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CERTIFIED FOR PARTIAL PUBLICATION[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TERRY LEE SHIELDS, Defendant and Appellant.	G043124 (Super. Ct. No. 06CF3470) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuhara Makino, Judge. Affirmed as modified.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Quisteen Shum and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

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[1] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II, III, IV, V, VI, and VII.

Terry Lee Shields appeals from a judgment after a jury convicted him of 10 counts of forcible lewd acts on a child under the age of 14, kidnapping to commit a sex offense, three counts of using a minor to produce child pornography, and possession and control of child pornography, and found true he had substantial sexual contact with the victims, and he kidnapped a victim and the movement substantially increased the risk of harm to the victim. Shields argues: (1) three counts of using a minor to produce child pornography was unauthorized and violated his federal and state equal protection rights; (2) the court erroneously failed to hold a hearing to determine whether his defense counsel should have been substituted; and (3) there were numerous sentencing errors. As we explain below, we agree there were sentencing errors. None of his other contentions have merit, and we affirm the judgment as modified.

FACTS[2]

Counts 8-11/J.H. & Counts 12-14/J.H.2

J.H., who was born December 17, 1990, and her younger sister, J.H.2, who was born October 31, 1995, and is autistic, rode the school bus to school in June 1999. Shields drove the school bus. The girls' mother befriended Shields and invited him to their home on holidays and family birthday parties. She also asked Shields to babysit her daughters. While babysitting the girls, Shields removed J.H.'s pants and underpants and touched her vagina with his hands on three separate occasions. Shields also showed J.H. a pornographic movie. Shields babysat J.H.2 on three separate occasions in September 2002, May 2003, and September 2003, while her father, mother, and sister were out of town.

[2] Because all but one of Shields's contentions concern his sentence, we provide an abbreviated discussion of the facts.

Counts 1-7/A.L.

On June 9, 2004, seven-year-old A.L. was walking to school when Shields stopped his car, honked, and told her that he would take her to Disneyland. A.L. got into the car because she was afraid, and Shields made her get into the trunk, which was accessible from the backseat. He gave her something to drink, but she spilled it on the floor because she thought it was beer. Shields drove her to a house. Shields, who was nude, made A.L. take off her clothes, told her to stop crying, and forced her to pose for photographs. Shields kissed A.L.'s breasts and vagina, and rubbed his penis on her vagina. Shields held A.L. down and first put his penis inside her vagina and then put his penis in her mouth. Shields left A.L. at a McDonalds, and she walked to a carwash. Someone found her and called the police.[3]

Count 15

Two years later, Shields was at an internet café when an employee saw him looking at what appeared to be child pornography on a computer. The employee called the police. Officers found Shields sitting at a computer and they took him outside. Shields told them he had been at the internet café for about three hours looking at pornography when he saw pictures of children and downloaded them because he was curious. Officers found a computer disk in the disk drive of the computer Shields had been using. The computer disk contained seven images of young men and women having sex. Officers arrested Shields for possession of child pornography. After advising

[3] At trial, A.L. testified she could not remember the details of what happened that day. The jury, however, watched a videotape of her interview with a Child Abuse Services Team member and a detective. A.L. denied anyone looked at or touched her genitals, or photographed or videotaped her. After the detective showed A.L. a picture of A.L., and A.L. said the photograph was not of her, the detective asked A.L. to tell her what probably happened to the girl in the photograph. A.L. provided the details stated above.

Shields of his *Miranda*[4] rights, Shields wrote he downloaded the images to turn them over to law enforcement and denied being sexually aroused by the images and denied being interested in children.

The Investigation

The next day, a detective interviewed Shields. After a detective advised him of his *Miranda* rights, Shields said the child pornography images "just pop[ped] up" and he downloaded them to give to the police. He denied being sexually aroused by the photographs.

Officers obtained a search warrant for Shields's car. Officers found a backpack containing topical anesthetic cream, condoms, lubricant, vibrators, dildos, a pacifier, and a Grim Reaper mask. Officers also found dolls, stuffed animals, video and camera equipment, binoculars, a copy of American Cheerleader magazine, women's underwear, lollipops, and a Little Mermaid bracelet.

