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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLE MARIE CAST,

Defendant and Appellant.

A107799

(Contra Costa County  
Super. Ct. No. 05-030819-7)

Nicole Marie Cast was convicted of residential burglary, unlawfully driving or taking of a vehicle and two counts of receiving stolen property and sentenced to nine years eight months in state prison. (Pen. Code, §§ 459, 460, 496d, 496, subd. (a); Veh. Code § 10851, subd. (a).)<sup>1</sup> On appeal, she argues that she was improperly convicted of taking a vehicle and receiving the same vehicle as stolen property. She also challenges the trial court's reason for imposing a consecutive term and contends that the consecutive term violated the rule of *Blakely v. Washington* (2004) 542 U.S. \_\_\_ (159 L.Ed.2d 403; 124 S.Ct. 2531).

We accept the Attorney General's concession of error as to defendant's first argument and will reverse the conviction for receiving a stolen vehicle. In all other respects, we will affirm.

<sup>1</sup> Except where otherwise indicated, all statutory references are to the Penal Code.

## BACKGROUND

Joanne Holland returned to her home about 9:30 the evening of April 11, 2003 and saw a strange car parked in her driveway. The house had been burglarized and jewelry, binoculars and watches were missing. The car in the driveway had the keys in it and it belonged to defendant. The grass behind the house was flattened as though someone had recently run through the yard. There was a footbridge that led from Holland's neighbor's yard to the backyard of a house on Mier Road.

Shortly after Holland discovered the burglary, Graham Johnson's gray pickup truck was stolen from the driveway of his home at 7 Mier Road. Ashley Johnson, alerted by her mother's cell phone call, saw the truck as she approached her home, called the police and began following the truck. She could not see who was driving. When Graham Johnson learned of the theft, he joined the chase. Through the truck's side mirror, he could see a vague image of the driver, whom he described as a white male with black hair and whiskers.

The police entered the chase, and Ashley and Graham Johnson discontinued their pursuit. The pursuing police officers could not see inside the truck, but Officer Delatorre, who was waiting at an intersection as the truck approached, could see the driver and a passenger. He described the driver as a white female with dark hair past her shoulders and a white or light-colored shirt. At one point in the chase, the truck veered across the road and started driving northbound in the southbound lanes towards the downtown area. Police discontinued the chase for safety reasons but monitored the truck's location.

Officers found the abandoned truck on Kathryn Drive. Items taken in the burglary were found scattered inside the truck by the passenger seat. Local residents told police they saw two people walk through a backyard and jump over a fence. Police apprehended a male suspect near a shed.<sup>2</sup> Defendant, wearing a black tank top, was found hiding inside the shed.

Defendant was charged with first degree residential burglary (§§ 459, 460, subd. (a)), unlawful driving or taking of a vehicle (Veh. Code § 10851, subd. (a)), reckless

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<sup>2</sup> Co-defendant Bryan Stacy is not a party to this appeal.

driving while evading a peace officer (Veh. Code § 2800.2, subd. (a)), receiving a stolen vehicle (§ 496d) and receiving stolen property from the burglary (§496, subd. (a)). The information also alleged that defendant suffered a prior burglary conviction that was a serious felony and a strike. (§§ 667, subd. (a)(1); 667, subds. (b)-(i); 1170.12.)

At the trial, defendant testified in her own defense. She admitted two prior theft related felony convictions. She testified that she spent the day of the burglary and vehicle theft with her drug supplier, Manuel, Bryan Stacey and Amber Forige, drinking alcohol and using drugs. They all left her parent's home in her car to drive Amber to Walnut Creek. Manuel dropped them off in a residential area and left with defendant's car. When Manuel did not return, defendant and the other two took the truck. Amber drove until they abandoned the vehicle. Although defendant admitted participating in the vehicle theft, she denied entering Holland's home and taking any jewelry.

The jury found defendant guilty of all counts except count three, evading an officer. The jury deadlocked on that count, which was eventually dismissed by the prosecution. In a bifurcated trial, the court found defendant had suffered a prior serious felony conviction and a prior strike.

