

CERTIFIED FOR PARTIAL PUBLICATION<sup>1</sup>

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK DAVIS JULIAN,

Defendant and Appellant.

D057741

(Super. Ct. No. SWF026544)

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APPEAL from a judgment of the Superior Court of Riverside County, Patrick F. Magers, Judge. Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant Mark Davis Julian.

Edmund G. Brown, Jr., and Kamala Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

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<sup>1</sup> Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Discussion I, II, IV, V and VI.

A jury convicted defendant Mark Davis Julian of two counts of vehicular manslaughter while intoxicated without gross negligence (counts 1 and 2, Pen. Code<sup>2</sup> §191.5 (b)). The jury also found Julian inflicted great bodily injury under section 12022.7, subdivisions (a) and (b) as to both manslaughter counts. With respect to count 1, the vehicular manslaughter of Terri Keller (Terri), the jury found Julian guilty of inflicting great bodily injury causing the coma of Terri's daughter Amanda Keller (Amanda). (§12022.7, subd. (b).) Also on count 1, the jury found Julian inflicted great bodily injury within the meaning of § 12022.7, subdivision (a) on Terri's other daughter Alexis Keller (Alexis). (§12022.7, subd. (a).) With respect to count 2, the vehicular manslaughter of Amanda, the jury found Julian inflicted great bodily injuries on Terri and Alexis within the meaning of §12022.7, subdivision (a).

The court sentenced Julian to 12 years of imprisonment. The sentence was composed of a four-year upper term year for the manslaughter of Terri, a five-year enhancement for Amanda's great bodily injury resulting in a coma and a three-year enhancement for Alexis's great bodily injury. With respect to the manslaughter of Amanda, a four-year upper term and two three-year great bodily injury enhancements for the injuries to Terri and Alexis were imposed and stayed under section 654.

Julian appeals, contending the trial court erred: (1) in rejecting his offer of proof with respect to a power outage at the site of the accident; (2) in admitting into evidence an "in-life" photograph of the Keller family; (3) in imposing section 12022.7 subdivisions

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

(a) and (b) enhancements for manslaughter victims Terri and Amanda; (4) in imposing two section 12022.7 (a) enhancements for the great bodily injury suffered by Alexis; (5) in imposing the maximum restitution fine of \$10,000 without considering his ability to pay; and (6) in failing to give him four days of presentence credits.

We find no error and affirm.

### FACTUAL BACKGROUND

On the afternoon of May 13, 2008, after drinking several 32-ounce beers, Julian was traveling eastbound on Highway 74 in Riverside County, approaching Briggs Road. Terri, who was driving a sports utility vehicle (SUV), was stopped on northbound Briggs Road at Highway 74 and waiting for the signal to change. Although traffic on eastbound 74 was stopped at Briggs Road, Julian drove his pick-up truck at between 45 and 59 miles per hour past the stopped traffic and through a red light at Briggs Road. Julian's truck collided with Terri's SUV, which had entered the intersection. Terri suffered an "internal decapitation" and died on impact.

Terri's two daughters Amanda and Alexis were passengers in the SUV. After being hit by Julian's truck, Terri's SUV spun around, hit two vehicles in westbound lanes of Highway 74 and came to a stop. At the opposite traffic light, off-duty Police Officer Joseph Nardone was in his personal vehicle. Nardone saw a body fly out of the rear window of the SUV and into oncoming traffic. The body Nardone saw was Alexis, who lost consciousness. When she awoke, Alexis found herself lying face down on the pavement next to another vehicle's tire; blood and glass were everywhere around her.

Nardone moved Alexis to safety. On route to a local hospital, Alexis went in and out of consciousness. Alexis suffered a ruptured spleen, a laceration on the back of her head and a broken back. Alexis was hospitalized for four days. Upon her release she was placed in a back brace which she wore for six months; she was confined to bed for the remainder of the summer.