Officers also obtained search warrants for Shields's storage units. Officers found Lidocaine, sodium chloride, obstetrical towels, DVDs, CDs, a bra, women's underpants, and pornographic magazines, including one titled "Child."

Finally, officers obtained a search warrant for a room Shields was renting. Officers found a computer containing over 2,000 pornographic images of children around the age of six or seven years old. They also found a lock box containing 26 videotapes, 34 DVDs, 42 computer disks, a photographic album, photographs of children in various states of undress, and women's underpants. The photographic album contained photographs of young women estimated to be between the ages of 17 and 22, with each picture the women wearing less clothing. One of the women pictured in the album also appeared on one of the videotapes. The videotape showed Shields photographing the woman and having sex with her. One of the videotapes depicted a girl approximately 13

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

years old wearing a nightgown that she lifted up to expose her vagina. There were also several photographs of the girl. The girl in the videotape and photographs was identified as J.H. Another videotape showed two females, one of whom was nude, lying on separate beds in a motel room. The videotape showed Shields hold a vibrator to the nude female's vagina while she spread her legs. Seventeen of the computer disks contained images of child pornography. The disks included 70 images of children engaged in sexual activity. Twelve of the pornographic images were of a young girl named J.R. Fourteen of the pornographic images were of J.H. and J.H.2. Three of the computer disks included seven videos depicting child pornography. One of the CDs was labeled "A[]L. 7 yo." This CD included photographs showing A.L. sitting on a toilet nude, spreading her legs, holding a vibrator, and touching her vagina with her hands.

At some point in October, Shields called his landlord and told her he had a "shameful secret" and he had been arrested because of "a sin of his" for which he wanted to die. There was additional child pornography in the residence.

Trial Court Proceedings

An information charged Shields with the following: A.L.-three counts of forcible lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1))[5] (counts 1-3), kidnapping to commit a sex offense (§ 209, subd. (b)(1)) (count 4), and three counts of using a minor to produce child pornography (§ 311.4, subd. (c)) (count 5-penetration of vagina, count 6-masturbation, and count 7-posing nude); J.H.-four counts of committing lewd acts on a child under the age of 14 (§ 288, subd. (a)) (counts 8-11); J.H.2-three counts of committing lewd acts on a child under the age of 14 (§ 288, subd. (a)) (counts 12-14); and possession and control of child pornography (§ 311.11, subd. (a)) (count 15). With respect to counts 1 to 3 and 8 to 14, the information alleged Shields committed lewd acts on multiple children and he had

[5] All further statutory references are to the Penal Code, unless otherwise indicated.

substantial sexual conduct with a child (§§ 1203.066, subds. (a)(7) & (a)(8), 667.61, subds. (b), (e)(1)). As to counts 1 to 3, the information alleged he kidnapped the victim and the movement of the victim substantially increased the risk of harm to the victim (§§ 667.61, subds. (a), (b), (d)(2), & (e)(5)).

Pursuant to Evidence Code section 1108, the prosecutor offered the testimony of J.R., who was 21 years old at the time of trial. J.R. testified that when she was 12 years old, Shields was the bus driver at her school and a friend of her foster mother. She stated Shields gave her gifts. J.R. said that before she moved to another nearby foster home, Shields gave her his telephone number. She testified Shields showed up at her new foster home one day, picked her up, picked up another woman (who J.R. later learned was a prostitute), and went to a motel. J.R. stated she and the woman took a bath together and the woman shaved J.R.'s vaginal area and used a vibrator on her; Shields took photographs. J.R. explained Shields gave her blue thong underpants and a blue nightgown, which he told her to put on. J.R. said she and the woman moved to the bed and the woman orally copulated her while Shields took photographs. J.R. testified that on another occasion, Shields took her to an airport parking lot in a van where they touched each other's genitals and orally copulated each other; Shields videotaped this encounter.

