Filed 12/28/17 P. v. Parker CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KENNETH TERRELL PARKER, Defendant and Appellant.	B268147 (Los Angeles County Super. Ct. No. GA076587)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed as modified with instructions.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

After the trial court ruled defendant Kenneth Terrell Parker mentally competent to stand trial, a jury found him guilty of kidnapping to commit rape, attempted forcible rape, and two counts of assault with intent to rape. The court imposed the mandatory sentence of seven years to life on the kidnapping count and consecutive determinate sentences on the remaining counts; it stayed the sentence for attempted forcible rape pursuant to Penal Code section 654.[1]

On appeal, defendant contends the court's competency determination was supported by inadequate evidence, namely "fundamentally flawed expert opinions" that ignored his seizure disorder and impermissibly incorporated case-specific hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). He further argues that one of his convictions for assault with intent to rape was not supported by substantial evidence of his intentions, and that the trial court violated section 654 by sentencing him for both kidnapping to rape and assaulting with intent to rape the same victim. We find no reversible error. However, we direct the trial court to amend the abstract of judgment to reflect defendant's determinate sentences as well as his indeterminate one. So modified, the judgment is affirmed in all respects.

PROCEDURAL HISTORY

An information filed June 8, 2009 alleged defendant kidnapped victim Linda T. to commit rape (§ 209, subd. (b)(1), count 1), assaulted Linda T. with the intent to commit rape (§ 220, subd. (a)(1), count 2), attempted to forcibly rape Linda T. (§§ 261, subd. (a)(2), 664, count 3), and assaulted victim Jane Doe

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

with the intent to commit rape (§ 220, subd. (a)(1), count 4.) Defendant pled not guilty to the charges. The case subsequently was continued numerous times.

In September 2012, defendant's attorney declared a doubt as to his mental competency pursuant to section 1368 and the court ordered criminal proceedings adjourned. Defendant was moved to Patton State Hospital (Patton).

In April 2013, the medical director at Patton certified that defendant had been restored to competency pursuant to section 1372. Criminal proceedings resumed shortly thereafter. The trial court subsequently denied defendant's motion for a competency hearing, and the matter proceeded to jury trial in February 2014. The court declared a mistrial after defense counsel discovered and declared a conflict during trial. The court appointed new counsel for defendant and continued the matter.

In April 2014, the court adjourned the criminal proceedings a second time after defendant's new attorney declared a doubt as to his competency. In February 2015, the parties agreed to a court trial on the issue of defendant's competency. The court held a competency trial over three days in June and August 2015. It found defendant competent and resumed criminal proceedings against him on August 18, 2015.

Defendant proceeded to jury trial in October 2015 and was found guilty of all charges. The court sentenced defendant to seven years to life in state prison on count 1, kidnapping to commit rape. On count 2, assault with intent to rape Linda T., the court imposed the high term of six years, to run consecutively to the kidnapping sentence. The court found that count 3, attempted forcible rape of Linda T., "merges with" count 2 under section 654 and accordingly imposed no additional term

on count 3. On count 4, the assault with intent to rape Jane Doe, the court sentenced defendant to the midterm of four years, to run consecutively to the sentences on counts 1 and 2. The court imposed various assessments, fines, and fees, and awarded defendant 2,745 days of custody credit.

Defendant timely appealed.

FACTUAL BACKGROUND

On the evening of April 23, 2009, Los Angeles County Sheriff's Department (LASD) detective Steven Kays was participating in an undercover surveillance operation in San Gabriel. He and several other law enforcement officers were stationed in the vicinity of a target house on South Palm Avenue; Kays was in an unmarked vehicle in a parking lot.

At around 7:30 p.m., Kays saw defendant walking southbound on Palm, on the west side of the street. Kays "kept an eye on him to see if [he] would potentially then go to our target house." Kays also radioed an alert to the other members of the surveillance team. As defendant passed in front of Kays's vehicle, he crossed the street and continued walking southbound, out of Kays's sight. Shortly thereafter, Kays heard a radio call from another member of his team stating that he saw defendant stop and have a conversation with "an unknown Asian female adult."

That team member, LASD detective Michael Duncan, testified that he saw defendant stop and have a brief conversation with an Asian woman who was walking northbound on Palm Avenue. According to Duncan, "The woman slowed down momentarily as he appeared to be conversing with her. She continued to walk northbound on the sidewalk. He remained stationary . . ., but still facing her. As she walked away, it

appeared to me he was still trying to engage her in conversation." When the woman continued walking, defendant turned around and began walking after her. Duncan saw defendant's walk become a run as he neared the woman. Duncan could not see the woman, but testified that he heard a female voice scream. He then saw defendant run, alone, "in a northwesterly direction towards Valley Boulevard."

Detective Kays had a better view of defendant's interaction with the woman, Jane Doe. Doe entered Kays's line of sight, walking northbound on Palm, soon after defendant left it. A short time later, Kays saw defendant "running at full speed northbound on Palm Avenue directly towards the female who now has her back to him." Kays testified that defendant "ran up behind her, grabbed her in what I would call a bearhug [*sic*] from behind and around her waist, picked her up off the ground; and then I saw his right hand go towards her groin" or "crotch area." Defendant's hand remained above Doe's blue jeans, but stayed in the groin region "[t]he entire time he held her up." Defendant dropped Doe when she began screaming loudly. Defendant then ran away, "at full speed from the location she was, across the street northbound toward Valley Boulevard." Doe resumed walking northbound on Palm.

Kays testified that he "believe[d] that a crime had occurred"; the incident did not appear consensual to him. Kays made a radio call to the other members of his surveillance team, informing them that some kind of "sexual battery" may have occurred and telling them to keep an eye on defendant.

Kays decided to break his undercover status and approach Doe about the incident. He pulled out of the parking lot and drove along Palm until he reached Doe. He identified himself,

showed Doe his badge, and asked her to tell him what happened. Kays testified that Doe "appeared very nervous [and] very scared." She told him, "'He had grabbed me. He grabbed me." As Kays was attempting to elicit more information from Doe—he testified there was a language barrier—he heard a call on his radio stating that "defendant had now gone into a business on Valley Boulevard, grabbed a female and forced her to the back of the business out of view." Kays let Doe walk away and drove to assist his fellow officers; he "figure[d] we [would] try to find her at some point." On cross-examination, Kays admitted LASD's later efforts to locate Doe were unsuccessful.

LASD detective Dwayne Bednar testified he also was part of the surveillance team on April 23, 2009. He was stationed in an unmarked truck on Valley Boulevard. At approximately 7:30 p.m., he heard a radio call about a man running northbound on Palm. Bednar observed a man running and began following the man in his truck. Bednar testified that the man, whom he identified in court as defendant, slowed to a walk but kept looking back toward Palm Avenue.

