Filed 10/25/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ELIZALDE MONTOYA, Defendant and Appellant.	F039071 (Super. Ct. No. SC082478A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Leahann Alcazar and William Kim, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Ricardo Elizalde Montoya was convicted of carjacking (Pen. Code, § 215), vehicle theft (Veh. Code, § 10851, subd. (a)), and evading a police officer (Veh. Code, § 2800.2). The trial court stayed defendant's sentence for the vehicle theft pursuant to Penal Code section 654. Defendant claims vehicle theft is a lesser included offense to carjacking and thus the sentence for the vehicle theft must be reversed. We disagree and affirm the judgment.

Facts

In May of 2001, Amanda Locke was trying to sell her Jeep. Defendant came to her house to look at the car. Defendant inspected the vehicle, and then Locke took defendant for a ride in the car. Defendant asked Locke to pull over so he could drive. Locke pulled over. Defendant got in the driver's seat. As Locke climbed in the passenger seat, defendant pulled out a gun and pointed it at her shoulder.[1] Defendant said, "I hate to do this, but get out." Locke got out. Defendant asked her to shut the door; she did so and defendant drove off. Locke fled to a neighboring house and called 911.

Bakersfield police officer Bobby Woolard was in uniform on his way to work when he heard a dispatch regarding the carjacking. He spotted the vehicle. He followed it until backup units arrived. At that time, he turned on his siren and overhead lights. Defendant drove away, leading officers on a high-speed chase ending in Los Angeles where the Jeep ran out of gas. Defendant was arrested.

Discussion

"An individual may not be convicted of both a greater offense and a necessarily included lesser offense [citation]; '[i]f the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed' [citation]." (*In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1742.)

"'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.'" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) "The analysis of whether an offense is necessarily included 'is conducted in the abstract, without reference to the pleadings or facts of the particular case. [Citation.]'" (*In re Joseph G., supra,* 32 Cal.App.4th at p. 1742.)

---

[1] The jury found the gun use enhancement not true.

Defendant was convicted of carjacking. "'Carjacking' is the felonious 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 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." (Pen. Code, § 215, subd. (a).)

The jury additionally found defendant guilty of violating Vehicle Code section 10851, subdivision (a). A person is guilty of a violation of this section if that person "drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle."

Defendant claims vehicle theft is a lesser included offense of carjacking and thus his vehicle theft conviction must be reversed. According to defendant, both statutes require a taking and both require the intent to permanently or temporarily deprive the owner of possession of the vehicle. Defendant asserts that the taking element is the same because the taking requirement in the carjacking statute must be construed to include taking possession through an act of driving.

The People contend vehicle theft is not a lesser included offense of carjacking because vehicle theft requires a driving of the car (asportation) and carjacking does not.

We need not determine whether carjacking requires an asportation because an examination of the intent requirements of the two crimes results in a finding that a carjacking can be committed without committing a vehicle theft.

Carjacking requires an intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession. Vehicle theft requires the taking to occur without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle.

"'[C]arjacking is a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large.'" (*People v. Hill* (2000) 23 Cal.4th 853, 859.) The Supreme Court found that carjacking is "more nearly a crime against the person than a crime against property." (*Id.* at p. 860.) Carjacking is a crime against the possessor or passengers in a vehicle. Vehicle theft is a crime against ownership. Thus, the owner of a vehicle, or someone else at the owner's behest, may carjack a vehicle from the possession of another and commit a carjacking yet not commit a vehicle theft because the crime was committed with the consent of the owner (or actually by the owner) and the owner was not deprived of title or possession of the vehicle.[2]

Acordingly, vehicle theft is not a lesser included offense of carjacking.

Defendant also argues that under the facts of this case the carjacking and the vehicle theft were so intimately connected as to constitute one indistinguishable act for purposes of both statutes and therefore the lesser included offense of vehicle theft cannot stand.

The determination of whether one crime is a lesser included offense of another is made without reference to the particular facts of a particular case. "The fact one indivisible act or indivisible course of conduct simultaneously violates two statutes does not require a conclusion one of the offenses is a necessarily lesser included offense to the other, making the defendant subject to conviction for only one of the offenses." (*People v.*

---

[2] We can envision such an occurrence. An owner of a vehicle may give permission to a spouse, relative or friend, perhaps a co-owner, to drive the owner's vehicle. While the other person is in possession of the vehicle, the owner may become angry and through force or fear require the person in possession to give up possession of the vehicle to the owner. In such a scenario, a finding that carjacking has occurred does not mean a vehicle theft has likewise been committed because the taking would be with the consent of the owner and the owner would not be deprived of title or possession of the vehicle.

Dominguez (1995) 38 Cal.App.4th 410, 418.) The trial court here stayed the sentence on the vehicle theft pursuant to Penal Code section 654; that is all that was required.

DISPOSITION

The judgment is affirmed.

_____
VARTABEDIAN, Acting P. J.

WE CONCUR:

_____
CORNELL, J.

_____
GOMES, J.