Filed 3/28/12 P. v. Garcia CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILSON GARCIA et al., Defendants and Appellants.	B228211 (Los Angeles County Super. Ct. No. BA363319)

APPEALS from judgments of the Superior Court of Los Angeles County. William C. Ryan, Judge. Reversed in part, affirmed in part and remand for resentencing.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant Wilson Garcia.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant Ivan Stephan Martinez II.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant Nissahni Robinson.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven E. Mercer and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Wilson Garcia (Garcia), Nissahni Robinson (Robinson) and Ivan Stephan Martinez II (Martinez) (collectively appellants) appeal from the judgments entered upon their convictions by jury of home invasion robbery (Pen. Code, § 211, count 1),[1] kidnapping (§ 207, count 2), as a lesser included offense of kidnapping for robbery (§ 209, subd. (b)(1)), and false imprisonment by force (§ 236, count 5). Garcia also appeals from his conviction of carrying in public a loaded firearm not registered to him (former § 12031, subd. (a)(1), count 4).[2] With regard to counts 1, 2, and 5, the jury found to be true as to all appellants the allegation that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) and, as to Garcia, that he personally used a firearm within the meaning of section 12022.53, subdivision (b). With regard to count 1 the jury found to be true as to all appellants that they voluntarily acted in concert and entered an inhabited dwelling within the meaning of section 213, subdivision (a)(1)(A). Garcia admitted suffering a prior felony conviction, which the trial court determined to constitute a strike within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) and prior serious felony within the meaning of section 667, subdivision (a)(1). The trial court sentenced Martinez, Robinson and Garcia to aggregate state prison terms of nine years, 12 years, and 33 years eight months, respectively.

Appellants contend that (1) the trial court erred in failing to stay execution of sentence on their convictions of kidnapping pursuant to section 654. Garcia contends that (2) the trial court erred in failing to stay execution of sentence on his conviction of carrying a firearm pursuant to section 654. Garcia and Robinson further contend that (3) they are entitled to additional presentence credit, and (4) that their abstracts of judgment must be corrected to reflect the oral judgment.

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

2 Section 12031, subdivision (a)(1) was repealed effective January 1, 2012, and readopted as section 25850, subdivision (a). We continue to refer to the former statute.

Martinez joins in the contentions of the other appellants to the extent applicable to him. (Cal. Rules of Court, rule 8.200(a)(5); see *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

We reverse the judgments in part, affirm in part and remand for resentencing.

FACTUAL BACKGROUND

In October 2009, Olympia Boris (Boris) worked full time at the medical office of her father, Dr. George Boris (Dr. Boris). She was also living with him on Saint Ives Drive, in Los Angeles. Boris lived on the middle level of the three level home, below the entry level. Dr. Boris had a safe in the closet of Boris's bedroom. Boris knew Robinson, a nurse at her father's office, with whom she had a good relationship. Robinson had been to Dr. Boris's house several times.

On October 12, 2009, Boris set the house alarm as she was leaving for work. Dr. Boris had already left. While outside the front door locking it, Boris saw Martinez holding flowers approach her and say "Olympia." Garcia was behind him with a gun pointed down. Both men wore medical scrubs. Garcia ordered Boris to open the door. Frightened, she told the men that the alarm was on and that she would deactivate it inside. She opened the door, and the men followed her into the kitchen where she turned off the alarm but signaled the silent duress code.

Garcia told Boris: "I want you to go downstairs. If you listen to me, I'm not going to hurt you." He said he was there to collect money from her older brother for "unfinished business." As Garcia followed Boris down the stairs, he nudged her with the gun. Boris was crying and very frightened.

Once downstairs, Boris unlocked the door to her bedroom as ordered. Garcia then ordered her to lie face down on the bed. He and Martinez tied her hands behind her back, tied her legs together and placed a pillow case over her head. Boris feared for her life, cried and begged them not to make her do that. She heard a lot of noise, like appellants were moving something "really big." After a few minutes the noise stopped. Boris heard a helicopter. She was able to escape the tie around her feet, shook off the pillow case and ran out of the room, her hands still tied. On her way up the stairs, she ran around the safe

that had been moved from her bedroom. Outside, a police officer removed the ties restraining her hands.

