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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOSE JUAN SILVA, Defendant and Appellant.	B231261 (Los Angeles County Super. Ct. No. TA058888)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr. Judge. Affirmed as modified and remanded with directions.

Thomas T. Ono, 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, Linda C. Johnson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

On retrial following post-conviction proceedings, a jury convicted defendant, Jose Juan Silva, of first degree murder (Pen. Code,[1] § 187, subd. (a)) and attempted willful, deliberate and premeditated murder. (§§ 664, 187, subd. (a).) The jury further found the murder was perpetrated by means of a drive-by shooting. (§§ 190, subd. (d), 190.2, subd. (a)(21).) As to both counts, the jury found defendant discharged a handgun within the meaning of section 12022.53, subdivisions (b) through (d). On count 1, defendant was sentenced to 25 years to life consecutive to life without the possibility of parole. On count 2, defendant received concurrent sentences of life with the possibility of parole and 25 years to life. On appeal, defendant contends: the prosecution failed to demonstrate witness unavailability; the trial court committed evidentiary errors; and the restitution orders violated double jeopardy and due process. We modify the judgment and remand with directions.

II. THE EVIDENCE

A. The Prosecution Case

1. Hortensia Silva

Defendant's sister, Hortensia Silva, owned a white Mazda minivan. On January 23, 2001, defendant was in possession of that van. Ms. Silva had given it to defendant some time prior to that date. Ms. Silva did not remember whether there was a bullet hole in the windshield when she gave the van to defendant.

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[1] All further statutory references are to the Penal Code except where otherwise noted.

2. Adrian Harro

Adrian Harro, the attempted murder victim, testified at defendant's first trial. The trial court found Mr. Harro was unavailable to testify at the retrial. (Evid. Code, § 240, subd. (a)(5).) Mr. Harro's recorded testimony was introduced.

On January 23, 2001, Mr. Harro was a passenger in the black Camaro of a friend, Lorenzo Velarde. Mr. Velarde stopped at a red light at the intersection of Euclid Avenue and Long Beach Boulevard in the City of Lynwood. A white minivan came up beside them. The driver fired a gun at them. Mr. Harro did not see anyone else in the minivan. Mr. Harro was struck twice. Mr. Velarde was fatally shot five times. Detective Richard Tomlin prepared a photographic lineup with defendant's image in position No. 4. A wanted poster featured the same photograph of defendant. Mr. Harro was unable to identify the person who fired the handgun. Mr. Harro subsequently saw the wanted bulletin at Mr. Velarde's sister's house. He recognized the photograph as the same image he had seen in the photographic lineup. At trial, Mr. Harro was uncertain whether defendant fired the shots. Mr. Harro further testified, however, that both defendant and the person depicted in the photograph looked similar to the assailant. Mr. Harro testified defendant had more hair than the person in the wanted poster. Also, defendant's face was a little fuller. Defendant also looked more like the assailant than any of the other individuals in the photographic lineup.

3. Carlos Hinojosa

Carlos Hinojosa was walking towards his vehicle to go to work when he heard gunshots. Mr. Hinojosa heard tires screeching. He saw a white van pass by traveling at 40 to 45 miles per hour. He thought it was a Mazda van. Mr. Hinojosa saw one person in the vehicle. On February 1, 2001, Mr. Hinojosa viewed the photographic lineup. Mr.

Hinojosa said the person in position Nos. 3 or 4, defendant, looked like the man driving the white van.

4. Rocio Jauregui

Rocio Jauregui also witnessed the incident. In 2001, she identified defendant as the minivan's driver. After viewing the photographic lineup on January 30, 2001, she wrote, "[No.] 4 looks to be the driver of the w/Mazda [minivan] that I saw speeding through Euclid and Long Beach after hearing the [shots]." Ms. Jauregui also wrote, "[No. 4] look[s] to be the driver w/Mazda [minivan]." Her confidence level in her identification was 5 out of 10. At the time of the retrial, Ms. Jauregui no longer recalled the events.