As defendant walked down Valley Boulevard, he looked in the windows of various businesses. He looked inside a salon before opening its door and entering. From his vantage point just outside the salon, Bednar saw defendant engage the salon's sole occupant, an Asian woman, in conversation. He saw the woman "pointing towards the rear of the store maybe giving directions" to defendant. Defendant then walked to the back of the salon and entered a room in the eastern corner.

Bednar saw defendant emerge from the room and have another conversation with the woman, whom Bednar identified in court as Linda T. Bednar was unable to hear the conversation,

but saw Linda T. gesturing toward the outside of the salon; he testified that she appeared to be giving directions. Bednar then saw defendant and Linda T. walk toward the door. Defendant exited, and Linda T. stayed inside at the threshold.

Defendant walked about 10 feet down the street before making an "abrupt turn around" back toward the salon. He pushed the salon door open and grabbed Linda T., who was still standing there, "by the waist with both hands." Bednar described the grab as "somewhat of a bear hug" that "looked like it was going to be a tackle on the 50-yard line." Bednar saw defendant push or drag Linda T., whom he described as "somewhat petite," to the back of the salon. Linda T. struggled, but defendant, who was "large," "had control over her arms," lifted her feet from the ground, and succeeded in taking her to the back of the salon.

Bednar testified that he was shocked by what he was observing. He put out a call over the radio, requesting backup, and prepared to enter the salon. While he was putting on his protective vest and LASD badge, Bednar lost sight of defendant and Linda T.

Kays responded to Bednar's call. When he arrived at the salon, Kays put on his protective vest and joined Bednar and Officer Rebecca Gomez, a San Gabriel patrol officer. All three officers testified that they entered the salon and conducted a protective sweep. They then headed to a closed door at the back, where they believed defendant had taken Linda T. Kays testified that he heard a female voice coming from inside the closed room, saying, "'No. No. No. Stop.'" Bednar testified that he heard voices and "commotion" coming from within the room. Gomez testified that she heard screaming and a distressed female voice shouting, "No. Please no."

Kays forced the door open with his shoulder. He testified that defendant and Linda T. were in a "corner area." "She was turned facing him, and he was facing her, and . . . he was physically on her when we got the door open." Bednar also testified that Linda T. and defendant were in the back corner of the room, "face-to-face" and so close they were touching. According to the officers, Linda T. was crying and looked "disheveled," "distraught," and "frantic." Kays and Gomez further testified that Linda T.'s blouse was ripped open and her face and neck were red. Bednar testified that defendant's "shorts were down off of his waist, but still attached to his hip area," and Gomez testified that the button and zipper of defendant's shorts were undone. Bednar "dealt with" defendant while Kays pulled Linda T. from the room.

Linda T. testified[2] that she was working at a hair salon on Valley Boulevard on the evening of April 23, 2009. She was there alone; her coworker had left at 7:00 p.m. Linda T. was wearing a white shirt, jean skirt, and pantyhose. Beneath those garments she also had on a bra and tight smoothing undergarment that was similar to a one-piece bathing suit.

At around 7:30 p.m., defendant entered the salon and asked if he could use the bathroom. Linda T. told him he could and pointed toward the restroom at the back of the salon. Defendant came out a few minutes later and told Linda T. there was no toilet paper. Linda T. became suspicious, because she had put toilet paper in the restroom earlier in the day. Believing defendant was going to rob her, she got up from the chair she was

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[2] The parties stipulated "that on February 14, 2012[,] on April 10 of 2012, June 18 of 2013, and January 14, 2014, Linda T. pled to misdemeanor crimes amounting to moral turpitude."

sitting in and tried to leave the salon. Defendant followed her, however, and grabbed her, forcing her back into the salon.

Defendant held Linda T. with his left arm and pushed her toward the restroom with his right. She struggled but could not overcome his "very strong force." Defendant pushed her into the restroom and locked the door, telling her, "I want to fuck you." He also repeatedly told her to be quiet. Linda T. continued asking defendant questions, however, asking him what he was doing and telling him she would give him money if that was what he wanted. He repeated, "No. I want to fuck you. I want to fuck you," and began tearing at her clothes. He ripped several buttons off her blouse.

As Linda T. continued to yell and struggle with defendant, he hit her in the head, chest, and neck with his fists and a can of air freshener. Defendant bent Linda T. over the toilet and tried unsuccessfully to remove her skirt. He thrust his body against hers, and she felt his erect penis touch "the middle of [her] butt," which was still clothed. She told him, "Don't do that," and also said "No. No. No." He then turned her around and pushed her into a seated position on the toilet. As she stood up, facing defendant, police officers broke into the restroom and pulled her out. Linda T. testified that she was scared and crying; she did not know defendant or consent to any of his actions.

DISCUSSION

I. Competency

Defendant argues that his convictions cannot stand because he was incompetent to stand trial. He contends the record was "devoid" of evidence that he was competent, because the opinion of one of the prosecution's experts "lacked the material, information, and facts of appellant's seizure condition,

had a foundation that was inadequate as a matter of law, and did not constitute substantial evidence." Defendant further argues that the same expert's testimony included case-specific hearsay, in violation of *Sanchez*, *supra*, 63 Cal.4th 665, and his confrontation clause rights. We disagree.

A. Legal Principles

"'Trial of an incompetent defendant violates the due process clause of the Fourteenth Amendment to the United States Constitution (*Godinez v. Moran* (1993) 509 U.S. 389, 396, [125 L.Ed.2d 321, 113 S.Ct. 2680]) and article I, section 15 of the California Constitution.' [Citation.] 'California law reflects those constitutional requirements.'" (*People v. Nelson* (2016) 1 Cal.5th 513, 559.) Section 1367, subdivision (a) provides, "A person cannot be tried or adjudged to punishment . . . while that person is mentally incompetent. A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." When a defendant presents substantial evidence of incompetence, due process entitles him or her to a full competency hearing. (*People v. Lawley* (2002) 27 Cal.4th 102, 131 (*Lawley*).) He or she also has a statutory right to a jury trial of the question, though counsel is permitted to waive the right on the defendant's behalf. (*Ibid.*)

A defendant is presumed to be competent unless the trier of fact unanimously finds by "a preponderance of the evidence that the defendant is mentally incompetent." (§ 1369, subd. (f); see also *Lawley*, *supra*, 27 Cal.4th at p. 131; *People v. Rells* (2000) 22 Cal.4th 860, 867.) The party claiming incompetence bears the burden of proof. (See § 1369, subd. (f); *Medina v. California*

(1992) 505 U.S. 437, 440; *People v. Rells*, *supra*, 22 Cal.4th at p. 867.) We review the trial court's finding of competency for substantial evidence, viewing the record in the light most favorable to the verdict. (*Lawley*, *supra*, 27 Cal.4th at p. 131.) "'Evidence is substantial if it is reasonable, credible and of solid value.' [Citation.]" (*Ibid.*)

B. Hearing

1. Defense Evidence

Defendant called Dr. Ari Kalechstein, Ph.D., a clinical psychologist with a specialty in neuropsychology. Dr. Kalechstein met with defendant three times on three occasions, in July 2012, July 2014, and September 2014, for a total of approximately six or seven hours. Dr. Kalechstein prepared two reports documenting these meetings: one dated September 7, 2012, and another dated September 16, 2014. Both reports were admitted into evidence.