Police apprehended Garcia and Martinez, who were wearing scrubs with identification numbers that were the same as scrubs used in Dr. Boris's office. The Chevrolet Tahoe (the Tahoe) used for their escape was registered to Robinson. Its rear license plate was covered by a piece of cardboard. Officers recovered cell phones from Martinez and Garcia which contained several text messages around the time of the robbery to and from Robinson, informing Garcia when Dr. Boris had left for the office, that Boris was home alone and other information apparently referring to the robbery.

Inside the Tahoe, officers recovered scrubs, a loaded gun reported stolen out of Las Vegas, latex gloves, a surgical mask, zip ties, fresh flowers, printout, and other items.

When word of the robbery reached Dr. Boris's office, he immediately left. Robinson was shaking uncontrollably. She also left and did not return. At 11:30 a.m., Robinson was seen walking from her apartment complex, pulling a suitcase.

DISCUSSION

I. Section 654 Stay

A. Kidnapping count (count 2)

1. Appellants' convictions

Appellants were convicted of home invasion robbery (count 1), kidnapping (count 2) and false imprisonment by force (count 5). Garcia was also convicted of carrying a loaded firearm in public not registered to him (count 4). The jury found that as to all appellants on counts 1, 2, and 5 a principal was armed with a firearm (§ 12022, subdivision (a)(1)) and, as to Garcia, that he personally used a firearm (§ 12022.53, subd. (b)). With regard to the home invasion robbery in count 1, the jury found to be true that appellants acted in concert and entered an inhabited building. (§ 213, subd. (a)(1)(A).) The trial court determined that Garcia suffered a prior felony strike and prior serious felony.

2. Trial court's ruling regarding section 654

At the sentencing hearing, the parties argued whether section 654 barred appellants from being punished for the kidnapping. The prosecutor argued that if the jury had come back with convictions for kidnapping for robbery and home invasion robbery, she would have conceded that section 654 applied. However, "because of the fact that the jurors came back on a lesser on the kidnapping, that was a message out to everybody that they believed that the simple kidnapping was a gratuitous separate act."

The trial court ruled: "I do not agree that Count 2 [kidnapping] is stayed pursuant to Penal Code section 654. . . . I would agree that the movement up to the point of the safe was for the purposes of the robbery, and if that's as far [as] it went, I agree. But it didn't go that far. [¶] Then they moved to the bed, and they tied her up, and I think that movement to the bed is enough for the separate crime of kidnapping, and that's not incidental. It's part of the same robbery. So I don't think that count 2 is . . . stayed pursuant to Penal Code section 654." The trial court then proceeded to sentencing.

3. Appellants' sentences

a. Garcia

The trial court sentenced Garcia to an aggregate prison term of 33 years eight months, as follows: on count 1, six years doubled to 12 years as a second strike plus 10 years for personal firearm use pursuant to section 12022.53, subdivision (b); on count 2, a consecutive term of one-third the midterm of five years, or one year eight months doubled as a second strike, plus one-third of 10 years, or three years four months, pursuant to section 12022.53, subdivision (b); on count 4, the midterm of two years, doubled as a second strike, to be served concurrently with counts 1 and 2; and on count 5, the midterm of two years, doubled as a second strike, plus 10 years pursuant to section 12022.53, subdivision (b), stayed pursuant to section 654. The firearm enhancement pursuant to section 12022, subdivision (a)(1) on counts 1, 2, and 5 were stricken.[3] The

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[3] The transcript is unclear whether the one-year enhancement under section 12022, subdivision (a)(1) was stricken or not.

trial court added five years for the serious felony enhancement in section 667, subdivision (a). It awarded Garcia 361 days of actual custody credit and 26 days of conduct credit for a total of 387 days presentence credit.

