

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS LORENZO MOORE,

Defendant and Appellant.

D061132

(Super. Ct. No. SCN275163)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed in part; reversed in part with instructions.

A jury convicted Curtis Lorenzo Moore of five felonies: kidnapping for extortion (Pen. Code,<sup>1</sup> § 209, subd. (a); count 1), kidnapping during a carjacking (§ 209.5, subd. (a); count 2), robbery (§ 211; count 4), burglary (§ 459; count 6), and fraudulent conveyance of an access card (§ 484e, subd. (a); count 7). On counts 1 and 2, the court sentenced Moore to concurrent indeterminate life terms with the possibility of parole. On

---

<sup>1</sup> Future statutory references are also to the Penal Code.

counts 4, 6 and 7, the court sentenced him to concurrent determinate terms of three years, 16 months, and 16 months, respectively. The court stayed the sentences on counts 2 and 7 under section 654.

On appeal, Moore contends his conviction on count 6 must be reversed because under California law the insertion of a stolen automated teller machine (ATM) card into an ATM does not constitute burglary. He also contends his conviction on count 7 must be reversed because under California law he did not convey an ATM card. The People concede these points, and we concur.

Additionally, Moore asserts the court erred by not staying his sentence on count 4 under section 654 on the ground the robbery and kidnapping for extortion (count 1) were incident to the same intent and objective. The People disagree, and we concur with them.

## FACTS

On July 25, 2008, John Sung Do Kim, a limousine driver, drove a client to an outlet center in Carlsbad. Kim was seated in the driver's seat of his van waiting for his client to return, when Moore pointed a gun at him and ordered him to move to the backseat, kneel down, and keep his head lowered. Moore tied Kim's hands and feet with plastic ties. Moore searched Kim's pockets, and Kim told Moore his wallet "was right next to the door." Moore took approximately \$200 and an ATM card from the wallet.

Moore then drove the van around for about 40 minutes with Kim tied up in the backseat. Moore repeatedly demanded Kim's personal identification number for the ATM card, and he eventually revealed it out of fear. Moore stopped the van and got out,

and Kim heard what sounded like cash being dispensed from an ATM. He looked up and saw Moore standing at an ATM.

Eventually, Moore drove Kim back to the Carlsbad outlet center. Moore got out of the van, but told Kim to remain on the floor of the van and that he would return to the van soon. After waiting a period, Kim got out of the van with his hands and feet still tied and got help.

Security video from the ATM showed Moore driving Kim's van and withdrawing cash, later determined to be \$500, from the ATM. Also, DNA consistent with Moore's was found on the plastic ties that bound Kim.<sup>2</sup>

## DISCUSSION

### I

#### *Count 6: Burglary*

"Under section 459, a person is guilty of burglary if he or she enters any building (or other listed structure) with the intent to commit larceny or any felony." (*People v. Davis* (1998) 18 Cal.4th 712, 715 (*Davis*)). It has long "been established that a burglary . . . can be committed by using an instrument to enter a building." (*Id.* at p. 716.)

---

<sup>2</sup> Moore testified and claimed he and Kim were acquaintances through gambling, and he agreed to help Kim stage a theft from his account to cover a gambling debt so his wife would not learn about the debt. Moore, however, never mentioned a prior relationship with Kim to police and there was no corroborating evidence of one. Moore admitted that in 2009 he was convicted of robbing a credit union using a BB gun that looked like a semiautomatic weapon.

In *Davis*, the court held: "Inserting a stolen ATM card into an ATM, or placing a forged check in a chute in the window of a check-cashing facility, is not using an instrument to effect an entry within the meaning of the burglary statute. Neither act violates the occupant's possessory interest in the building as does using a tool to reach into a building and remove property. It is true that the intended result in each instance is larceny. But the use of a tool to enter a building, whether as a prelude to a physical entry or to remove property or commit a felony, breaches the occupant's possessory interest in the building. Inserting an ATM card or presenting a forged check does not. Such acts are no different, for purposes of the burglary statute, from mailing a forged check to a bank or check-cashing facility." (*Davis, supra*, 18 Cal.4th at p. 722, fn. omitted; *People v. Carrington* (2009) 47 Cal.4th 145, 187.)

