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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE BELTRAN, Defendant and Appellant.	B258269 (Los Angeles County Super. Ct. No. MA062765)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie LaForteza, Judge. Affirmed in part, reversed in part and remanded.

Nadezhda M. Habinek, 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; Paul M. Roadarmel, Jr. Supervising Deputy Attorney General; and Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

Jose Beltran was charged with robbery after taking a purse from his former girlfriend, Ana Posada. At trial, Posada testified that Beltran pulled the purse out of her hands, causing the strap to break, and then walked away. The trial court denied Beltran's request for a special instruction clarifying the amount of force that must be exerted to constitute robbery. Beltran was found guilty and sentenced the upper term of five years in prison. The trial court also ordered Beltran to reimburse the costs of his appointed attorney.

On appeal, Beltran argues that: (1) there was insufficient evidence to support his robbery conviction; (2) the trial court erred in denying his special instruction regarding the term "force"; (3) the court abused its discretion in sentencing him to the upper term; (4) the court violated Penal Code section 987.8 by ordering him to reimburse the costs of his attorney without holding a hearing to determine his ability to pay the fee; (5) the abstract of judgment misstates his presentence custody credits. We vacate the attorney fee order and direct the trial court to hold a hearing on his ability to pay; we also modify the judgment with respect to Beltran's presentence custody credits. The judgment is otherwise affirmed.

FACTUAL BACKGROUND

A. Summary of testimony at trial

On May 16, 2014, the district attorney of the County of Los Angeles filed a two-count information against Jose Beltran alleging robbery (Pen. Code, § 211[1]) and violation of a domestic violence protective order. (§ 273.6, subd. (a).) Three witnesses testified at trial: Ana Posada (the victim), Evelyn Suarez (a witness) and Daniel Haven (a responding officer).

1. Posada's testimony

Posada testified that on the afternoon of April 20th, 2014, she was leaving a swap meet with her friend, Evelyn Suarez. When Posada and Suarez arrived at Suarez's car,

[1] Unless otherwise noted, all further statutory citations are to the Penal Code.

Beltran, then Posada's ex-boyfriend, approached them and asked to speak with Posada.[2] Posada refused, informing Beltran that there was a protective order in place that prohibited them from speaking.[3] Beltran then "took [Posada's] purse" out of her hand, told her they "should go and talk" and began walking away. Suarez saw what had happened and immediately called the police. Posada started to follow Beltran, who was walking back toward the swap meet, but then returned to Suarez's car when the police arrived. While Posada was speaking with the police, Suarez saw Beltran walking in the distance and said "'there he goes.'" The police then detained Beltran and recovered the purse, which had a broken strap. Posada stated that she was angry at Suarez for calling the police because "all [Beltran] [had] wanted to do was talk."

Posada provided conflicting testimony regarding whether Beltran had caused the strap to break when he removed the purse from her hand. Posada initially testified that the strap broke because she had "tried to hold" onto the purse and "pulled [it] toward [herself]." Posada later testified, however, that she and Beltran did not "struggle" over the purse, and that she only discovered the strap was broken after the police returned the purse to her. On cross-examination, Posada also denied pulling the purse toward herself, stating that Beltran had simply grabbed it out of her hand. Posada further stated that, on various past occasions, Beltran had taken her purse away so that she would not leave him. On each such occasion, he had returned the purse to her.

2. Suarez's testimony

Suarez testified that she was sitting in the driver seat of her car with the window down when she heard Posada say "'No. No. My purse.'" Suarez turned and saw a man taking Posada's purse, which Suarez described as a "wristlet." Suarez stated that the man

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[2] Posada testified that although she was not in a relationship with Beltran at the time of the alleged robbery, she was dating him again at the time of trial. Posada also admitted she had repeatedly asked the district attorney to drop the charges against him.

[3] The prosecution introduced a copy of the protective order that Posada referenced during her testimony. On appeal, Beltran has not challenged his conviction for disobeying a domestic violence protective order.

did not "pull" the purse or use any "force" when removing it from Posada's hand. Suarez called 9-1-1 to report what she had witnessed. After the police arrived, Suarez saw Beltran in the distance and identified him as the perpetrator. The police immediately apprehended Beltran and recovered the purse.

