

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN RUSSELL SMITH,

Defendant and Appellant.

C062191, C063545

(Super. Ct. No.
P06CRF0473)

APPEAL from a judgment of the Superior Court of El Dorado County, James R. Wagoner, Judge. Affirmed as modified.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, and Stephen G. Herndon and Larenda Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II and IV.

Defendant was convicted by jury of molesting a victim from the time she was eight years old until she turned 15. Sentenced to 18 years in state prison, he appeals.

On appeal, defendant raises issues concerning (1) the statute of limitations, (2) jury instructions, (3) restitution, and (4) sentencing. Except for the need to make some minor modifications to the judgment, we find no merit in defendant's contentions of error. We therefore modify and affirm the judgment.

PROCEDURE

The district attorney charged defendant by information with one count of committing a lewd act on a child under 14 (count I; committed between January 1, 1987, and August 10, 1988; Pen. Code, § 288, subd. (a))¹ and one count of continuous sexual abuse (count II; committed between August 11, 1988, and August 9, 1993; § 288.5). A jury found defendant guilty of both counts.

The trial court sentenced defendant to the upper term of 16 years in state prison on the continuous sexual abuse count and a consecutive two years (one-third the middle term) on the lewd act count, for a total state prison term of 18 years. The court also ordered various fines and fees, as well as victim restitution in an amount to be determined later.

Defendant filed a timely notice of appeal from the judgment. (Case No. C062191.)

¹ Hereafter, unreferenced code citations are to the Penal Code.

After a hearing on the amount of victim restitution, the trial court ordered defendant to pay the victim \$753,265, consisting of \$3,265 in economic damages and \$750,000 in noneconomic damages. The court noted that a total of \$79,210.68 had been lodged with the court on behalf of defendant. The court ordered that the funds lodged with the court, including interest accrued, be distributed to the victim. The court also issued an abstract of judgment and writ of execution for the total amount of restitution (\$753,265).

Defendant filed a timely notice of appeal from the restitution order. (Case No. C063545.)

We consolidated the two appeals.

FACTS

The victim, Jane Doe, was born on August 10, 1979. She met defendant at the age of eight, in 1988, when he started dating her mother. Doe's mother and defendant were married in 1992 and divorced in 2000.

When Doe was eight years old, defendant routinely babysat her at his trailer while Doe's mother worked. Dropped off at defendant's trailer after school, Doe would stay with defendant until Doe's mother picked her up in the evening. During Doe's visits to defendant's trailer, defendant would lift her onto the kitchen counter and touch Doe's chest, stomach, neck, and back, over and under her clothing, eventually doing so when Doe was wearing her underwear only. Defendant also digitally penetrated Doe's vagina when she was eight years old.

The molestation continued after Doe turned nine years old and beyond. As Doe recalls, "[b]asically every day" when she was alone with defendant, she was molested. He had her take off all of her clothes, and he touched her, grabbing her waist, stomach, and chest.

Doe moved into an apartment with her mother and defendant when she was 10 years old, and the molestations continued there, during the day, when Doe was alone with defendant. When she was 12 years old, defendant began digitally penetrating her vagina regularly.

Doe started homeschooling when she was 11 years old and continued with homeschooling through high school. The homeschooling was defendant's idea, and defendant was responsible for her during school time.

When Doe was 13 years old, she and her mother moved with defendant to a home in Ione. Doe's mother slept in the master bedroom, and defendant slept on a cot in the living room. As Doe grew through puberty, defendant focused more on her chest. Defendant routinely had Doe join him on the cot at night, both undressed. He touched her chest, buttocks, and vagina, while he had her touch his chest and stomach.

When Doe was 14 years old, defendant began orally copulating Doe, and, when Doe was 16 years old, defendant began penetrating Doe's vagina with his penis, which occurred almost every day. During a trip to Disneyland to celebrate Doe's graduation from high school, defendant had Doe orally copulate him while Doe's mother slept in the other bed.

Defendant took more than 800 naked pictures of Doe while she was a minor, starting when she was eight years old. He commonly destroyed the pictures after two or three weeks so that he would not get caught with them. One of the pictures, however, was found by defendant's sister. It was admitted as evidence at trial.

After Doe turned 18 years old, she moved out of the house. However, defendant frequently visited her and had sexual relations with her. When Doe needed money, defendant paid her for sex acts. The encounters continued until November 2005, when Doe was 26 years old.

Defendant lived with his father from 1997 until about the time of his arrest. He sent pictures of Doe to Playboy and encouraged her to become a stripper. When defendant's sister was cleaning up their father's house after his death, she found a naked picture of Doe and a printout of a Yahoo profile of a 15-year-old. On the back of the printout was written, "moms with daughters lesbian chat room."

In March 2006, Doe reported defendant's conduct to the El Dorado County Sheriff's Department. She told a detective, however, that defendant had never penetrated her vagina with his fingers or penis. At trial, she testified that she lied concerning this specific point because she "was not prepared to recollect the whole entire truth"

With the help of the detective, Doe made a pretext call to defendant. During the call, Doe told defendant she needed to talk to him because she had to deal with "some of the stuff that

you did to me” Doe said: “I just want to know why you did some of the stuff you did to me in the past when I was a child.” Defendant responded: “I don’t know what to say at this point.” Defendant was evasive, so Doe said that he needed to talk to her or she would go to the authorities. Defendant said: “[W]hat’s going to say you’re not going to go anyhow?” Defendant expressed discomfort with talking over the phone and said: “I just want to assure that it’s just you and me talking.” He wanted to be sure that their conversation was not being recorded.

Doe asked defendant, “Why did you start touching me when I was eight years old sexually and when I was a child and I didn’t know what the hell was going on?” Defendant replied: “I don’t know. It’s probably not what you want to hear, but I don’t know.” Doe asked why defendant had sexual intercourse with her, and defendant said he thought it sounded like she was reading from a paper. Doe again asked why defendant had done “things” to her, and defendant answered: “Well, I didn’t try to take advantage of you if that’s what you’re trying to say.”

