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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARGARITO VILLASENOR, Defendant and Appellant.	B234343 (Los Angeles County Super. Ct. Nos. KA093275, KA090956)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Mike Camacho, Judge. Judgment affirmed; order affirmed as modified.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Margarito Villasenor appeals a judgment of conviction entered after a jury trial and an order revoking probation and imposing a prison sentence following a probation violation hearing. In case number KA093275, defendant was convicted of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))[1] and possession of ammunition (§ 12316, subd. (b)(1)). In a bifurcated bench trial, the court found defendant's prior strike allegation pursuant to sections 667, subdivisions (b)-(i), and 1170.12 true and four of the five prior prison terms allegations pursuant to section 667.5, subdivision (b), true. The court sentenced defendant to 10 years in state prison.

In case number KA090956, the probation violation was heard concurrently with the preliminary hearing in case number KA093275. The trial court found defendant in violation of probation. It sentenced defendant to an additional two years in state prison in the case.[2]

Defendant challenges the conviction of possession of a firearm, the lack of a unanimity instruction concerning the charge of possessing ammunition, and the propriety of the court security fee (§ 1465.8). We agree the trial court erred in the imposition of the court security fee and modify the judgment and order accordingly. In all other respects, we affirm.

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[1] All further statutory references are to the Penal Code, unless otherwise identified.

[2] In case number KA090956, defendant had pled guilty to possession of marijuana for sale (Health & Saf. Code, § 11359) and possession of cocaine base for sale (Health & Saf. Code, § 11351.5). Defendant also admitted a prior strike conviction pursuant to Health and Safety Code section 11350 (§§ 667, subd. (b)-(i), & 1170.12), and having served four prior prison terms (§§ 667.5, subd. (b)). He was sentenced to a total of nine years and eight months in state prison, which the court suspended, and he was placed on formal probation.

FACTS

On September 21, 2010, after defendant pled guilty to possession of marijuana and cocaine base for sale and admitted the prior prison terms in case number KA090956, he was placed on formal probation.

At some point in time between October 2010 and January 2011, defendant moved into a two-bedroom residence in Pomona. The residence belonged to Jorge Pineda (Pineda); Pineda occupied one bedroom and another tenant, Juan Santana (Santana), occupied the second one. When defendant moved in, he occupied the living room, sleeping on the sofa.[3]

In December 2010, Santana went with defendant to the home of a friend, Darwin. Darwin offered to sell Santana a .25-caliber Beretta that came with a magazine clip.[4] Santana did not purchase the gun, but defendant bought it.

On three occasions, Santana saw defendant carry the gun in the front pocket of his shorts. Defendant would also keep his guns "stashed" in the living room sofa where he slept.

Defendant had another gun, a 9-millimeter Glock. He kept the case next to the sofa. Defendant told Santana three days before Santana moved out that he bought the Glock from Pineda, who owned five guns himself.[5]

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[3] According to Santana, defendant moved in during the month of January 2011, the same month Santana moved out.

[4] Santana testified at the preliminary hearing that the gun defendant bought from Darwin was a .22-caliber Smith and Wesson.

[5] Only one of the guns was a handgun that was registered to Pineda. The four other guns were rifles, which did not have to be registered. Pineda removed his guns from his bedroom where he kept them three days before Pomona Police Detective Andrew Bebon searched the house.

After defendant moved in, Pineda saw him, on ten occasions, inside and outside of the house, carrying a black .22-caliber gun with a brown, wood-colored handle. Pineda also knew that defendant kept that gun in the living room sofa in different spots.

On January 27, 2011, Pineda saw defendant cleaning the .22-caliber gun inside the house. Defendant was always looking for small guns. They were easier to carry and did more damage than larger caliber guns.

On February 2, 2011, Pomona Police Detective Andrew Bebon conducted a compliance search at the residence. In the sofa, behind a seat cushion, he found a Beretta wrapped in a bandana. The Beretta contained a magazine or clip with a live round of .22-caliber long rifle ammunition inserted in the gun. The gun also had one live .22-caliber long rifle round in the chamber. The detective also found a live .22-caliber bullet on a table next to the sofa. The bullet was the type the Beretta could shoot.

Detective Bebon identified defendant in various photographs taken at the residence holding what appeared to be firearms. One photograph depicted defendant holding what appeared to be a Glock-style handgun with an extended magazine. A second photograph depicted defendant holding two handguns, one in each hand. A third photograph depicted defendant sitting in a chair, a black shotgun with five live rounds strapped to the butt of the shotgun on his lap; defendant had a Glock-style handgun with an extended magazine in his right hand, and another semiautomatic handgun similar to a Colt .45-caliber gun in his left hand.