The prosecutor offered the testimony of Dr. Jody Ward, a clinical and forensic psychologist, who testified concerning child sexual abuse accommodation syndrome, including secrecy intercourse, helplessness, entrapment and accommodation, delayed unconvincing disclosure, and retraction or recantation.

Shields rested on the state of the evidence.

The jury convicted Shields of all counts and found all allegations true. At the sentencing hearing, defense counsel stated she was ready to proceed with sentencing. After the victim impact statements and the prosecutor's argument, defense counsel stated she did not wish to make any argument. In response to the trial court's questions

concerning the propriety of indeterminate sentences on some of the counts, the prosecutor requested a short recess to retrieve relevant case authority. When back on the record, defense counsel asked to briefly speak with Shields. The court agreed and defense counsel spoke with Shields. Defense counsel stated, "I am sorry, your honor, I just need a few minutes." The court again agreed. Defense counsel stated they were ready to proceed. When the court stated it was proceeding with sentencing and asked whether Shields waived arraignment for sentencing and "no legal cause," defense counsel replied, "Yes."

The trial court sentenced Shields to prison for 151 years to life as follows: 25 years to life on count 1; 15 years to life for each of counts 8 to 14; eight years for each of counts 2 and 3; three years on count 5; and eight months for each of counts 6, 7, and 15. With respect to counts 6 and 7, the court reasoned it was imposing consecutive terms because "they are separate photographs obviously taken separately, they are photographs of two different victims." The court stayed the life sentence on count 4 pursuant to section 654. The court "impose[d] a restitution fine of $10,000 on each of counts 1, count 8[,] and count 12." The court explained that was a $10,000 fine for each victim. The court also imposed a parole revocation fine in the amount of $200 for each victim. The court ordered Shields "not to have any contact with any of the victims." The court awarded him 1,135 days of actual credit and 170 days for local conduct credit for a total of 1,305 days presentence custody credits.

After the trial court had pronounced sentence, advised Shields of his post-trial rights, and remanded Shields to the sheriff's custody, defense counsel informed the trial court that Shields wanted to address the court. The court asked why. Defense counsel replied, "I believe he has got case law in front of him with regards to ineffective assistance of counsel. And a new trial order. I believe he wants to have a new trial ordered based on [ineffective assistance of counsel]." The court stated: "Okay. Well, it is a little untimely to be doing that now after the sentence, because a motion for a new

trial is one of the bases for a legal cause as to why judgment should not now be pronounced, and there was no legal cause stated, and the judgment has been imposed. So those are matters I think you are going to have to take up by way of appeal or way of writ, if you think that there is a valid basis for any objection to the judgment that has been ordered. Okay. So the judgment will remain."

DISCUSSION

I. Section 311.4-Counts 5, 6, and 7

Shields argues we must reverse two of his three convictions for violating section 311.4 because his conduct constituted a single violation of the statute and three convictions violates his federal and state equal protection rights. The Attorney General contends Shields forfeited appellate review of this issue because he did not object below and his contentions are meritless. We will address the merits of Shields's claims. (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1324-1325 (*Spencer S.*) [appellate courts have discretion to address constitutional issues raised on appeal where issue pure question of law turning on undisputed facts].)

Section 311.4, subdivision (c), provides in relevant part: "Every person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years . . . to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film, filmstrip, or a live performance

involving, sexual conduct by a minor under the age of 18 years alone or with other persons or animals, is guilty of a felony."

A. Applicability[6]

Shields asserts section 311.4 does not authorize a separate violation for each piece of media created involving the same victim on the same occasion. There are no published cases addressing the issue before us. In answering this question, the plain language of section 311.4, subdivision (c), and its legislative history are instructive.

