

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH LAWRENCE KRAMIS,

Defendant and Appellant.

B236892

(Los Angeles County
Super. Ct. No. NA082632)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed as modified.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Michael R. Johnsen and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II through III D.

I. INTRODUCTION

A jury convicted defendant, Joseph Lawrence Kramis, of assaulting a woman, Nicole J., by means of force likely to produce great bodily injury. (Former Pen. Code,¹ § 245, subd. (a)(1), Stats. 2004, ch. 494, § 1, now § 245, subd. (a)(4), Stats. 2011, ch. 183, § 1.) The jury found *not true* an allegation defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) The trial court declared a mistrial as to a second count, willful infliction of corporal injury upon a former cohabitant. (§ 273.5, subd. (a).) Defendant was sentenced to 4 years in state prison. Defendant contends: the trial court erroneously excluded evidence going directly to the victim's credibility and veracity; it was reversible error to fail to instruct the jury it had to specify in the verdict what act constituted assault with force likely to produce great bodily injury; it was an abuse of discretion to deny defendant probation; and defendant was entitled to additional presentence custody credit. In addition, we asked the parties to brief the effect, if any, of *Southern Union Co. v. United States* (2012) 567 U.S. ___, [132 S. Ct. 2344, 2348-2349] on the trial court's imposition of a \$10,000 restitution fine. (Former § 1202.4, subds. (b)(1), (c) & (d), Stats. 2008, ch. 468, § 1.) We modify the judgment as to defendant's presentence custody credit. We affirm the judgment in all other respects.

¹ All further statutory references are to the Penal Code except where otherwise noted.

[The portions of this opinion that follow (parts II–III D) are deleted from publication.]

II. THE EVIDENCE

A. Overview

To summarize, Nicole testified defendant repeatedly assaulted her while they were alone together on his yacht. Defendant denied assaulting Nicole. He presented evidence she was injured because the sea was rough and she fell repeatedly over the course of a day. It was undisputed that during that day and evening in question, defendant and Nicole both consumed alcoholic beverages.

B. The Prosecution Case

1. Nicole

Nicole was 5 feet, 5 inches tall and weighed 111 pounds. Defendant was 6 feet tall and weighed 220 pounds. Nicole had dated defendant for 10 months beginning on August 27, 2008. They had spent every night together for a four- to six-month period. It was an on and off relationship towards the end. On July 2, 2009, Nicole and defendant had just resumed their relationship after a month apart.

On the morning of July 2, 2009, defendant and Nicole left Oxnard on a 58-foot yacht, “3 Comma,” and sailed to Avalon Harbor in Catalina. On the ride over to Catalina, the back door was slamming back and forth. Nicole was lying on a couch in the living area. Defendant started yelling at Nicole and calling her names. He called her a “lazy bitch” and a “whore.” Nicole remained quiet for the rest of the three- to four-hour trip. As defendant and Nicole arrived at Avalon Harbor, defendant came down to the living area and asked Nicole, “Are you gonna come up above?” She said: “No. I’m fine down here.” Defendant responded: “You stupid bitch. I’ll drop you off at LAX right now.”

The moorings were full, so defendant dropped anchor in the harbor. Defendant's friend, Wesley Ryan, came on board to help moor the boat. Nicole went downstairs to put on her bathing suit. All three had a drink of Vodka. This was defendant's second drink of the day. Defendant lowered the tender, "Little Coma," into the water, got in and motored away. Mr. Ryan separately went on his way.

After defendant returned, another friend, Dick Saller, came on board. Defendant, Mr. Saller and Nicole sat in the living area and talked. At the end of the visit, defendant and Nicole took the tender to the island to get something to eat. Both had food and drinks. It was about 4 p.m. They got into a bit of an argument about their relationship at the restaurant. They returned to the yacht briefly but left again. They went to a bar on the beach. Not long after that, Nicole was conversing with another man. She was about 100 to 150 feet away from defendant at the time. Defendant yelled at her, calling her a "Ho." He asked, "What do you think you are doing?" When Nicole walked closer to defendant, he continued to yell at her.

Defendant and Nicole met Mark Sentyrz at the bar. Thereafter, they returned to defendant's yacht. After all three were on board, Nicole started to cry. She was upset and embarrassed that defendant had berated her. Mr. Sentyrz tried to console her. He spoke to her and patted her on the back. Mr. Sentyrz was too close to her face. She signaled nonverbally to defendant to let him know she was uncomfortable. Defendant told Mr. Sentyrz to get away from Nicole. Defendant and Mr. Sentyrz walked to another area of the boat. It had gotten dark by then. Nicole took a swig of vodka, but spilled some of the drink on herself. She went downstairs and put on a hoodie. She yelled: "Can everybody please just get off the boat. I want to go to sleep."

Defendant and Nicole went to bed around 11:30 p. m. Defendant lay down on the bed and put his arm around Nicole tightly. He started to say negative things to her about their relationship. Nicole pulled defendant's hands off. She stood up and said: "You know what? You're an asshole." She walked upstairs.

Nicole went to the couch, intending to sleep there. She was taking the pillows off the couch when she was kicked in the back from behind. Nicole fell forward and landed

on her hands and knees on the floor. She rolled over onto her back. Defendant was standing over her. He yelled, "You think you can talk to me like that?" He got on top of Nicole with his knees on her shoulders. He put his hands around her neck and started to choke her. He was swearing at her. Finally, he released her and stood up. Nicole said: "Why are you hitting me? Why are you doing this?" Defendant said, "I'm not hitting you." Then he hit her across the face with his hand three times. He said, "Now I hit you." Defendant hit Nicole on the left side of her face and ear.

Nicole ran outside to the back of the boat and tried to yell. She did not know whether any sound came out. Defendant pulled Nicole back inside and threw her to the deck. He closed the sliding glass door that led outside. Defendant said: "Scream as loud as you want. No one is gonna hear you." Defendant kicked Nicole and stomped on her ribs. Nicole testified it felt like he broke her rib. Nicole tried to crawl away but could not. At some point defendant pushed her face into the floor. Her face became wet with blood. Defendant turned her on her back, pinned her down, and forced her legs apart so he could get between them. He pinned her wrists down with his hands. She heard her knee pop. Defendant said, "Oh, honey, that's gonna hurt." Defendant walked away.

