

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

IOANE SOLIA,

Defendant and Appellant.

E053035

(Super.Ct.No. RIF150373)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Richard J. Hanscom and Edward D. Webster, Judges.* Affirmed in part and reversed in part with directions.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

* Judge Hanscom is a retired judge of the San Diego Superior Court and Judge Webster is a retired judge of the Riverside Superior Court, both assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Gil Gonzalez and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

This opinion follows our November 1, 2012, order granting defendant's petition for rehearing and vacating our prior opinion in this matter. (*People v. Solia* (Oct. 11, 2012, E053035) [nonpub. opn.]; Cal Rules of Court, rule 8.268(d).)¹

A jury found defendant Ioane Solia guilty of kidnapping to commit rape or oral copulation (Pen. Code, § 209, subd. (b)(1); count 1),² oral copulation by force, sexual penetration by force, sodomy by force, and forcible rape (§§ 288a, subd. (c)(2), 289, subd. (a)(1), 286, subd. (c)(2), 261, subd. (a)(2); counts 2-5). Jane Doe, a woman in her early 20's whom defendant found sitting on a street curb in Beaumont on May 17, 2008, was the victim of the crimes. The jury also found that defendant personally used a firearm in the commission of counts 1 through 5 (§ 12022.53, subd. (b)) and found additional firearm and kidnapping allegations true in counts 2 through 5 (§§ 667.8, subd. (a), 667.61, subds. (d)(2), (e)(1), (e)(4)). The court found that defendant had a prior conviction for continuous sexual abuse of a child (§ 288.5) within the meaning of section 667.61, subdivision (d)(1), and the conviction qualified as both a prior serious felony conviction and prior strike conviction (§ 667, subds. (a), (c), (e)(1)).

¹ All further references to rules are to the California Rules of Court.

² All further statutory references are to the Penal Code unless otherwise indicated.

The January 28, 2011, sentencing minute order and the February 16, 2011, abstract of judgment indicate that defendant was sentenced to a determinate term of 55 years, plus an indeterminate term of 214 years to life—including consecutive terms on counts 2 through 5.

On this appeal, defendant, whose native language is Samoan, claims he was not provided with a competent Samoan defense interpreter during trial. Alternatively, he claims his trial counsel rendered ineffective assistance in failing to request, before trial, a hearing on the defense interpreter's competency. We reject these claims.

Defendant also raises two claims of sentencing error. First he claims his 14-year-to-life sentence on count 1, together with the 10-year personal use enhancement on count 1, should have been stayed under section 654. We reject this claim. He also claims that all of the terms the court imposed on counts 2 through 5 must run concurrent to the term imposed on count 1 because, in orally pronouncing judgment, the court did not state it was imposing consecutive terms on any counts (§ 669), did not state any reasons for imposing consecutive sentences (rule 4.406(b)(5)), and did not announce an aggregate sentence. We granted defendant's petition for rehearing to reconsider this issue, and agree that *all* of the terms the court orally imposed on counts 2 through 5 must run concurrent to the 24-year-to-life term imposed on count 1.

Lastly, defendant claims the court's sentencing minute order and the abstract of judgment must be corrected to reflect that his 94 days of local conduct credits were calculated under section 2933.1, not section 4019.

We remand the matter to the trial court with directions to issue a new sentencing minute order and a corrected abstract of judgment reflecting that (1) concurrent rather than consecutive terms were imposed on counts 2 through 5, and (2) defendant's 94 days of local conduct credits were calculated under section 2933.1, not section 4019. In all other respects, we affirm the judgment.

II. FACTUAL BACKGROUND

Around 11:00 p.m.³ on May 17, 2008, Jane Doe walked to the Thrifty gas station at Beaumont Avenue and 6th Street in Beaumont, around one-half mile from her home. After buying cigarettes, Doe sat down on the curb by the gas station to smoke and noticed a man driving around in a white car. When the man stopped and offered her a ride, she declined. The car continued circling the area. Concerned that the man might follow her home, Doe began walking in the direction opposite her home.

As Doe was walking, defendant came up behind her, pressed a gun to her back and forced her into the passenger seat of his car. He drove Doe from Beaumont to Moreno Valley via Interstates 10 and 60. During the drive, defendant pointed a gun at Doe and told her she was his wife now. He also told her he was going to cut her into pieces and bury her "all over in the dirt" so her body could not be identified.