"'"When we interpret the meaning of statutes, our fundamental task is to ascertain the aim and goal of the lawmakers so as to effectuate the purpose of the statute." [Citation.] "We take a three-step sequential approach to interpreting statutory language. [Citation.] First, we will examine the language at issue, giving 'the words of the statute their ordinary, everyday meaning.' [Citations.] If we conclude that the statutory meaning is free of doubt, uncertainty, or ambiguity, the language of the statute controls, and our task is completed. [Citations.] Second, if we determine that the language is unclear, we will attempt to determine the Legislature's intent as an aid to statutory construction. [Citation.] In attempting to ascertain that intent, 'we must examine the legislative history and statutory context of the act under scrutiny. [Citations.]' [Citation.] Third, if the clear meaning of the statutory language is not evident after attempting to ascertain its ordinary meaning or its meaning as derived from legislative intent, we will 'apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable [citations], . . . practical [citations], in accord with common sense and justice,

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[6] In his reply brief, Shields claims the Attorney General failed to respond to this claim and thus concedes it. The Attorney General responds to this contention when it argues the Legislature enacted section 311.4 to prevent the sexual exploitation of children.

and to avoid an absurd result [citations].' [Citation.]" [Citation.]' [Citation.]" (*Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.)

Here, section 311.4, subdivision (c)'s plain language authorizes multiple convictions for each piece of media created. The statute makes it a crime for any person to knowingly "promote[], employ[], use[], persuade[], induce[], or coerce[]" a minor the person knows or should reasonably know is under the age of 18 years to pose or model to prepare "any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film, filmstrip, or a live performance involving, sexual conduct . . . ."

Section 311.4 contemplates that if a person knowingly coerces a minor to pose for a sexual "photograph" that person violates section 311.4. When identifying the relevant media, the Legislature used the singular and not the plural. The Legislature did not prohibit a person from knowingly coercing a minor to pose for sexual "*photographs*." We decline Shields's invitation to read into section 311.4 a limitation the Legislature did not include. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 273 [we presume Legislature says what it means and give effect to plain language of statute where no ambiguity].) Additionally, the Legislature did not include in section 311.4 any language suggesting a person who knowingly coerces a minor to pose for sexual "photographs" can only suffer one conviction. (See § 288.5 [defendant may only be charged with one count under section unless multiple victims].) Finally, we find analogous the situation where a defendant may be convicted of multiple sex acts during a single encounter. (§§ 288, 289; *People v. Scott* (1994) 9 Cal.4th 331; *People v. Harrison* (1989) 48 Cal.3d 321, 329.)

Although we conclude section 311.4's plain language authorizes multiple convictions for multiple media, section 311.4's legislative history compels the same conclusion. As Shields correctly notes, the Legislature enacted section 311.4 to prevent

the abuse and exploitation of children. "Enacted in 1961, section 311.4 is part of a statutory scheme '"to combat the exploitive use of children in the production of pornography."' [Citation.] The statute is 'aimed at extinguishing the market for sexually explicit materials featuring children.' [Citation.] The Legislature was particularly concerned 'with visual displays such as might be found in films, photographs, videotapes and live performances,' and section 311.4 thus 'prohibits the employment or use of a minor . . . in the production of material depicting that minor in "sexual conduct."' [Citation.]" (*People v. Cochran* (2002) 28 Cal.4th 396, 402.)

The Legislature's purpose in enacting section 311.4 is to prevent the abuse and sexual exploitation of children by extinguishing the market for child pornography. When a person creates multiple photographs of child pornography, the person adds to the market more than the person who creates one photograph of child pornography. Each additional photograph further exploits the minor victim, and the Legislature clearly intended to prevent that exploitation by criminalizing its creation. The Legislature's attempt to end the exploitation of children by criminalizing the creation of each item of child pornography can be contrasted to the possession of child pornography. (See *People v. Manfredi* (2008) 169 Cal.App.4th 622, 634 [possession of child pornography one offense]; *People v. Hertzig* (2007) 156 Cal.App.4th 398, 403 [*possession* of 30 video images of child pornography one crime under section 311.1 because crime of possession and not the act of abusing or exploiting children].)

Shields states he fails to comprehend how any legislative purpose could be advanced by an interpretation of the statute that allows for an unlimited number of charges and convictions where only a single charge could result in punishment. Above, we explain how section 311.4's plain language authorizes multiple convictions for multiple media/photographs. Additionally, section 654 only precludes multiple punishment, not multiple convictions. (*In re Pope* (2010) 50 Cal.4th 777, 784.)

