Filed 11/13/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. EDWARD YOUNG, Defendant and Appellant.	C054130 (Super. Ct. No. LF008429A)

APPEAL from a judgment of the Superior Court of San Joaquin County, Charlotte P. Orcutt, Judge. Affirmed as modified.

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, J. Robert Jibson and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Edward Young was convicted of second degree robbery. (Pen. Code, § 211.)[1] In bifurcated proceedings, the court found true the allegations

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the introduction, Factual and Procedural Background, part I. of the Discussion, and the Disposition of this opinion are certified for publication.

[1] Undesignated statutory references are to the Penal Code.

that defendant had suffered three prior strike convictions (§§ 1170.12, subd. (b), 667, subd. (d)), all of which also qualified as serious felonies under the five-year enhancement statute (§ 667, subd. (a)). Upon granting the People's motion to strike prior convictions under section 667, subdivision (a), the court sentenced defendant to an aggregate term of 25 years to life in state prison. Defendant appeals his conviction, contending the trial court had no authority to reopen closing arguments after the jury declared itself deadlocked; the trial court abused its discretion in allowing a readback of defense counsel's second closing argument; he received ineffective assistance of counsel; and the cumulative result of these errors deprived him of his due process rights. We shall affirm the judgment with a modification to the abstract of judgment on the number of days of actual custody credit.

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2005, at approximately 2:00 a.m., Christina Lopez and Maria Valdez were working as cashiers at the USA Gas station in Lodi. Two men entered the store, defendant and his friend, Eli Hayes (whom he later identified as his codefendant). Hayes approached Lopez at the cash register, pulled a gun and threatened to shoot her if she did not give him money. Lopez gave him money from her register. Defendant went to Vasquez, pulled a gun,[2] and demanded she give him money. When Vasquez

[2] Defendant actually used a plastic or "simulated" BB gun.

could not open her register, defendant raised his arm as though he was going to hit her. While Vasquez was trying to open her cash register, she was also activating the alarm. Vasquez realized defendant's weapon was not real, because she could see the "point was crushed." Nonetheless, she was frightened and scared. After getting money from Lopez, Hayes and defendant left the store and went their separate ways.

Responding to a dispatch, Lodi Police Officer Kevin Kent arrived at the USA Gas station shortly after the robbery. He took statements from Lopez and Valdez, got general descriptions of the perpetrators and watched a video surveillance tape. He also later received still-frame photographs produced from another surveillance tape.[3] Officer Kent did not see either Hayes or defendant with a gun on the tape.

Officer Dale Eubanks, who had known defendant and his family for a number of years, saw the still-frame photographs and recognized one of the robbers as defendant. About a week after the robbery, Eubanks was riding with Detective Nick Rafic when he saw defendant in front of a local market. Defendant was wearing clothes that were either the same or very similar to those depicted in the photographs from the robbery. Eubanks and Rafic pursued defendant, but he fled the scene and they were unable to find him.

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[3] Apparently, there were two surveillance tapes, one taken by the in-store system and a second by an independent system. The still-frame photographs were taken from the independent surveillance system video.

Detective Rafic was assigned to follow up on the investigation of the case. As part of that investigative process, he procured a prior booking photo of defendant.[4] Using that photograph, he prepared a photo line-up. He showed the photo line-up to both Lopez and Vasquez. Each identified defendant as one of the robbers. However, Lopez expressed some uncertainty.

Detective Rafic then learned defendant was at Calaveras County Jail, so he went there to speak with defendant. He told defendant he was there investigating the robbery. Defendant indicated he was aware of the robbery and, after being *Mirandized*, gave Rafic a statement.

Defendant stated he and Hayes had decided to rob the gas station. He made it clear to Hayes he did not want anyone to get hurt. He used a plastic or simulated BB gun, and Hayes had a knife. When Hayes got the money, they left the store and met up later at an abandoned house. In counting the proceeds, they had about $200. Hayes kept the money and would not share it with defendant. But, Hayes used the money to buy food and drugs, which he shared with defendant. Defendant indicated he was sorry for his actions and particularly sorry he had frightened Lopez and Vasquez. Despite his remorse, defendant was not concerned about discussing the robbery, because he knew

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[4] Regarding the prior booking photo, Detective Rafic offered the unsolicited clarification that "anybody who gets booked in the state, their photo becomes available to a police officer--for viewing for prior booking arrests."

