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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AURELIO ELIAS, Defendant and Appellant.	B257150 (Los Angeles County Super. Ct. No. LA073402)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael K. Kellogg, Judge. Affirmed as modified with directions.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen, Steven E. Mercer and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Aurelio Elias, of: heroin possession for sale (Health & Saf. Code, § 11351)[1]; heroin transportation (§ 11352, subd. (a)); methamphetamine possession for sale (§ 11378); and methamphetamine transportation (§ 11379, subd. (a)). The trial court found defendant had sustained three prior felony convictions within the meaning of section 11370.2, subdivision (a). Also, the trial court found defendant had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Defendant was sentenced to split terms of 10 years in county jail and 4 years mandatory supervision. (§ 1170, subd. (h)(5)(B); see *People v. Borynack* (2015) 238 Cal.App.4th 958, 964 ["[T]he phrase 'mandatory supervision' merely describes the type of supervision the probation department must provide for certain felons sentenced under the Realignment Act."].) We affirm the judgment as modified.

II. THE EVIDENCE

A. The Prosecution

On February 22, 2013, Officers David Paulauskas and Daniel Lopez executed a traffic stop of a van. Veronica Pinto was the driver. Defendant was a passenger in the middle rear seat. After Officers Paulauskas and Lopez had begun to follow the van, defendant started bouncing around and moving side to side. Defendant told the officers he owned the van but could not drive it as he had no driver's license. Defendant said he was not on probation but on that "new thing" and he was subject to search conditions. Defendant consented to a search of the van. Officer Paulauskas found a scale, commonly used to weigh narcotics, and two cellular telephones in the glove compartment. In a

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[1] Further statutory references are to the Health and Safety Code except where otherwise noted.

storage compartment next to the middle rear seat, Officer Paulauskas found four baggies containing: 13.81 grams of methamphetamine; 6.10 grams of methamphetamine; 0.28 grams of methamphetamine; and 6.16 grams of heroin. Officer Paulauskas also found narcotics in Ms. Pinto's purse, 2.08 grams of methamphetamine and 1.11 grams of crystalline methamphetamine. There were no needles or smoking devices in the van. Defendant had $855 cash in his pocket in small bills. Defendant admitted a backpack and the iPhone in it were his. The iPhone contained the following voicemail: "Hi, my name is, uh, Michael G[.], I'm with Manuel [Unintelligible]. We bought some product from you, and I was calling to see if we can get some more. Uh . . . give me a call back at [number]. Thank you." After defendant was arrested, handcuffed and placed in the patrol car, he yelled to Ms. Pinto: "Hey, just take it. You're not going to get anything. Take it. Nothing is going to happen. You won't get anything."

Officer Joshua Ordonez testified as to whether the narcotics found in the van were possessed for purposes of sale. In Officer Ordonez's opinion, defendant possessed the narcotics for sale. Officer Ordonez further testified the voicemail message on defendant's iPhone was consistent with a buyer calling to purchase narcotics.

Evidence of prior drug possession by defendant was presented. On September 1, 2005, Officer Joshua Lukaszewski and a partner, identified only as Officer Diaz, searched a vehicle defendant had been driving. Defendant's wallet, which was in the center console, contained $377 in small bills. There were no narcotics or drug paraphernalia in the vehicle. But defendant had 9.84 grams of cocaine base in his pocket. Before the cocaine base was taken from him, defendant was asked what was in his pocket. Defendant said he did not know. Officer Lukaszewski testified the 9.84 grams was a large quantity of cocaine base, more than a usable amount. In Officer Lukaszewski's opinion, defendant possessed the cocaine base for sale. The cocaine base was booked into evidence.

B. The Defense

Defendant testified in his own defense. In terms of the charged offenses, defendant denied owning the van or the iPhone. Defendant denied any knowledge there were narcotics in the van. Defendant said Ms. Pinto told the officers the drugs belonged to her. Defendant denied telling Ms. Pinto to take responsibility. Defendant denied possessing rock cocaine for sale in 2005. Defendant admitted he was "convicted of a felony" in 2003, 2005 and 2010. Defendant testified the 2010 conviction was for domestic violence. The driver, Ms. Pinto, was called to testify for the defense. However, Ms. Pinto asserted her Fifth Amendment right not to testify.

