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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GRIMALDI MELENDEZ et al.,

Defendants and Appellants.

B237732

(Los Angeles County
Super. Ct. No. VA117646)

APPEAL from judgments of the Superior Court of Los Angeles County.

Philip H. Hickok, Judge. Affirmed as modified.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant Grimaldi Melendez.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Wilbur Morales.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant Andes Vera.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Ana R. Duarte and Jonathan Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This appeal involves the imposition of consecutive sentences within the meaning of Penal Code section 654. We agree that one of two counts (one for kidnapping during a carjacking and another for kidnapping to commit robbery) should have been stayed, and two carjacking convictions should have been stricken rather than stayed; otherwise, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

On November 17, 2010, at about 7:30 p.m., Erika Carmona parked her car at the South Gate campus of East Los Angeles College. After she turned off the engine, Wilbur Morales opened the driver's side door and told Carmona to move over to the passenger seat. When she refused, he showed her a knife and said, "You better do it." Carmona complied, and saw three other men, including Grimaldi Melendez and Andes Vera, were already sitting in the back seat of her car. Someone in the back said, "Let's go." Morales started the car and drove away.

Carmona begged them to let her go and not to hurt her. She was told "not to do anything stupid" and, in Spanish, to face forward ("Derecho"). Morales said they were going to "do business" they needed to do in downtown Los Angeles. Morales had Carmona's cell phone and asked if she lived with someone who was expecting her back home. Carmona said her mother knew she had just come in to take a test and would not be long. Morales then asked her, "What's going to happen to your mom if you never make it back home?" When Carmona responded that her mother would die, Morales said he didn't care because his mother and sisters had died in a car accident.

Carmona told Morales she had money in the bank and if he would turn around, she would get them some money. The passengers said "No," but Morales made a U-turn and one of the passengers directed Morales to a Chase bank branch. Carmona told Morales she would get the money if he would let her drive. He agreed and told her not to do anything other than to get the money. Melendez then walked with Carmona to the ATM

machine (where the surveillance camera recorded the transaction), and tried to take the money from Carmona, but she gave it to Morales.

Morales then got out and moved to the front passenger seat, allowing Carmona to drive. Morales and the passengers gave her directions. Vera was holding Carmona's laptop. She asked him not to take it because it had personal photos and asked them not to hurt her. Melendez told her to stop talking and listen to the directions, saying "[Y]ou guys never know how to follow directions." Melendez said something about putting Carmona in the trunk. She followed their directions and drove to an alley. The passengers got out and looked through Carmona's car, taking her laptop, GPS, cell phone battery and digital camera in addition to the cash from the ATM.

Three days later, on November 20, at about 7:00 p.m, Maria Gonzalez drove to a discount store to make a purchase. When she got back to her car and unlocked it, Morales grabbed her from behind and pushed her. Showing her a knife, he said, "This is a robbery. Don't scream. Don't do anything[;] otherwise, you'll die." Melendez came around on the passenger side, opened the door and got in. Morales and Melendez then pushed Gonzalez over to the back seat where Vera was sitting.

Morales drove for some time. Then Melendez got into the back seat and pushed Gonzalez down. Her face was on Melendez's lap. Melendez took Gonzalez's jewelry off and directed Gonzalez to remove her ring and give it to him. When the car stopped, Morales and Vera got out and came back with some luggage. Vera confirmed with Melendez that everything was "fine." The two got back in the car and told Gonzalez they were looking for a bank, with Morales driving and Vera and Melendez in the back with Gonzalez. They had taken her bankcard and asked for her Personal Identification Number which she provided. Morales and Vera left to get cash. After their first attempt, Morales yelled that Gonzalez had lied and given the wrong number. She said the number was correct and repeated it. After the second attempt, Morales cursed, saying they had only been able to get \$200. Morales and Vera got back in the car. Vera and Melendez

kept Gonzalez down as they continued driving. Morales said nothing would happen to her if she cooperated. Then she was told to get up slowly and tell them where they were. She saw a Melrose Street sign but did not know where they were. Morales told her to get down again and continued driving.

Eventually, Morales stopped and got out of the car. Melendez and Vera switched places, and Melendez turned on Gonzalez's phone and told her she had calls and messages. Morales returned with a map and drove away again. Gonzalez's ATM card was used to make purchases of \$50.50 at a Wal-Mart and \$30.95 at a market in Paramount plus cash withdrawals in the amounts of \$60 in South Gate, \$200 on Venice Boulevard and \$100 on Wilshire Boulevard.

At about 11:30 p.m., after more than four hours, Morales stopped the car and let Gonzalez get out. He told her to walk to a gas station for help but told her not to call the police. He or Vera gave her the jacket Melendez had been wearing and a \$20 bill. She walked for a while until she saw a man outside who called the police for her.