"he [could] plead insanity," and specifically used the phrase "5150."[5] Detective Rafic explained this reference as "they use numbers based on some of these--you know, the mentally unstable." Rafic's interview with defendant was not recorded in any way. Rafic acknowledged he was familiar with defendant and knew him to be a drug user.

After the presentation of evidence, the jury was instructed. The instructions included the lesser included offenses of attempted robbery, petty theft and attempted petty theft. The instructions also included liability under an aiding and abetting theory.[6]

Jury deliberations commenced on June 2, 2006. The next court day, the jury asked to see the surveillance tape and asked for a readback of Lopez's testimony. The next day, the jury sent a note stating it was deadlocked and had been since the previous morning. The foreperson indicated it was unclear whether "there's 100 percent understanding from everyone in the box how--from the lesser--how the lesser charges work with the robbery."

The court directed the jury back to the instructions and the foreperson indicated the instructions had been read "over

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[5] Presumably, this was a reference to Welfare and Institutions Code section 5150, which allows for a 72-hour involuntary commitment for those determined to be dangerous to themselves or others.

[6] Defense counsel's objection to the instructions on liability premised on an aiding and abetting theory was overruled.

and over and over" and were not especially helpful. The foreperson advised the court the problem appeared to be a disagreement on "the perception of the facts" and did not believe any additional time would be helpful in reaching a verdict. The rest of the jury agreed that neither further time nor instruction would be helpful. The court asked about the split on the last vote, and was advised it was "three numbers," "ten--to one--to one," indicating their level of disagreement. The court asked if further argument from the attorneys might be helpful. Although some of the jurors did not think it would be, others did. Accordingly, the court reopened closing argument for both parties. Neither party objected.

The prosecutor focused his second closing argument on liability under either a conspiracy theory or an aiding and abetting theory, theories which had been originally instructed upon but which he had not argued in his original closing argument. Defense counsel continued to focus his argument on the lesser included offenses.

The jury resumed deliberations. A short time later, it asked for a readback of defense counsel's second closing argument. Neither party objected. The court re-advised the jury that statements and argument of the attorneys is not evidence and defense counsel's argument was reread to the jury. The jury continued deliberations for over an hour, broke for lunch, reconvened and deliberated for another hour, at which time they had reached a verdict of guilty as to count 1 (§ 211).

DISCUSSION

I. The Court Was Authorized to Reopen Closing Argument to Assist the Jury in Overcoming a Deadlock

Defendant contends the trial court was without authority to reopen closing argument while the jury was deliberating. He contends doing so resulted in a miscarriage of justice, violated his due process rights, and constituted improper jury coercion. We are not persuaded.

Initially, we note that despite being specifically asked if there was any objection, defendant did not object to having the case reopened to present additional closing argument to the jury. That failure to object forfeited the issue for appeal. (See *People v. Jennings* (1991) 53 Cal.3d 334, 383-384; *People v. Bishop* (1996) 44 Cal.App.4th 220, 235.) Perhaps anticipating this outcome, defendant argues alternatively that counsel's failure to object was ineffective assistance of counsel. Because we find defendant's claim has no merit, counsel's failure to object did not render his representation ineffective.

Defendant specifically argues, "[t]here appears to be no statute that would authorize the court's action in allowing the prosecution to reargue the case as a means of overcoming jury deadlock." Defendant is mistaken.