5. Detective Tomlin

Detective Tomlin arrived at the crime scene on January 23, 2001. He recovered a piece of vehicle molding near the intersection. There was a bullet wedged inside the strip of molding. Detective Tomlin found shattered glass nearby. The location of the glass corresponded to where the driver's side of the Camaro would have been if it was stopped at a red light eastbound on Euclid. Detective Tomlin searched the Camaro. He did not find any weapons or bullet casings in or near the vehicle. There was no indication any weapon was fired from inside the Camaro. However, Detective Tomlin did find a bullet on the Camaro's front passenger seat. The bullet in the molding and in the Camaro were of the same caliber, .9 millimeter. On January 30, 2001, Detective Tomlin searched defendant's garage and recovered a white Mazda minivan. The front windshield was completely broken out. There was shattered glass inside the van. A piece of molding was missing from the passenger side front door. The molding recovered from the shooting scene matched that missing from defendant's minivan. There was evidence two

bullets had been fired from inside the vehicle outward. There was no evidence any shots were fired into the minivan.

6. Hercelia Montes-Deoca

Hercelia Montes-Deoca knew defendant who lived in her apartment complex. Ms. Montes-Deoca saw defendant drive a white van every day. She never saw anyone else driving it. Ms. Montes-Deoca saw defendant's van two or three days before the sheriff's department took it away. There was a hole in the windshield that looked like a bullet hole. Ms. Montes-Deoca asked defendant, "What is this?" Defendant said, "They tried to kill me, but I kill first." He looked proud of what he had done. During the first trial, Ms. Montes-Deoca had testified defendant said only, "They tried to kill me."

Ms. Montes-Deoca did not tell Detective Tomlin about defendant's "but I kill first" statement during the 2001 investigation.

B. The Defense Case

Erasmo Martinez detailed cars for a living. On January 23, 2001, he was in an alley near the scene of the shooting. Mr. Martinez was cleaning a car for an individual identified only as Titere. Mr. Martinez thought Titere was a drug dealer. Defendant pulled into the alley in a white minivan with a broken windshield. Defendant spoke to Titere. Then Titere gave something to defendant. Titere and another person left in defendant's van. Defendant stayed behind. Defendant asked Mr. Martinez for a cigarette. About 20 minutes later, Mr. Martinez heard sirens. Ten minutes after that, Titere drove up in the van and threw the keys back to defendant. Titere gave Mr. Martinez $20, Titere then drove off "kind of fast" in his car. Titere drove off with another unidentified person. No words were exchanged. On cross-examination, Mr. Martinez admitted he had sustained three prior felony convictions. He explained how he came to be testifying at trial. Mr. Martinez said that two to three weeks after the

shooting, he overhead two people talking about someone who was wrongly in custody. The person had been arrested for Mr. Velarde's murder. Mr. Martinez believed it was defendant they were talking about. Mr. Martinez contacted defendant's brother. Mr. Martinez then explained what he knew.

C. Rebuttal

Detective Tomlin testified defendant was not arrested until June 11, 2001, about five months after the shooting.

III. DISCUSSION

A. Unavailable Witness

Defendant asserts it was reversible error to introduce Mr. Harro's recorded testimony. Defendant contends the prosecution failed to demonstrate good faith efforts to locate Mr. Harro. We conclude the prosecution met its burden.

Former testimony is admissible in a retrial against a criminal defendant when the witness is unavailable (Evid. Code, § 1291, subd. (a)(2)) provided that the prosecution has exercised reasonable diligence in attempting to locate the witness. (Evid. Code, § 240, subd. (a)(5).) Under federal constitutional law, before a trial court can introduce recorded testimony of an unavailable witness, the prosecution must demonstrate it made a good faith effort to secure the witness's presence at trial. (*Barber v. Page* (1968) 390 U.S. 719, 725; *People v. Bunyard* (2009) 45 Cal.4th 836, 849; *People v. Cromer* (2001) 24 Cal.4th 889, 892, 897.) Under California law, the statutory test is whether the prosecution has shown reasonable or due diligence in attempting to locate the witness. (Evid. Code, § 240, subd. (a)(5); *People v. Bunyard, supra*, 45 Cal.4th at p. 849; *People v. Cromer, supra*, 24 Cal.4th at pp. 892, 897.) In *People v. Smith* (2003) 30 Cal.4th 581, 609, our Supreme Court held: "The constitutional and statutory requirements are 'in

harmony.' (*People v. Enriquez* [(1977) 19 Cal.3d 221,] 235[, disapproved on another point in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3].)" Our Supreme Court has further held: "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]' (*People v. Mayfield* (1997) 14 Cal.4th 668, 742.)" (*People v. Wilson* (2005) 36 Cal.4th 309, 340; accord, *People v. Friend* (2009) 47 Cal.4th 1, 67.)

