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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB GEORGE DAVID,

Defendant and Appellant.

E061334

(Super.Ct.No. FBA1100147)

OPINION

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed as modified with directions.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jacob George David was charged by amended information with carjacking (Pen. Code, § 215, subd. (a), count 1),<sup>1</sup> two counts of robbery (Pen. Code, § 211, counts 2 & 3), two counts of kidnapping for the purpose of robbery (Pen. Code, § 209, subd. (b)(1), counts 4 & 5), two counts of false imprisonment by violence (Pen. Code, § 236, counts 6 & 7), and one count of evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a), count 8).<sup>2</sup> As to counts 1 through 7, it was alleged that defendant used a firearm. (Former Pen. Code, § 12022.53, subd. (b).) A jury found defendant guilty of carjacking (count 1), robbery (counts 2 & 3), false imprisonment (counts 6 & 7), and evading an officer (count 8). The jury also found the firearm allegations true. The trial court dismissed counts 4 and 5 (kidnapping for robbery) on the People's motion. The court imposed the following sentence: on count 1, nine years, plus a 10-year consecutive term on the firearm use enhancement (former Pen. Code, § 12022.53, subd. (b)); on counts 2 and 3, the court imposed consecutive one-year terms, plus three years four months on the firearm use enhancement (former Pen. Code, § 12022.53, subd. (b)); and on count 8, the court imposed two years, concurrent. On counts 6 and 7, the court imposed eight months, plus three years four months on the

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

<sup>2</sup> In an order filed on December 15, 2014, we took judicial notice of the records in case Nos. E054927 and E058917, in which defendant's codefendants Monique Venegas and Dustin Moore appealed, respectively.

firearm use enhancement (former Pen. Code, § 12022.53, subd. (b)), but stayed these terms pursuant to section 654. Thus, the court sentenced defendant to a total term of 27 years eight months in state prison.

On appeal, defendant contends that the court should have stayed the sentence on count 2 pursuant to section 654. The People argue that the court erred in applying section 654 to the sentences on counts 6 and 7. We agree with the People. In all other respects, we affirm.

### FACTUAL BACKGROUND<sup>3</sup>

Monique Venegas was in a relationship with Efrain Jara. She was in Arizona and wanted to come and stay with him, so she asked him to pick her up. He agreed to drive to Bullhead City, Arizona, to pick up Venegas and bring her back to California. He rented a car to drive out to Arizona, and his brother, Reginaldo Jara, went with him.<sup>4</sup> When they arrived at the house address provided by Venegas, she asked them to park the car on the next street over and wait for her. She then approached the car with two male friends, defendant and Dustin Moore. They were all carrying luggage. Efrain did not know the two males, and Venegas just said they were with her and were coming too. After putting

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<sup>3</sup> The majority of this statement of facts is taken from this court's opinion filed on November 28, 2012. (See *People v. Venegas* (Nov. 28, 2012, E054927) [nonpub. opn.] .)

<sup>4</sup> We will refer to Efrain and Reginaldo Jara by their first names when speaking of them individually, and as "the victims" when speaking of them collectively. We mean no disrespect by the use of their first names.

the luggage in the trunk, Venegas, Moore, and defendant (the defendants) got into the backseat of the car. Efrain sat in the front passenger seat, and Reginaldo drove.

Venegas later said she was hungry, so they stopped at a restaurant. Venegas, Efrain, and Moore went inside. Reginaldo and defendant stayed in the car. While inside the restaurant, Venegas asked Efrain if he had received his income tax refund yet. Efrain thought it was an odd question, and said no. As they were waiting outside, defendant asked Reginaldo to open the trunk. Reginaldo opened the trunk and went back inside the car. When the three others returned to the car, the defendants got in the backseat. Venegas sat in the middle seat, between Moore and defendant.