After the police detained Beltran, they discovered that Beltran and Posada did not speak English. The responding officers asked Suarez, who spoke Spanish and English, to serve as a translator. At the officers' request, Suarez asked Beltran why he had taken the purse. According to Suarez, Beltran responded by saying that "he wanted to talk to [Posada]" and "get back together with her." Suarez denied ever hearing Beltran say he took the purse to "get back at" Posada, and denied telling the officers that he had made any such statement. The district attorney showed Suarez photographs of a purse with a broken strap, which she identified as Posada's purse.

3. Haven's testimony

Los Angeles County Deputy Sheriff Daniel Haven testified that on April 20, 2014, he responded to a call alleging that a robbery had occurred at the swap meet. When Haven arrived, he saw Posada, who appeared to be "very upset." After discovering that Posada was unable to speak English, Haven requested that Suarez act as an interpreter. Suarez told Haven that Posada said "her purse [was] wrapped around her wrist" and that a "male walked up behind her, forcibly grabbed her purse, breaking the strap." The man then ran northward into the swap meet. While Haven was conducting his investigation, Posada pointed to a man 200 to 300 feet away and identified him as the perpetrator. Haven got into his vehicle and approached Beltran, who was walking at a normal pace and holding a purse in his hand. After Haven detained Beltran, Suarez "spontaneously asked" the defendant why he had taken the purse. According to Haven, Suarez interpreted Beltran's response as "he wanted to get back at her."

B. Jury instructions and closing arguments

1. Beltran's motion to dismiss and jury instruction request

After the prosecution rested, Beltran moved to have the robbery count dismissed pursuant to section 1118.1,[4] arguing that there was insufficient evidence to prove he had exerted any force beyond that necessary to remove the purse from Posada's hand. The court denied the motion, explaining that the photographs of the purse and some of the witness testimony suggested the strap had been "ripped off" during the encounter, raising an inference that Beltran had forcibly removed the purse from Posada. The court did, however, conclude it was required to provide an instruction on grand theft as a lesser-included offense, explaining that it was "a close call as to whether or not there [wa]s sufficient force" to constitute robbery.

Beltran requested that the court also provide a special instruction informing the jury that "[t]he force required for robbery is more than just [the] quantum of force which is necessary to accomplish the mere seizing of the property." Beltran's counsel explained that the instruction was based on language in *People v. Garcia* (1996) 45 Cal.App.4th 1242 (*Garcia*) [disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2 & 3]), describing the level of force necessary to support a robbery conviction. The court denied Beltran's request, explaining that the standard CALCRIM instruction on robbery adequately informed the jury it was required to find the defendant had used force to take the property; the court did not believe any further instruction defining the term "force" was necessary. The court then read several instructions to the jury, which

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[4] Penal Code section 1118.1 states: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

included an instruction modeled on CALCRIM 1600 (robbery) and CALCRIM 1800 (theft by larceny).[5]

2. Closing arguments

During closing argument, both parties focused on the element of force. The district attorney explained that there was a "dispute" regarding whether Beltran had used sufficient force to constitute robbery, explaining: "I think Beltran may argue that there was no force used because he just took it out of her hand. Okay. There's the strap. . . . He took the purse with enough force to break that strap. You can see the frayed threads there [in the photographs]. Now, if . . . she just had it in her hand . . . , and he plucked it out of her hand, that's not robbery because there's no force. . . . Robbery requires that you take it from the person with force. It doesn't mean that you have to throw the person

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[5] The instruction on robbery stated in relevant part: "To prove that the defendant is guilty of [robbery], the People must prove that:

1. The defendant took property that was not his own;
2. The property was in the possession of another person;
3. The property was taken from the other person or his or her immediate presence;
4. The property was taken against that person's will;
5. The defendant used force or fear to take the property or to prevent the person from resisting;
   AND
6. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owners' possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property."

The instruction on theft by larceny stated: "The defendant is charged in a lesser to Count 1 with grand theft in violation of Penal Code section 487(c). To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant took possession of property owned by someone else;
2. The defendant took the property without the owner's consent;
3. When the defendant took the property he intended to deprive the owner of it permanently;
   AND
4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief."

to the ground and kick them, or stick a gun in their face. It's just force. And the only way you break that strap right there and break those threads, is with some force. This isn't a wet noodle, or a single little thread. You can see from the broken thing there that some force was used."