b. Robinson

The trial court sentenced Robinson to an aggregate prison term of 12 years, as follows: on count 1, the upper term of nine years pursuant to section 213, subdivision (a)(1)(A) plus a consecutive one-year term on the principal armed allegation in section 12022, subdivision (a)(1); on count 2, a consecutive sentence of one-third the midterm or one year eight months plus one-third of one year pursuant to section 12022, subdivision (a)(1), or four months; on count 5, a concurrent midterm of two years, stayed pursuant to section 654. The trial court awarded Robinson 360 days of actual custody credit and 26 days of conduct credit for a total of 386 days presentence credit.

c. Martinez

The trial court sentenced Martinez to an aggregate prison term of nine years, as follows: on count 1, the midterm of six years plus one year pursuant to section 12022, subdivision (a)(1); on count 2, a consecutive one-third the midterm of five years, or one year eight months, plus one-third of one year, or four months, pursuant to section 12022, subdivision (a)(1); on count 5 the midterm of two years concurrent to counts 1 and 2, stayed pursuant to section 654. The trial court awarded Martinez 361 days of actual custody credit plus 26 days of conduct credit for a total of 387 days presentence credit.

4. Contentions

Appellants contend that the trial court erred in failing to stay execution of their sentences for kidnapping pursuant to section 654. They argue that the kidnapping was part of an indivisible course of conduct with the single objective of robbing the safe. This contention has merit.

5. Applicability of section 654

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be*

punished under more than one provision." (§ 654, subd. (a), italics added.) A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, on the other hand, "the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Whether multiple convictions were part of an indivisible transaction is primarily a question of fact (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583), each case determined based upon its own facts (*In re Adams* (1975) 14 Cal.3d 629, 633). We review a finding that there was more than one objective under the substantial evidence test (*People v. Osband* (1996) 13 Cal.4th 622, 730–731); we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.) We must determine whether the violations were a means toward the objective of commission of the other. (*People v. Beamon, supra,* 8 Cal.3d at p. 639.)

6. The kidnapping was incidental to the robbery

The trial court found that the robbery and kidnapping arose from independent, multiple criminal objectives and was not incidental to the robbery. (See *People v. Beamon*, 8 Cal.3d at p. 639.) We disagree and find no evidence that Boris was kidnapped for any reason other than to facilitate the robbery.

Garcia and Martinez kidnapped Boris to obtain her cooperation in locating and gaining access to the safe they intended to take. They confronted her outside Dr. Boris's residence as she was leaving for work. Robinson had informed them by text messages that Boris was home alone. Garcia, holding a gun, forced Boris to unlock the front door, turn off the security alarm and lead them downstairs to her room. He told her that he

would not hurt her if she cooperated and that they were there to "collect money." When they got to Boris's room downstairs, she unlocked the door.

According to the trial court, up until this point, the movement of Boris was to facilitate the robbery. But the trial court concluded that when the perpetrators told Boris to lie on the bed, tied her up and covered her head with a pillow case, "that movement . . . [was] enough for the separate crime of kidnapping, and that's not incidental." The trial court provided no explanation of what separate objective appellants could have had for that conduct, and we find insufficient evidence of any independent objective.

The kidnapping occurred at the same time as the robbery, a factor tending to show that the kidnapping was incidental to the objective of committing the robbery. The close temporal proximity of the offenses, although not determinative on the question of whether there was a single objective, is a relevant consideration. (*People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10; see also *People v. Foster* (1988) 201 Cal.App.3d 20, 27–28 [where imprisonment of victim occurred after robbery completed section 654 stay inapplicable].)

Boris was not physically injured and was told that she would not be hurt if she cooperated. Thus, this is not a case of a gratuitous criminal act harming an unresisting victim for no reason at all. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190 [harming an unresisting robbery victim has a separate objective from the robbery itself]; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1016.)