About 30 to 40 minutes after they got on the freeway, Efrain noticed that defendant and Moore started smoking a pipe. Reginaldo said, "Hey, no smoking." Efrain looked back and saw that defendant had a gun on his lap, so he told his brother, "Don't say nothing, he has a gun." About five minutes later, Efrain heard one of the defendants say something like, "How we gonna do this?" Then, defendant held the gun to Reginaldo's neck, and Moore held a knife to Efrain's neck.<sup>5</sup> Defendant told the

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<sup>5</sup> There appears to be some confusion in the record regarding which defendant was sitting behind the driver, Reginaldo, and which one was sitting behind Efrain. In light of the jury's findings that defendant personally used a firearm and Moore personally used a knife, we will assume that defendant was sitting behind Reginaldo, holding the gun, and Moore was sitting behind Efrain, holding the knife.

victims to give him and Moore their cell phones and wallets.<sup>6</sup> They also asked for their PIN numbers. Efrain said he did not have a PIN number, and Moore poked him with the knife. Reginaldo said a number, and Venegas repeated the number to defendant and Moore. Reginaldo continued to drive for another two hours or so to Barstow. He could not stop the car or speed up because defendant and Moore would either poke him with the gun or the knife. He believed he could not stop the car until they told him to.

About one hour before they reached Barstow, Efrain was ordered to take off his shoes, socks, and belt. He passed them to the backseat. Moore and defendant took a chain necklace and a belt from Reginaldo.

Reginaldo continued to drive and was instructed to exit the freeway in Barstow. Defendant and Moore first directed him to drive to an alley. Then, they had him drive to an apartment complex parking lot about five minutes away. Defendant and Moore put on gloves and covered their faces, and Efrain recalled them “wiping the evidence.” Defendant and Moore again demanded the PIN numbers and threatened to shoot the victims. Reginaldo gave them \$100, and they asked if he had any more money. One of the defendants told Reginaldo to get out of the car. Moore got into the driver’s seat. He then told Efrain to get out of the car and go to the backseat. However, defendant told Efrain to stay in the front seat. Efrain acted like he did not understand what do to, as he

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<sup>6</sup> Before giving them his wallet, Reginaldo took the money (about \$200) out and threw it (the money) on the floorboard.

opened the door and got out. He then pushed the door, ran, and told his brother to run. They ran to a few apartments until they found someone to help them and call the police. Defendant, Moore, and Venegas drove off in the car. The police arrived at the apartment complex about five minutes later.

The police tracked the car and a pursuit ensued, involving several police units. Defendant was driving and refused to stop. The police chased defendant from the 10 freeway to the 101 freeway to the city streets of Los Angeles. During the pursuit, defendant drove through two stop signs and ran 23 red lights. The police were eventually able to stop him by using a PIT (pursuit immobilization technique) maneuver.

## ANALYSIS

### Section 654 Did Not Apply

Defendant contends that the consecutive term for the robbery of Reginaldo (count 2) should have been stayed pursuant to section 654. He specifically argues that the sentence on count 2 should have been stayed because the robbery and carjacking (count 1) were part of an indivisible course of conduct. We disagree.

#### *A. Relevant Law*

Section 654, subdivision (a), provides in pertinent part, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .” “Section 654 precludes multiple punishments for a single act or indivisible course of conduct.”

(*People v. Hester* (2000) 22 Cal.4th 290, 294.) “The purpose of section 654 is to prevent multiple punishment for a single act or omission [or indivisible course of conduct], even though that act or omission [or indivisible course of conduct] violates more than one statute and thus constitutes more than one crime. . . .” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135 (*Liu*); see *People v. Harrison* (1989) 48 Cal.3d 321, 335.) “The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment 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. [Citations.] The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]” (*Liu*, at pp. 1135-1136.)

*B. The Court Properly Sentenced Defendant on Count 2*

Defendant essentially contends that the sentence on count 2 (robbery) violated section 654 because the robbery of Reginaldo continued up to the moment when he was

told to get out of the car. In other words, he argues that the robbery and carjacking were part of an indivisible course of conduct. Defendant asserts that the evidence showed he only had one intent and objective in robbing Reginaldo and committing the carjacking—to take property from Reginaldo. We disagree.

The evidence here showed that defendant had more than one objective. Defendant and Moore took out their weapons and demanded the victims' cell phones and wallets. They also demanded the victims' belts, shoes, and socks, and stole Reginaldo's necklace. After they took the items, Reginaldo continued to drive for another two hours. When they arrived in Barstow, one of the defendants ordered Reginaldo out of the car. The victims fled on foot, and the defendants took the car and drove off. The apparent objective of the defendants in taking the car was to flee the scene, in anticipation of the victims notifying the police (which they did). This objective was separate from the defendants' initial intent of taking the personal property of the victims. Therefore, section 654 did not apply. (*Liu, supra*, 46 Cal.App.4th at p. 1135.)

