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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN DAMON JOHNSON, Defendant and Appellant.	F049488 (Super. Ct. No. BF110630A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

Appellant Kevin Damon Johnson was charged with kidnapping to commit robbery (count 1, Pen. Code,[1] § 209, subd. (b)(1)); kidnapping to facilitate carjacking (count 2, § 209.5, subd. (a)); second degree robbery (count 3, § 212.5, subd. (c)); and carjacking (count 4, § 215, subd. (a)). The information also alleged as to all four counts that Johnson personally used a deadly or dangerous weapon in the commission of the offenses. (§ 12022, subd. (b)(1).) The matter went to trial. Before the presentation of evidence, the trial court struck the personal use allegation. Thereafter, the jury returned with its verdict. On count 1, the jury acquitted Johnson of kidnapping to commit robbery, but returned a guilty verdict on the lesser-included offense of misdemeanor false imprisonment. (§ 236.) The jury also acquitted Johnson of count 2. The jury found Johnson guilty of counts 3 and 4 as charged.

Johnson was sentenced to a total term of 10 years in state prison as follows: the upper term of nine years on count 4 and a consecutive term of one year, one-third the mid-term, on count 3. The court also imposed a concurrent term of one year in county jail on count 1.

FACTUAL SUMMARY

On March 21, 2005, Jose Pantoja stopped to offer assistance to a woman, Ashley Irons, who was walking along a Bakersfield street with a baby. The area is known for prostitution and drug deals. While Pantoja was talking with Irons, Johnson approached Pantoja's van, wearing a ski mask. He pointed a gun at Pantoja's head and jumped into the van. Irons and the baby got into the van as well. Johnson drove to a motel and forced Pantoja at gunpoint into room 16. He told Pantoja to lie face down on the bed or he would be killed. Johnson ordered Pantoja to give him his money. When Pantoja said "I don't have any," Johnson took Pantoja's wallet, which contained approximately $20,

[1]All further statutory references are to the Penal Code unless otherwise stated.

identification, and some credit cards. Johnson asked if any of the cards could be used to withdraw cash. He ordered Pantoja to give Johnson a pin number. When Pantoja complied, Johnson handed Irons the keys to Pantoja's van and ordered Irons to go withdraw money using Pantoja's card. Irons drove Pantoja's van to an ATM and withdrew $400. When she returned, Johnson allowed Pantoja to leave, but kept Pantoja's identification, threatening Pantoja with, "I know where you live." Pantoja found a police officer and reported the offense. Johnson, Irons, and the baby were located at a pay phone not far from the motel. Johnson had $383, nineteen $20 bills and three $1 bills, in his jacket pocket. Irons had Pantoja's identification card in her pocket. Officers found the ski mask and a pellet gun under the bed in room 16.

Johnson testified that Irons was his ex-girlfriend and a prostitute. He said Pantoja was a friend of his, like a "John" for a prostitute. Later he denied being a pimp. He said he was staying in room 14 and that room 16 was the room they rented for prostitution. He claimed Pantoja was a regular customer of Irons' and that Johnson had received $60 from Pantoja on March 21 in exchange for scoring some drugs for Pantoja. He said Irons asked him to carry her money when they walked to the store together because she had no pockets. He denied the carjacking and the robbery, stating there was another man staying with Irons. Johnson said the pellet gun that was found was a toy belonging to his five-year-old son.

DISCUSSION

I. Imposition of upper term

Johnson contends that the trial court abused its sentencing discretion when imposing the upper term for count 4 because 1) the court was not authorized to consider Johnson's use of the pellet gun because the deadly weapon enhancement had been dismissed, fear or force is an element of carjacking, and the testimony that the pellet gun was held to the victim's head was related to the kidnapping charge of which the jury acquitted Johnson; 2) the court was not permitted to consider the presence of the young

child in the room because the magistrate had dismissed a child-endangerment charge on the grounds of insufficient proof; and 3) the "remaining factors in aggravation overlap and constitute but a single aggravating factor." We reject these arguments and find no abuse of discretion.