After exiting Interstate 60 at Heacock Street, defendant stopped in a secluded area near some empty buildings. There, defendant forced Doe into the backseat of the car at gunpoint, removed her pants and underwear, and began sexually assaulting her.

³ In one place the victim indicated it could have been around 9:00 p.m.

Defendant orally copulated Doe, bit her genitalia, raped her, digitally penetrated her, and sodomized her, all while pointing a gun at her. After defendant ejaculated, Doe “kicked” her way out of the car and ran for her life.

Doe was completely naked and only able to grab her T-shirt as she fled. After attempting to flag down passing cars, Doe ran to a house on Cactus Street and knocked on the door. The occupant, Ms. Bennett, answered. Crying hysterically and wearing only a T-shirt, Doe told Bennett she had been kidnapped and raped. Bennett called the police.

A sexual assault response team nurse determined that Doe had injuries consistent with having been sexually assaulted. A DNA swab taken from Doe’s vagina matched defendant’s DNA.

At the time of the assault, defendant was wearing a GPS (global positioning system) monitoring device. Data from the GPS device indicated that at 2:28 a.m. on May 17, 2008, defendant was in the area of Beaumont where Doe claimed she had been taken, and he traveled to Moreno Valley via the same path Doe described. The data also indicated that defendant exited Interstate 60 at Heacock Street at 2:56 a.m. and stopped at that location for a time. Serta Mattress Company, where defendant worked and where Doe told detectives the assault occurred, was near the area where the GPS data showed defendant stopped.

The cameras at the Serta Mattress Company recorded a white vehicle driving into the parking lot on the night of the assault. Defendant usually drove his wife’s white

Toyota Camry. Doe identified defendant as her assailant in a photographic lineup and at trial.

Around one year after the incident, defendant was interviewed by police. After being shown a photograph of Doe, defendant denied knowing her, having seen her before, having given her a ride, having raped her, or having had sex with her.

III. DISCUSSION

A. *Defendant Was Not Denied His Right to a Competent Samoan Interpreter*

Defendant, whose native and primary language is Samoan, claims he was denied his state constitutional right to a “competent” Samoan language defense interpreter during trial. (Cal. Const., art. I, § 14.) Alternatively, he claims his trial counsel rendered ineffective assistance in failing to object to the court’s failure to follow the procedural requirements for using a nonregistered interpreter. (Rule 2.893.) We reject these claims.

1. Relevant Background

In June 2009, before defendant’s arraignment on the amended felony complaint, the court ordered that he be assisted by a Samoan interpreter. At his June 22, 2009, arraignment and during several other pretrial proceedings, defendant was assisted by Saga Tuiasosopo, the only *registered* Samoan interpreter in California. During the jury trial in November and December 2010, and when the jury returned its verdicts and findings, defendant was assisted by Tupe Auelua, a nonregistered Samoan interpreter.

Interpreter Auelua’s first appearance on the record in this case was at a settlement conference on October 23, 2009. On that date, defense counsel stipulated to the use of

Interpreter Auelua as a nonregistered Samoan interpreter. The court's October 23, 2009, minute order indicates that Interpreter Auelua's "[s]worn oath" was "on file." After October 23, 2009, and up to the time the jury trial commenced in November 2010, defendant was again assisted by registered Samoan Interpreter Tuiasosopo.

The jury returned its verdicts and findings in December 2010. The matter was later scheduled for a court trial on the prior conviction allegation and for sentencing on January 28, 2011. On January 28, Interpreter Tuiasosopo was again interpreting for defendant. The probation officer's report and sentencing recommendation that defendant be sentenced to 214 years to life plus 106 years in prison was on file when the court called the matter.

At the outset of the proceedings, defense counsel told the court that defendant had just informed him that Interpreter Auelua had "inadequately interpret[ed]" statements that defendant made to defense counsel during trial. Counsel clarified that on one occasion when defendant intended to communicate to defense counsel that he had a question, Interpreter Auelua did not translate to defense counsel that defendant had a question but that defendant felt "ashamed." Also according to defendant, and based on defendant's "full knowledge" of Samoan and "functioning knowledge" of English, there were other instances in which Interpreter Auelua misinterpreted statements defendant made to defense counsel.