Three days after that, on November 23, a police officer (Joshua Lever) employed by the Draper Police Department in Utah confirmed that a car he observed with a California license plate had been reported stolen. He contacted additional officers and followed the car to initiate a felony stop. After Lever activated his lights and sirens, the car he was following changed lanes and slowed almost to a stop but then sped away and later crashed. Escorted by police, Melendez, Morales and Vera were taken to the hospital for treatment and arrested.

Melendez, Vera and Morales were charged with two counts of kidnapping during a carjacking (Pen. Code, § 209.5, subd. (a) [all undesignated statutory references are to the Penal Code]), counts 1 and 5); two counts of kidnapping to commit another crime (robbery) (§ 209, subd. (b)(1), counts 2 and 6); first degree automated teller machine robbery (§ 211, count 3); second degree robbery (§ 211, counts 4 and 7); and carjacking (§ 215, subd. (a), count 8). Melendez and Vera were charged with carjacking (§ 215,

subd. (a), count 9).¹ As to counts 1 through 7, it was alleged Morales had personally used a deadly and dangerous weapon (a box cutter and knife). (§ 12022, subd. (b)(1).) As to count 8, it was further alleged Morales (and Melendez) had personally used a deadly and dangerous weapon (a knife) within the meaning of subdivision (b)(2) of section 12022.²

At trial, the People presented evidence of the facts summarized above. The defense presented no witnesses on the defendants' behalf.

Melendez, Vera and Morales were found guilty as charged in counts 1 and 3 through 9, and the weapon use allegations as to Morales were found true. (The weapon use allegation as to Melendez in count 8 was found not true, and all defendants were found not guilty on count 2.)

The trial court sentenced both Melendez and Vera to state prison for three consecutive life terms with the possibility of parole plus four years. Morales was sentenced to state prison for three consecutive life terms with the possibility of parole plus six years (an additional year on each of counts 3 and 5 for Morales's knife-use enhancement; on counts 4, 6, and 7 through 9, the one-year term for Morales's knife use was stayed pursuant to section 654). In addition, all three defendants were ordered to pay \$200 restitution fines (§ 1202.4, subd. (b)); \$200 parole revocation fines (§ 1202.45), which were suspended pending satisfactory completion of parole; \$40 court security assessments (§ 1465.8, subd. (a)(1)); and \$30-per-count criminal conviction fees (Gov. Code, § 70373) and received presentence custody credits of 429 days.

Melendez, Vera and Morales appeal.

¹ Melendez was also charged with sexual battery (§ 243.4, subd. (e)(1), a misdemeanor) in count 10, but this count was dismissed on the People's motion (§ 1385).

² Counts 1 through 4 and 9 related to Carmona; Counts 5 through 8 related to the crimes involving Gonzalez.

DISCUSSION

According to Melendez, Vera and Morales, the trial court was required to stay either count 5 (kidnapping during a carjacking) or count 6 (kidnapping to commit another crime (robbery)) because these crimes (involving Gonzalez) were committed pursuant to an indivisible course of conduct.³ (§ 654.) We agree.

At the sentencing hearing, Morales's counsel (joined by counsel for Vera and Melendez), argued, "This is one continu[ous] course of conduct. I don't think we can divide it into that car [sic, part] was a carjacking, this part was robbery, this part was kidnapping. I think it should all fall under one of the charges, and I think the charge is kidnapping for robbery. Everything else is 654."

The trial court responded: "The case did involve the possibility of great injury to both of the victims. There w[ere] two separate occasions [where] there was a use of a knife involved, which obviously highlighted the opportunity for great bodily injury to have occurred. It did not, luckily, in this case. However, it could have.

"There were two victims in the case. There were three separate defendants in the case, all in one car. The victims in this case were particularly vulnerable; it was at night, they were alone coming back to their car when they were accosted. The defendants physically overpowered the victims in this case, forced them back into their car[s], forced them to drive.

"I think for all of those reasons the court is going to follow some of the recommendations of the People in this matter."

The court selected count 3 (first degree (ATM) robbery of Carmona) as the principal term, sentencing each of the defendants to the midterm of four years for

³ Melendez, Vera and Morales have all filed appellate briefs and also join in their codefendants' briefs to the extent the arguments contained in these briefs would benefit each of them.

violation of section 211, noting that it could have been six years, and added one year to Morales's sentence for the knife use enhancement.

As to count 4 (second degree robbery of Carmona), the trial court imposed the midterm of three years, but stayed the sentence under section 654. (The extra year for Morales's knife use was imposed but stayed.)

As to count 7 (second degree robbery of Gonzalez), the trial court imposed the midterm of three years, but stayed the sentence under section 654. (The extra year for Morales's knife use was again imposed but stayed.)

As to count 8 (carjacking of Gonzalez), the trial court imposed the low term of three years, but stayed the sentence under section 654. (The extra year for Morales's knife use was imposed but stayed.)

