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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOE RAY RASMUSSEN, Defendant and Appellant.	A125942 (Humboldt County Super. Ct. No. CR084607S)

Appellant Joe Ray Rasmussen was convicted by jury of a felony charge of resisting an executive officer (Pen. Code, § 69),[1] and three misdemeanors—exhibiting a deadly weapon (§ 417, subd. (a)(1)), assaulting a peace officer (§ 241, subd. (c)), and resisting or obstructing a peace officer (§ 148, subd. (a)(1)). Rasmussen was sentenced to three years in state prison on the felony charge and concurrent county jail terms on the misdemeanors. At the time of sentencing, he received credit for 286 days served in jail, plus 142 days under the then-operative version of section 4019, plus 92 days served in a state hospital, for a total of 520 days.

On appeal, Rasmussen seeks our review of the sealed transcript of the trial court's hearing on his pretrial motion for discovery of complaints against the police officers involved in the incident giving rise to the charges against him (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) He also contends that (1) the trial court erred in instructing the jury as to the intent required for the crime of resisting an executive officer,

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.A., and parts II.C. through II.E.

[1] All subsequent code references are to the Penal Code unless otherwise indicated.

(2) the sentences on the misdemeanor convictions must be stayed pursuant to section 654, and (3) he is entitled to additional custody credits based on required retroactive application of 2009 amendments to section 4019.

Having reviewed the transcript of the trial court's hearing on Rasmussen's *Pitchess* motion, we find no error. In addition, we conclude the trial court did not err in instructing the jury. Accordingly, we affirm Rasmussen's convictions.

We conclude, however, that the sentence on one misdemeanor conviction must be stayed under section 654, and we agree Rasmussen is entitled to retroactive application of the amendments to section 4019. In addition, the sentence reflected in the abstract of judgment as to another of the misdemeanor counts is inconsistent with the sentence orally imposed by the trial court. We order modification of Rasmussen's sentence to reflect these changes.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Evidence at Trial

On August 7, 2008, Rasmussen entered a Bank of America branch in Arcata. He was carrying a backpack and walked with crutches; his right leg had been amputated below the knee. He spoke with teller Vanessa Carrasco and asked to withdraw money from his safety deposit box, but he did not have a key or a valid box number.

Bank manager A.J. Gonzales attempted to assist Rasmussen, but could not locate any account belonging to him. Rasmussen became agitated. He motioned toward the vault and said he had money there, stated he and "Oprah" owned the bank, and told Gonzales to take him back to the vault. Gonzales refused. Rasmussen became more agitated, frustrated and angry. He swore at Gonzales and threatened to kill him and his staff, saying he had killed other bank managers before. Gonzales, Carrasco, and another bank employee, Brittany Rogers, testified that Rasmussen raised his crutch as if he were going to use it to strike Gonzales and Carrasco. Gonzales asked Rogers to call the police. Gonzales also told Rasmussen he needed to leave the bank.

Gonzales continued to talk to Rasmussen until police officers entered the bank's east entrance. When Rasmussen saw the police arrive, he picked up his backpack and

went out the northwest exit, walking quickly on his crutches. The officers followed him out.

Arcata police sergeants Ben Whetstine and Bart Silvers arrived at the bank in response to a report of someone inside the bank threatening to kill people. When the officers entered, they saw Rasmussen on the west side of the bank. Rasmussen began walking away rapidly on his crutches when he saw Whetstine. Whetstine told Rasmussen to stop. When Rasmussen did not stop, Whetstine, followed by Silvers, ran after Rasmussen and followed him out of the bank.

Whetstine caught up with Rasmussen at the corner of Eighth and G Streets and told him to stop. Rasmussen turned around, apparently let go of one of his crutches, and grabbed the other crutch with both hands like a baseball bat. He took a step toward Whetstine as if he were going to swing the crutch at him. Whetstine believed Rasmussen was threatening him with the crutch and was capable of carrying out the threat.

Whetstine stepped back and took out his taser. Whetstine told Rasmussen he would use the taser on Rasmussen if he did not put down the crutch. Rasmussen dropped the crutch and sat down.

When Silvers arrived, along with Officer Jorge Sanchez, Rasmussen was crouched down with his knee bent, leaning against a wall and almost sitting on the ground. Whetstine told Rasmussen he would be detained in handcuffs until the police determined what had happened at the bank. Silvers and Sanchez then took hold of Rasmussen's arms in an effort to put his hands behind his back to handcuff him. Sanchez attached a handcuff to Rasmussen's right wrist. However, Rasmussen resisted the officers' efforts to handcuff him; he said something like " 'not behind my back,' " lunged forward, and brought his arms and hands down to his waist in front of him.

Whetstine told Rasmussen he would use the taser on Rasmussen if he did not stop resisting. Rasmussen did not stop resisting, so Whetstine removed the taser cartridge (containing the probes) from the taser and pressed the taser against one of Rasmussen's shoulders in a procedure known as a "drive stun." Rasmussen reacted by struggling more violently. Still in a crouch, Rasmussen kicked at Whetstine with his good leg, almost

hitting Whetstine in the face with his foot. Rasmussen also got his right arm free and, with the handcuffs still attached to that wrist, began swinging at the officers. Silvers let go of Rasmussen's left arm out of concern he would be hit by Rasmussen's fist and the handcuffs.

The officers again warned Rasmussen to stop resisting, but he continued to thrash. Whetstine put the cartridge back into his taser and deployed it at Rasmussen. One of the probes hit Rasmussen in the torso. Rather than incapacitating Rasmussen, this only further enraged him. Rasmussen jumped up and, using his amputated leg and the wall of the bank for support, continued swinging and punching at the officers; he also swore and yelled at them.