Dr. Kalechstein assessed defendant using several tests, including the Weschler Adult Intelligence Scale-IV (WAIS-IV), the MacArthur Competence Assessment Tool–Criminal Adjudication, the Selective Reminding Test, the b Test, the Rey 15-item Test, and the Woodcock Johnson–III Tests of Achievement. He concluded that defendant had an overall IQ score of 68, which he testified was in the "mild[ly] mentally retarded" or "intellectually impaired" range.[3] Dr. Kalechstein

[3] At the hearing and in reports, Dr. Kalechstein and other experts used the terms "mentally retarded" and "mental retardation." In accordance with current law and usage, this opinion uses the synonymous terms "'intellectually disabled'" and "'intellectual disability'" except when quoting. (See *People v. Townsel* (2016) 63 Cal.4th 25, 33, fn. 1 (citing Stats. 2012, ch. 448, the Shriver "'R-Word'" Act, "which revised various statutes

explained, however, that defendant's low IQ score alone was not sufficient to establish that defendant suffered from an intellectual disability.

According to Dr. Kalechstein, intellectual disability has three diagnostic criteria: (1) diagnosis prior to age 18; (2) an IQ score of at or below 70 or 75; and (3) impairments in adaptive functioning. Dr. Kalechstein testified that defendant met all three criteria.

Although defendant was not formally diagnosed with an intellectual disability prior to age 18, Dr. Kalechstein testified that his educational and Social Security records (which are not in the record) showed that he had exhibited behavioral problems since his youth and "never really demonstrated a capacity to learn." Dr. Kalechstein further stated that records from the Los Angeles County Department of Mental Health (which are not in the record) corroborated defendant's assertion that he suffered a traumatic brain injury after being struck by a truck as a child. Dr. Kalechstein opined that this historical data supported his conclusion that defendant was not feigning his symptoms or malingering, and called into question prosecution expert Dr. Andrea Bernhard's conclusion to the contrary. He likewise disagreed with Dr. Bernhard on the significance of the fact that defendant was not referred to a regional center for assessment as a child. Dr. Kalechstein testified that "often times individuals fall through the cracks. Mr. Parker would be one of them."

Dr. Kalechstein concluded that defendant had impairments in relevant adaptive functioning. Thus, even if defendant could prepare toast for himself or perform other daily tasks, Dr.

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to replace references to 'mental retardation' with the term 'intellectual disability'").)

Kalechstein did not "see that that would be an indicator that a person is competent to stand trial." He disagreed with a report from Patton indicating that defendant did not demonstrate any behaviors suggestive of impairments in adaptive functioning. Specifically, he stated, "that assertion is so absurd I can't believe that they would say it." According to Dr. Kalechstein, defendant "has impairments in basic reading, his ability to express himself is impaired, he's never been able to hold a job, he can't stay on his medication regimen and provide adequate self care. He would easily meet the criteria for intellectual disability . . . ."

Dr. Kalechstein conceded that a person with an intellectual disability could be competent to stand trial. However, he opined that defendant was not such a person. Even though defendant had "linear and goal oriented" thought processes and could answer questions, adhere to a daily schedule, and attend to his basic hygiene, "it should not be inferred that, because he can do all those things, he must be competent to stand trial." To be legally competent to stand trial, Dr. Kalechstein opined, a defendant should "know who you are, you know your identification, you know your status meaning you know you're a defendant, you know your charges, and that you can assist counsel in a rational manner. . . . [Y]ou can't just be considered competent if you sit there like a potted plant and you don't disrupt the courtroom proceedings."

Dr. Kalechstein further explained that competency has three prongs: understanding, reasoning, and appreciation. He opined defendant showed impairment in all three. "Mr. Parker has limited verbal skills to understand everything at about the level of a third grader, so that's the first obstacle because what you'd have to believe is that a person who understands English at

the level of the average third grader can understand the vocabulary that's used during the course of a courtroom setting. [¶] . . . [¶] With regard to paying attention, he's impaired, so that creates another obstacle because now, not only is he limited in his understanding of words, but because his attentional skills are impaired. He's only picking up on some of those words, not even all of them. Then, not only is he having problems understanding language, not only is he impaired with regard to attention, but he also has impaired capacity to remember those words. So that's a third obstacle, and that doesn't even include the idea of how he integrates and synthesizes that information. So, when you consider that a courtroom trial lasts anywhere from five to six hours in a day and the thousands of words that might be used during the course of a trial and the fact that he's going to have to be able to pay attention to understand them and remember them not as well as an attorney, not as well as a judge, not as well as a doctor but at least enough to talk to you and assist you in a rational manner, from my perspective and based on the data that I've collected and basically on the other data I've reviewed from historical sources like the Social Security Administration, I don't think he can do it." In addition, Dr. Kalechstein noted that defendant's memory could be adversely affected if he had a seizure disorder, an effect that could be compounded by anti-convulsant medications. Dr. Kalechstein did not testify that defendant had a seizure disorder.

Dr. Kalechstein's opinion of defendant's competency did not change when he considered Patton's assessment or the fact that he previously was deemed competent. Dr. Kalechstein explained that the competency training at Patton only addresses the understanding prong of competence and is not designed to

remediate impairments in reasoning and appreciation. Thus, even if defendant could "parrot back" information about the criminal justice system or lead a mock trial at Patton, Dr. Kalechstein opined that defendant would not be able to retain the information and would still suffer competency-preclusive impairments in reasoning and appreciation. In his opinion, there was no chance that defendant ever could become competent. Dr. Kalechstein further opined that Patton uses a "much too liberal" standard to assess competency, "meaning that they don't evaluate in a reasonable sort of way a person's impairments for example in the same way I did."