III. DISCUSSION

A. Evidence Code Section 1101, Subdivision (b)

1. The other offense evidence

Defendant challenges the admission of the uncharged offense evidence. Evidence Code section 1101, subdivision (b) states: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Evidence Code section 1101, subdivision (b), permits uncharged misconduct evidence to be admitted when it is relevant to establish some fact other than the defendant's character or disposition. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Evidence of a prior drug offense may be admissible under Evidence Code section 1101, subdivision (b) to show an accused's knowledge of the contraband's character and the intent to sell it. (*People v.*

Ghebretensae (2013) 222 Cal.App.4th 741, 754; *People v. Ellers* (1980) 108 Cal.App.3d 943, 953; *People v. Foster* (1974) 36 Cal.App.3d 594, 597; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691.) To be admissible for such purpose, the charged and uncharged offenses must be sufficiently similar to permit an inference the perpetrator probably had the same intent in each instance. (*People v. Foster, supra,* 50 Cal.4th at p. 1328; *People v. Ewoldt, supra,* 7 Cal.4th at pp. 401-402.) The degree of similarity necessary to support the intended inference depends on the purpose for which the evidence is introduced. (*People v. Foster, supra,* 50 Cal.4th at p. 1328; *People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) The least degree of similarity between the uncharged act and the charged offense is required in to prove intent. (*People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Ewoldt, supra,* 7 Cal.4th at p. 402.)

If the trial court finds sufficient similarity, it must then weigh the probative value of the evidence against its prejudicial effect under Evidence Code section 352. (*People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) In *Ewoldt,* our Supreme Court explained, "The principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of a common design or plan." (*People v Ewoldt, supra,* 7 Cal.4th at p. 404; see *People v. Hendrix* (2013) 214 Cal.App.4th 216, 244.) Our Supreme Court more recently discussed the weighing process in *People v. Quang Minh Tran* (2011) 51 Cal.4th 1040, 1047: "Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial. (See *People v. Ewoldt*[, *supra*] 7 Cal.4th [at p.] 404; *People v. Thompson* (1980) 27 Cal.3d 303, 318.) But Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect. 'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome' [citation].' (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) [¶] . . . We [have] identified several factors that might serve to increase or decrease the probative value or the prejudicial effect of evidence of uncharged misconduct and thus are relevant to the weighing process required

by Evidence Code section 352. [¶] The probative value of the evidence is enhanced if it emanates from a source independent of evidence of the charged offense because the risk that the witness's account was influenced by knowledge of the charged offense is thereby eliminated. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) On the other hand, the prejudicial effect of the evidence is increased if the uncharged acts did not result in a criminal conviction. This is because the jury might be inclined to punish the defendant for the uncharged acts regardless of whether it considers the defendant guilty of the charged offense and because the absence of a conviction increases the likelihood of confusing the issues, in that the jury will have to determine whether the uncharged acts occurred. (*Id.* at p. 405.) The potential for prejudice is decreased, however, when testimony describing the defendant's uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense. (*Ibid.*)"

Our review of the trial court's rulings under Evidence Code sections 1101, subdivision (b) and 352 is for an abuse of discretion. (*People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329; *People v. Davis* (2009) 46 Cal.4th 539, 602.) As our Supreme Court explained in *People v. Hovarter* (2008) 44 Cal.4th 983, 1004, "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)" (Accord, *People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329.)

The trial court did not abuse its discretion. The uncharged misconduct's similarity to the present offenses had a strong tendency to demonstrate defendant's knowledge and intent. In both the prior and present incidents: defendant was transporting the contraband by vehicle; he possessed large quantities of narcotics and sums of cash in small bills; and he denied any knowledge of the drugs' presence. Without abusing its discretion, the trial court reasonably could have concluded the uncharged misconduct evidence was highly probative. Moreover, Officer Lukaszewski, who testified about the 2005 incident, was an independent source. Officer Lukaszewski no doubt knew

defendant was charged with drug offenses in the present case, but there was no reason to believe his account was influenced by knowledge of that fact. And the 2005 misconduct had apparently resulted in a conviction. While testifying, defendant admitted he was convicted of a felony in 2005, albeit not the conviction's specific nature. That admission militated against any tendency on the jury's part to punish defendant for his prior conduct. And neither the present nor the prior offense was stronger or more inflammatory than the other. The trial court could reasonably conclude the probative value of the evidence was not substantially outweighed by its prejudicial effect.