There is authority guiding the trial court's actions with respect to the order of a jury trial and its obligations upon being faced with a deadlocked jury. Section 1093 delineates the order that trial procedures shall follow, including the direction that the prosecutor and defense counsel may argue the

case to the court and jury upon the close of evidence. (§ 1093, subd. (e).) Section 1094 grants the trial court broad discretion to depart from the order specified in section 1093.[7] Section 1140 entitles the trial court to ascertain whether there is a reasonable probability a jury deadlock might be broken. (Cf. *People v. Miller* (1990) 50 Cal.3d 954, 993-994; *People v. Sheldon* (1989) 48 Cal.3d 935, 959.) When the court is faced with a deadlocked jury, it must proceed carefully, lest its actions be viewed as coercive. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) At the same time, when faced with questions from the jury, including that they have reached an impasse, "a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Here, there were no remarks by the court that could have been viewed as coercive. It did not urge the jurors to reach agreement. There were no coercive instructions given. Nor did

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[7] Relying on the authority conferred on the court by sections 1093 and 1094, the Judicial Council recently clarified the existing authority of the court and enacted California Rules of Court, rule 2.1036. This rule expressly states that after a jury reports it has reached an impasse in deliberations, if the trial judge determines further action may assist the jury in reaching a verdict, the trial judge may "permit attorneys to make additional closing arguments." (Rule 2.1036(b)(4).) This rule became effective January 1, 2007. (Judicial Council of Cal., Admin. Off. of Cts., Rep. on Jury Rule Proposals [to adopt Cal. Rules of Court, rules 2.1032, 2.1033, 2.1034, 2.1035 & 2.1036] (Nov. 28, 2006), pp. 10, 17.)

any remarks from the court show a preference for a particular verdict. By asking if additional argument might be helpful, the court did no more than ascertain the reasonable probability of the deadlock being broken and a means by which that might be accomplished. When some of the jurors agreed additional argument might help them in reaching a verdict, it was not inappropriate for the court to seek to offer that alternative to aid the jury. Further, the procedure was neutral, giving each side a brief opportunity to argue. We see no impropriety in the court's exercise of its discretion.

The determination that the court acted within its inherent authority and did not abuse its discretion necessarily resolves defendant's claim that his trial counsel was ineffective for failing to object to further closing argument.

To establish ineffective assistance of counsel, a defendant must show "'"not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."' [Citation.] Prejudice occurs only if the record demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*People v. Lucero* (2000) 23 Cal.4th 692, 728.)

Here, defendant has not demonstrated deficient performance by counsel. The procedure implemented by the court was well within its authority. It was not an "unprofessional error" for counsel not to object to an authorized procedure, nor did this

lack of objection affect the outcome of these proceedings.

[This ends part I. of the published portion of this opinion.]

II. It Was Not an Abuse of Discretion to Permit the Jury to Hear a Readback of Defense Counsel's Second Closing Argument*

Defendant next contends the trial court abused its discretion in allowing a rereading of defense counsel's second closing argument. Acknowledging that, again, there was no objection to this readback, defendant alternatively argues counsel was ineffective in failing to object.

During discussions with the court about the jury's request to have his second closing argument read back, defense counsel noted that argument is not evidence. The trial judge clarified that the decision was within her discretion and went on to indicate, "Based on the fact that they previously told me they were hung, I think that maybe I would allow them to rehear it." Counsel asked which argument the jury was requesting and the court answered, the second one. Counsel responded, "It was a piece of garbage." Counsel went on to state, "I don't know. I always thought it was error. I'm not arguing with you. That was always my impression, that it wasn't evidence and it couldn't be given." The trial judge corrected counsel and clarified that although argument is not evidence, it is "up to the Court whether or not I give it. [¶] Now, normally, I wouldn't give it again, but on a case where I know they're already hung, if you don't object, I am willing to just

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* See footnote, *ante*, page 1.

read--they only want today's . . . . I am willing to give it to them if they think it's going to be helpful." Defense counsel stated he would not object, "[i]f they think it's helpful." The trial judge replied, "I know they think it's helpful because they asked for it." Prior to the readback of argument, the court reminded the jury that "statements and arguments made by counsel are not evidence."

As above, despite being specifically asked, counsel did not object to the procedure proposed by the court. The failure to object forfeits the issue on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Anticipating this conclusion, defendant argues in the alternative that counsel was ineffective for failing to object. Again, we are not persuaded.