The burglary charge here was based on Moore's insertion of Kim's ATM card into an ATM. Moore asserts, the People concede, and we concur, that the conviction on count 6 must be reversed for lack of evidence.<sup>3</sup>

## II

### *Count 7: Fraudulent Conveyance of Access Card*

"Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of grand theft." (§ 484e, subd. (a).) In *People v. Cordell* (2011) 195 Cal.App.4th 1564, 1579, this court held that the

---

<sup>3</sup> Given our holding, we are not required to address Moore's alternative contention the court erred by not staying his sentence on count 6 under section 654.

conduct defined in section 484e, subdivision (a), does not include the defendant's unauthorized *use* of an access card to purchase goods.

The fraudulent conveyance charge here was based on Moore's unauthorized use of Kim's ATM card to obtain cash from his bank account. Moore asserts, the People concede, and we concur, that the conviction on count 7 must be reversed for lack of evidence.

### III

#### *Count 4: Robbery*

##### A

Additionally, Moore contends the court erred by not staying the concurrent sentence for robbery under the proscription against separate punishment contained in section 654, because the robbery and the kidnapping for extortion counts "were incident to one objective: obtaining Kim's money illegally." The People disagree with this point, and we concur with them.

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.] [Citation.] Section 954 generally permits multiple conviction[s]. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment[s] for the same 'act or omission.' When section 954 permits multiple conviction[s], but section 654 prohibits multiple punishment[s], the trial court must stay execution of

sentence on the convictions for which multiple punishment is prohibited." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)

"The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations 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. Beamon* (1973) 8 Cal.3d 625, 639.)

The court's ruling under section 654 is subject to a substantial evidence standard of review. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626.) " ' "We must 'view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence.' " ' " (*Id.* at p. 627.)

"Numerous cases support the proposition that . . . section 654 bars multiple punishment for convictions of kidnapping for the purpose of robbery and for committing that very robbery." (*People v. Porter* (1987) 194 Cal.App.3d 34, 37-38 (*Porter*).) For instance, in *People v. Knowles* (1950) 35 Cal.2d 175, the defendant, in the course of robbing a store, forced the victims at gunpoint to move from room to room. Our high court held the defendant could not be punished for both crimes because the defendant "committed no act of kidnapping that was not coincident with the taking of personal property. There was no seizure or confinement that could be separated from the actual robbery as a separate and distinct act." (*Id.* at p. 189; see also *People v. Beamon, supra*, 8

Cal.3d at p. 639; *People v. Milan* (1973) 9 Cal.3d 185, 197; *People v. Lewis* (2008) 43 Cal.4th 415, 434-439, 519.)

"Other cases have found separate, although sometimes simultaneous, objectives under the facts" for which double punishment does not run afoul of section 654. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212.) For instance, in *Porter, supra*, 194 Cal.App.3d 34, the court found a kidnapping sufficiently distinguishable from a robbery to justify punishment for each. In *Porter*, the defendant got into the victim's car and at knifepoint stole the few dollars in the victim's wallet and took what he believed was an ATM card from the wallet. The victim tried to explain the card was a credit card, but the defendant forced the victim to reveal the location of his bank. The defendant drove the victim to the bank and threatened to make the victim "remember how to use this card." When the defendant momentarily set his knife down, the victim escaped. (*Id.* at pp. 36-37.)

A jury convicted the defendant of robbery and kidnapping for robbery, and the trial court sentenced him to prison for life on the kidnapping count and a concurrent upper term on the robbery count. On appeal, the defendant argued the trial court erred by not staying the concurrent sentence for robbery under section 654. The appellate court disagreed, concluding the "record in this case supports the trial court's implied finding that the two crimes for which appellant was sentenced involved multiple objectives, were not merely incidental to each other, and were not a part of an indivisible course of conduct." (*Porter, supra*, 194 Cal.App.3d at p. 38.) The opinion explains:

"A reasonable inference from the record is that appellant and his companion initially planned only to rob the victim of the contents of his wallet, but thereafter came up with a new idea: kidnapping the

victim to his bank to compel him to withdraw money from his account by means of what they thought was an automated teller card. [Citations.] In this case the record suggests that appellant was convicted of the robbery of the victim's wallet and of kidnapping for the purpose of a different robbery involving the compelled withdrawal of funds from an automated teller, which was unsuccessful. This is not, therefore, a case of punishing appellant for kidnapping for the purpose of robbery and for committing 'that very robbery.' [Citation.] Nor is this a case of multiple punishment for taking several items during the course of a robbery. [Citation.] What began as an ordinary robbery turned into something new and qualitatively very different. No longer satisfied with simply taking the contents of the victim's wallet, appellant decided to forcibly compel the victim to drive numerous city blocks to a bank where, only with the victim's compelled assistance, could appellant achieve a greater reward. . . . In the unusual circumstances of this case, appellant could be punished both for the robbery he committed and the kidnapping for the purpose of a distinctly different type of robbery." (*Id.* at pp. 38-39.)

