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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN MANUEL MEDINA, Defendant and Appellant.	B169140 (Los Angeles County Super. Ct. No. NA054131)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Modified and affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Marc E. Turchin and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Manuel Medina appeals from the judgment entered upon his conviction by jury of five counts of attempted kidnapping during commission of a carjacking (Pen. Code, §§ 664/209.5, subd. (a) (counts 1 through 5))[1] and one count of attempted carjacking (§§ 664/215, subd. (a) (count 6)). Appellant admitted having suffered a prior felony conviction within the meaning of sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i), and section 667, subdivision (a)(1). The trial court sentenced him to an aggregate state prison term of 37 years eight months. Appellant contends that (1) the evidence was insufficient to sustain his convictions of attempted kidnapping during commission of a carjacking because that offense requires a completed carjacking, (2) his conviction of attempted carjacking must be dismissed because it is a lesser included offense of attempted kidnapping during commission of a carjacking, and he cannot be convicted of both, (3) the trial court erred in failing to instruct the jury sua sponte on the lesser included offenses of attempted carjacking and attempted kidnapping, (4) the carjacking instruction was erroneous in failing to inform the jury that that offense required asportation of the vehicle, (5) the trial court erred in denying his motion to recuse the deputy district attorney, who was physically attacked by appellant during trial, and the entire Los Angeles County District Attorney's Office, (6) the trial court's imposition of a consecutive sentence deprived him of his right to a jury trial as articulated in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and (7) the trial court erred in limiting presentence custody credits to 15 percent pursuant to section 2933.1.

We modify appellant's custody credits and otherwise affirm the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

On September 5, 2002, in the City of Long Beach, Long Beach Police Officer Don Mauk, a passenger in a patrol car driven by Officer Decarvalho, observed appellant recklessly driving a Ford Escort northbound in the southbound lanes. They stopped appellant's vehicle in an alley near the 6800 block of Cherry Avenue. Appellant exited his vehicle and ran, refusing to stop when ordered by Officer Mauk who pursued him on foot.

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

Appellant ran to a Food4Less parking lot at 68th Street and Cherry Avenue. He approached a parked, white Ford van, with Officer Mauk approximately 50 to 75 yards away. Hubie Perez was sleeping in the front passenger seat of the van, waiting for his wife, Zoveida Rodriguez, who was getting off from work. Perez had left the car key in the ignition. Rodriguez arrived at the car and, after opening the hatchback and driver's door, was buckling her three children into the back seats when she saw appellant enter the driver's seat of the van. She leaped from the back to the front seat, between appellant and Perez, and elbowed appellant in an attempt to oust him from the vehicle, yelling: "Get the fuck out of my car. You are not getting my car," and, "My kids are in the van. I have kids here." Appellant kept saying: "We got to go, we got to go," as he attempted to turn the steering wheel and put the car in gear. He reached for the ignition which he was unable to start because it was "tricky." Appellant struggled with Rodriguez and pushed her into Perez, waking him up. By then, Officer Mauk had arrived at the door of the van and was pointing a gun at appellant. He ordered appellant to exit, but appellant instead jumped from the vehicle and ran, Officer Mauk continuing in pursuit. Officer Mauk lost sight of appellant who was eventually apprehended by other officers.

That same day, Officer Goodman entered appellant's apartment and retrieved a porcelain plate with a clear baggie in it containing an off-white, crystalline substance, later determined to be methamphetamine, and a heavily used glass pipe, containing a residue.

Dr. Terence McGee, a medical doctor and expert on "addiction medicine," testified for the defense on the effects of methamphetamine use. He testified that methamphetamine stimulates the central nervous system, causing a person to be agitated, hyperactive, paranoid and lack common sense, resulting in bad decision making. Some of appellant's behavior was consistent with methamphetamine use, including his panic reaction on seeing police and his jumping from a second story window during the pursuit. Appellant's positive urine test for methamphetamine and elevated heart rate were consistent with methamphetamine usage. Dr. McGee admitted, however, that sometimes people run from the police for no reason or because they are on felony probation, as was appellant on the day of the incident.

As a result of the incident, the district attorney filed an information charging appellant with five counts of attempted kidnapping during commission of a carjacking, one count relating to each member of the Perez family, the first count pertaining to Rodriguez. The information charged appellant in count 6 with attempted carjacking from Rodriguez. It also alleged that appellant had suffered a prior strike conviction. A jury found him guilty of all charges, and he admitted the prior felony conviction.