The proponent of prior recorded testimony has the burden of demonstrating by competent evidence that the witness is unavailable. (*People v. Smith, supra*, 30 Cal.4th at p. 609; *People v. Price* (1991) 1 Cal.4th 324, 424.) Our Supreme Court has explained the meaning of reasonable or due diligence in this context: "'The term "reasonable diligence" or "due diligence" under Evidence Code section 240, subdivision (a)(5) "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]'"' (*People v. Wilson, supra,* 36 Cal.4th at p. 341, quoting *People v. Cromer*[, *supra,*] 24 Cal.4th [at p.] 904 ['reasonable diligence same as due diligence'].) 'Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' (*People v. Wilson, supra,* 36 Cal.4th at p. 341.)" (*People v. Friend, supra,* 47 Cal.4th at p. 68.) Where, as here, the facts are undisputed, we independently review the trial court's due diligence determination. (*People v. Herrera* (2010) 49 Cal.4th 613, 623; *People v. Friend, supra,* 47 Cal.4th at p. 68.)

The United States District Court for the Central District of California granted defendant's habeas corpus petition on January 22, 2010. (*Silva v. Harrison* (No. CV 05-01293 [nonpub. opn.]) The matter was first on calendar for retrial purposes in superior court on March 5, 2010. It was set for a pretrial conference on March 30, 2010. Deputy District Attorney Eugene Miyata retrieved the prosecution's archived file and, in late February or early March, notified Detective Tomlin the case would be retried. Detective Tomlin then had to retrieve the sheriff's archived records.

Detective Tomlin began attempts to locate Mr. Harro on April 2, 2010. Detective Tomlin went to Mr. Harro's last know residence in Compton. Detective Tomlin learned Mr. Harro no longer lived there. Detective Tomlin went to Mr. Harro's sister's address, also in Compton. A neighbor said no one by the sister's name lived there. Mr. Harro's telephone number had been disconnected. His sister's telephone number had also been disconnected. Detective Tomlin went to another's sister's address in Ontario. She no longer lived there. Her telephone number was disconnected. Detective Tomlin spoke to Mr. Velarde's sister. She said Mr. Harro had called her from a motel in Chicago three months earlier. She did not know the name of the motel. Mr. Harro told Mr. Velarde's sister he was recently divorced and living in Chicago. Mr. Harro said he would contact her when he got settled. She had not heard from him since. Detective Tomlin conducted an unsuccessful search of the: "United States D.M.V. system"; the California Department of Motor Vehicles records; and California vehicle registration records. He did not try to contact anyone in Chicago because he did not have an address. Moreover, Detective Tomlin was not even sure Mr. Harro was in Chicago. Mr. Velarde's sister's husband, Romero Pinedo, told Detective Tomlin: "He said he wasn't even sure if it was Chicago. He knew it [was] Illinois. They just said Chicago." Mr. Pinedo spoke to Detective Tomlin about Mr. Harro. This conversation occurred about one week before Detective Tomlin testified. Mr. Pinedo had been trying to locate Mr. Harro without success. Mr. Pinedo's wife was also involved in the effort to locate Mr. Harro. None of the Pinedos' mutual friends had any information.

Apparently there are unspecified telephone records concerning a number from which Mr. Harro had called. On cross-examination, Detective Tomlin admitted he did not make any effort to search those phone records. Two weeks earlier, Detective Tomlin had placed one call to the Chicago Police Department but it was not returned. He did not check jail records in Illinois. He did not check any other records in Illinois. He did not check for out-of-state warrants. Detective Tomlin did not make any effort to find a court record of Mr. Harro's divorce.

We agree with the trial court's assessment that the prosecution demonstrated due diligence. Detective Tomlin took substantial good faith steps to locate Mr. Harro eight years after the first trial. That defendant can with hindsight suggest other lines of inquiry does not render Detective Tomlin's efforts insufficient. (*People v. Valencia* (2008) 43 Cal.4th 268, 293; *People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) The trial court did not err in concluding Mr. Harro was unavailable as a witness.