Defense counsel moved for a new trial based on the "apparent misinterpretation" of Interpreter Auelua. In opposing the motion, the prosecutor argued that "any problems

with translation should have been brought up” as soon as they arose. Defendant should have asked his question again if he believed Interpreter Auelua was misinterpreting his questions, and defendant had “plenty of opportunities” to have any questions answered by defense counsel during the course of the seven-day jury trial. The prosecutor also said it was clear that defendant was trying to avoid being sentenced and taking responsibility for his crimes.

In denying the motion, the court pointed out that Interpreter Auelua appeared to be “very alert and very conscientious” during trial, and the court did not notice any problems with the interpretation. Moreover, the court said that, although defendant’s native language was Samoan, defendant had been living in California for 30 years, was employed and in prison for some time, and was able to make jokes in English during his police interrogation in 2009. The court concluded that defendant’s “substantial knowledge of English” had “a bearing” whether he should have promptly discovered and promptly alerted his defense counsel or the court to any “serious mistakes in translation” on the part of Interpreter Auelua.

The court also pointed out that misinterpretations occur even between people who speak the same language, but they can be promptly corrected. As an example, the court said that when defense counsel used the word “ashamed,” both the court and the court reporter did not understand the word he used and had to ask him to repeat it. In sum, the court said it “heard nothing” to indicate that Interpreter Auelua “didn’t do a competent job”

2. Applicable Legal Principles

Interpreters perform three interrelated but distinct roles in a criminal proceeding: (1) as “witness interpreter” to enable questioning of non-English-speaking witnesses; (2) as “proceedings interpreter” to enable a non-English-speaking defendant to understand exchanges at trial among the witnesses, the attorneys, and the court; and (3) as “defense interpreter” to enable a non-English-speaking defendant to communicate with his or her English-speaking attorney. (*People v. Romero* (2008) 44 Cal.4th 386, 410.)

Article I, section 14 of the California Constitution provides that “[a] person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.” Under this provision, a non-English-speaking defendant “is entitled to two interpreters, one to interpret the witnesses’ testimony and the other to be the personal interpreter for the defendant.” (*People v. Estrada* (1986) 176 Cal.App.3d 410, 415, citing *People v. Aguilar* (1984) 35 Cal.3d 785.)

A personal interpreter performs the overlapping or dual functions of a proceedings interpreter and a defense interpreter. (See *People v. Aguilar, supra*, 35 Cal.3d at pp. 790-791.)⁴ Here, Interpreter Auelua served as defendant’s personal interpreter (i.e., proceedings and defense) during the jury trial in November and December 2010.

The dual functions of a personal interpreter are critical, because a defendant who cannot understand the proceedings or communicate with his trial counsel cannot be “truly

⁴ A personal interpreter cannot simultaneously serve as a witness interpreter without depriving the defendant of his only means of understanding the proceedings *and* communicating with defense counsel. (*People v. Aguilar, supra*, 35 Cal.3d at p. 791.)

present at his trial” and “is ipso facto denied effective representation.” (*People v. Aranda* (1986) 186 Cal.App.3d 230, 236, fn. omitted.) The right to interpreters safeguards the constitutional rights of non-English-speaking defendants “to due process, to confrontation, to effective assistance of counsel, and to be present at trial.” (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1011; see also *People v. Romero, supra*, 44 Cal.4th at p. 410.)

The Legislature has enacted a comprehensive statutory scheme governing court interpreter services (Gov. Code, § 68560 et seq.), including provisions for the certification of interpreters of languages “designated” by the Judicial Council (Gov. Code, §§ 68561, 68562). Except upon a showing of good cause, a court may only appoint “a certified court interpreter” to interpret a designated language. (Gov. Code, § 68561, subd. (a); see also *id.*, subd. (c).) The parties agree that Samoan is not a designated language and that there are no certified Samoan court interpreters in California.

For nondesignated languages, interpreters “shall be qualified by the court under the qualification procedures and guidelines adopted by the Judicial Council.” (Gov. Code, § 68561, subd. (d).) If an interpreter of a nondesignated language is “qualified by the court under the qualification procedures and guidelines adopted by the Judicial Council” *and* “passes an English fluency examination offered by a testing entity approved by the Judicial Council,” then the interpreter “shall be designated a ‘registered interpreter.’” (*Ibid.*) As noted, Interpreter Tuiasosopo was the only registered Samoan

interpreter in California at the time of trial, and Interpreter Auelua was a nonregistered Samoan interpreter.