Sanchez then deployed his taser at Rasmussen; the probes struck Rasmussen's right hand or arm, but did not incapacitate Rasmussen. Rasmussen said, " 'Is that all you've got?' " Rasmussen, without his crutches and using his amputated leg, advanced toward Sanchez, moving rapidly, "a lot faster than a walk." Sanchez backed quickly away from Rasmussen. While retreating, Sanchez sprayed pepper spray at Rasmussen, which had no effect. Some of the spray hit Silvers in the eye, and he turned and covered his face out of concern Rasmussen was about to attack him.

Seeing that Silvers was incapacitated by the pepper spray and that Sanchez had both hands full with his deployed taser and his pepper spray, Whetstine ran up to Rasmussen, got him in a headlock, and threw him to the ground. Rasmussen continued to struggle with Whetstine as they rolled around on the ground, and he continued yelling and cursing. When Whetstine got on top of Rasmussen, Silvers and Sanchez grabbed Rasmussen's arms and handcuffed Rasmussen's hands behind his back. Rasmussen continued physically resisting until he was handcuffed. At that point, Rasmussen and the officers were in the middle of Eighth Street, 10 to 20 feet from the bank.

All three police officers suffered minor scrapes and abrasions, and Silvers had to decontaminate his eye from the pepper spray. Rasmussen had an abrasion above his eye, scrapes on his back, and bleeding and abrasions on his amputated leg.

B. The Charges, Verdict and Sentence

As a result of the August 7, 2008 incident, Rasmussen was charged by information with: (1) making a criminal threat against bank manager Gonzales (count one; § 422); (2) resisting an executive officer (Sanchez) (count two; § 69); (3) drawing or exhibiting a deadly weapon (his crutch) in a threatening manner, "in the presence of another person" (count three; § 417, subd. (a)(1));[2] (4) assaulting a peace officer (Sanchez) (count four; § 241, subd. (c)); and (5) resisting or obstructing a peace officer (Whetstine) (count five; § 148, subd. (a)(1)).

The jury convicted Rasmussen on counts two through five. The jury was unable to reach a verdict as to count one, criminal threats, and the trial court declared a mistrial as to that count.

As noted above, the trial court sentenced Rasmussen to a prison term of three years on the felony charge of resisting an executive officer (count two). As to the three misdemeanors, the trial court imposed county jail terms of six months for exhibiting a deadly weapon (count three), one year for assault on a peace officer (count four), and one year for resisting an officer (count five). The court ordered that the jail terms for the misdemeanors run concurrently with each other and with the prison term on count two. Rasmussen received presentence credit for a total of 520 days.

II. DISCUSSION

A. The *Pitchess* Motion

Prior to trial, Rasmussen filed a motion under *Pitchess*, seeking discovery of complaints about Silvers, Whetstine, and Sanchez. The trial court found good cause to proceed with an in camera hearing. After holding an in camera hearing with counsel for the City of Arcata and the custodian of records for the Arcata Police Department, the trial court did not order production of any materials.

[2] Count three did not specify in whose presence Rasmussen allegedly brandished his crutch.

Rasmussen, who has no access to the sealed transcript of the in camera hearing, asks us to review it. The People agree Rasmussen is entitled to this review. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228–1229, 1231.) We have reviewed the transcript, and readily conclude the trial court did not abuse its discretion. (See *id.* at p. 1228 [abuse of discretion standard].)

B. The Jury Instructions for Section 69

Rasmussen contends the trial court erred by instructing the jury that resisting an executive officer under section 69 (count two) is a general intent crime. The People respond that the mental state required depends upon the theory under which the prosecution proceeds. We agree with the People.

Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

The Supreme Court has explained that section 69 "sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814 (*Manuel G.*), citing *In re M.L.B.* (1980) 110 Cal.App.3d 501, 503; see also *People v. Hines* (1997) 15 Cal.4th 997, 1061–1062 & fn. 16 (*Hines*) [section 69 prohibits attempts to deter or prevent an executive officer from performing his or her duty; "[a]nother portion of section 69 also makes it a crime to 'knowingly resist[], by the use of force or violence, [an] officer in the performance of his duty . . . ."].) "The two ways of violating section 69 have been called 'attempting to deter' and 'actually resisting an officer.' " (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 255 (*Lacefield*), citing *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530 (*Lopez*).)

The two types of offenses have different elements. (*Lacefield, supra,* 157 Cal.App.4th at p. 255; *Lopez, supra,* 129 Cal.App.4th at p. 1530.) For example, "[t]he first type of offense can be established by '[a] threat, unaccompanied by any physical force.' ([*Manuel G., supra,*] 16 Cal.4th at p. 814.) It may involve 'attempts to deter *either* an officer's *immediate* performance of a duty imposed by law *or* the officer's performance of such a duty at some time *in the future*.' (*Id.* at p. 817[, fn. omitted].) If the threat is to deter the officer's performance of duty at a later time, 'only the future performance of such duty must be lawful,' which means it is unnecessary to decide whether the officer was lawfully performing duty at the time the threat was made. (*Ibid.*) For the second type of offense, the resistance must include 'force or violence,' and the officer had to be lawfully engaged in the performance of duty at the time of the defendant's resistance. (*Id.* at pp. 815–816.)" (*Lacefield, supra,* 157 Cal.App.4th at p. 255.)