Nicole got up as fast as she could and went downstairs. She was in pain and felt empty. She touched her face and saw blood on her hand. When she looked in a mirror, she saw blood all over her face. She was rinsing her face when defendant came in behind her. He said, "You look good with a fat lip." She looked at the inside of her lip and saw that it was red and purple. The side of her face was swollen. Her eyes were swollen from crying. Defendant then walked away again.

When Nicole heard defendant upstairs, she went to the master bedroom. She was stumbling around trying to find her purse when defendant came into the room. She was trying to gather her belongings. Defendant said something like: "I don't know where you're gonna go with your stuff. Swim someplace." Nicole sat down on the bed. She realized she had nowhere to go. Defendant sat down too. Then he got on top of her and put his legs around her neck. He started to squeeze her neck with his legs. Nicole went limp but remained conscious. She thought he was going to kill her. But defendant

released her and lay on the bed. Defendant took off his clothes and lay back down. He said to Nicole: “You wanted me to do this to you. You wanted to feel this pain. I’ll tie a chain around your ankle and throw you over the boat. You can join Davey Jones’ locker.” He said: “You’re dead. No one will miss you.” Then he said: “You enjoy pain. You wanted this to happen. What are you . . . going to do? Call the police on me? Would you ruin my life like that? Is that what you would do?” Then he said, “I’ll just tell them you were in a car accident.” Nicole felt helpless.

Nicole got up from the bed and crawled up the stairs. She prayed for help. She returned to the bedroom and told defendant: “Joe, I need to go to the hospital. There’s something really wrong with me.” Defendant said: “Shut the fuck up. Go to sleep. You’re fine.” Nicole begged defendant to take her to the hospital but he did not respond. She lay down and waited for defendant to fall asleep. When he was snoring loudly, she got up and found her purse. She went upstairs and sat by the sliding glass door. She called the emergency operator. The jury heard a recording of the telephone conversation.

Nicole suffered a fractured rib. She wore a rib brace every day for a month. Her foot was injured and she lost a toenail. She also suffered a sprained knee. There was a small collection of fluid about her right kneecap, a condition usually caused by trauma. She was in physical therapy for the injury to her knee for two to three months. She continued to have pain in her knee at the time of trial.

The prosecution introduced photographs of Nicole’s injuries. The photographs were taken on July 3, 2009, after Nicole returned to Las Vegas. In addition, “a few days” after the assault, Nicole recorded the events in a journal. The 15-page journal was admitted in evidence. Nicole’s recorded description of the assault was consistent with her testimony at trial.

Nicole also secured a restraining order upon her return to Las Vegas. She read before the jury her description of the assault in the restraining order application: “On July 3rd at 1:23 a.m., I called 911 from Joseph’s boat in Catalina after he had beat me for approximately one hour about four times. He choked me repeatedly, pinned me down, pressed my face into the carpet where my nose bled profusely, kicked me and stomped

me in my ribs, he broke one, dragged me on the floor, kicked me, and threatened my life. He said he would tie a chain around my ankle, throw me overboard and join Davey Jones'[s] locker and no one would find me. If I called the police, he would say I was in a car accident. I prayed on my hands and knees and screamed for help. I begged him to take me to the hospital. He told me I deserved and wanted to be hurt, I like the pain. I told him to shut the fuck up and go to sleep. I dragged my things upstairs and called 911 after he passed out in bed after he choked me with his legs around my neck. This is a brief description and not a full account.” Nicole submitted her application under penalty of perjury.

On cross-examination, Nicole admitted she had been drinking on the day defendant assaulted her. She further testified she had consulted a lawyer to determine whether a civil lawsuit against defendant was feasible. She had not pursued the lawsuit because, in her words, “I don’t want to sue him so you guys don’t think I’m after his money.” If he was convicted and went to jail, Nicole would consider that justice. She would then consider whether to bring a civil suit against him. She had allowed the statute of limitations on a civil action to expire pending the outcome of this criminal matter. She understood that if defendant was convicted, then she could file civilly.

2. Officer Jason Manix

Officer Jason Manix was on duty patrolling the harbors off Catalina Island on July 2-3, 2009. The water was calm. At 1:30 a.m. on July 3, Officer Manix was dispatched to 3 Comma, which was moored in Avalon Harbor. Sheriff’s Detective Robert Garcia accompanied him. Nicole was onboard. She was emotionally charged. She had a swollen eye and lacerations. Officer Manix transported Nicole to a rescue float, where the paramedics were located.

3. Detective Garcia

When Detective Garcia arrived on Comma 3, Nicole was very upset and crying. She was very uncooperative. She wanted to get off the boat. She told Detective Garcia her boyfriend had attacked her. She had bruising on her body and marks on her face and neck. Detective Garcia did not see any bloodstains on the light-colored carpet. After Nicole left the boat, Detective Garcia located defendant. He was in a downstairs bedroom sleeping. Detective Garcia woke defendant up, told him to get dressed and took him into custody. Defendant cooperated. Detective Garcia subsequently offered Nicole a victim's information pamphlet and a temporary protective order. Nicole refused both.

4. Dr. Laura Ulibarri

Dr. Ulibarri treated Nicole at the Catalina Island Medical Center emergency room. She had multiple fresh contusions on her arms, legs, chest and face. Her left forehead and temple and her right jaw were bruised. She had a fractured rib. There was blood in her nostrils. She had a hematoma on her upper under-lip. There was tenderness on her neck, ribs, right knee and lower back. There was a small collection of fluid above her right kneecap, possibly the result of trauma. Nicole complained of shortness of breath. She could not breathe deeply without pain. Dr. Ulibarri discharged Nicole with pain medication. Also, Nicole was given a wrap for her right knee and a rib belt to aid in breathing.