When defendant returned to the residence later in the day, he discovered it had been searched. He contacted Officer Reginald Villanueva, an acquaintance. To the officer, defendant seemed concerned or nervous.

DISCUSSION

A. *Possession of Firearm*

Defendant contends that the trial court erred by permitting him to be convicted of offenses not shown by the evidence at the preliminary hearing. Specifically, he contends

the photographs were erroneously admitted to show possession of weapons other than the .25-caliber Beretta, the only weapon as to which the prosecution presented evidence at the preliminary hearing. We disagree.

Initially, the People assert that defendant forfeited his objection to admission of the photographs by failing to interpose the same objection on appeal that was made before the trial court. To preserve a claim for review on appeal, the defendant must have first interposed the same claim before the trial court. (*People v. Hart* (1999) 20 Cal.4th 546, 617, fn. 19.) Trial counsel objected to introduction of the photographs as irrelevant but did not indicate that the admission of evidence violated defendant's constitutional rights to due process, the claim he makes now. Although counsel could have more clearly cited the constitutional and statutory grounds for exclusion of the photographs, her objection was adequate.

B. Procedural Background

During the preliminary hearing, Santana testified that he and defendant had lived together for about three weeks until Santana moved out in January 2011. In December 2010, defendant purchased a .22-caliber Smith and Wesson from Darwin, a friend of Santana. Santana testified that defendant hid his guns, a .22-caliber and a black Glock. Detective Bebon's preliminary hearing testimony related to a .22-caliber gun.

Prior to trial, court and counsel discussed photographs depicting defendant holding various guns which the prosecution wished to introduce at trial. Defense counsel objected to the photographs as irrelevant because none of the guns in the photographs was the gun in question in the current case. One photograph showed defendant sitting on a sofa holding what appeared to be a Glock-style handgun with an extended magazine. Detective Bebon testified that photograph appeared to have been taken inside defendant's residence. Another photograph portrayed defendant holding two handguns in the bedroom of defendant's residence. The detective did not identify the make or model of those guns. A third photograph showed defendant sitting in a chair in the kitchen area. In the photograph, defendant is holding what Detective Bebon described as a Glock-style

handgun (with an extended magazine) in one hand and another handgun resembling a .45-caliber semiautomatic Colt in the other hand, and a black shotgun with five shotgun shells strapped to its butt is draped across his lap.

The trial court asked the prosecutor, "The photograph . . . which form[s] the basis of count 1, or the weapon that form[s] the basis of count 1, is it in any of these photographs or is it a different weapon?" The prosecutor explained that "the handgun in count 1 [was] pled generally" "as a handgun." The prosecutor further noted that the evidence was presented at the preliminary hearing regarding two different guns, a Beretta and a Glock, and the pictures depict what appears to be a Glock handgun.

At trial, Santana testified that defendant possessed a .22-caliber Beretta and a Glock. Defendant usually carried the Beretta in his front shorts pocket and he almost never moved the Glock, which he kept in a case next to the sofa where he slept. Pineda also testified that defendant carried the .22-caliber gun. Detective Bebon recovered a .22-caliber gun from the living room sofa where Santana and Pineda said defendant kept it.

During a discussion about the jury instructions, the trial court stated it would give a unanimity instruction as to count 1. "Given that we have evidence that there is more than one firearm in possession, albeit by photograph of [defendant], People's theory is that it's limited to the Beretta .22-caliber, which is marked as People's [Exhibit] 2. I still think that the jury is required to find that it is that firearm that [defendant] possessed for purposes of count 1. They all have to agree on the same firearm. . . . I think out of an abundance of caution we need for them to have a unanimity finding."

The trial court ultimately instructed the jury as follows:

"The People allege that the defendant possessed the following firearms:

"1. (Beretta) handgun

"2. (Glock) handgun with an extended magazine

"3. (Colt) handgun

"You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the firearms, and you all agree on which firearm he possessed."

During argument, the prosecutor argued that the photographs showed defendant "has control over the firearms, that he has the ability to take pictures of the firearms, and he's proud of them." The prosecutor also indicated that the jury only had "to unanimously agree on one firearm. That's it." He continued in argument, "All you have to agree on is one. So if you all agree that he possessed that Glock, good to go. If you all agree that he possessed the Beretta, good to go. All right. Just one."