Beltran's counsel, however, asserted that the only reasonable inference that could be drawn from the evidence was that the defendant had simply exerted the amount of force necessary to remove the purse from Posada's hand: "I think the focus here is force. And the law is clear that you need more than the force that you use to take a personal property [sic] from another. You need more than that. So what I'm trying to say is, if I walked up to you and grabbed the purse that is sitting on your lap, then I grab it, that's not a robbery because there's no tussling over it, or I'm not doing anything other than applying force necessary for me to snatch the purse. Because if that's a robbery, there would be more robberies in this world. Purse snatching is not robbery." Beltran's counsel further contended that the evidence showed the purse strap was "really skimpy" and that Posada and Beltran had not "struggle[d]" over the purse.

The parties also provided conflicting argument regarding whether the evidence showed Beltran had intended to permanently deprive Posada of the purse. The district attorney contended that the "circumstances" of the offense indicated Beltran did not intend to return the purse. In support, the district attorney noted that Beltran had retained the purse for seven or eight minutes before the police apprehended him, and that he was located 200 feet away from Posada, "walking in the opposite direction." According to the prosecution, the jury could reasonably infer from this evidence that Beltran took the purse because he was "mad" and "wanted to get back at her." Beltran's counsel, however, argued that the evidence showed the defendant did not touch anything that was in the purse (including Posada's money, phone and keys), suggesting that he never intended to permanently withhold her property. Rather, according to counsel, Beltran's actions showed he had taken the purse as "collateral to get her to talk."

3. Verdict and sentencing

The jury convicted Beltran of robbery and violation of a domestic violence protective order. The court sentenced Beltran to the "high term" of five years in prison on the robbery count, explaining that the defendant had been on probation at the time he committed the offense. The court sentenced Beltran to one year in prison for violating the protective order, to be served concurrently. It also found by the preponderance of the evidence that he had committed a parole violation and sentenced him to eight months in prison, to be served consecutively. At the end of the sentencing hearing, the court announced it was also ordering Beltran to reimburse the county for the costs of his appointed counsel: "Before I close the matter, I am going to impose reimbursement. He is ordered to reimburse the County for the services of the Public Defender for $9,400."

DISCUSSION

On appeal, Beltran argues that: (1) there was insufficient evidence to support his robbery conviction; (2) the court erred in denying his request to provide a special instruction regarding the term "force"; (3) the court abused its discretion by electing to sentence him to the upper term on the robbery count; (4) the court violated section 987.8 when it ordered him to reimburse the costs of his attorney without holding a hearing on his ability to pay; and (5) the abstract of judgment misstates his presentence custody credits.

A. Substantial evidence supports the jury's guilty verdict on the robbery count

Beltran contends there was insufficient evidence to support the jury's guilty verdict on the robbery count. "The standard of review of a challenge to the sufficiency of the evidence to support a judgment is well established" (*People v. $497,590 United States Currency* (1997) 58 Cal.App.4th 145, 152): "[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] '"[I]f the verdict is supported by substantial evidence, we must accord due

deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."' [Citation.] 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."'" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "To secure a robbery conviction, the following elements must be proved: (1) A person had possession of property of some value however slight; (2) the property was taken from that person or from his immediate presence; (3) the property was taken against the will of that person; (4) the taking was accomplished by either force or fear; and (5) the property was taken with specific intent permanently to deprive that person of the property. [Citation.]" (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.) Beltran argues the prosecution provided insufficient evidence to prove either of the last two elements.

Beltran first asserts that no reasonable juror could conclude that the force he exerted in removing the purse from Posada was sufficient to convict him of robbery. In explaining the amount of force necessary to constitute a robbery (as opposed to merely theft), our courts have stated that "something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property." (*People v. Morales* (1975) 49 Cal.App.3d 134, 139 (*Morales*); *People v. Wright* (1996) 52 Cal.App.4th 203, 210 ["at the very least it must be a quantum more than that which is needed merely to take the property from the person of the victim"]; *Garcia*, *supra*, 45 Cal.App.4th at p. 1246 [affirming robbery conviction where "touching was more than incidental and was not merely the force necessary to seize the [property]"].) "Stated another way, [the proper inquiry is whether the] defendant engage[d] in a measure of

force at the time of taking to overcome the victim's resistance[.]" (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.)