DISCUSSION

I. The attempted kidnapping during commission of a carjacking convictions are supported by substantial evidence.

Appellant contends that there is insufficient evidence to sustain his convictions of attempted kidnapping during commission of a carjacking because the evidence establishes that the carjacking was incomplete. He argues that the gravamen of kidnapping during commission of a carjacking is the kidnapping and that a completed carjacking is merely the context in which the kidnapping occurs. Therefore, like the completed offense, an attempted kidnapping during commission of a carjacking requires a completed carjacking, and attempted kidnapping during an attempted carjacking is a "non-crime." This contention is without merit.

Appellant cites two cases in support of this contention. One is the decision by the Fifth Appellate District in *People v. Navarro* (2005) 127 Cal.App.4th 159 (*Navarro*), rendered while this matter was pending before us and presented by appellant in a supplemental letter brief on April 7, 2005. But on June 8, 2005, the California Supreme Court granted appellant's petition for review of *Navarro*, which is therefore no longer precedent. (See Cal. Rules of Court, rule 976(d) ["Unless otherwise ordered . . . an opinion is no longer considered published if the Supreme Court grants review . . . ."]; *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1067, fn. 6; *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 745, fn. 10 [case "accepted for review . . . provides no precedent"].) The second case cited by appellant, *People v. Jones* (1999) 75 Cal.App.4th 616, contains only

dictum on this point with no analysis of the issue.[2] Cases are not authority for propositions not considered. (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2.) We are thus presented with an issue of first impression; whether attempted kidnapping during commission of a carjacking requires a completed carjacking. We conclude that it does not.

Section 209.5, subdivision (a), defining kidnapping during commission of a carjacking, provides: "Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole."[3]

Kidnapping during commission of a carjacking requires that the carjacking be completed. (*People v. Contreras* (1997) 55 Cal.App.4th 760, 765; see also *People v. Jones, supra*, 75 Cal.App.4th at pp. 624-625.) These cases correctly analyze the language of section 209.5, subdivision (a), and conclude that if the Legislature had intended the offense to be committed if there was only an attempted carjacking, it could easily have so provided

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[2] *People v. Jones, supra*, 75 Cal.App.4th at page 627, footnote 3, states: "Neither party argues for reduction of the conviction to attempted kidnapping during the commission of carjacking. *We therefore need not decide whether such a crime exists, although if it does, under the language of section 209.5, it appears a completed carjacking would be a requirement*." (Italics added.)

[3] Section 215, defining carjacking, provides in part: "(a) 'Carjacking' is the felonious taking of a motor vehicle, . . . 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." Carjacking requires the movement or asportation of the vehicle. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1063.)

Section 207, defining kidnapping, provides in part: "(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." To prove kidnapping, the prosecution must prove that (1) the person was unlawfully moved by use of physical force or fear, (2) without the person's consent, (3) a substantial distance. (*People v. Jones* (2003) 108 Cal.App.4th 455, 462.)

by defining the crime as kidnapping "in order to facilitate the commission of the carjacking *or attempted carjacking.*" Having failed to do so, its intent that a completed carjacking occur is manifest.

Although kidnapping during commission of a carjacking requires a completed carjacking, we see no justification for appellant's quantum leap in logic to the conclusion that an attempted commission of that offense similarly requires a completed carjacking. We conclude that the usual rules regarding attempt crimes apply to kidnapping during commission of a carjacking and compel a contrary conclusion.

An attempt to commit a crime consists of two elements: a specific intent to commit the target crime, and a direct but ineffectual act done towards its commission. (§ 21a; *People v. Swain* (1996) 12 Cal.4th 593, 604.) By definition, an attempt does not require that all of the elements of the completed offense be proven. It requires that one or more of the elements not be proven, for otherwise the perpetrator would have committed the completed offense and not merely made an attempt at its commission. Kidnapping during commission of a carjacking is an amalgam of two offenses, carjacking and kidnapping, insofar as both of those offenses must be completed in order to commit the crime. To attempt to kidnap during commission of a carjacking, it is only required that the perpetrator intend to commit each of the combined offenses and make an ineffectual act towards accomplishment of the kidnapping during commission of the carjacking. An attempted kidnapping during commission of a carjacking is committed when the kidnapping is incomplete or the carjacking is incomplete, or both are incomplete.