The trial court made the following statement about why it chose the upper term:

> "Circumstances in [aggravation], the crime did involve great violence in that the defendant held what the victim perceived was a gun to his head during the entire incident; the defendant was armed with what the victim perceived to be a handgun; the defendant's prior convictions as an adult and sustained petitions in juvenile court are numerous and significant in that he has three prior convictions, adjudications for misdemeanor 10851, also, of course, a crime of battery and theft; the defendant was on four grants of misdemeanor probation when this crime occurred.
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> "His prior performance on juvenile and misdemeanor probation has been unsatisfactory in that he has failed to appear for court hearings, he's failed to appear for jail commitments, he's failed to pay fines, he's violated the terms and conditions of his probation by continuing to re-offend. Also this crime was committed in the presence of an 11-year-old -- excuse me -- 11-month-old baby, the daughter of the co-defendant, which put this baby at risk as well. The crimes of robbery and carjacking were predominantly independent of each other.
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> "With all this in mind, there are no factors in mitigation. Any one of these circumstances in aggravation would justify the upper term. Of course, in their totality, they definitely justify it."

Initially, Johnson failed to object to the trial court's use of any of the three challenged factors used to aggravate the sentence. Neither party briefed the issue of waiver. Pursuant to Government Code section 68081, we requested supplemental briefing on this issue.

The California Supreme Court has applied the waiver doctrine to cases in which the court states reasons inapplicable to the case; to cases in which the court purportedly erred because it applied a sentencing factor more than once or misweighed factors; and to cases in which the court failed to state reasons or to give a sufficient number of reasons

for a sentencing choice. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755; *People v. Scott* (1994) 9 Cal.4th 331, 356-357.) Since Johnson did not object to the trial court's use of the enumerated aggravating factors to impose an upper prison term, he has waived this contention on appeal.

Even if not waived, there is nothing improper about considering the callousness of using a pellet gun to facilitate the offenses. Pantoja believed the gun to be real and was in constant fear for his life. Although the personal-use-of-a-deadly-weapon allegation was dismissed, it was dismissed presumably because a pellet gun is not a deadly weapon. This has no bearing on the trial court's ability to consider its use as an aggravating factor. (Cal. Rules of Court, rule 4.421(a)(1) [court may consider factors in aggravation whether or not they have been charged as an enhancement].)

Likewise, although use of fear or force is an element of carjacking, the trial court was not "double dipping" when it considered the degree of violence used or the callous nature of the threat used to force the victim's compliance. (Cal. Rules of Court, rule 4.421(a)(1) [court may consider as aggravating fact whether crime involved great violence or high degree of cruelty, viciousness, or callousness].) Placing a gun to the victim's head and threatening to shoot him is beyond the level of violence needed to effectuate the carjacking and exhibits a high level of viciousness. (See *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1132 [use of profane language and yelling at victim sufficient to support finding that taking was by force or fear].)

Finally, there is no merit to Johnson's argument that the jury acquitted him of kidnapping and, therefore, any testimony about pressing the gun to Pantoja's head cannot be considered because the jury "apparently" did not find the victim "credible in this respect." Pantoja testified that Johnson held the gun to his head not only during the initial drive to the motel, but while he was forced to lie on the bed. The jury obviously found this testimony credible because it convicted Johnson on counts 3 and 4, and force is an element of both robbery and carjacking.

Further, there is nothing improper about using the fact that a small child was present when the offenses were committed as an aggravating factor. Although Johnson was not charged with child endangerment, his violent actions posed a high level of risk, particularly to an infant. His actions were callous and justify the upper term. (See *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1144 [carjacking victims are subjected to threat of violence and are exposed to high level of risk]); see also Cal. Rules of Court, rule 4.408(a) [criteria in rules not exclusive].)

We also reject Johnson's contention that the court used two sides of the same coin when noting both that Johnson's prior juvenile adjudications were numerous and that he was on misdemeanor probation at the time of this offense as factors justifying the upper term. These are distinct concerns: Johnson's history of recidivism and his failure to comply with the terms of his prior grant of probation. In any event, under California law, a single factor in aggravation is sufficient to support the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Even if we were to decide these factors are too closely intertwined to be considered separate, the two remaining factors are individually sufficient to support the upper term, especially in light of the trial court's record comment that "[a]ny one of these circumstance in aggravation would justify the upper term."