Rule 2.893 sets forth the qualification procedures and guidelines for appointing *noncertified* interpreters of *designated* languages. No rule of court expressly sets forth qualification procedures and guidelines for appointing registered or nonregistered interpreters of nondesignated languages. For purposes of our discussion, however, we assume that rule 2.893(d) also governs the appointments of registered and nonregistered interpreters of nondesignated languages, including Samoan. (See *People v. Superior Court (Almaraz)* (2001) 89 Cal.App.4th 1353, 1356-1360 [noting the importance of the procedural requirements of former rule 984.2, the precursor to rule 2.893, in ensuring “a competent interpreter and an adequate record of that fact”].)

Under rule 2.893(b)(1), noncertified interpreters of designated languages may be considered for appointment for a six-month period, provided the presiding judge or other designated judicial officer finds the noncertified interpreter to be “provisionally qualified” pursuant to the procedures and guidelines set forth in Judicial Council form IN-100. If a provisional qualification order is signed (Judicial Council form IN-110), the judge in the proceeding in which the interpreter is to be assigned must find that (1) good cause exists to appoint the noncertified interpreter (Gov. Code, § 68561, subd. (c)), and (2) the interpreter is qualified to interpret the proceeding (rule 2.893(b)(1)(B)). The court must also inform the defendant that (1) the proposed interpreter is not certified; (2) the court has found good cause to appoint him or her; and (3) the court has found the

interpreter to be qualified. (Rule 2.893(d)(1).) “If the defendant . . . objects to the appointment of the proposed interpreter or waives the appointment of a certified interpreter, the objection or waiver must be on the record.” (Rule 2.893(d)(2).)

“An interpreter regularly employed by the court and certified or registered in accordance with [Gov. Code, § 68650 et seq.] . . . may file an oath . . . with the clerk of the court. The filed oath shall serve for all subsequent court proceedings until the appointment is revoked by the court.” (Evid. Code, § 751, subd. (d).) Additionally, interpreters are subject to the same rules of competency and examination as expert witnesses (see Evid. Code, §§ 750, 752; Cal. Law Revision Com. com., 29B pt. 2 West’s Ann. Evid. Code (1995 ed.) foll. § 752, p. 372), and a criminal defendant does not have a right to a certified or registered interpreter, only a *competent* interpreter (*People v. Estrada, supra*, 176 Cal.App.3d at p. 415).

3. Analysis

Defendant claims that when he complained after trial that Interpreter Auelua had inaccurately interpreted one or more of his questions or statements to defense counsel *during trial*, the court erroneously failed to conduct a hearing in order to determine whether Interpreter Auelua was competent to interpret Samoan. Defendant also complains that “the record does not indicate that . . . the court followed the mandatory procedures for appointing a nonregistered interpreter and found that the interpreter qualified.” These arguments are unavailing.

Defendant voiced no objections whatsoever to Interpreter Auelua's competency at any time during trial. Instead, he waited until January 28, 2011, the date he was to be sentenced, to complain that Interpreter Auelua misinterpreted some of his questions and statements to defense counsel during trial. Because defendant did not object to Interpreter Auelau's competency during trial, he has forfeited the competency issue on appeal. (*People v. Aranda, supra*, 186 Cal.App.3d at p. 237.)⁵

But even if the issue of Interpreter Auelua's competency were properly before this court, it has no merit. With the assistance of Interpreter Tuiasosopo, defendant complained on the date of sentencing that Interpreter Auelua had misinterpreted some statements and questions he posed to defense counsel during trial. Defendant's only specific complaint was that Interpreter Auelua mistranslated his statement, "I have a question," as "I am ashamed."

If that happened, it would have been immediately apparent to defendant that his counsel did not understand he had a question. It was therefore incumbent upon defendant to repeat his statement, "I have a question," so that his counsel knew he had a question, *and then ask his question*. Indeed, defendant did not claim he was unable to ask his

⁵ As explained in *People v. Aranda, supra*, 186 Cal.App.3d at page 237: "The question of an interpreter's competence is a factual one for the trial court. [Citations.] The ideal time to question the qualifications of an interpreter is before he is permitted to act [citation], although, if the competence of an interpreter becomes an issue after he commences his duties, it can be raised at that time. [Citation.] When a showing is made, at trial, that an interpreter may be biased or his skills deficient, one solution may be appointment of a 'check interpreter.' [Citation.] When no objection is raised to the competence of the interpreter during trial, the issue cannot be raised on appeal. [Citations.]"

question or that his question went unanswered. Nor did he claim that defense counsel failed to answer or acknowledge any other questions or comments he made during trial, notwithstanding that some of his questions or comments were initially misinterpreted. Defendant also did not claim that Interpreter Auelua misinterpreted any statements by the witnesses, the court, the prosecutor, his defense counsel, the court reporter, or anyone else who spoke during trial.

