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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN MARTINEZ MAGANA,

Defendant and Appellant.

G046141

(Super. Ct. No. 09CF0542)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey and Robert R. Fitzgerald, Judges. Affirmed as modified.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Anthony DaSilva and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Martin Martinez Magana of two counts of robbery in concert (Pen. Code, §§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A)) against victims Jose Guadarrama and Euner Hernandez.¹ The jury also convicted defendant of three counts of assault with a firearm (§ 245, subd. (a)(2)) against victims Jose Guadarrama, Alejandro Sanchez Guadarrama, and Hernandez. The jury also convicted defendant of false imprisonment by violence or deceit (§§ 236, 237, subd. (a)), carjacking (§ 215, subd. (a)), possession of firearm by felon (§ 12021, subd. (a)(1)), and street terrorism (§ 186.22, subd. (a)). The jury found true associated gang and firearm enhancements. The trial court ultimately sentenced him to 25 years to life in prison (after recalling and modifying the original sentence).²

FACTS

On February 28, 2009, Hernandez owned a house where he lived with his two nine-year-old children. Jose Guadarrama, his wife (Sonia Sanchez), and their adult son (Alejandro Guadarrama) also lived there as tenants.³

On that day, Jose left the house and drove toward a grocery store. At some point, a truck drove into his path and blocked his way. Three unknown Hispanic men got out of the truck, and one climbed into Jose's front passenger seat, while the other two sat

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All statutory references are to the Penal Code.

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The court originally sentenced defendant to a consecutive five-year term for carjacking, then resentenced him to a concurrent 15-year-to-life term for that crime. The court also awarded defendant conduct credits.

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For ease of reference and to avoid confusion, we refer to victims Jose Guadarrama and Alejandro Sanchez Guadarrama by their first names only.

in the back seats and pointed guns at Jose. The man in the front passenger seat left to park the truck, then returned to Jose's car.

The men asked Jose how many people were at home and whether there were any women or children there. Jose replied that some children and his wife were at the house. The men told Jose to drive home. As Jose passed a police vehicle on the way home, the men warned him not to "do anything" or they would shoot him.

At the house, Jose parked in the driveway. One man took Jose's car keys. Defendant, who carried a black gun, hit Jose and took him toward the house's front door.

The men knocked at the front door. Hernandez's daughter opened the door and yelled to her father that the men were beating up Jose. Hernandez headed downstairs, but one man hit him on the shoulder with a long revolver and forced him back upstairs. The men put Hernandez's daughter in the upstairs bathroom.

The men locked Jose, Alejandro, Hernandez, and Hernandez's son in Jose's bedroom. Defendant, holding a semiautomatic handgun, cursed at them not to move and threatened to kill them if they tried to do anything. Defendant pulled a television cable and the television fell on Hernandez's son. The other two men searched the room. The men kept telling Hernandez and Jose to "pull out the money." One man took Jose into Hernandez's bedroom and demanded money, but Jose said he did not have any. The men searched the home.

The men took three laptop computers, a camera, some DVDs, some coins (quarters that had been saved for laundry), \$100 from Jose's wallet, and some money from Alejandro, as well as a jewelry chain that defendant pulled from Hernandez's neck and a gold bracelet and a gold chain that another man pulled from Jose's wrist and neck.

The other men yelled at defendant, "Flaco, let's go." They drove away in Jose's car.

Jose went downstairs and saw his car was gone. In pursuit of the men, he took the keys to a red car parked at the house and drove toward the place where the men

had left their truck. As Jose reached the location, the truck drove toward him with two of the men inside, while defendant drove Jose's car in another direction. Jose called 911 and reported the truck's license plate to the dispatcher. Jose followed the truck until the truck stopped and one man got out, fired a gunshot at Jose, and got back in the truck. The truck took off again. Jose tried to follow the truck, but lost it.