Dr. Kalechstein also called into question the assessment techniques and opinions of the prosecution's experts, Dr. Andrea Bernhard, Psy.D. and Dr. Dominique Kinney, Ph.D. In his opinion, the Test of Nonverbal Intelligence 4th Edition (TONI-4) Dr. Bernhard used to assess defendant's intellectual functioning was not appropriate "when you are trying to make an assessment of disability," because that test consists of "essentially pattern matching," and "intelligence includes use of verbal skills like defining words or understanding relationships between two words." In Dr. Kalechstein's opinion, the TONI-4 was "not the gold standard measure" of intelligence, where the "gold standard" is "a commonly accepted measure within a field that is used for the assessment of a particular construct." Dr. Kalechstein testified that he used the gold standard intelligence test, the WAIS-IV. He also used the "gold standard measure for the assessment of competency to stand trial," the MacArthur test, which defendant did not pass. In contrast, Dr. Kalechstein testified, Dr. Bernhard "didn't administer a measure that's used to assess competency to stand trial." Dr. Kalechstein also

criticized Dr. Bernhard's use of the Inventory for Legal Knowledge (ILK) to assess defendant's malingering. Even though he agreed that, "in a vacuum," the ILK could be considered a gold standard test, he opined it was not appropriate for defendant because "it's never been validated for individuals with . . . severe traumatic brain injury or intellectual disability." Dr. Kalechstein concluded that defendant was "putting forth his best effort" by assessing him with tests that were so validated, the b Test and the Test of Memory Malingering.

2. Prosecution Evidence

The prosecution called Dr. Kinney and Dr. Bernhard as experts to opine about defendant's competence. The trial court also admitted into evidence several exhibits, including the entirety of defendant's Patton State Hospital Psychiatric Record.

a. Dr. Kinney

Dr. Kinney testified that she was a psychologist with a specialty in neuropsychology who worked as a specialist at Patton. Her job duties there included assessing patients who had been deemed incompetent to stand trial and supervising psychologist trainees as they performed similar assessments. Dr. Kinney supervised the psychologist trainee who assessed defendant at Patton. That is, she supervised the trainee who assessed defendant with various assessment instruments, including the WAIS-IV test, the "WRAT4," the Test of Malingered Memory, the Rey 15-Item Recall Test, and the Texas Functional Living Scales.

Dr. Kinney agreed with Dr. Kalechstein's summation of the three diagnostic criteria for intellectual disability: onset before age 18, an IQ score of 70 or below, and impaired adaptive functioning. However, she disagreed with Dr. Kalechstein's

conclusion that defendant had an intellectual disability. In her opinion, defendant did not meet the diagnostic criteria. Dr. Kinney opined that there was no evidence that defendant had an intellectual disability prior to age 18. She explained that children born and raised in the United States typically "are identified early on at some point in childhood that they have mental retardation" and receive services. She testified that there was no indication defendant had received such services, which in California are provided through regional centers. Dr. Kinney opined that the lack of a referral to a regional center "calls into question the presence of an intellectual disability like mental retardation because nobody has identified it . . . throughout their childhood as this person being somebody who might have" an intellectual disability. She explained, "if they weren't in the system, then we have no evidence to go on to suggest they had mental retardation prior to the age of 18." On cross-examination, she reiterated that "[m]ultiple group homes and multiple schools would have needed to make mistakes" not to refer someone "overtly mentally retarded" to a regional center. Dr. Kinney testified that she could not conclude from defendant's receipt of special education services alone that he had an intellectual disability before age 18, because "children are recommended for special education for a variety of reasons," including behavioral misconduct.

To assess defendant's adaptive functioning, Dr. Kinney approved the trainee's use of the Texas Functional Living Scales test, which evaluates a person's general ability to "function in the real world," "like can they make change, can they tell time, can they . . . remember to take medications if they're given an alarm reminder?" She concluded that defendant put forth his best effort

on the test and exhibited "mildly impaired" adaptive functioning. Though his scores were impaired, they were "almost two standard deviations higher than individuals with bona fide mild mental retardation." On cross-examination, Dr. Kinney explained the tasks assessed in the Texas Functional Living Scales test were relevant to trial competency because they demonstrated an individual's ability to "learn throughout their lifetime basic functional abilities," from which one could extrapolate an "ability to learn what is necessary in order to understand the trial process."

Dr. Kinney also supervised the trainee's measurement of defendant's IQ. Using the same test Dr. Kalechstein used, she arrived at a full scale score within one point of his, 69. This score suggested to Dr. Kinney that defendant is "just on the border of having borderline intellectual functioning or mild mental retardation." She explained that "borderline intellectual function is a diagnosis reserved for individuals who have subaverage intelligence but who do not meet the threshold necessary to meet the criteria for mental retardation. [I]t acknowledges that the individual's intellectual functioning is of clinical significance because it's subaverage, but it's not severe enough to warrant a diagnosis of mental retardation."

Dr. Kinney concluded defendant had borderline intellectual functioning rather than intellectual disability, because his scores on the four indices underlying the full scale IQ score were "all on the borderline range," and he did not meet the other diagnostic criteria for intellectual disability. Dr. Kinney did not consider defendant's report that he suffered a traumatic brain injury as a child in reaching this conclusion. She explained that the claim "didn't seem credible" "[w]ithout any hospital records available to

us, and given his self-report that he was unconscious for a year without any substantial orthopedic injuries, without any medical records, without involvement in the regional center, and without significant impairments in his functional abilities."

Dr. Kinney also discounted defendant's self-reported history of psychotic symptoms. She testified she found the report "questionable" because the treatment team at Patton, which she was not on, determined that he likely suffered from a mood disorder, not a psychotic spectrum disorder. Dr. Kinney further testified that defendant was prescribed medication to treat a mood disorder and seizures.

Dr. Kinney opined that it is possible for individuals with borderline intellectual functioning or intellectual disability to attain trial competency. She concluded that defendant was among those individuals who could attain competency. Dr. Kinney explained that her opinion was based on observations she made of defendant in 2013 when defendant was at Patton. He "was appropriately dressed and groomed," communicated his needs and wants in a normal voice and "in a fluent way," and generally had basic functional capacity. Dr. Kinney conceded that it would be possible for someone to be trained to become competent and then lose that ability after a period of time. She emphasized that she did not assess defendant's competence with a specific test. Rather, she explained, "[a]ll I can attest to and testify to are the issues that I brought up in my report and his abilities and the possibilities to attain trial competency. And those won't change."

b. Dr. Bernhard

Dr. Bernhard testified that she was a psychologist in private practice and adjunct professor at Pepperdine University. She previously worked at Patton as a staff psychologist for over five years. In connection with this case, she reviewed the arrest report; the police interrogation audio and videotape; the felony complaint; reports written by Dr. Kalechstein and several non-testifying experts; Patton records; and jail mental health records. She also spent an hour and forty-five minutes meeting with defendant at a jail facility.