5. Dr. Steven Lis

Dr. Lis, a radiologist, interpreted x-rays of Nicole's ribs taken on July 3, 2009, at the Catalina Island Medical Center. He found she had suffered a "nondisplaced" fracture of her tenth rib on her right side. There was a break in the integrity of the bone. But the bone was not overlapping itself. A displaced fracture might be more serious, but on the

right side, the ribs protect the liver. Nicole could have suffered the fracture by being violently thrown against a solid object.

B. The Defense Case

1. Mr. Sentyrz

Mr. Sentyrz and two friends, Holden Daniels and Paul Smitco, sailed to Catalina Island on July 1, 2009. The 39-mile trip from Marina Del Rey Harbor to Avalon took more than four hours. On the trip over, the sea became rough. They moored their boat inside the main harbor. The following morning, they had to move their boat outside the harbor to wait for a buoy for that night. Outside the harbor, the sea was very rough. Everything on the boat got thrown to the floor.

Later that evening they went to a bar on Descanso Beach. While seated in the bar, they saw two people—defendant and Nicole—attempting to pull a dinghy up on shore. Mr. Daniels and Mr. Smitco tried to help them. They all fell down several times. They could not get the boat up on the beach. Defendant moved it back out to sea. The five of them subsequently sat down together at the bar. They were all drinking. Nicole was acting flamboyant and a little drunk. She was swearing a lot. According to Mr. Sentyrz, she had a mouth like a sailor. She was talking like guys talk; locker room talk. Mr. Sentyrz never heard defendant yell at Nicole.

Defendant offered to loan Mr. Sentyrz a pump. Mr. Sentyrz needed to inflate his dinghy. Mr. Sentyrz, Nicole and defendant returned to defendant's yacht. The sea was rough. The yacht was bouncing up and down and moving side to side. Nicole fell as she was getting out of the dinghy onto the yacht. Defendant invited Mr. Sentyrz inside for a drink. After 10 or 15 minutes, Nicole became quite antagonistic towards defendant. Mr. Sentyrz thought she was behaving that way because defendant was not paying enough attention to her. Nicole yelled at defendant and swore at him. At one point, she slammed the lid of his laptop down on his hand. After a while, Nicole made herself a drink. Mr.

Sentyrz testified she was dancing around scantily clad. She flirted with Mr. Sentyrz. Mr. Sentyrz saw her fall a couple of times. The sea was still rough. At some point she had hurt her knee or her leg. Mr. Sentyrz, a paramedic, examined it. It was a little red and swollen. Mr. Sentyrz told Nicole to put ice on it. She was also bruised. They all were bruised, because the sea was so rough. Later, two more men joined them on the yacht. They all drank together. Nicole poured a round of shots for everyone. Nicole was probably drinking more than anyone else. She was also being ornery. Defendant told her to go to sleep downstairs. She screamed at him. She said: "Fuck you, Joe. Fuck you." Later, they were all standing around in the kitchen. Defendant made some pasta and they ate. Nicole finally went downstairs.

Thirty minutes or so later, Nicole returned to the kitchen. Mr. Sentyrz described her behavior: "She was just super ornery. . . . [S]he was out of control. She just was screaming . . . loud as a woman could ever scream." Defendant told her a number of times, "Just shut up, leave us alone." Nicole tried to hit defendant. Once or twice, defendant grasped her in the front of her neck for up to 10 seconds. Mr. Sentyrz testified Nicole was coming at defendant and he just reacted. But, Mr. Sentyrz testified, "[Defendant] was handling it pretty cool." Defendant repeatedly pushed Nicole away. Defendant asked his guests to stay, but Mr. Sentyrz wanted to leave. It was really uncomfortable. Finally, Mr. Sentyrz left. Mr. Sentyrz did not see defendant physically abuse Nicole in any way. Defendant never lost his temper. Before Mr. Sentyrz left 3 Comma, they moved the boat from the anchorage area to a buoy inside the harbor. Mr. Sentyrz and defendant had become friends since that first meeting, on July 2, 2009.

2. Sharon Kramis

Defendant's mother testified that on May 30, 2009, she celebrated his birthday with him in Las Vegas. Defendant's father was also there. They stayed in defendant's condominium for several days. During that time, Ms. Kramis cleaned and cooked for defendant and did his laundry. There was no evidence Nicole was residing there. Ms.

Kramis did not see any women's undergarments in the house. She did not find any mail addressed to anyone other than her son. Ms. Kramis did not find any mail addressed to anyone named Nicole.

3. Lawrence Bauerlein, Jr.

Mr. Bauerlein had been a state-certified emergency medical technician for 29 years. He was in Avalon, Catalina Island, on July 2, 2009. The sea swell that day was three to four feet and very choppy. There were white caps on the water. Around 4 p.m. that afternoon, Mr. Bauerlein was in his dinghy on the way from Descanso Beach to Avalon Harbor. He saw defendant and Nicole in their dinghy next to 3 Comma. The yacht was anchored outside the harbor. It was rocking front to back and side to side. The swim step was coming up out of the water above the dinghy. Water was washing over it. Nicole was having a great deal of difficulty boarding the yacht. Mr. Bauerlein viewed it as a dangerous situation. As Nicole got on the boat, she was thrown against the back of the boat, the transom. She fell into the transom on her right side and then onto the swim step. She hit her head and shoulder. It looked like she hit the right side of her face. Defendant accepted Mr. Bauerlein's offer of help. Mr. Bauerlein and defendant assisted Nicole onto the yacht. Mr. Bauerlein grabbed her in a forceful manner by the bicep and forearm. They got her up the steps and onto the yacht. Mr. Bauerlein asked Nicole whether she was all right. She said she was fine. Mr. Bauerlein examined Nicole from head-to-toe to determine whether she was hurt anywhere. She told him: "I'm fine, I hope Mr. Kramis has good insurance." It appeared she had some minor bruises and abrasions. Nicole was reluctant to be examined. She was combative and aggressive toward Mr. Bauerlein. Mr. Bauerlein recommended that Nicole go to a hospital emergency room, but she said she was fine and she would not go. He advised her to put ice on the bruises to help reduce the swelling.