An officer was dispatched to Hernandez's house and noted that some upstairs rooms had been ransacked and Jose's face was swollen on one side. Jose took the officer to the location where one man had fired a shot at him. A nearby store owner reported that he had heard a loud noise like a gunshot and saw a red car make a quick U-turn and drive away.

Jose identified defendant from a photographic line-up as the man who struck him in the face and ordered him up the stairs. Hernandez identified defendant from a photographic line-up as the man who struck him on the head inside the house. Hernandez and Jose also identified Humberto Alatorre as one of the other robbers.

On March 10, 2009, officers searched defendant's apartment and found a laptop on his bed and a black-handled revolver with four live rounds and one expended round in his dresser drawer.

An officer read defendant his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, then interviewed him. Defendant stated he was a member of the Jeffrey Street gang, was "jumped in" in 1990, had a tattoo of "JST" on his arm, and had the moniker, "Flaco." Defendant stated it was his room that was searched. The officer stated some items were found in defendant's room, but did not specify what those items were. Defendant mentioned the computers, saying, "I don't know what the computers, I just came up on them." In gang parlance, the expression "I just came up on them" means "robbing somebody, burglarizing a residence, burglarizing a vehicle, or just stealing an item." The officer asked defendant how he obtained the laptop. Defendant replied: "I

just came up on it. I can't tell you all that. I just came up on it. That is all. A homie told me to sell it.”

A gang expert opined defendant was a member and active participant of the Jeffery Street Gang on February 28 and March 10 of 2009. The expert opined Alatorre was a member and active participant of the Jeffery Street Gang on February 28, 2009.

On May 8, 2009, Hernandez's house was searched and Jose and Alejandro were arrested for selling cocaine. At trial, Jose admitted he used cocaine and marijuana in 2009 and sold cocaine after February 28, 2009 (the day of the robbery).⁴ He sold cocaine because he did not have a job and needed to pay his bills. At trial, Hernandez testified he (Hernandez) was not a drug dealer.

The parties stipulated that between October 18, 2008 and February 28, 2009, over 650 phone calls were made between Alejandro's and Alatorre's cell phones.

DISCUSSION

Sealed Search Warrant Affidavit and In Camera Hearing

Defendant asks us to independently review: (1) a sealed affidavit attached to the warrant for the May 8, 2009 search of Hernandez's house, and (2) a sealed reporter's transcript of an October 2, 2009 in camera hearing on defendant's motion to discover the affidavit and a confidential informant's identity. The Attorney General does not object to our reviewing these sealed documents.

In *People v. Lawley* (2002) 27 Cal.4th 102, the parties joined in requesting our Supreme Court “to review the sealed transcript of the in camera hearing to determine whether the trial court correctly applied” the proper standard. (*Id.* at p. 160.) *Lawley* explained that the applicable standard requires the prosecution to “disclose the name of

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Hernandez and Jose testified under use-immunity agreements.

an informant . . . or suffer dismissal of the charges against the defendant” (*id.* at p. 159) if the evidence shows “a reasonable possibility that [the informant] could give evidence on the issue of guilt that might exonerate the defendant” (*ibid.*). “The defendant bears the burden of adducing ““some evidence’” on this score.” (*Ibid.*) After reviewing the sealed transcript, the *Lawley* court concluded “the record demonstrates, based on a sufficiently searching inquiry [by the trial court], that the informant could not have provided any evidence that, to a reasonable possibility, might have exonerated defendant.” (*Id* at p. 160.)

An appellate court reviews for an abuse of discretion a trial court’s ruling on whether a reasonable possibility exists that a “confidential informant could give evidence on the issue of guilt that could result in [the] appellant’s exoneration.” (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 31.)

Here, trial judges denied: (1) defense counsel’s oral request at the preliminary hearing for an in camera review of the confidential affidavit; (2) defendant’s written motion under *Brady v. Maryland* (1963) 373 U.S. 83 for disclosure of any exculpatory information in the confidential affidavit, or in the alternative, dismissal of the case; and (3) defendant’s written motion under *People v. Hobbs* (1994) 7 Cal.4th 948 for the unsealing of the confidential affidavit or disclosure of the identity of the confidential informant.