Dr. Bernhard testified that there was a "dramatic" difference between defendant's presentation in person and on paper. During his interview with her, defendant was unable to identify the charges he faced or converse about "very basic trial competence skills." According to Dr. Bernhard's review of defendant's Patton records, however, while at the hospital "he was able to name the charges. He knew about plea bargaining. He talked about . . . how . . . he was offered a deal of, I believe it was, 20 years, but he didn't want it because it was too much. He talked to staff members about different inconsistencies in witness reports and how those could be used favorably to his defense. He knew the four pleas. He knew the role of court personnel, judge, D.A., and defense counsel. He's also described as having participated in what's called mock trials . . . And they specifically described that Mr. Parker played a role of judge, that he was able to go through the script by himself and did not need any assistance, and that he was able to correctly instruct the attorneys to go through the direct, cross, redirect, and cross without any assistance from staff." Dr. Bernhard opined, in her experience, that level of participation and understanding of the

mock trial exercise was unusual for someone with an intellectual disability; while working at Patton, she had never seen anyone with intellectual disability try to play the role of judge or get through the script without staff assistance.

Defense counsel objected to Dr. Bernhard's reliance on the Patton records on hearsay grounds. The court overruled his objection, ruling, "I'm taking it as the basis for her opinion." Defense counsel stated he had "no problem" with the records themselves being admitted, and the court accepted them into evidence. During his cross-examination of Dr. Bernhard, defense counsel also read into the record excerpts from a competency report from Patton that was admitted into evidence; the excerpts described defendant's participation in the mock trial exercise.

Dr. Bernhard testified that she suspected defendant was malingering, so she asked him a series of questions aimed at assessing his competency to stand trial. He said that he did not know the answers to many of them, even several he had answered correctly at Patton. Dr. Bernhard opined that "[t]he pattern of I don't know and I really don't know answers is typical of malingering." She explained that individuals with intellectual disability who are not malingering "will usually try to impress us with how much they do know. They will try to mask their deficit. They will try to show you how well they did at Patton and how much they do know. This was not the case here."

Dr. Bernhard testified that defendant's performance on the ILK and TONI-4 tests she administered also was indicative of malingering. His score on the ILK was appreciably lower than he would have been able to obtain by random guessing, and also was nearly 20 points lower than he scored during a previous administration of the test. His score on the TONI-4 was "so low

that it is inconsistent with his overall functioning document[ed] in the hospital records." Dr. Bernhard explained that defendant "performed so poorly" on that nonverbal intelligence test "that even kids who are about six years of age perform better than he did."

Dr. Bernhard contrasted defendant's performance during her interview with his performance during a police interview immediately after his arrest in 2009. In the 2009 interview, a videotape of which was played for the court, Dr. Bernhard saw "no evidence" that defendant suffered from an intellectual disability. That was important to Dr. Bernhard because in her opinion intellectual disability "does not come and go." Dr. Bernhard concluded that defendant was malingering.

Consistent with her assessment that defendant was malingering, Dr. Bernhard opined that defendant was not intellectually disabled. She testified that nothing in the records she reviewed suggested that defendant was diagnosed with an intellectual disability prior to age 18, or that his adaptive skills were so impaired as to be consistent with intellectual disability. Dr. Bernhard found it important that defendant never was referred to a regional center despite receiving special education services. She did not perform diagnostic tests to determine what, if any, intellectual challenges defendant faced.

Dr. Bernhard opined that there was "overwhelming evidence of competence." She emphasized that the 2009 interview video "shows some of the skills that Mr. Parker has and that are relevant to trial competence, like the ability to answer questions, to answer questions on topic, to understand the questions, to engage in a conversation with people, police officers, to maintain adequate and calm behavior during the interview."

Dr. Bernhard testified she was not troubled by the six-year age of the video because intellectual disability "is a chronic condition. So it doesn't come in flare ups and it doesn't get better or worse. . . . [W]e see Mr. Parker at any possible point in time at this very stable baseline of functioning before he is interviewed by me and before there are more incentives to malinger. In other words, a person who has mental retardation, I would not expect them to have a certain level of function six years ago and then have a different level of functioning today." She further stated, "I believe that Mr. Parker has a number of mental health issues and mitigating factors and that his IQ is not the highest and he may even be below average. I believe that he was in special education. I do believe that he has had behavioral issues, possibly ADHD, like, horrible head trauma at age four. I'm not questioning any of that. I just don't believe that he's incompetent. I think that he's disadvantaged when compared to other defendants, but not to the point of being incompetent."

On cross-examination, Dr. Bernhard stated that she did not know whether defendant suffered from a seizure disorder. She testified, "I think it's possible he does have medical issues." She further explained that she did not look into a seizure disorder, but thought defendant suffered from one "for a long time." Dr. Bernhard opined that even a series of seizures between his two stays at Patton would not have affected defendant's memory to the degree his deteriorated test and interview results suggested.

3. Ruling

After hearing argument and informing the parties that it had reviewed all of the submitted evidence, the court found defendant competent. It agreed with Dr. Bernhard that the video of defendant's 2009 interview "was a valuable piece of

information because it does provide some insight into Mr. Parker's mental capabilities." "[I]t certainly demonstrates his ability to communicate appropriately, to respond to questions. It's clear that he understands what is being asked of him. It's clear he is able to respond, that he's able to provide a narrative on certain items. He's able to talk rationally about the events. And based upon the evidence that we have in the preliminary hearing transcript, . . . one interpretation would be that he is laying out a story which reduces or eliminates any potential culpability as he lays at the feet of the complaining witness, an elderly Asian woman, claiming that she had attacked him, grab[bed] him, hit him which in my mind shows a certain ability to understand that he's in a bit of a tight spot and trying to create a parallel alternative narrative that would benefit him. So, in the aggregate in looking at all of this and looking at [CALJIC] jury instruction 4.10, I cannot say that the defense has carried their burden of proof. The defendant is presumed to be competent, mentally competent. The burden is on the defense, and of course it is only a burden by a preponderance of the evidence, but in looking at all the evidence and the way it balances out, I cannot say that the defense has carried their burden, and therefore I'm making a finding at this point in time that he is mentally competent to stand trial." The court remarked that it was "a close call" because "the experts do not line up on this one." It also thanked both counsel for their hard work during the hearing.

C. Substantial Evidence

Defendant contends that the court's competency determination "stands or falls based on Dr. Bernard's [*sic*] testimony," and therefore must fall because her testimony did not constitute substantial evidence of defendant's competency. He

asserts that Dr. Bernhard's "lack of information regarding Parker's seizure disorder rendered her competency opinion fundamentally flawed, provided too great an analytical gap between the data and offered opinion, and did not rise to the dignity of substantial evidence." We disagree.