Here, count two of the information, tracking the language of the statute, alleged both types of offenses contained within section 69.[3] However, the prosecutor elected to rely on the second type of offense, i.e., actually resisting an officer. When the trial court and counsel discussed jury instructions, defense counsel argued that section 69 was a specific intent crime. The trial court responded by noting the distinction between the two types of offenses in section 69, stating "one phase of it is specific intent and one phase of it is general intent, according to the book. Deterring an officer by threat or violence is specific. Resisting by force or violence is general." The court asked the prosecutor whether she was relying on one or both of the two theories of culpability. The prosecutor responded: "The second." Defense counsel then asked the court to instruct on both theories, but the court stated it would not do so, because the prosecutor was relying only

[3] Count two stated Rasmussen violated section 69 because he "did willfully, unlawfully and feloniously attempt by means of threats or violence to deter or prevent Officer Jorge Sanchez, who was then and there an executive officer, from performing a duty imposed upon such officer by law, or did knowingly resist by the use of force or violence said executive officer in the performance of his or her duty."

on the second theory. The court said it would instruct the jury using CALCRIM Nos. 252 (which identified count two as a general intent crime),[4] and 2652 (which covered only the actual resistance theory of section 69).[5]

We conclude the trial court correctly instructed the jury that the resistance prong of section 69, the theory on which the prosecutor relied, was a general intent crime. "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456–457 (*Hood*).) The resistance prong of section 69 involves a defendant who "knowingly" resists an executive officer. (§ 69.) "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission." (§ 7, subd. 5.) "The use of the words knowingly and willfully in a penal statute usually define a general criminal intent. [Citation.] There can be specific intent crimes using the terms but the specific intent in those instances arises not from the words willfully or knowingly, but rather from the

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[4] The version of CALCRIM No. 252 later given by the trial court provided that resisting an executive officer as charged in count two required proof of general intent, and stated: "For you to find a person guilty of these crimes [counts two through five], that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose, however, it is not required that he or she intend to break the law." The court instructed the jury that count one, criminal threats, was a specific intent crime.

[5] This instruction provided in part: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant unlawfully used force or violence to resist an executive officer; [¶] Two, when the defendant acted, the officer was performing his lawful duty; [¶] AND [¶] Three, when the defendant acted, he knew the executive officer was performing his duty." CALCRIM No. 2651 is the separate instruction on trying to prevent an executive officer from performing his/her duty, and includes a specific intent element.

requirement in those offenses there be an intent to do a further act or achieve a future consequence. [Citations.]" (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1043.)

The definition of the resistance offense in section 69 describes only the act of resisting an executive officer and does not require an intent to do a further act or achieve a future consequence. (See § 69; *Hood, supra,* 1 Cal.3d at pp. 456–457.) Accordingly, the resistance offense is a general intent crime. (See *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 8–9 (*Roberts*) [stating "the first part of [section 69] defines a specific intent crime, whereas the second portion constitutes a general intent offense"].)

As Rasmussen notes, courts in several cases have held or assumed that at least the crime described in the first clause of section 69 (the "attempting to deter" offense) is a specific intent crime, requiring proof of a specific intent to interfere with the executive officer's performance of his or her duties. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153–1154 (*Gutierrez*); *Hines, supra,* 15 Cal.4th at pp. 1060–1061; *In re M.L.B., supra,* 110 Cal.App.3d at p. 503; *People v. Patino* (1979) 95 Cal.App.3d 11, 27 (*Patino*).)[6] Rasmussen points out that the courts in these cases did not distinguish between the two distinct offenses set forth in section 69. For example, in *Patino*, the court did not distinguish between the two clauses of section 69, but stated generally that the crime of obstructing or resisting an officer under section 69 "would appear to require an act done with the specific intent to interfere with the officer's performance of his duties." (*Patino, supra,* 95 Cal.App.3d at p. 27.) In *Gutierrez*, the Supreme Court cited *Patino* without disapproving this language. (*Gutierrez, supra,* 28 Cal.4th at pp. 1153–1154.) However, in both *Gutierrez* and *Patino*, the actions of the defendants were within the scope of the first clause of section 69. (See *Gutierrez, supra,* 28 Cal.4th at pp. 1153–1154 [threat]; *Patino, supra,* 95 Cal.App.3d at pp. 27–28 [same].) As Rasmussen acknowledges, no case has affirmatively stated the second clause of section 69 describes

[6] As we have noted, the CALCRIM instructions, relying on *Roberts*, differentiate between the distinct offenses set forth in section 69. CALCRIM No. 2651 provides that preventing or deterring an executive officer from performance of his/her duty requires specific intent.

an offense requiring specific intent. (See, e.g., *Gutierrez, supra,* 28 Cal.4th at pp. 1153–1154; *Patino, supra,* 95 Cal.App.3d at pp. 27–28.)

As noted above, the court in *Roberts* did address this issue, stating that, although the first portion of section 69 describes a specific intent crime, the second portion describes a general intent crime. (*Roberts, supra,* 131 Cal.App.3d Supp. at p. 9.) However, the appellant in *Roberts* was charged with resisting arrest in violation of section 148, and the court reached its conclusion about section 69 in order to determine whether section 148 is a general or specific intent crime.[7] (*Id.* at pp. 8–9.) The appellant in *Roberts* contended the crimes described in sections 69 and 148 are in pari materia and, because section 69 had been construed by the *Patino* and *M.L.B.* courts to require specific intent, section 148 also required proof of specific intent. (*Id.* at p. 8.) The *Roberts* court disagreed, emphasizing that section 69 describes two distinct offenses, and distinguishing *Patino* and *M.L.B.* as involving the first type of offense in section 69. (*Id.* at pp. 8–9.) The *Roberts* court concluded section 148, like the second clause of section 69, requires proof of general intent. (*Ibid.*) The statement in *Roberts* regarding the second clause of section 69 therefore is not the direct holding of the case.