We have reviewed the confidential affidavit and reporter’s transcript. Our review reveals that the trial court performed “a sufficiently searching inquiry [and] that the informant could not have provided any evidence that, to a reasonable possibility, might have exonerated defendant.” (*People v. Lawley, supra*, 27 Cal.4th at p. 160.)

Section 654 Challenge to Carjacking Sentence

Defendant contends the court erred under section 654 by failing to stay execution of sentence on his concurrent term for carjacking. He argues his offenses of

robbery in concert and carjacking of Jose were part of an indivisible transaction. He argues both crimes involved the same victim and the same intent to deprive Jose of his personal property (including the car) by force or fear.

Section 215, subdivision (a) defines carjacking as “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.” Subdivision (c) of section 215 provides: “This section shall not be construed to supersede or affect Section 211 [robbery]. A person may be charged with a violation of this section and Section 211. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.”

By its plain terms, section 654 bars multiple punishments of a single, physical act or omission. Our Supreme Court, however, significantly enlarged the statute’s scope by adopting, in *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), a test focusing on whether the defendant engaged in an indivisible course of conduct pursuant to a single intent and objective. (*Id.* at p. 19, disapproved on a different point in *People v. Correa* (2012) 54 Cal.4th 331, 334.) Subsequently, in *People v. Latimer* (1993) 5 Cal.4th 1203, our Supreme Court criticized the *Neal* test as a “‘judicial gloss’” that can defeat the statute’s purpose of matching punishment with culpability. (*Latimer*, at p. 1211.) Nonetheless, *Latimer* declined to overrule the *Neal* test. (*Latimer*, at p. 1205.) *Latimer* “‘stressed, however, that ‘nothing we say in this opinion is intended to cast doubt on any of the later judicial limitations of the *Neal* rule.’” (*Correa*, at p. 336.)

These judicial limitations — intended to better correlate punishment with culpability — have narrowed the application of *Neal*’s single intent and objective test. (*People v. Correa, supra*, 54 Cal.4th at p. 341; *People v. Kwok* (1998) 63 Cal.App.4th

1236, 1253.) For example, courts have sometimes found a defendant harbored multiple independent objectives for crimes separated by time (*People v. Beamon* (1973) 8 Cal.3d 625, 639) and place (*People v. Howell* (1966) 245 Cal.App.2d 787, 788, 792 [two accidents three miles apart occurring during one “continuous act of driving” were “separated in time and place”]). In addition, courts have recognized the need for flexibility in applying the rule on a case by case basis: “[T]here can be no universal construction which directs the proper application of section 654 in every instance.” (*Beamon*, at p. 636.)

“The defendant’s intent and objective are factual questions for the trial court.” (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) When a trial court sentences a defendant for two crimes, without suspending execution of sentence, the judge implicitly finds the acts involved more than one objective. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) The court’s findings (express or implied) are subject to the substantial evidence standard of review. (*Coleman*, at p. 162.) “We review the court’s determination of [a defendant’s] “separate intents” for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.” (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

Here, the court gave a great deal of thought to the carjacking sentence. At the original sentencing hearing, the court struck the gang enhancement to the carjacking count, finding the sentence was disproportionate to that of a codefendant. The court noted as to the carjacking: “[I]t is a separate act of violence. There is some gap in time, which was reflection.” The court sentenced defendant to a consecutive term of five years for carjacking with a personal use of firearm enhancement. Ten days later, the court recalled the sentence under section 1170, subdivision (d), in order to award defendant conduct credits and, having “rethought” the carjacking sentence, to change the consecutive 5-year-term to a concurrent 15-to-life term.