First, we are not persuaded by defendant's assertion that Dr. Bernhard's testimony was the linchpin evidence pertaining to defendant's competency. Dr. Kinney also testified as to defendant's mental capabilities, the only basis for incompetence at issue. In addition, the trial court admitted into evidence numerous reports of other experts documenting defendant's intellectual capabilities; defendant's records from Patton, including his previous certificate of competency; and the video of his 2009 interview.

Defendant largely does not dispute that the reports of non-testifying experts and other admitted records constituted substantial evidence on which the court was entitled to rely. He challenges only the 2009 video, which he contends was "a long time removed" from the competency trial and depicted defendant performing "routine manual" or "mechanical" tasks that were not indicative of his ability to understand the judicial process and consult with his attorney; and the 2013 competency report, which he asserts "had no collateral estoppel/res judicata effect because a later . . . section 1368 doubt was declared." We are not persuaded that these items lacked substantial evidentiary value. Both Dr. Kinney and Dr. Bernhard testified that intellectual disability is a "chronic" condition that does not change over time, such that the 2009 video remained relevant at the time of the competency hearing. The transcript of the video also undermines defendant's assertion that it depicts "routine manual" or "mechanical" tasks.

Rather it indicates defendant appropriately responded to substantive questions regarding the crimes and his medical and criminal history. Likewise, there is no indication that the court or any of the experts attempted to accord controlling weight to the 2013 certificate of competence.

Defendant essentially contends that Dr. Bernhard's testimony should be discounted because she did not recall if he suffered from a seizure disorder. However, Dr. Bernhard testified that she did not question any of defendant's claims of mental illness, behavioral issues, and head trauma. Thus, even though she did not recall whether defendant suffered from a seizure disorder, nothing in her testimony suggests she relied on the absence of such a disorder when forming her opinions about defendant and his abilities. Defendant's own expert, Dr. Kalechstein, did not testify that defendant had a seizure disorder. He merely opined that seizure disorders often co-occur with intellectual disability and may affect an individual's memory and cognitive abilities; he did not specifically say that defendant had a seizure disorder, or suffered from side effects that impaired his competency.

Defendant has not pointed to any record evidence supporting his assertion that he suffered from a competency-affecting seizure disorder aside from Dr. Kinney's testimony that he was prescribed an anti-seizure medication.[4] He asserts that

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[4] When defense counsel asked Dr. Kinney if she could "tell us more about the seizures he experienced," Dr. Kinney responded, "Individuals at Patton State Hospital who come in reporting a history of seizure disorder are prophylactically put on seizure medication." There is no indication in the Patton records that defendant had a seizure while there, and the report of non-testifying defense expert Dr. Hope Goldberg, Ph.D. states, "[a]ll

he "was not required to present 'conclusive' medical evidence that he suffered seizures that rendered him incompetent to stand trial." He was, however, required to prove that he was incompetent by a preponderance of the evidence. The evidence regarding a seizure disorder and its effect on his competence is mixed at best. Even if the court credited Dr. Kalechstein's suggestions that defendant's memory could be adversely impacted, ample evidence supported its ultimate conclusion that defendant was competent to stand trial. The experts agreed that defendant had below average intelligence but offered varying opinions about the extent to which his intellectual impairments affected his competency. The court was entitled to credit the opinions of the prosecution's experts over that of defendant's expert. The court also had before it the video of defendant's 2009 interview, and had the opportunity to observe defendant in the courtroom. We cannot conclude on this "close call" record that the court erred in finding defendant failed to overcome the presumption that he was competent to stand trial.

The close nature of the evidence in this case renders it distinguishable from *People v. Samuel* (1981) 29 Cal.3d 489 (*Samuel*), on which defendant relies. In *Samuel*, the defendant "exhibited 'overtly and in a sense grossly psychotic' behavior," including hallucinations and coprophagia. (*Samuel*, *supra*, 29 Cal.3d at pp. 499-500.) Eight psychiatrists and psychologists who examined him testified at trial; "[t]he consensus was that he suffered from three separate mental disorders: chronic schizophrenia, some degree of mental retardation, and some organic dysfunction," which resulted in "'extremely bizarre

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records indicated he has a history of a seizure disorder but no formal workup was found."

patterns of thought and speech.'" (*Id.* at pp. 499-500.) The prosecution countered this powerful evidence with the testimony of two lay witnesses who offered testimony indicating "that defendant could walk, talk, and at times, recall and relate past events." (*Id.* at p. 503.) The Supreme Court accordingly concluded that "the jury could not reasonably reject the persuasive and virtually uncontradicted defense evidence proving Samuel's mental incompetence to stand trial" and set the competency finding aside. (*Id.* at p. 506.) The evidence here was not so one-sided; highly credentialed psychologists offered differing opinions regarding defendant's diagnoses and abilities. The court did not err by crediting the prosecution's evidence over defendant's.

D. *Sanchez*

In *Sanchez*, *supra*, 63 Cal.4th 665, 686, the California Supreme Court held that an expert witness cannot in conformity with the Evidence Code "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." This holding upended the previous evidentiary paradigm, under which courts routinely admitted out-of-court statements as the bases of experts' opinions and permitted the finder of fact to use them to assess the value of those opinions. (See *id.* at p. 679.) Experts "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that [they] did so"; they may not, however, tell the jury the particulars of that hearsay. (*Id.* at p. 685.) *Sanchez* also held that, in criminal cases, "there is a confrontation clause violation" when a prosecution expert seeks to relate testimonial hearsay "unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for

cross-examination, or forfeited that right for wrongdoing." (*Id.* at p. 686.)

Defendant argues that the prosecution violated *Sanchez* at his competency hearing when Dr. Bernhard testified about his mock trial participation and other activities at Patton. Defense counsel objected to this testimony on hearsay grounds. The court overruled the objection and allowed the testimony "as the basis for her opinion." Defendant is correct that this ruling was erroneous under *Sanchez*; Dr. Bernhard's testimony about out-of-court occurrences at Patton was hearsay that was not admissible for its truth.

However, *Sanchez* errors are not per se reversible. Like other evidentiary errors, we review the improper admission of hearsay testimony under the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836: we ask whether it is reasonably probable the verdict would have been more favorable to defendant absent the error. Here, there is no question that the error was harmless. Dr. Bernhard's hearsay statements concerned defendant's Patton records, which were admitted into evidence in full without objection. Indeed, defense counsel read many of the now-challenged portions of them into the record during his cross-examination of Dr. Bernhard. Defendant accordingly has forfeited any objection to the admission of these documents at this stage, including his current assertion that they contained multiple levels of hearsay. (Evid. Code, § 353; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 408.) The trier of fact had before it the original out-of-court statements that it properly could consider for their truth. No reversible error occurred.