Mr. Bauerlein returned to 3 Comma around 9 p.m. that evening. He wanted to see how Nicole was doing. Defendant, Nicole and two other gentlemen were present. Nicole

told Mr. Bauerlein more than once, “Get the hell off my boat” and “Get the fuck off my boat.” Mr. Bauerlein testified, “I think she was pretty much telling everybody to get off the boat at that time.” She was “a bit belligerent” according to Mr. Bauerlein. She was a bit bruised up on her face and biceps. Nicole’s toes were “scuffed up a bit.”

4. Defendant

Defendant met Nicole in Las Vegas in the end of August 2008. The relationship ended on the Fourth of July weekend, 2009. Between August 2008 and July 2009, they were together off and on for less than a total of 30 days. Defendant did not consider Nicole his girlfriend. They never lived together at his Las Vegas residence. She did not maintain her clothing at his home or receive her mail there. There were occasions, however, when Nicole would spend the night.

In June 2009, Nicole told defendant she was really unhappy. She had been staying at a friend’s place for two and a half months, but there was no place for her to sleep. She did not have a bed there. Defendant took the mattress from his spare bedroom and delivered it, together with bedding, to Nicole.

Defendant had plans to stay with friends in San Diego over the Fourth of July weekend, 2009, with a stopover at Catalina Island. Those plans did not include Nicole. However, Nicole telephoned him prior to the weekend sounding “kind of destitute” and invited herself to Los Angeles. Defendant bought Nicole a ticket to fly from Las Vegas to Los Angeles. He met her at the airport and they spent the rest of the day and night in Los Angeles. The following day, they drove to defendant’s Oxnard home and began to prepare for the Catalina trip.

Defendant and Nicole left Oxnard for Catalina on the 3 Comma the following morning. The crossing took about five hours. Defendant described the weather conditions: “I would say at that time, about two to three feet. The wind was blowing slightly. We’re talking about five or six knots of wind going downhill” He did not

have any trouble getting to Catalina. Nicole slept on the couch for the duration of the trip. They did not have any arguments on the trip over to Catalina.

There were no moorings available in Catalina. The harbor master instructed defendant to anchor 3 Comma in front of Descanso Beach, in the designated anchorage area. The area is not protected and defendant characterized it as “open ocean.” A friend, Mr. Ryan, came on board and helped defendant anchor the boat in front of Descanso Beach. The boat was rocking and rolling. It was rolling front to back and side to side. It was difficult to launch the tender. Nicole was in the kitchen pouring some vodka when Mr. Ryan and another of defendant’s friends, Mr. Saller, came on board. They said the sea was really rough and they were having a hard time on their boat.

After Mr. Ryan and Mr. Saller left, defendant and Nicole took the tender to the shore. They walked through the town and had lunch at the Catalina Cantina. They sat in the bar area. Nicole did not seem to be having a good time. She seemed irritated. Defendant had some food and one beer. Nicole had two large Margaritas. She did not have anything to eat. A couple seated nearby had come to the island to get engaged. The woman was admiring her ring and talking about how happy she was. It seemed to upset Nicole. She asked defendant, “When are you buying me one of those?” Defendant answered, “Well, we’re not getting married.” Nicole was upset and irritated. (When cross-examined, Nicole did not recall any such conversation.) Defendant went to pay the bill but discovered he did not have his wallet. He asked Nicole to pay the bill and she stormed out of the bar. Defendant ran after her and convinced her to pay for the meal. They started walking towards the Casino, a historical site defendant wanted to show to Nicole. But she was “just kind of pissed off” in defendant’s words. She walked 10 or 15 feet in front of defendant all the way back to the pier.

Defendant and Nicole returned to 3 Comma in the tender sometime after 4 p.m. The ocean was a lot rougher than it had been earlier. The yacht was pitching four to six feet in each direction. Water was washing over the swim step. Nicole moved to the front of the tender to tie it to 3 Comma. As she jumped from the tender to the yacht, she landed hard against the transom and then fell backwards to the swim step. She hit the

transom with her right chest. She fell straight back onto the swim step and then fell to her left side. She rolled and tried to sit up. Her right knee was red and bruised. Mr. Bauerlein arrived “out of nowhere” and offered help. Together, they lifted Nicole up and helped her onto the yacht. Mr. Bauerlein explained that he was a fireman. Defendant testified that after Mr. Bauerlein started to ask Nicole some questions: “She started to go off on a tirade, ‘You know this is all your fault. You did this, and you’re gonna pay.’ I mean, just - - just, ‘You should have known better,’ like it was all my fault.” Nicole said to defendant: “I hope you have good insurance. This is gonna cost you.” Nicole was rude to defendant and to Mr. Bauerlein. Defendant and Mr. Bauerlein picked Nicole up and moved her to the sofa in the salon. Mr. Bauerlein sat on the coffee table and asked Nicole whether she felt any pain. He started to check around her shoulders. Nicole became “really combative.” She did not want Mr. Bauerlein to touch her. She winced when Mr. Bauerlein moved her knee. Nicole left the salon and went downstairs.

After Mr. Bauerlein left the 3 Comma, Nicole came upstairs. She had changed into dry clothes. She made herself a drink. Because it was unpleasant being on the boat in the rough conditions, defendant and Nicole decided to go to the Descanso Beach Club. They got back into the tender and headed for the beach. Defendant drove the tender straight into the beach. Defendant and Nicole were attempting to pull the tender up onto the beach when two men—Mr. Daniels and Mr. Smitco—came to help. All four of them fell down one or more times. The effort was futile. Ultimately, defendant had to move the tender back out to the rope line and tie it up there. Nicole stayed on the beach. Defendant secured the tender and swam ashore. He walked to the open air bar and restaurant to join Nicole. Defendant, Nicole, Mr. Daniels, Mr. Smitco and Mr. Sentryz spent two hours talking and drinking together.

Defendant denied seeing Nicole stop and talk to a man on her way back from the bathroom. He denied calling her a “Ho,” or anything like that. He denied saying to her, “You can’t do this to me” or “Who do you think you are.” As they were leaving the bar, Nicole was drunk.