Lastly, we do not believe that the trial court "imprudently rejected" any mitigating factors. The court has always been free to weigh aggravating and mitigating factors in terms of both quality and quantity. (*People v. Roe* (1983) 148 Cal.App.3d 112, 119.) It is not required to assign the same weight to mitigating factors argued by a defendant and may minimize or even reject mitigating factors without stating its reasons. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813; *People v. Jones* (1985) 164 Cal.App.3d 1173, 1181.) Johnson's lack of felony priors is not significant in light of the number of juvenile priors and the seriousness of the current offenses. Nor was the trial court obligated to accept as a mitigating factor Johnson's self-serving claim that "what he did was because of drugs."

II. Blakely

Johnson contends that by imposing the upper term on count 4 and the consecutive term on count 3 based on factors including the use of a weapon, the number and increasing seriousness of his prior convictions, and his unsatisfactory performance on probation, the trial court violated his Sixth and Fourteenth Amendment rights to a jury trial and proof of all facts beyond a reasonable doubt. He cites to *Blakely v. Washington* (2004) 542 U.S. 296.

The California Supreme Court has now resolved the *Blakely* issue and rejected the arguments made by Johnson. The imposition of a consecutive sentence based on facts determined by the trial court, not admitted by Johnson or found by a jury, does not deprive Johnson of his constitutional right to a jury trial or his rights to have all facts legally essential to his sentence proved beyond a reasonable doubt. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1265.) No further discussion is required. (We are aware that the United States Supreme Court is currently reviewing the applicability of *Blakely* to California sentencing in *People v. Cunningham* (Apr. 18, 2005, A103501), cert. granted *sub nom. Cunningham v. California* (2006) 126 S.Ct. 1329.)

III. Section 654

Johnson contends that section 654 prohibits punishment for both the carjacking and the robbery of the ATM card because they are part of a single course of conduct, i.e., "a forceful demand for keys and money with the single intent and objective of depriving the owner of property."[2] We disagree.

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[2]The conduct which forms the basis of counts 3 and 4 does not include the initial taking of the van after Pantoja stopped to ask Irons if she needed help. Although, technically, if the initial taking of the van occurred as Pantoja testified, this too would constitute a traditional carjacking. (§ 215.) However, this conduct served as the basis of counts 1 and 2, which posed problems for the jury. In his opening and closing arguments, the prosecutor told the jury that the evidence supporting the allegation in count 3 was the act of taking Pantoja's keys and driving to the ATM to withdraw cash

Johnson was properly convicted of both offenses because robbery is not a lesser-included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 700.) However, Johnson could not be punished for both offenses if the crimes arose out of an indivisible course of conduct. (§ 654; § 215, subd. (c).) Section 654 prohibits the court from imposing multiple punishments where there has been a course of conduct which violates more than one statute but nevertheless constitutes an indivisible transaction and has a single intent and objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1215; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The proper procedure where there is a single intent and objective found is to stay execution of sentence on all but one of the offenses. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-361.) In determining whether the facts call for the application of section 654, the threshold inquiry is to determine the defendant's objective and intent. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Whether there are multiple objectives is a question of fact for the trial court which must be sustained on appeal if supported by substantial evidence. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.)

The trial court found that the robbery and carjacking were "predominately independent of each other." Although this is a close case, we believe the court's finding is supported by substantial evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085 [defendant's intent and objective are factual questions for trial court, whose decision will be upheld if supported by record evidence].) Pantoja testified that Johnson and Irons took him to motel room 16 and ordered him to lie face down or he would be killed. Johnson ordered that Pantoja give his money to Johnson. When Pantoja said "I don't have any," Johnson took the wallet, which contained approximately $20. Johnson looked through the wallet. Irons testified that Johnson asked Pantoja for money and**,**

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from Pantoja's account. Neither Johnson nor respondent argue anything different on appeal.

after Pantoja said "he only had $20," Johnson "noticed credit cards" and asked Pantoja if any of the cards "had money" on them. Johnson then ordered Pantoja to give Johnson a pin number. When Pantoja complied, Johnson directed Irons to go withdraw money. He handed Pantoja's van keys to her. From this evidence, the trial court could reasonably infer that the initial objective was to rob Pantoja of his money. When Johnson discovered Pantoja only had $20, but had an ATM card that could be used to access money, Johnson formed a new intent—to temporarily take Pantoja's van in order to send Irons to withdraw additional money from the ATM. (§ 215.)