During his rebuttal argument, the prosecutor argued that the photographs were "proof positive" of defendant's guilt. He showed the jury a photograph of defendant with the Glock and stated:

"[T]hat is a crime, ladies and gentlemen. Right there, proof positive. This gun, the one Santana said he saw him possess, the one that he possessed next to the couch, the one that he kept in this case and carried to and from his cousin's house, based on testimony. Showing control over that firearm. Showing that he had it on multiple days, right? This felon with that gun, crime. Exactly."

Defendant relies on *People v. Burnett* (1999) 71 Cal.App.4th 151 to support his position. In *Burnett*, defendant was charged with one count of "being a felon in possession of a firearm" (§ 12021, subd. (a)(1)), specifically a "'.38 caliber revolver,'" and one count of brandishing a firearm (§ 417, subd. (a)(2)) on or about January 8, 1996. (*Burnett, supra*, at pp. 155-156.) During the preliminary hearing, the prosecutor introduced evidence that the defendant possessed and brandished a .38-caliber revolver. (*Id.* at p. 164.) No evidence was presented at the preliminary hearing that would even suggest that the defendant possessed a revolver of any caliber other than a .38-caliber revolver. (*Ibid.*)

On the first day of trial, "over objection, the court granted the prosecution's motion to amend count 1 by striking the words '.38 caliber' from the information." (*People v. Burnett*, *supra*, 71 Cal.App.4th at p. 156.) At trial, Mark Daniels, someone with whom the defendant had temporarily stayed before the charged incident, testified that the defendant had shown him a .357 magnum revolver, which Daniels had locked away for safekeeping on January 4, 1996, and then returned to the defendant on

January 7, 1996. (*Id*. at p. 157.) The prosecutor requested a unanimity instruction and argued to the jury that the defendant could be convicted for "either of two separate incidents, one of which was never the subject of the preliminary hearing." (*Id*. at p. 181, italics omitted.) The jury convicted the defendant of being a felon in possession of a firearm. (*Ibid*.)

The appellate court reversed the defendant's conviction. It observed that "[t]he amendment of the information, combined with the prosecutor's argument at trial and the jury instructions, allowed the jury to convict [the defendant] solely on the basis of his possession of the gun observed by Daniels, even if it did not believe the testimony of [the other witnesses]." (*People v. Burnett*, *supra*, 71 Cal.App.4th at p. 170.)

The court acknowledged that, technically, amendment of the information did not result in a charge of an offense not shown at the preliminary hearing; however, the amendment, coupled with the prosecutor's argument and jury instructions, allowed the defendant to be convicted solely on the basis of the incident as to which no testimony was presented at the preliminary hearing. (*People v. Burnett*, *supra*, 71 Cal.App.4th at pp. 173-177.)

The circumstances of the instant case are distinguishable from those in *Burnett*. In *Burnett*, from the outset, the defendant was charged with possession of a specific firearm, a .38-caliber revolver. The *Burnett* court stated, "The prosecution began this case by claiming all the witnesses saw [the defendant] with the same gun, on separate occasions within the same day." (*People v. Burnett*, *supra*, 71 Cal.App.4th at p. 175.) In the instant case, the prosecution's case began with the general allegation that defendant possessed a firearm, without any reference as to the specific firearm possessed.

The function of a preliminary hearing is to give a defendant notice of the particulars of the crime charged, such as "'the time, place, and circumstances of [the] charged offenses.'" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 904.) Due process requires that a defendant be given notice of the charges against him and the opportunity to defend against them. (*People v. Silva* (2001) 25 Cal.4th 345, 368; *People v. Jones* (1990) 51 Cal.3d 294, 317.) He must have a reasonable opportunity to prepare and

present his defense and cannot be taken by surprise by evidence offered at trial. (*Jones, supra*, at p. 317.)

Here, evidence was presented at the preliminary hearing and at trial that defendant possessed two firearms, a .22-caliber Beretta or Smith and Wesson, and a Glock-style gun. Because the prosecutor alleged firearm possession generally, without reference to what type of firearm defendant possessed, the prosecutor did not surprise defendant with evidence of uncharged crimes during trial, impairing his ability to prepare and present his defense. Hence, there was no due process violation.

C. *Ineffective Assistance of Counsel*

When a defendant raises a claim of ineffectiveness of counsel, he must establish that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome." (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) """The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."'" (*In re Cudjo*, *supra*, at p. 687; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674.)

Defendant has not met his burden of demonstrating that defense counsel's failure to object on the specific ground of inadequate notice of the charge, and the resulting allegedly defective instruction, was ineffective.

