Filed 4/2/14 P. v. Bates CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR BATES,

Defendant and Appellant.

2d Crim. No. B241991
(Super. Ct. No. BA376576)
(Los Angeles County)

Arthur Bates appeals from his conviction by jury of kidnapping (Pen. Code, § 207, subd. (a));[1] dissuading a witness by force or threat (§ 136.1, subd. (c)(1)); and two counts (3 and 6) of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), with a true finding as to the section 12022.7, subdivision (e) allegation that appellant personally inflicted bodily injury under circumstances involving domestic violence during the count 3 assault. The jury also found the count 6 domestic violence allegation (§ 12022.7, subd. (e)) was not true, and acquitted appellant of two cohabitant abuse charges (§ 273.5, subd. (a)).

In bifurcated proceedings, appellant admitted three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a), (d)), three prior serious felony convictions

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

(§ 667, subd. (a)), and having served four prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him as a third strike offender to serve an aggregate sentence of 110 years to life.

Appellant challenges the sufficiency of the evidence to support dissuading a witness by force or threat, and contends the trial court erred by failing to instruct the jury that force, or the threat of force, is an essential element of the charged witness dissuasion. He further contends he was denied his rights to due process and the effective assistance of counsel when the court denied his request for continuance during trial, and it denied him his right to present a defense when it struck his trial testimony. Appellant also raises sentencing issues concerning prior prison term enhancements, presentence custody conduct credits and his consecutive sentence for count 4. We modify the trial court's order staying the imposition of sentence for prior prison terms (§ 667.5, subd. (b)) deeming the order to have directed the striking of the sentence for those priors. We also award additional custody credits. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

June 20, 2010 – Father's Day Assault

Appellant lived and worked at Accelerate Bail Bonds (Accelerate) in downtown Los Angeles. On June 20, 2010, he took his girlfriend, Iliana L., to the home of his daughter, Melinda Bates (Mindy), for a Father's Day party. He and Iliana stayed there for several hours. When she could not find appellant, Iliana decided to leave, grabbed her purse, and started walking. She heard appellant ask where she was going. She claimed she was looking for him. He noticed her purse, and accused her of lying. Iliana sat on a chair in Mindy's yard. Appellant punched her chest "hard" several times.

Iliana testified she later asked Mindy to drive her to her car. They were sitting in Mindy's car, with the doors locked. Appellant ordered Iliana to get out, and she sat on a chair. He grabbed her purse. She cursed and he punched her mouth, jaw and head, knocking her backward and off the chair. She hit her forehead, which bled profusely. A party guest drove Iliana to the hospital. After persistent inquiries from

hospital staff, Iliana said her boyfriend had punched her. The staff notified the police but Iliana left the hospital before they arrived. She did not want appellant to go to jail. Her injuries (a black eye, a deep forehead wound, a chipped tooth and a swollen mouth) prevented her from working on June 21, 2010. She lost her job and her apartment. She continued to see appellant after June 20, but was afraid to tell him where she lived or worked.

September 30, 2010, Assaults and Other Crimes

On September 29, Iliana had several heated telephone conversations with appellant while he was at The Gardens Restaurant Bar. She met him there around midnight. After having drinks, they left the bar around 2:00 a.m. Although she had not told appellant where she was living following the June 20 beating, she feared he was too drunk to drive and suggested he follow her to her residence.

As they approached her Brookshire Avenue residence, Iliana pulled over, in front of the home of her neighbor, Salvador Elizalde. She cautioned appellant to be quiet because she lived in a quiet neighborhood. He dropped his motorcycle in front of her car, rushed to her car, kicked it, and demanded she park her car. When she complied, he reached through her open car window and socked Iliana's face several times. Shouting, he demanded information about her apartment and her roommates. She told him she was trying to move on, as he had done, and get away from him. He grabbed her, pulled her to his motorcycle, and said they were "going on the bike."

Appellant repeatedly tried to start his motorcycle but his efforts only resulted in the motorcycle falling over and, on one occasion, pinning Iliana to the curb. Elizalde awoke to the sound of appellant's yelling, and Iliana crying in pain, saying, "No," and "Please stop." Appellant kicked and hit her seven or eight times. Joe Pina lived in Iliana's neighborhood, on Cole Street. He heard a woman scream for help sometime after 1:00 a.m. on September 30, and heard something that sounded like a gunshot.

