Filed 4/25/07 P. v. Julius CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. VERNON DALE JULIUS, Defendant and Appellant.	C049159 (Super.Ct.No. 04F931) **OPINION ON REHEARING**

Paranoid and delusional as a result of methamphetamine use, defendant took his elderly landlord on a bizarre all-night trip from Redding to Sacramento and back. A jury convicted defendant of kidnapping for carjacking (Pen. Code, § 209.5, subd. (a)), carjacking (Pen. Code, § 215, subd. (a)), kidnapping (Pen. Code, § 207, subd. (a)), false imprisonment of an elder (Pen. Code, § 368, subd. (f)), and elder abuse (Pen. Code, § 368, subd. (b)(1)), and found true allegations as to the first three crimes of a violent crime committed against a vulnerable person (Pen. Code, § 667.9, subd. (a).) The jury also found defendant sane. Defendant was sentenced to a life term plus one year.

On appeal, defendant contends there was insufficient evidence of his victim's lack of consent and insufficient evidence of his specific intent for carjacking or kidnapping for carjacking. He further contends it was prejudicial error to admit evidence of his prior bad acts. In a supplemental brief filed on rehearing, defendant contends the convictions for carjacking, kidnapping and false imprisonment of an elder must be dismissed because they are necessarily included in the enhanced kidnapping for carjacking count. He also contends the concurrent sentence for elder abuse should be stayed pursuant to Penal Code section 654. We reverse the convictions for carjacking, kidnapping and false imprisonment of an elder and otherwise affirm.

FACTS

Brantley Hunter turned 71 years old on February 3, 2004. Hunter had known defendant for about five years, having met him through his son, Tim, who lived next door. One day, defendant and his wife, Tanya, moved into a trailer in Hunter's backyard. It bothered Hunter, but he took pity on them. Defendant and his wife helped out around the house and looked after Hunter's handicapped daughter.

After a year or two, the city complained about the trailer, and defendant and his wife moved into Hunter's basement. At first they occupied one room, but eventually took over the whole basement, crowding Hunter out of his workshop. Defendant changed the locks on the basement; Hunter asked for and received a key, but later defendant took it back. Defendant agreed to

pay $200 per month in rent, but often borrowed money and usually just paid the loan.

In late January and early February 2204, defendant and his wife became suspicious of Hunter, and left to stay at other places. Defendant was convinced Hunter was spying on them. When defendant asked for help, Hunter usually gave them help. He purchased tires for their car, gave them rides, and paid for motel rooms.

On February 2, 2004, at 10 p.m., defendant called Hunter and told him someone had taken their keys and they needed a ride. Defendant asked Hunter to bring his cell phone. When Hunter arrived at the house to which defendant had directed him, it was dark and defendant and his wife came out the back door. Defendant wanted to drive; he was fairly forceful about it. Hunter did not want defendant to drive but let him. Hunter was a bit intimidated by defendant, a large man who could hurt him. Hunter got more afraid as the trip progressed.

Defendant and Tanya told Hunter that people were after them who wanted to kill them. They had gone to the police, but were not taken seriously. As they headed south on Interstate 5, defendant was very paranoid about other cars and tried to out run them; he would look at the cars and say, “that’s some of them.” Defendant believed people were out to get them; he was convinced that people could hear what they were saying. Hunter asked several times to go home. Defendant replied they were not going far, but he kept going.

They stopped in Williams for gas. Defendant kept the car running as Tanya paid and began filling the car. When Hunter reached over and tried to turn off the engine, defendant grabbed his hand. Hunter then tried to pull the anti-theft wire but defendant grabbed his hands. Hunter did not struggle too hard because it was futile. They left the gas station before Tanya had pumped all the gas she had purchased.