Here, appellant's conduct provides strong circumstantial evidence of his specific intent to kidnap during a carjacking. (*People v. Beeman* (1984) 35 Cal.3d 547, 558-559 [specific intent must often be inferred from circumstantial evidence as "direct evidence of the mental state of the accused is rarely available except through his or her testimony"].) While running from a police pursuit, appellant entered the victims' van, yelled, "We got to go," tried to start the ignition and place the car in gear, and fought with Rodriguez as she tried to force him out of the vehicle. He knew the family was in the vehicle. It could be reasonably inferred that appellant intended to take the van and its occupants to facilitate his

escape from the police. But carjacking requires movement or asportation of the vehicle. (*People v. Lopez, supra*, 31 Cal.4th at p. 1063.) The uncontroverted evidence establishes that appellant failed to move the Perez family van, thus failing to complete a carjacking, and, hence, failing to complete a kidnapping during commission of a carjacking. His actions were ineffectual only because he was unable to start and move the van, precluding a completed kidnapping or carjacking, both of which require asportation, and hence a completed kidnapping during commission of a carjacking. Because there was sufficient evidence that appellant had the specific intent to kidnap the victims and carjack their vehicle and sufficient evidence of ineffectual acts in an effort to do so, his conviction of attempted kidnapping during commission of a carjacking was supported by sufficient evidence.

II. Attempted carjacking is not a lesser included offense of attempted kidnapping during commission of a carjacking.

Appellant was found guilty in count 1 of attempted kidnapping of Rodriguez during commission of a carjacking and in count 6 of attempted carjacking from Rodriguez. Pursuant to section 654, the trial court stayed appellant's sentencing on count 6. Appellant contends that if his convictions of attempted kidnapping during commission of a carjacking are not dismissed for insufficiency of the evidence, as he argues they should be in part I, *ante*, then the attempted carjacking charge must be dismissed, not stayed. He argues that attempted carjacking is a lesser included offense of attempted kidnapping during the commission of a carjacking and that he cannot therefore be convicted of both. This contention is without merit.

A person may not be convicted of both a greater and lesser included offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Moran* (1970) 1 Cal.3d 755, 763.) While carjacking is a lesser included offense of kidnapping during commission of a carjacking (*People v. Jones, supra*, 75 Cal.App.4th at p. 626), as is an attempted carjacking (*ibid*.), it does not follow, as appellant argues without citation of authority, that an attempted carjacking is a lesser included offense of an attempted kidnapping during commission of a carjacking. An offense is a lesser included offense if "either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the

elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

As previously stated, the offense of kidnapping during commission of a carjacking is a compound offense, requiring completion of both a kidnapping and a carjacking. The attempted offense, however, requires a specific intent to commit the target crime, and a direct but ineffectual act done towards its commission. (§ 21a; *People v. Swain, supra,* 12 Cal.4th at p. 604.) Therefore, in order to be convicted of an attempted kidnapping during commission of a carjacking, appellant had to intend to commit that offense (i.e., intend both kidnapping and carjacking) and perform at least one ineffectual act towards its commission. That ineffectual act might be an act towards kidnapping *or* an act towards carjacking, not necessarily an act towards each. If the act was directed at the kidnapping but not the carjacking, the elements of attempted carjacking would not be present. Therefore, attempted kidnapping during commission of a carjacking can be committed without committing attempted carjacking. Consequently, the latter offense is not a lesser included offense of the former.

Appellant was convicted of both attempted kidnapping during commission of a carjacking and attempted carjacking. Because the latter is not a lesser included offense of the former, the trial court did not err in failing to dismiss the attempted carjacking conviction.

III. The trial court did not err in failing to instruct sua sponte on the offenses of attempted kidnapping and attempted carjacking.

Appellant contends that the trial court erred in failing to instruct the jury sua sponte on the lesser included offenses of attempted kidnapping and attempted carjacking. He argues that under the elements test, attempted carjacking and attempted kidnapping are lesser included offenses of attempted kidnapping during commission of a carjacking and that failing to instruct on those lesser included offenses deprived the jury of the option of finding appellant guilty of lesser crimes. This contention is without merit.

The short answer to this contention is found in our conclusion in part II, *ante*, that attempted carjacking is not a lesser included offense of attempted kidnapping during

commission of a carjacking. By a parity of logic, we also conclude that attempted kidnapping is not a lesser included offense of that crime. As a result, the trial court was not obliged to instruct on them sua sponte.