B. Instructional Error

Defendant asserts the trial court committed reversible error in refusing requested self-defense and imperfect self-defense instructions. Such instructions were required only if there was substantial evidence to support the defenses. (*People v. Rogers* (2006) 39 Cal.4th 826, 883; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1165; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1101, disapproved on another point in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5.) Any purported error was harmless. Defendant relies on Ms. Montes-Deoca's testimony that when she asked him about the hole in his windshield he said, "They tried to kill me, but I kill first." But there was no direct evidence supporting a self-defense or imperfect self-defense theory. There was no evidence the victims engaged in any threatening conduct. There was no evidence Mr. Velarde or Mr. Harro did anything that might have appeared to endanger defendant. There was no evidence the victims were armed. There was no evidence any shots were fired at defendant or his vehicle. There was no evidence any weapon was fired from Mr. Velarde's automobile. No weapons were found in or near Mr. Velarde's Camaro. Any alleged error was harmless. (Cal. Const., art. VI, §13; *People v. Breverman* (1998) 19 Cal.4th 142, 164-179.) We disagree with defendant's argument that we do not apply the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice analysis. *Breverman* has not been overruled by our Supreme Court. (*People v. Thomas* (2012) 53 Cal.4th 771, 814; *People v. Moye* (2009) 47 Cal.4th 537, 541.)

C. Evidentiary Rulings

1. Standard of review

Defendant challenges several evidentiary rulings. Our review is for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) As our Supreme Court held in *Guerra*, "The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) . . . [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. Rodriguez* [, *supra*,] 20 Cal.4th [at pp.] 9-10.)" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1113; accord, *People v. Hartsch* (2010) 49 Cal.4th 472, 497.)

2. Exclusion of evidence

Defendant asserts reversible error in that, "[T]he jury was not allowed to consider relevant evidence that [defendant's] brother had access to information that the police were looking for [defendant] within weeks of the shooting on January 23, 2001." As noted above, Mr. Martinez offered alibi evidence. Mr. Martinez testified defendant was in an alley when the shooting occurred. On cross-examination, Mr. Martinez explained that two to three weeks after the incident he overheard two unidentified men talking about someone who was wrongly in custody for Mr. Velarde's murder. Mr. Martinez believed it was defendant the unidentified men were talking about. Mr. Martinez contacted defendant's brother. Mr. Martinez related what he had seen.

In rebuttal, Detective Tomlin testified defendant was not arrested until June 11, 2001. The following occurred on cross-examination of Detective Tomlin's rebuttal testimony: "By [defendant's counsel, Patrick] Thomason: [¶] Q. Did you talk to

[defendant's] wife shortly after discovering the van in the garage? [¶] [Deputy District Attorney Eugene] Miyata: Objection. Relevance. [¶] The Court: Sustained. [¶] By Mr. Thomason: [¶] Q. Did you talk to [defendant's] sister about this case? [¶] Mr. Miyata: Objection. Relevance. [¶] The Court: Sustained. [¶] Mr. Thomason: Can we approach, Your Honor? [¶] The Court: Sure. With or without the reporter? [¶] Mr. Thomason: With. [¶] . . . [¶] The Court: Outside the presence of the jury. [¶] Mr. Thomason: The relevance of those questions would be that if the police were trying to talk to [defendant's] wife and his sister in the days around the period that Mr. [Martinez] was talking about, then that would lend some credence to the idea that he knew that the police were thinking the defendant was involved or he was in trouble regarding whether he was in custody or not. So I think it has some marginal relevance there. [¶] The Court: Who would know? You said 'He would know.' 'He' who? If the sister or the wife was trying [to] talk to the police, he would know. Who is he? [¶] Mr. Thomason: [Defendant] - - well, no. Let me see. [¶] The Court: You said Mr. - - [¶] Mr. Thomason: It goes to the brother would know that the police felt that [defendant] was involved and that he would be out trying to find witnesses for him. [¶] The Court: Well, but that basically is a quantum leap. We're assuming a lot of things. That the sister and the wife basically told the brother what was going on and even suggested that the brother should go out and look for witnesses. I mean, that's a lot of assumptions. And there's nothing that suggests there's even any nexus between the sister and the wife and the brother. And I don't know if there's any evidence that the sister and the wife ever did anything. But seems to me that it's all, for the most part, irrelevant, hearsay, uncorroborated, a number of rules of evidence that it violates. But basically it is irrelevant. Also speculation and calls for a conclusion. [¶] Mr. Thomason: I'll just submit it, then. [¶] The Court: I'll just deny it." In closing argument, the deputy district attorney, Mr. Miyata, argued defendant's alibi witness, Mr. Martinez, was not credible. Mr. Miyata based his argument in part on the fact that Mr. Martinez claimed defendant's brother was seeking help two to three weeks after the shooting yet defendant was not arrested until June 11, 2001, almost five months later.