Doe asked defendant why he had tried to have sex with her and why he touched her chest and orally copulated her. Defendant said: “There’s no explanation for anything that I can come up with right this instant. Or any other time.” Doe persisted in seeking an explanation, and defendant expressed further suspicion that she was being prompted.

Doe accused defendant of touching her with sexual intentions, and defendant said: “Well, I didn’t have sexual

intentions with you, if that's what you're saying. I don't -- there's no way in heck I did." Doe pressed for an answer, and defendant continued to say he did not have an answer. He also continued to express his paranoia over talking to her about it on the phone and what he perceived as Doe's attempt to "entrap" him. He told Doe that he did not want her to go to the authorities because "it should be between you, me, and your mother, because your mother was right there too."

Doe asked: "Why did you touch my chest? Why did you touch my vagina? Why did you have attempted intercourse with me? Why did you . . . have any sexual contact with me?" And defendant said: "I -- I don't know why -- uh -- why anything would come up on that. There was -- there's no explanation for any of it other than the fact that we were living together and, you know, your mother and I and you, all three of us ran around in -- well, we probably shouldn't have either -- very open." He continued: "And unfortunately, you know, a lot of stuff started when your mother and I were first together, and I guess it just progressed, but it shouldn't have been."

Defendant said he was trying not to be attracted to Doe; he was attracted to her mother. Doe asked why he came to her, and defendant said: "I guess because you and I were getting closer overall."

Doe told defendant that she was worried that defendant would do those things to her future children. He said: "Never. Absolutely never." He also said, "I won't do it to anybody. I

have never done it to anybody, and I tried to do is raise a daughter [sic], and I guess that was wrong too, right?"

Doe asked why he had touched her "in certain spots that you're not supposed to touch me as a father." Defendant said: "I don't know. There's no answers to anything. I don't know what to say to you. I'm sorry your life has been so screwed up, whether it was my fault, [Doe's boyfriend's] fault, or your mother's, or anybody else's."

Defendant told Doe: "Well, I'm sorry whatever (inaudible) happens happened [sic]. I don't have an actual answer for you because I don't know what to say to you, or anybody else. I just don't know. I just wish you could do what you're saying, close this thing off and go on with your life."

Before they hung up, defendant told Doe that he was dating a woman without children, and that he had purposely found someone without children.

The prosecution presented evidence of defendant's conduct with other girls. Around 1989, when defendant was married to a woman other than Doe's mother, he fondled the breasts of his teenage stepdaughter over her clothing. On another occasion, defendant, in the presence of friends and family, made sexual remarks about the same stepdaughter, who was wearing a bikini.

In 2004, defendant gave a computer disk to his fiancée. He told her that he was being investigated and that the disk contained naked pictures of Doe which he had taken when, as an adult, she was trying to become a pole dancer. The fiancée never looked at the pictures and later destroyed the disk.

The fiancée ended her relationship with defendant when she learned that defendant had entered her home and tried to get into the bathroom when her 16-year-old daughter was showering.

Defendant testified at trial. He denied that he babysat Doe before they moved to Ione. He also denied that he ever molested Doe. Any touching between them was incidental and without sexual intent. However, he said that Doe hugged him when she was naked. He was shown one naked picture of Doe and was asked if he had taken the picture. He said no. He also denied paying her for sex.

Concerning the pretext call, defendant claimed he did not deny her accusations because he was trying to figure out what was going on. While defendant was being questioned by a detective about the accusations, defendant asked to speak to his father. In the interview room, defendant's father asked defendant where the conduct occurred, and defendant replied that it occurred in Placerville and Ione. Referring to the recording of the pretext call, defendant told his father: "If they run that tape, it's going to screw me down."

DISCUSSION

I

Statute of Limitations

The standard statute of limitations for count I, a violation of section 288, subdivision (a), is six years because it falls within the category of crimes punishable by

imprisonment for eight or more years.² (§ 800.) Here, the prosecution commenced more than six years after the alleged offense. (See § 804.) However, section 803, subdivision (f) provides for extension of the statute of limitations under specific circumstances. Defendant contends that (A) section 803, subdivision (f) does not apply in this case and (B) trial counsel was ineffective for not requesting a jury instruction on section 803, subdivision (f). We conclude that (A) the evidence produced at trial was sufficient to establish that the limitations period had not expired when this action was commenced against defendant and (B) defendant suffered no prejudice from any alleged deficiency in trial counsel's representation as to this issue.

Defendant did not raise the statute of limitations issue in the trial court. Neither did he request instructions so that the jury could make factual findings relevant to the statute of limitations. The failure to raise the statute of limitations issue did not forfeit consideration of the issue on appeal because the issue is jurisdictional and the charging document indicates on its face that the action is time-barred. (*People v. Williams* (1999) 21 Cal.4th 335, 340-341.) However, because defendant did not request jury instructions on the statute of limitations issues, he cannot argue on appeal that jury

² "Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense." (§ 800.)

instructions should have been given. (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1192-1193.)

Enacted effective January 1, 1994, section 803, subdivision (f) (1), states: "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section . . . 288" ³ Thus, this law extends the applicable statute of limitations for specified crimes, so long as the crimes "were not time-barred on January 1, 1994" (*People v. Vasquez* (2004) 118 Cal.App.4th 501, 504; see also *Stogner v. California* (2003) 539 U.S. 607, 618-619 [156 L.Ed.2d 544, 556] (*Stogner*) [section 803, subdivision (f) may extend limitations period only if limitations period had not yet expired when that provision became effective, applying ex post facto prohibition].)

Here, there is no *Stogner* ex post facto problem with applying the extension provision. Even though the information alleged acts before January 1, 1988 (six years before the January 1, 1994, enactment of the extension provision), the evidence at trial established that defendant did not meet Doe

³ Section 803, subdivision (f) was previously codified as subdivision (g) and is referred to as section 803, subdivision (g) in several cases discussed in this section. We will nonetheless refer to the current statute because the changes that have been made to the statute do not affect the issues in this case.

until sometime in 1988, when defendant started dating Doe's mother.