Even if these offenses were lesser included, the trial court was still not required to instruct on them here. In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) This obligation has been held to include giving instructions sua sponte on lesser included offenses when the evidence raises a question whether all of the elements of the charged offense are present (*People v. Breverman, supra,* at p. 154), but not when there is no evidence that the offense was less than charged. A trial court must instruct sua sponte on a lesser included offense even if it is inconsistent with the defendant's theory of the case. (*Id.* at p. 159 ["'[t]he trial court must instruct on lesser included offenses . . . [supported by the evidence] . . . , regardless of the theories of the case proffered by the parties'"]; *People v. Elize* (1999) 71 Cal.App.4th 605, 615 ["a lesser included instruction is required even though the factual premise underlying the instruction is contrary to the defendant's own testimony, so long as there is substantial evidence in the entire record to support that premise"].)

There was no evidence here that the offense committed was less than that charged. More specifically, there was no evidence that appellant intended to attempt to commit any offense other than kidnapping during the commission of a carjacking. The evidence established that if appellant committed either attempted kidnapping or attempted carjacking, he necessarily committed the other. If the jury found that appellant intended to kidnap the Perez family, it must have also found that he intended to carjack, as he was running from the police and jumped into the van and attempted to start it, knowing the Perez family was inside. If appellant had successfully started the van and driven away, he would have simultaneously committed carjacking and kidnapping. There was no evidence he intended

only one of those offenses and not the other, or, under the facts, he would have committed only one.

Even if the trial court erred in failing to instruct on attempted kidnapping and attempted carjacking, that error was harmless. The failure to instruct on a lesser included offense in a noncapital case is evaluated under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman, supra*, 19 Cal.4th at p. 165.) An error is harmless when it is reasonably probable that if the instruction had been given, the defendant would not have received a more favorable result. The evidence is overwhelming that appellant intended to commit both carjacking and kidnapping here, not just one of the offenses. Additionally, as respondent aptly points out, the jury found appellant guilty of both attempted kidnapping during commission of a carjacking and attempted carjacking with respect to Rodriguez. There is no reason to suspect that it would have found differently had it been instructed on attempted kidnapping and attempted carjacking with respect to the other Perez family members, as the pertinent facts with respect to each were virtually identical to the facts pertaining to Rodriguez.

IV. The trial court committed harmless error in failing to instruct that asportation of the van was an element of the offense of kidnapping during commission of a carjacking.

The jury was instructed in accordance with CALJIC No. 9.46,[4] regarding the elements of carjacking and CALJIC No. 9.54.1[5] regarding the elements of kidnapping

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[4] CALJIC No. 9.46 as given, provides: "Defendant is accused in Count Six of having committed the crime of carjacking, a violation of section 215 of the Penal Code. [¶] Every person who takes a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the vehicle of his or her possession, accomplished by means of force or fear, is guilty of the crime of carjacking in violation of Penal Code section 215. [¶] 'Immediate presence' means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person had possession of a motor vehicle; [¶] 2. The motor vehicle was taken from his or her person or immediate presence, or from the person or immediate presence of a passenger of such vehicle; [¶] 3. The motor vehicle was taken

against the will of the person in possession; [¶] 4. The taking was accomplished by means of force or fear; and [¶] 5. The person taking the vehicle had the intent to either permanently or temporarily deprive the person in possession of the vehicle of that possession."