After attending to Alexis, Nardone found Amanda partially ejected from the SUV with her head outside of the car and her feet held inside the vehicle by a seatbelt. Amanda was unconscious, bleeding from both ears, her nose and mouth and was having extreme difficulty breathing. Upon removing Amanda from the SUV, Nardone realized she had ceased breathing. Nardone successfully administered cardio-pulmonary resuscitation and Amanda was flown by helicopter to a local hospital. However, Amanda never regained consciousness.

Six months later, in December 2008, a doctor determined Amanda was in a permanent vegetative state and would never regain complete consciousness. In January 2009, after discussing Amanda's condition with her physician, Amanda's father permitted the physician to withdraw Amanda's life support and she died.

Two hours after the accident Julian had a recorded blood alcohol level of .10. An expert testified that given the rate at which Julian likely metabolized the alcohol in his bloodstream, at the time of the accident Julian probably had a blood alcohol level of .14. Julian was not seriously injured in the collision.

## TRIAL COURT PROCEEDINGS

As we indicated at the outset, a jury convicted Julian of two counts of vehicular manslaughter while intoxicated without gross negligence and found true the alleged great bodily injury enhancements. (Counts 1 and 2, §§ 191.5 (b), 12022.7 subds. (a), (b).) As we also indicated, the trial court sentenced Julian to a total of 12 years' imprisonment including four years for the manslaughter of Terri, five years on the enhancement for Amanda's great bodily injury resulting in a coma and three years on the enhancement for Alexis's great bodily injury. Sentence for Amanda's manslaughter, including enhancements for the bodily injuries Terri and Alexis suffered, was imposed and stayed under section 654.

## DISCUSSION

### I

#### *Excluded Evidence of Power Outage*

##### *1. Background*

At the time of the accident, several witnesses and experts confirmed the traffic signal at the intersection of Highway 74 and Briggs Road was cycling properly. The prosecution witnesses also agreed that at the time of the accident Terri had a green light which permitted her to proceed north on Briggs Road and eastbound traffic on Highway 74 had a red light which should have prevented Julian from going into the intersection. The witnesses did agree one of the three redundant red lights controlling traffic on eastbound Highway 74 was burned out.

Importantly, a CalTrans worker who was familiar with the operation of traffic signals also testified. On the day after the accident he replaced the burned out bulb on the third red light facing eastbound traffic on Highway 74. He testified the signals at the intersection were surge protected, that if electric power to them was interrupted they would operate on battery power for several hours, and if the computer synchronizing the lights froze, the lights would simply stop working. The CalTrans worker testified under no circumstance would the signals give both traffic on Briggs Road and traffic on Highway 74 simultaneous green lights.

In apparent contemplation of the likely testimony of the prosecution witnesses and the CalTrans worker, Julian's counsel made an offer of proof to the effect a power outage at the intersection signals was reported three days before the accident and repairs to the signals were made the day before the accident. Counsel argued the power outage report and repairs were relevant evidence with respect to the issue of whether Julian, as he stated to officers at the scene of the accident, had a green light when he went through the accident. Significantly, counsel conceded she had no evidence which showed the outage and repairs caused the signals to operate improperly on the day of the accident.

The trial court rejected counsel's offer of proof: "There's a complete void here between whatever happened May 12th, whatever they repaired, and whether or not that had any affect whatsoever [on] what was happening on May 13th." The trial court found the proffered evidence was irrelevant, "time consuming and very confusing."

## 2. Legal Principles

It is axiomatic under Evidence Code section 352 a trial court may exclude evidence which is unduly time consuming or confusing. We review rulings made under Evidence Code section 352 for abuse of discretion. (See *People v. Alcala* (1992) 4 Cal.4th 742, 790-791.) "The court's finding will not be disturbed 'absent a finding that the injury is of such gravity as to amount to a manifest miscarriage of justice.' " (*People v. Dyer* (1988) 45 Cal.3d 26, 73.)

Contrary to Julian's contentions, a trial court's determinations under Evidence Code section 352 do not ordinarily implicate the federal Constitution. Constitutional concerns only arise when a defendant is deprived of the opportunity to introduce relevant evidence with significant probative value. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Reeder* (1974) 82 Cal.App.3d 543, 553.) Evidence leading to speculative inferences is of course irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 974, 1035; *People v. Morrison* (2004) 34 Cal.4th 698, 711.)