Defendant also claims that Dr. Bernhard's testimony was testimonial hearsay that violated his confrontation clause rights.

Defendant did not object on confrontation clause grounds below, however, which means he has forfeited this contention on appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730.) Defendant argues that his forfeiture should be excused because an objection on confrontation clause grounds would have been futile, as his competency hearing occurred before the *Sanchez* decision was announced. Courts have made mixed rulings on whether such objections would be futile. (Compare *People v. Ochoa* (2017) 7 Cal.App.5th 575, 585, fn. 7 [objections would not have been futile] with *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 [objections would have been futile].) We need not resolve the question, however, because any confrontation clause contention fails on the merits.

The confrontation clause by its terms applies only "in all criminal prosecutions." (U.S. Const., 6th Amend.) "A competency proceeding, although certainly related to the underlying criminal case, is not itself a criminal action." (*People v. Masterson* (1994) 8 Cal.4th 965, 969.) Indeed, the trial court explicitly adjourned criminal proceedings to convene the competency proceeding. Despite the presence of some procedural safeguards traditionally found in criminal trials, competency hearings are "'special proceeding[s]'" that are neither criminal nor civil. (*Ibid.*; see *Kansas v. Hendricks* (1997) 521 U.S. 346, 364-365.) Courts have held the confrontation clause does not apply in other such non-prosecutorial yet criminal-adjacent proceedings, such as probation revocation hearings (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411) and civil sexually violent predator hearings (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 55). We find these cases persuasive and conclude the confrontation clause is not applicable in competency proceedings.

II. Intent to Rape Jane Doe

Defendant contends the prosecution failed to carry its burden of proof on count 4, assault with intent to rape victim Jane Doe, because there was no evidence that he intended to commit anything more than a sexual battery against Doe when he grabbed her on the street and dropped her when she screamed. We disagree.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]"' (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

"'To support a conviction for assault with intent to commit rape, the prosecution must prove the assault and an intent on the part of defendant to use whatever force is required to complete the sexual act against the will of the victim.' [Citation.]" (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1222.) The requisite intent may be present at any point during the incident; the crime

is complete when a defendant entertains the intent to have sexual intercourse with his or her victim by force. (*Id.* at pp. 1222, 1223.) Abandonment of that intent before consummating sexual intercourse does not absolve the defendant. (*Id.* at p. 1222.) Intent may be inferred from the circumstances. (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.) "Circumstances which have been considered relevant to proving intent to satisfy sexual desires include: the charged act, extrajudicial statements, the relationship of the parties, other acts of lewd conduct, coercion or deceit used to obtain the victim's cooperation, attempts to avoid detection, offering a reward for cooperation, a stealthy approach to the victim, admonishment of the victim not to disclose the occurrence, physical evidence of sexual arousal, and clandestine meetings." (*Ibid.*)

Here, the jury heard eyewitness testimony from Duncan and Kays that defendant briefly talked with a petite Asian woman, Doe, on the street. He continued his attempts to engage her even after she walked away from him in the opposite direction. Defendant walked, then ran to catch up to Doe, grabbed her from behind in a bear hug, and lifted her from the ground. He placed his right hand in her "crotch area," and kept it there as he held Doe in the air. Defendant dropped Doe when she began screaming, and then he ran away.

Bednar testified that, within minutes, he saw defendant arrive at a salon staffed solely by Linda T., another petite Asian woman. Defendant entered the salon after looking in the windows of various other businesses and engaged Linda T. in a brief conversation. Linda T. testified that defendant went to the restroom, then told her that there was no toilet paper. She and Duncan both testified that Linda T. tried to get defendant to

leave, but he abruptly turned around, grabbed her in a bear hug, and lifted her from the ground. Linda T. testified that she struggled, but defendant overpowered her and carried her to the restroom in the back of the salon, where he hit her in the head, ripped her blouse, and thrust his erect penis against her. Linda T. heard defendant say, "I want to fuck you," and Bednar and Gomez noted that defendant's shorts were "down" and "undone" when they interrupted the encounter.

The jury reasonably could conclude from this evidence that defendant intended to rape Doe when he chased her on the street, picked her up, and grabbed her genital area. Though he abandoned the intent when Doe screamed, his immediate subsequent actions toward Linda T., whom he explicitly told, "I want to fuck you," give rise to a reasonable inference that defendant also intended to engage in sexual intercourse with Doe when he assaulted her. Linda T. and Doe were similar in appearance and stature, though Linda T. was in a more isolated location. Defendant grabbed both women in an identical fashion, minutes apart. He carried Linda T. to a private area before thrusting his penis against her, hitting her, ripping her clothing, and lowering his shorts. It was reasonable for the jury to infer that defendant intended to engage in similar behavior with Doe when he picked her up, but abandoned the intent and sought another victim when she screamed.

Defendant contends such an inference is at odds with *People v. Greene* (1973) 34 Cal.App.3d 622 (*Greene*). We disagree. In *Greene,* the defendant, an adult male, encountered a 16-year-old girl walking alone late at night. He "put his arm around her waist and turned her around," telling her, "'Don't be afraid. I have a gun. Don't move,'" while pressing something into her side.

(*Greene*, *supra*, 34 Cal.App.3d at p. 629.) The defendant told the victim to put her arm around his waist, and she complied. When she asked him what he wanted, he said, "'I just want to play with you,'" and "moved his hand up and down her waist a little." (*Ibid.*) The victim was able to run away. (*Ibid.*) The jury also heard evidence that, within the previous year and a half, defendant accosted two other young women who were walking alone late at night; he offered one of them money in exchange for sex and digitally penetrated the other. (See *id.* at pp. 629, 631-632.) A jury convicted him of assault with intent to rape the 16-year-old victim, and the appellate court reversed. It concluded that the circumstances of the encounter "fail to rise to the dignity of showing intent to overcome his victim's resistance by force or violence." (*Id.* at p. 653.) It reasoned that "the failure of defendant to exhibit his private parts or offer money on the occasion in question renders the prior offenses of little if any persuasive value on the issue of the intent to commit sexual intercourse, as distinguished from lascivious acts, on the subsequent occasions. . . . [The previous incidents] are of no persuasive value on the intent to use force." (*Ibid.*)

The evidence and reasonable inferences that follow therefrom are stronger in this case than in *Greene*. (See *People v. Thomas* (1992) 2 Cal.4th 489, 516 ["When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts."].) Defendant used force on Doe by lifting her off the ground, and he specifically grabbed her genital area; he did not simply sidle up to her and rub her waist. He continued with the unwanted contact until Doe screamed loudly. He then resumed markedly similar conduct within minutes, not months, with a woman who was

physically similar to but more isolated than Doe, and both physically and orally indicated his intent to engage in sexual intercourse with her. The court in *Greene* recognized that the incidents with the woman to whom the defendant in that case offered money "furnish[ed] some support for a finding that the sexual gratification the defendant sought with [the victim] was sexual intercourse." The incident with Linda T. here likewise offers strong support for a finding that defendant intended to do more to Doe than merely grab her. Defendant contends such an inference is akin to a "pole vault" from mere sexual contact to intent to rape, but the temporal proximity and factual similarity of the two incidents in this case narrow the inferential gap considerably. The conviction was supported by substantial evidence.