Shields states he found no case that involved more than one conviction with one victim on a single occasion. That there is no reported case involving multiple convictions for multiple photographs does not mean section 311.4 forbids it. Therefore, section 311.4's plain language and legislative history compel the conclusion multiple conviction for multiple media is permitted.

B. Equal Protection

Shields claims his three convictions violate the federal and state equal protection clauses because section 311.4 as applied allowed similarly situated persons to be treated differently and there is no rational basis to a legitimate governmental purpose. We disagree.

"When a statute is challenged on equal protection grounds, a court's initial inquiry is twofold. It must first determine whether '"the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.] [¶] If the statute affects similarly situated groups unequally, the court must then decide whether to apply the strict scrutiny or rational basis test in analyzing the statute's constitutionality. 'For most legislation . . . a court will apply the rational basis test. The "standard formulation of the test for minimum rationality" [citation] is whether the classification is "rationally related to a legitimate governmental purpose."' [Citation.] 'A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."' [Citation.] [¶] . . . '[A] statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity."' [Citation.]" (*Spencer S., supra,* 176 Cal.App.4th at pp. 1324-1325.) Federal and state equal protection analysis is substantially the same. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-573.)

"As to the first prong of the inquiry described above, minor bears the burden of showing, as a foundational matter, that the challenged classification affects similarly situated groups unequally. [Citation.]" (*Spencer S., supra*, 176 Cal.App.4th at p. 1325.) Shields contends section 311.4 affects similarly situated persons differently because a person who creates one lengthy videotape could only suffer one conviction whereas someone who took multiple photographs could suffer multiple convictions.

Shields draws the wrong comparison. Of course there is a difference between creating three photographs of child pornography and one videotape of child pornography just as there is a difference between being convicted of three counts of rape based on three penetrations and one count of rape based on one penetration. The proper comparison is a person who creates three photographs of child pornography and three videotapes of child pornography. In both cases, the person could be charged with three counts of violating section 311.4. Thus, section 311.4 does not treat similarly situated persons differently.

As to the second prong, Shields argues there is no rational basis for allowing someone who took multiple photographs on a single occasion to suffer multiple convictions while someone who created one lengthy videotape could suffer only one conviction. Although we have concluded section 311.4 as applied does not affect similarly situated persons differently, we will briefly discuss the second prong of the analysis. As we explain above, the Legislature enacted section 311.4 to prevent the abuse and sexual exploitation of children by extinguishing the market for child pornography. Needless to say this is a legitimate government interest. Even were we to conclude section 311.4 as applied affected similarly situated persons differently, there is a rational basis for treating those who create multiple photographs of child pornography as more culpable than those who create one lengthy videotape. Those who create multiple photographs of child pornography contribute to the child pornography marketplace to a greater degree than those who create a single videotape. Thus, Shields's three

convictions for violating section 311.4 did not violate his federal and state equal protection rights.

II. Section 654-Counts 5, 6 and 7

Relying on section 654, Shields contends the trial court erroneously failed to stay the sentences on counts 6 and 7 because they involved the same criminal course of conduct with a single victim on the same occasion as count 5. The Attorney General concedes the error. As we explain below, sufficient evidence does not support the trial court's conclusion consecutive sentences on counts 6 and 7 were proper.

In pertinent part, section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654's purpose is "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Section 654 may also apply where the defendant suffers multiple convictions as a result of a single course of conduct pursuant to a single intent or objective. "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*).) Multiple punishment for more than one offense arising from the same act or from a series of acts constituting an indivisible course of conduct is prohibited. (*People v. Lewis* (2008) 43 Cal.4th 415, 519.)

Here, the trial court stated it was imposing consecutive sentences because there were separate photographs of separate victims. They were not separate victims. Counts 5, 6, and 7 all named A.L. as the victim. The photographs showed A.L. sitting on a toilet, spreading her legs, holding a vibrator, and touching her vagina with her hands. Shields took these photographs of the same victim on the same day at the house. Shields photographing the same victim, A.L., in various poses on the same day constitutes an invisible course of conduct with one objective—sexual gratification. As the court mistakenly believed the photographs depicted different victims, we cannot conclude sufficient evidence supports the trial court's conclusion consecutive sentences were proper. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310.)