The court struck the prior strike and sentenced defendant to the midterm of four years for the burglary, five consecutive years for the prior serious felony, and another consecutive term of eight months for the Vehicle Code section 10851 violation. The court stayed the sentence on count four, receiving a stolen vehicle and count five, receiving stolen property pursuant to section 654. Defendant filed a timely notice of appeal.

## DISCUSSION

Defendant argues that she cannot be convicted of stealing and receiving the same vehicle. She also contends that the trial court impermissibly relied on the multiple victim factor to impose a consecutive sentence for count two. Finally, she argues that imposition of a consecutive sentence violates the rule of *Blakely*. We discuss these issues in the order presented.

## Defendant Cannot Be Convicted of Taking and Receiving the Same Vehicle

Defendant was convicted of violating Vehicle Code section 10851. That statute may be violated by the unlawful driving, as well as by the unlawful taking of a vehicle. She was also convicted of violating section 496d, receiving a stolen vehicle.

Our Supreme Court recently decided *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*) in which it considered the relationship between the receiving stolen property provisions of section 496 and Vehicle Code section 10851. The court explained that where the evidence shows a defendant took the vehicle with the intent to permanently deprive the owner of possession, the conviction is for a theft, and the defendant may not also be convicted of receiving the same stolen vehicle. On the other hand, if the defendant violated Vehicle Code section 10851 by driving the vehicle after the theft was complete, a conviction for that offense and receiving stolen property would not violate the dual conviction bar of section 496.<sup>3</sup> (*Garza, supra*, 35 Cal.4th at p. 871.)

The issue in *Garza* was whether a conviction for a violation of Vehicle Code section 10851 bars a section 496 conviction where the evidence supports either a taking or a post-theft driving theory. (*Garza, supra*, 35 Cal.4th at p. 871.) The court stated that the crucial issue in such cases is “whether the section 10851(a) conviction is for a theft or a nontheft offense. If the conviction is for the taking of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction that bars a conviction of the same person under section 496(a) for receiving the same vehicle as

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<sup>3</sup> Section 496, subdivision (a) generally defines the crime of receiving stolen property. It was amended in 1992 to codify the narrow form of the common law rule prohibiting dual convictions: “A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.” (Stats. 1992, ch. 1146, § 1, p. 5374; *Garza, supra*, 35 Cal.4th at pp. 874-875.) The fact that defendant’s conviction was for violating section 496d, which does not contain similar language, does not change the result in this case. Even prior to the amendment of section 496, subdivision (a), when the factual circumstances of the case showed that the theft and receiving offenses related to the same time and acts, common law prohibited dual convictions. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757; *People v. Strong* (1994) 30 Cal.App.4th 366, 372-373.)

stolen property. Dual convictions are permissible, however, if the section 10851(a) conviction is for post-theft driving of the vehicle.” (*Garza, supra*, 35 Cal.4th at p. 881.)

The defendant in *Garza* was found sitting in a parking lot in a car that had been stolen six days earlier. The key was in the ignition and the motor was running. The Supreme Court found that the only reasonable inference was that defendant had committed the separate crime of driving the car to that location long after the theft was complete. (*Garza, supra*, 35 Cal.4th at p. 882.) The court in *Garza* affirmed the dual conviction because, under the circumstances of that case, it was “not reasonably probable that a properly instructed jury would have found defendant guilty of violating section 10851(a) by stealing the car but not by post-theft driving.” (*Garza, supra*, 35 Cal.4th at p. 882.)

In defendant’s case, the jury was not properly instructed regarding dual convictions. However, the theft and driving of the vehicle occurred simultaneously. There was conflicting testimony as to the identity of the driver. The prosecutor reminded that jury that although defendant denied driving the truck, she admitted that she and her friends stole it. During deliberations, the jury asked the court if getting into and riding in a vehicle defendant knew was stolen constituted taking a vehicle under Vehicle Code section 10851. The jury was unable to reach a decision on the only count that required a finding that defendant was driving: the reckless driving count. The only reasonable conclusion to be drawn from these circumstances is that defendant was found guilty as a participant in the theft of the truck and not as a post-theft driver of the truck.

The Attorney General agrees with defendant’s argument and concedes the error. We accept the concession and will reverse the conviction under section 496d for receiving a stolen vehicle.