III. Sentencing

The trial court sentenced defendant to an indeterminate term of seven years to life on count 1, kidnapping with intent to rape Linda T., and imposed an additional, consecutive, upper term sentence of six years on count 2, assault with intent to rape Linda T. It also imposed a consecutive midterm sentence on count 4, assault with intent to rape Doe. Defendant contends the sentence on count 2 punished the same act as count 1 and therefore "violated section 654's prohibition against multiple punishment and the Fourteenth Amendment Due Process Clause." Respondent does not dispute this contention; rather, it argues that defendant properly was sentenced on counts 1, 2, and 4 under section 667.6, which operates as an exception to section 654. We agree with respondent.

Section 654[5] was enacted to ensure that courts impose punishments that are commensurate with a defendant's culpability. (*People v. Newman* (2015) 238 Cal.App.4th 103, 111.) By its terms, section 654 applies only where a single act or omission gives rise to multiple statutory violations and convictions. (*People v. Hicks* (1993) 6 Cal.4th 784, 791 (*Hicks*).) However, "decisions interpreting section 654 have extended its protection 'to cases in which there are several offenses committed during "a course of conduct deemed to be indivisible in time." [Citation.]' [Citation.]" (*Ibid*.) Section 654 thus "generally precludes multiple punishments for a *single physical act* that violates different provisions of law [citation] as well as multiple punishments for an *indivisible course of conduct* that violates more than one criminal statute. [Citations.]" (*People v. Newman*, *supra*, 238 Cal.App.4th at pp. 111-112.) "'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]' [Citation.]" (*Hicks*, *supra*, 6 Cal.4th at p. 789.)

Section 667.6 is a later-enacted sentencing provision applicable to specified sexual offenses. As is relevant here, section 667.6, subdivision (d), provides that "A full, separate, and

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[5] Section 654, subdivision (a) provides: "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."

consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] . . . [¶] The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment." The trial court must sentence a defendant in conformity with this provision if he or she is convicted of at least two of the violent sex crimes enumerated in section 667.6, subdivision (e). (*People v. Jones* (1988) 46 Cal.3d 585, 594 & fn. 5.)

The trial court properly invoked section 667.6, subdivision (d) here, because defendant was convicted of two enumerated crimes, assault with intent to rape (see § 667.6, subd. (e)(9)), against two separate victims, Linda T. and Doe. The court accordingly was obligated to sentence defendant to "full, separate, and consecutive" terms on counts 2 and 4. Once section 667.6, subdivision (d) was triggered by the offenses in counts 2 and 4, it also required the court to run the collective term on those counts "consecutively to any other term of imprisonment," namely the mandatory sentence of seven years to life on count 1, the kidnapping charge (§ 209, subd. (b)(1)). (See *People v. Pelayo* (1999) 69 Cal.App.4th 115, 124-125.)

Our Supreme Court specifically has held that section 667.6, subdivision (c) operates as an exception to section 654's prohibition against multiple punishments for certain sexual acts committed pursuant to a single intent or objective. (*Hicks*, *supra*, 6 Cal.4th at pp. 796-797.) Thus, under section 667.6, subdivision (c), the court has discretion to sentence a defendant who commits multiple sex crimes against a single victim pursuant to a single intent of sexual gratification separately for each crime. "Such

increased penalties are appropriate, because a defendant who commits 'a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.' [Citation.]" (*Id.* at p. 796.) Subdivision (c) is a discretionary provision; subdivision (d) makes such increased penalties mandatory where the crimes involve separate victims or the same victim on separate occasions. (*Id.* at p. 794.) Therefore, the exception to section 654 discussed in *Hicks* also applies to section 667.6, subdivision (d), which is applicable here. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1395, fn. 10.)

Defendant acknowledges this, but argues that section 667.6, subdivision (d) does not supersede section 654's prohibition against multiple punishments for a single act. He relies on *People v. Siko* (1988) 45 Cal.3d 820, which held that a defendant convicted of three separate sex offenses stemming from only two acts against a single victim could not under section 654 or section 667.6 be sentenced for all three offenses. (*Siko*, *supra*, 45 Cal.3d at p. 826.) Defendant argues *Siko* controls here, because he completed both the kidnapping and assault offenses against Linda T. during his single act of forcibly holding, dragging, and detaining her in the bathroom. We disagree. The evidence showed and the prosecution argued that defendant committed assault against Linda T. not only through the forcible act of kidnapping her but also by beating her with his hands and a can of air freshener once he had her confined in the restroom. Unlike *Siko*, where the defendant committed two acts but was convicted of and improperly sentenced for three crimes, defendant here committed two distinct acts that were separately and correctly punished as such.

IV. Abstract of Judgment

In its brief, respondent correctly asserts that the abstract of judgment does not accurately reflect defendant's sentence. Specifically, the abstract of judgment, form CR-292, "indicates terms were imposed on counts 2 and 4, and that on count 3 a term was stayed pursuant to section 654, but the form does not indicate the length of the determinant [*sic*] terms." Respondent accordingly requests that we direct the trial court to prepare an amended indeterminate abstract (form CR-292) reflecting that determinate terms were imposed, as well as an additional determinate abstract (form CR-290) that enumerates the duration of those terms. Defendant did not respond to this request.

"It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]" *(People v. Jones* (2012) 54 Cal.4th 1, 89.)

We agree with respondent that the single indeterminate abstract of judgment in this case does not fully reflect defendant's additional determinate sentences on counts 2 and 4. We accordingly direct the clerk to issue an amended indeterminate abstract, as well as a determinate abstract.

DISPOSITION

We direct the clerk of the superior court to amend the indeterminate abstract of judgment to reflect additional determinate terms were imposed. In addition, the clerk is directed to prepare a determinate abstract of judgment reflecting the six-year determinate sentence on count 2 and the four-year determinate sentence on count 4, which run consecutively to one another and to the indeterminate sentence on count 1. The trial court is directed to forward the amended abstracts of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.