However, for the reasons discussed above, we agree with the *Roberts* court that, under the *Hood* test, the second clause of section 69, which includes only a description of the act of resisting an executive officer and does not refer to an intent to do a further act or achieve a future consequence, describes a general intent crime. (See § 69; *Hood, supra,* 1 Cal.3d at pp. 456–457; *Roberts, supra,* 131 Cal.App.3d Supp. at pp. 8–9.)

Rasmussen argues that, if the second clause of section 69 is not construed to require proof of specific intent, it will have the same elements as misdemeanor resisting arrest under section 148, a result Rasmussen contends would be illogical. We reject this

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[7] Section 148, subdivision (a)(1) provides: "Every person who willfully resists, delays, or obstructs any public officer, peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished . . . by imprisonment in a county jail not to exceed one year . . . ."

argument, as the two offenses do not have identical elements. (*Lacefield*, *supra*, 157 Cal.App.4th at pp. 256–257.) In *Lacefield*, the court addressed the question whether section 148, subdivision (a)(1), misdemeanor resisting arrest, is a lesser included offense of the second type of offense in section 69. (*Ibid.*) After examining the statutes and the jury instructions listing the elements of the offenses, the *Lacefield* court noted that "[t]here are striking similarities, and some important differences, between the elements of the second type of offense in section 69 and the offense in section 148(a)(1). . . . The section 69 offense specifies unlawful resistance with 'force or violence,' while section 148(a)(1) can be violated without force, since it punishes a person who 'willfully resist[ed], delay[ed], or obstruct[ed].' The section 69 offense requires that the defendant 'knew' the officer was performing his duty, while section 148(a)(1) requires that the defendant 'knew or reasonably should have known' of the officer's role." (*Ibid.*) These different elements are reflected in the CALCRIM instructions for these offenses, which were given to the jury here. (See CALCRIM No. 2652 [§ 69]; CALCRIM No. 2656 [§ 148, subd. (a)].)

In sum, we conclude the trial court correctly instructed the jury that the second type of offense within section 69, resisting an executive officer, is a general intent crime.

C. Section 654

Rasmussen contends the sentences for the three misdemeanor convictions (counts three, four & five) should be stayed pursuant to section 654, because they were based on the same indivisible course of conduct as the felony conviction (count two).

Section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591 (*Deloza*); accord, *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603 (*Moseley*).) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; accord, *People v. Latimer* (1993) 5 Cal.4th 1203,

1208, 1216; *Moseley*, at p. 1603.) When a defendant is convicted under two statutes for one indivisible course of conduct, section 654 requires that the sentence for one conviction be imposed, and the other imposed and then stayed. (*Deloza*, at pp. 591–592.) Section 654 "does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]" (*Deloza*, at p. 592.) However, "[t]here is a multiple victim exception to [section 654] which allows separate punishment for each crime of violence against a different victim, even though all crimes are part of an indivisible course of conduct with a single principal objective." (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1630–1631, citing *People v. McFarland* (1989) 47 Cal.3d 798, 803.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Sentencing errors under section 654 cannot be waived and are corrected on appeal regardless of whether the appellant raised the point in the trial court. (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.)

As noted above, the trial court ordered that the sentences for counts three, four and five run concurrently with each other and concurrently with the sentence for the count two felony conviction. In explaining its decision, the trial court stated the crimes were "part and parcel of a sequence of events that in time took very little. . . . It's just a single course of conduct at a single location." The court added, "I suppose an argument could be made to run one or more of them consecutively given that they may have been committed against different officers. But when it's part and parcel of such a short event, I would run them concurrently." Relying in part on these statements by the trial court, Rasmussen argues all the convictions (counts two through five) were part of an

indivisible course of conduct and were incident to one objective—"resisting the officers' attempts to detain him."

The People appear to concede that Rasmussen's efforts to resist the officers outside the bank were part of an indivisible course of conduct and were incident to one objective. And, the People agree that count four (assault on a peace officer) should be stayed because Rasmussen's assault was directed at Sanchez, who was also the named victim in count two (resisting an executive officer). The People contend, however, that the sentences for counts three (brandishing a crutch) and five (resisting or obstructing an officer) need not be stayed, because they fall within the multiple-victim exception to section 654. Further, the People argue the count three conviction was supported by evidence Rasmussen brandished the crutch at the bank employees before the police arrived (as well as by evidence he later brandished the crutch at Whetstine outside the bank), and that this conduct involved a different objective, i.e., Rasmussen might have brandished the crutch at the bank employees "out of anger at the employees for refusing to take him to the vault." In his reply brief, Rasmussen responds by arguing the crimes charged in counts three and five are not crimes of violence and thus do not trigger the multiple-victim exception; Rasmussen also asserts there is no substantial evidence supporting a finding that he brandished a crutch inside the bank.

1. *Count Five (Resisting Arrest)*

As to count five, we conclude the multiple-victim exception applies. The information alleged the victim of count two (felony resisting an executive officer; § 69) was Sanchez, while the victim of count five (misdemeanor resisting or obstructing an officer; § 148, subd. (a)(1)) was Whetstine.[8] And, both of these provisions proscribe acts of violence, thus triggering the multiple-victim exception to section 654.

