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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY ALBERTO KATRAKAZOS, Defendant and Appellant.	2d Crim. No. B284795 (Super. Ct. No. 2013033508) (Ventura County)

Johnny Alberto Katrakazos appeals judgment after a jury convicted him of second degree robbery and attempted carjacking. (Pen. Code,[1] §§ 211, 664/215, subd. (a).) The jury could not reach a verdict on kidnapping for robbery and the trial court dismissed that count. (§ 209, subd. (b)(1).) Katrakazos admitted allegations that he suffered a prior conviction that is both a serious felony and a strike, and that he served three prior

[1] Further unspecified statutory references are to the Penal Code.

prison terms. (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The court sentenced Katrakazos to 19 years 8 months in state prison as follows: 10 years for the robbery (a five-year upper term doubled for the strike); plus 20 months for the attempted carjacking (one-third the midterm doubled); plus five years for the prior serious felony; plus three years for the prior prison terms.

Katrakazos contends (1) there was not sufficient evidence of attempted carjacking to support the conviction, (2) his sentence for attempted carjacking should have been stayed because it involved the same act as the robbery, and (3) the court punished him for exercising his right to go to trial when it imposed the maximum term for robbery in violation of his right to due process. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Katrakazos robbed a 99 Cent Store and tried to steal the owner's car from the parking lot. A surveillance camera recorded him in the store and a witness watched him in the parking lot.

Katrakazos first bought something in the store, left, and returned about 10 minutes later. He grabbed the owner, Khen Lu, around her neck and repeatedly "pounded at" her face. He pulled her 15 feet to the cash register and told her to open it. He took the cash register tray and Lu's car keys, and ran out of the store.

Lu ran after Katrakazos, yelling "he stole my money." She saw him approach her minivan at the driver's side. She was six feet away from him, on the passenger side. "[H]e was about to try to insert [the key]" into the front door, but "school was let out and the students approached, so he just took off." He did not

actually insert the key. Lu said, "When the customers arrived, then he threw the key down." "Then he threw the tray, and he ran."

The witness testified she saw Katrakazos go into the store. Then he "ran outside, dropped the money; then he was trying to get into the brown van that was parked out front." He was on the driver's side. The witness saw Lu come out of the store yelling "he stole my money," and Katrakazos ran toward the train station. The witness said, "He tried to get into the van. He couldn't get in, and he took off" running. She saw him, "struggling trying to open the van, and it was unsuccessful from what I saw. I didn't see him actually get in the van." She could not see if he had keys, "but he was struggling trying to get into the van, and then he just dropped everything and ran down the street."

In his opening statement, Katrakazos's counsel conceded that Katrakazos "committed a robbery that day." He argued Katrakazos did not commit carjacking or kidnapping however, because the movement was incidental to the robbery and there was no evidence he intended to take the van. At the close of evidence, the court denied Katrakazos's motion to dismiss the attempted carjacking count.

DISCUSSION

Sufficient Evidence of Attempted Carjacking

Katrakazos asks us to reverse the attempted carjacking conviction because there is no substantial evidence that he attempted to take the van. After examining the whole record in the light most favorable to the judgment, we determine substantial evidence—evidence that is reasonable, credible and of solid value—supports the finding of guilt beyond a reasonable

doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Attempted carjacking requires proof of (1) specific intent to commit carjacking and (2) a direct but ineffectual act done toward its commission. (§§ 21a/215.) Carjacking requires proof of a "felonious taking of a motor vehicle in the possession of another, from . . . her person or immediate presence . . . against . . . her will and with the intent to . . . deprive [her] of [it], accomplished by means of force or fear." (§ 215, subd. (a).)

Katrakazos argues he did not attempt to take the van, pointing to testimony that no one saw him touch the van and he ran off as soon as Lu came outside. Preparation alone does not prove attempt; there must be, "some appreciable fragment of the crime committed," in progress such that it will be "consummated unless interrupted" by independent circumstances. (*People v. Dillon* (1983) 34 Cal.3d 441, 454.) Attempt may be proven with "acts which indicate a certain, unambiguous intent to commit [the] crime," and are "an immediate step in the present execution of the criminal design." (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.) Lu's testimony provides sufficient evidence of attempt because she said she saw Katrakazos approach the driver's door, look at the key ring, and prepare to insert the key into the van door. This act shows certain, unambiguous intent to take Lu's van. The jury could reasonably believe this was an immediate step that would have consummated in carjacking had he not been interrupted by the approaching students.

Katrakazos contends his conduct was not attempted carjacking because he did not attempt to take the van directly from Lu. The carjacking statute is designed to address "the

violent nature of vehicle takings committed against drivers and passengers" (*People v. Coleman* (2007) 146 Cal.App.4th 1363, 1373 (*Coleman*)), that is, to "address a specific problem—the taking of a motor vehicle directly from its occupants" (*id.* at p. 1369). But carjacking "does not require that the victim be inside or touching the vehicle at the time of the taking." (*People v. Medina* (1995) 39 Cal.App.4th 643, 650 (*Medina*).) And it "is not limited to cases in which a defendant initially gains possession by dispossessing the victim of the vehicle through the use of force or fear." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131 (*O'Neil*).)