Defendant drove very fast, reaching 100 miles per hour. When they reached Sacramento, defendant looked for a police station. Tanya asked directions from a security guard at Memorial Hospital, but they could not find the station. Defendant stopped a police officer in a patrol car. The officer told defendant the police station was not downtown. Hunter did not ask the police officer for help as he was afraid defendant would take off on another high speed chase.

Defendant announced he wanted to go to the bus station; he was thinking of going to Illinois. He accused Hunter of putting out a contract on him. Defendant accused Hunter of wearing a wire, so Hunter took off his jacket so Tanya could search it.

When they stopped again for gas, defendant did not turn off the car. Hunter did not try to get out as he figured defendant would grab him. They got back on the freeway and headed north; Tanya wanted to see Hunter's wife.

Defendant said he would not hesitate to ram people, which scared Hunter. Defendant got more agitated the closer they got to Redding.

At 6 a.m., defendant stopped at a USA gas station and asked Hunter for his credit card. Hunter gave it to defendant, hoping it would distract him. Hunter turned off the engine, took the keys and ran. Defendant grabbed him and tore Hunter's jacket. He sat Hunter down on a planter and wrestled the keys from him as Hunter hollered for help. Defendant gave Hunter the keys and told him he could drive. Hunter felt more in control driving.

Jeannie Winstead had stopped at the gas station on her way to work. She saw an elderly man squatting and two people standing over him. A burly man told the elderly man, "You're making this difficult for us." She was concerned for the safety of the elderly man, who looked exhausted and helpless, and got the license plate number of the car. The burly man shoved the elderly man into the car and yelled, "It's not what you think. I'm with the cops." A clerk at the gas station also saw the scuffle between Hunter and defendant and called the police.

Defendant wanted to stop at Safeway, but once there would not get out. They went to Carl's Jr. and got some food. Hunter did not ask the employees for help as he was not feeling threatened. Defendant then wanted to go to the Vagabond Motel, but once there changed his mind. As they began to leave, a police car came up behind them and flashed its lights. Hunter turned off the car and got out.

The police officer told Hunter there had been a report of an altercation at a gas station. Hunter appeared disoriented, frazzled, and "a little shook up." The officer testified it was obvious that defendant was under the influence of

methamphetamine. People on methamphetamine have delusions and perceive things that are not there.

David McGee-Williams, a clinical neuropsychologist, testified that defendant's methamphetamine use was a significant factor in his delusions, but he believed defendant had an underlying delusional disorder. That defendant was still reporting delusions months afterwards indicated a fixed encapsulated delusion. Dr. McGee-Williams testified defendant's felony conviction for burglary in 1973 and his two felony convictions for crimes of moral turpitude in 1995 did not cast doubt on his evaluation of defendant's believability. Defendant had been diagnosed as suffering from an antisocial personality disorder in 1994. Dr. McGee-Williams admitted defendant was probably a sociopath due to his criminal history.

Two court-appointed doctors, who evaluated defendant for competency to stand trial and sanity, opined that his delusions were methamphetamine-induced. There was no evidence of a free-standing defect or disease.

DISCUSSION

I

Defendant contends the prosecution failed to prove beyond a reasonable doubt that defendant's actions were taken against the will of Hunter. He points to evidence of the long-standing, close relationship between defendant and his wife and the Hunters, as well as evidence Hunter agreed to pick defendant up that night, let him drive, and failed to seek help although presented with several opportunities to do so. Since lack of

consent by the victim is an element of kidnapping to facilitate carjacking, carjacking, kidnapping, and false imprisonment of an elder, defendant asserts the convictions for these crimes must be reversed. He further contends that even if Hunter did not actually consent, the evidence established defendant had a good faith, reasonable belief that Hunter consented to the acts involved in the kidnapping and carjacking.