III. Substitution of Trial Counsel

Relying on *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), Shields asserts the trial court erroneously failed to conduct a hearing to address his claim defense counsel was ineffective.[7] We disagree.

"A criminal defendant is entitled to raise his or her dissatisfaction with counsel at any point in the trial when it becomes clear that the defendant's right to effective legal representation has been compromised by a deteriorating attorney-client relationship." (*People v. Roldan* (2005) 35 Cal.4th 646, 681, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) The decision whether to grant a requested substitution is within the discretion of the trial court. A trial court abuses its discretion in denying such a motion only if the denial would substantially impair the defendant's right to effective assistance of counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

Here, Shields did not inform the trial court he wished to file a new trial motion based on ineffective assistance of counsel until *after* the court imposed sentence,

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[7] On appeal, Shields does not contend the trial court erroneously failed to consider his new trial motion. His sole contention is the court erroneously failed to conduct a *Marsden* hearing.

advised him of his post-trial rights, and remanded him to the sheriff's custody. At this point in the proceeding, the time to file a new trial motion had passed. (§ 1182; *People v. Smyers* (1969) 2 Cal.App.3d 666, 668.) Assuming for the sake of argument that Shields's request should have been construed as a request for substitute counsel for purposes of making a new trial motion, we would find no abuse of discretion in the courts denial of that motion. *People v. Whitt* (1990) 51 Cal.3d 620 (*Whitt*), is instructive.

In *Whitt, supra,* 51 Cal.3d 620, 658, defendant's counsel had already filed a new trial motion. At a hearing on various other post-trial motions, defendant also brought a *Marsden* motion, asking that new counsel be appointed to "expand upon" the pending new trial motion. The trial court, after noting the appointment of new counsel for that purpose would delay the pronouncement of judgment for over two months, denied the *Marsden* motion. The Supreme Court held this was not error: "The only reasons given in support of the *Marsden* motion related to counsel's performance before or during the . . . special circumstance retrial. Because defendant never indicated dissatisfaction with counsel in the ensuing three- to four-month period, the court had reasonable grounds to question the sincerity of his current criticisms. In any event, the motion could properly be denied as untimely. The court was not required to stop the nearly completed proceeding in its tracks in order to allow another attorney to completely familiarize himself with the case. Denial of the *Marsden* motion was within the court's discretion. [Citation.]" (*Id.* at pp. 658-659.)

Here, when the trial court became aware of Shields's intentions, substituted defense counsel could not have provided him with any assistance as the case was over. (*People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*) [*Marsden* motion forward looking in sense new counsel provide effective assistance in future].) There was literally nothing left to do but file a notice of appeal. Assuming defense counsel had been rendering ineffective assistance, she had done all the harm she could do. Thus, the failure to

replace her could no longer "substantially impair the right to assistance of counsel" nor was it "likely to result" in "ineffective representation." (*Smith, supra,* 6 Cal.4th at p. 696.)

Relying on his assertion he brought case authority and a proposed order for a new trial to the sentencing hearing, Shields makes a number of claims to support his contention the trial court should have held a *Marsden* hearing. First, Shields asserts the court should have known he was making a *Marsden* motion before the court pronounced judgment. Although Shields maintains he had documents with him, nothing in the record suggests the court was aware before sentencing Shields had those documents. Nor can we infer, or conclude, the court should have known from the fact he interrupted the proceedings to speak with defense counsel that Shields wanted to make a *Marsden* motion. We simply cannot impute knowledge of Shields's unspoken intentions to the trial court. Second, Shields states he did not know he could speak, he waited his turn to speak, and the court should have afforded him an opportunity to speak. We will not infer from his silence Shields did not know he could speak to the court. The court afforded Shields the opportunity to speak with his defense counsel twice before sentencing and asked, albeit in abbreviated form, "No legal cause?" The record reflects the judge accommodated Shields and his defense counsel. Nothing in the record suggests had Shields made an attempt to speak directly to the court he would not have been afforded that opportunity. Finally, Shields claims his defense counsel knew of his intentions before sentencing and his defense counsel sat silent, and he should not be penalized for his counsel's "conflict of interest." Shields essentially accuses his defense counsel of an ethical violation that on the record before us we cannot decide. A claim of ineffective assistance of counsel on a silent record is more appropriately litigated in a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