[8] Consistent with the charges in the information, the jury instructions referred to Sanchez as the victim in count two. As to section 148, subdivision (a)(1), the instructions permitted the jury to convict defendant of committing this offense against Sanchez (as a lesser included offense of the violation of section 69 charged in count two), or against Whetstine (as the named victim in count five); accordingly, the instruction for section 148, subdivision (a)(1) referred to the victim as "Jorge Sanchez and/or Ben Whetstine."

" ' "[W]hether a crime constitutes an act of violence that qualifies for the multiple-victim exception to section 654 depends upon whether the crime . . . is defined to proscribe an act of violence against the person." ' [Citation.]" (*People v. Martin* (2005) 133 Cal.App.4th 776, 782 (*Martin*).) In *Martin*, the court held felony resisting arrest in violation of section 69 is an act of violence (*id.* at pp. 782–783); Rasmussen does not argue to the contrary. "The statutory language [of section 69] specifically provides that the offense is one involving resisting an officer by 'force or violence.' It is designed to protect police officers against violent interference with performance of their duties. [Citation.] While the object of the offense may not be to attack a peace officer, its consequence is frequently to inflict violence on peace officers, or subject them to the risk of violence." (*Id.* at p. 782.)

Rasmussen contends, however, that misdemeanor resisting arrest in violation of section 148, subdivision (a)(1) is not a crime of violence. It is true that section 148, subdivision (a)(1) is not expressly labeled a violent crime, and a defendant may resist arrest by violent or by nonviolent, willful conduct (i.e., a person violates the statute if he or she "resists, delays, or obstructs" a peace officer discharging his or her duties). However, this distinction is not dispositive as to whether the multiple-victim exception applies. "Whether the statute is framed as a crime 'against the person' [citation] or, while not so framed, is, in fact, such a crime, makes no difference in assessing whether the multiple-victim exception is applicable. The test is whether, *in fact*, a particular type of crime is a crime of violence against a person. [¶] Other offenses that are not specifically directed 'against the person' [citation] have nonetheless been found to be crimes of

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Despite the use of a single instruction for these two purposes, however, the court emphasized Sanchez was the victim in count two and Whetstine was the victim in count five. The jury was also instructed it could not convict defendant of both a greater offense and a lesser included offense for the same conduct. Because the jury convicted defendant of committing the greater offense against Sanchez in count two, we presume the jury followed these instructions and that the jury's verdict on count five was based on defendant's conduct directed at Whetstine.

violence invoking the multiple-victim exception." (*Martin, supra,* 133 Cal.App.4th at p. 782.)

For example, in *People v. Centers* (1999) 73 Cal.App.4th 84 (*Centers*), the appellant challenged the imposition of separate and unstayed sentences for burglary and kidnapping. (*Id.* at p. 98.) Burglary, defined as entry into a house or other specified structure with intent to commit a felony, is not an inherently violent offense. (§ 459; *Centers, supra,* at pp. 98–99.) However, that did not prevent the court from applying the multiple-victim exception to section 654, because the facts revealed appellant had carried out the burglary in a violent manner, by using a firearm to gain entry into the victim's residence. (*Id.* at pp. 99–100.) After concluding there were separate victims for the kidnapping and burglary, the court affirmed the separate sentences. (*Id.* at p. 102.)

Here, the trial court stated at sentencing that Rasmussen's resistance to the officers involved violence. The evidence supports this conclusion. As discussed above, the officers testified Rasmussen violently resisted arrest, including by struggling with the officers to prevent them from handcuffing him, kicking at Whetstine, swinging his arms at the officers, advancing toward Sanchez, and resisting Whetstine in an attempt to break free after he was on the ground in a control hold. Rasmussen's violent conduct was directed at both Sanchez and Whetstine (as well as at Silvers). Accordingly, the multiple-victim exception applies, and the imposition of concurrent sentences on counts two and five is permissible.

2. *Count Three (Brandishing)*

As to count three, we agree with Rasmussen that the multiple-victim exception does not apply, because the crime charged in count three—drawing or exhibiting a deadly weapon in a rude, angry, or threatening manner in violation of section 417, subdivision (a)(1)—is not a crime of violence. In *People v. Hall* (2000) 83 Cal.App.4th 1084 (*Hall*), the court held that the crime of drawing or exhibiting a firearm in a rude, angry, or threatening manner in the immediate presence of a peace officer in violation of section 417, subdivision (c) is not a crime of violence that triggers the multiple-victim exception to section 654. (*Id.* at pp. 1086–1087, 1095.) The *Hall* court thus ruled that,

under section 654, the appellant could not be sentenced for three counts of brandishing a firearm based on a single act of brandishing in the presence of three police officers. (*Id.* at pp. 1086, 1096.) The court stated the crime of exhibiting a firearm in the presence of a peace officer "is, by its very definition, not committed upon a peace officer, but only in the presence of a peace officer. The multiple-victim exception to section 654 requires multiple victims, not multiple observers. Only once the exhibition of the firearm becomes an assault may the observers become victims, and may a single act warrant multiple punishment." (*Id.* at pp. 1087, 1096.)

As Rasmussen notes, the *Hall* court's analysis applies to the crime of brandishing a deadly weapon other than a firearm in violation of section 417, subdivision (a)(1). Rasmussen's act of brandishing his crutch at Whetstine outside the bank was not an act of violence involving a victim; accordingly, it does not trigger the multiple-victim exception to section 654. And, even if this act of brandishing was an act of violence, the multiple-victim exception would not permit concurrent, unstayed sentences on both counts three and five, because Whetstine was the named victim in count five.