"Issues regarding the sufficiency of the evidence are determined according to well-established legal principles. 'When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence - i.e., evidence that is credible and of solid value - from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.] The reviewing court presumes in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citations.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Although there was evidence of equivocal action by Hunter that could be construed as consent or at least a reasonable belief in his consent, there was evidence from which the jury could conclude Hunter did not consent to the night-long escapade and communicated his lack of agreement to defendant. Hunter testified he believed originally that he was giving defendant and Tanya only a short ride to a friend's house. When they got on the freeway, Hunter asked where they were going. When

defendant would not tell him, Hunter asked to go home. Any belief that Hunter was consenting to the long trip was unequivocally dispelled when they first stopped for gas in Williams and Hunter tried to turn off the car and tried to pull out the anti-theft device. Defendant grabbed his hands and, according to Hunter, "made it quite plain he wasn't going to allow me to do anything or get out of the car."

There was sufficient evidence from which the jury could find a lack of consent.

II

Defendant contends there is insufficient evidence that he had the specific intent required for either kidnapping for carjacking or carjacking. He contends he was delusional throughout the episode so it was "impossible" to believe he formed the specific intent to kidnap Hunter to facilitate the carjacking or to deprive Hunter temporarily or permanently of possession of his car.

Kidnapping in the commission of carjacking requires the specific intent "to facilitate the commission of the carjacking." (Pen. Code, § 209.5, subd. (a); *People v. Perez* (2000) 84 Cal.App.4th 856, 860.) Carjacking requires "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).)

In *People v. Perez*, *supra*, 84 Cal.App.4th 856, the court considered the specific intent necessary for kidnapping during

commission of a carjacking. The court found there was the required specific intent if the kidnapping was intended to make it easier to take the victim's car or if the kidnapping was intended to effect an escape or prevent an alarm from being sounded. (*Id*. at pp. 860-861.) Defendant contends there was no evidence he kidnapped Hunter to effect an escape or prevent the sounding of an alarm.

There was evidence, however, from which the jury could infer that defendant kidnapped Hunter to make it easier to take, or at least keep, Hunter's car. As the prosecutor argued below, kidnapping Hunter kept a source of money in the car. When they stopped at the USA gas station, defendant told Hunter they had used all their money on gas and demanded his credit card, which was used to pay for gas. Hunter paid for food at the Carl Jr.'s. Hunter was about to use his money for a motel room when the police arrived. There was sufficient evidence of a specific intent for kidnapping in the commission of a carjacking.

The specific intent for carjacking is found where the victim remains in the car and defendant exercises dominion and control over the car by force or fear. (*People v. Gray* (1998) 66 Cal.App.4th 973, 985.) There is ample evidence to support such an intent in this case. Defendant commandeered Hunter's car, determining where and how fast they would go, while ignoring Hunter's pleas to return home. Hunter testified he was intimidated and frightened throughout and witnesses described him as scared, helpless, and frightened. There was substantial evidence of carjacking.

III

Over defendant's objection, the trial court allowed the prosecutor to question Dr. McGee-Williams about defendant's criminal history, in sanitized form, to impeach defendant's credibility as to the statements he made to medical professionals. "[T]he jury is entitled to decide if he's lying to save his neck because he's facing a long time here, conceivably." Dr. McGee-Williams testified he did not discuss defendant's criminal history with him, but his knowledge that defendant had a 1973 conviction for burglary and two felony convictions in 1995 for crimes of moral turpitude did not cast doubt on his evaluation of defendant's believability.

David Wilson, a clinical psychologist, testified defendant suffered from a meth-induced psychotic disorder and he found no evidence of a free-standing defect or disease. He testified defendant discussed his criminal history, but did not mention that he had any felony convictions.

Defendant contends it was prejudicial error to admit evidence of his prior bad acts. He contends the evidence had only marginal or nonexistent relevance, but was highly inflammatory, branding him a criminal. He contends it is reasonably probable a result more favorable to him would have occurred absent its admission because the evidence of his specific intent and Hunter's lack of consent was minimal. Defendant asserts admission of this evidence denied him due process.

