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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO PELICO,

Defendant and Appellant.

B233007

(Los Angeles County  
Super. Ct. No. BA366857)

APPEAL from a judgment of the Superior Court of Los Angeles County.

William C. Ryan, Judge. Affirmed as modified.

Gideon Margolis, 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, Susan Sullivan Pithey and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Ernesto Pelico challenges certain aspects of the sentence imposed following his conviction for the crimes of carjacking, robbery, kidnapping to commit robbery, and kidnapping for carjacking. We modify the sentence, and otherwise affirm.

### **BACKGROUND**

Rigoberto Pedro, a cab driver, received a call to pick up passengers at an address in Los Angeles. He picked up five men, including appellant, in his Honda passenger van. Pedro was directed to drive to three different addresses. During the ride, Pedro was choked and punched, his life was threatened, appellant took his keys and drove the cab, and \$32 was taken from him. Pedro eventually was able to escape, and was taken by police to Verdugo Hospital.

Soon afterward, the cab was stopped by a Los Angeles police officer for a seatbelt violation. The cab was registered to Pedro, and Pedro's wallet was found in it. The cab was towed; appellant was cited for driving without a license, and was released. However, the officer later heard a crime broadcast about the carjacking, and went to the address appellant had provided during the earlier traffic stop. He found and detained appellant, who was wearing a shirt spattered with blood. Pedro identified appellant at the hospital, where Pedro was treated for his injuries.

On April 1, 2010, appellant was charged by information with four felony counts: count 1, carjacking (§ 215, subd. (a)); count 2, robbery (§ 211); count 3, kidnapping to commit robbery (§ 209, subd. (b)(1)); count 4, kidnapping for carjacking (§ 209.5, subd. (a)).<sup>1</sup> On January 27, 2011, a jury found appellant guilty on all counts, and found the robbery to be in the first degree.

On May 5, 2011, the court sentenced appellant on count 3, kidnapping to commit robbery, to life in prison with the possibility of parole; and on count 4, kidnapping for carjacking, to a life term concurrent with the count 3 term. On count 1, carjacking, the court imposed a mid-term five-year sentence, and on count 2, robbery, it imposed a mid-term four-year sentence, staying the count 1 and count 2 sentences under section 654.

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

The court ordered a \$200 restitution fine (§ 1202.4), and a \$200 parole revocation restitution fine, suspended unless parole is revoked (§ 1202.45). It ordered appellant to pay restitution in the stipulated amount of \$5,930.05 to the State Victim's Compensation Fund; \$160 court security fee (§1465.8); and \$120 criminal conviction assessment (Gov. Code, § 70373). Appellant was credited with 550 days of presentence credit, consisting of 478 actual days and 72 local conduct days, pursuant to the 15 percent limitation of section 2933.1. A notice of appeal was filed on Pelico's behalf that same day.

## **DISCUSSION**

### **1. The Count 1 Carjacking Conviction Must Be Vacated Because It Is A Lesser Included Offense Of The Count 4 Kidnapping For Carjacking Conviction.**

Carjacking is a necessarily included offense of kidnapping for carjacking. (*People v. Medina* (2007) 41 Cal.4th 685, 693.) Because Pelico cannot be convicted of both kidnapping for carjacking and the lesser included offense of carjacking (a point the People appropriately concede), the lesser included offense must be vacated, rather than merely stayed. (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415.) For that reason we accede to the parties' request that the count 1 carjacking conviction must be dismissed, and that the abstract of judgment must be corrected to reflect its dismissal. (*Ibid.*; § 1260.)

### **2. Section 654 Requires That The Count 4 Conviction Must Be Stayed.**

Subdivision (a) of section 654 prohibits multiple punishments for separate offenses arising out of a single act or occurrence, even when the act or occurrence violates more than one statute. Section 654 applies when multiple acts are parts of a single indivisible transaction, incident to one intent and objective. (*People v. Lewis, supra*, 43 Cal.4th at p. 519; *People v. Perez* (1979) 23 Cal.3d 545, 551.) If all of the defendant's offenses were incident to one objective, he may be punished for no more than one of them. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) But if the offenses were independent of each other, the defendant may be punished separately even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789; see *People v. Smith* (1985) 163

Cal.App.3d 908, 912 [under § 654, a defendant cannot be sentenced for both burglary and robbery where robbery was the sole purpose of the burglary].) Whether he had multiple criminal objectives or acted with a single indivisible goal and motivation is a factual determination for the trial court, whose determination will be upheld if it is supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Appellant contends that in this case the acts for which he was convicted in count 3 (kidnapping to commit robbery) had the same objective as the acts for which he was convicted in count 4 (kidnapping for carjacking): to take Mr. Pedro's property. Because his act of kidnapping was all part of a single indivisible transaction for which he can be punished only once, he argues, the judgment should be modified to reflect that the sentence imposed for his count 4 kidnapping for carjacking conviction is stayed.

We agree. The trial court made no express finding that appellant separately intended to kidnap Pedro and take his cab, but only later formed an intention to again kidnap him in order to rob him of his money. Nor do we find support in the record for such an implied finding. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512 [finding that the crimes were divisible is implied only if supported by substantial evidence].) Although the carjacking of Pedro's cab and the robbery of his money apparently were not simultaneous, the facts in this case indicate that there was only a single act of kidnapping. The fact that during the ensuing half hour appellant exhibited his intentions and objectives to carjack Pedro's cab and to rob him of his money cannot transform the single act into multiple kidnapping offenses.

The trial court expressly anticipated the possibility that this court might conclude that section 654 bars punishment for both count 3 and count 4. In sentencing appellant as to count 4, the court added that "[i]f upon appellate review, the Court of Appeal feels that the sentence on count 4 should have been stayed pursuant to Penal Code section 654, then in the alternative, [the life-with-parole sentence for count 4] would be stayed . . . permanently upon . . . completion of the sentence as to count 3." Because the count 3 and count 4 kidnapping convictions rest upon a single indivisible criminal act of kidnapping, we adopt the trial court's alternative, staying the sentence imposed for the count 4

conviction. (§ 1260; *People v. Duff* (2010) 50 Cal.4th 787, 796 [appellate court may modify judgment or order appealed from].)<sup>2</sup>

**DISPOSITION**

The judgment is modified to dismiss the count 1 carjacking conviction, and to stay the count 4 conviction for kidnapping for carjacking pending completion of service of sentence upon count 3, with the stay to become permanent upon completion of that sentence. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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<sup>2</sup> This court invited the parties to address how the order staying the count 2 robbery sentence might be affected by the relief requested by appellant under section 654. (Gov. Code, § 68081.) Respondent's reply conceded that if this court were to hold that section 654 applies to stay the count 4 sentence, as Pelico has urged, no remand would be required.