge of unlawful driving or taking of a vehicle. (See § 1118.1.) When considering whether the trial court properly denied a motion to acquit, we test the sufficiency of the evidence as it stood at the time that the motion was made—i.e., at the close of the prosecution’s case-in-chief. (See *People v. Stevens* (2007) 41 Cal.4th 182, 200; *People v. Cole* (2004) 33 Cal.4th 1158, 1213.) Venegas asserts that he was entitled to an acquittal at the close of the prosecution case because there was no evidence of *driving* and insufficient evidence that he participated in the *taking* of the Yukon. Much of this argument is based on his construction of jury instructions, closing arguments and the deliberations arising after the motion was denied—circumstances that are inappropriate for our consideration of the propriety of the earlier order denying acquittal. As we analyze this claim of error, we limit ourselves to the situation that existed at the time of the motion.

The Attorney General argues that there was sufficient evidence from which a trier of fact could find that Venegas aided and abetted Brewer’s taking of the Yukon—i.e.,

circumstantial evidence that he participated in the burglary. One may be liable as an aider and abettor if he or she aids the perpetrator of an offense, knowing of the perpetrator's unlawful purpose and intending by his or her own act of aid to commit, encourage or facilitate commission of the offense. The aider and abettor need not personally engage in all elements of the crime, but the aider and abettor's intent to encourage or facilitate the perpetrator's actions must be formed before or during the commission of the underlying crime. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039; *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

If the evidence supports an inference that Venegas aided and abetted Brewer's burglary of the Dupont residence, then a further inference of their joint possession of the Yukon may arise. Possession of stolen property need not be exclusive—an item may be jointly possessed. (*People v. Land, supra*, 30 Cal.App.4th at p. 223.) If Venegas aided and abetted Brewer's burglary, Venegas could be said to have jointly possessed the Yukon with Brewer.<sup>14</sup> This aiding and abetting theory is clearly proper, as the statute expressly includes within its ambit one who is an accessory or accomplice to the taking of the vehicle. (Veh. Code, § 10851, subd. (a).) Thus, Venegas could be deemed to have possessed the Yukon if there was evidence that he acquired a measure of control or dominion over it. (See *People v. Land, supra*, 30 Cal.App.4th at pp. 223-224 [receiving stolen property].)

During the case-in-chief, the prosecution offered evidence from which a reasonable jury could have found that Venegas and Brewer were roommates; that Brewer burglarized the Dupont residence; that the Yukon was taken during the burglary; that a stolen camera taken during the same burglary was found in Venegas's possession; that he pawned golf clubs and tools that were also taken during that burglary; that he was later

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<sup>14</sup> It is not required that Venegas actually operated the vehicle to be found to have taken it. One may take a vehicle within the meaning of Vehicle Code section 10851 even if there was no evidence that he or she operated it. (See *People v. Barrick, supra*, 33 Cal.3d at p. 135.)

seen riding in the truck; and that when he realized that the police had spotted it, Venegas fled from authorities, changed his clothing and attempted to conceal himself from them.

Venegas's possession of other property stolen from Dupont, his relationship with Brewer and his flight from police—taken together—constitute sufficient circumstantial evidence from which a jury could infer that he aided and abetted Brewer's taking of the Yukon during that same offense. Venegas was found to have possessed the camera, the golf clubs and the tools taken at the same time as the truck. Possession of recently<sup>15</sup> stolen property is so incriminating that only slight additional evidence beyond the possession itself is required to warrant a conviction for burglary or for unlawful taking of a vehicle. (*People v. McFarland, supra*, 58 Cal.2d at p. 754; *People v. Hopkins* (1963) 214 Cal.App.2d 487, 492.) Suspicious circumstances or conduct tending to show guilt will constitute corroboration justifying an inference of a taking. (*People v. Mendoza* (2000) 24 Cal.4th 130, 176 [burglary]; *People v. McFarland, supra*, 58 Cal.2d at p. 754 [burglary, unlawful taking of vehicle]; *People v. Hopkins, supra*, 214 Cal.App.2d at p. 492 [unlawful taking of vehicle].)

Venegas's flight from police is the kind of slight evidence needed—in addition to the possession of recently stolen property—to support an inference that he aided and abetted the burglary. Flight may indicate a consciousness of guilt, which the jury may infer from the circumstances of the flight. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1245; *People v. Miles* (1969) 272 Cal.App.2d 212, 218.) Venegas not only fled the Yukon when he realized that police had spotted it, but did so while it was still moving. As soon as he arrived at his apartment, he changed his clothes in an apparent attempt to avoid detection. These circumstances are consistent with a consciousness of guilt.