In *Medina*, *supra*, 39 Cal.App.4th 643, for example, a carjacking conviction was affirmed where the defendants lured the victim into a motel room and forcibly took the keys to his car which was parked 20 feet away. That he was not in the car when they took his car was immaterial. Likewise, in *O'Neil*, *supra*, 56 Cal.App.4th 1126, the victim was inside his house when the defendant started to drive the victim's truck away. The victim ran outside, confronted the defendant, and climbed into the bed of his truck for a moment before he was scared into relinquishing the truck by defendant's screams. Here, Lu stopped six feet away from the van out of fear, but that does not alter the fact that Katrakazos attempted to take it from her immediate presence.

This case is unlike *Coleman*, *supra*, 146 Cal.App.4th 1363, in which a carjacking conviction was reversed when the defendant took truck keys from someone who never owned or rode in the truck and was not near it. He took the keys from an office manager who "was not within any physical proximity to the [owner's truck], the keys she relinquished were not her own, and there was no evidence that she had ever been or would be a

driver of or a passenger in the [truck]." (*Id.* at p. 1373.) Here, Lu relinquished the keys to her own vehicle and was only six feet from the van when Katrakazos tried to take it.

Katrakazos argues he only "grabbed" the keys from the owner, and did not "forcibly" take them. The evidence showed that he took the keys by fear when he grabbed them from her hand after taking her by the neck and beating her face. Katrakazos argues his actions "clearly indicate he wanted no part of trying to take the minivan from Lu's immediate presence," because he dropped the keys and ran as soon as she confronted him. That is one interpretation of the evidence, but the jury rejected it. Another interpretation, more favorable to the verdict, is that Katrakazos willingly engaged in physical confrontation with Lu when he beat her and he only dropped the keys because he was interrupted by approaching students.

Section 654

Katrakazos contends his sentence for attempted carjacking should be stayed because it was part of an indivisible course of conduct with the robbery and the two offenses shared a single intent and objective. (§ 654; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 420 (*Dominguez*).) We disagree because Katrakazos formed a separate intent and objective for each offense.

Section 654 prohibits multiple punishment for a single act. Section 215, subdivision (c) provides, "no defendant may be punished under this section [carjacking] and [s]ection 211 [robbery] for the same act which constitutes a violation of both this section and [s]ection 211." Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on "the intent and

objective of the actor." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If all of the offenses were "incident to one objective," the defendant may be punished for only one. (*Ibid*.) Objectives may be separate when "the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

The record supports the trial court's implied finding that Katrakazos committed different acts with separate objectives when he violated sections 215 and 211. Katrakazos committed one act when he struck Lu and took money from the register with the objective of getting that money; he committed a separate act when he grabbed her keys and tried to take her van with the objective of getting the van.

This case is unlike *Dominguez*, *supra*, 38 Cal.App.4th at page 420, in which the defendant could not be punished for both carjacking and robbery because the victim simultaneously surrendered his jewelry and fled his van when the defendant got into the back of it, held a metal object to the victim's neck, demanded "everything you have," and threatened to kill him. The two crimes were part of the same act. Here, Katrakazos took Lu's keys after he took her money. She testified, "After he got all the money, he just grabbed the keys."

Due Process—Maximum Term

Katrakazos contends the trial court violated his right to due process by imposing the maximum term as punishment for going to trial on a "grossly overcharged" case. We disagree. The record demonstrates that the decision to go to trial played no part in the court's sentencing decision.

A sentencing court may not punish a defendant for exercising his or her right to go to trial and it may not use its

sentencing power to expedite resolution. (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363; *People v. Collins* (2001) 26 Cal.4th 297, 309; *In re Lewallen* (1979) 23 Cal.3d 274, 278-279.) But nothing in the record suggests the court did so. It was defense counsel who introduced the subject at the sentencing hearing when he told the court that Katrakazos would have settled the case if the People had not insisted on a life sentence for the kidnapping count. Counsel said, "[t]here shouldn't be a trial taxation. And I know that that's the [c]ourt's perspective. But I just want the [c]ourt to know that we were trying to settle the case for some number in the teens . . . ." The court did not comment on Katrakazos's decision to go to trial or indicate in any way that it was punishing him for exercising his rights.

The trial court based its sentencing decision on appropriate factors. It selected the maximum term because the victim was particularly vulnerable in so far as Katrakazos "outweighed [her] by about 80 pounds"; Katrakazos "beat the heck out of her"; he had a significant prior record; and the court believed "he's a serious danger to society."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

David R. Worley, Judge

Superior Court County of Ventura

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