Section 803, subdivision (f) imposed three additional conditions that must be met before the statute of limitations can be extended. They are "(A) The limitation period specified in Section 800 . . . has expired. [¶] (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual. [¶] (C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation." (§ 803, subd. (f)(2).) Concerning the corroboration requirement, "[n]o evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals." (§ 803, subd. (f)(3).)

Here, the complaint, on its face, indicates that the prosecution for the crime charged in count I is time-barred because, as the parties agree, the limitations period for the crime was six years (§ 800) and more than six years elapsed between the alleged commission of the offense and the filing of the complaint. The information alleged, in count I, that defendant committed a lewd act on Doe between January 1, 1987, and August 10, 1988. Therefore, absent extension of the limitations period pursuant to section 803, subdivision (f), which is not shown on the face of the information, the six-year

limitations period ended August 10, 1994, long before defendant was charged in this case.

Doe turned nine years old on August 10, 1988, the ending date of the crime alleged in count I. Therefore, the evidence concerning what defendant did when Doe was eight years old is the only evidence relevant to this inquiry.

A. *Conditions for Extending Limitations Period*

"The People ha[ve] the burden to prove the charges were timely brought. [Citation.] Generally, the burden to show this is by a preponderance of the evidence. [Citation.]" (*People v. Ruiloba* (2005) 131 Cal.App.4th 674, 681 (*Ruiloba*)).

Defendant challenges the application of section 803, subdivision (f) based on the last two of the conditions stated in subdivision (f)(2). He asserts that (1) there was contradictory evidence concerning whether his crimes against Doe in 1988 involved "substantial sexual conduct" and (2) there was no independent evidence that clearly and convincingly corroborated Doe's allegations. Neither assertion persuades us that extension of the limitations period was improper.

1. *Contradictory Evidence*

Defendant argues that the evidence concerning whether his molestation of Doe when she was eight years old involved substantial sexual conduct was contradictory. While it is true that there was some contradictory evidence concerning the extent of defendant's molestation of Doe when she was eight years old, there was substantial evidence that the molestation involved substantial sexual conduct.

"Substantial sexual conduct," for the purpose of applying section 803, subdivision (f), includes digital penetration of the vagina. It does not include touching of the stomach, chest, neck, and back.⁴ (§ 1203.066, subd. (b).)

Doe's testimony concerning whether defendant's acts against her when she was eight years old included digital penetration was internally contradictory. She first testified on direct examination by the prosecutor that, when she was eight, defendant's acts were limited to touching her stomach, chest, neck, and back, both over and under her clothing. She stated that defendant did not touch her vagina during this time period. After a break in the proceedings, however, she testified, still on direct examination, that defendant first digitally penetrated her vagina when she was eight years old. Again on cross-examination, Doe testified that defendant digitally penetrated her vagina when she was eight years old.

While Doe's testimony was internally inconsistent, it constituted substantial evidence that defendant's molestation of Doe when she was eight years old involved substantial sexual conduct. Defendant does not argue to the contrary. Instead, he simply notes the inconsistencies. But he provides no authority for the proposition that the substantial sexual conduct

⁴ "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by an foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 1203.066, subd. (b).)

condition of section 803, subdivision (f) cannot be established by evidence for which there is contradictory evidence. We know of none. Therefore, defendant has not shown error.

2. Clear and Convincing Corroboration

Defendant also argues that there was no evidence clearly and convincingly corroborating Doe's allegation that defendant molested her when she was eight years old. We disagree.

When a defendant argues on appeal that there was no independent evidence clearly and convincingly corroborating the victim's allegation, our task is to determine whether there is substantial evidence corroborating the allegations. (*Ruiloba, supra*, 131 Cal.App.4th at p. 681.) "[T]he corroboration does not have to corroborate each allegation in the criminal pleading, only the 'victim's allegation.' (§ 803, subd. [(f)](2)(B).) . . . Further, the corroboration does not have to be sufficient to support a conviction. [Citation.]" (*Ruiloba, supra*, at p. 683, original italics.) For example, evidence obtained in a pretext call leading to an inference that there was sexual conduct with the victim can be substantial evidence corroborating the victim's allegation. (*Id.* at pp. 687-688.)

Here, defendant made statements during the pretext call from which an inference could be drawn that defendant engaged in sexual conduct with Doe when she was eight years old. Defendant argues that there was no mention, in the pretext call, of digital penetration when Doe was eight years old. But the corroborating evidence need not corroborate every element. As this court stated in *Ruiloba*, "The fact [the pretext call]

corroborates any sexual acts corroborates all of [the victim's] allegations, because the call tended to prove his lewd disposition toward her in particular. [Citation.]” (*Ruiloba, supra*, 131 Cal.App.4th at p. 688.) The pretext call corroborated Doe’s allegation that defendant molested her when she was eight years old.

In addition to the pretext call, there was other evidence that corroborated Doe’s allegations. Defendant possessed nude pictures of Doe. He fondled another girl’s breasts and made sexual remarks about her. He tried to get into the bathroom when his fiancée’s 16-year-old daughter was taking a shower. He possessed an Internet profile of a 15-year-old girl, on which was written, “moms with daughters lesbian chat room.” This evidence of defendant’s uncharged sexual conduct has significant probative value in corroborating the victim’s allegations. (*Ruiloba, supra*, 131 Cal.App.4th at pp. 682-683.)

Therefore, there was sufficient evidence to corroborate Doe’s allegations against defendant, and the record supports extension of the limitations period pursuant to section 803, subdivision (f).

B. *Effective Assistance of Counsel*

In the alternative, defendant contends that his trial counsel’s performance was deficient because he did not request an instruction to the jury concerning the requirements of section 803, subdivision (f) for extending the limitations period. Such an instruction would have required the jury to decide, based on the evidence, whether the limitations period

was extended. Specifically, the jury would have decided whether defendant engaged in substantial sexual conduct with Doe when she was eight years old. We need not determine whether the failure to request an instruction was deficient because, even if it was, the failure to request the instruction did not prejudice defendant.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right ‘entitles the defendant not to some bare assistance but rather to *effective* assistance.’ (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof.” (*In re Avena* (1996) 12 Cal.4th 694, 721.)” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466-467.) The test for prejudice is whether there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.)