Thus, any error on the part of the court in failing to determine Interpreter Auelua's competency (rule 2.893), either before or after trial, was harmless beyond a reasonable doubt (*People v. Rodriguez, supra*, 42 Cal.3d at p. 1014 [appointment of one interpreter as personal interpreter for two codefendants was harmless beyond a reasonable doubt, given there was no showing that either defendant's ability to communicate with his counsel or comprehend the proceedings was impeded by the use of the single interpreter]). In sum, defendant has not articulated any discernable reason to believe his rights to due process, to confrontation, to be present at trial, or to effective assistance of counsel were in any way compromised by the court's failure to determine Interpreter Auelua's competency in accordance with rule 2.893. (*People v. Rodriguez, supra*, at pp. 1011-1012.)

Defendant has also failed to demonstrate that his trial counsel rendered ineffective assistance in failing to request a hearing, after trial, on Interpreter Auelua's competency during trial. Even if counsel's omission fell below an objective standard of reasonableness, it is not reasonably probable that defendant would have realized a more

favorable result at trial had the hearing been requested and conducted. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-686; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Indeed, given the paucity of defendant’s complaints, the court’s observation that it saw nothing to indicate that Interpreter Auelua did not “do a competent job,” defendant’s “functioning” knowledge of English, and the entire record, it is not reasonably probable that the court would have found defendant was in any way prevented from being fully present and fully participating in his trial based on any deficiencies in Interpreter Auelua’s qualifications or performance during trial.

B. The Life Term and Use Enhancement on Count 1 Were Properly Not Stayed

Defendant claims the court erroneously failed to stay imposition of his life term on count 1 for kidnapping to commit rape or oral copulation (§ 209, subd. (b)(1)), together with his 10-year personal use enhancement on count 1 (§ 12022.53, subd. (b)), because the court “used the kidnapping” to impose both the life term on count 1 under section 209, subdivision (b), and the 25-year-to-life terms in counts 2 through 5 under the one strike law (§ 667.61, subd. (d)(2)). We disagree there was any error.

1. Background

For his conviction in count 1 for kidnapping to commit rape or oral copulation (§ 209, subd. (b)(1)), defendant was sentenced to life with a minimum parole eligibility period of seven years, doubled to 14 years based on his prior strike conviction, plus 10 years for the personal use enhancement. A life term is required to be imposed for kidnapping to commit rape or oral copulation, among other crimes (*id.*, subd. (b)(1)), “if

the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense” (*id.*, subd. (b)(2)).

In counts 2 through 5, defendant was sentenced to 25 years to life under the one strike law (§ 667.61) doubled to 50 years based on his prior strike conviction. In these counts, defendant was convicted of oral copulation by force, sexual penetration by force, sodomy by force, and forcible rape. (§§ 288a, subd. (c)(2), 289, subd. (a)(1), 286, subd. (c)(2), 261, subd. (a)(2).) In each count, the jury found that defendant kidnapped Doe, the victim of the underlying offenses, and the movement of the victim “substantially increas[ed] the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense” within the meaning of section 667.61, subdivision (d)(2) of the one strike law.

2. Analysis

Under section 209, subdivision (d), “a person may not be punished under [section 209,] subdivision (b) and section 667.61 *for the same act that constitutes a violation of both subdivision (b) and Section 667.61.*” (Italics added.) Relying on this provision, defendant argues that his life term and use enhancement on count 1 must be stayed because the life term was imposed based on the “same act” that constituted a violation of both section 209, subdivision (b) and section 667.61, namely, the kidnapping of Doe with movement substantially increasing her risk of harm over the risk inherent in the underlying offenses. (§ 209, subd. (d).)