[5] CALJIC NO. 9.54.1 as given, provides: "Defendant is accused in Counts 1, 2, 3, 4, and 5 of having committed the crime of attempted kidnapping during the commission of a carjacking, a violation of section 664/209.5(a) of the Penal Code. [¶] Kidnapping during the commission of a carjacking is defined as follows: [¶] every person who, during the commission of a carjacking and with the specific intent to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking is guilty of a violation of Penal Code section 209.5(a), a crime. [¶] The specific intent to facilitate the commission of carjacking must be present when the kidnapping commences. [¶] Carjacking is the taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will, by means of force or fear, and with the specific intent to either permanently or temporarily deprive the person in possession of the vehicle of his or her possession of the motor vehicle. [¶] Kidnapping, as used in this instruction, is the unlawful movement of another person without that person's consent accomplished by use of physical force, or by any other means of instilling fear, where the person is moved a substantial distance from the vicinity of the carjacking, where such movement is beyond that merely incidental to the commission of the carjacking and the movement of the person increases the risk of harm to the person over and above that necessarily present in the crime of carjacking itself. [¶] Brief movements to facilitate the crime of carjacking, are incidental to the commission of the carjacking. On the other hand, movements to facilitate the carjacking that are for a substantial distance rather than brief are not incidental to the commission of the carjacking. [¶] A 'principal' in the crime of carjacking is a person who directly and actively commits or attempts to commit the act constituting the carjacking, or who aids and abets the commission or attempted commission of the carjacking. [¶] . . . [¶] 2. The movement of that person occurred during the commission of a carjacking; [¶] 3. The movement of that person was without that person's consent; [¶] 4. The movement of that person was caused with the specific intent to facilitate the commission of the carjacking; [¶] 5. The person causing the movement had that specific intent when the movement commenced; [¶] 6. The movement of that person was for a substantial distance from the vicinity of the carjacking, that is, a distance more than slight, brief, or trivial; [¶] 7. The movement of that person increased the risk of harm to the person over and above that necessarily present in the crime of carjacking itself; and [¶] 8. The person moved was not a principal in the carjacking."

during commission of a carjacking. Neither instruction informed the jury that carjacking required movement of the vehicle, although CALJIC No. 9.54.1 stated that movement of the person was required to convict appellant of kidnapping.

Appellant contends that the trial court erred in failing to instruct the jury that asportation of the vehicle was an element of the offense of carjacking. He argues that because an attempted kidnapping during commission of a carjacking requires a completed carjacking, and asportation is an element of a completed carjacking, the jury could not have properly determined whether there was an attempted kidnapping during commission of a carjacking. He further argues that under the facts presented, the jury might have concluded that the carjacking was completed when appellant "entered the car, sat in the driver's seat and pushed the driver away." Respondent appears to concede that the trial court erroneously failed to instruct the jury that carjacking requires asportation, but nonetheless argues that the error was harmless. We agree with respondent.

In *People v. Lopez, supra,* 31 Cal.4th at page 1063, our Supreme Court held that the taking element of the carjacking offense includes a requirement that the vehicle be moved. The trial court here erred in failing to so instruct the jury. Its duty to instruct on general principles relevant to the issues raised "requires the trial court to instruct on . . . every material *element* of an offense" (*People v. Flood* (1998) 18 Cal.4th 470, 480; *Neder v. United States* (1999) 527 U.S. 1, 11).

But "an instructional error that improperly describes or omits an element of an offense . . . , generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution. Indeed, the high court never has held that an erroneous instruction affecting a single element of a crime will amount to structural error . . . and the court's most recent decisions suggest that such an error, like the vast majority of other constitutional errors, falls within the broad category of trial error subject to *Chapman*[**6**] review." (*People v. Flood, supra,* 18 Cal.4th at pp. 502-503.) We must therefore determine whether the instructional error was harmless. Under

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6 *Chapman v. California* (1967) 386 U.S. 18, 23-24.

Chapman we must evaluate whether, if the jury was properly instructed, it is beyond a reasonable doubt that the verdict would have been the same. One consideration is whether the factual question addressed by the omitted instruction "was necessarily resolved adversely to defendant under other, properly given instructions." (*People v. Garrison* (1989) 47 Cal.3d 746, 789-790.) We conclude that even under this stringent standard, the instructional error was harmless beyond a reasonable doubt.

The evidence was undisputed and overwhelming that appellant intended to move the van. He was running from police when he entered the driver's seat, yelled, "We got to go," and unsuccessfully attempted to start the ignition. Moreover, it was not necessary for the jury to find asportation of the van to find attempted kidnapping during commission of a carjacking. (See part I, *ante*.)

Additionally, the jury instruction on kidnapping during commission of a carjacking provided that movement of the kidnapped person "a substantial distance" was required. While that instruction and the carjacking instruction did not mention that movement of a vehicle was required for a carjacking, in the facts presented, the jury would have to have found that appellant intended substantial movement of the vehicle. The undisputed facts were that he entered the van and attempted to start it in an effort to evade pursuing police officers by driving away. He knew the Perez family was in the van, and he stated: "We got to go." In finding appellant guilty of attempted kidnapping during commission of a carjacking, the jury would have to have found that appellant intended to move his victims a substantial distance. In the facts presented, that contemplated movement had to have been in the van.

V. The trial court did not abuse its discretion in denying recusal of the Los Angeles County District Attorney's Office and the prosecuting deputy.