It is not necessary for the court to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*)

Defendant argues that trial counsel could not have had a valid tactical reason for not requesting the instruction, and the Attorney General makes no attempt to argue to the contrary. Therefore, we proceed to the question of prejudice -- whether there is a reasonable probability that the result of the proceeding would have been different if trial counsel had requested instructions to the jury on the statute of limitations as to count I.

Defendant's argument that there was prejudice largely echoes his arguments concerning whether there was evidence of substantial sexual conduct when Doe was eight years old and whether there was independent evidence that clearly and convincingly corroborated Doe's allegation that defendant molested her when she was eight years old. As we noted, there was substantial evidence of substantial sexual conduct, based on Doe's testimony that defendant digitally penetrated her vagina when she was eight years old, and there was ample evidence corroborating her allegation of molestation. The real question here is whether there is a reasonable probability the jury, having heard the contradictions in Doe's testimony concerning

digital penetration when she was eight years old, would have found there was no digital penetration at that age. (See § 803, subd. (f)(2)(B) [substantial sexual conduct requirement].) If the jury had found no digital penetration at that age, the court would have been constrained to conclude that the limitations period expired before the case commenced.

We conclude it is not reasonably probable that the jury, had it been instructed concerning section 803, subdivision (f), would have found that the defendant did not digitally penetrate Doe's vagina when she was eight years old. Although Doe initially testified that defendant did not digitally penetrate her vagina when she was eight years old, she reversed that testimony, still on direct examination. On cross-examination, she expressly confirmed that digital penetration took place when she was eight years old. Considering the verdicts, the jury found Doe to be a credible witness. Nothing about the instruction defendant now contends should have been requested would have affected the jury's credibility determination. Furthermore, Doe's testimony revealed many years of defendant's molestation, including numerous instances of substantial sexual conduct. Even considering Doe's original testimony that defendant did not digitally penetrate her vagina when she was eight years old, it is unlikely that the jury would have disbelieved her later reversal of that testimony during direct examination and her express confirmation on cross-examination of the digital penetration.

We therefore conclude that it is not reasonably probable that the jury would have concluded that defendant did not digitally penetrate Doe's vagina when she was eight years old. Accordingly, defendant's contention that he was denied effective assistance of counsel is without merit.

II

Jury Instructions

A. *CALCRIM No. 362*

Defendant contends the judgment should be reversed because the jury was instructed with a version of CALCRIM No. 362 that permitted the jury to infer from defendant's false or misleading trial testimony that the defendant was conscious of his guilt of the charged crime. He claims that this instruction (1) lightened the prosecution's burden of proof beyond a reasonable doubt and (2) burdened his right to testify and right to present a meaningful defense. Neither claim has merit.

The jury was instructed with CALCRIM No. 362 as follows: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Unlike CALJIC No. 2.03, which also instructs concerning a defendant's false or misleading statements, the version of

CALCRIM No. 362 given here did not limit the defendant's false or misleading statements to those made before trial. As pointed out in *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1248-1249 (*Beyah*), the CALCRIM committee apparently made an unintended drafting error in CALCRIM No. 362, which permitted the jury to infer a defendant's consciousness of guilt based on false statements made during trial, as well as those made before trial. In August 2009, the CALCRIM committee revised the first paragraph of CALCRIM No. 362 to read: "If [the] defendant . . . made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt." (CALCRIM No. 362 (Sept. 2009 ed.).) However, defendant's trial took place in early 2009, before the revision, and the jury was instructed under the former version of CALCRIM No. 362.

Beyah, cited by defendant in his opening brief, rejects the claims defendant now advances -- that former CALCRIM No. 362 lightened the prosecution's burden of proof beyond and reasonable doubt and vitiated his right to testify and to present a meaningful defense. The court concluded that whatever error the drafters of that instruction made, the error did not harm the defendant "because California law makes clear that a defendant's false trial testimony may, in proper circumstances, be considered as evidence of consciousness of guilt." (*Beyah*, *supra*, 170 Cal.App.4th at p. 1249.) *Beyah* explained that former

CALCRIM No. 362, as applied to false trial testimony, "did nothing more" than state the principle that "if the jury concluded that defendant intentionally gave false or misleading testimony, it may infer that defendant is aware of his guilt and may consider that inference -- along with other evidence -- in determining defendant's guilt." (*Id.* at p. 1250. italics omitted.) *Beyah* also explained that "although it might be said that the instruction singles out a defendant's testimony as subject to heightened scrutiny compared to other witnesses, that is true only because the principle involved is uniquely applicable to the defendant. That is not, however, a legitimate ground for concluding that the instruction unconstitutionally burdened defendant's choice to testify or resulted in any improper inference of guilt based on the jury's evaluation of his testimony." (*Ibid.*, fn. omitted.)

The same analysis applies here. Because a jury may properly infer consciousness of guilt from a defendant's false trial testimony (*People v. Showers* (1968) 68 Cal.2d 639, 643; *Beyah, supra*, 170 Cal.App.4th at pp. 1249-1250), and the language used in former CALCRIM No. 362 is permissive, not mandatory, defendant cannot establish that the instruction lightened the prosecution's burden of proof or infringed on his right to testify and present a defense.

B. *CALCRIM No. 361*

Defendant contends that the trial court erred by instructing the jury with CALCRIM No. 3.61, concerning a defendant's failure to explain or deny evidence, because doing

so deprived him of his right to a fair trial and due process by shifting the burden to him to prove he was not guilty. As have prior courts, including the California Supreme Court, we conclude the instruction is not infirm under the federal Constitution. Neither did it prejudice defendant's state rights.