Substantial evidence supports the court's finding the carjacking was divisible from the robbery of Jose for purposes of section 654. The amended information charged defendant with carjacking by, inter alia, taking the car from Jose, "who was the driver of the motor vehicle, with the intent to temporarily and permanently deprive Jose . . . of possession." The evidence showed defendant and his cohorts stopped Jose's car, got in, asked how many people, women, and children were at the house, and at gunpoint forced Jose to drive to Hernandez's house. These actions constituted carjacking even though Jose drove the car, because the perpetrators exercised dominion and control. (*People v. Duran* (2001) 88 Cal.App.4th 1371, 1377 [carjacking occurred when carjacker "imposed his dominion and control over the car by ordering [victim] to drive"].) The perpetrators did not rob Jose in the car. Their only clearly expressed objective at that time was to have Jose drive them to the house. The carjacking was divisible in time and location from the robbery which took place later at Hernandez's house. (*People v. Quinn* (1964) 61 Cal.2d 551, 552,556, superseded by constitutional amendment on a different point as stated in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 117 [automobile theft occurring one night before narcotics robbery was separate incident for purposes of section 654]; *People v. Green* (1996) 50 Cal.App.4th 1076, 1085 [carjacking separated in time and place from initial robbery of victim's purse and interrupted by sexual attack].) During the drive, defendant had an opportunity to reflect on any intention he might have had, at that time, to rob Jose. (*People v. Gao* (2000) 81 Cal.App.4th 919, 935 [course of conduct divisible in time may be multiply punished, particularly when defendant had opportunity to reflect and renew intent before committing next offense].) Later, at Hernandez's house, when the robbers were unable to obtain the money they sought, they apparently changed their objective and took jewelry, coins, and other items they may not have originally intended to steal.

Defendant's reliance on *People v. Ortega* (1998) 19 Cal.4th 686, disapproved on a different point in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229, is

misplaced. *Ortega* held “that a defendant may be *convicted* of both carjacking and robbery, . . . but may not be convicted of both robbery and theft, based upon the commission of a single act or course of conduct.” (*Id.* at p. 690, italics added; see also *People v. Gamble* (1994) 22 Cal.App.4th 446, 452 [defendant may not be convicted of both robbery and grand theft of automobile].)

Defendant’s other cited case, *People v. Lewis* (2008) 43 Cal.4th 415, is also inapposite. There, our Supreme Court reversed the defendant’s multiple *punishments* for robbery and kidnapping for robbery because the crimes “were committed ‘pursuant to a single intent and objective,’ that is, to rob the victims of their cars and/or cash from their bank accounts.” (*Id.* at p. 519) The record showed the defendant kidnapped each victim for the purpose of robbing them and robbed them in the victim’s car or at ATM’s to which they drove with the victim in the victim’s car. (*Id.* at pp. 434-438.) Indeed, the offense of kidnapping for robbery requires that the defendant “have the specific intent to commit a robbery when the kidnapping begins.” (*Id.* at p. 519.) Here, in contrast, the perpetrators did not exhibit a specific intent to rob Jose when they entered his car and took temporary control and dominion of the vehicle by forcing him to drive them to Hernandez’s house. Later, on the driveway, one man took the car keys. Once inside the house, the robbers told both Hernandez and Jose to pull out the money. It is not clear who the robbers initially intended to rob. Eventually, as to Jose, the robbers took jewelry, \$100, and a computer.

The court did not err by executing sentence on the carjacking conviction.

Calculation of Presentence Custody Credits

Defendant contends, and the Attorney General agrees, that the court erred by failing to award defendant additional days of presentence custody credit for the time he served between his original sentencing on November 18, 2011 and his resentencing on November 28, 2011. (§ 1170, subd. (d) [credit given for time served between previous

sentence and commitment and resentencing].) As the parties agree, defendant served 10 days of actual time between his original sentencing and resentencing, and, under section 2933.1, subdivision (a), accrued a corresponding extra two days of conduct credit. Accordingly, he is entitled to a total of 1,143 days of presentence custody credits, comprised of 994 days actually served plus 149 days of conduct credits.

DISPOSITION

The judgment is modified to grant defendant a total of 1,143 days of presentence credits, comprised of 994 days in actual custody and 149 days of conduct credits. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.