A court determines the relevance of evidence by determining, "whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts . . . . [Citation.]' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1166.) Importantly, even if evidence has some potential relevance, the evidence "may nonetheless be excluded under Evidence Code section 352 at the trial court's discretion if 'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of

confusing the issues, or of misleading the jury.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

### 3. Analysis

Here, at trial counsel merely proffered evidence an outage occurred in the days before the accident and signal repairs at the intersection were performed. As the trial court correctly pointed out, there is no evidentiary nexus in the record between the alleged power outage and the lights' functioning three days later at the time of the accident. The inference, which counsel would have the jury draw, that because a power outage occurred and repairs were made the signals at the intersection were thereafter malfunctioning, was entirely speculative. Thus, the proffered evidence was not probative with respect to any material issue at trial and the trial court could properly reject it as irrelevant, time consuming and confusing. Julian had no constitutional right to present evidence with such, at best, attenuated relevance. (See *People v. Babbitt, supra*, 45 Cal.3d at pp. 684-685.)<sup>3</sup>

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<sup>3</sup> In light of the number of witnesses who stated Julian had a red light, the fact he passed vehicles stopped at the intersection and the CalTrans worker's testimony that under no circumstances would the intersection signals give conflicting green lights, even if the speculative evidence proffered by counsel had been admitted, there is no reasonable probability Julian would have obtained a more favorable result. Thus, any error, had it occurred, was not prejudicial.



## II

### *Admission of "In-Life" Photograph*

#### *1. Background*

The prosecution moved in limine to introduce an "in-life" photograph of Terri, her husband and their daughters Amanda and Alexis, apparently on a family vacation. The trial court never ruled on the *in limine* motion because at the time the motion was heard Julian's counsel had not yet seen the photograph and was not prepared to comment on it. Later during trial, Julian's counsel did not object when the prosecutor offered the photograph into evidence and referred to it during closing argument.

#### *2. Legal Principles and Analysis*

As the Attorney General notes, counsel's failure to object to the photograph at trial prevents Julian from raising the issue directly on appeal. (Evid. Code, § 353.) Although not raised in his briefs, in the alternative Julian might argue his counsel was ineffective in failing to object to the photograph and thus raise the issue indirectly. However, even as the predicate for a claim of ineffective assistance of counsel, the photograph will not support relief from Julian's judgment of conviction.

In order to establish a claim of ineffective assistance of counsel, Julian must establish counsel acted deficiently and counsel's deficiency was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052]; *People v. Kipp* (1998) 18 Cal.4th 349, 366.) Significantly, where it is clear from the record the asserted deficiency did not prejudice the defendant, we may reject the claim of ineffective assistance on that

ground without determining whether counsel was effective. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

On this record, given the overwhelming evidence of Julian's guilt and the undisputedly horrific nature of the losses inflicted on the victims' family, there is no reasonable probability Julian would have received a more favorable verdict had the photographs been objected to and the objection sustained. We recognize our Supreme Court has "repeatedly cautioned against the admission of photographs of murder victims while alive unless the prosecution can establish the relevance of such items." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230.) However, we note among other witnesses who described the injuries Terri, Amanda and Alexis suffered, Amanda's physician testified as to conversations he had with Amanda's father about withdrawing life support from Amanda and Alexis herself testified about her recollection of the accident, her ejection from her mother's SUV and her injuries. Given the relevance and profoundly sympathetic nature of this testimony, as well as all the other circumstances attending the crime, including Julian's intoxication, it would not be reasonable to conclude the "in-life" photograph materially altered the jury's attitude about the impact of the crime or Julian. (See *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1231.)

In sum, introduction of the "in-life" photograph does not permit us to disturb the jury's verdict.

### III

#### *Section 12022.7, Subdivision (g)*

##### *1. Background*

Relying on section 12022.7, subdivision (g), Julian argues the enhancements imposed for the injuries Terri and Amanda suffered were improper. We find no error.