The jury was instructed with CALCRIM No. 361 as follows: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

The jury was also instructed: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

As defendant notes, CALCRIM No. 361 is substantially the same as CALJIC No. 2.62. Authorities applying to one generally apply to the other. (*People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067.) Giving CALJIC No. 2.62, or CALCRIM No. 361, to the jury is appropriate when there are "facts or evidence in the prosecution's case within [the defendant's] knowledge which he

did not explain or deny.” (*People v. Saddler* (1979) 24 Cal.3d 671, 682 (*Saddler*).) The jury cannot be instructed to draw an inference until evidence is adduced to support that inference. (*Id.* at p. 681.)

Here, defendant contends that he did not fail to explain or deny evidence against him; therefore, CALCRIM No. 361 should not have been given. The Attorney General responds that it was properly given because some or all of defendant’s explanations and denials were implausible. We need not determine whether defendant failed to explain or deny evidence against him because, in either case, he suffered no prejudice from the instruction.

Giving CALCRIM No. 361 when there is no evidence that defendant failed to explain or deny evidence against him does not violate the defendant’s federal jury trial and due process rights. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471 (*Lamer*).) The discussion in *Lamer* also applies to this case: “[W]e reject Lamer’s argument that the instruction violated his constitutional right to due process by requiring him to disprove the existence of an element of the offense. A nearly identical argument was rejected in *Saddler*. That court stated: ‘It is claimed that the instruction denies to a defendant the presumption of innocence and places in its stead an “inference of guilt.” Since principles of due process protect the accused against conviction except upon proof beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368]), an instruction to the jury which has the effect of reversing or

lightening the burden of proof constitutes an infringement on the defendant's constitutional right to due process.

[Citations.] CALJIC No. 2.62 does not violate these principles. After stating the circumstances under which adverse inferences may be drawn, the instruction cautions that "The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of defendant beyond a reasonable doubt." (*Saddler, supra*, 24 Cal.3d at p. 679-680.) [¶] The *Saddler* court concluded that the instruction 'suffers no constitutional . . . infirmity.' (*Saddler, supra*, 24 Cal.3d at p. 681.)" (*Lamer, supra*, 110 Cal.App.4th at p. 1471, see also *People v. Rodriguez, supra*, 170 Cal.App.4th at p. 1067.)

Defendant makes no argument to differentiate the discussion of the constitutionality of CALJIC No. 2.62 in *Saddler* and *Lamer* from the constitutionality of CALCRIM No. 361 in this case. Both instructions contain the cautionary language upon which *Saddler* and *Lamer* relied to reject the constitutional challenge. Accordingly, the instruction did not shift the burden onto the defendant to prove he was not guilty.

Neither did any error in giving CALCRIM No. 361 prejudice defendant under a state law prejudice analysis -- a reasonable probability that defendant would have obtained a more favorable result absent if the instruction had not been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Defendant claims the

instruction would have caused the jury to expect defendant not just to explain or deny the evidence against him but also to “explain away” all the evidence against him. To the contrary, there is nothing in this record to indicate that the jurors were unable to determine that, if defendant gave plausible explanations and denials, CALCRIM No. 3.61 did not apply to the facts of this case and, based on that determination, ignore the instruction. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions. [Citation.]” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

III

Restitution

Defendant makes several contentions concerning the trial court’s restitution order. He contends: (A) the order violated his jury trial rights, (B) the order violated his equal protection rights, (C) the court abused its discretion in setting the amount of restitution, (D) the participation of the victim’s counsel in the restitution hearing was improper, and (E) the court erred by not giving defendant credit for restitution already paid. Except for the last contention concerning credit for restitution already paid, we find no merit in defendant’s contentions concerning restitution.

Article I, section 28, subdivision (b) (13) (A)-(C) provides victims the right to restitution from criminal defendants. It states: “(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a

result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. [¶] (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. [¶] (C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim."

Implementing article I, section 28, subdivision (b)(13), Penal Code section 1202.4, subdivision (f) requires the trial court to order the defendant to pay restitution to the victim "in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." "The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. . . ." (§ 1202.4, subd. (f)(1).)

With one exception, restitution orders are limited to the victim's economic damages. The exception is for "[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288." (§ 1202.4, subd. (f)(3)(F); *People v. Fulton* (2003) 109 Cal.App.4th 876, 884, fn. 5.)

Economic damages are "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities."

(Civ. Code, § 1431.2, subd. (b)(1).) Noneconomic damages are "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." (Civ. Code, § 1431.2, subd. (b)(2).)

At sentencing in this case, the trial court ordered defendant to pay restitution to the victim in an amount to be determined. Doe, through her own attorney, filed a memorandum requesting restitution. The memorandum sought \$3,265 in economic damages for medical care. It also sought \$750,000 in noneconomic damages pursuant to section 1202.4, subdivision (f)(3)(F). Attached to the memorandum were two newspaper stories recounting civil jury verdicts of approximately \$8 million and \$1.7 million in favor of long-term molestation victims against their molesters.

The trial court held a contested restitution hearing. Defense counsel and Doe's attorney were present for the hearing. A deputy district attorney who did not try the case attended the restitution hearing because the deputy district attorney who tried the case was in trial elsewhere. Citing this court's opinion in *People v. Dehle* (2008) 166 Cal.App.4th 1380 (*Dehle*), in which we concluded that the restitution hearing was fatally flawed because the prosecutor did not attend the hearing, defense counsel objected to Doe's attorney putting on the case for restitution. He argued that the prosecutor's nonparticipating presence was the same as absence. The trial

court distinguished *Dehle* based on the prosecutor's total absence in that case and overruled the defense's objection.

The defense stipulated to the amount of economic damages (\$3,265); therefore, the hearing focused on Doe's request for an award of noneconomic damages.

The evidence presented at the restitution hearing established that defendant not only molested Doe, as established by defendant's convictions, but also isolated her and took advantage of a position of trust from the time she was eight years old until she left the home as an adult. She was still having nightmares and flashbacks concerning the abuse. And she had been in therapy to deal with the problems caused by the abuse. She was having difficulty keeping jobs, and, at age 30 at the time of the hearing, had not finished her education, still attending Folsom Lake College. She twice attempted suicide by overdosing on ibuprofen.