There was also no evidence that appellants placed Boris on the bed, tied her up and placed a pillow case over her head to avoid detection for the crime. (See *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657–1658; see also *People v. Coleman* (1989) 48 Cal.3d 112, 162.) Neither Garcia nor Martinez threatened Boris with reprisal if she reported the crime. The pillow case placed over her head was not to prevent her from identifying them, as she had already seen them when they approached her front door and walked her to her bedroom.

Tying up Boris on the bed facilitated the robbery. Once she let appellants into her house and led them to her room, what were they to do with her as they attempted to move the heavy safe? They could not very well thank her for her assistance and allow her go on her merry way, likely to summon the police and foil the robbery. "In California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.' [Citation.]" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Hence, tying Boris up would also give the perpetrators time to reach a place of relative safety, that is, complete their crime.

Finally, we agree with appellants that subjecting them to punishment for both the robbery and kidnapping would undermine the factual findings of the jury. The jury rejected the charge of kidnapping for robbery and convicted appellants of the lesser offense of simple kidnapping. To prove simple kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear, (2) the movement was without the person's consent, and (3) the movement of the person was for a substantial distance. (*People v. Dalerio* (2006) 144 Cal.App.4th 775, 781; *People v. Jones* (2003) 108 Cal.App.4th 455, 462.) Proof of aggravated kidnapping to commit robbery, in addition to the simple kidnapping elements, requires a finding of the additional element that the movement of the victim is not merely incidental to the commission of the robbery and substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself. (*People v. Curry* (2007) 158 Cal.App.4th 766, 779; § 209, subd. (b)(2).) It follows from the jury's verdict that it was this additional element of kidnapping for robbery that the jury failed to find, as the other elements were found in connection with the simple kidnapping guilty verdict.

The trial court's failure to stay punishment for the kidnapping undermined the jury's finding that the movement was incidental to the robbery and did not substantially increase the risk of harm to the victim. The constitutional guaranty of a jury trial and due process requires that the jury decide all material issues in support of the charges. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278; *People v. Flood* (1998) 18 Cal.4th 470, 479–480.) A jury's decision is undermined if a factor it found not to exist may still

be considered by the trial court to increase the defendant's punishment. (See *People v. Gragg* (1989) 216 Cal.App.3d 32, 44–45 ["What is prohibited is the unwarranted practice of imposing extra punishment on a defendant convicted of one charge based on a conclusion by the judge the jury erred in acquitting the defendant on any companion charges"].)

We, therefore, conclude that the trial court erred in failing to stay execution of sentence on the kidnapping count pursuant to section 654. The firearm enhancement associated with the stayed count must also be stayed. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711 ["'an enhancement must necessarily be stayed where the sentence on the count to which it is added is required to be stayed [under section 654],'" disapproved on other grounds in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8].)

A defendant's aggregate prison term under the determinate sentencing law "cannot be viewed as a series of separate independent terms, but rather must be viewed as one prison term made up of interdependent components. [¶] . . . [¶] In making its sentencing choices in the first instance the trial court undoubtedly considered the overall prison term to be imposed." (*People v. Savala* (1983) 147 Cal.App.3d 63, 69–71, disapproved on other grounds in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044; see also *People v. Rojas* (1988) 206 Cal.App.3d 795, 802 [remanded for resentencing where section 667, subdivision (a) improperly imposed].) In light of our reversal of appellants' sentences on the kidnapping count, we remand for resentencing.

B. Gun possession count (count 4)

1. Contention

Garcia contends that the trial court erred in failing to stay his sentence for carrying a loaded firearm not registered to him (count 4). He argues that punishing him for both the unlawful possession of the firearm and enhancing his robbery conviction for his personal use of that firearm constitute multiple punishments for the same act in violation of section 654. We agree.