However, as the People note, the evidence supports a conclusion that Rasmussen also brandished his crutch at the bank employees. The prosecutor argued the jury could base a conviction on count three on either Rasmussen's act of brandishing inside the bank or his act of brandishing at Whetstine outside the bank. The alleged act of brandishing inside the bank, which occurred before the police began seeking to detain Rasmussen, could not have involved the same objective as Rasmussen's acts outside the bank, i.e., "resisting the officers' attempts to detain him." Instead, Rasmussen's act of brandishing inside the bank must have been motivated by a different objective, such as that posited by the People, i.e., Rasmussen acted "out of anger at the employees for refusing to take him to the vault." Section 654 does not prohibit separate punishment of acts motivated by different criminal objectives. (See *Neal v. State of California, supra,* 55 Cal.2d at p. 19; *People v. Latimer, supra,* 5 Cal.4th at pp. 1208, 1216.)

Rasmussen contends there is no substantial evidence supporting a finding that he brandished the crutch inside the bank. Rasmussen contends, as did defense counsel at

trial, that a surveillance videotape of his actions inside the bank does not show him brandishing the crutch. Rasmussen has submitted to this court a DVD of the surveillance footage, which was a trial exhibit. This court has reviewed the DVD, which at one point shows Rasmussen grasping the bottom of one of his crutches, although it does not appear to establish that Rasmussen raised the crutch above the bank counter. In any event, three witnesses—bank manager Gonzales, teller Carrasco, and bank employee Rogers—testified that Rasmussen raised his crutch as if he were going to use it to strike Gonzales and Carrasco. Regardless of how high Rasmussen raised the crutch, this testimony is substantial evidence that Rasmussen "dr[ew] or exhibit[ed]" his crutch "in a rude, angry, or threatening manner" in the presence of the bank employees. (See § 417, subd. (a)(1).)

Rasmussen also notes the trial court, when discussing whether to impose concurrent or consecutive sentences, stated the crimes "may have been committed against different officers." Rasmussen argues this statement suggests the trial court believed the jury's verdict on count three was based solely on the alleged act of brandishing at Whetstine outside the bank, rather than on the alleged act of brandishing inside the bank. However, we do not read this brief statement by the trial court as foreclosing a conclusion that the jury's verdict could have been based on both acts of brandishing. Because both alleged acts were supported by substantial evidence, and because we "presume the existence of every fact the trial court could reasonably deduce from the evidence" (*People v. Jones, supra,* 103 Cal.App.4th at p. 1143), we conclude the trial court's decision not to stay the sentence on count three under section 654 was supported by substantial evidence.

For the foregoing reasons, we conclude the concurrent sentences on counts three and five are proper.

D. Presentence Credits

Under the version of section 4019 in effect at the time that Rasmussen was sentenced, a defendant earned two days of credit for every *four* days of custody unless he failed to perform assigned work or abide by the facility's reasonable rules and regulations. (Former § 4019, subds. (a)(4), (b), (c), (f), as amended by Stats. 1982,

ch. 1234, § 7, p. 4553.) The amendments to section 4019 which are at issue, with certain exceptions not applicable here, increase the good conduct credits a defendant can receive for presentence custody. Effective January 2010, section 4019 provided for up to two days of credit for every *two* days of custody under the same conditions. (Former § 4019, subds. (a)(4), (b)(1), (c)(1), (f), as amended by Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.)[9]

Numerous, and conflicting, decisions have been published addressing the retroactive application of the amendments to section 4019. The People have argued here and in other cases that the amendments do not apply retroactively. (See, e.g., *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted Sept. 22, 2010, S184957; *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.)

In *People v. Pelayo* (2010) 184 Cal.App.4th 481 (*Pelayo*), review granted July 21, 2010, S183552, we joined several other courts of appeal in holding that the amendments to section 4019 apply retroactively because punishment is mitigated. (See also *People v. Jones* (2010) 188 Cal.App.4th 165, 183; *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782; *People v. Keating* (2010) 185 Cal.App.4th 364, review granted Sept. 22, 2010, S184354; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.) As indicated, our Supreme Court has granted hearing in these cases and will ultimately decide the issue. Pending direction from the

[9] Sections 4019 and 2933 have been further amended by urgency legislation, operative on September 28, 2010. (Stats. 2010, ch. 426, § 2.) The September 2010 amendments do not affect this case and do not change our analysis in this matter. Unless otherwise noted, all subsequent references to section 4019 or its amendments refer to section 4019, as amended by Statutes 2009–2010, 3rd Extraordinary Session 2009, chapter 28, section 50.

Supreme Court, we adopt and incorporate our discussion and reasoning in *Pelayo*, as set forth hereafter, and again hold that the statute must be given retroactive effect.

1. *Retroactivity of Penal Statutes in General*

The Penal Code provides that "[n]o part of it is retroactive, unless expressly so declared." (§ 3.) "That section simply embodies the general rule of construction . . . that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively." (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*).) The rule, however, "is not a straitjacket" and "should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent" even if the Legislature has not expressly stated that a statute should apply retroactively. (*Ibid*.) In *Estrada*, the Supreme Court considered the particular circumstance of a penal statute that lessens the punishment for a crime but does not include an express statement that the statute was to apply retroactively. (*Id.* at pp. 743–744.) In that situation, the court concluded, the inevitable inference is "that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology," which instruct that punishment is directed toward deterrence, incapacitation, and rehabilitation, but not "punishment for its own sake." (*Id.* at pp. 744–745.) Accordingly, "where the amendatory statute mitigates punishment and there is no saving clause [requiring only prospective effect], the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.) That is,

it will apply to all judgments of conviction that are not yet final on direct review. (*Id.* at p. 744.)