##### *2. Legal Principles*

Section 12022.7, subdivision (g) states: "This section shall not apply to murder or manslaughter or a violation of Section 451 or 452. Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense." In *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1168 (*Verlinde*), we interpreted section 12022.7, subdivision (g) in a context related to the one presented here.

In *Verlinde* the defendant was convicted of the manslaughter of one of the passengers in her vehicle, as well as other offenses. With respect to all her convictions, the jury found the defendant inflicted great bodily injuries within the meaning of section 12022.7, subdivision (a) on two surviving passengers. Relying on section 12022.7, subdivision (g), the defendant argued that because she was convicted of manslaughter, enhancements under section 12022.7 were not authorized. In rejecting this argument, we stated: "Section 12022.7 does not define a separate offense, but rather is a legislative attempt to punish more severely those crimes that result in great bodily injury 'on any person.' [Citations.] The language of section 12022.7, subdivision (g) does not limit application of the statute to this vehicular manslaughter case where, in addition to the

homicide victim, two other victims suffered great bodily injury. The statutory exemption for murder and manslaughter *is intended to bar imposition of an enhancement for the injuries inflicted on the homicide victim*, who obviously has suffered great bodily injury. Thus, the statutory exemption prevents prohibited dual punishment for the same crime. [Citation.] 'When a defendant engages in violent conduct that injures several persons, he may be separately punished for injuring each of those persons, notwithstanding section 654. [Citation.]' [Citation.] Verlinde's argument is inconsistent with a fundamental objective of our penal justice system, namely, 'that one's culpability and punishment should be commensurate with the gravity of both the criminal act undertaken and the resulting injuries.' [Citation.]" (*Verlinde, supra*, 10 Cal.App.4th at p. 1168 (italics added).)

In *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1330-1331 (*Weaver*), another manslaughter case, we followed *Verlinde* and held a great bodily injury enhancement could be imposed for injuries suffered by the survivor of the collision the defendant caused. "[Appellant] does not persuade us that section 12022.7, subdivision (a) is inapplicable in a case involving only a 'victim-specific' murder or manslaughter offense where a person other than the deceased victim sustains great bodily injury. First, and most importantly, we note the express language of section 12022.7, subdivision (a) does *not* limit its application to a specific *victim* of a felony offense. Rather, it applies to great bodily injuries sustained by 'any *person* other than an accomplice.' [Citation.] Second, its express language also applies when the defendant personally inflicts great bodily injury on any person '*in the commission* of a felony.' [Citation.] That language is

sufficiently broad to include persons other than the victim of a victim-specific felony offense who sustain great bodily injury during the defendant's commission of that offense. Had the Legislature intended to limit section 12022.7, subdivision (a)'s application to only the ostensible victim injured in the commission of a felony offense, it could have expressly so provided. [Citations.] Furthermore, we note it is generally appropriate that a defendant be subject to greater punishment for committing an offense if his or her commission of that offense causes injuries to multiple persons. [Citations.] It is consistent with our criminal justice system to impose greater punishment on Weaver for the great bodily injuries she personally inflicted on [the injured survivor] during her commission of the section 191.5, subdivision (a) offense that caused [the manslaughter victim's] death." (*Id.* at pp. 1330-1331.)

The holdings and reasoning we adopted in both *Verlinde* and *Weaver* require us to reject Julian's contention. Although Terri and Amanda died as a result of their injuries and their deaths support Julian's manslaughter convictions, in this case their injuries also support enhancements under section 12022.7.

As we did in *Verlinde* and *Weaver*, we narrowly construe the exception set forth in section 12022.7, subdivision (g). Under section 12022.7, subdivision (g), when a defendant is convicted of murder or manslaughter, that conviction may not be enhanced with the injury the victim of the murder or manslaughter necessarily suffered. However, injuries caused to *other* victims of the defendant's conduct may serve as enhancements under section 12022.7. (*Verlinde, supra*, 100 Cal.App.4th at p. 1168; *Weaver, supra*, 149 Cal.App.4th at pp. 1330-1331.)