Immediately after the verdicts were returned, appellant physically attacked the prosecuting deputy district attorney, striking him in the head multiple times until subdued by three sheriffs deputies. The public defender's office declared a conflict, and a bar panel attorney appointed to replace him moved to recuse the prosecuting deputy district attorney and all of the attorneys in the Los Angeles County District Attorneys Office.

The trial court denied the motion, stating: "The only thing that is remaining is court trial relating to the prior, which means that, basically, the document will speak for itself. Either the People will be able to present documents to prove that up, or there will be insufficient evidence to support that allegation. [¶] As far as the sentencing, that is up to the court's discretion, and the court will decide whether or not certain type of sentencing request is going to be followed or not. So that is up to the court's discretion. So I don't see a conflict."

When appellant returned to court for the sentencing hearing, he threatened the life of the deputy district attorney, stating "'You're a dead man. . . . You heard me. You are a fucking dead man. Promise you that. You will burn in hell, bitch."

As a result of appellant's actions, he was charged with assaulting a public official (§ 217.1, subd. (a)), obstruction of an executive officer (§ 69) and making a criminal threat (§ 422).

Appellant contends that the trial court erred in failing to disqualify the prosecuting attorney and the entire Los Angeles County District Attorney's Office. He argues that the incident created an actual, or at the very least an apparent, conflict that rendered it unlikely appellant would be treated fairly and evenhandedly at subsequent proceedings. He urges that because the trial court erroneously concluded that there was no conflict, it never exercised its discretion to determine if appellant would likely have received a fair sentencing hearing. This contention is without merit.

Section 1424, subdivision (a)(1) provides that a motion to recuse a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." "[A] 'conflict,' within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable *possibility* that the DA's office may not exercise its discretionary function in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, 148, italics added.) But not every conflict as so defined requires recusal. To mandate recusal, a conflict must be so grave as to render it *unlikely* appellant will receive fair treatment during all portions of the proceedings. (*Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277, 1285.) The likelihood the defendant

will not receive a fair trial must be actual, not merely apparent. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.)

The rationale for this rule is that "'[a] fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law. [Citations.] [¶] . . . [¶] . . . A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case. [¶] . . . [¶] [Thus] we conclude that a trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary function of his office.'" (*People v. Conner, supra,* 34 Cal.3d at p. 146.) A prosecutor is not disinterested "'if he has . . . an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged.'" (*People v. Eubanks, supra,* 14 Cal.4th at p. 590.) It may also be appropriate to recuse an entire district attorney's office where there is substantial evidence that a deputy's animosity toward the accused may affect his colleagues. (*People v. Conner*, *supra*, 34 Cal.3d at p. 148.)

We review the trial court's ruling on a motion for an order recusing the district attorney for a conflict of interest by determining whether there is substantial evidence to support its factual findings, and based on those findings whether the trial court abused its discretion in denying the motion. (*People v. Eubanks, supra,* 14 Cal.4th at p. 594.) We conclude that the trial court's findings here were supported by substantial evidence, and its ruling did not abuse its discretion. Contrary to appellant's assertion, the trial court did not incorrectly fail to engage in the two-step analysis called for by our Supreme Court. It was not required to engage in the second step.

The first step in the analysis of a motion to recuse a prosecutor is to determine whether the district attorney has a conflict, that is whether there is a *reasonable possibility* the district attorney will not fairly exercise its discretionary function. If the case is over,

there is no reasonable possibility that the district attorney will unfairly exercise his or her discretion because there is no further discretion to be exercised. It is therefore appropriate for the trial court to consider the stage of the proceeding at which the recusal motion is made to assess whether there is further opportunity for the exercise of prosecutorial discretion.

Here, the motion to recuse was made and heard after the trial had concluded, the jury rendered its verdicts and the prosecutor filed his sentencing memorandum. In ruling on the motion, the trial court reviewed the prosecutor's sentencing memorandum, which was consistent with the recommendation in the probation report, and found nothing in it to suggest bias by the prosecutor. At that late stage of the proceeding, there was little, if any, further opportunity for the prosecutor to exercise discretion unfairly. That being so, there was no reasonable possibility that he would do so. This conclusion was supported by substantial evidence. Having properly concluded that there was no conflict, there was no need to proceed to determine if the conflict was disabling. But even had the trial court concluded that there was a conflict and proceeded to determine if it was disabling, there was not a scintilla of evidence of any actual likelihood of bias that would have justified recusal.