In 1996, the Supreme Court expressly reaffirmed the *Estrada* rule. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7 (*Nasalga*).) In a prior case, the court had suggested that the rationale of *Estrada* had been undermined by further developments in penology in this state. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045, fn. 1, citing § 1170, subd. (a)(1) ["Legislature finds and declares that the purpose of imprisonment for crime is punishment"].) In *Nasalga*, however, the court rejected an invitation to reconsider *Estrada* in light of this change in penological theory. "In the 31 years since this court decided *Estrada*, . . . the Legislature has taken no action, as it easily could have done, to abrogate *Estrada*."[10] (*Nasalga*, at p. 792, fn. 7.) In short, in *Nasalga* the court reaffirmed the *Estrada* rule on the ground of legislative acquiescence, regardless of the continuing persuasiveness of the *Estrada* rationale. (Cf. *People v. Meloney* (2003) 30 Cal.4th 1145, 1161 (*Meloney*) [" ' "[when] a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it" ' "].) After *Nasalga*, it is no longer open to debate whether the *fact* that the Legislature enacted a statute that mitigates punishment supports an inference that the Legislature *intended* the statute to apply retroactively. (*Nasalga*, at p. 792, fn. 7.)

2. *Retroactivity of Statutes Increasing Custody Credits*

In at least four prior decisions long predating the current amendments, courts of appeal have held that the *Estrada* rule applied to amendments increasing the credits a defendant could receive for presentence custody. (*People v. Hunter* (1977) 68 Cal.App.3d 389, 391–393 (*Hunter*); *People v. Sandoval* (1977) 70 Cal.App.3d 73, 87–

[10] Notably, during that 31-year period the Supreme Court had repeatedly followed and applied *Estrada*. (See, e.g., *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Rossi* (1976) 18 Cal.3d 295, 298–300; *People v. Chapman* (1978) 21 Cal.3d 124, 126–127; *People v. Babylon* (1985) 39 Cal.3d 719, 721–722; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300–301.)

88 (*Sandoval*); *People v. Doganiere* (1978) 86 Cal.App.3d 237, 238–240 (*Doganiere*); *People v. Smith* (1979) 98 Cal.App.3d 793, 798–799 (*Smith*).) As far as we are aware, no published decisions have held to the contrary. In *Hunter*, the issue was whether amendments to section 2900.5, which allowed credit for actual time spent in presentence custody against sentences imposed as a condition of probation, applied retroactively to probationary sentences imposed prior to the effective date of the amendments. (*Hunter*, at p. 391.) Following *Estrada*, the court held the amendments applied retroactively to judgments that were not yet final on the effective date of the new law. (*Ibid.*) *Sandoval* agreed with and followed *Hunter* on the same issue. (*Sandoval*, at pp. 87–88.)

In *Doganiere*, the issue was the retroactivity of amendments to section 2900.5 that authorized *conduct* credit (pursuant to § 4019) for time that had been served in jail as a condition of probation against a sentence later imposed after a violation of probation. (*Doganiere, supra,* 86 Cal.App.3d at pp. 238–239.) Following *Estrada* and *Hunter*, the court held the amendments were retroactive. (*Id.* at pp. 239–240.) In *Smith*, the court followed *Estrada* and *Doganiere* and held that 1979 amendments to section 4019 applied retroactively. (*Smith, supra,* 98 Cal.App.3d at p. 799.) In *Doganiere*, the court specifically rejected an argument that the amendments should not apply retroactively because conduct credits were an incentive for future inmate behavior, a goal that could only be accomplished through prospective application. (*Doganiere*, at pp. 239–240.) "It appears to us that in applying the principles of *Estrada*, as indeed we must, the Legislature simply intended to give credit for good behavior and in so doing, dangled a carrot over those who are serving time. It would appear to be fair, just and reasonable to give prisoner A, who has been a model prisoner and by reason thereof served only five months of his six-month sentence, credit for the full six months if we are going to give credit for the full six months to prisoner B, who is recalcitrant, hard-nosed, and spent his entire time violating the rules of the local jail." (*Ibid.*) We note that *Estrada* itself implicitly rejected a similar argument made by the dissent in that case, that retroactive application of a lessened criminal penalty undermines the deterrent effect of penal statutes. (See *Estrada, supra,* 63 Cal.2d at p. 753 (dis. opn. of Burke, J.).) *Doganiere*

concluded, "Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Doganiere*, at p. 240.) Again, under *Nasalga*, the legitimacy of that inference is no longer open to debate. (*Nasalga*, *supra*, 12 Cal.4th at p. 792, fn. 7.)

The People contended in *Pelayo* that the reasoning of *Doganiere* is unsound, since the public purpose of good conduct statutes is to provide effective incentives for good behavior, and that this purpose can only be furthered by prospective application of additional credits. "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*).) *Stinnette* considered an amendment to section 2931 under the Determinate Sentencing Act, which allowed prisoners to earn conduct credits but restricted application of the amendment to time served after the effective date. (*Stinnette*, at pp. 803–804.) The issue was whether the express prospective application of the statute violated equal protection. (*Id.* at p. 804.) The court concluded that it did not because there was a rational basis for treating those who had already begun serving their sentences differently from those who began serving their sentences after the effective date. (*Id.* at pp. 805–806.) Unlike *Stinnette*, the amendments to section 4019 at issue here do not specify the Legislature's intent regarding retroactive or prospective application. We find that *Stinnette* is not helpful in determining the Legislature's intent when amending section 4019.