Defendant relies upon *People v. Bauer* (1969) 1 Cal.3d 368 (*Bauer*); however, *Bauer* is distinguishable. In that case, the defendant and his accomplice entered the home of three elderly women under false pretenses, tied up the women, and ransacked the house. Over a period of two hours, the defendant and his accomplice took personal items from inside the home and loaded them into one of the victim's cars. (*Id.* at pp. 372, 377.) The defendant and his accomplice then drove away in the car. (*Id.* at p. 372.) The defendant was eventually tried and found guilty, and the court imposed concurrent

sentences for robbery and car theft. (*Id.* at pp. 371-372.) On review, the Supreme Court held that separate punishments on the car theft and robbery convictions were barred by section 654. The court found that the car theft and robbery arose out of the same transaction. It noted that the robbers were carrying the stolen property from the house to the garage, which indicated that they formed the intent to steal the car either before the robbery or during it. Thus, the evidence demonstrated that the defendant and his accomplice used the victim's car to facilitate the robbery. (*Id.* at pp. 377-378.) Unlike *Bauer*, there was no evidence in the instant case that defendant used the car to facilitate the robbery of Reginaldo.

Defendant also relies upon *People v. Dominguez* (1995) 38 Cal.App.4th 410 (*Dominguez*), in arguing that the robbery and carjacking constituted a continuous course of conduct. However, *Dominguez* is factually distinguishable. In that case, the defendant entered a van, put a "cold and metallic object" against the victim's neck, and said, " "Give me everything you have." " (*Id.* at p. 414.) The victim gave defendant two rings and a chain, and then got out of the van and fled. (*Id.* at p. 415.) The defendant was convicted of carjacking and robbery. (*Id.* at p. 414.) The prosecutor conceded the applicability of section 654 in the trial court, but the trial court erroneously imposed a concurrent term for the robbery, instead of staying the term under section 654. (*Id.* at pp. 419-420.) In correcting the error, the appellate court explained that the victim simultaneously "handed over his jewelry and van by handing over the jewelry and fleeing the van." (*Id.* at p. 420.) Thus, the "same act" of placing the weapon to the back of the

victim's neck "was essential to both offenses and thus [was] not separately punishable" under section 654. (*Ibid.*)

Defendant here argues that, similar to *Dominguez, supra*, 38 Cal.App.4th 410, the robbery was still in progress when the car was taken. He contends that the robbery of Reginaldo began during the drive and continued after the group stopped at the apartment complex in Barstow, where he searched Reginaldo for more money. He points out that he and Moore brandished their weapons throughout the drive, up until the time they took the rental car. In *Dominguez*, the court considered the robbery and carjacking simultaneous because the victim handed over his jewelry and *immediately* ran out of his van. (*Id.* at p. 420.) In the instant case, the victims handed over their personal property long before they reached Barstow. Even though the codefendants demanded the PIN numbers again and took money from Reginaldo once they reached Barstow, the victims did not flee from the car *immediately* thereafter, as in *Dominguez*. The codefendants were switching seats in the car and disagreeing over who should sit where, and amidst the confusion, Reginaldo got out of the car and ran. Then, the defendants took the car and drove off. This evidence does not demonstrate an indivisible course of conduct. The robbery occurred when the codefendants threatened Reginaldo with a gun and demanded his personal property. The carjacking occurred when the codefendants ordered Reginaldo out of the car, one of them got into the driver's seat, and the defendants drove away.

Defendant points out that in California, "the 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 then asserts that “the defendants did not reach a place of temporary safety until after they drove away in the rental car.” Thus, defendant concludes that the robbery of Reginaldo continued right up to the moment the defendants drove off. While we acknowledge that a robbery ends when the robber reaches a place of relative safety, we note that defendant took personal property from Reginaldo at separate times, during a car ride that lasted for hours. Furthermore, robbery is defined as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) Here, defendant used force or fear to gain possession of Reginaldo’s property, but then used force or fear to facilitate other crimes, such as false imprisonment and the carjacking. Due to the unique circumstances of this case, it is difficult to characterize exactly when the robbery ended. Even assuming *arguendo* that the robbery continued up until the defendants drove off in the car, the evidence still showed that defendant had more than one objective in committing the robbery and committing the carjacking. (See *ante.*) We note that “[t]he principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts.” (*Liu, supra*, 46 Cal.App.4th at p. 1135.) Ultimately, because defendant had multiple objectives in committing the carjacking and robbery of Reginaldo, section 654 did not apply to stay the sentence on count 2.