While appellant attacked her, Iliana saw three young men walking on the opposite side of the street. Seeing them, appellant told Iliana not to run across the street

and said, "You better not move because if you do, I'm going to hurt them, too." Nathan P., one of the young men, testified that he yelled for appellant to stop and said he would call, "the cops." He did so when the beating continued.

Unable to start the motorcycle, appellant told Iliana to "get in the car," then threw her inside it. He tore a necklace from her neck, hit her in the face with his fist, slammed the door, got in the driver's seat and sped away. Inside the car he continued to yell at Iliana, and punched her in the head and ears. He told her that if the cops came, he was not going to jail and he would drive "between the [freeway] island," and they would "die together." Elizalde and other witnesses heard screeching sounds as appellant sped away.

As appellant and Iliana approached Accelerate, they saw a teenage girl known to them as "Kendra," outside.[2] Appellant told Iliana to look down so that Kendra would not see her injured face, then drove away, threatening Iliana, "If my bike's . . . gone, you're going to die, bitch. My bike better be there when we go back over there." Fearing for her life, Iliana jumped from the moving car, injuring her feet, arms, and right knee when she landed. She ran to Accelerate.

Appellant's nephew, Stanley Sanchez, was at Accelerate when Iliana arrived there. Upon seeing Iliana, he asked, "What happened?" She said appellant started hitting her "again." Sanchez asked, "[W]hy did you even go back to him? You know how he is." She answered she was stupid. She asked Sanchez to call appellant, tell him she would not call the police, and ask him to return her car. Sanchez did as she requested. Shortly thereafter, appellant returned to Accelerate, opened the door to his room, and ordered Iliana inside. She begged him to return her keys and let her go. He insisted, "Get in here now." Fearing him, she complied. Appellant socked her in the eyes "over and over again." She begged him to stop. He told her he hated her, said, "You're going to die," and started strangling her. He grabbed her hair, dragged her to the

[2] Her real name is Isabel C.; we refer to her as Kendra, the name she used in September 2010.

bathroom, threw her in the shower and turned on the water. He kicked her body and punched her right rib. At some point, appellant removed Iliana's clothes and walked away. About 15 minutes later, she noticed he was asleep in bed. She quietly dressed and left his room.

Kendra testified that while Iliana was in appellant's room, she heard loud noises that sounded "like somebody got thrown around." She heard a woman crying and saying, "Baby, please let me go." Iliana returned from appellant's room, with her "face . . . all purpl[ish] and she could barely open her eyes [which] were . . . popped out, [with] blood coming from them." Iliana testified she could not see, and was in a great deal of pain. Both women testified that Sanchez tried to prevent Iliana from leaving. With Kendra's help, Iliana left Accelerate, and located officers at Union Station. Los Angeles Sheriff's Department Sergeant David Buckner questioned Iliana and repeatedly asked who struck her. She did not answer, and lost consciousness. An ambulance took her to the hospital.

Later that morning, officers located appellant, sleeping in his room at Accelerate. He had no visible injuries. There was blood in his bedroom and bathroom. The officers transported him to a location where Kendra identified him. He was arrested and booked. The jeans he was wearing immediately before his arrest tested positive for blood.

Iliana remained in the hospital for 12 days. She suffered multiple facial bone fractures; significant eye injuries, including lacerations of her left lower eyelid and tear duct; bilateral ear bruising; neck swelling and bruising; bruising over her thyroid cartilage consistent with strangulation; bruising on her limbs and torso; five chipped teeth; a fractured rib; and bilateral head hemorrhaging and hematoma. Iliana also lost all hearing in her right ear. Dr. Deirdre Anglin, who treated Iliana, testified that her extensive head, neck and facial bruises were consistent with Iliana's description of the attacks.

Defense Evidence

June 2010

Appellant's daughter, Mindy, testified that Iliana was very tipsy and "a little bit belligerent," during the June 20, 2010, Father's Day party at her home. Mindy denied Iliana was in her car, and denied there was furniture in Mindy's front yard that day. Oscar Cairo had known appellant's family for many years. Cairo testified he attended the Father's Day party at Mindy's home. He saw Iliana slip on the grass and hit the side of her head, near her left eye.

September 2010

Defense expert witness Dr. Paul Bronston testified that some of Iliana's injuries could have been caused when she jumped from her car on September 30.