The Legislature, which is presumed to have been aware of the *Hunter/Doganiere* case law, "has taken no action, as it easily could have done, to abrogate" these decisions in the more than 31 years since the last of them was decided. (Cf. *Nasalga*, *supra*, 12 Cal.4th at p. 792, fn. 7.) Moreover, the Legislature twice amended section 4019, in 1982 and 2009, without expressly providing that the amendments would apply prospectively only. (Stats. 1982, ch. 1234, § 7, p. 4553; Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.) On these facts, we may infer that the Legislature has acquiesced in *Doganiere*. (See *Meloney*, *supra*, 30 Cal.4th at p. 1161.)

3. *Legislative Intent in 2009 Amendments of Section 4019*

As the People acknowledged in *Pelayo*, the Legislature, in enacting the amendments to section 4019, did not expressly declare its intent in doing so. The appellant in *Pelayo* asserted that an intent to retroactively apply the amendments can be discerned from the statement that Senate Bill 18 was enacted to "address[] the fiscal emergency declared by the Governor" (Sen. Bill 18, § 62) and that earlier release of prisoners would foster that purpose. However, the legislative intent at issue "is not the *motivation* for the legislation" but rather "the Legislature's intent concerning whether the [enactment] should apply prospectively only." (*Nasalga, supra*, 12 Cal.4th at p. 795). The statute's purpose of saving state funds by reducing prison population while at the same time minimizing security risk is at least as consistent with retroactive as with prospective application of the amendments to section 4019.

The appellant in *Pelayo* also contended that the express use of a saving clause in other statutes amended by the same legislation (Sen. Bill 18, § 41[11]; § 2933.3, subd. (d) [providing additional custody credits for prison inmate firefighting training or service only for those eligible after July 1, 2009]) compels a conclusion that the Legislature intended retroactivity for amended section 4019. The Legislature's inclusion of a saving clause in the amendment to section 2933.3, but not in the amendments to section 4019, supports an inference that the Legislature had a different intent with respect to the retroactive or prospective application of the two provisions. (Cf. *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62 ["use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended"].) The People urged that we could divine a contrary legislative purpose for only prospective application from the fact that the amendment to section 2933.3, subdivision (d) was expressly made partially retroactive, and the Legislature *failed* to do so here. We think that the Legislature's use of the phrase "shall *only* apply" in amending section 2933.3

[11] "The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 41.)

(italics added), however, suggests an intent to *limit* the provision's retroactive application, rather than *extend* the provision's otherwise prospective application retroactively.

The appellant in *Pelayo* further argued that we could look to the Legislature's explicit recognition of inevitable delays in implementation of new custody credit calculations by the Department of Corrections and Rehabilitation (Sen. Bill 18, § 59) as evidence that the Legislature contemplated retroactive application of such credits. Section 59, an uncodified provision of Senate Bill 18, provides: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from the changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 59.) While ambiguous, this section does tend to support an inference that the Legislature intended the provisions affecting custody credits to have retroactive effect.

Ultimately, however, we concluded that, in the absence of clear affirmative indications that the Legislature intended the amendments to section 4019 to have prospective application only, we must apply the *Estrada* and *Doganiere* presumption that the amendments are retroactive as to all sentences not yet final on direct appeal at the time the amendments went into effect. We found no clear expression of such an intent and thus held that the amendments must be applied retroactively.

4. *Conclusion*

Accordingly, we hold that Rasmussen is entitled to the benefits of the 2009 amendments to section 4019. As noted above, at the time of sentencing, Rasmussen

received credit for 286 days served in jail, plus 142 days under the then-operative version of section 4019, plus 92 days served in a state hospital, for a total of 520 days. Rasmussen is entitled to an additional 142 days under the amendments to section 4019, for a total of 662 days.

E. The Sentence on Count Three

At the sentencing hearing, the trial court orally imposed a concurrent six-month jail term on count three, and concurrent one-year terms on counts four and five. Minutes of the sentencing hearing reflect these same terms. However, the abstract of judgment states Rasmussen was sentenced to concurrent one-year terms as to all three of the misdemeanors (counts three through five).

When a discrepancy exists between the oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–186; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Appellate courts have authority to correct an abstract of judgment that does not accurately reflect the oral judgment of the sentencing court. (*People v. Mitchell*, *supra*, 26 Cal.4th at pp. 185–186.) We will direct the trial court to correct the abstract of judgment to reflect the six-month term imposed as to count three.

III. DISPOSITION

The judgment is reversed only as to the calculation of presentence custody credits and the modification of Rasmussen's sentence. On remand, the trial court shall revise its sentencing order and the abstract of judgment to reflect that Rasmussen earned an additional 142 days of presentence custody credits pursuant to section 4019, for a total of 662 days. In addition, the sentence for count four must be stayed pending finality of the judgment and service of sentences on counts two, three, and five, such stay to become permanent upon completion of the sentences as to those counts. The amended abstract of judgment prepared by the trial court shall reflect the imposition and stay of the sentence on count four. The abstract of judgment shall also reflect a concurrent sentence of six months, rather than one year, on count three. The trial court is directed to forward a

certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

_____
Needham, J.

Superior Court of Humboldt County, Case No. CR084607S, Timothy P. Cissna, Judge.

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