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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERGIO ROMERO PALACIOS, Defendant and Appellant.	B232619 (Los Angeles County Super. Ct. No. KA091788)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Robert J. Waters, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sergio Romero Palacios appeals from the judgment entered following a jury trial that resulted in his convictions for unlawfully driving or taking a vehicle in violation of Vehicle Code section 10851, receiving a stolen motor vehicle in violation of Penal Code section 496d, driving without a license, and resisting, obstructing, or delaying a peace officer. Palacios was sentenced to a term of four years in prison.

Palacios contends he could not properly be convicted of unlawfully taking a vehicle and also of receiving the same stolen vehicle, and the trial court erred by failing to so instruct the jury. He argues that the conviction for receiving a stolen vehicle must be stricken, or alternatively the Vehicle Code section 10851 offense must be construed as a conviction for unlawfully driving, not taking, the vehicle. We agree the latter remedy is appropriate, and affirm the judgment on that basis.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*[1]

a. *People's case.*

In 2010, Socorro Galicia lived in a Pomona mobile home park. She owned a 2002 Nissan Xterra sport utility vehicle. She kept the original dealer-issued key to the car in her bedroom closet, because it had broken off her keychain, and used a duplicate key to drive the car.

Palacios was employed as a handyman at the mobile home park. Nine or ten months prior to August 19, 2010, he was in Galicia's bedroom twice to repair a light fixture. On August 19, 2010, Galicia discovered her Xterra was missing and reported it stolen.

On August 31, 2010, a Pomona detective observed Palacios driving the Xterra. Aware that the vehicle had been reported as stolen, the detective made a traffic stop.

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[1] Because appellant does not challenge his convictions for driving without a license and resisting, obstructing, or delaying a peace officer, we do not detail the evidence supporting those offenses.

Palacios pulled to the curb but then fled, running through a nearby alley. Shortly thereafter he was apprehended and arrested. The dealer-issued key that Galicia had kept in her bedroom was in the Xterra's ignition.

b. *Defense case.*

Both Palacios and Steven Wuo, the owner of the mobile home park, testified that Palacios had stopped working at the park in approximately 2008. According to Palacios, his friend Dennis Perez, who was Galicia's boyfriend, rented the Xterra to him for $200 on August 18, 2010, so Palacios could travel to Arizona and move his belongings to California. Palacios testified that he had never entered Galicia's trailer. He admitted suffering two prior convictions for petty theft with a prior.

c. *People's rebuttal.*

Perez testified that he had been a manager at the mobile home park. He had seen Palacios at the mobile home park but the men were not friends. Perez never took any money from Palacios for rental of the Xterra, and never agreed to lease the Xterra to him.

2. *Procedure.*

Trial was by jury. Palacios was convicted of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)), driving without a license (Veh. Code, § 14601.1, subd. (a)), and resisting, obstructing, or delaying a peace officer (Pen. Code, § 148, subd. (a)(1)). In a bifurcated proceeding, the trial court found Palacios had suffered a prior "strike" conviction for robbery (Pen. Code, §§ 211, 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). Palacios's *Romero* motion[2] and his motion for a new trial, based on allegations of juror misconduct, were denied. The trial court sentenced Palacios to a term of four years in prison. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, theft assessments, and a criminal conviction assessment. Palacios appeals.

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[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

Conviction under both Vehicle Code section 10851 and Penal Code section 496d was permissible because Palacios engaged in "posttheft driving."

Palacios contends the trial court erred by failing to instruct the jury that it could not convict him of both theft of the Xterra and receipt of the same stolen Xterra. Consequently, he posits, he was improperly convicted of both offenses. He asserts that the Vehicle Code section 10851 offense must be deemed a non-theft offense, or, alternatively, that his conviction for receiving a stolen vehicle under Penal Code section 496d must be stricken. The People concede the instructional error, but urge that the proper remedy is to strike the section 496d conviction. Our Supreme Court's decision in *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*) compels the conclusion that both convictions may stand, but the Vehicle Code section 10851 offense must be construed as a "nontheft conviction for posttheft driving." (*Garza, supra,* at p. 882.)