Appellant's ex-wife, Pauline Bates, testified she saw Iliana with a small gun. Appellant's sister, Cynthia Bates testified that Iliana told her she carried a gun. Sanchez testified Iliana showed him a .25-caliber, nickel-plated black handled gun that she called "Baby." He further testified she used the butt of that gun to shatter the front window at Accelerate. That occurred when Iliana was angry that appellant's former girlfriend, Caroline Perez, spent the night with him. Perez testified she saw Iliana shatter the Accelerate window with something shiny.

Sanchez testified he did not hear Iliana screaming in appellant's room on September 30, 2010. He saw some blood in the front office and "the back" of the building that morning. Sanchez also testified Kendra left Accelerate at about 4:00 a.m., and Iliana left about 20 minutes later, and he did not try to prevent either woman from leaving. At some point, Sanchez entered appellant's room and tried to awaken him. He did not see blood in the room. Sanchez admitted he did not initially allow the police to enter Accelerate on September 30. When cross-examined about his inconsistent statements to the police, Sanchez stated: "The truth being, I wasn't going to help. I knew my uncle [appellant] was guilty of it. I wasn't going to help them build a case. I'm not new to this. I know how this works."

Appellant testified at trial but refused to submit to cross-examination. The trial court struck his testimony, which we describe in section III of our Discussion, below.

DISCUSSION

I. *Substantial Evidence Supports Dissuading a Witness by Force or Threat of Force*

Appellant claims there is insufficient evidence to support his conviction of dissuading a witness by force or threat of force. We disagree.

In assessing the sufficiency of evidence, we consider the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence that is "'reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. . . .'" (*People v. Burney* (2009) 47 Cal.4th 203, 253.) We presume all facts in support of the judgment which could be deduced from the evidence, and do not reweigh the evidence or redetermine credibility. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) Reversal is warranted only if there is no substantial evidence to support the conviction under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Appellant was convicted of dissuading a witness, "accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person . . . ." (§ 136.1, subds.(b)(1), (c)(1).) There is no requirement that a defendant say specific words to violate section 136.1 by force or threat. The entire interaction between the defendant and the witness should be considered in determining whether defendant's words or actions reveal an express or implied threat of force or threat to discourage a witness from reporting a crime. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1344; *People v. Hallock* (1989) 208 Cal.App.3d 595, 607.) Appellant brutally beat Iliana in Downey and continued the assault in the car. He admonished her that he would kill her if the police arrived. Such evidence supports the inference appellant expressly and impliedly threatened Iliana not to report his crimes, and he was prepared to "die together."

II. *CALCRIM No. 2623*

Appellant contends, and respondent concedes, that the trial court erred by failing to instruct the jury with CALCRIM No. 2623, a mandatory instruction which would have required the jury to specifically find "The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property" of the witness or a third person, to dissuade the witness from reporting a crime. We conclude the error is harmless beyond a reasonable doubt.

The court erred by failing to instruct the jury on the essential element of force or threat of force required for witness dissuasion by force or the threat of force. (*People v. Wims* (1995) 10 Cal.4th 293, 303, overruled on another ground in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [court has sua sponte duty to instruct on all elements of a crime].) "Such an error ordinarily requires reversal of a conviction unless the error was harmless. But, if no rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt and the conviction stands. (*Neder v. United States* (1999) 527 U.S. 1, 19; accord, *People v. Flood* (1998) 18 Cal.4th 470, 506.)" (*People v. Ortiz* (2002) 101 Cal.App.4th 400, 416.)

We conclude that the jury necessarily accepted Iliana's testimony regarding appellant's use of force, or the threat of force, in seeking to dissuade her from reporting the crime. Every statement upon which the prosecution based the witness dissuasion charge was accompanied by at least a threat of force to Iliana, or to third parties who might assist her in reporting the crimes. For example, Iliana testified appellant told her that if she moved toward the young men watching the assault, he would harm them, and he later told her if his motorcycle was missing, he would kill her. He made both statements at or around the time he was assaulting her. The court's failure to instruct on the force element was harmless beyond a reasonable doubt.

III. *Denial of Continuance*

Appellant argues that the court's denial of a continuance deprived him of due process and the right to effective assistance of counsel. We disagree.

On the afternoon of February 16, 2010, in the third week of trial, appellant decided to testify. The prosecution had rested, and several defense witnesses had testified. The court and counsel had discussed appellant's prior convictions on the preceding day. The trial court advised him of his right to remain silent, and explained he would be cross-examined, and could be impeached with his multiple prior convictions (a 1980 murder that would be described as a crime of "moral turpitude," a 1990 attempted robbery, a 2001 criminal threats offense, and a 2009 narcotics offense). Appellant said he understood, but added, "Well, I want to make sure I'm right."