In his argument to the trial court, Doe's attorney recognized that the court was in the "unenviable position of having to put a dollar amount on this psychological harm caused to [Doe]." Nonetheless, Doe's attorney asked the trial court to award \$750,000 for the extraordinary harm. Counsel suggested that the court could turn for guidance to the civil jury instruction concerning an award of noneconomic damages. (See CACI No. 3905A.)

Defense counsel objected, based on due process and equal protection grounds, to any award of noneconomic damages. He

also argued that there was "no evidence whatsoever to support a \$750,000 judgment for restitution for psychological harm."

The trial court agreed that it was in the "unenviable" position of quantifying Doe's psychological harm in dollars. Searching for a way to proceed, the court noted that defendant's acts against Doe occurred over a 15-year period, from age eight to age 23. The court multiplied that 15 years by \$50,000 per year, thus arriving at the \$750,000 requested by Doe. The court therefore awarded \$750,000 in noneconomic damages.

A. Noneconomic Damages -- Jury Trial Rights

Defendant contends that, although economic damages are properly awarded at sentencing without a jury determination of the amount, noneconomic damages cannot be so awarded without violating the defendant's right to a jury trial. He asserts that, because noneconomic damages are determined pursuant to a subjective standard, that determination must be made by a jury. "As noneconomic damages in [section 1202.4,] subdivision (f) (3) (F) are indistinguishable from noneconomic damages in the civil trial context," argues defendant, "there is no rational reason why they should not be subject to the right to a jury trial under Article [I], section 28 of the California Constitution."

We disagree. As a sentencing order, a restitution order for noneconomic damages does not give rise to a jury trial right.

"In determining the propriety and amount of restitution, the preponderance of the evidence standard satisfies due

process. [Citation.] The defendant is not entitled to a jury trial [citation] and 'the requisite hearing [need not] approximate the formality of a civil trial.' [Citation.]” (*People v. Narron* (1987) 192 Cal.App.3d 724, 736-737, bracketed text in original.)

Despite this and other authorities stating that a defendant has no right to have a jury determine restitution, defendant attempts to distinguish between restitution orders for economic damages and such orders for noneconomic damages, the latter being available only for violation of section 288. He claims that, because the determination of the amount of noneconomic damages is subjective, the jury must make that determination. But this claim has no merit because there is no basis for distinguishing jury trial rights, or lack thereof, for restitution orders for economic damages and restitution orders for noneconomic damages. In both cases, the trial court is performing a task that, in a civil case, a jury would perform.

Defendant argues that a restitution order for noneconomic damages is indistinguishable from a civil jury award for noneconomic damages. The same can be said, however, for a restitution order for economic damages and a civil jury award for economic damages. While the restitution order and the civil jury award produce the same result (an enforceable judgment against the defendant (§ 1214, subd. (b))), they are a different means to that end, one based in the civil law, with its protections and requirements, and the other in criminal law, with its own protections and requirements. The restitution

hearing, whether for economic or noneconomic damages, is a criminal sentencing hearing, not a civil trial. (§ 1202.4, subd. (f)(1); *Dehle, supra*, 166 Cal.App.4th at p. 1386.)

Therefore, contrary to defendant's argument, there is a rational reason for distinguishing restitution orders, provided for by article I, section 28 of the California Constitution and section 1202.4, subdivision (f), from the constitution's provision of the right to a civil jury trial. That rational reason is that the restitution order is part of criminal sentencing.

B. *Noneconomic Damages -- Equal Protection*

Defendant also contends that a restitution order for noneconomic damages, applicable only to violations of section 288 and not to other crimes, violates his state and federal equal protection rights. Specifically, he asserts that section 1202.4, subdivision (f)(3)(F) deprives child molesters of a civil jury determination of noneconomic damages liability but does not so deprive other criminals. He claims there is no rational reason for this differential treatment. We conclude the contention is without merit because child molesters are not similarly situated with other criminals.

"It is basic that the guarantees of equal protection embodied in the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21, of the California Constitution, prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. This principle, of course, does not preclude the state from drawing

any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose. [Citations.] Moreover, 'in cases involving "suspect classifications" or touching on "fundamental interests" . . . the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that distinctions drawn by the law are necessary to further its purpose.' [Citations.]" (*In re King* (1970) 3 Cal.3d 226, 232, italics omitted.)

Defendant suggests that section 1202.4, subdivision (f) (3) (F) may be subject to strict scrutiny because it limits civil jury trial rights. We disagree. Violators of section 288 have the same civil jury trial rights as anyone else. But this is not a civil jury trial; it is a criminal sentencing. Therefore, strict scrutiny is inapplicable.

We also conclude that the differential treatment is rationally related to a legitimate public purpose. Enacted as part of a broader effort to protect child victims of sexual abuse (Stats. 1995, ch. 313, § 5), the noneconomic loss provision of section 1202.4 does just that -- helps to protect child victims of sexual abuse, both by increasing the punishment for offenders and by compensating those victims for psychological harm. Differentiating between child victims and other victims is rational based on the vulnerability of children in general and society's interest in protecting children. Therefore, even though section 1202.4 allows restitution orders

for noneconomic damages against child molesters only, it does not violate the equal protection provisions of either the federal or state constitution.

C. *Amount of Noneconomic Damages*

Defendant contends the trial court abused its discretion in setting the amount of noneconomic damages. He makes two arguments to support this contention: (1) the award does not meet the requirements applied to an award of economic damages and (2) the award was based on the victim's suffering during years after the crimes were committed. Neither argument is convincing. The standard for awarding economic damages, which by their nature are more definite, cannot be used to challenge an award of noneconomic damages, and Doe's pain and suffering as a result of the crimes has lasted well beyond her childhood.

We review the amount ordered for restitution using the abuse of discretion standard. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) One way of establishing an abuse of discretion is by showing a demonstrable error of law. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.)

