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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DEAN SULLIVAN,

Defendant and Appellant.

C069216

(Super. Ct. No. 10F08181)

Sentenced to a state prison term of life without possibility of parole plus 13 years, defendant Joseph Dean Sullivan contends only that insufficient evidence supported his conviction on one count out of six. We affirm the judgment in its entirety.

A jury convicted defendant of residential burglary (count 1; Pen. Code, § 459), residential robbery (count 4; Pen. Code, § 211), carjacking (count 5; Pen. Code, § 215), possession of methamphetamine (count 6; Health & Saf. Code, § 11377, subd. (a)), and administering an intoxicating substance to commit a felony (count 7; Pen. Code, § 222). The jury hung on count 3 (kidnapping for robbery; Pen. Code, § 209, subd. (b)(1)). The jury found true as to counts 1, 4, and 5 that defendant should have known the victim was

over the age of 65 (Pen. Code, § 667.9, subd. (a)); as to counts 1 and 4, that defendant inflicted great bodily injury on the victim (Pen. Code, § 12022.7, subd. (a)); and as to count 2, that defendant caused bodily harm and confinement, exposing the victim to substantial likelihood of death (Pen. Code, § 209, subd. (a)).

The trial court sentenced defendant as follows: the upper term of six years on count 1 (residential burglary), plus three years for the great bodily injury enhancement and one year for the elderly victim enhancement; one year eight months on count 5 (carjacking), eight months on count 6 (possession of methamphetamine), and eight months on count 7 (administering an intoxicating substance to commit a felony), all consecutive to count 1; and life without possibility of parole on count 2 (kidnapping for robbery, plus the enhancements thereon). The court stayed sentence on count 4 (residential robbery) and the elderly victim enhancement on count 5 (Pen. Code, § 654).

Defendant contends insufficient evidence supported his conviction for carjacking because it was not shown that he took the victim's car from her immediate presence by force or fear, or that he had formed the intent to take her car when he initially accosted her. For reasons that follow, we disagree.

FACTS AND PROCEEDINGS

In 2010, Miriam K., a 68-year-old widow and registered nurse employed at Roseville Cardiology Medical Associates, lived alone in Orangevale. Defendant lived with his aunt about a mile from Miriam K.'s house; he did not have a car and got around on a bicycle.

At 7:10 a.m. on December 14, 2010, Miriam K. was about to leave for work. As she entered her attached garage and headed toward her Toyota Solara, defendant also entered the garage dressed in black with gloves on and a mask over his face. Saying "I never thought you were going to come out," he struck her up to 10 times until she fell to the floor.

Defendant ordered Miriam K. to hand over her wallet and to dump the contents of her purse on the floor. When she held on to her car keys, he ordered her to drop them. Afraid for her life, she complied with his demands.

After forcing Miriam K. to call in late for work, defendant ordered her to put her things back in her purse and to return to the house. Once inside, defendant closely controlled Miriam K.'s movements for almost two hours, forcing her to go from room to room. Even when he briefly left her immediate presence, she did not try to escape because she was sure he could stop her.

During the course of the morning, defendant asked Miriam K. where her jewelry and silverware were, then ordered her to take out her credit cards and call to obtain the balances on them. The defendant then ordered her to call for the balance on her bank ATM card and the amount she could withdraw per day, asking her as he did so, "How do you get money out of the Quick-Stop?" He demanded her personal identification number (PIN) and social security number and, at some point, took her wallet which held \$85 in cash. He also asked her age and occupation.

After making these demands, defendant ordered Miriam K. to sit on a chair in her bedroom facing the wall and said she could go to the bank with him or be tied up. She chose the latter.

Defendant tied Miriam K. to the chair, then made her drink three 12-ounce glasses of whiskey until she lost consciousness, sometime around 9:00 a.m.

At 10:17 a.m., a video camera in a Quik Stop store less than a mile from Miriam K.'s home recorded a man operating an ATM inside the store while holding a green towel later identified as Miriam K.'s. Using Miriam K.'s ATM card without authorization, the man withdrew over \$100.

At around 12:20 p.m., Miriam K.'s friend and co-worker Teresa M., concerned for Miriam K.'s well-being, broke a window to get into her house and awakened her. Miriam K. was taken to the hospital, where she remained for six days.

Police investigators found that Miriam K.'s home had been ransacked, and large items, including a television set, a Comcast cable box, a camera, a picture frame, and two computer scanners, had been stolen. Miriam K.'s Toyota Solara was also missing and a stolen-car report went out on it. Defendant's bicycle was found in a wooded spot near Miriam K.'s house.

Around noon on the day of the crimes, Sacramento County Sheriff's Deputy Martin Dighero, in uniform and driving a marked patrol car, saw a car matching the description of Miriam K.'s car in the parking lot at Oak Avenue Park with someone in the driver's seat. Deputy Dighero called in the license plate number and waited for backup. The person in Miriam K.'s car (defendant) opened the door, looked at Deputy Dighero, and then started walking away. Deputy Dighero stopped him and ordered him to the ground at gunpoint. After complying at first, defendant said "Fuck this, you're not going to shoot me," then took off running. Another officer and a police dog apprehended him.

A search incident to defendant's arrest found \$109; a glass pipe; 3.06 grams of methamphetamine; and Miriam K.'s driver's license, Medicare card, and Visa card. Miriam K.'s stolen car contained a television set, a Comcast cable box, and two computer scanners, among other things. DNA evidence on a methamphetamine pipe found in Miriam K.'s house was consistent with defendant's genetic profile.