After a brief recess, appellant's counsel requested "additional time to conduct a more extensive and meaningful question and answer session" with appellant. Counsel indicated that if the court did not grant "additional time," he would request that appellant be permitted to testify in the narrative. He further explained that he and appellant had not "gone over extensive question and answer sessions [and counsel believed] that would be a subject of an [ineffective assistance of counsel claim] in the event that [appellant was] convicted." Counsel further explained that in October 2011, while representing himself, appellant gave a statement of his version of the events.[3] The court ruled appellant could not testify in the narrative, and denied his request for a continuance, because there was "some urgency" to complete the case and the court was "not going to send the jurors home at 2:45 [p.m.].[4]

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[3] Appellant's counsel was appointed as standby counsel, on July 21, 2011, when appellant was in propria persona. In December 2011, or January 2012, he was appointed to represent appellant at trial. Trial began on July 25, 2012.

[4] In ruling, the court stated: "I believe that, counsel, you have been on this case for several months now. It seems clear–it has seemed clear to me that [appellant] would probably want to testify in this matter. [¶] . . . so I am going to respectfully deny that request. [¶] This case is already three days past what we estimated. I'm not saying that that's your fault. I'm just saying that's where we are. And I also know that there [is] some urgency to try to get this case finished and that's only by way of saying I'm not going to –I'm not going to send the jurors home at 2:45 today. [¶] All right. Let's bring the jurors in."

Appellant took the stand before 3:00 p.m. He admitted he was with Iliana at Mindy's house on June 20, 2010. They drank a lot of alcohol, but he did not hit her.

Appellant also testified that he was with Iliana on September 30, 2010. He admitted he hit her when they were on the street in Downey but denied he hit her in the car, or while they were at Accelerate. He testified they left the Gardens, after 1:30 a.m. He rode his motorcycle and followed Iliana as she drove to Downey. On the street in Downey, they argued heatedly, as he tried to start his motorcycle. Iliana screamed at him, pointed a gun at his head, and fired it. Fearing she would kill him, appellant grabbed her gun-holding hand, and "just started socking her" in the face and "all over." He grabbed her by her necklace, broke it, and eventually got the gun and put it in his pocket. She kept crying and screaming. When he heard someone say they were going to call the police, he told Iliana, "Let's get out of here because the cops are going to come." She agreed, entered her car, and he drove it toward Accelerate. Appellant testified that he "wouldn't even have hit her like that if she wouldn't have pulled a gun and shot it at me. I would never do that to her. There's no reason for me to do that to her."

Later, at Accelerate, appellant decided to drive Iliana's car to Downey to get his motorcycle, and she joined him. He told her that after he got his motorcycle, she could take her car and "stay out of [his] fucking life." She said, "You're going to pay for this," and jumped out of the car. He returned to Accelerate after Sanchez called and said Iliana was not calling the police.

Appellant also testified that when she was in his room at Accelerate, while "bleeding from her eyes," Iliana cried, hugged him, and said she would go to "rehab and anger management." He told her to take a shower because he was going to take her to the hospital. After he helped her into the shower, appellant took two pain pills and lay down in bed. The police awakened him later that day.

In denying that he hit Iliana at Accelerate, appellant testified, "There's no way anybody's going to hit anybody . . . like that," and, "Why would anybody hit a person like that?" Near the end of his direct examination, counsel asked him, "Did you strike Iliana for no reason on September 29th or were you defending yourself?"

Appellant responded, "I'm trying to figure out what date -- Yes. I would have never ever done that to a woman, period."

After appellant testified, the court conferred with both counsel and appellant, outside the jury's presence. The prosecutor argued appellant had "open[ed] th[e] door" to the admission of prior acts of violence towards women by testifying that he "would never do that to her" and "would never do that to a woman, period," when asked if he hit Iliana (other than in self-defense).

The court indicated it would allow the prosecutor to cross-examine appellant regarding his prior violent acts against women. It also stated appellant had been clearly instructed as to the parameters of cross-examination and impeachment "a few times, and it was made clear in [his] presence that so long as he didn't portray himself as a person who would never injure a woman, that–that the [prosecutor was] choosing not to impeach him on that."