1. *Standard for Fixing Noneconomic Damages*

In arguing that the trial court abused its discretion in fixing the amount of restitution for noneconomic loss, defendant cites cases involving economic loss, such as medical costs. For example, in *People v. Carbajal* (1995) 10 Cal.4th 1114, at page 1125, the Supreme Court stated: "Restitution orders may not be based merely upon the trial court's subjective belief regarding the appropriate compensation; there must be a factual and

rational basis for the amount ordered and the defendant must be permitted to dispute the amount or manner in which restitution is to be made. [Citations.]” Unlike restitution for economic loss, however, loss for noneconomic loss is subjectively quantified.

We are guided in this matter by the civil jury instruction concerning noneconomic loss: “No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.” (CACI No. 3905A (2009 ed.).) On appeal from a civil judgment awarding attorney fees, the review is deferential to the fact finder’s decision: “The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.” (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507.)

The obvious difference between the review of a civil award of noneconomic damages and a criminal restitution order for

noneconomic damages is that the trial court, not a jury, makes the determination in the first instance. Even with that difference in mind, we see no reason to adopt any other standard of review. We therefore affirm a restitution order for noneconomic damages that does not, at first blush, shock the conscience or suggest passion, prejudice or corruption on the part of the trial court.

Admittedly, this standard is not as delimited as the review of a restitution order for economic damages. By their nature, economic damages are quantifiable and thus awards of economic damages are readily reviewed for whether they are "rationally designed to determine the . . . victim's economic loss." (*People v. Giordano, supra*, 42 Cal.4th at pp. 663-664.) Noneconomic damages, however, require more subjective considerations. Thus, the different standard is justified.

Applying the appropriate standard, we conclude that the restitution order for \$750,000 in noneconomic damages for years of sexual abuse does not shock the conscience or suggest passion, prejudice or corruption on the part of the trial court. (See *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1059-1061 [upholding award of \$1.5 million to student molested by teacher].) The trial court did not abuse its discretion.

2. Pain and Suffering Years After Crime

In determining how to fix an amount of noneconomic damages, the trial court expressed its willingness to base the award on 15 years of abuse by defendant. Multiplying that 15 years by

\$50,000, the court arrived at the figure requested by Doe -- \$750,000 for noneconomic damages. Defendant asserts that this was an abuse of discretion because he was convicted of only seven years of abuse, ending when Doe turned 15 years old. We are not concerned by the court's statements in making the award. As would a jury, the court was searching for some way to quantify Doe's pain and suffering. And there is no credible argument, especially on the facts of this case, that Doe's psychological harm ended when she was 15 years old. Accordingly, the court did not abuse its discretion.

D. *Involvement of Victim's Counsel*

Less than two months after this court's decision in *Dehle*, *supra*, 166 Cal.App.4th 1380, concerning the required participation of the prosecutor in a restitution hearing, California voters, on November 4, 2008, passed Proposition 9, also known as the Victims' Bill of Rights Act of 2008: Marsy's Law. This initiative added or enhanced several state constitutional rights of victims, including rights relating to restitution. The restitution hearing in this case took place one year after the passage of Marsy's Law.

As noted, defendant objected to the participation of Doe's attorney in the restitution hearing, as well as the deputy district attorney's nonparticipation, citing *Dehle*, *supra*, 166 Cal.App.4th 1380. The deputy district attorney was not the same one who tried the case and was unfamiliar with the case, except that she had discussed, with the deputy district attorney who tried the case, "in general terms this concept and this issue,"

apparently referring to restitution and the involvement of Doe's attorney in the hearing. She shared with the court the opinion of the deputy district attorney who tried the case that, at the restitution hearing, the People's interest would be consistent with Doe's interest in restitution. When the court asked the attending deputy district attorney whether it was her desire to have Doe's attorney assist in the presentation at the restitution hearing, she replied affirmatively. After that, the deputy district attorney did not say anything on the record, other than saying she did not have additional evidence to present beyond that which Doe's attorney presented.

On appeal, defendant renews his objection, pursuant to *Dehle*, that the restitution hearing was invalid because it was put on by Doe's attorney and because, although a deputy district attorney was present, she did not participate. We asked for and obtained from the parties supplemental briefing on the effect of Marsy's Law on this issue. Having reviewed the original and supplemental briefing, we conclude that (1) this case is distinguishable from *Dehle* because the deputy district attorney appeared at the restitution hearing, representing the interests of the People, and (2) Doe had a right, under Marsy's Law, to have her attorney appear at the restitution hearing and present evidence and argument.

1. Participation of the Prosecutor

In *Dehle*, no prosecutor appeared at the restitution hearing. After the victim's attorney presented evidence concerning economic loss, the trial court ordered more than

\$600,000 in restitution. (166 Cal.App.4th at pp. 1385-1386.) Recognizing that "it has long been the law in California that the trial court may permit private counsel to assist the district attorney in a given prosecution," we nonetheless reversed because "[t]he district attorney's obligation to the People to seek a just and fair result can only be accomplished by his presence at the hearing and his consideration of evidence and issues presented as they bear on the ultimate goals of victim restitution in a criminal case." (*Id.* at p. 1389.)

This case is unlike *Dehle* because here, a deputy district attorney represented the interests of the People at the restitution hearing. She expressed her desire to have Doe's attorney proffer evidence and stated that the People had no further evidence beyond the evidence presented by Doe's attorney.

Defendant argues that, despite the deputy district attorney's presence at the restitution hearing, this case cannot be distinguished from *Dehle* because the deputy district attorney's participation was insufficient. Specifically, the deputy district attorney was unfamiliar with the case, and she did not present evidence or argument. We disagree. We presume from the presence of the deputy district attorney at the restitution hearing that, if the presentation by Doe's attorney had differed from the People's interests, she would have made that known. (Evid. Code, § 664 [presumption that official duty performed].) The deputy district attorney's unfamiliarity with the case does not rebut this presumption. She was briefed by

the other deputy district attorney on the "concept" of the restitution hearing, and she heard the evidence and argument presented by Doe's attorney and defendant. Therefore, she was capable of protecting the People's interests.