Defendant is mistaken. Under section 667.61, subdivision (a), a term of 25 years to life is required to be imposed on a person convicted of the offenses in counts 2 through 5, under *one or more of the circumstances* specified in subdivision (d) of section 667.61. The kidnapping enhancement was a circumstance described in subdivision (d)(2) of section 667.61. In addition, the court found that defendant had a prior conviction for continuous sexual abuse of a child (§ 288.5) within the meaning of section 667.61, subdivision (d)(1). Thus, the offenses in counts 2 through 5 were committed under *two circumstances* described in section 667.61, subdivision (d).

This triggered the application of section 667.61, subdivision (f), which requires the court to impose the maximum possible punishment authorized by law for sex offenses committed under more than one circumstance described in subdivision (d). As pertinent, the statute states: “If only the minimum number of circumstances specified in subdivision (d) . . . that are required for the punishment provided in subdivision (a) . . . to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) . . . rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. However, if any additional circumstance or circumstances specified in subdivision (d) . . . have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a) . . . and any other additional

circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other provision of law.” Section 209, subdivision (d), states that “[s]ubdivision (b) shall not be construed to supersede or affect Section 667.61.”

Thus, here, the court was required to use the prior conviction finding to impose the 25-year-to-life terms in counts 2 through 5 and to impose the life term on count 1 based on the increased risk of harm to Doe that was part of the kidnapping offense in count 1.

C. Concurrent Rather Than Consecutive Terms Were Imposed on Counts 2 Through 5

The January 28, 2011, sentencing minute order and the February 16, 2011, abstract of judgment each state that defendant was sentenced to a determinate term of 55 years, plus an indeterminate term of 214 years to life.

According to these documents, the aggregate sentence consists of seven years to life on count 1, doubled to 14 years to life based on the prior strike, plus 10 years for the personal use enhancement for a total of 24 years to life on count 1. The documents further state that defendant was sentenced to consecutive terms of 50 years to life on counts 2 through 5 (25 years to life on each count, doubled to 50 years to life based on the prior strike), plus 10 years for the personal use enhancements on each of these counts, plus one 5-year term for the prior serious felony conviction. (§ 667, subd. (a).) This resulted in the aggregate term of 55 years plus 214 years to life.

Defendant claims the sentencing minute order and abstract of judgment reflect errors, and that the determinate and indeterminate terms imposed on counts 2 through 5 must run concurrent to the 24-year-to-life term imposed on count 1. Defendant argues

that, in orally pronouncing judgment, the court did not clearly indicate that it was imposing consecutive terms on any counts. (§ 669.)

On October 11, 2012, we issued an opinion remanding the matter to the trial court with directions to *clarify* whether the terms were imposed concurrently or consecutively. (*People v. Solia* (Oct. 11, 2012, E053035) [nonpub. opn.].) Defendant petitioned for rehearing, claiming the opinion was contrary to section 669. We granted the petition on November 1, 2012, thereby vacating our October 11, 2012 opinion. (Rule 8.268(d).) By this opinion, we agree that the terms imposed on counts 2 through 5 must run concurrent to the 24-year-to-life term imposed on count 1, plus the single five-year prior serious felony enhancement (§ 667, subd. (a)), because in orally pronouncing sentence the court did not clearly indicate that any consecutive terms were to be imposed.

Section 669 provides, in pertinent part: “When any person is convicted of two or more crimes . . . 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 . . . shall run concurrently 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.”

Accordingly, when the court fails to state whether terms are to run consecutively or concurrently, section 669 requires the terms to run concurrently. (*People v. Downey* (2000) 82 Cal.App.4th 899, 912-915; *People v. Caudillo* (1980) 101 Cal.App.3d 122, 126-127; see also *People v. Black* (2007) 41 Cal.4th 799, 822 [§ 669 provides for “a

default” in favor of concurrent terms if court fails to exercise its discretion to impose consecutive terms]; cf. *People v. Edwards* (1981) 117 Cal.App.3d 436, 451-452 & fn. 4 [§ 669 does not apply if court indicates its intent to impose consecutive terms].)

In orally pronouncing sentence, the court here did not clearly indicate that it was imposing consecutive terms on any counts. In pronouncing judgment, the court said: “Now, with regard[] to Count 1, the kidnapping for the sex offense, it’s seven years to life, doubled because of the strike, so it would be 14 years to life. The . . . use of [a] firearm enhancement[] will be the full upper term of ten years.