*C. Section 654 Does Not Apply to the Sentences on Counts 6 and 7*

The probation officer recommended that the court impose the sentences on counts 6 and 7 (false imprisonment), plus the firearm enhancements on those counts, consecutively. However, the trial court applied section 654 to stay the sentences on counts 6 and 7. The People did not object to the application of section 654. However, the People now argue that the court erred in staying the sentences on counts 6 and 7. We agree that the court erred.

At the outset, we note defendant's assertion that the trial court explicitly stated its finding that the false imprisonment counts were "a 654 matter," and the prosecutor agreed. However, upon review of the record, we cannot say that the prosecutor necessarily agreed with the court. Prior to sentencing defendant, the court asked if either side wished to be heard. Among other things, defense counsel stated that "the Court through conferences has indicated that with respect to Counts 6 and 7 that [it] already felt those things were at least 654, so we didn't have to really address the issue in that regard to those counts." Defense counsel asked the court to consider a term of 13 years on count 1 and to run concurrent, or apply section 654, to the remaining counts. The prosecutor stated: "The People would ask the Court to follow the probation recommendation with the exception that the Court has indicated that it is the Court's belief that Counts 6 and 7 would be 654. I'm going to submit to the Court and agree that those *can be found to be sufficient to run concurrent.*" (Italics added.) Defendant points out that the prosecutor used the word "agree" and, thus, concludes that the prosecutor agreed that section 654

applied. While the prosecutor did use the word “agree,” the record shows that the prosecutor then argued that the counts should run *concurrent*. Defendant also asserts that the People did not file a separate notice of appeal on the applicability of section 654 to counts 6 and 7. We note that section 654 error results in an unauthorized sentence that is reviewable on appeal and can be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17 [“It is well settled, for example, that the court acts in ‘excess of its jurisdiction’ and imposes an ‘unauthorized’ sentence when it erroneously stays or fails to stay execution of a sentence under section 654”]; *People v. Purata* (1996) 42 Cal.App.4th 489, 498 [“. . . sentences beyond the jurisdiction of the trial court . . . can be corrected any time when brought to the court’s attention either by the People’s appeal, by the Attorney General in response to the defendant’s appeal, or by the Department of Corrections”]; *People v. Brents* (2012) 53 Cal.4th 599, 618.)

We further note that the trial court did not state any factual findings on the application of section 654 to counts 6 and 7. We assume the record reflects a determination by the trial court that section 654 precluded separate sentences for false imprisonment offenses based on the facts in the record. (See, e.g., *People v. Blake* (1998) 68 Cal.App.4th 509, 512.) On appeal, we will uphold such a determination if there is substantial evidence to support it. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

The record in this case supports a finding that defendant had separate objectives in falsely imprisoning the victims and in committing the other offenses of robbery,

carjacking, and evading an officer. The evidence showed that the imprisonment of the victims occurred *after* defendants initially pulled out the gun and knife and took the victims' personal property. About 45 minutes after they left the restaurant, defendant held a gun to Reginaldo's neck, Moore held a knife to Efrain's neck, and they proceeded to rob them of their personal property. The false imprisonment began thereafter, as they forced Reginaldo to drive to their desired location in Barstow. Reginaldo could not stop the car or speed up because defendant and/or Moore would either poke him with the gun or with the knife. He believed he could not stop the car until they told him to. The false imprisonment continued for approximately two hours, until they reached their destination in Barstow, and the victims fled from the car. Thus, the false imprisonment went far beyond what was necessary to accomplish the robbery of the victims. Moreover, the objective of the robbery was to take the victims' property. The apparent objective of the false imprisonment was to force the victims to drive the defendants to Barstow. The evidence indicates that the defendants had some type of plan there, since they directed Reginaldo to drive to a certain apartment complex and, once there, they put on gloves and covered their faces.

In light of the evidence that defendant had multiple objectives, we conclude that the trial court erred in staying the sentences on counts 6 and 7 under section 654.

#### DISPOSITION

The judgment is modified to vacate the section 654 stay on the sentences on counts 6 and 7. The judgment is affirmed as modified. The matter is remanded to the

superior court for resentencing in accordance with this opinion. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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HOLLENHORST  
Acting P. J.

We concur:

KING  
J.

CODRINGTON  
J.