2. Applicability of section 654 to enhancements

Appellate courts have disagreed as to whether section 654 applies to enhancements. (*People v. Coronado* (1995) 12 Cal.4th 145, 157 (*Coronado*); see also *People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7.) There are two different categories of sentence enhancements: (1) status enhancements, which go to the nature of the offender, such as recidivist enhancements; and (2) conduct enhancements, which go to the nature of the offense, such as firearm or bodily injury enhancements. (*Coronado, supra,* at p. 156; *People v. Ahmed* (2011) 53 Cal.4th 156, 161 (*Ahmed*); *People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519.) *Coronado* held that section 654 does not apply to prior conviction enhancements (status enhancements) because they "'relate to the *status* of the recidivist offender engaging in criminal conduct, not to the conduct itself.'" (*Coronado, supra,* at p. 157.) Because a "repeat offender (recidivist) enhancement" does not implicate multiple punishment of an act or omission, section 654 is inapplicable. (*Coronado, supra,* at p. 158; see also *People v. Price* (1992) 4 Cal.App.4th 1272, 1277 [§ 667, subd. (a) creates a status, not a conduct enhancement, and § 654 does not apply].) The court in *Coronado* left open the question of whether section 654 can apply, at least, to some conduct enhancements.

The modern trend has been for appellate courts to hold, or at least to assume, that section 654 does apply to conduct enhancements. (*Ahmed, supra,* 53 Cal.4th at p. 162.) This trend is supported by the express language of section 654 which "proscribes multiple punishment for the same act." (*People v. Moringlane* (1982) 127 Cal.App.3d 811, 817–818, disapproved on other grounds in *People v. Jones* (1991) 53 Cal.3d 1115, 1144–1145.) It states that it applies to "different provisions of law" that punish "an act or omission" in different ways. Nothing in section 654 explicitly prohibits its application to enhancements.

In the recent case of *Ahmed*, the Supreme Court confirmed that "as a default, section 654 does apply to enhancements [other than status enhancements dealt with in *Coronado*] when the specific statutes do not provide the answer." (*Ahmed, supra,* 53 Cal.4th at p. 163.) *Ahmed* involved the question of whether section 654 prohibits

imposition of both the great bodily injury enhancement and the firearm use enhancement because both apply to the same act. (*Ahmed, supra,* at p.162.) Thus, section 654 potentially applies to the firearm enhancement involved in the case before us.

3. Application of section 654 to possessing a firearm and using it

The appellate record is bereft of any evidence, let alone substantial evidence, that Garcia's possession of the firearm had any objective other than to assist in the robbery. "'[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved.'" (*People v. Bradford* (1976) 17 Cal.3d 8, 22; *People v. Garcia* (1978) 86 Cal.App.3d 314, 317.) For example, in *People v. Killman* (1975) 51 Cal.App.3d 951, the defendant had given his girlfriend money to purchase a gun. Several months before the robbery, the defendant used the gun for target practice and took it with him when he moved to a new residence. (*Id.* at p. 955.) Section 654 did not bar punishment on both first degree robbery and firearm possession charges; the defendant was properly punished "for his own personal possession of the gun before the robbery." (*People v. Killman, supra,* at p. 959; see also *People v. Garfield* (1979) 92 Cal.App.3d 475, 478 [defendant properly sentenced for burglary and possession of a weapon by a narcotics addict, based upon his possession of a firearm stolen during the burglary; he had the weapon in his personal possession when arrested six days after the burglary and had not stored it with the rest of the fruits of the burglary].)

"'On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.'" (*People v. Bradford, supra,* 17 Cal.3d at p. 22; *People v. Garcia, supra,* 86 Cal.App.3d at p. 317.) *People v. Jurado* (1972) 25 Cal.App.3d 1027 (*Jurado*) is illustrative. In that case, the Court of Appeal concluded that where a weapon was possessed in commission of a burglary and was the basis for elevating that offense to first degree, and there was no evidence that the defendant possessed the gun before or after the burglary, the defendant could not properly be sentenced for both burglary and carrying a concealed weapon, even if the terms were

to run concurrently. (*Id.* at p. 1033; *People v. Duran* (1976) 16 Cal.3d 282, 296, fn. 16 [citing *Jurado* with approval and in dictum stating, "We note, however, that as there is no evidence in the record now before us that defendant possessed the weapon except during the assault [*Jurado*] he could not have been properly sentenced under both violations found against him. (Pen. Code, § 654.)"]; *People v. Garcia*, *supra,* 86 Cal.App.3d at p. 317 [*Jurado* cited with approval].)