The recorded discussions relating to appellant's impeachment refer to convictions, but do not otherwise refer to prior acts of domestic violence. The prosecutor stated, however, that discussions relating to appellant's testimony had occurred "throughout this trial . . . by all the parties in the presence of appellant . . . and [they] discussed the issues of his prior acts of violence *both on and off the record in his presence, as well.*" (Italics added.) Neither appellant nor his counsel disputed that statement. Further, before he testified, the court warned appellant that anything he "sa[id] on the witness stand [would] be subject to cross-examination."

The next day, before trial resumed, the court again met with both counsel in appellant's presence. Appellant claimed the court's denial of a continuance contributed to his "mistake" in testifying he "would never [hit] a woman, period." His counsel requested a mistrial, or an opportunity to re-open appellant's direct testimony to explain that his answer applied only to his conduct toward Iliana. Counsel posed other means to address the "mistake," including striking portions or all of appellant's testimony. The court did not agree that additional preparation time with counsel would have prevented appellant's "mistake." It did not believe such time would have been spent to "augment[]

the general notion that you should not get up on the witness stand and perjure yourself . . . [which was not] something that would require preparation." The court indicated that if appellant did not return to the witness stand for cross-examination, it would strike his testimony, which would leave him without any basis to argue that he acted in self-defense. Appellant did not return to the witness stand.

When jurors returned to the courtroom, the trial court informed them that it had granted the prosecution's motion to strike appellant's direct testimony, and instructed jurors they were "not entitled to consider anything [appellant] said on direct examination." When the court asked if the jurors understood that instruction, they "responded in the affirmative."

Section 1050, subdivision (e) permits the trial court to grant a continuance of trial "only upon a showing of good cause." "Whether good cause exists is a question for the trial court's discretion. [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) The trial court must consider the benefit that the moving party anticipates from the continuance, the likelihood of obtaining such benefit, the burden on witnesses, jurors and the court, and whether justice will be accomplished or defeated by granting the motion. (*Ibid*.) The court may not exercise its discretion so as to deprive the defendant or his attorney of a reasonable opportunity to prepare a defense. (*Ibid*.) On appeal, the reviewing court considers the circumstances of the case and the reasons presented for the continuance request to determine whether the denial of a continuance is "so arbitrary as to deny due process. [Citation.]" (*Ibid*.) Moreover, an order denying a continuance is "seldom successfully attacked. [Citation.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

Appellant failed to meet his burden of establishing good cause for a continuance. There is no suggestion that he or counsel had just become aware of previously unavailable evidence, or lacked the opportunity to meet previously regarding his testimony. In fact, both counsel and the court had discussed the possibility of appellant's testifying throughout trial, in his presence, both on and off the record.

We also reject the claim that the denial of a continuance deprived appellant of the effective assistance of counsel. To establish the ineffective assistance of counsel, a defendant must establish that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, and that he suffered prejudice therefrom. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.) Prejudice is established by showing that there is a reasonable probability of a more favorable result absent his attorney's shortcomings. (*Ibid*.) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*Ibid*.) A reviewing court may resolve an ineffective assistance of counsel claim by deciding only the question of prejudice. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland, supra,* at p. 697.)

There is no reasonable probability that the jury would have reached a different result had it been permitted to consider appellant's direct examination testimony, even absent any impeachment or cross-examination. The evidence against appellant is overwhelming.

IV. *Striking Testimony*

Appellant further argues that the court's rulings striking his direct testimony and denying his mistrial motion violated his constitutional right to defend himself. We disagree. "Where a witness refuses to submit to cross-examination, or is unavailable for that purpose, the conventional remedy is to exclude the witness's testimony on direct. As stated in Witkin: 'In either a civil or criminal case, where a party is deprived of the benefits of cross-examination of a witness *by refusal of the witness to answer*, the trial court may *strike out the direct examination*. . . .' [Citation.] This rule applies even 'where the refusal to answer is based on a valid claim of privilege. . . . [Fn. omitted.]" Where a witness refuses to submit to proper cross-examination regarding material issues, the striking out or partial striking out of direct testimony is common, and has been allowed even where the result was to deprive a criminal defendant of the fundamental constitutional right to testify in his own behalf. . . ." (*Fost v. Superior Court* (2000) 80

Cal.App.4th 724, 735-736.) Moreover, based upon the overwhelming evidence of appellant's guilt, any error in the challenged rulings was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

V. *Sentencing Issues*

The trial court sentenced appellant as a third striker to an aggregate term of 110 years to life. The court stayed the count 1 kidnapping sentence; imposed a sentence of 45 years to life for the count 3 assault by means likely to produce great bodily injury (25 years to life, with one § 12022.7, subd. (e) 5-year enhancement and three § 667, subd. (a) 5-year enhancements); 40 years to life for the count 4 witness dissuasion by force (25 years to life, with three § 667, subd. (a) 5-year enhancements); and 25 years to life for the count 6 assault by means likely to produce great bodily injury. The court ordered appellant to serve consecutive terms for counts 3, 4 and 6.