Thus, Julian's conviction for the death of Terri cannot be enhanced with punishment for the grievous injury Terri herself suffered. However, under *Verlinde* and *Weaver* it is clear the conviction for Terri's death can be enhanced for the serious injuries the surviving occupant of the SUV, Alexis, suffered. Alexis's injuries are, for purposes of applying section 12022.7, subdivision (g), indistinguishable from the injuries suffered by the surviving victims in *Verlinde* and *Weaver*. Like the injuries the survivors in those cases suffered, Alexis's injuries were caused by the same conduct which caused Terri's death, and as in *Verlinde* and *Weaver*, those injuries to a survivor will support enhancement of Julian's underlying manslaughter conviction.

This brings us then to the injuries Amanda suffered. The fact Amanda died from her injuries cannot, by itself, prevent those injuries from being used as an enhancement to Julian's punishment for Terri's death. Amanda's injuries were just as distinct from Terri's injuries as Alexis's injuries and under *Verlinde* and *Weaver* their separate and distinct nature permits the injuries to be used as an enhancement. (See *Verlinde, supra*, 100 Cal.App.4th at p. 1168; *Weaver, supra*, 149 Cal.App.4th at pp. 1330-1331.) To hold Alexis's injuries will support an enhancement but, because she died, Amanda's injuries will not, would permit a defendant, such as Julian, to benefit to some extent from the fact one of his multiple victims died rather than survived. We of course must reject such a grotesque interpretation of the statute. As we stated in *Verlinde*, "a fundamental principle of statutory construction is that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences." (*Verlinde, supra*, 100 Cal.App.4th at pp. 1168-1169.)

Moreover, the fact Amanda's fatal injuries led to a second distinct manslaughter conviction did not prevent the trial court from imposing a section 12022.7, subdivision (b) enhancement to Terri's manslaughter based on Amanda's injuries. Under section 654 Julian could not and was not punished twice for the fatal injuries Amanda suffered. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 56; *People v. Arndt* (1999) 76 Cal.App.4th 387, 395.) As we have noted, although Amanda's fatal injuries were the basis for both the five-year enhancement imposed for Terri's death and the four-year upper term imposed for the second manslaughter conviction, the trial court properly stayed execution of the second manslaughter sentence under section 654. Thus, a broader interpretation of section 12022.7, subdivision (g) is not necessary to avoid dual punishment.

On the other hand the narrower interpretation of section 12022.7, subdivision (g) which we adopted in *Verlinde* and *Weaver* is necessary so that a trial court has the ability to fully comply with section 654. Under section 654, where an act is punishable by different provisions of law the defendant must be punished "under the provision that provides for the longest potential term of imprisonment." Here, only under our narrow interpretation could the trial court comply with section 654 by imposing the five-year enhancement under section 12022.7, subdivision (b) for the injuries resulting in Amanda's coma and staying execution of the four-year upper term for her manslaughter.

In sum, we continue to adhere to the narrow interpretation of section 12022.7, subdivision (g) we adopted in *Verlinde* and *Weaver*. That interpretation not only avoids the absurd result of diminishing punishment when a victim dies, it also is consistent with the requirement of section 654 a defendant be sentenced under the statute which provides

the longest potential term of imprisonment. Under *Verlinde* and *Weaver*, the distinct nature of Amanda's injuries permitted those injuries to enhance the sentence for Terri's manslaughter; similarly, and subject to section 654, Terri's injuries were properly used as an enhancement for Amanda's manslaughter.

#### IV

##### *Section 12022.7 Enhancements for Alexis*

Next, Julian contends the trial court erred by imposing section 12022.7, subdivision (a) enhancements for the injuries Alexis suffered on each of his two manslaughter convictions. Contrary to Julian's argument, the trial court satisfied the requirements of sections 654 and 1170.1, subdivision (g) in imposing a section 12022.7, subdivision (g) enhancement on each manslaughter conviction and staying execution of sentence on the conviction for the manslaughter of Amanda and the enhancements imposed on that conviction.