It has long been the common law rule that a person may not be convicted of both stealing and receiving the same property.[3] (*People v. Smith* (2007) 40 Cal.4th 483, 522; *Garza*, *supra*, 35 Cal.4th at pp. 871, 874; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757; *People v. Strong* (1994) 30 Cal.App.4th 366, 370.) This principle is now codified in Penal Code section 496, subdivision (a), the general statute governing the receipt of stolen property.[4] (Pen. Code, § 496; *People v. Ceja* (2010) 49 Cal.4th 1, 3.) In an

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[3] An exception exists when " 'there is evidence of complete divorcement between the theft and a subsequent receiving, such as when the thief has disposed of the property and subsquently receives it back in a transaction separate from the original theft.' " (*Garza*, *supra*, 35 Cal.4th at pp. 874-875, italics omitted.) No evidence suggested such a "divorcement" here, and this exception is therefore not at issue.

[4] We note that in *Garza* the defendant was prosecuted for receiving stolen property under Penal Code section 496, subdivision (a), whereas here Palacios was charged with receiving a stolen vehicle in violation of Penal Code section 496d, subdivision (a). Section 496, subdivision (a) is a general statute covering the receipt of all types of stolen property. It was amended in 1992 to expressly state that "no person may be convicted both pursuant to this section and of the theft of the same property," language that codified

appropriate case, a trial court must sua sponte instruct the jury that it may not convict a defendant of both the theft and receipt of the same property. (*Garza*, *supra*, at p. 881; *People v. Strong*, *supra*, at pp. 375-376.) Where dual convictions are improper, staying sentence under Penal Code section 654 is not an appropriate or sufficient solution. (*People v. Ceja*, *supra*, at pp. 6-8.)

However, a person may be convicted of both receiving a stolen vehicle and of unlawfully *driving* the same car. Vehicle Code section 10851, subdivision (a), defines the crime of unlawfully driving or taking a vehicle.[5] The statute proscribes a " 'wide range of conduct.' [Citation.] A person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*Garza*, *supra*, 35 Cal.4th at p. 876.) "A person who violates section 10851(a) by taking a car with the intent to permanently deprive the owner of possession, and who is convicted of that offense on that basis, cannot also be convicted of receiving the same vehicle as stolen property." (*Ibid.*) "On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete ["posttheft driving"]. Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction and does

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the long-standing common law rule to the same effect. Penal Code section 496d, subdivision (a), is a specific statute that governs the unlawful receipt of stolen motor vehicles and vessels. Unlike section 496, subdivision (a), section 496d does not contain an express prohibition on dual convictions for theft and receipt of the same property. This circumstance is of no moment in the instant case. *Garza* recognized the existence of the common law rule, which had been applied long before the 1992 amendment. (*Garza*, *supra*, 35 Cal.4th at p. 874.) Consequently, the common law rule applies to section 496d, and the parties do not argue to the contrary.

[5] Vehicle Code section 10851, subdivision (a), provides in pertinent part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ."

not preclude a conviction under section 496(a) for receiving the same vehicle as stolen property." (*Garza, supra,* at p. 871, italics omitted; *People v. Strong*, *supra*, 30 Cal.App.4th at p. 374 [if the evidence shows two distinct violations of section 10851--a taking and a separately chargeable driving offense--conviction based on the unlawful driving is not a conviction for theft].)