Moore mentions *Porter, supra*, 194 Cal.App.3d 34 only in passing, and he has not cited any opinion that questions *Porter's* reasoning. In *People v. Smith* (1992) 18 Cal.App.4th 1192 (*Smith*), this court relied on *Porter* as settled precedent in affirming double punishment for robbery and kidnapping for robbery, when the defendant robbed the victim of cash and electronic equipment in his home, and then kidnapped the victim and drove him to a bank several blocks away where the defendant used the victim's ATM card to obtain additional cash. (*Smith, supra*, at pp. 1194-1195, 1199.) We noted that if the Supreme Court disagreed with our analysis, it could rectify the matter on review. (*Id.* at p. 1199.) The Supreme Court granted review, but it subsequently dismissed the matter and ordered our opinion published. (*People v. Smith* (1993) 862 P.2d 148; see also *People v. Latimer, supra*, 5 Cal.4th at p. 1212 [Supreme Court cited *Porter, supra*, 194 Cal.App.3d at pp. 37-39, with approval in discussing section 654 issue].)

Here, the trial court expressly found Moore originally planned to steal cash from Kim's wallet, and when he discovered Kim's ATM card he formed a separate intent to kidnap Kim and transport him to an ATM to steal additional cash from his bank account. Moore cites no evidence that the kidnapping was part of his original intent rather than an opportunistic reaction to finding Kim's ATM card. This case is essentially indistinguishable from *Porter, supra*, 194 Cal.App.3d 34, and *Smith, supra*, 18 Cal.App.4th 1192, and we conclude substantial evidence supports the court's finding of divisible criminal objectives.

## B

Moore relies on this court's opinion in *People v. Wiley* (1994) 25 Cal.App.4th 159, in which we held that separate punishments for robbery and kidnapping for robbery, which all took place at a bank's ATM's, violated section 654. *Wiley*, however, does not mention *Porter, supra*, 194 Cal.App.3d 34, or *Smith, supra*, 18 Cal.App.4th 1192, the facts of which are more analogous to the facts here. In any event, the question is whether substantial evidence supports the trial court's finding, not whether the evidence would have permitted a different determination. (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867 ["If the evidence gives rise to conflicting inferences, one of which supports the trial court's findings, we must affirm."].)

Moore also cites *People v. Anderson* (2011) 51 Cal.4th 989, 994, which explains, "In California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.'" He also cites *People v. Ortega* (1998) 19 Cal.4th 686, 699, disapproved of on another point in *People*

*v. Reed* (2006) 38 Cal.4th 1224, 1228 which explains, " 'When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.' " (See also *People v. Rush* (1993) 16 Cal.App.4th 20, 25, disapproved of on another point in *People v. Montoya* (2004) 33 Cal.4th 1031, 1036, fn. 4 ["a defendant who steals various items by force or fear, in a continuing transaction, commits but one offense and the loot may not be splintered into separate counts of theft for purposes of multiple conviction[s]").)

Moore asserts he committed only one robbery, which continued from the time he stole the cash from Kim's wallet until he left Kim's van after the ATM theft, and thus section 654 necessarily prohibits separate punishments. He posits that since there was a single robbery, he is being punished for kidnapping for the purpose of robbery and for the very same robbery. In *Smith, supra*, 18 Cal.App.4th 1192, however, this court concluded we could consider the theft of cash from the victim's home, and the subsequent theft of cash from his bank account with an ATM card, as "separate and distinct" events in determining whether section 654 prohibited punishment for both robbery and kidnapping for robbery. (*Smith*, at p. 1197.) Implicitly, the court in *Porter, supra*, 194 Cal.App.3d 34, came to the same conclusion. Moore has not persuaded us another rule should apply.

## DISPOSITION

The convictions on counts 6 and 7 are reversed and the corresponding sentences are vacated. The trial court is directed to prepare an amended abstract of judgment accordingly, and to forward a certified copy of it to the California Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.