2. Instructional error

The jury was instructed on other crimes evidence pursuant to CALJIC No. 2.50.[2] Defendant contends the instruction should have been limited to the specific issue or issues the uncharged offense evidence was admitted to prove. Instead, defendant argues, the unvarnished version of CALJIC No. 2.50 made reference to irrelevant issues such as

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[2] The jury was instructed: "Evidence has been introduced for the purpose of showing that the defendant committed a crime crimes [*sic*] other than that for which he is on trial. The testimony concerning the activity in 2005. [*Sic*] [¶] Except as you will otherwise be instructed, [t]his evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused. [¶] The existence of the intent which is a necessary element of the crime charged; [¶] The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] A motive for the commission of the crime charged; [¶] The defendant had knowledge of the nature of things found in his possession; [¶] The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged; [¶] you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. [*Sic*] [¶] You are not permitted to consider such evidence for any other purpose."

identity and motive. However, defendant raised no objection to the jury instruction in the trial court. As a result, he forfeited the present argument. (*People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1047; *People v. Bryant* (2014) 60 Cal.4th 335, 418.)

Even if the issue were properly before us, we would not find any prejudicial error. We apply the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard in determining prejudice. (Cal. Const. art. VI, §13.) We must determine whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been modified in the manner now asserted. (*People v. McKinnon* (2011) 52 Cal.4th 610, 679; *People v. Gamache* (2010) 48 Cal.4th 347, 376.) In closing argument, the prosecutor urged the jury to rely on the 2005 incident for a proper purpose, as evidence of defendant's knowledge and intent in this case. Further, the jury was instructed that all instructions were not necessarily applicable: "The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts." The jury is presumed to have understood and followed that instruction. (*People v. Charles* (2015) 61 Cal.4th 308, 324, fn. 8; *People v. Pearson* (2013) 56 Cal.4th 393, 477.) It is not reasonably probable the result would have been more favorable to defendant had CALJIC No. 2.50 been limited to the specific issues the uncharged offense evidence was admitted to prove.

B. The Amendments, Effective January 1, 2014, to Sections 11352 and 11379

As noted, defendant has been convicted of two counts involving the transportation of a controlled substance. In count 2, defendant was convicted of heroin transportation in violation of section 11352, subdivision (a). In count 4, defendant was convicted of methamphetamine transportation in violation of section 11379, subdivision (a). Effective January 1, 2014, both offenses were amended to define "transports" as "transport for

sale." (Stats. 2013, ch. 504, §1, 2.) The jurors were not instructed the offenses of *transportation* of heroin or methamphetamine require that the contraband be transported for purposes of sale. Thus, defendant contends he is entitled to a reversal of his convictions under counts 2 and 4.

Prior to January 1, 2014, neither sections 11352, subdivision (a) nor 11379, subdivision (a) required the heroin or methamphetamine be transported for purposes of sale. Previously, it was a black letter rule of California law that controlled substance transportation statutes did not require the contraband transported be for purposes of sale. (*People v. Rogers* (1971) 5 Cal.3d 129, 134-135; *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316.) Prior to January 1, 2014, section 11352, subdivision (a) stated in part, "Except as otherwise provided in this division, every person who transports . . . (1) any controlled substance specified in subdivision . . . (c) . . . of Section 11054 . . . shall be punished by imprisonment . . . ." (Stats. 2011, ch. 15, § 154.) Section 11054, subdivision (c)(11) identifies heroin as a controlled substance. Effective January 1, 2014, section 11352, subdivision (c) was added to state, "For purposes of this section, 'transports' means to transport for sale." (Stats. 2013, ch. 504, § 1.) A similar amendment was made to section 11379. Prior to January 1, 2014, section 11379, subdivision (a) prohibited methamphetamine transportation without reference to whether it was being transported for purposes of sale, "[E]very person who transports. . . . any controlled substance which is . . . specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055 . . . shall be punished . . . ." Section 11055, subdivision (d)(2) identifies methamphetamine as a controlled substance. Effective January 1, 2014, section 11379, subdivision (c) was added to state, "For purposes of this section, 'transports' means to transport for sale." (Stats. 2013, ch. 504, § 2.) As a result, transportation of specified controlled substances for personal use no longer violates sections 11352 and 11379. (Legis. Counsel's Dig., Assem. Bill No. 721 (2013-2014 Reg. Sess.) Stats. 2013, ch. 504 ["This bill would instead define 'transports' for those purposes to mean to transport for sale."]; Assem. Floor Bill Concurrence in Sen. Amends. to Assem. Bill No. 721 (2013-

2014 Reg. Sess.) as amended June 27, 2013, p. 1 ["Amends existing law to make the transportation of specified controlled substances a felony only if the individual is transporting the controlled substance for sale."].)

Assembly Bill No. 721 (2013-2014 Reg. Sess.) was signed by the Governor on October 3, 2013. The jury was instructed in our case on October 10 and 11, 2013. The jury verdicts were returned on October 15, 2013. As noted, Assembly Bill No. 721 (2013-2014 Reg. Sess.) did not go into effect until January 1, 2014. Defendant was sentenced on April 4, 2014.