No abuse of discretion occurred. The trial court could reasonably rule the excluded evidence was marginally relevant at best. Relevant evidence is evidence having any tendency in reason to prove or disprove any disputed consequential fact. (Evid. Code, § 210; *People v. Fuiava* (2012) 53 Cal.4th 622, 663.) Our Supreme Court has held, "The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts." (*People v. Scheid* (1997) 16 Cal.4th 1, 13; accord, *People v. Guerra, supra,* 37 Cal.4th at p. 1117.) To find an abuse of discretion requires several factually unsupported leaps in logic. There is no evidence defendant's brother knew anything about a law enforcement search within weeks of the January 23, 2001. Further, there is no evidence defendant's wife and sister spoke to the brother about conversation with a detective about a sheriff's manhunt. The trial court did not abuse its discretion in precluding Mr. Thomason's inquiry on relevance grounds.

Even if the trial court did abuse its discretion, there was insufficient prejudice to permit reversal. (*People v. Guerra, supra,* 37 Cal.4th at pp. 1113, 1116; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) The jury had before it evidence that within days of the shooting the sheriff's department was investigating defendant. The shooting occurred on January 23, 2001. Seven days later, on January 30, 2001, Detective Tomlin searched defendant's garage and recovered the white Mazda minivan. Shortly after January 29, 2001, defendant's sister, Ms. Silva, spoke to sheriff's investigators about her white Mazda minivan. Detective Tomlin began presenting the photographic lineup to witnesses on January 30, 2001. This evidence supported a reasonable inference that within two to three weeks of the shooting the brother knew the sheriff's department was investigating defendant. It is not reasonably probable the verdict would have been more favorable to defendant had Detective Tomlin testified concerning the alleged conversations.

3. Admission of evidence

As noted above, Mr. Harro testified concerning a photograph resembling defendant that was contained in both a photographic lineup and a wanted poster. In a

pretrial hearing, defendant's attorney, Mr. Thomason, sought to redact the wanted bulletin and Mr. Harro's testimony with respect thereto. Mr. Thomason argued the wanted bulletin was unduly prejudicial under Evidence Code section 352 in that it included the sheriff's emblem and the words, "Wanted for Murder." The trial court had already redacted the wanted bulletin's text. The trial court denied the further redaction request. In his previously recorded testimony, Mr. Harro testified he saw the wanted poster. Mr. Harro recognized defendant's photograph as having also been in the photographic lineup. Mr. Harro further testified the individual depicted in position No. 4 of the photographic lineup (defendant) looked more like the person driving the minivan than any of the others.

On appeal, defendant argues it was an abuse of discretion to deny his redaction request. Defendant reasons the wanted bulletin and Mr. Harro's testimony concerning it had no probative value. Defendant argues Mr. Harro never made an identification based on either the photographic lineup or the poster. We find no abuse of discretion. Mr. Harro testified the person in the poster and defendant looked similar to the assailant. Without abusing discretion, the trial court could rule this was probative evidence as to the identity of the person who fired the shots. The images and language on the partially redacted wanted poster also tended to explained why Mr. Velarde's sister was in possession of it. The jury knew that not long after the shooting the sheriff's detectives had focused on defendant as a suspect. The trial court could reasonably conclude the probative value of the evidence outweighed any prejudicial effect. (Evid. Code, § 352; see *People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

4. Constitutional contentions

Defendant argues the foregoing evidentiary rulings violated his Fourteenth Amendment constitutional due process rights. As we have noted, there were no violations of state law. Hence, no constitutional violation occurred and defendant has not been denied his right to a fair trial. (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27;

People v. Cowan (2010) 50 Cal.4th 401, 463-464; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

D. Sentencing Issues

1. Restitution, fees and assessments

In its oral pronouncement of judgment, the trial court declined to impose restitution under section 1202.4, subdivision (b) because $1,000 in such restitution had been imposed following the first trial and had been paid. The trial court also did not impose any fees or assessments. However, the abstract of judgment erroneously reflects imposition of: a $200 restitution fine under section 1202.4, subdivision (b)(1); a $30 court security fee under section 1465.8, subdivision (a)(1) and a $30 court facilities assessment under Government Code section 70373, subdivision (a)(1). The abstract of judgment must be corrected to reflect that a $1,000 restitution fine was previously imposed. (See *People v. Cropsey* (2010) 184 Cal.App.4th 961, 966.)