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<sup>15</sup> Typically, this inference arises when the accused is found in possession of stolen goods soon after the taking. (*People v. McFarland* (1962) 58 Cal.2d 748, 754.) The California Supreme Court has upheld convictions based on possession occurring within a few days of the taking. (See *id.* at p. 758.) The Dupont burglary occurred sometime between June 10 and June 12. Venegas's act of pawning property taken in this burglary on June 12 and his constructive possession of other stolen property on June 14 constitutes possession of recently stolen property for our purposes.

Merely being a passenger in a stolen vehicle is not sufficient evidence to support a conviction for unlawful driving or taking of a vehicle. (*People v. Land, supra*, 30 Cal.App.4th at pp. 224, 228; *People v. Clark* (1967) 251 Cal.App.2d 868, 873-874; *People v. Champion* (1968) 265 Cal.App.2d 29, 32 [insufficient evidence of theft of vehicle].) Additional circumstances are necessary to establish Venegas's possession or control of the Yukon, based on the unique facts of his case. (See *People v. Land, supra*, 30 Cal.App.4th at p. 228.) Strong evidence of a passenger's guilty knowledge and a close relationship to the driver who actually stole the vehicle may give rise to an inference of passenger possession. (*Id.* at p. 227.)

In our case, the evidence shows much more than that Venegas merely rode in an illegally acquired truck. He had a close relationship with Brewer—the two shared a room.<sup>16</sup> Brewer committed burglary and car theft sometime between June 10 and June 12. Venegas was connected to several other items of stolen property taken during that burglary, pawning some of it for money. He fled from the truck after police began following it. His connections to recently stolen property, coupled with the inference raised by his flight and the evidence that he had been a passenger in the truck—taken together—offer sufficient circumstantial evidence to allow a jury to find that Venegas aided and abetted Brewer's taking of the Yukon. At the time of the motion for acquittal, while conviction on this theory was not required, it was permitted based on reasonable inferences raised from the evidence. (See, e.g., *People v. McFarland, supra*, 58 Cal.2d at p. 757.) As such, the trial court properly denied Venegas's motion for acquittal on the charge of unlawful driving or taking of a vehicle.

### C. Verdict

We also consider whether there was substantial evidence to support the jury's verdict that Venegas was guilty of unlawful driving or taking of a vehicle. In his argument, Venegas reasons that if we examine the jury instructions, the prosecution's

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<sup>16</sup> The evidence that they were cousins did not come out until after the motion for acquittal was determined.

closing argument, and the verdict, these circumstances compel the conclusion that the jury actually relied on the unlawful driving, not unlawful taking.

We need not determine this issue, because we find sufficient evidence to support a jury verdict on either a taking or driving theory. If the jury focused on the *unlawful* taking aspect of the charge, the same evidence that successfully defeated Venegas's motion to acquit—that he aided and abetted the taking of the Yukon during the burglary, taking joint possession of the truck—would also support the jury's guilty verdict. (See pt. II.B., *ante*.) If the jury found that Venegas was guilty of unlawful *driving* of a vehicle, Brewer's testimony that his cousin drove the truck on June 12 to Fairfield<sup>17</sup> would provide sufficient evidence to support that verdict.

On appeal, we construe the evidence in the light most favorable to the jury's verdict. (*People v. Smith, supra*, 37 Cal.4th at pp. 738-739.) Although Brewer retracted his testimony that Venegas was driving the vehicle when the two men abandoned it on June 14, the credibility of his testimony about Venegas's driving on June 12 was not challenged. On appeal, we may reverse a judgment for insufficiency of evidence only if it appears that under no hypothesis whatever is there substantial evidence to support the underlying conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) As there is a reasonable hypothesis to support the jury's verdict if it is based on an unlawful driving theory, we must affirm it.

#### D. *Inconsistent Verdicts*

Venegas also argues that his conviction for receiving stolen property is inconsistent with a lawful finding that he participated in the taking and driving of the Yukon, because one cannot be found guilty of both taking and receiving the same property. (See *People v. Allen* (1999) 21 Cal.4th 846, 850-857.) No inconsistent verdicts were rendered. Venegas was not convicted of burglary. The information clearly charged Venegas with the unlawful driving or taking of the *Yukon* and of receiving the *camera* knowing that it was stolen. The jury was so instructed, early in the case and again during

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<sup>17</sup> The evidence that on June 12 in Fairfield, Venegas pawned items taken from the Dupont house tends to corroborate this testimony.

deliberations. We presume that the jury followed the trial court's instructions. (See *Francis v. Franklin* (1985) 471 U.S. 307, 324-325 fn. 9; *People v. Harris* (1994) 9 Cal.4th 407, 426.) Thus, the verdict on the unlawful driving or taking of the Yukon was not inconsistent with the jury's finding that Venegas also received the camera as stolen property.