Defendant was shown to Miriam K. at the hospital. She could not positively identify him, but said his height, race, and hair color matched those of her assailant, and his voice sounded similar to her assailant's voice.

Miriam K.'s cardiologist opined that she suffered a "small to medium-sized" heart attack between 6:00 a.m. and 11:00 a.m. on the date of the crimes; she also experienced "minimal" congestive heart failure, most likely due to aspirating liquid. Before that date, she did not have congestive heart failure or permanent heart damage.

Defendant testified on his own behalf, claiming that the real robber was his methamphetamine dealer, Brandon Black.

Called as a defense witness, Black asserted his Fifth Amendment privilege. He was required to stand during defendant's testimony so that the jury could see him. Like defendant, he generally matched Miriam K.'s description of her assailant.

According to defendant, on December 13, 2010, Black asked to borrow defendant's bicycle so that Black could use it to commit a robbery. Defendant agreed to lend him the bicycle in return for the temporary use of Black's van.

On December 14, 2010, according to defendant, Black called him around 9:00 a.m. and told him to meet Black at Oak Avenue Park. Driving there in Black's van, defendant met Black, who was driving a Toyota Solara. Defendant got into the Solara, which he knew to be stolen, along with its contents; he touched a camera inside the car, on which the police later found his fingerprint.

After they smoked methamphetamine in the car (using defendant's pipe), Black gave defendant Miriam K.'s bank card and driver's license. Black then left in the car to dispose of a large television set. Defendant drove Black's van to the Quik Stop, where he withdrew \$100 from the ATM with Miriam K.'s bank card, for which Black had given him the PIN. He did not take more because Black did not tell him Miriam K.'s daily withdrawal limit.

Defendant returned to the park, where he met Black again and returned his van to him; Black left in the van, saying he would return defendant's bicycle. While defendant waited in the Solara, officers arrived and detained him. He tried to escape because he was in possession of stolen property and methamphetamine.

DISCUSSION

Sufficiency of the Evidence of Carjacking

Defendant contends there was insufficient evidence to support his conviction of carjacking because it was not shown that he took Miriam K.'s car from her immediate

presence by force or fear, or that he intended to take the car when he initially accosted her. We disagree.

“ ‘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.” (Pen. Code, § 215, subd. (a).) “The requisite intent--to deprive the possessor of possession--must exist before or during the use of force or fear. [Citations.]” (*People v. Gomez* (2011) 192 Cal.App.4th 609, 618 (*Gomez*).)

Where the defendant contends the evidence was insufficient to support his conviction, we review the record most favorably to the judgment, drawing all reasonable inferences to support it, and affirm if the conviction is supported by substantial evidence. (*People v. Coleman* (2007) 146 Cal.App.4th 1363, 1367 (*Coleman*).)

Defendant argues the evidence was insufficient to show he took Miriam K.’s car in her immediate presence by force or fear.

“A vehicle is within a person’s immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear. [Citations.] It is not necessary that the victim be physically present in the vehicle when the confrontation occurs. [Citation.]” (*Gomez, supra*, 192 Cal.App.4th at p. 623.)

If the defendant forces the victim to relinquish her car keys and thereafter takes the victim’s car while she is not physically present, those facts establish the element of taking the victim’s car from her person or immediate presence by force or fear. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 609 (maj. opn. of Gaut, J.); see also *Gomez, supra*, 192 Cal.App.4th at p. 624; but see *Coleman, supra*, 146 Cal.App.4th at p. 1373.)

Here, defendant took Miriam K.’s car keys by force, then kept her under control in a continuous state of fear for almost two hours, then forcibly tied her to a chair and made

her drink alcohol until she lost consciousness. Thereafter he stole her car from her garage, just outside the house. The car was “sufficiently within [her] control so that [she] could retain possession of it if not prevented by force or fear.” (*Gomez, supra*, 192 Cal.App.4th at p. 623.)

Coleman, on which defendant relies, is distinguishable because the alleged victim, the office manager of the business robbed by the defendant, did not own or possess the truck the defendant stole: it belonged to the business’s owner. Although the alleged victim had access to the keys, she did not even routinely drive the truck. (*Coleman, supra*, 146 Cal.App.4th at pp. 1366, 1371.) The court recognized that as the business’s employee she had constructive possession of the truck for purposes of robbery, but concluded that she was not within the class of persons the Legislature intended to protect by enacting the carjacking statute. (*Id.* at pp. 1371-1372.) Miriam K., the owner of the car defendant stole, clearly falls within that class.

Substantial evidence established the immediate presence element of carjacking.

Defendant also argues the evidence was insufficient to show he had the requisite intent for carjacking.

Defendant arrived at Miriam K.’s house on his bicycle, but hid it some distance away and approached the house on foot. Then he loaded her car’s trunk with items too big to carry away by bicycle and left in the car, abandoning his bicycle. From these facts, the jury could reasonably have concluded that defendant intended all along to take anything he could physically transport, including the car itself and the large items in the trunk, and that therefore his scheme always included the intent to deprive Miriam K. of possession of her car. Although the jury could also have concluded that defendant initially meant only to steal small items such as credit and bank cards and opportunistically formed the intent to steal larger items afterward, it was not required to so conclude.

Substantial evidence established the intent element of carjacking.

DISPOSITION

The judgment is affirmed.

 HULL , J.

We concur:

 NICHOLSON , Acting P. J.

 ROBIE , J.