Substantial evidence supports the jury's finding that Beltran removed Posada's purse through the use of force. Posada initially testified that when Beltran grabbed her purse, she tried to hold on to it and pulled it toward herself, which caused the strap to break. Although Posada, who was in a relationship with Beltran at the time of trial, provided conflicting testimony on these issues during her cross-examination, the jury could have given more credence to her original statements. The prosecution also introduced photographs of Posada's purse that showed the strap was broken. Moreover, officer Haven testified that Suarez, acting as Posada's interpreter, told him that the suspect had "forcibly grabbed [Posada's] purse, breaking the strap." Based on all of this evidence, jurors could reasonably infer that Beltran pulled the purse from Posada with enough force to break the strap, thereby exceeding the quantum of force necessary "to accomplish the mere seizing of the property." (*Morales, supra,* 49 Cal.App.3d at p. 139.)

Beltran next asserts that the prosecution failed to prove he intended to permanently deprive Posada of the purse, contending that "the only reasonable inference supported by the evidence is that he intend[ed] to deprive her of the purse for . . . [only] a brief time." The evidence showed that, after taking Posada's purse, Beltran walked away from her, and remained in possession of the purse until the police detained him. When the police stopped Beltran, which occurred seven to eight minutes after he took the purse, he was a substantial distance from Posada. Officer Haven testified that Suarez told him Beltran had said he took Posada's purse to "get back at her." Posada, in turn, testified that Beltran had previously taken her purse away when he did not want her to leave him. The jury could reasonably infer from this evidence that Beltran intended to keep Posada's purse to punish her for refusing to speak with him.

B. The trial court did not commit instructional error

Beltran next contends that the trial court erred in denying his request for a special instruction informing the jury that the amount of force necessary to commit a robbery is "more than the quantum of force necessary to accomplish the mere seizing of the property." Under the circumstances presented here, we find no error in the trial court's decision to deny the special instruction.

Our Supreme Court has previously held that "[t]he terms 'force' and 'fear' as used in the definition of the crime of robbery have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors." (*People v. Anderson* (1966) 64 Cal.2d 633, 640; see also *People v. Sullivan* (2007) 151 Cal.App.4th 524, 544 ["The requirement of use of force or fear has no technical meaning which must be explained to jurors"].) The Court has likewise held that "[a] trial court is not required to instruct on the meaning of terms that are commonly understood," even if the defendant has made such a request. (*People v. Malone* (1988) 47 Cal.3d 1, 54-55 [trial court did not err in rejecting instruction defining "aggravating" and "mitigating" because, "[a]lthough . . . the instructions may have provided a 'helpful framework' for the jury's consideration . . . .[,] '[a]ggravation' and 'mitigation' are commonly understood terms"]; *People v. Wader* (1993) 5 Cal.4th 610, 659 [same].) As stated in *People v. Forbes* (1996) 42 Cal.App.4th 599, 606 "a trial court is not required to instruct on the meaning of a commonly understood term and does not err in refusing a requested instruction which attempts to define such a word or phrase." (*Id.* at p. 604.) In light of these precedents, we find no basis to conclude that a trial court was required to grant Beltran's request to provide an instruction clarifying the meaning of the term force.

The cases on which Beltran relies contain no language holding, or even implying, that a trial court should, upon request, instruct the jury on the issue of force. In *Morales*, *supra*, 49 Cal.App.3d 134, 139, the issue presented was whether the trial court had erred in refusing to instruct the jury on the lesser-included offense of grand theft. The court's description of the amount of "force" necessary to constitute robbery – "more is required than just the quantum of force which is necessary to accomplish the mere seizing of the

property" (*id.* at p. 139) – was made in the context of distinguishing robbery from grand theft. The court concluded that the evidence presented in that case "left sufficiently open the question of whether the element of force was present so as to entitle the defendant" an instruction on the lesser-included offense. (*Id.* at p. 140.) In *Garcia, supra*, 45 Cal.App.4th 1242, which cites and quotes the language of *Morales*, the court likewise analyzed whether the defendant was entitled to an instruction on the lesser-included offense of grand theft. In this case, the court did instruct the jury on grand theft as a lesser-included offense. Moreover, during close arguments, both parties were permitted to argue why the evidence did, or did not, support a finding that Beltran used sufficient force to convict him of robbery, rather than merely theft.