Garza considered whether a Vehicle Code section 10851 conviction barred a conviction under section 496, subdivision (a), where, as here, the evidence did not exclude the possibility that the defendant had taken the vehicle with an intent to permanently deprive the owner of possession, *and* subsequently engaged in posttheft driving. (*Garza, supra,* 35 Cal.4th at p. 876.) Just as in the instant matter, in *Garza* the evidence at trial "adequately supported the section 10851(a) conviction on either a taking or a posttheft driving theory, the prosecutor argued both . . . theories to the jury, the trial court's instructions did not require the jury to choose between the theories and did not explain the rule prohibiting convictions for stealing and receiving the same stolen property, and the jury's guilty verdict did not disclose which theory or theories the jurors accepted." (*Garza, supra,* at p. 871.)

Garza concluded the "crucial issue" was "whether the section 10851(a) conviction [was] for a theft or a nontheft offense." (*Garza*, *supra*, 35 Cal.4th at p. 881.) *Garza* reasoned that a defendant "who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of section 10851(a)." (*Garza, supra,* at p. 880; *People v. Strong*, *supra*, 30 Cal.App.4th at pp. 373-374.) The theft is complete when, inter alia, the driving is no longer part of a continuous journey away from the locus of the theft, or where the thief reaches a place of temporary safety. (*Garza, supra,* at p. 880.) Once the taking is complete, "further driving of the vehicle is a separate violation of section 10851(a) that is properly regarded as a nontheft offense for purposes of the dual conviction prohibition of section 496(a)." (*Garza, supra,* at pp. 880-881.)

In *Garza,* the defendant had been employed by a limousine service. The keys to the company's vehicles were kept in an unlocked cabinet. After Garza's employment

terminated, the company discovered one of its vehicles was missing. Six days later, a police officer found Garza seated in the missing vehicle in a parking lot, with the key in the ignition and the engine running. (*Garza, supra,* 35 Cal.4th at p. 872.) There was no evidence suggesting someone else had driven the car to the location; the only reasonable inference was that the defendant had driven the car to the site. The theft of the vehicle, having occurred six days earlier, "was long since complete, and the driving therefore constituted a separate, distinct, and complete violation of section 10851(a)." (*Id.* at p. 882.) It was not reasonably probable a properly instructed jury would have found the defendant guilty of violating Vehicle Code section 10851 by stealing the car, but not by posttheft driving. (*Ibid.*; see also *People v. Strong, supra,* 30 Cal.App.4th at pp. 375-376; *People v. Cratty* (1999) 77 Cal.App.4th 98, 101-103.) Accordingly, "by construing defendant's conviction under section 10851(a) as a nontheft conviction for posttheft driving," both convictions could be upheld. (*Garza, supra,* at p. 882.)

Applying these principles here leads to the same conclusion. As in *Garza*, the evidence was sufficient to establish both that Palacios initially stole the Xterra, and that he committed a subsequent offense by driving it long after the initial theft. The evidence showed Palacios had been in Galicia's bedroom, where he had access to the key. He was found with the key, driving the car. His story that he leased the car was contradicted by Perez's testimony. Thus, the jury could easily have found Palacios stole the Xterra with the intent to permanently deprive Galicia of it. Given that Palacios was found driving the car days after the theft, the jury no doubt also concluded that he had engaged in posttheft driving of the Xterra. The jury's general verdict did not disclose whether it convicted Palacios based on the theft, or on the posttheft driving. As in *Garza,* therefore, it was error for the trial court to fail to instruct the jury that Palacios could not be convicted of both stealing the Xterra and of receiving it. (*Garza, supra,* 35 Cal.4th at p. 881; *People v. Strong, supra,* 30 Cal.App.4th at pp. 375-376.)

Just as in *Garza,* however, the instructional error was harmless. (*Garza, supra,* 35 Cal.4th at p. 882.) There was no question Palacios engaged in posttheft driving: it was undisputed that a detective observed him driving the Xterra. The theft was long since

complete, having occurred approximately 12 days before. No reasonable juror could have found Palacios was still engaged in the original taking. (See *People v. Strong, supra,* 30 Cal.App.4th at p. 375 [where defendant was found driving stolen truck four days after theft, he was not on a continuous journey from the theft site and driving the truck constituted a separate offense].) Thus, the theft and the posttheft driving were separate, distinct, complete violations of Vehicle Code section 10851, subdivision (a). (*Garza, supra,* 35 Cal.4th at p. 882.) There is no likelihood that a properly instructed jury would have found Palacios committed the initial theft, but did not engage in posttheft driving. As in *Garza,* therefore, we uphold both convictions by construing the section 10851, subdivision (a) conviction as a nontheft conviction for posttheft driving.