None of the cases Shields relies on involve the issue we are faced with here—whether after the trial court pronounced judgment the court should have

considered a new trial motion based on ineffective assistance of counsel as a *Marsden* motion and held a hearing. (*People v. Mendoza* (2000) 24 Cal.4th 130, 157 [request before trial]; *Smith, supra,* 6 Cal.4th at p. 690 [at sentencing hearing before sentencing]; *People v. Diaz* (1992) 3 Cal.4th 495, 573 [before hearing on motion to modify death penalty]; *People v. Webster* (1991) 54 Cal.3d 411, 435 [before trial]; *People v. Reed* (2010) 183 Cal.App.4th 1137, 1140 [before sentencing]; *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1084 [at sentencing hearing before sentencing]; *People v. Winbush* (1988) 205 Cal.App.3d 987, 989 [after verdict but before sentencing].) And we have not found any case that supports Shields's argument. Thus, the trial court did not err in failing to hold a *Marsden* hearing.

IV. No Contact Order

Shields argues the trial court erroneously imposed a "no-contact" order with the victims. The Attorney General responds the trial court imposed a "no-visitation order" pursuant to section 1202.05. As we explain below, we modify the judgment to reflect the trial court imposed a no-visitation order pursuant to section 1202.05.

Section 1202.05, subdivision (a), states in relevant part: "Whenever a person is sentenced to the state prison on or after January 1, 1993, for violating [s]ection . . . 288 . . . and the victim of one or more of those offenses is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim."

There is no authority for the trial court to have imposed a no-contact order. However, the court was required to impose a no-visitation order between Shields and the child victims pursuant to section 1202.05. As Shields does not object, we modify the judgment to reflect the trial court imposed a no-visitation order pursuant to section 1202.05. (See *People v. Stowell* (2003) 31 Cal.4th 1107, 1114 [where statement of reasons is not required and the record is silent, reviewing court will presume the trial court had a proper basis for a particular finding or order]; Evid. Code, § 664

[presumption "official duty has been regularly performed"]) We direct the clerk of the superior court to prepare a new abstract of judgment reflecting the trial court imposed a no-visitation order pursuant to section 1202.05.

V. Restitution and Parole Revocation Fines

Shields contends the trial court erroneously imposed a restitution fine in excess of the statutory limit and a non-identical parole revocation fine. The Attorney General concedes the error, and we agree.

"Under section 1202.4, subdivision (b), '*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.' The maximum restitution fine that may be levied under this section is $10,000." (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 864, italics added; § 1202.4, subd. (b)(1).) "'[I]n cases in which the court *imposes* a restitution fine, imposition of a parole revocation fine is also *mandatory*. (§ 1202.45.)' [Citation.] Similarly, and consistent with the express language of section 1202.45 . . . when a section 1202.4 fine is imposed, imposition of a section 1202.45 fine in an equal amount is *mandatory*. [Citations.]" (*People v. Rodriguez* (2000) 80 Cal.App.4th 372, 375-376.)

Here, the trial court imposed three $10,000 restitution fines and three $200 parole revocation fines. This was error. Section 1202.4 prohibited the trial court from imposing more than a $10,000 restitution fine, and thus the court should have imposed one $10,000 restitution fine. Section 1202.4 requires an identical parole revocation fine, and thus the court should have imposed a $10,000 parole revocation fine. We modify the judgment to reflect the imposition of a $10,000 restitution fine and a $10,000 parole revocation fine. (*Rodriguez, supra,* 80 Cal.App.4th at pp. 378-379.)