The foregoing analysis is equally applicable in supporting the trial court's refusal to recuse the entire district attorney's office of more than 900 attorneys. Additional considerations support that refusal. To recuse an entire district attorney's office, the trial court must consider, among other relevant factors, the size of the district attorney's office, the extent of the communication of the incident to coworkers, the seriousness of the incident and impact on the district attorney involved. (*People v. Conner, supra,* 34 Cal.3d at p. 148.) Appellant failed to present any evidence that would justify disqualifying the district attorney's office. There was no evidence that the prosecuting attorney spoke with the media about the incident, widely discussed it with his coworkers, or that his coworkers were otherwise aware of it. The large size of the Los Angeles County District Attorney's Office suggests that the attorneys were not all close associates who would likely know of the incident and consequently be biased against appellant. These facts are a far cry from those in *People v. Conner* where the Court of Appeal affirmed the trial court's recusal of the

entire district attorney's office which only had 25 attorneys, at least 10 of which had been told by the prosecuting attorney of the violent incident in which the defendant shot him, and the prosecutor had spoken with the media about the incident.

VI. Appellant's consecutive sentences did not deprive him of his right to a jury.

The trial court sentenced appellant to an aggregate state prison term of 37 years eight months, calculated as follows: (1) on his attempted kidnapping during commission of a carjacking conviction in count 1, the base count, the midterm of seven years, doubled as a second strike, (2) on each of his other attempted kidnapping during commission of carjacking convictions, in counts 2 through 5, consecutive terms of one-third the midterm, or two years four months, doubled as second strikes, (3) a consecutive five-year term pursuant to section 667, subdivision (a)(1) for one prior conviction, and (4) a stayed sentence on count 6 for attempted carjacking.

In ordering counts 2 through 5 to run consecutively, the court made findings, as follows: "Pursuant to Rules 4.425(A), 4.425(B), 4.423(B), 4.421, the court finds the following aggravating factors: [¶] One, the crime involved potentially a great bodily harm to all the victims, especially three victims in which the oldest was six years old; second, the defendant was engaged in a violent conduct at the time he was placed on probation for a robbery conviction that he suffered less than two years ago; third, the court finds the defendant did not show any remorse relating to the pending charge. For the foregoing reasons, the court will run counts one through five consecutive."

In his supplemental brief, appellant contends that the imposition of consecutive sentences violated his right to a jury trial under the Sixth Amendment to the United States Constitution, as articulated in *Blakely, supra,* 542 U.S. 296. He argues that pursuant to section 669,[7] as implemented in California Rules of Court, rule 4.425, in the absence of

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[7] Section 669 provides in part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently

special findings by a preponderance of the evidence by the trial court, multiple terms should be imposed concurrently not consecutively. This violates the right to a jury trial as explained in *Blakely* because such finding must be made by the jury beyond a reasonable doubt.

Respondent initially meets this contention by asserting that it was waived. It argues that unlike in *Blakely* where the defendant objected to the trial court's imposition of the increase in his sentence, appellant here did not object.

We need not decide whether, as respondent asserts, appellant's claim has been forfeited in the absence of any objection on this ground in the trial court. Appellant's contention was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which concluded that "[t]he judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

VII. The judgment must be corrected with regard to the custody credits.

Appellant received an aggregate sentence of 37 years eight months in state prison. The trial court awarded him presentence custody credit of 300 actual days, plus 45 days good time credits, amounting to 15 percent of the actual days served presentence. The abstract of judgment had neither the section 2933.1 nor the section 40-19 boxes checked, signifying the statute under which the credits were awarded.

Appellant contends that the trial court erred in awarding him only 15 percent credit under section 2933.1 because that section applies only to violent felonies. Appellant was convicted of serious, not violent, felonies. Respondent agrees with appellant on this issue as do we.

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or consecutively. . . . [¶] Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

Although unarticulated, it appears that the trial court limited appellant to 15 percent conduct credits apparently pursuant to section 2933.1 which provides that a person convicted of a violent felony, as defined in section 667.5, shall accrue not more than that amount. (§ 2933.1, subd. (c).) All of appellant's convictions here were for crimes that are not violent felonies under section 667.5. Thus, he was entitled to credits under section 4019, calculated by the "two-for-four" method set forth in *People v. Browning* (1991) 233 Cal.App.3d 1410, 1413. Hence, appellant is entitled to 150 days of conduct credit and a total of 450 days of presentence credit.