### III. NOTICE OF CHARGES

Venegas raises a related claim of error—that he was not given adequate notice of the nature of the charges against him. He reasons that confusion about possession and driving of a vehicle, the prosecutor's closing argument, and a claimed ambiguity in the verdict lead to the conclusion that the information did not adequately inform him of the nature of the charges against him. He reasons that we must reverse his conviction for violation of his state and federal due process rights and his Sixth Amendment right to notice.

Venegas contends that the jury's verdict of unlawful driving or taking of a vehicle was ambiguous, at best. He cites the prosecution's closing argument that he and Brewer had *joint possession* of the truck as improper, reasoning that this argument was only relevant to a charge of receiving stolen property. He reasons that the cases of joint possession by a driver and passenger of a vehicle support constructive possession for purposes of receiving stolen property, but not aiding and abetting the unlawful driving of a vehicle. Venegas couches this claim of error as one of prosecutorial misconduct depriving him of a fair trial.

We reject Venegas's claim of error, for two reasons. On a procedural basis, Venegas failed to raise a claim of prosecutorial misconduct in the trial court. To preserve a prosecutorial misconduct claim of error for appeal, the defense must make a timely objection and ask the trial court to admonish the jury to disregard those of the prosecutor's questions that constitute misconduct. (*People v. Earp* (1999) 20 Cal.4th 826, 858; see *People v. Sapp* (2003) 31 Cal.4th 240, 279.) If the defense fails to do so, the right to appeal the issue is waived. (*People v. Earp, supra*, 20 Cal.4th at pp. 858-859.) The failure to demur to an information waives any right to challenge any

uncertainty in the pleading. (See *People v. Jennings* (1991) 53 Cal.3d 334, 356-357.) By any measure, this issue was waived in the trial court.

Even if we were to reach the merits of this claim of error, we disagree with Venegas's assessment of the prosecution argument. The prosecution argued that Venegas and Brewer could have joint possession of the vehicle even if they could not physically both drive it at the same time. Our reading of this portion of the closing argument in context satisfies us that a reasonable construction of the prosecution's argument was that Venegas could be convicted of unlawful taking of a vehicle based on Brewer and Venegas's joint possession of the truck if Venegas aided and abetted his cousin in the commission of the Dupont burglary when the truck was taken. We have already concluded that this theory could properly support a conviction for unlawful driving or taking of a vehicle. (See pt. II., *ante*.)

The prosecution did not rely on an uncharged theory of guilt, but on more than one theory of guilt for unlawful driving or taking of a vehicle. The jury was correctly instructed on the elements of this offense and on aiding and abetting. (See pt. V., *post*.) Venegas was not charged with receiving the truck as stolen property, nor was he convicted of this charge. Even if we were able to overcome the procedural hurdle of a lack of a prosecutorial misconduct objection, we would find no misconduct in the argument made.<sup>18</sup>

#### IV. SEVERANCE

Next, Venegas asserts that the denial of his motion to sever his trial from Brewer's trial resulted in gross unfairness amounting to a denial of due process. In the trial court,

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<sup>18</sup> Venegas also complains that the jury found him guilty of taking the truck, even though the trial court instructed the jury that a taking was not required. The instruction was correct. Section 10851 of the Vehicle Code sets out two offenses—one based on driving, and the other on taking of another's vehicle. The trial court properly instructed the jury that the two offenses were separate and that a defendant could be found guilty of violating section 10851 of the Vehicle Code on an unlawful driving theory even if there was no evidence of an unlawful taking. (See, e.g., *People v. Barrick, supra*, 33 Cal.3d at p. 135 [taking and driving as distinct acts forming alternative bases of violating Vehicle Code section 10851].)

he filed a motion for severance. He argued that Brewer had given an incriminating statement implicating him, which would be used against him at trial. He also contended that the case against Brewer was stronger than the case against him and that Brewer faced more serious charges. Finally, Venegas argued that his defense conflicted with Brewer's defense. After statements from the two defendants referring to each other were redacted in a very detailed manner, the trial court denied the motion to sever.

When two defendants are jointly charged with any public offense, they *must* be tried jointly unless the trial court opts to order separate trials. (§ 1098.) Joint trials play a vital role in the criminal justice system, promoting efficiency and contributing to the avoidance of inconsistent verdicts. (*Zafiro v. United States* (1993) 506 U.S. 534, 537; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) In this matter, Venegas and Brewer were jointly charged with some of the same offenses, so they met the statutory preference for a joint trial. (See *People v. Hardy* (1992) 2 Cal.4th 86, 167; *People v. Morganti* (1996) 43 Cal.App.4th 643, 672.)