When a trial court applies section 654, it must impose the sentence and stay execution; the court does not have the authority to abstain from imposing sentence on each crime defendant committed. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466 (*Alford*).) Thus, the trial court's imposition of an enhancement on both manslaughter convictions was required by section 654.

Section 1170.1, subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements



applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm." (§ 1170.1, subd. (g), italics added.) Here, Julian was convicted of multiple offenses, to wit: two manslaughter convictions. Section 1170.1, subdivision (g) by its terms did not prevent imposition of an enhancement on each of the manslaughter convictions growing out of the injuries Alexis suffered.

In sum, the trial court did not err in its application of section 12022.7 to Alexis's injuries.

## V

### *Restitution*

#### *1. Background*

In imposing the upper term on count 1, the trial court found the devastating nature of the harm Julian caused outweighed the absence of any criminal record: "the tremendous devastation on this family, the taking of the life of a child, putting her on a respirator for five months, and forcing Mr. Keller ultimately to make that horrible decision whether or not to authorize termination of life support so Amanda can go to a better place, is horrific." Thereafter the trial court judge imposed on Julian a restitution fine of \$10,000, the maximum amount permissible under section 1202.4, subdivision (a). In imposing the fine, the court stated: "And the Court imposes a restitution fine of \$10,000 on Count 1 based on upon the severity of this crime. The Court is not considering ability to pay. But based upon the nature and the circumstances of this case, the Court feels that the maximum restitution fine, which is a payment to the restitution fund, is appropriate." On appeal Julian claims the trial court's statement demonstrates it

failed to give proper consideration to his ability to pay as required by section 1202.4, subdivision (d).

## *2. Legal Principles*

Section 1202.4, subdivision (d) states in pertinent part: "In setting the amount of the fine . . . the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." Thus, where as here, the trial court imposes a restitution fine in excess of the \$200 minimum required by section 1202.4, subdivision (b)(1), the trial court should consider a defendant's inability to pay, along with other relevant factors. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) However, where a defendant has not properly raised the issue in the trial court, the defendant may not raise it for the first time on appeal. (*Ibid.*)

## *3. Analysis*

Our examination of the record shows Julian did not raise his inability to pay the restitution fine either before or after the trial court made its statement with respect to the restitution fine, and in particular it appears Julian made no attempt to bring to the trial

court's attention the error he now asserts. Plainly, had Julian brought section 1202.4, subdivision (d) to the trial court's attention, the trial court would have had an opportunity to clarify its statement. Thus, arguably, on this record Julian waived any section 1202.4, subdivision (d) error.

However, we reject Julian's argument on two more fundamental bases. First, we do not agree the trial court's statement reflects an unambiguous abdication of the trial court's duty under section 1202.4, subdivision (d). Rather, read in its entirety, and along with the other views the trial court expressed at the time of sentencing, the trial court's statement of its reasons for imposing the maximum restitution fine strongly suggest the trial court determined that notwithstanding *any* inability to pay, the horrific nature of the losses suffered by the victims nonetheless required imposition of the maximum restitution fine. Such a determination is plainly within the terms of section 1202.4, subdivision (d), which only requires the inability to pay be considered along with other factors, including the seriousness and gravity of the crime, the number of victims and the psychological harm caused by the crime.

Second, even if we found that the trial court erred in the manner in which it expressed its determination, it is clear from all the views the trial court expressed, had the requirements of section 1202.4 subdivision (d) been brought to the trial court's attention, the trial court would have imposed the maximum fine. Plainly, the trial court believed, and the record supports its belief, the grievous harm Julian caused justified the fullest punishment available under the law. Thus, Julian cannot demonstrate he was prejudiced by the trial court's statement.

VI

*Presentence Credits*

Finally, Julian has requested us to allow him to augment the record with bail bond documents, which he contends show he is entitled to an additional four days of presentence credits. The Attorney General has objected to the motion to augment on the grounds the bail bond documents suggest, but do not prove, Julian is entitled to additional credits. In light of this factual dispute, we deny the motion to augment without prejudice to Julian's ability to seek the additional credits in the trial court under section 1237.1.

DISPOSITION

The judgment is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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McDONALD, J.

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IRION, J.