Defendant contends the amendments to sections 11352 and 11379 applied retroactively to him. Defendant argues the amendments to sections 11352 and 11379 mitigated punishment by adding to the crimes' elements. (Cf. *People v. Wade* (2012) 204 Cal.App.4th 1142, 1151-1152 [Pen. Code, § 487]; *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1197-1199 [Pen. Code, § 666]; *People v. Todd* (1994) 30 Cal.App.4th 1724, 1728-1730 [§ 11353.6].) There is no savings clause. And the judgment against defendant was not yet final when the amendments took effect. Therefore, defendant contends the amended versions of sections 11352 and 11379 apply to him under *In re Estrada* (1965) 63 Cal.2d 740, 745. (See *People v. Wade, supra,* 204 Cal.App.4th at pp. 1151-1152; *People v. Vinson, supra,* 193 Cal.App.4th at p. 1199; *People v. Todd, supra,* 30 Cal.App.4th at pp. 1728-1730; see also, *People v. Hajek* (2014) 58 Cal.4th 1144, 1195-1196 [explaining the *Estrada* analysis].)

We need not resolve the issue of whether the Legislature intended that the retroactive effect of the two amendments extend to jury instructions given prior to January 1, 2014. And, we need not determine whether the federal due process right to instruction on an element of an offense extends to pre-statutory amendment jury instructions as is the case here. Further, we need not determine whether the retroactive impact of these statutes as occurred here requires the use of the federal or state reversible error provisions. We assume for purposes of discussion only that the federal due process right to instruction on an element extends to retroactive amendments to statutes as present

here. And we further assume for purposes of discussion only that we must apply federal harmless error analysis to the failure to instruct concerning the purposes of sale element.

Based on those assumptions, the omission of an offense's element is subject to *Chapman v. California* (1967) 386 U.S. 18, 24, harmless error analysis. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 662-663; *People v. Prieto* (2003) 30 Cal.4th 226, 256.) The evidence was overwhelming the heroin and methamphetamine in our case was transported for purposes of sale: defendant's presence in and ownership of the van; the substantial quantities of the drugs; the presence of a scale commonly used to weigh narcotics in the glove compartment; the absence of any drug use paraphernalia; the $855 in small bills on defendant's person; the voicemail on defendant's cellular telephone was solely consistent with a buyer seeking to purchase narcotics; the uncontradicted opinion testimony that the drugs were possessed for sale; and the prior occasion on which defendant was traveling and possessed narcotics for sale. Moreover, the jury found defendant possessed the drugs for sale and was transporting them. In other words, the jury found the very same drugs that were transported were possessed for purposes of sale. (*People v. Wright* (2006) 40 Cal.4th 81, 98; *People v. Mayberry* (1975) 15 Cal.3d 143, 157-158.) Given this record, the failure to instruct on the transportation *for sale* element of the offenses which went into effect on January 1, 2014, was harmless beyond a reasonable doubt.

C. Defendant's Peace Officer Personnel Records Motion

Defendant filed a pretrial motion for disclosure of information contained in Officers Paulauskas's and Lopez's personnel records. The motion sought records of any accusation either officer was dishonest, prepared false police reports or fabricated evidence among other things. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534-540; Evid. Code, §§ 1043-1047; Pen. Code, §§ 832.5, 832.7.) In his declaration in support of the motion, defense counsel, Stephen H. Beecher, alleged the evidence at trial would establish the officers fabricated facts in their police report. The trial court

conducted an in camera hearing only as to Officer Lopez because he wrote the police report and testified at the preliminary hearing. Defendant raised no objection. Defendant has requested that we independently review the sealed transcript of the in camera hearing to determine if any documents should have been but were not disclosed. We have conducted that review. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.) The trial court did not abuse its discretion in determining no document was discoverable. (*People v. Myles, supra,* 53 Cal.4th at p. 1209; *People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc, supra,* 26 Cal.4th at p. 1228.)

D. Sentencing

1. Restitution fines

Restitution fines were imposed as follows: "The court . . . imposes as required a 280-dollar parole fine; 280-dollar restitution fine as to count 2, and as for count four. . . ." The trial court orally imposed the restitution and parole revocation restitution fines as to each of counts 2 and 4. (Pen. Code, §§ 1202.4, subd. (b)(1), 1202.45) The $280 fines should have been imposed only once. (*People v. Moore* (2015) 236 Cal.App.4th Supp. 10, 18; see *People v. Ferris* (2000) 82 Cal.App.4th 1272, 1277-1278.) The oral pronouncement of judgment must be modified to impose a single $280 restitution fine and a single $280 probation revocation restitution fine. The abstract of judgment is correct in this regard and need not be amended.