The Attorney General makes no attempt to justify the admission of this evidence. Instead, he argues any error in its admission was harmless because the psychologists testified their opinions of defendant's mental state were unaffected by his criminal history and the evidence of defendant's criminal activity in this case was "all but uncontradicted." Further, the Attorney General asserts a brief mention of defendant's prior felonies in a transcript of over 1000 pages is too de minimis to rise to the level of depriving defendant of a fair trial.

The trial court's decision to admit evidence that defendant committed uncharged crimes is reviewed for an abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Error in admitting character evidence is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, whether there is a reasonable probability the result would have been more favorable to defendant if the evidence had not been admitted. (*People v. Malone* (1988) 47 Cal.3d 1, 22.)

We agree with the Attorney General that any error in admitting evidence of defendant's felony convictions was harmless. The evidence against defendant was strong. Defendant's actions that night were largely undisputed and, while there was conflicting evidence on his mental state, there was substantial evidence his delusions were drug-induced only. The evidence of his prior felony convictions was fleeting and played a small part in the case; it was only mentioned in the context of two psychologists' opinions and neither gave it much

weight. More damaging to defendant's case was the evidence that he was a sociopath, which was elicited in cross-examination of Dr. McGee-Williams about a 1994 psychological evaluation of defendant, before any mention of his criminal history.

Defendant contends he was denied due process because no permissible inference could be drawn from the prior felony evidence. He relies on *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378. We find *McKinney* distinguishable. In *McKinney*, the victim's throat was slit by a knife and the weapon was never found. The prosecution introduced evidence that defendant had a knife collection, was fascinated with knives, and had scratched "Death is His" on the closet door. The Ninth Circuit found much of this evidence was probative only of defendant's character and likely to have a strong impact on the jury. Its admission deprived defendant of a fair trial because the evidence was not insignificant and the case against defendant was not strong. (*Id*. at p. 1386.) Here, by contrast, the evidence did not have the same emotional impact because it did not involve the same crimes as those at issue. Indeed, although the jury learned defendant had been convicted of burglary, it acquitted him of robbery in this case. Finally, there was a permissible inference to be drawn from the evidence; evidence of prior felony convictions is admissible on the issue of credibility. (Evid. Code, § 788.)

Any error in admitting the evidence of defendant's prior felony convictions was harmless.

IV

Defendant contends his convictions for carjacking and kidnapping must be reversed because both offenses are lesser included offenses of kidnapping for carjacking. The Attorney General agrees.

Where defendant is convicted of a greater and an included offense, the conviction for the included offense must be reversed. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Carjacking is necessarily included in a violation of kidnapping for carjacking. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765.) Similarly, kidnapping is also a necessarily included offense of kidnapping for carjacking. (See *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088-1089 [in kidnapping for carjacking case court properly instructed on lesser included offenses of simple kidnapping, false imprisonment and carjacking]; cf. *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [simple kidnapping is lesser offense included within crime of kidnapping for robbery].) Defendant's convictions for carjacking and kidnapping must be reversed.

V

Defendant contends his conviction for false imprisonment of an elder must be reversed because it is a lesser included offense of kidnapping for carjacking with the enhancement for a particularly vulnerable victim, here based on the victim being 65 years of age or older. (Pen. Code, § 667.9, subd. (a).) Defendant asserts that when the enhancement is considered as

part of the offense, all of the elements of false imprisonment of an elder are contained within kidnapping for carjacking with an elder victim enhancement. Defendant contends recent decisions of the United States Supreme Court, such as *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], treat enhancements as the functional equivalent of elements of a greater offense. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Seel* (2004) 34 Cal.4th 535, 539 and fn. 2.)