2. Victim's Rights under Marsy's Law

While we conclude that this case is distinguishable from *Dehle*, we also find that the victim restitution provisions of Marsy's Law gave Doe the right to have her attorney participate in the restitution hearing.

Marsy's Law added several provisions relating to victim restitution to the California Constitution. The victim has the right (1) to be notified of and to be present at all public proceedings, (2) to be heard at any proceeding, including the sentencing hearing, and (3) to receive restitution. (Cal. Const., art. I, § 28, subd. (b)(7), (8) & (13).) The victim has the right to "seek and secure restitution" (Cal. Const., art. I, § 28, subd. (b)(13)(A).) And "[a] victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request." (Cal. Const., art. I, § 28, subd. (c)(1).)

As a result of these provisions, Doe had a right to not only be notified of the restitution and to be present, but also to be heard. She was also entitled to have counsel represent her in being heard. Therefore, neither defendant nor the trial

court could have lawfully prevented the participation of Doe's attorney in the restitution hearing.

Despite these clear provisions, defendant contends that they cannot be read "to allow the victim's civil attorney the right to conduct restitution hearings in the prosecutor's place" We need not reach the question as characterized by defendant because, although Doe's attorney presented the evidence and was allowed to argue at defendant's restitution hearing, the prosecutor was also present, representing the People's interests. The appropriate characterization of the question is whether Doe had the right to have her attorney appear at the restitution hearing and to be heard on the issue of restitution. The answer to that question is unequivocally yes. Marsy's Law not only gives the victim the right to restitution but also to be heard through counsel at the restitution hearing.

Defendant also argues that, if the victim has the right to conduct restitution hearings, Marsy's Law must also be interpreted to give the right to the victim to substitute herself for the prosecutor in enforcing all of the other rights in subdivision (b) of section 28 of article I. For example, it would give the victim the right to conduct bail hearings and discovery proceedings. Again, defendant overstates the involvement of Doe's attorney in the restitution hearing. Doe did not substitute herself for the prosecutor. Her attorney presented evidence and argued on behalf of Doe only, and the deputy district attorney was present to protect the People's

interests. It is unremarkable that the People's interests did not diverge from Doe's interests at the restitution hearing.

Accordingly, Doe was entitled to have her attorney present evidence and argument at the restitution hearing, and that involvement did not invade the exclusive province of the district attorney's prosecutorial authority.

E. *Credit for Restitution Paid*

Before the restitution hearing, \$79,210.68 in funds had been lodged with the court on behalf of defendant. At the restitution hearing, the court ordered those funds to be released to Doe. The court, however, did not give defendant credit for those funds when it issued the abstract of judgment and writ of execution.

Defendant contends, and the Attorney General agrees, that the trial court should have reduced the amount due to Doe in the abstract of judgment and writ of execution by the amount (\$79,210.68, plus interest accrued) released to Doe at the restitution hearing. We agree. The court should have noted the partial satisfaction of the restitution amount in the order and the writ of execution. (See Code Civ. Proc., §§ 699.520, subd. (e) [writ of execution to reflect reduction for partial satisfaction]; Code Civ. Proc., § 674, subd. (a)(5) [abstract of judgment to reflect amount ordered].) Because we do not know how much interest accrued on those funds, we must remand for the trial court to make those corrections.

IV

Other Sentencing Issues

Defendant contends that (1) the \$200 sex offender fine imposed pursuant to section 290.3 fine must be reduced to \$100 because the fine was only \$100 when defendant committed the crimes (Stats. 1988, ch. 1134, § 1), (2) the \$5,600 parole revocation fine pursuant to section 1202.45 must be stricken because that code section was not enacted until after defendant committed his crimes (Stats. 1995, ch. 313, § 6), and (3) defendant is entitled to presentence credit pursuant to section 4019, not pursuant to section 2933.1, because section 2933.1, limiting presentence credits for a defendant convicted of a section 288 violation, was not enacted until after defendant committed the crimes (Stats. 1994, ch. 713, § 1).

The Attorney General agrees with each of these contentions, as do we, based on ex post facto principles. (See *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.) Therefore, we order modifications to the judgment.⁵

⁵ Defendant claims he is entitled to 61 days of presentence credit for 122 actual days in custody, citing the former version of section 4019 in effect when he committed the crimes. To the contrary, he is entitled to only 60 days of credit under the formula then in effect, which awarded two days of credit for every four full days of presentence custody. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26.)

Defendant is not entitled to additional credits pursuant to recent amendments to section 4019 because he is required to register as a sex offender. (§§ 2933, subd. (e)(3); 4019.)

The Attorney General additionally asserts that the trial court imposed an unauthorized sentence by failing to impose a \$40 court security fund fee (\$20 for each conviction) pursuant to former section 1465.8, subdivision (a)(1) (Stats 2009-2010, 4th Ex. Sess., ch. 22, § 29) and a \$60 court facilities funding assessment (\$30 for each conviction) pursuant to Government Code section 70373, subdivision (a)(1). Defendant "disagrees" that the fee and assessment should be imposed, but he concedes that the authoritative precedent requires it. (See *People v. Alford* (2007) 42 Cal.4th 749, 755-759; *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1494.) Therefore, we also order these modifications to the judgment.

DISPOSITION

The judgment is modified as follows: (1) the \$200 sex offender fine pursuant to section 290.3 is reduced to \$100; (2) the \$5,600 parole revocation fine pursuant to section 1202.45 is stricken; (3) defendant's presentence custody credit is modified to 60 days; (4) a \$40 court security fund fee pursuant to former section 1465.8, subdivision (a)(1) is imposed, and (5) a \$60 court facilities funding assessment pursuant to Government Code section 70373, subdivision (a)(1) is imposed. As modified, the judgment is affirmed. The case is remanded to the trial court to correct the writ of execution to reflect defendant's partial satisfaction of the restitution order. The court must also prepare an amended abstract of judgment reflecting the modifications to the judgment and the partial satisfaction of the restitution order and send the

amended abstract to the Department of Corrections and
Rehabilitation.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

HULL, J.