#### No Error in Imposing Consecutive Sentence

Defendant argues that the court betrayed an improper reliance on the multiple victim factor when it imposed consecutive sentences for burglary in count one and taking a vehicle in count two. When it imposed the sentence, the court said: “I believe it is appropriate to impose the consecutive sentence because it [count two] is an entirely

separate crime with an entirely separate loss.” The court continued: “I choose to impose the midterm on [count one] and impose a consecutive sentence recognizing that there was, in fact, a separate victim. So the total term would be nine years, eight months.”

Defendant, who did not object at the sentencing hearing, now argues that the court’s statements reveal an improper application of the multiple victim sentencing factor, citing *People v. Humphrey* (1982) 138 Cal.App.3d 881, 882-883 (*Humphrey*), and similar cases. *Humphrey* stated that the multiple victim factor applies only when a defendant commits two or more crimes, and at least one crime has multiple victims. (*Id.* at p. 882.) The court in *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365 (*Valenzuela*), disagreed with that approach, and found the multiple victim factor applicable if the crimes were a part of one transaction.<sup>4</sup>

We presume that a trial court has properly performed its duty. (Evid. Code, § 664.) “If it has faithfully applied the sentencing rules, the only other question is whether, all circumstances considered, the trial court’s decision exceeds the bounds of reason.” (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Judgments are presumed correct, and are not reversed in the absence of a miscarriage of justice. (*Garza, supra*, 35 Cal.4th at p. 881.)

The sentencing court’s discussion and the circumstances of defendant’s convictions reveal two crimes that were separated by time and distance. Defendant was convicted of burglarizing the home of one victim, and sometime thereafter, of stealing a truck owned by a different victim that was parked on a street behind the location of the burglarized home. Although one of the court’s statements at sentencing referred to separate victims, in context, the court was speaking of separate crimes. The fact that “[t]he crimes and their objectives were predominately independent of each other,” is a valid factor for imposing a consecutive sentence. (Cal. Rules of Court, rule 4.425 (a)(1).) The trial court did not base the consecutive sentence on an inappropriate factor.

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<sup>4</sup> *Valenzuela* recognized that California Rules of Court, former rule 425(a)(4) was repealed in 1991, but stated that multiple victims may still be used as a sentencing factor. (*Valenzuela, supra*, 40 Cal.App.4th at pp. 363, 365; Cal. Rules of Court, rule 4.408 (a) [listed sentencing factors not exclusive].)

Consecutive Sentence Does Not Implicate *Blakely*

Defendant argues that her sentence violates the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely*.

*Apprendi* and *Blakely* concerned the imposition of sentences that increased the penalty for a crime beyond the statutory maximum based on facts that were not admitted by the defendant or found true by a jury. (*Apprendi, supra*, 530 U.S. at p. 490; *Blakely, supra*, 124 S.Ct. at p. 2536.)

Prior to *Blakely*, courts held that *Apprendi* did not apply to consecutive sentences. (See, e.g., *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231 [rejecting argument that *Apprendi* applied to consecutive sentencing determination]; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.)

*Blakely* does *not* change that reasoning as explained in the recently decided decision of *People v. Black*. (*People v. Black* (June 20, 2005, S126182) \_\_\_ Cal.4th \_\_\_ [2005 Lexis 6566; 2005 WL 1421815; 2005 C.D.O.S. 5326, 5332-5333]; see also *People v. Shaw* (2004) 122 Cal.App.4th 453 [imposition of consecutive sentences does not violate *Apprendi* and *Blakely* where basis for sentencing is supported by jury's verdict].)

The jury's verdict in this case and the trial court's independent findings justified imposition of the consecutive sentence. We conclude that the consecutive sentence imposed here for two separate crimes does not violate *Apprendi* or *Blakely*.

DISPOSITION

The judgment as to count four, receiving a stolen vehicle, is reversed and stricken. The clerk of the superior court is ordered to correct the abstract of judgment accordingly. Upon issuance of the remittitur, the superior court clerk is to prepare a corrected abstract of judgment which reflects the foregoing modification and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Margulies, J.