Defendant recognizes that there is authority holding that enhancements are not considered for purposes of determining lesser included offenses. (*People v. Wolcott* (1983) 34 Cal.3d 92, 101 [enhancements not included in determining duty to instruct sua sponte on lesser included offenses]; *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1093-1096 [enhancements not considered in determining whether multiple convictions based on necessarily included offenses].) The issue, however, is not settled; the issue of whether enhancements should be considered in applying the multiple conviction rule of *People v. Pearson, supra*, 42 Cal.3d 351, is currently pending before the California Supreme Court in *People v. Sloan* (2005) 126 Cal.App.4th 1148, review granted June 8, 2005, S132605; *People v. Izaguirre*, review granted June 8, 2005, S132980; *People v. Jenkins* (2006) 143 Cal.App.4th 369, review granted Jan. 24, 2007, S147926.

Although the uncertainty of the law is clearly set forth in defendant’s supplemental brief, the Attorney General does not take a position on it or otherwise urge this court to uphold the

conviction for false imprisonment of an elder. Instead, the Attorney General agrees the count should be reversed. Given the unsettled state of the law and the Attorney General's knowing waiver of the issue, we accept the concession.

VI

Defendant contends his concurrent sentence for elder abuse should have been stayed pursuant to Penal Code section 654 because it was committed for the same criminal objective and as apart of the same criminal conduct as the kidnapping for carjacking.

At the trial court's direction, the parties addressed whether Penal Code section 654 applied to count six, elder abuse, at the sentencing hearing. The prosecutor argued defendant's conduct went beyond that necessary for kidnapping and carjacking. Defendant verbally abused Hunter, accusing him of conspiring against defendant. He grabbed Hunter and kept him in the car, assaulted him in the USA Gas station parking lot, and forced Hunter back into the car. This verbal and physical abuse was not to facilitate taking the car, which had happened hours earlier, but to prevent Hunter from raising an alarm. The defense argued what happened at the gas station was part of a continuous course of conduct to keep control of the car. The court asked how the assault at the gas station could be considered incidental when the kidnapping and carjacking could have been completed at that point. The court imposed a concurrent sentence, finding the elder abuse was independent of and not incidental to the kidnapping and carjacking.

Penal Code section 654 provides in part: "An 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 punishment, but in no case shall the act or omission be punished under more than one provision." (*Id.,* § 654, subd. (a).)

"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 the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of* California (1960) 55 Cal.2d 11, 19; see *People v. Latimer* (1993) 5 Cal.4th 1203 [adhering to *Neal* intent and objective test due to principles of stare decisis].)

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. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Beamon* (1973) 8 Cal.3d 625, 636.) 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. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Substantial evidence supports the trial court's determination. The trial court could conclude that because defendant's abuse of Hunter continued after defendant obtained

Hunter's car and his money for gas, defendant entertained a separate objective in abusing Hunter.

DISPOSITION

The convictions for counts two (carjacking), three (kidnapping) and five (false imprisonment of an elder) are reversed. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

MORRISON, J.

I concur:

RAYE, Acting P.J.

Concurring and dissenting opinion of Cantil-Sakauye, J.

I concur in the majority's opinion as to parts II, III and IV and respectfully dissent as to part V. In part V the majority recognizes the unsettled state of the law and the cases currently pending before the California Supreme Court regarding the multiple conviction rule and whether enhancements should be considered in determining lesser included offenses. Defendant acknowledges the uncertainty in this area of the law and argues that enhancements should be considered in applying the multiple conviction rule. The Attorney General does not argue otherwise.

The majority accepts the concession and reverses defendant's conviction for false imprisonment of an elder as a lesser included offense of defendant's conviction of kidnapping for carjacking with the enhancement for the victim being 65 years of age or older. I respectfully disagree. In my view, to utilize enhancements to determine whether an offense is a lesser included of a greater charged offense has at a minimum the potential to affect the formal charging process of criminal offenses against a defendant by turning that process into a strategic planning objective, to unnecessarily invite notice and due process issues into the trial and to cause unnecessary confusion with the trial judge's instructional responsibilities.

_____CANTIL-SAKAUYE_____ J.