There is no doubt that a trial court has inherent authority to "order argument by counsel to be reread to the jury or to be furnished to that body in written form. The exercise of such power must be entrusted to the court's sound discretion. As a result, review must be conducted under the deferential abuse-of-discretion standard." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1260, disapproved on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835; *People v. Gurule* (2002) 28 Cal.4th 557, 649 [no abuse of discretion where trial court declined request for readback of closing argument, particularly when defense counsel's closing arguably misstated the law]; *People v. Sims* (1993) 5 Cal.4th 405, 452-453; *People v. Pride* (1992) 3 Cal.4th 195, 266-267.)

Defendant concedes a readback of argument is within the court's discretion, but argues that since the "jury never should have heard reargument . . . it was a gross abuse of discretion to allow the jury to hear it *again*." That is, his argument that the court abused its discretion in allowing the readback is premised on the supposition that the initial determination to reopen the case for further argument was error. As above, the initial determination regarding further argument was not in error; it was a decision well within the court's discretion.

Without the foundational predicate for defendant's claim, the court's decision to permit the readback of closing argument was similarly well within its discretion. Prior to the readback, the court took the precaution of reminding the jury that argument was not evidence. The argument was brief and the court believed rereading it would be helpful to the jury. Under these circumstances, the court's ruling was not an abuse of discretion.

As above, to prevail on a claim of ineffective assistance of counsel, the defendant must show prejudice. To establish prejudice, the accused must show a reasonable probability, sufficient to undermine confidence in the outcome, that, but for the allegedly deficient performance, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [80 L.Ed.2d 674, 697-698]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218 (*Ledesma I*).) In demonstrating prejudice, the defendant "must carry his burden of

proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

"'Failure to object rarely constitutes constitutionally ineffective legal representation. . . .' [Citation.] Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 206.)

This is not a case where there could be no satisfactory tactical reason for counsel's failing to object to the readback of his second closing argument. The readback of defense counsel's closing argument meant that his version of the case, that defendant was not guilty of robbery but a lesser included offense, was put before the jury on three separate occasions. Tactically, counsel could have determined this readback represented a unique opportunity for defense counsel to have his vision of the case be the *last word* presented to the jury.[8] We cannot fault this reasoning, nor can we find on this record that

[8] Defendant's real complaint seems to be with the quality of this second closing argument and defense counsel's statement that his second argument was "garbage." However, the fact that a better or different argument could have been made does not render counsel's performance deficient. (*People v. Ledesma* (2006) 39 Cal.4th 641, 748 (*Ledesma II*).)

counsel's performance was deficient because he did not object to a rereading of his argument already heard by the jury.

III. References to Defendant's Prior Record and Drug Use Did Not Render Trial Counsel's Representation Ineffective*

Defendant next puts forth a series of acts and omissions by trial counsel that, he contends, when taken together rendered counsel's representation ineffective. Again, we are not persuaded.

Defendant raises four specific instances of claimed error by counsel. First, on direct examination, Detective Rafic testified that he obtained defendant's prior booking photo to prepare a photo line-up. Rafic also explained to the jury what a prior booking photo is. Defense counsel did not object to this reference to, or description of, prior booking photos. Second, on cross-examination of Rafic, defense counsel elicited testimony that defendant had been initially contacted by Rafic when he was in the Calaveras County Jail. Third, defense counsel elicited testimony from Rafic that he was familiar with defendant as a drug user. Lastly, at the very end of closing argument, defense counsel "apparently slipped" and requested that if the jury were to find defendant guilty of anything, it should find him guilty of "petty theft with *a prior*" (italics added). Defendant's prior convictions had been bifurcated and were not before this jury.

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* See footnote, *ante*, page 1.

"'Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence.' [Citation.] 'In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.'" (*People v. Williams* (1997) 16 Cal.4th 153, 215.) It does not do so in this case.

We do not agree that counsel's decision to not object to Detective Rafic's unsolicited mention of prior booking photos constituted ineffective assistance of counsel. Trial counsel may have decided not to object to Rafic's testimony about defendant's prior booking photos because an objection would have highlighted the testimony and made it seem more significant than it was. (See *People v. Padilla* (1995) 11 Cal.4th 891, 958, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) This is a legitimate tactical reason to decide not to object to testimony.