As to count 9 (carjacking of Carmona), the trial court imposed the low term of three years, but stayed the sentence under section 654. (The extra year for Morales's knife use was imposed but stayed.)

At this point, the trial court summarized the total determinate sentence for Vera and Melendez was four years in state prison while Morales's determinate sentence included an additional year for the knife use enhancement.

"The court then will go to count 1. Count 1 is the kidnapping charge under Penal Code section 209.5[, subdivision] (a). For that, each of the defendants will be imprisoned in the state prison for the term of life. [C]ount 1 is consecutive to the time that will be spent as far as count 3 is concerned.

"Count 5 will then be imposed, that term is for another [section] 209.5[, subdivision] (a) charge. That term will be life in the state prison system. That will be consecutive to the sentences already imposed. The court is running these consecutive for the reasons heretofore stated in my oral presentation.

"[O]n that one, there's one additional year for Mr. Morales because of the use of the knife under [section] 12022[, subdivision (b)(1)].

“Finally, as far as count 6, the final [section] 209 . . . charge, I will sentence each of the defendants to a term of life imprisonment pursuant to [section] 209[, subdivision] (b)(1). As far as Mr. Morales is concerned, one additional year will be imposed on that case, and stayed pursuant to Penal Code section 654.”

The clerk inquired: “Count 5 is consecutive to the other two life terms?” The court responded, “Yes. Counts 1, 5 and 6 are consecutive to counts [sic] 3, and to one another.”

Section 654, subdivision (a) provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .”

Because section 654 is intended to ensure punishment commensurate with culpability, it has been applied to circumstances in which a defendant commits several offenses during an “indivisible course of conduct.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.) The defendant’s “intent and objective” determine whether the transaction is “indivisible.” (*People v. Coleman* (1989) 48 Cal.3d 112, 162, citations omitted [“section 654 does not preclude multiple convictions but only multiple punishments for a single act or indivisible course of conduct”].) Where a defendant harbored “multiple criminal objectives,” which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, “even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Harrison, supra*, 48 Cal.3d at p. 335, citation omitted.) The question of whether a defendant harbored a “single intent” within the meaning of section 654 is generally a factual one. (*Ibid.*) “A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported

by substantial evidence.” (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368, citations and internal quotations omitted.)

The Attorney General argues the trial court “impliedly found [Melendez, Vera and Morales] harbored separate and multiple criminal objectives during the kidnapping during a carjacking and kidnapping to commit robbery of Gonzalez.” This is so, the Attorney General says, because Morales told Gonzalez it was a robbery when he first approached her; the kidnapping in Gonzalez’s car was a way to facilitate that robbery, and Melendez, Vera and Morales acted in accordance with that same intent during the car ride but only “*later* decided to take her car.” (Italics added.) “Thus, the intent to rob preceded the intent to carjack *even if it was somewhat overlapping.*” (Italics added.) In the Attorney General’s view, “[T]he [trial] court could have clearly concluded that the kidnapping to commit robbery and the kidnapping during a carjacking were separate occurrences because [Melendez, Vera and Morales] formed the intent to carjack after they formed their intent to rob.”

To the contrary, after reviewing the record, we find there is not substantial evidence to support an implied finding that Melendez, Vera and Morales formed a subsequent, separate intent to take Gonzalez’s car, rather than always intending to take her money as well as her car. (See *People v. Green* (1996) 50 Cal.App.4th 1076, 1085, citations omitted [““there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced””]; and see *People v. Contreras* (1997) 55 Cal.App.4th 760, 765 [“a violation of section 209.5 [kidnapping] ‘during the commission of a carjacking’ requires a completed offense of carjacking”]; § 215, subd. (a) [“‘Carjacking’ is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear”].) Consequently, the imposition of consecutive sentences for counts 5 and 6 is

not supported by evidence of the formation of a new, separate intent, and Melendez, Vera and Morales are properly punished for one of these two offenses, but not for both of them.⁴ (*People v. Green, supra*, 50 Cal.App.4th at p. 1085.)

Melendez, Vera and Morales also argue, and the Attorney General concedes, the carjacking convictions in counts 8 and 9 must be reversed because carjacking is a lesser included offense of kidnapping during the commission of a carjacking (counts 1 and 5). We agree. (*People v. Contreras, supra*, 55 Cal.App.4th at pp. 762-765; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

DISPOSITION

The judgment is modified to (1) stay imposition of sentence for *either* count 5 (kidnapping during a carjacking) *or* count 6 (kidnapping to commit robbery) pursuant to section 654 and (2) strike the convictions for carjacking (counts 8 and 9) that previously had been stayed pursuant to section 654. In all other respects, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.

⁴ Melendez, Vera and Morales were sentenced to consecutive life terms on counts 5 and 6.