Here, there is no substantial evidence that the firearm was possessed by Garcia other than in conjunction with the robbery of Dr. Boris's home. The only evidence regarding the firearm was that Garcia was holding it at the scene of the robbery, when Boris first saw Garcia and Martinez as she was locking the front door to the house. The gun was found in the Tahoe after Garcia and Martinez were arrested fleeing the scene of the robbery. There was no evidence of how, from whom and when Garcia obtained the gun. There was no evidence that the gun had been previously carried or used by him for any other purpose. (See *People v. Killman, supra,* 51 Cal.App.3d 951.) There was no evidence he possessed the gun, other than at the scene of the robbery. As appellant aptly points out, it is possible, although purely speculative, that the gun was handed to Garcia by Martinez at the moment they approached Boris. The fact is, we do not know. We do know, however, that the People introduced no evidence on that point. We therefore conclude that section 654 precludes multiple punishment of Garcia for both the 10-year firearm use enhancement and the conviction of possessing a loaded firearm not registered to him.

"If multiple punishment has been erroneously imposed, the appropriate procedure on appeal is to eliminate the effect of the judgment as to the lesser offense or offenses insofar as the penalty alone is concerned." (*People v. Diaz* (1967) 66 Cal.2d 801, 807.) As the punishment for the possession charge is less than the personal firearm use enhancement, we reverse Garcia's sentence in count 4 and order that it must be stayed.

II. Additional presentence credits

A. Background

Garcia and Martinez were arrested on October 12, 2009, and sentenced on October 8, 2010. Robinson was arrested a day later and was sentenced with the other appellants.

At sentencing, Garcia and Martinez were each awarded 361 days of custody credit and 26 days of conduct credit, for total presentence credit of 387 days. Robinson was awarded 360 days of custody credit and 26 days of conduct credit, for total presentence credit of 386 days.

On May 27, 2011, Martinez's counsel filed a request in the trial court for modification of his presentence credits. He informed the court that his award of 361 days custody credit was erroneous and that he was actually in custody for 362 days. He also advised the court that pursuant to section 2933.1, he should have been awarded 15 percent of 362 days or 54 days of conduct credit, not the 26 days awarded. The trial court agreed and amended the abstract of judgment as requested.

On February 11, 2011, Garcia's counsel filed a request in the trial court for a similar modification of his conduct credit, informing the court that he received only 26 days of conduct credit on his 361 days of custody and that he should have received 54 days of conduct credit. The record does not indicate whether the trial court has acted on Garcia's request.

B. Contentions

Garcia and Robinson contend that they are entitled to additional presentence conduct credits. They argue that they are entitled to 15 percent of 361 days custody, or 54 days, conduct credit and that they were erroneously awarded only 26 days. Though they did not request it in their briefs, it appears that, like Martinez, Garcia and Robinson are also each entitled to an additional day of custody credit.

The People agree with Garcia and Robinson's contention, as do we. They also agree that Garcia and Robinson are each entitled to an additional day of custody credit,

but claim that they forfeited that claim by failing to assert it in their appellate briefs. We disagree with the People.

C. Forfeiture

We conclude that the error in computing the actual custody days is a simple computation error, which has resulted in an unauthorized sentence and does not involve any disputed fact or exercise of discretion. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.) Because there are other issues to be decided on this appeal, we may resolve an issue of credits. (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.) It would make no sense to refuse to consider this issue which is correctable at any time.

D. Appellants are entitled to 15 percent conduct credits

A defendant convicted of a violent felony listed in section 667.5, subdivision (c) and sentenced to state prison "shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." (§ 2933.1, subds. (a), (c) & (d).) Any robbery is a violent felony, as is kidnapping. (§ 667.5, subds. (c)(9) & (c)(14).)