There were also possible legitimate tactical reasons for defense counsel's elicitation of the testimony that defendant was in jail when Detective Rafic interviewed him. The record reveals defense counsel sought to challenge the accuracy of defendant's statement to Detective Rafic. The subsequent questions in cross-examination, combined with counsel's closing argument, suggest counsel was trying to raise the implication

that it was unusual for a statement taken at a jail not to be recorded in some fashion. Consistent with that challenge to defendant's unrecorded statement to Detective Rafic, defense counsel reminded the jury that oral statements by the defendant had to be considered with caution if they were not written or recorded, noted that in his experience statements taken by police officers are recorded, and described some of the challenges in relying on one person's interpretation of another's oral statements. Thus, it appears from this record there could have been a legitimate tactical reason for counsel eliciting the testimony that defendant was interviewed while in jail.

Similarly, in looking at the entire record, it appears defense counsel had a tactical reason for eliciting the testimony that Detective Rafic was familiar with defendant as a drug user. In closing argument, counsel questioned defendant's coherence in making his statement. He attempted to argue that defendant was "spaced out"[9] when he made his statement, and that defendant referenced insanity and "5150" (see fn. 5, *ante*) which counsel characterized as "the typical course for anybody that's done any business with drug use."

Third, with respect to counsel's misspeaking in closing argument that the jury should convict defendant of petty theft

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[9] The particular characterization of defendant as "spaced out" was objected to and that objection was sustained. Nonetheless, it gives insight into counsel's reasoning in eliciting that testimony.

with a prior rather than robbery, certainly this was an error on counsel's part. However, we cannot say the error was prejudicial. Improper statements to the jury are prejudicial when "'there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001; see also *People v. Osband* (1996) 13 Cal.4th 622, 696-697.) We see no such reasonable likelihood here.

Counsel's strategy at trial was not to claim his client's innocence, a claim which would likely have undercut his credibility with the jury given the evidence against defendant, which included surveillance videos, eyewitness identifications and a statement to police.[10] Rather, his strategy was to argue defendant was not guilty of robbery but a lesser included offense, such as attempted petty theft. He argued this point throughout both of his closing arguments. It is clear from the record that counsel's reference to "petty theft with a *prior*" (italics added) was a "slip of the tongue," a slip which he immediately corrected by stating, "Excuse me. He was guilty of

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[10] "It is not ineffective assistance of counsel for counsel to admit obvious weaknesses in the defense case. [Citation.] '[W]here the evidence of guilt is quite strong, "it is entirely understandable that trial counsel, given the weight of incriminating evidence, made no sweeping declarations of his client's innocence but instead adopted a more realistic approach, namely, that . . . defendant . . . may have committed [a lesser included offense] . . . ."' [Citation.] '"'[G]ood trial tactics [may] demand[] complete candor' with the jury."'" (*In re Alcox* (2006) 137 Cal.App.4th 657, 668.)

attempted petty theft." We cannot believe this inadvertent slip of the tongue, which was immediately corrected, so infected the proceedings that but for it, the result of the proceeding would have been different.

"In sum, although another lawyer might have used different tactics, it is not reasonably probable a more favorable verdict would have resulted in the absence of the alleged errors." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.)[11]

IV. There Was No Cumulative Prejudice That Amounted to a Due Process Violation[*]

Defendant's final contention is that the effect of the errors alleged when considered cumulatively produced a trial setting which was fundamentally unfair. As discussed fully in this opinion, we have not found such errors. The trial court acted within its authority in reopening closing argument; the

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[11] Defendant argues defense counsel's "errors are underscored, and perhaps explained, by a strange argument defense counsel initiated with [defendant]--on the record--at the court trial of the prior allegations." We disagree with defendant's assertion that the referenced exchange demonstrated a "lack of respect for due process" by defense counsel or that counsel "had difficulty distinguishing between his role as defense counsel and the role of the prosecution." As explained in this opinion, there were legitimate tactical reasons for counsel's alleged errors. With respect to the specific exchange defendant complains about, defendant appeared to believe that because he had pleaded to the prior offenses, they were not convictions. Counsel advised him this was a legal misapprehension. Counsel then entered an objection on defendant's behalf, based on defendant's belief. This record does not reveal any lack of respect for due process or confusion from defense counsel about his role or obligations in this case.