The trial court had discretion to order separate trials as an exception to this general rule. (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 190; see 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 370, pp. 536-537.) As the statutory prerequisites for joinder were met, Venegas must make a clear showing of prejudice to establish an abuse of discretion in denying severance. (See *People v. Mendoza, supra*, 24 Cal.4th at p. 160; *People v. Price* (1991) 1 Cal.4th 324, 388.) This determination turns on the particular facts of the individual case. (*People v. Kraft, supra*, 23 Cal.4th at p. 1030; *People v. Grant* (2003) 113 Cal.App.4th 579, 586.) Although a severance decision rests in the discretion of the trial court, severance should generally be granted if a codefendant confesses; if there is prejudicial association with a codefendant; if confusion would likely result from evidence on multiple counts; if the defendants offer conflicting defenses; or if there is a possibility that at a separate trial a codefendant would offer exonerating evidence. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40; *People v. Hardy, supra*, 2 Cal.4th at p. 167.)

Even if severance was properly denied at the time of the motion,<sup>19</sup> we may reverse a conviction if the joint trial actually resulted in a gross unfairness to the defendant, depriving him or her of a fair trial and thus, due process. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Ervin* (2000) 22 Cal.4th 48, 69.) A general claim of jury confusion, without evidence to support that assertion, is not sufficient to establish gross unfairness. (See *People v. Ervin, supra*, 22 Cal.4th at p. 69.) When—as here—two defendants are charged with common crimes involving a common victim and events, a classic case for a joint trial exists. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40; *People v. Morganti, supra*, 43 Cal.App.4th at p. 672.)

A key factor that may require severance—the danger of an incriminating statement from a codefendant—did not come into play in this matter. Brewer testified at trial about a *redacted* version of his statement to police. Venegas’s *cross-examination* of Brewer satisfied his Sixth Amendment right of confrontation. (See, e.g., *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 43.)

In essence, Venegas criticizes the prosecution for “playing heav[ily]” on evidence of Brewer’s burglary to show that Venegas committed unlawful driving or taking of a vehicle. However, it was not improper for the prosecution to do so. Its theory of Venegas’s guilt of unlawful driving or taking of a vehicle was that there was circumstantial evidence from which a jury could infer that Venegas *aided and abetted* Brewer’s commission of the burglary, which could allow a further inference of Venegas’s unlawful taking of the truck. The evidence of Brewer’s involvement in the burglary was not imputed to Venegas, but was offered as a means of establishing—along with other

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<sup>19</sup> The propriety of a denial of severance is often evaluated twice. In the first instance, we are asked to evaluate the denial of the motion based on the facts as they appeared to the trial court at the time of that ruling. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41; *People v. Mendoza, supra*, 24 Cal.4th at p. 161; *People v. Price, supra*, 1 Cal.4th at p. 388.) It appears that Venegas does not raise this argument, as his claim is one of gross unfairness based on the trial conducted after the motion was denied.

evidence—Venegas’s own criminality in taking the vehicle.<sup>20</sup> (See pt. II., *ante.*) To prove its aiding and abetting theory, evidence of Brewer’s burglary had to be admitted in Venegas’s trial, even if the two had been separately tried. The cross-admissibility of this evidence supports rather than undermines the trial court’s denial of severance. Venegas has not demonstrated that the denial of his severance motion caused gross unfairness at his subsequent trial. For this reason, we find that the trial court properly denied the motion. (See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 533.)

## V. JURY INSTRUCTIONS

### A. CALCRIM No. 203

Venegas also contends that the trial court committed various instructional errors. First, Venegas urges us to find that the trial court erred by instructing the jury on a version of CALCRIM No. 203 that he reasons told the jurors that both defendants were charged with the same crimes. If multiple defendants are on trial, the trial court has a sua sponte duty to instruct on the need for separate verdicts. (*People v. Mask* (1986) 188 Cal.App.3d 450, 457; see Bench Notes to CALCRIM No. 203, p. 36.) When the instruction given is viewed in the context of other jury instructions, it is clear that the trial court met this obligation.