2. Drug program fee

The trial court did not impose any drug program fee pursuant to section 11372.7, subdivision (a). On this silent record, we presume the trial court determined defendant did not have the ability to pay any drug program fee. (*People v. Sharret* (2011) 191

Cal.App.4th 859, 864; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516-1518.) Further, as we held in *Sharret,* "[T]he prosecutor's failure to object forfeited any claim of error on appeal." (*People v. Sharret, supra,* 191 Cal.App.4th at p. 864; accord, *People v. Martinez, supra,* 65 Cal.App.4th at pp. 1518-1519.) There is no merit to the argument the judgment must be modified to impose the drug program fee on any count.

3. Criminal laboratory analysis fee

Defendant was subject to a section 11372.5, subdivision (a) $50 criminal laboratory analysis fee as to *each* of the four counts of which he was convicted. (*People v. Valencia* (2014) 226 Cal.App.4th 326, 330; *People v. Sharret, supra*, 191 Cal.App.4th at p. 863.) The trial court failed to impose those mandatory fees. In addition, each criminal laboratory analysis fee is subject to penalties and a surcharge totaling $155 per $50 fine: a $50 state penalty (Pen. Code, § 1464, subd. (a)(1)); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (Pen. Code, § 1465.7, subd. (a)); a $25 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $20 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)); and a $10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1). (*People v. Valencia, supra,* 226 Cal.App.4th at p. 330; *People v. Sharret, supra,* 191 Cal.App.4th at pp. 863-864.) The counts 1 and 3 criminal laboratory analysis fees plus penalties and a surcharge must be stayed under Penal Code section 654, subdivision (a) as have the substantive charges. (*People v. Sharret, supra,* 191 Cal.App.4th at p. 869; see *People v. Sencion* (2012) 211 Cal.App.4th 480, 484.) The judgment must be modified and the abstract of judgment amended to so provide. (*People v. Valencia, supra,* 226 Cal.App.4th at p. 330; *People v. Sharret, supra*, 191 Cal.App.4th at pp. 870-871.)

4. Presentence custody and conduct credit

The trial court awarded defendant credit for 440 days in presentence custody plus 440 days of conduct credit. However, defendant was arrested on February 22, 2013, and sentenced on April 4, 2014, a period of 407 days. Therefore, defendant was entitled to credit for 407 days of presentence custody. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469) Also, defendant was entitled to 406 days of conduct credit. (*People v. Whitaker* (2015) 238 Cal.App.4th 1354, __ [190 Cal.Rptr.3d 490, 492-495]; *People v. Chilelli* (2014) 225 Cal.App.4th 581, 588). The judgment must be modified and the abstract of judgment amended to so provide. (*People v. Chilelli, supra,* 225 Cal.App.4th at pp. 591-592; *People v. Sencion, supra,* 211 Cal.App.4th at pp. 482, 485.)

5. The abstract of judgment

As noted above, the trial court sentenced defendant to 10 years in county jail custody and 4 years mandatory supervision for a total sentence of 14 years. (§ 1170, subd. (h)(5)(B).) Section 12 of the abstract of judgment, however, states: "MANDATORY SUPERVISION: Execution of a portion of defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B) as follows . . . : [¶] Total: 5YR Suspended: 4YR Served forthwith: 1YR." The abstract of judgment does not reflect the sentenced imposed. It must be amended to reflect a total sentence of 14 years with 4 years suspended and 10 years to be served in county jail forthwith. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [oral pronouncement of judgment controls]; *People v. Mesa* (1975) 14 Cal.3d 466, 471 [same].)

IV. DISPOSITION

The oral pronouncement of judgment is modified to reflect the restitution and parole revocation restitution fines (Pen. Code, §§ 1202.4, subd. (b), 1202.45) are imposed

only once and not as to each of counts 2 and 4. The judgment is modified to impose a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) as to each count, together with $155 in penalties and a surcharge as to each count as set forth above. The judgment is further modified to reflect the criminal laboratory analysis fees together with the penalties and surcharges are stayed as to counts 1 and 3. The stay is to be entered pursuant to Penal Code section 654, subdivision (a). The judgment is modified to reflect 407 days of presentence custody credit and 406 days of conduct credit. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment consistent with the foregoing. Additionally, the abstract of judgment must be amended in section 12 to reflect a total sentence of 14 years with 4 years suspended and 10 years to be served forthwith. The clerk of the superior court is to deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

BAKER, J.