Defendant, Nicole and Mr. Sentyrz returned to 3 Comma at about 8 p.m. Nicole went to the kitchen to make more drinks. Defendant and Mr. Sentyrz were looking at pictures of an America's Cup boat on defendant's computer. Defendant helped pump up Mr. Sentyrz's tender. They returned inside. They sat around the dining room area and had a few drinks. Nicole came in and out of the cabin. Nicole had a few drinks. Then she started drinking vodka straight from the bottle. Nicole became irate, infuriated. Defendant did not know why. She slapped the top of the computer down on defendant's hands. She slapped defendant more than three times on the face, head and shoulder. She tried to slap him all over. She punched him once with a closed fist. Defendant twice held Nicole back by pushing her away. He put his hand near her clavicle bone, in the center of her chest. He held her for no longer than 10 seconds. He held her in the neck area. Defendant denied squeezing her neck. Defendant told Nicole she needed to stop drinking. That "really pissed her off" in defendant's words. She said: "s. You don't tell me what to do." Nicole left and went to the bedroom area.

Around 9 p.m., Nicole came out of the bedroom. As she came up some steps, she fell without bracing herself and landed on her face. Mr. Sentyrz, who was closer to her, helped her up and sat her down on the couch. Mr. Sentyrz asked Nicole if she was hurt and looked her over. Nicole became annoyed and got back up. She moved about the cabin and continued drinking. Defendant said, "You should just sit down and rest." Defendant got her a bag of ice and told her, "You really should ice that knee." Nicole declined. Mr. Saller came onboard and joined them. Nicole was talking to Mr. Saller when she suddenly started crying and ran from the room. Mr. Bauerlein also came on board. At some point, Nicole told everyone, "Get the fuck off my boat." Defendant said, "Don't talk to my guests like that." Defendant apologized to everyone. Mr. Bauerlein left followed shortly by Mr. Saller, leaving Mr. Sentyrz, Nicole and defendant on board. Mr. Sentyrz stayed another hour and a half. During this time, Nicole continued to drink. Defendant did not see her eat anything.

Defendant was concerned about their safety staying on anchor during the night. Around 11 p.m., he contacted the harbor master, who offered them a mooring for the

night. With Mr. Sentyrz's help, defendant moved the yacht to a mooring in the harbor. The harbor was much calmer. It was packed with vessels. There was a boat moored 20 to 25 feet away on either side of 3 Comma. Defendant could hear people talking on other boats. Nicole fell asleep on the sofa. Eventually, Mr. Sentyrz left. Defendant cleaned up the dirty dishes and glasses then went downstairs and went to bed.

Detective Garcia woke defendant up. Defendant spent a night in jail. When he returned to 3 Comma, he found his locked briefcase had been ransacked and items were missing. His business tie, which he kept folded in his briefcase, had been removed and cut in half. Quite a few papers had been torn and shredded. A greeting card defendant had received from a female friend had been torn in pieces and thrown in the garbage can. The card read: "Thanks for everything. Keep in touch. Nice to know somebody as genuine as you are in this world." Two photographs—modeling headshots—of another female friend also were in the garbage can. They had been torn up. (Nicole denied that she had gone into defendant's briefcase or ripped up any photographs.)

On cross-examination, defendant said that from the time they left Oxnard until he was arrested on July 3, 2009, he suffered only a "couple bumps. . . here and there." But, defendant testified "I didn't develop any bruises." He bumped his shoulder, but it was not actually injured.

C. Rebuttal

Detective Garcia was recalled to the stand. Detective Garcia woke defendant up in the master bedroom of the yacht. Detective Garcia at that time did not see any injuries to defendant's face or upper body area. Detective Garcia did not notice any injuries when defendant was booked.

III. DISCUSSION

A. Credibility Evidence

1. Arguments and applicable law

Defendant argues the trial court abused its discretion in excluding evidence Nicole was in poor financial condition. Defendant reasons the evidence tended to show Nicole's motivation to retaliate against defendant after he said they were not going to be married. On cross-examination, defense counsel, Roger J. Rosen, inquired of Nicole as follows: "Q . . . [¶] And you went on a six-day travel excursion with [defendant] for pleasure, didn't you? [¶] A Yes. [¶] Q And he bought you some clothes and he bought you a bag to take that trip, right?" Deputy District Attorney Amy Wilton objected on relevance grounds. At sidebar, defense counsel stated defendant would testify: "[W]hen he met [Nicole], she didn't have anything and that she was enamored with the lifestyle, being with somebody who could afford to do things for her, give her things, show her a style of life she could not afford without him. And . . . when she talked to him about marriage and house and a future with him and his response was, 'I don't think so. It's not going to happen,' that was a substantial reason why this happened. And this was during the time that [she] was on the boat when she was quite inebriated." The trial court struck all testimony about Nicole's personal circumstances. The trial court ruled that if defendant testified, the defense could then recall Nicole and inquire further. The trial court informed the jury: "The prior testimony by Nicole about her living arrangements in Las Vegas, Nevada, where she was living, who she was living with, what this building was, co-op, apartment, who was paying the rent, that's all struck. The jury is not to consider it as well as all the testimony about a trip taken by Nicole with defendant, who paid for what and what was purchased. That's not relevant to the charge here"

At the conclusion of Nicole's testimony, however, the trial court changed its mind about allowing Mr. Rosen to recall Nicole. The following discussion occurred at sidebar:

“The Court: . . . [¶] I intend to excuse her now. You did get the testimony that she is considering filing a [civil] lawsuit. So that, I believe, covers everything you would want to cover in your defense case with her that is admissible, but I will hear you sir. [¶] Mr. Rosen: You’re right. [¶] The Court: Okay. [¶] I will excuse her, and then we will get to your last witness. [¶] Ms. Wilton: Go ahead. [¶] Mr. Rosen: I just have one question. I want to make sure that I understood your ruling correctly because I don’t want to violate it. You indicated I am going to be allowed in the case-in-chief—not what—I tried to do it in the case-in-chief—to put on evidence of her economic and financial situation, correct? [¶] The Court: No. [¶] Mr. Rosen: Okay. [¶] What was your ruling? Could I ask you to please revisit with me because I want to make sure I am in conformance. [¶] The Court: Under 352, any probative value is outweighed by undue prejudice, confusion of issues, and consumption of time. She would be entitled to counter that testimony with financial status, what she’s doing now, since she’s presently of a mind possibly to sue your client. So we would go into an entire financial analysis of her currently and at that time. [¶] In addition, you brought up the idea that she would do this in connection with wanting to marry him, some kind of getting used to his lifestyle. So we would have to go into her life then and now as to whether she was truly dependent on him in this fashion and that’s the only way she could survive. This would be a lawsuit within a lawsuit and distract the jurors in their decision of what happened that day and not this tangential lawsuit which you brought out that she is considering it. So they can weigh that as to her bias. [¶] Mr. Rosen: Okay. [¶] Just so I can have my record complete, I just want to indicate the purpose of going into—desiring of going into that area to show her economic situation during the ten months they were together up to and leading to the events which this jury is going to decide regarding these charges is twofold. One, I believe the cases permit setting the victim within the framework of her background at that time; and, two, it is part of the defense theory. I understand the court’s ruling that I am not going to be allowed to go into that so I have no objection to having her excused based on that.”

Defendant argues the trial court abused its discretion in excluding evidence Nicole had been intoxicated and behaved poorly on two prior occasions—in April and May 2009. Defendant asserts evidence Nicole had behaved badly after drinking on prior occasions would have bolstered evidence she was drunk and belligerent at the time of the assaults.

Under Evidence Code section 352, “The court in its discretion may exclude evidence 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.” We review the trial court’s Evidence Code section 352 rulings for an abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 578; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.) Our Supreme Court has held: “A trial court abuses its discretion when its ruling ‘fall[s] ‘outside the bounds of reason.’” [Citations.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 714; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 663.) Our Supreme Court has further held, “A trial court’s exercise of discretion under [Evidence Code] section 352 will be upheld on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner. (*People v. Williams* (2008) 43 Cal.4th 584, 634–635; [*People v.*] *Rodrigues* [(1994)] 8 Cal.4th [1060,] 1124–1125.)” (*People v. Thomas* (2012) 53 Cal.4th 771, 806.)

2. Nicole’s financial condition

We find no abuse of discretion. It was clear defendant was wealthier than Nicole. There was substantial evidence defendant was financially secure. He was the president and chief executive officer of four companies. He owned multiple residences, a yacht and a vintage car. He had access to a private jet. There was also substantial evidence Nicole was not wealthy. She had been living temporarily in another person’s home without a bed. Defendant paid for her flight from Las Vegas to Los Angeles. There was also evidence that after Nicole fell trying to re-board the yacht, she told defendant: “I

hope you have good insurance. This is gonna cost you.” She told Mr. Bauerlein, “I hope Mr. Kramis has good insurance.” Nicole admitted she was contemplating a civil lawsuit against defendant. In closing argument, defense counsel argued Nicole’s motive for fabricating the assault was financial. The trial court could reasonably conclude the time consumed further litigating Nicole’s financial condition substantially outweighed its probative value. The trial court’s ruling was not outside the bounds of reason.

3. Nicole’s alcohol consumption

Nicole admitted she was intoxicated on the day of the incident. Her heavy drinking and combative conduct was observed by others who testified to her condition. There was evidence Nicole assaulted defendant. Nicole acknowledged that at the preliminary hearing, she testified her father had recently passed away, she sometimes went on drinking binges and she consumed alcohol to deal with her emotions. A trial, Nicole admitted that when she consumes alcohol, she becomes emotional, dismissive, and withdraws. The trial court could reasonably conclude the probative value of evidence Nicole had been intoxicated and behaved badly on two prior occasions, in April and May 2009, was of limited probative value and would necessitate an undue consumption of time. That decision was not arbitrary, capricious or patently absurd.

4. Defendant’s constitutional claims

Defendant argues the trial court violated his Fifth, Sixth and Fourteenth Amendment rights under the federal Constitution when it excluded the evidence relevant to Nicole’s credibility. For the same reasons we find no abuse of discretion, the trial court’s rulings also did not violated defendant’s constitutional rights. (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27; *People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31; *People v. Benavides* (2005) 35 Cal.4th 69, 95.) As our Supreme Court has held, “The ‘routine application of state evidentiary law does not implicate [a] defendant’s

constitution rights.’ [Citation.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010, quoting *People v. Brown* (2003) 31 Cal.4th 518, 545; accord, *People v. Mills* (2010) 48 Cal.4th 158, 194.)

B. Jury Instruction

The jury was given a unanimity instruction: “The People have presented evidence of more than one act to prove that the defendant committed [an assault by means of force likely to produce great bodily injury]. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed.”

Defendant contends that in addition, under the circumstance of this case, the trial court had a *sua sponte* duty to instruct the jury to specify the agreed-upon act *in the verdict*. Defendant argues the prosecution presented evidence of three separate assaults: first, his grabbing Nicole by the neck to restrain her when she assaulted him; second, the assault in the living area of the yacht; and third, the assault in the bedroom. Defendant argues only the assaultive conduct in the yacht’s living area, the second attack, involved force likely to produce great bodily injury. Defendant concedes that the assault in the living area, if found true by the jury, *did* involve force likely to produce great bodily injury. And defendant agrees this assault, if found to have occurred, did cause Nicole’s broken rib. Defendant argues, however, that it cannot be assumed the jury relied on that act. Defendant reasons this is so because the jury found *not true* the allegation he personally inflicted great bodily injury on Nicole. Defendant notes that the jury disbelieved Nicole insofar as, in failing to reach a verdict on count 1, it found she was not his former cohabitant. Moreover, he argues “neutral” witnesses testified Nicole suffered injuries by non-assaultive means. Defendant concludes that that under these unique circumstances, the trial court was required to instruct the jury to specify the agreed-upon act in the verdict.