“With regard to Count 2, oral copulation by force with the enhancement of kidnapping, which makes it then a 25 to life offense, and that [is] double[d] for 50 years to life. And I believe the enhancement for the kidnapping, which is what makes it doubled, that can’t be imposed because it’s already used, but the [personal use] enhancement of ten years will be imposed, plus the [section] 667[, subdivision (a)](1) enhancement, that’s serious prior felony of five years.

“As to Count 3, it will be the same exact sentence as to Count 2. And as to Count 4, it will be the same exact sentence as to Counts 2 and 3. And also Count 5, same exact sentence. So you’ll be sentenced to prison for *that term*.” (Italics added.)

The court’s statements in orally pronouncing the judgments or terms imposed on counts 2 through 5 are ambiguous, and as such do not clearly indicate that the court intended to impose consecutive rather than concurrent terms on counts 2 through 5. The court also failed to state any reasons for imposing consecutive sentences (rule

4.406(b)(5); see *People v. Coelho* (2001) 89 Cal.App.4th 861, 886) and did not pronounce an aggregate sentence. Had it done so, it would have indicated an intent to impose consecutive terms. But because the record does not clearly indicate that the court intended to impose consecutive sentences, all of the terms imposed on counts 2 through 5 must run concurrently to the 24-year-to-life term on count 1. (*People v. Caudillo, supra*, 101 Cal.App.3d at pp. 126-127.) Specifically, the 50-year-to-life terms, the 10-year personal use enhancements, and the five-year prior serious felony enhancements that the court orally imposed on counts 2 through 5 must run concurrent to the 24-year-to-life term on count 1.

To be sure, the court had discretion to impose consecutive terms on counts 2 through 5 (see § 669 [“Life sentences . . . may be imposed to run consecutively with one another”]), and as indicated, the January 28, 2011, sentencing minute order and the abstract of judgment each indicate that consecutive terms were imposed. But because the court did not clearly indicate that it was imposing consecutive terms on counts 2 through 5, the minute order and abstract must be considered clerical errors. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471-472 [discrepancy between judgment as orally pronounced and as entered in minutes is presumably the result of clerical error, and abstract of judgment can neither add to nor modify the judgment which it purports to digest or summarize].)

D. *Corrections to Court Records, Including the Abstract of Judgment*

At the sentencing hearing on January 28, 2011, the court awarded defendant 941 days of custody credits based on 627 days of actual custody, plus 314 days of conduct

credits under section 4019. At a subsequent hearing on February 4, 2011, conducted by a different judge, the court corrected the credits and reduced them to 721. (§ 2933.1.)

The parties agreed that the total number of local custody credits should have been 94, calculated under section 2933.1, not section 4019. The court corrected the sentence to award defendant 721 in total custody credits, comprising 627 in actual credits plus 94 in local custody credits calculated under section 2933.1 (15 percent of 627 equals 94). However, the February 4, 2011, minute order and the abstract of judgment indicate that the 94 days in local conduct credits were calculated under section 4019, not section 2933.1.

Defendant claims and the People agree that the February 4, 2011, minute order and the abstract of judgment must be corrected to reflect that defendant was awarded 94 days of local conduct credit under section 2933. 1, rather than section 4019. (*People v. Mitchell* (2006) 26 Cal.4th 181, 185.) But rather than correct the court's February 4, 2011, or January 28, 2011, sentencing minute orders, we direct the court to issue an additional sentencing minute order and a corrected abstract of judgment. In addition to reflecting that the terms imposed on counts 2 through 5 are to run concurrent to the term imposed on count 1, the new order and corrected abstract are to reflect that the 94 days of local conduct credits were calculated under section 2933.1, not section 4019.

IV. DISPOSITION

Because in orally pronouncing judgment the trial court did not clearly state that it was imposing consecutive terms on any counts, the terms imposed on counts 2 through 5,

including the 50-year-to-life terms, the 10-year personal use enhancements (§ 12022.53, subd. (b)), and the five-year prior serious felony enhancements (§ 667, subd. (a)), must be run concurrent to the 24-year-to-life term imposed on count 1 (§ 669). The matter is remanded to the trial court with directions to issue an additional sentencing minute order and a corrected abstract of judgment reflecting this judgment, and that defendant was awarded 94 days of custody credits under section 2933.1, not section 4019. A copy of the corrected abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.