We note that the abstract of judgment accurately reflects these amounts. But because the oral pronouncement of judgment controls over the minute order or

abstract of judgment, we must modify the judgment to impose the proper fines. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.)

VI. Presentence Custody Credits

Shields asserts he was entitled to additional presentence custody credit. The Attorney General concedes the error, and we agree.

"Under section 2900.5, a person who is sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody prior to sentencing. (§ 2900.5, subd. (a).) Section 4019 provides that a criminal defendant may earn additional presentence credit against his sentence for being willing to perform assigned labor (§ 4019, subd. (b)), and for complying with applicable rules and regulations (§ 4019, subd. (c)). [Citation.]" (*People v. James* (2011) 196 Cal.App.4th 1102, 1105.) Actual credits includes the day of arrest and the day of sentencing. (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124.) Section 2933.1, subdivision (c), limits worktime credits to a maximum of 15 percent for persons convicted of felonies, including lewd and lascivious acts. (§ 2933.1, subd. (a).)

Officers arrested Shields on October 5, 2006.[8] The trial court sentenced Shields on December 24, 2009. Including the day of arrest and the day of sentencing, Shields was in custody for 1,177 days. Recalculating the trial court's award of 15 percent of actual credit, the correct award for local conduct credit is 176 days for a total of 1,353 days presentence custody credit. We modify the judgment to reflect Shields is entitled to 1,177 days of actual credit and 176 days of local conduct credit for a total of 1,353 days of presentence custody credit.

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[8] Citing to the reporter's transcripts, Shields claims officers arrested him on October 4, 2006, and he is entitled to 1,178 days of presentence custody credits. Murawski testified that they were on patrol August 4, 2006, at 11:15 p.m. when they responded to the internet café. The probation report states officers arrested him the next day, October 5.

VII. Abstract of Judgment

Shields claims the abstract of judgment should be revised to accurately reflect his sentences on count 4, and counts 8 to 14. The Attorney General concedes the abstract of judgment should be revised to reflect the trial court stayed his sentence on count 4 but asserts the abstract of judgment accurately reflect his sentences on counts 8 to 14. We agree with the Attorney General.

"If the minutes or abstract of judgment fails to reflect the judgment pronounced by the court, the error is clerical and the record can be corrected at any time to make it reflect the true facts. [Citation.]" (*People v. Little* (1993) 19 Cal.App.4th 449, 452.) Although section 11 of the indeterminate abstract of judgment reflects the trial court stayed the sentence on count 4, section 1 does not. The clerk of the superior court is directed to prepare a revised abstract of judgment to accurately reflect the court stayed the sentence on count 4.

With respect to Shields's other claim, the indeterminate abstract of judgment reads: "Defendant was sentenced to State Prison for an INDETERMINATE TERM: [¶] . . . [¶] 6[.] For 25;15 years to life, WITH POSSIBILITY OF PAROLE on counts 1; 8, 9, 10, 11, 12, 13, 14[.]" This language accurately reflects the trial court sentenced Shields to 25 years to life on count 1, and 15 years to life on counts 8 to 14, and no revision is necessary.

DISPOSITION

We modify the judgment to reflect the trial court stayed the sentences on count 6 and 7, imposed a no-visitation order between Shields and the child victims, and imposed a $10,000 restitution fine and a $10,000 parole revocation fine. In all other respect, the judgment is affirmed.

The clerk of the superior court is directed to prepare a new abstract of judgment reflecting the following: (1) the eight month sentences on counts 6 and 7 are stayed; (2) the trial court imposed a no-visitation order pursuant to section 1202.05;

(3) the imposition of a $10,000 restitution fine and a $10,000 parole revocation fine; (4) Shields is entitled to 1,177 days of actual credit and 176 days of local conduct credit for a total of 1,353 days of presentence custody credit, and (5) the sentence on count 4 is stayed. The clerk is directed to forward a copy to the Department of Corrections and Rehabilitation, Division of Adult Operations.

CERTIFIED FOR PARTIAL PUBLICATION

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.