Beltran also argues that CALCRIM 1600 specifically directs that the trial court should provide an instruction on the term "force" whenever that element is in reasonable dispute. In support, he cites language appearing in the "Related Issues" section of CALCRIM 1600 stating: "**Force – Amount** The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246.)" Nothing in this comment mandates that, upon request, a trial court must instruct the jury on the amount of force necessary to constitute a robbery. The comment merely serves to inform the court how the term has been defined in the case law. Such information would presumably aid the court in cases where the jury has sought guidance concerning the meaning of the term "force," or where the court otherwise exercises its discretion to instruct on the issue.[6]

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[6] Beltran also relies on language in the "Bench Notes" section of CALCRIM 1600 stating: "If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28.)" *Estes*, however, did not concern the level of force necessary to constitute robbery. Rather, the issue presented in that case was whether the jury could consider force the defendant exerted "in resisting attempts [by the owner] to regain the property . . . regardless of the means by which defendant originally acquired the property." (*Id.* at pp. 27-28.) This bench note suggests that, under some circumstances, an additional instruction may be necessary to explain that force exerted

C. The trial court did not abuse its discretion in selecting the upper term on the robbery count

Beltran argues that the trial court abused its discretion in selecting the upper term of five years in prison on his robbery conviction. According to Beltran, we must vacate his robbery sentence because there was no evidence supporting three factual findings the court relied on when selecting the upper term: (1) that Beltran was "not remorseful" for his crime; (2) that Posada was a "vulnerable victim"; or (3) that the crime was "heinous" in nature.

"A trial court's decision to impose a particular sentence . . . will not be disturbed on appeal 'unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] . . . . Even if a trial court has stated both proper and improper reasons for a sentence choice, 'a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]' [Citation.]" (*People v. Jones* (2009) 178 Cal.App.4th 853, 860-861 (*Jones*).) Moreover, "a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term . . . ." (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1045 (*Brown*).)

Contrary to Beltran's assertions, the court did not cite his lack of remorse, Posada's vulnerability or the heinousness of the offense in selecting the upper term sentence on his robbery conviction. Rather, the transcript of the sentencing hearing shows the court made these statements in support of its finding that Beltran was not eligible for probation, a decision he has not appealed. The sole factors the court cited in support of selecting the upper term was that Beltran was on probation when he committed the offense and that his performance while on parole was unsatisfactory. (See Cal. Rules of Court, rule 4.421 (b)(4) & (5).) Beltran has not challenged either of these factual findings, nor has he provided any explanation why these findings were insufficient to

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after the defendant has actually taken the property may nonetheless be sufficient to support a robbery conviction. The note is not concerned with the amount of force needed to sustain a robbery conviction.

justify imposition of the upper term. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360 ["A single factor or circumstance in aggravation is sufficient to justify imposition of the upper term"]; *Brown, supra*, 83 Cal.App.4th at p. 1043.) He has therefore failed to demonstrate any abuse of discretion.[7]

D. The trial court erred by failing to hold a hearing regarding his ability to reimburse the costs of his appointed attorney

Beltran contends the trial court erred in ordering him to reimburse the costs of his appointed counsel (approximately $9,500) without holding a hearing regarding his ability to pay for the reimbursement. Section 987.8 "empowers the court to order a defendant who has received legal assistance at public expense to reimburse some or all of the county's costs." (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1213 (*Viray*).) Subdivision (b) requires, however, that a court must hold a hearing regarding the defendant's ability to pay prior to entering a reimbursement order. (§ 987.8, subd. (b) ["In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof"].)

The Attorney General concedes that the trial court did not hold a hearing on Beltran's ability to pay the reimbursement order, and that its failure to do so violated the statutory mandate set forth in section 987.8. The Attorney General contends, however, that Beltran has forfeited any challenge to the reimbursement order because he did not object to the imposition of the fee during the trial court proceedings. Our Supreme Court

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[7] Beltran also asserts it was ineffective assistance for his trial counsel not to object to the court's imposition of the upper term sentence. Given that Beltran does not dispute he was on probation when he committed the offense nor that his performance while on probation was unsatisfactory, we fail to see how it was ineffective for his trial counsel not to object to the court's finding that these two factors were aggravating circumstances warranting imposition of the upper term. (See Cal. Rules of Court, rule 4.421(b)(4) & (5).)

has explained that although a defendant who does not challenge a ruling in the trial court ordinarily forfeits his or her right to raise the claim on appeal, that "does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority [to address the issue]. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. . . . Whether or not it should do so is entrusted to its discretion." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; see also *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 ["'The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue'"]; *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1411 [even if defendant "forfeited his right to challenge the judge's conduct on appeal through his counsel's failure to object, it is still within our discretion to consider the claim"].) In this case, there are several reasons why we choose to address the issue despite Beltran's lack of an objection.