In *Burnett*, the defendant claimed effectively on appeal that there could be no satisfactory tactical explanation for defense counsel's failure to object to the amendment deleting the caliber reference. (*People v. Burnett, supra*, 71 Cal.App.4th. at pp. 180-182.) The *Burnett* court explained, "Since [the defendant] cold not constitutionally be prosecuted for or convicted of an offense not shown by the evidence at the preliminary hearing, [the] defense counsel should have objected or taken some action to protect [the

defendant's] rights, at least when it became clear the jury was going to be asked to convict on the basis of either the incident shown by the preliminary hearing evidence or the incident not addressed at the preliminary hearing." (*Id*. at p. 181, italics omitted.) At the time the defense counsel objected to the amendment, it was apparent that the defendant was being prosecuted for a single incident of possession of a firearm. (*Id*. at pp. 180-181.) The *Burnett* court found it significant that the defense counsel did not object again after it became clear that the prosecutor was no longer proceeding against the defendant for a single incident of possession, but for either of two incidents. (*Ibid*.)

While it is true, in the instant case, that defense counsel could have made an objection for lack of notice for prosecution of the Glock or Colt depicted in the photographs, the objection would not have changed the outcome. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

If the trial court had sustained an objection and limited the prosecution to proving that defendant possessed the .22-caliber Beretta and instructed the jury to that effect, the result would still have been a conviction. The evidence against defendant as to the Beretta was overwhelming. The prosecution witnesses were credible. Santana described in detail the circumstances regarding defendant's purchase of the gun. Both Santana and Pineda saw defendant keep the gun in the same place—the living room sofa. In addition, Detective Bebon recovered the gun from that location.

While it is true that there was no evidence presented as to when the photographs depicting defendant with the Glock or Colt were taken, the jury did not need to rely on those photographs to convict defendant of possession of the .22-caliber Beretta.

Simply stated, defendant cannot demonstrate prejudice or that his counsel was ineffective because it is not reasonably probable that he would have received a more favorable result. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

D. *Possession of Ammunition*

Defendant contends that the trial court erred in failing to provide the jury with a unanimity instruction with respect to the charge of possessing ammunition. Defendant submits that the instruction was necessary because there were multiple acts on which the jury could have found him guilty of possessing ammunition in count 2. We agree but find the error harmless.

Initially, the People claim that defendant's failure to submit an actual instruction for the trial court to consider forfeited the claim of error. (*People v. Hardy* (1992) 2 Cal.4th 86, 153; *People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491.) Defendant asserts that the trial court's duty to give an unanimity instruction is a sua sponte one. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) We need not resolve the People's claim, inasmuch as we find the error was harmless.

A defendant has the right to a unanimous jury verdict. (*People v. Jones*, *supra*, 51 Cal.3d at p. 321.) The standard unanimity instruction generally should be given when a defendant committed multiple acts, which could have been charged as separate offenses but were not, and the jurors could disagree as to which act the defendant committed but still convict him of the crime charged. (*People v. Beardslee* (1991) 53 Cal.3d 68, 92, 93; *Jones*, *supra*, at p. 321.) The instruction need not be given "'[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place . . . .'" (*Beardslee*, *supra*, at p. 93) It also need not be given where "the acts alleged are so closely connected as to form part of one transaction," "the defendant offers essentially the same defense as to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.)

In count 2, defendant was charged with violating subdivision (b)(1) of section 12316. The jury instruction given the jury provided as follows:

"[D]efendant is charged in Count 2 with unlawfully possessing ammunition in violation of . . . section 12316[, subdivision](b)(1).

"To prove that . . . defendant is guilty of this crime, the People must prove that:

"1. [D]efendant possessed ammunition;

"2. [D]efendant knew he possessed the ammunition;

"AND

"3. [D]efendant had previously been convicted of a felony.

"*Ammunition* means a bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. *Ammunition* includes reloaded ammunition.

"Two or more people may possess something at the same time.

"A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

"[D]efendant and the People have stipulated, or agreed, that . . . defendant was previously convicted of a felony. This stipulation means that you must accept this fact as proved.

"Do not consider this fact for any other purpose. Do not speculate about or discuss the nature of the conviction."

It is true that the evidence offered in the case presented the jury with more than one act on which it could base a guilty verdict in count 2. There was evidence Detective Bebon found .22-caliber rounds in the Beretta and on a table next to the sofa when he conducted his search on February 2, 2011. In addition, the photographs offered by the prosecutor showed that the Glock gun in defendant's possession had an extended magazine.