Garcia, awarded 361 days of conduct credit and 26 days of conduct credit is entitled to one additional day of custody credit plus 54 days of conduct credit, for a total of 416 days of presentence credit.

Robinson, awarded 360 days of custody credit and 26 days of conduct credit, is also entitled to one additional day of custody credit and 54 days of conduct credit, for a total of 415 days of presentence credit.

III. Correction of abstracts of judgment

A. Background

At the sentencing hearing, the trial court sentenced Garcia on count 5 to the midterm of two years doubled as a second strike, staying execution pursuant to section 654. The abstract of judgment reflects the imposition of a concurrent term of four years on that count.

The trial court sentenced Robinson to the midterm of two years on count 5, concurrent with counts 1 and 2, staying execution pursuant to section 654. The abstract

of judgment for that count has the boxes stating "concurrent" and "consecutive/violent" checked.

B. Contentions

Garcia and Robinson contend that the abstracts of their judgments must be corrected to comport with the oral pronouncement of judgment. They argue that the abstracts do not accurately reflect the trial court's oral pronouncement that it was staying execution of sentence on count 5 pursuant to section 654. The People agree as do we.

C. Oral pronouncement is paramount

Rendition of judgment is an oral pronouncement. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Entry of judgment in the minutes is a clerical function. (*Ibid.*; § 1207.) An abstract of judgment is not the judgment of conviction and cannot add to or modify the judgment it purports to summarize. (*People v. Mesa, supra,* at p. 471.) The oral pronouncement of judgment controls over the abstract of judgment. (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1416.) If a minute order or abstract of judgment fails to reflect the judgment pronounced by the trial court, the error is clerical and the record can be corrected at any time to make it reflect the true facts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa*, *supra,* at p. 471; see also *People v. Williams* (1992) 10 Cal.App.4th 827, 830, fn. 3; *People v. Jack* (1989) 213 Cal.App.3d 913, 915–916.)

D. Conflict in oral pronouncement here

Garcia and Robinson's abstracts of judgment do not conform to the trial court's oral pronouncement that count 5 is stayed pursuant to section 654. They must therefore be corrected to reflect that fact.

IV. Striking firearm enhancement

As set forth in part IA3a, *ante*, the trial court imposed the 10-year personal use of a firearm enhancement in section 12022.53, subdivision (b). It struck the principal firearm use enhancement in section 12022, subdivision (a)(1).

On February 23, 2012, we requested supplemental briefs from the parties on the question of whether the section 12022.5, subdivision (a)(1) enhancement was properly

stricken or whether it should have been imposed and stayed, as set forth in *People v. Gonzalez, supra,* 43 Cal.4th 1118.

On March 5, 2012, the People filed a supplemental brief arguing that *Gonzalez* mandates that the sentence on section 12022, subdivision (a)(1) be imposed and stayed rather than stricken. By letter of March 1, 2012, appellant stated that he "had nothing to add in light of the reasoning articulated in *People v. Gonzalez*."

Hence, on resentencing, the section 12022, subdivision (a) firearm enhancement must be imposed and stayed, not stricken.

DISPOSITION

Appellants' sentences for kidnapping and Garcia's sentence for possession of a loaded firearm are reversed and the judgments modified as follows: (1) with respect to each appellant's judgment, execution of sentence on count 2 for kidnapping and the firearm enhancements associated with that count is stayed, (2) with respect to Garcia's judgment, execution of sentence on count 4 is stayed and presentence credit is modified to be 54 days of presentence conduct credit and 362 days of custody credit through October 8, 2010, and (3) Robinson's judgment is modified to provide 54 days of presentence conduct credit and 361 days of custody credit through October 8, 2010. In all other respects the judgments are affirmed. On remand the trial court is directed to resentence appellant consistent with the foregoing modifications, to impose and stay the section 12022, subdivision (a) firearm enhancement, recalculate presentence credit as directed in *People v. Buckhalter* (2001) 26 Cal.4th 20 and issue corrected abstracts of judgment consistent with this decision.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