[*] See footnote, *ante*, page 1.

court did not abuse its discretion in allowing the jury to have defense counsel's second closing argument read back; and counsel was not ineffective. In fact, the only error claimed, which we agree was error, was counsel's slip of the tongue near the end of his first closing argument. However, the "jury had heard the entire case--the evidence, the argument and the instructions . . . . If a slip of the tongue of this character influenced the jurors and caused them to find defendant guilty rather than not guilty, our whole jury system must fail as this would be tantamount to a holding on our part that the average juror lacks the necessary intelligence and common sense to act as a trier of fact." (*People v. Sparks* (1967) 257 Cal.App.2d 306, 309.) We will not so find.

V. Sentencing Error and Error in Abstract of Judgment*

In our review of the record, we have discovered an error in the abstract of judgment that must be corrected.

There is a clerical error in the abstract on the number of actual days of custody credit. The trial court indicated defendant had 326 actual days, and 48 days of section 2933.1 conduct credits, resulting in a total of 374 days of custody credit.[12] However, the abstract indicates the transposed figure of *362* actual days. We shall order the abstract modified to

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* See footnote, *ante*, page 1.

[12] The reporter's transcript indicates defendant had served 326 days, and the court awarded 40 days of conduct credit for a total of 374 days custody credit. Based on the math, it appears the court reporter mistranscribed the 48 days as 40 days.

show 326 actual days; the conduct credits (48 days) and total (374 days) are listed accurately on the abstract.

In addition, the abstract of judgment correctly reflects the imposition of a $500 administrative surcharge.[13] However, this surcharge was not orally imposed by the court at the sentencing hearing. Section 1202.4, subdivision (*l*) provides: "At its discretion, the board of supervisors of any county may impose a fee to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid, to be added to the restitution fine and included in the order of the court, the proceeds of which shall be deposited in the general fund of the county." San Joaquin County has imposed such a fee. (San Joaquin County Board of Supervisors Order No. B-95-1015 (eff. Sept. 18, 1995).)

Where a county's board of supervisors has exercised its discretion to impose an administrative fee under section 1202.4, subdivision (*l*), and a trial court in that county imposes a restitution fine, the surcharge is mandatory. Since the surcharge was mandatory, we can correct the trial court's error

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[13] The clerk's minutes reflect this as a $20 administrative surcharge on the restitution fine. It appears this is based on an error by the clerk. At sentencing the court imposed identical $5,000 restitution and parole revocation fines under sections 1202.4, subdivision (b) and 1202.45. The court also imposed victim restitution in the sum of $200. (§ 1202.4, subd. (f).) The clerk's minutes reflect a $200 restitution fine was imposed under section 1202.4, subdivision (b). It was not. The 10 percent administrative surcharge attaches to the restitution fine imposed under section 1202.4, subdivision (b), not to the victim restitution.

in failing to order the surcharge despite the absence of an objection at sentencing. (See *People v. Smith* (2001) 24 Cal.4th 849, 852-854.) We shall therefore modify the judgment to provide for the 10 percent ($500) surcharge on the restitution fine pursuant to section 1202.4, subdivision (*l*). Since the surcharge already appears on the abstract of judgment, no correction to the abstract is required as to the surcharge.

In the interest of judicial economy, we will correct these errors without first requesting supplemental briefing. Any party wishing to address this issue may petition for rehearing. (Gov. Code, § 68081.) **[The remainder of this opinion is certified for publication.]**

DISPOSITION*

The judgment is modified to provide for a 10 percent ($500) administrative surcharge under section 1202.4, subdivision (*l*), as correctly indicated on the abstract of judgment. The trial court is directed to prepare an amended abstract of judgment that reflects the correction of 326 actual days of custody credit, and to forward a certified copy of the amended abstract

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* See footnote, *ante*, page 1.

of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

BUTZ, J.

We concur:

SIMS, Acting P.J.

HULL, J.