The prosecutor argued in his opening argument the following:

"And there is a count 2 regarding that firearm [referring to the .22-caliber Beretta], right? Regarding the ammunition. Now, [Detective] Bebon testified that yes, he found the firearm. Opened up the evidence envelopes for you. Showed that yes, the firearm contained a magazine, it contained ammunition, and that there was also a .22 caliber bullet seated next to the couch on a table, in close proximity to the firearm which he just

found. Ladies and gentlemen, that ammunition, whether it's in the gun, or the ammunition on the coffee table, qualifies nonetheless as a violation of count 2."

In response to defense counsel's closing argument, the prosecutor also referenced a photograph of the gun defendant possessed next to the sofa, that defendant kept it in its case and carried it to and from his cousin's house. The prosecutor told the jury that the magazine accompanying the gun shown in the photograph could support the possession of ammunition charge.

The People contend, despite the argument from the prosecutor regarding the magazine from the photograph, the evidence presented proved only that defendant possessed .22-caliber ammunition on or about February 2, 2011. Detective Bebon did not recover the Glock-style gun. Defendant correctly points out that there was photographic evidence depicting defendant holding a Glock gun with an extended magazine and shotgun with what appeared to be shotgun shells from which the jury could have convicted defendant.

The prosecutor was not required to prove that the crime of possession of ammunition took place exactly on February 2, 2011, but was required to prove that defendant possessed ammunition on a day reasonably close to that date. Detective Bebon recovered the photographs from the residence defendant had stayed since October or November 2010. Santana or Pineda did not establish an exact time from when the photographs were taken.

Defendant contends that the jurors could easily have found the photographs depicted acts "reasonably close" to February 2, 2011 and considered them in convicting defendant on count 2. The People respond that the trial court was not obligated to sua sponte instruct the jury with a unanimity instruction because the evidence did not suggest more than one discrete crime. We disagree and find that the jurors could easily have used the photographs as a basis for convicting defendant on count 2.

Even though the trial court erred in failing to give the jury a unanimity instruction, the error was harmless under any standard. (*Chapman v. California* (1972) 405 U.S. 1020, 1024 [92 S.Ct. 1284, 31 L.Ed.2d 483]; *People v. Watson* (1956) 46 Cal.2d 818,

836.) "Some cases found harmless any error in failing either to select specific offenses or give a unanimity instruction, if the record indicated the jury resolved the basic credibility dispute against the defendant and would have convicted the defendant of any of the various offenses shown by the evidence to have been committed." (*People v. Jones*, *supra*, 51 Cal.3d at p. 307, italics omitted.) Detective Bebon recovered live .22-long rifle ammunition from defendant's .22-caliber Beretta handgun and a live .22-caliber long rifle ammunition round next to the sofa where defendant slept. There was no substantial evidence presented to dispute that the ammunition belonged to defendant. Having convicted defendant of possessing the handgun, the jury necessarily would have found defendant possessed the ammunition as well.

E. *Court Security Fee*

The trial court ordered defendant to pay a court security fee of $40 for each of his four convictions (two in case number KA090956 and two in case number KA093275), for a total of $160, pursuant to section 1465.8. Defendant contends that the court was only authorized to impose a fee of $30 per conviction in the probation violation case, case number KA090956. The People concur.

Section 1465.8, subdivision (a)(1), requires the imposition of a court security fee "on every conviction for a criminal offense . . . ." As the statute states, the court security fee is assessed as of the time of conviction. (*People v. Alford* (2007) 42 Cal.4th 749, 754; *People v. Davis* (2010) 185 Cal.App.4th 998, 1000.)

The Legislature increased the court security fee to $40 from $30 on October 19, 2010. Defendant sustained two convictions in case number KA090956 on September 21, 2010. At his sentencing, the court ordered him to pay a $40 court security fee for each conviction from that case. Having been convicted before the statute's amendment raising

the court security fee to $40, he is not subject to the higher $40 fee but rather the $30 fee in effect at the time of his conviction.[6]

DISPOSITION

In case number KA090956, the order is modified by reducing the $40 court security fee as to each count to $30 per each count. As so modified, the order is affirmed. The judgment in case number KA093275 is affirmed. The trial court is directed to prepare a corrected abstract of judgment in case number KA090956 and to forward it to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

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[6] The trial court expressly stated it was not imposing the fee on count 2 of the new case because it stayed the sentence in that count pursuant to section 654. As both parties point out, the stay of the fee was error. The court security fee is mandatory as to each conviction and is not subject to a section 654 stay of punishment. (See *People v. Woods* (2010) 191 Cal.App.4th 269, 272.) The minutes and the abstract of judgment correctly reflect a fee for each conviction.