The People urge that because the evidence Palacios stole the Xterra was "very strong," it would be "inappropriate to deem count one to be a 'non-theft' offense." The People appear concerned about dicta in *Garza* to the effect that construing the Vehicle Code section 10851 offense as a nontheft offense "may have future consequences" in regard to later use of the conviction to enhance a subsequent sentence.[6] (*Garza, supra,* 35 Cal.4th at p. 882, fn. 3.) The People contend limiting future use of the conviction "would be an unjust result . . . given the clear and strong evidence of theft here." Therefore, the People prefer that the conviction for receiving stolen property be stricken.

The People's position appears inconsistent with *Garza.* In *Garza,* the evidence of the initial taking was equally strong as the evidence in the instant case, but that circumstance did not cause the California Supreme Court to strike the receiving conviction. *Garza* construed "the People's defense of defendant's conviction for receiving stolen property as an abandonment of any claim that his conviction for violating section 10851(a) is a theft conviction." (*Garza, supra,* 35 Cal.4th at p. 882, fn. 3.) Here, although the People state they would prefer the receiving conviction be

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6 The question of the future use of the conviction is, of course, not before us, and we express no opinion on the matter.

stricken, they do not contend the conviction for receiving a stolen vehicle was unsupported by the evidence.

More significantly, *Garza* was guided by two familiar principles: first, that "on appeal a judgment is presumed correct," and a party attacking the judgment must demonstrate prejudicial error; and second, the California Constitution requires that no judgment shall be set aside absent a miscarriage of justice. (*Garza, supra,* 35 Cal.4th at p. 881.) Here, the parties have not shown the instructional error was prejudicial. Accordingly, applying the presumption that the judgment is correct, we must presume both convictions are proper and construe the Vehicle Code section 10851 conviction as based on posttheft driving.[7]

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[7] We observe that *People v. Jaramillo, supra,* 16 Cal.3d 752, held, contradictorily to the court's later decision in *Garza,* that when the record does not disclose the specific basis for the jury's verdicts, and based on the evidence the jury might have found the defendant intended to steal, as well as drive, a vehicle, "a second conviction based on a further finding that the defendant received that same stolen property is foreclosed." (*Id.* at p. 759.) *Garza,* which postdates *Jaramillo* by almost 30 years, explained that prior to 1992, the common law rule prohibiting convictions for both theft and receipt of the same property had been construed both narrowly and broadly. The narrow form of the rule prohibited only dual *convictions* for theft and receipt of the same property. The broad form of the rule, in contrast, prohibited "a conviction for receiving stolen property 'when the defendant has not been *convicted* of stealing the same property but there is *evidence* implicating him in the theft.' " (*Garza, supra*, 35 Cal.4th at p. 875.) When in 1992 the Legislature amended section 496, subdivision (a), the general statute governing receiving stolen property, it codified the "narrow" form of the rule. (*Garza, supra,* at pp. 875, 882.) *Garza* explained *Jaramillo* was distinguishable "because it was decided before the Legislature's 1992 amendment" and the court's "reasoning [in *Jaramillo*] may have been influenced by the then-prevailing uncertainty about the scope of the common law prohibition." (*Garza, supra,* at p. 882; see also *People v. Strong, supra,* 30 Cal.App.4th at p. 373.) As *Garza* declined to adopt *Jaramillo*'s approach, we apply the rule of *Garza* rather than *Jaramillo.*

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.