DISPOSITION

The judgment is modified to award appellant 150 days of conduct credit and total presentence credit of 450 days. The trial court is ordered to modify the abstract of judgment accordingly. The judgment is otherwise affirmed.

CERTIFIED FOR PUBLICATION.

_____, J.*

NOTT

I concur:

_____, P. J.

BOREN

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ASHMANN-GERST, J. -- Dissenting

I respectfully dissent from parts I, II and III of the majority opinion. Contrary to the majority, I conclude that attempted kidnapping during the commission of a carjacking requires a completed carjacking. Because appellant never moved the Perez family van, an element of carjacking, he did not complete the carjacking, and there was insufficient evidence to support his convictions of attempted kidnapping during the commission of a carjacking. Those convictions should be reversed.

When interpreting a statute, our role is to "ascertain and effectuate legislative intent." (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.) In performing this task, we must look first to the words of the statute. (*Ibid*.) If the statutory language is clear and unambiguous, such that it is not reasonably susceptible to more than one construction, we are bound by the plain meaning. (*Ibid*.) In my view, the statutory language of section 209.5, subdivision (a) is clear and unambiguous. It applies to a person "during the commission of a carjacking." (§ 209.5, subd. (a).)

Section 21a provides that an "attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." This leads the majority to say that "an attempt does not require that all of the elements of the completed offense be proven. It requires that one or more of the elements not be proven, for otherwise the perpetrator would have committed the completed offense and not merely made an attempt at its commission. Kidnapping during commission of a carjacking is an amalgam of two offenses, carjacking and kidnapping, insofar as both of those offenses must be completed in order to commit the crime. To attempt to kidnap during commission of a carjacking, it is only required that the perpetrator intend to commit each of the combined offenses and make an ineffectual act towards accomplishment of the kidnapping during commission of the carjacking. An attempted kidnapping during commission of a carjacking is committed when the kidnapping is incomplete or the carjacking is incomplete, or both are incomplete." (Maj. Opn., p. 6.)

I agree that an attempt does not require that all of the elements of a particular crime be proven. However, I disagree with the majority's characterization of section 209.5 subdivision (a) as an amalgam of two crimes, kidnapping (§ 207) and carjacking (§ 215). Section 209.5, subdivision (a) establishes a unique crime that cannot be treated as two crimes stitched together. It has two elements -- a kidnapping during the commission of a carjacking -- and only the kidnapping element is subject to an attempt analysis. This is because the statute does not presuppose a completed kidnapping, but it does presuppose a completed carjacking. While it is possible to apply the "direct but ineffectual act" language in section 21a to the kidnapping language, it is a non sequitur to apply it to the language in section 209.5, subdivision (a) that reads "during the commission of a carjacking." (§ 209.5, subd. (a).) A carjacking cannot be ineffectual during its commission. This, of course, would amount to a logical impossibility. The majority opinion does not address this paradox. Instead, the majority held that there was sufficient evidence of attempted kidnapping during the commission of a carjacking *even though there was no carjacking*.

By treating the carjacking element in section 209.5, subdivision (a) as though it is really an offense under section 215, the majority assumes that the carjacking element is subject to attempt analysis. I do not disagree that a crime under section 215 is subject to attempt analysis. But the language in section 215 and section 209.5, subdivision (a) is different. In my view, section 209.5, subdivision (a) establishes a type of kidnapping. In the absence of a carjacking, an attempted kidnapping is a type other than the type set forth in section 209.5, subdivision (a).

The majority reaches its holding by applying the usual rules regarding attempt crimes. "[U]nder California law, '[a]n attempt to commit a crime is itself a crime and [is] subject to punishment that bears some relation to the completed offense.' [Citation.] . . . [¶] . . . As past decisions explain: 'One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral

reason he could not complete the intended crime.' [Citation.] When a defendant acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere preparation . . . and . . . show[s] that the perpetrator is putting his or her plan into action' [citation], the defendant may be convicted of criminal attempt." (*People v. Toledo* (2001) 26 Cal.4th 221, 229-230.)

These rules do not change my analysis.

For purposes of section 209.5, subdivision (a), a defendant does not go beyond mere preparation until he has committed a carjacking. As I have stated, the statute presupposes a carjacking.

_____, J.
ASHMANN-GERST