Appellant contends the trial court misunderstood the scope of its discretion to impose a concurrent term in sentencing him for the count 4 witness dissuasion, and mistakenly applied a section 654 analysis in ordering appellant to serve his count 4 term consecutively to his count 3 term. The record belies his claim.

When a defendant is sentenced on multiple felony counts under the three strikes law, the trial court must impose consecutive sentences for all of the current convictions unless the current offenses were committed on the same occasion or arise from the same set of operative facts. (§§ 667, subds. (c)(6), (7), 1170.12, subds. (a)(6), (7).) The court retains discretion to impose either concurrent or consecutive sentences for crimes committed on the same occasion or arising from the same set of operative facts. (*Ibid.*) We presume that the trial court is aware of its statutory sentencing discretion. (*People v. Moran* (1970) 1 Cal.3d 755, 762; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.) Remand for resentencing is required if the record affirmatively shows the trial court misunderstood the scope of its discretion to impose concurrent sentences in a three strikes case. (*People v. Deloza* (1998) 18 Cal.4th 585, 600.) In this case, the court understood the scope of its discretion. It never stated it imposed consecutive terms because it was required to do so. To the contrary, it explained its "rationale for

sentencing the defendant to consecutive terms for those counts," and noted the crimes involved separate acts of violence or threats of violence. That rationale is among the approved "Criteria affecting concurrent or consecutive sentences." (Cal. Rules of Court, rule 4.425(a)(2).)

Appellant correctly contends the trial court erred because it failed to award him presentence conduct custody credits pursuant to section 4019. "Section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, 'a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. [Citations.]' (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125.)" (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907.) "[P]resentence conduct credits are available to a defendant sentenced to an indeterminate life term under the three strikes law." (*Ibid.*) The Department of Corrections may determine whether the provisions of section 2933.5 render a defendant ineligible for conduct credit. (*People v. Goodloe* (1995) 37 Cal.App.4th 485, 494-495.) Appellant's presentence conduct credits are subject to the 15 percent limitation provided by section 2933.1, subdivision (a). The court awarded him 621 days of actual custody, but did not mention conduct credits. He is entitled to 93 days of presentence conduct credit (15 percent of 621).

Appellant contends the trial court erred by staying the section 667.5, subdivision (b) prior prison term enhancements attached to the count 6 assault with intent to inflict great bodily injury. Because the court gave a statement of reasons in announcing it would not impose those enhancements, we conclude the court ordered them stricken. "[O]nce the prior prison term is found true within the meaning of section 667.5, [subdivision] (b)," the trial court must impose or strike the one-year enhancement pursuant to section 1385. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) If it strikes an enhancement, the court must state its reasons for doing so. (§ 1385, subd. (c)(1); Cal. Rules of Court, rule 4.428; *People v. Herrera* (1998) 67 Cal.App.4th 987, 991.) Here, the court explained it was not imposing the enhancements because it had imposed 35 years of other enhancements for three of the same prior convictions. We will

modify the judgment to comport with the court's order striking the prior prison term enhancements.[5]

DISPOSTION

We modify the judgment to: (1) reflect that the section 667.5 subdivision (b) prior enhancements charged in count 6 were "stricken," and (2) award appellant 93 days of presentence conduct credit. The superior court clerk is directed to: (1) amend its minutes for the June 11, 2012, proceedings, nunc pro tunc, to reflect the sentence imposed by the trial court; (2) prepare an amended abstract of judgment which accurately reflects the modified judgment; and (3) forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

[5] Respondent correctly notes a discrepancy between the reporter's transcript and the minute order for the June 11, 1012, sentencing proceedings. We will direct the superior court clerk to amend and correct the minute order.

Leslie A. Swain, Judge

Superior Court County of Los Angeles

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Kimberley J. Baker-Guillemet, Deputy Attorney General, for Plaintiff and Respondent.