First, our courts have previously observed that in the context of a challenge to a section 987.8 reimbursement order, the normal rules of forfeiture raise potential conflicts of interest between the defendant and his attorney. In *Viray, supra*, 134 Cal.App.4th 1186, the court explained: "We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge [a section 987.8] order concerning *his own fees*. It seems obvious to us that when a defendant's attorney stands before the court asking for an order taking money from the client and giving it to the attorney's employer, the representation is burdened with a patent conflict of interest and cannot be relied upon to vicariously attribute counsel's omissions to the client. Counsel can hardly be relied upon to contest an order when a successful contest will directly harm the interests of the person or entity who hired him and to whom he presumptively looks for future employment." (*Id.* at pp. 1215-1216.)

The court observed that although the case before it involved a direct conflict (the defendant's attorney had requested the reimbursement order), similar concerns were nonetheless present whenever the "defendant's sole representative [at the time of the reimbursement order] is the same publicly financed counsel for whose services

reimbursement is sought" (*id*. at p. 1216, fn. 15): "We recognize that a particular deputy public defender might, as a salaried employee, feel personally disinterested in a reimbursement order, and might even be willing to oppose it on behalf of the defendant. The same might even be true of an appointed attorney whose claim for payment, and prospects of future employment, were wholly and securely divorced from any reimbursement order the court might make. However, the spectacle of an attorney representing a client in connection with an order requiring that client to pay for the attorney's services, however attenuated the connection may be in fact, carries the patent appearance of at least a vicarious adversity of interests." (*Viray, supra*, 134 Cal.App.4th at p. 1216.) In this case, the record demonstrates that at the time the reimbursement order was made, Beltran was being represented by the same publicly appointed counsel whose employer would benefit from the order. Therefore, the very concerns described in *Viray* are present here.

Second, this is not a case where the defendant has simply challenged the court's factual findings regarding his ability to pay without having done so in the trial court. Instead, Beltran is essentially asserting there was no basis to find he had the ability to pay the reimbursement order because the court never held a hearing on the issue. As the Attorney General admits, Beltran's "presentence probation report does not recommend an attorney fees award, nor does it contain anything suggesting [Beltran's] financial capability to pay attorney fees, the value of his assets, or his employment prospects. . . . Moreover the trial court did not either expressly or implicitly find whether appellant had the ability to pay." Because the court never held a hearing on Beltran's ability to pay, and the record contains no independent evidence of his ability to do so, his claim effectively challenges the sufficiency of the evidence underlying the court's decision to impose reimbursement. Generally, the "'contention'" that a factual finding "is not supported by substantial evidence . . . is an obvious exception'" to the standard rule of forfeiture. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126.)

Third, we believe it is appropriate to consider the merits of Beltran's claim because neither party disputes that the trial court made a "clear and correctable" error of

law that may be resolved without a retrial of the entire case. (See *People v. Welch* (1993) 5 Cal.4th 228, 235-236 [courts have been willing to review claims even in the absence of an objection where the issue raises "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court . . . . Implicit in each of these decisions is the reviewing court's unwillingness to ignore clear and correctable legal error"].) Through its enactment of section 987.8, subdivision (b), the Legislature made clear that, before entering a reimbursement order, a court must hold a noticed hearing regarding the defendant's ability to pay. We are unwilling to ignore this mandate solely because defendant's appointed counsel failed to object.

Because the trial court failed to follow the procedures set forth in section 987.8, we vacate the reimbursement order and remand the case for a noticed hearing on Beltran's ability to pay. (See *People v. Prescott* (2013) 213 Cal.App.4th 1473, 1476 ["The preferred solution when a trial court fails to make a necessary finding [under section 987.8] is to remand the case for a new hearing on the matter"].)