Our review is de novo. (See *People v. Taylor* (2010) 48 Cal.4th 574, 627-628; *People v. Lueth* (2012) 206 Cal.App.4th 189, 195; *People v. Hernandez* (2009) 180 Cal.App.4th 337, 347-349.) We reject defendant's contention for several reasons. First, defendant did not object to the verdict forms in the trial court. As a result, he forfeited any claim those forms were inadequate. (*People v. Jones* (2003) 29 Cal.4th 1229, 1259; *People v. Bolin* (1998) 18 Cal.4th 297, 330.) Second, even if the issue had been preserved, or the trial court should have acted of its own accord, defendant cites no authority for the proposition the jury verdict form was inadequate. *People v. Jones* (1990) 51 Cal.3d 294, 304-305, on which defendant relies, did not so hold. Third, we presume the jury understood and followed the unanimity instruction. (*People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Fourth, the jury was not required to state the particular act agreed upon in its verdict. (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 & fn. 29; *People v. Davis* (2005) 36 Cal.4th 510, 560-561 & fn. 17; *People v. Bradford* (1997) 15 Cal.4th 1229, 1343 & fn. 16; CALJIC No. 17.01 ["It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict"]; CALJIC 4.71.5 [same].)

And fifth, no unanimity instruction was required in the first instance. Our Supreme Court discussed the unanimity requirement in *People v. Russo* (2001) 25 Cal.4th 1124, 1132-1135: "In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.] . . . 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one

count.’ [Citation.] [¶] On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant’s precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby the defendant is guilty. [Citation.] . . . [¶] . . . [¶] The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may for the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.”

In *People v. Jennings* (2010) 50 Cal.4th 616, 679-681, our Supreme Court discussed circumstances in which a unanimity instruction is not required—“the course-of-conduct exception” and “the same-defense exception”: “[N]o unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation], or ‘when the statute contemplates a continuous course of conduct or a series of acts over a period of time.’ [Citation.] There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]” (See *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1427.)

Here, both the continuous-course-of-conduct and the same-defense exceptions apply. Nicole testified to a continuous course of assaultive conduct. Defendant assaulted Nicole repeatedly; all of his assaultive conduct occurred close in time. There was one

crime, not two or more discrete crimes. Nothing in the evidence or counsel's arguments required the jury to consider each kick, stomp, choking or other act as a discrete criminal event. In closing argument, the prosecutor argued the assault by means of force likely to produce great bodily injury occurred when defendant stomped on and kicked Nicole's ribs. The prosecutor argued: "[We know the force used was likely to produce great bodily injury because] he is stomping on a body part. He's kicking a body part, and that body part is the ribs. And one of the things that we need to remember is the testimony of Dr. Lis that talks about the ribs, particularly, the ribs on the right side of the body, and we need to remember that Dr. Lis told us that one of the functions of the rib on the right side of the body is to protect the liver. So when you are now taking a person and they're on the ground and you are stomping on them and repeatedly stomping on a part of their body that protects the liver, and you're kicking it, that force is likely to produce great bodily injury; and, in fact, we know it did because he broke her rib."

Further, the jury resolved the basic credibility dispute—whether defendant assaulted Nicole or he did not—against him. There was no reason the jury would have found Nicole's testimony more credible as to one assaultive act over another. The jury necessarily believed beyond a reasonable doubt that defendant committed all of the assaultive acts if he committed any one of them. And defendant offered the same defense to the various acts; he denied assaulting Nicole. Under these circumstances, no unanimity instruction was required. (*People v. Lueth, supra*, 206 Cal.App.4th at p. 196; *People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1011; see *People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

We disagree with defendant's assertion the jurors' not true finding as to the great bodily injury allegation means they did not rely on the assault in the living area in finding him guilty. The jury may not have been convinced beyond a reasonable doubt that Nicole's broken rib was the result of that assault. But it could still find the force defendant used at that time was likely to produce great bodily injury.

Defendant's further claim the jury might have relied on his act of restraining Nicole by grabbing her throat is unpersuasive. Defendant testified he held Nicole back

by holding or pushing on her neck for no more than 10 seconds, using just enough force to hold her back. Mr. Sentryz corroborated defendant's testimony: "[He used] just enough [force] . . . to hold her back because she was swinging at him"; he acted instinctively. According to the evidence, at that time, Nicole, not defendant, was the aggressor. And the prosecution never argued this act constituted an assault with force likely to produce great bodily injury.

As noted above, in support of his verdict form challenge, defendant asserts the jury resolved credibility in defendant's favor insofar as it disbelieved Nicole's cohabitation claim; it was unable to reach a verdict on count 1. We disagree. The jury's inability to reach a verdict suggests at least some, but not all, of the jurors thought Nicole was a former cohabitant. Moreover, individual jurors might have disagreed that Nicole's and defendant's living situation was cohabitation without disbelieving her testimony.

C. Probation Denial

Defendant claims the trial court abused its discretion in denying him probation. Our Supreme Court has held: "A denial of a grant of probation generally rests within the broad discretion of the trial court and should not and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner. (See *People v. Wade* (1960) 53 Cal.2d 322, 337-339, [disapproved on another point in *People v. Carpenter* (1997) 15 Cal. 4th 312, 380-382].)" (*People v. Edwards* (1976) 18 Cal.3d 796, 807; see *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.) We find no abuse of discretion. The trial court could properly find as follows: defendant's crime involved isolation of the victim; he waited until they were alone on the boat before assaulting her; he dragged her back inside when she tried to summon help; he intentionally inflicted mental and physical abuse; he acted with extreme violence, brutality and cruelty; he struck, kicked, stomped on and choked her; he threatened her life; he taunted her; he refused her pleas for medical assistance; he took advantage of a position of trust, isolating her on his boat where he had a fiduciary duty, as captain, to

care for her; Nicole was vulnerable; she was alone on the boat with defendant; she was half his size; she had consumed alcohol throughout the day and night; and he thwarted her attempt to escape. No abuse of discretion occurred.