The trial court explained that Brewer was charged with burglary; and that both defendants were charged with unlawful driving or taking of a vehicle and with receiving stolen property. Immediately after this explanation, it instructed the jury to separately consider the evidence as it applied to each defendant. (CALCRIM No. 203.) It concluded by noting that “you may only find guilt or innocence on one charge, maybe on all three, maybe two or three, maybe as to one defendant, maybe not the other. I think everybody understands that.” During the trial, the jury was repeatedly reminded that Venegas and Brewer were charged with overlapping but not identical offenses. The jury did not return a burglary verdict against Venegas. To prevail on his claim of error,

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<sup>20</sup> The jury was instructed to consider the evidence separately as it applied to each defendant. Accordingly, we also reject Venegas’s assertion that the trial court failed to instruct the jury not to consider evidence of Brewer’s crime against him.

Venegas must show a reasonable likelihood that the jury misunderstood the challenged instructions. (See *People v. Cain* (1995) 10 Cal.4th 1, 36-37; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 31.) He has not done so.

B. *CALCRIM No. 1820*

Venegas also contends that the trial court erred by using the plural tense when defining unlawful driving or taking of a vehicle and when modifying CALCRIM No. 1820. He reasons that this use of the plural to refer to the both Venegas and Brewer effectively directed a verdict on the issue of acting in concert—i.e., on aiding and abetting. The jury was instructed that to prove Venegas and Brewer guilty of unlawful driving or taking of a vehicle, the prosecution was required to prove that “the defendants” took or drove someone else’s vehicle without the owner’s consent, and when “the defendants” did so, “they” intended to deprive the owner of possession or ownership of the vehicle for a period of time. During deliberations, a question from the jury suggested to the prosecutor that the jury may have believed that the offense of unlawful driving or taking of a vehicle required a taking. The trial court reread the definitional instruction—again using the plural tense—and added: “Neither defendant has to take [the Yukon to be guilty of this offense]. If *they* drive it and *they* do it, it’s somebody else’s, and it’s without the owner’s consent and *they* intend[] to deprive the owner of possession or ownership of the vehicle for any period of time[, t]hat would be a violation of [Vehicle Code section] 10851. [¶] I’m not saying *they* did, but that’s the definition of Count 2.” (Italics added.)<sup>21</sup>

On appeal, we must consider this instructional challenge in the context of all the instructions given. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) We assume that jurors are intelligent people with the capacity to understand, correlate, and follow all

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<sup>21</sup> Defense counsel did not object to the definitional instruction when it was given, nor to the trial court’s modification of it. On appeal, Venegas contends that these omissions constituted ineffective assistance of counsel. As we find no error in the instructions, no ineffective assistance of counsel claim has been shown. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

instructions. (*People v. Ayers* (2005) 125 Cal.App.4th 988, 997.) The jury was admonished to separately consider the evidence as it applied to each defendant, and to determine “each charge for each defendant separately.” It instructed that the jury could find one defendant guilty, but not the other. In light of all the instructions, the use of the plural tense in the challenged instruction did not raise a reasonable likelihood that the jury applied the law in an incorrect manner. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72, fn. 4; *People v. Cain*, *supra*, 10 Cal.4th at p. 36.)

### C. *Withdrawal*

In his last instructional challenge, Venegas contends that the trial court erred by failing to instruct *sua sponte* on the defense of withdrawal. He reasons that the evidence was reasonably susceptible to an inference that he acquired the knowledge that the truck was stolen during the June 14 ride, and then withdrew from the stolen vehicle when he abandoned it. (See CALJIC No. 3.03.) A trial court has a *sua sponte* duty to instruct on a specific defense only if substantial evidence supports that defense. (*People v. Maury* (2003) 30 Cal.4th 342, 424; *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054; see 1 Witkin & Epstein, Cal. Criminal Law, *supra*, Defenses, § 250, p. 618; *id.* (2011 supp.) p. 201.) On appeal, we conduct an independent review of the evidence to determine whether substantial evidence supported a defense. (*People v. Shelmire*, *supra*, 130 Cal.App.4th at p. 1055.)

To be entitled to an instruction on withdrawal, a defendant charged with aiding and abetting a crime must produce substantial evidence that he or she notified the other principals of his or her intention to withdraw from the commission of the intended crime; and that he or she did everything in his or her power to prevent the crime from being committed. (*People v. Shelmire*, *supra*, 130 Cal.App.4th at p. 1055.) There was no evidence from which a reasonable person could conclude that Venegas’s flight from the truck on June 14 was intended to communicate to Brewer an intent to withdraw from the commission of a crime. Likewise, there was no evidence that Venegas made any effort to prevent a crime from being committed. (See *id.* at pp. 1055-1056.) As he did not offer substantial evidence in support of his claimed defense of withdrawal, Venegas was not

entitled to a sua sponte instruction on that defense. (See *People v. Maury, supra*, 30 Cal.4th at p. 424; *People v. Shelmire, supra*, 130 Cal.App.4th at pp. 1054-1056.)

The judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.