E. The judgment shall be modified to conform to the trial court's oral pronouncement of Beltran's presentence custody credits

Finally, Beltran argues that his judgment should be amended to conform to the trial court's oral pronouncement regarding his presentence custody credits. The sentencing hearing transcript demonstrates that the trial court initially calculated Beltran's presentence custody credits to total 233 days. However, after an off-record discussion with defense counsel, the court announced it had made an error in its calculation and raised the presentence custody credits to 293 days. The minute order setting forth the court's judgment, however, reflects the court's original figure of 233 days.

The Attorney General does not dispute that Beltran should have received 293 days of presentence custody credits or that the minute order misstates that figure. She argues, however, that section 1237.1 precludes us from providing relief for this clerical error because Beltran failed to make a motion for correction in the trial court. Section 1237.1

states, in relevant part: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court."

In the People's appellate brief, the Attorney General argues: "In interpreting section 1237.1, the court in *People v. Acosta* (1996) 48 Cal.App.4th 411 (*Acosta*), stated that, generally speaking, 'the filing of a motion in the trial court is a prerequisite to raising a presentence credit issue on appeal.' [Citation.] The *Acosta* court further stated: '"The court's power to correct its judgment includes corrections required not only by errors of fact (as in the mathematical calculation) but also by errors of law."' [Citation.] Here, appellant does not allege, nor does the record show, that he ever filed a motion in the trial court to correct his custody credits pursuant to section 1237.1. For these reasons, this claim should be rejected."

The Attorney General's brief, however, ignores *Acosta's* clarification that "[s]ection 1237.1 only applies when the sole issue raised on appeal involves a criminal defendant's contention that there was a miscalculation of presentence credits. In other words, section 1237.1 does not require a motion be filed in the trial court as a precondition to litigating the amount of presentence credits when there are other issues raised on direct appeal." (*Acosta, supra,* 48 Cal.App.4th at p. 420.) *Acosta* also indicates that, contrary to the position it takes in the present matter, the Attorney General there argued that section 1237.1 only applied when the sole issue on appeal was the miscalculation of custody credits : "[W]e agree with both defendant and the Attorney General that when the object in view of the Legislature is considered, section 1237.1, when properly construed, does not require defense counsel to file motion [sic] to correct a presentence award of credits in order to raise that question on appeal when other issues are litigated on appeal." (*Id*. at p. 427.) Subsequent decisions have adopted *Acosta*'s reasoning. (See *People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12; *Jones, supra,*

82 Cal.App.4th at p. 493; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270 (*Duran*).)[8] We are not aware of any published decision that has rejected its holding.

We find it troubling that, in advocating for the denial of relief from a conceded clerical error that would result in two extra months in prison, the Attorney General has essentially misrepresented the holding of prior authority. The primary issue *Acosta* decided was whether section 1237.1 precludes an appellate court from addressing a miscalculation in custody credits where, as here, other issues have been raised in the appeal. Moreover, the Attorney General's appellate brief selectively quotes certain language from *Acosta* out of context, thereby altering the apparent breadth of the decision's holding.[9]

As explained in *Acosta*, because Beltran has raised additional issues in this appeal that are unrelated to his presentence custody credits, section 1237.1 does not preclude us from remedying the clerical error set forth in the judgment.

DISPOSITION

The judgment is reversed as to the attorney fee order and the trial court is directed to hold a noticed hearing pursuant to Penal Code section 987.8. The defendant's presentence custody credits shall total 293 days. Following the section 987.8 hearing, the trial court shall modify the judgment to reflect the defendant's proper number of

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[8] In at least one of those subsequent decisions, the Attorney General specifically "concede[d] that [section 1237.1 does not prohibit the appellate] court [from] correct[ing] [miscalculation of presentence custody credits] . . . so long as it is not the only issue on appeal." (*Duran, supra,* 67 Cal.App.4th at pp. 269-270.)

[9] The Attorney General's brief includes the following statement: "[T]he court in [*Acosta*] stated that, generally speaking, 'the filing of a motion in the trial court is a prerequisite to raising a presentence credit issue on appeal.' (*Id*. at p. 428 . . .)" However, read in full, the quoted sentence from *Acosta* states: "If there are no other issues [raised on appeal], the filing of a motion in the trial court is a prerequisite to raising a presentence credit issue on appeal." (*Ibid*.) The Attorney General's brief omits the first clause of the sentence, which materially qualifies the language the Attorney General did elect to include in its brief.

presentence custody credits and any change to the attorney fee order. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

BECKLOFF, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.