D. Presentence Custody Credit

The trial court gave defendant credit for 54 days in presentence custody plus 54 days of conduct credit for a total of 108 days. Defendant contends and the Attorney General agrees defendant was entitled to additional credit. Defendant was in pretrial custody for 55 days, from August 5, 2011, to September 27, 2011. Additionally, he was entitled to 55 days of conduct credit. (§ 2933, subd. (e), as amended by Stats. 2010, ch. 426, § 1 [“one day deducted . . . for every day . . . served”].) Therefore, defendant’s total presentence custody credit is 110 days. The judgment must be modified and the abstract of judgment amended to so provide.

[The remainder of this opinion is to be published.]

E. Restitution

The trial court imposed a \$10,000 restitution fine under former section 1202.4, subdivision (b)(1) as it was in effect on the date of the offense. We asked the parties to brief the question what was the effect, if any, of *Southern Union Co. v. United States*, *supra*, 567 U.S. at pages __ - __ [132 S.Ct. at pages 2348-2349] (*Southern Union Co.*) on the trial court’s imposition of a \$10,000 restitution fine. Former section 1202.4, subdivision (b)(1) provided, “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” At the time of the assault on Nicole (July 3, 2009), in the case of a felony conviction, the minimum fine was \$200, while the maximum fine was \$10,000. (*People v. Blackburn*

(1999) 72 Cal.App.4th 1520, 1534.)² It is the fact of the conviction that triggers imposition of a section 1202.4, subdivision (b)(1) restitution fine. (*People v. Arata* (2004) 118 Cal.App.4th 195, 202; *People v. Chambers* (1998) 65 Cal.App.4th 819, 822.)

The amount between \$200 and \$10,000 is set in the court's discretion, "commensurate with the seriousness of the" crime of which the accused has been convicted. (§ 1202.4, subd. (b)(1).) A defendant's inability to pay is not a compelling and extraordinary reason to excuse imposition of a section 1202.4, subdivision (b)(1) restitution fine. (§ 1202.4, subd. (c).) However, a defendant's ability to pay is considered, among other factors, in setting the amount of the fine above \$200. (§ 1202.4, subds. (c)-(d).) At the time defendant committed the present offense as well as when he was convicted and sentenced, section 1202.4, subdivision (d) stated: "In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred-dollar (\$200) or one hundred-dollar (\$100) minimum, 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. Express findings by the

² Section 1202.4, subdivision (b)(1) was amended effective January 1, 2012 to provide: "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, and shall not be less than one hundred twenty dollars (\$120) starting on January 1, 2012, one hundred forty dollars (\$140) starting on January 1, 2013, and one hundred fifty dollars (\$150) starting on January 1, 2014, and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor." (Stats. 2011, ch. 358, § 1.)

court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.” Here, as noted, the trial court imposed the statutory maximum—a \$10,000 restitution fine.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” As the United States Supreme Court explained in *Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*), “[The] ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Stated differently, “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Id.* at pp. 303-304.) Therefore, in sentencing a defendant, a judgment may not “inflic[t] punishment that the jury’s verdict alone does not allow.” (*Id.* at p. 304.) In *Southern Union Co.*, the United States Supreme Court held *Apprendi* applies to the imposition of criminal fines. (*Southern Union Co.*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2357].) The statutory fine imposed in *Southern Union Co.* was \$50,000 for *each day* of violation. In other words, the amount of the fine was tied to the *number of days the statute was violated*. In *Southern Union Co.*, the trial court, not the jury, made a specific finding as to the number of days of violation. The United States Supreme Court held the district court’s factual finding as to the number of days the defendant committed the crime violated *Apprendi*. (*Southern Union Co.*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2352].)

Southern Union Co. does not impact the restitution fine imposed in the present case. *Apprendi* and *Southern Union Co.* do not apply when, as here, the trial court exercises its discretion within a statutory range. (*Apprendi*, *supra*, 530 U.S. at p. 481; *People v. Urbano* (2005) 128 Cal.App.4th 396, 405, citing *United States v. Booker* (2005) 543 U.S. 220, 233-234 (maj. opn. of Stevens, J.) and *id.* at pp. 278-280 (separate dis. opn. of Stevens, J.); 3 Witkin, Cal. Crim. Law (4th ed. 2012) Punishment, § 113, p.

213; see *United States v. Milkiewicz* (1st Cir. 2006) 470 F.3d 390, 403-404; *United States v. Reifler* (2d Cir. 2006) 446 F.3d 65, 118-120; *United States v. Leahy* (3rd Cir. 2006) 438 F.3d 328, 337 [en banc].) As the United States Supreme Court held in *Apprendi*, “[N]othing in [the common law and constitutional history] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to the offense and offender—in imposing a judgment *within the range* prescribed by statute.” (*Apprendi, supra*, 530 U.S. at p. 481; accord, *People v. Urbano, supra*, 128 Cal.App.4th at pp. 405-406.) As the Court of Appeal for the Fifth Appellate District noted in *Urbano*, “*Apprendi* distinguishes a ‘sentencing factor’—a ‘circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense’—from a ‘sentence enhancement’—‘the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict’ constituting ‘an increase beyond the maximum authorized statutory sentence.’ ([*Apprendi, supra*, 530 U.S.] at p. 494, fn. 19.)” (*People v. Urbano, supra*, 128 Cal.App.4th at pp. 405-406.) Nothing in *Southern Union Co.* alters that holding. Under the applicable version of section 1202.4, subdivision (b)(1), absent compelling and extraordinary circumstances, the trial court was required to impose a restitution fine in an amount between \$200 and \$10,000. The \$10,000 section 1202.4, subdivision (b) restitution fine imposed in the present case was within that statutory range. The trial court did not make any factual findings that increased the potential fine beyond what the jury’s verdict—the fact of the conviction—allowed. Therefore, *Apprendi* and its progeny do not preclude its imposition. (*People v. Urbano, supra*, 128 Cal.App.4th at pp. 405-406.)

IV. DISPOSITION

The judgment is modified to award defendant 55 days of presentence custody credit and 55 days of conduct credit for a total presentence custody credit of 110 days. In all other respects, the judgment is affirmed. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.