Our conclusion is not prevented by *People v. Green*, *supra*, 50 Cal.App.4th 1076. In *Green*, the initial intent was to rob the victim, who was approached in her garage and robbed of her purse at gunpoint. The defendant then kidnapped the victim and sexually assaulted her. After these intervening offenses were complete, took the victim's car by force. The court found that, because the carjacking was separated in time and place from the initial robbery and was interrupted by the sexual attack, there was sufficient evidence to support a finding that the robbery and carjacking were separate incidents meriting separate punishment. (*Id.* at p. 1085.) True, the facts in *Green* more readily support a finding of separate objectives than do the facts here. But the rule does not require intervening offenses. It turns on whether a new intent and objective is formed beyond that of the first offense. The rule applies equally here. The trial court found a new intent and objective, and the evidence supports its finding. (See also *People v. Hicks* (1993) 6 Cal.4th 784, 789 [if offenses are independent of and not merely incidental to each other, defendant may be punished separately even though violations shared common act;] *People v. Latimer, supra,* 5 Cal.4th at p. 1208 [whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on intent and objective of actor].)

Johnson's reliance on *People v. Ortega* (1998) 19 Cal.4th 686 and *People v. Dominguez* (1995) 38 Cal.App.4th 410 is misplaced. In *Ortega*, the court held that,

"'[w]hen 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.' [Citation.]" (*Id.* at p. 699.) The defendant in *Ortega* robbed the driver of his wallet and pager, in conjunction with the carjacking of the driver's van. There was evidence that the robbery and carjacking were the result of the same objective and intent.

To the contrary, in this case there is substantial evidence that the robbery and the carjacking were separate and distinct and not committed pursuant to the same intention, impulse, or plan. The offenses were therefore not part of an indivisible transaction as was the case in *Ortega*. Similarly, in *Dominguez,* the court held that the defendant, who pointed a gun at the victim and demanded "everything you have," before taking jewelry and the victim's van, could not be punished for both carjacking and robbery. (*People v. Dominguez, supra*, 38 Cal.App.4th at p. 414, 420.) The evidence established that the same objective and intent existed for both offenses. Once this finding is made and the evidence supports it, double punishment is improper. (§ 654.) Here, in contrast, we have a different finding and different evidence.

We also reject Johnson's contention that, because the two offenses were accomplished by the same force or fear (holding the gun to Pantoja's head and threatening to shoot him), we must conclude that the two offenses share the same objective. The court in *Green* found separate objectives to the offenses even though the same force or fear (the same gun and same threat of harm) was used in that case. (*People v. Green, supra,* 50 Cal.App.4th at pp. 1080-1081, 1085.) In many cases, the initial show of force or threat of harm is sufficient to keep a victim fearful and to facilitate a number of offenses, regardless of whether the offenses are supported by the same objective or intent, as the facts in *Green* illustrate.

Since the evidence supports the trial court's finding that the two offenses were predominately independent of each other, it was not error to impose punishment for both.

IV. Imposition of consecutive terms

Lastly, Johnson contends that the trial court abused its discretion by ordering that the sentences imposed for counts 3 and 4 run consecutively, presumably because it found the crimes were independent of each other.

The governing rule of court provides that, in exercising discretion whether to impose concurrent or consecutive sentences, a trial court may consider any circumstances in aggravation or mitigation, except an element of the crime or an aggravating fact that has been used to impose the upper term or enhance the prison term. (Cal. Rules of Court, rule 4.425(b).) The trial court may also "consider the relationship between the crimes, including (1) whether the crimes and their objectives were independent of each other, (2) whether they involved separate acts of violence or threats of violence, and (3) whether they were committed at different times or separate locations. [Citation.]" (*People v. Black, supra,* 35 Cal.4th at p. 1262.) As we have already determined there is sufficient evidence to support the court's conclusion that the crimes were independent of one another, there is no abuse of discretion in imposing consecutive terms.

DISPOSITION

The judgment be affirmed

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Gomes, J.