The oral pronouncement of judgment must be modified to impose a $30 court security fee and a $30 court facilities assessment as to each of the two counts of which defendant was convicted. Imposition of the fees and assessments does not violate federal or state prohibitions against ex post facto statutes. (*People v. Alford* (2007) 42 Cal.4th 749, 755-759 [§ 1465.8, subd. (a)(1)]; *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1492-1493 [Gov. Code, § 70373, subd. (a)(1)].) The abstract of judgment must be amended accordingly.

The trial court also ordered defendant to pay $16,742 plus 10 percent interest to the victim's restitution fund. (§ 1202.4, subd. (f).) Contrary to defendant's assertion on appeal, due process concerns and double jeopardy prohibitions did not bar imposition of a victim restitution order for the first time upon retrial; victim restitution is a civil remedy, not punishment. (*People v. Bufford* (2007) 146 Cal.App.4th 966, 970, fn. 4; *People v. Harvest* (2000) 84 Cal.App.4th 641, 646-650.)

Defendant argues the victim restitution order should be stricken because there was no notice nor evidence to support it. Defendant did not object in the trial court to lack of notice or to the amount of victim restitution requested. He did not request a hearing to dispute the determination of the restitution amount. (§ 1202.4, subd. (f)(1).) As a result, he forfeited those objections. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075; see *People v. Gamache* (2010) 48 Cal.4th 347, 409.) Further, Krystyna Dailey, a restitution specialist with the district attorney's office, informed the trial court the victim compensation board had reimbursed the victims for $16,742 in expenses they incurred. A trial court has broad discretion in determining the amount of restitution to be paid. (*People v. Baker* (2005) 126 Cal.App.4th 463, 470; *People v. Dalvito* (1997) 56 Cal.App.4th 557, 562; *People v. Ortiz* (1997) 53 Cal.App.4th 791, 800.) Ms. Dailey provided a rational and factual basis for the award. We find no abuse of discretion.

Defendant argues his attorney's failure to object to the victim restitution request on grounds defendant lacked notice or to the amount of restitution requested constituted ineffective assistance of counsel. However, defendant has not shown as a demonstrable reality that but for his counsel's failure to so object it was reasonably likely the trial court would have ordered victim restitution in a lesser amount. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Horton* (1995) 11 Cal.4th 1068, 1122.) Ms. Dailey represented that the victim compensation board had paid $16,742 to the victims for economic loss suffered as a result of defendant's conduct. Pursuant to section 1202.4, subdivision (f), the trial court was required to order full restitution unless it found "compelling and extraordinary reasons" for not doing so. Defendant has not suggested any basis on which he might have contested the amount.

2. Enhancements

The trial court was required to *impose* and then stay the enhancements under sections 12022.53, subdivisions (b) and (c), and 12022.5, subdivision (a)(1). (*People v.*

Gonzalez (2008) 43 Cal.4th 1118, 1122-1123, 1130; *People v. McFearson* (2008) 168 Cal.App.4th 388, 391.) The judgment must be modified to impose and then stay a 10-year term under section 12022.53, subdivision (b) and a 20-year term under section 12022.53, subdivision (c). (§ 12022.53, as amended by Stats. 2000, ch. 287, § 23.) In addition, upon remittitur issuance, the trial court must select a specific term to impose under section 12022.5, subdivision (a)(1) prior to staying that term.

3. Abstract of judgment

Defendant was sentenced to life with the possibility of parole for attempted murder. However, the abstract of judgment erroneously states in two places that the sentence on count 2 was life *without* the possibility of parole. The abstract of judgment must be amended to correctly reflect the sentence imposed. The trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment which reflects the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgment is modified to impose a $30 court security fee and a $30 court facilities assessment as to each of the two counts of which defendant was convicted. The judgment is further modified to *impose* and then stay the 10-year Penal Code section 12022.53, subdivision (b) and 20-year Penal Code section 12022.53, subdivision (c) enhancements. Upon remittitur issuance, the trial court must select a specific term to impose under section 12022.5, subdivision (a)(1) prior to staying that enhancement. The abstract of judgment must be corrected to reflect: the duration of the stayed term imposed under Penal Code section 12022.5, subdivision (a)(1); that defendant was sentenced to life *with* the possibility of parole for attempted murder; $60 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)); $60 in court facilities assessments (Gov. Code, §

70373, subd. (a)(1)); and that a $1,000 restitution fine (Pen. Code, § 1202.4, subd. (b)) was previously imposed. The clerk of the superior court must then deliver a copy of the corrected 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.

KRIEGLER, J.