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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. HERIBERTO CORTEZ, Defendant and Appellant.	B283537 (Los Angeles County Super. Ct. No. LA082717)

APPEAL from a judgment of the Superior Court of Los Angeles, Alan Schneider, Judge. Affirmed with directions.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Heriberto Cortez appeals from the judgment after a jury convicted him of multiple counts of sexually abusing his minor daughter. Defendant contends that the trial court erred by failing to hold a hearing on his *Marsden*[1] motion to replace appointed counsel. He contends his statements to the police were inadmissible because a detective tricked him into waiving his *Miranda*[2] rights by softening him up with ingratiating conversation before advising him of those rights, and then coerced him into confessing through implied promises of leniency. He further contends that the trial court failed to instruct the jury orally on the elements of the charged and lesser offenses.

We hold that any failure to hold the *Marsden* hearing, which the trial court previously had scheduled, was inadvertent, and defendant abandoned his challenge because he did not bring the oversight to the trial court's attention. We hold that the conversation the detective had with defendant prior to advising him of his rights did not render his *Miranda* waiver involuntary, and that the record does not support defendant's claim that the detective impliedly promised leniency in exchange for cooperation. We further hold that the record indicates the trial court orally instructed the jury on the charged and lesser offenses.

We agree with defendant that the minute order of his sentencing hearing and abstract of judgment do not reflect the trial court's award of presentence credits and order the trial court to correct those documents. We affirm the judgment.

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

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

BACKGROUND

A jury convicted defendant of five counts of continuous sexual abuse of a child under the age of 14 years (Pen. Code, § 288.5, subd. (a)) and three counts of oral copulation with a child 10 years old or younger (*Id.*, § 288.7, subd. (b)). The victim was defendant's daughter. The trial court sentenced defendant to 27 years to life, awarded 594 days in presentence credits, and imposed various fines and fees. Defendant timely appealed.

The facts of the underlying offenses are not relevant to the issues on appeal and thus we do not summarize them. We provide additional procedural background relevant to defendant's challenges in our Discussion section, *post*.

DISCUSSION

A. Defendant Abandoned His *Marsden* Request

Defendant argues that the trial court committed reversible error by failing to hold a hearing on his *Marsden* motion. We disagree.

1. Additional background

On January 25, 2017, defendant filed a handwritten motion claiming his appointed counsel was ineffective and requesting a *Marsden* hearing. Defendant and his counsel appeared before the trial court the next day, January 26. Defendant's counsel stated that he would be filing several evidentiary motions. The trial court stated it would hear those motions on February 23, 2017. The trial court further stated that it would "handle [defendant's] *Marsden* motion on the 23rd," to which defendant agreed. The minute order from that proceeding reflected that the

trial court had received defendant's *Marsden* motion and would hold the hearing on February 23.

Defendant and his counsel appeared before the trial court on February 23. The trial court said it would "handle the motions that currently are on calendar" on March 1, 2017. The trial court did not refer expressly to the *Marsden* motion, nor was it mentioned in the minute order.

Subsequent minute orders reflected that defendant and his counsel appeared before the trial court again on March 1 and 2, at which time the trial court heard and denied defendant's evidentiary motions. The minute orders did not mention a *Marsden* motion or proceeding. Defendant and his counsel appeared again before the trial court on March 17, at which time the trial court granted a defense motion in limine and trailed the matter for jury trial to March 20. Again, the minute order did not mention a *Marsden* motion or proceeding. Trial began with jury selection on March 20, and again the minute order did not mention a *Marsden* motion or proceeding, nor did any of the subsequent record entries.

2. **Analysis**

" 'The law governing a *Marsden* motion "is well-settled. 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance.' " ' " (*People v. Jackson* (2009) 45 Cal.4th 662, 682.) "[O]nce the defendant clearly indicates to the trial court a request for the discharge and replacement of appointed counsel, the court must hold a hearing to allow the defendant to explain the basis for the request."

(*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179 (*Armijo*).) Failure to conduct such a hearing "is legal error that compels reversal of the defendant's conviction unless the record shows beyond a reasonable doubt that the error was harmless." (*Ibid.*, citing *Marsden*, *supra*, 2 Cal.3d at p. 126.)

When a trial court schedules a requested *Marsden* hearing but inadvertently fails to conduct it, it is the defendant's duty to "bring[ ] his motion to the trial court's attention at a time when the oversight c[an be] rectified." (*People v. Jones* (2012) 210 Cal.App.4th 355, 362 (*Jones*).) A defendant's failure to do so "before the matter proceed[s] to trial constitute[s] abandonment of his claim." (*Ibid.*)

In *Jones*, the defendant filed a *Marsden* motion and the court stated it would hear it on April 27, 2010. (*Jones*, *supra*, 210 Cal.App.4th at p. 360.) Subsequent minute orders reflected that defense counsel stipulated to or requested several continuances of the jury trial, and the trial court similarly continued the *Marsden* hearing. (*Ibid.*) On June 14, 2010, the trial court set trial for June 21 on defense counsel's motion. (*Ibid.*) The minute order did not mention the *Marsden* motion, nor did any subsequent minute orders. (*Ibid.*) The trial court granted additional continuances requested by the parties over the next two months, finally beginning jury selection on August 23. (*Ibid.*) The record reflected that the defendant personally was present for most of the hearings in which the trial court granted continuances, including those in which the minute orders did not refer to his *Marsden* claim. (*Ibid.*)

The Court of Appeal held that the defendant had abandoned his *Marsden* claim. (*Jones*, *supra*, 210 Cal.App.4th at p. 362.) The court cited "the general rule that 'a party may not

challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission was probably inadvertent.' " (*Id.* at p. 361, quoting *People v. Braxton* (2004) 34 Cal.4th 798, 813-814.) The court concluded that "[t]he trial court's failure to conduct a hearing on the motion appears to have been the inadvertent result of the repeated continuances," and it was the defendant's duty to bring the matter to the trial court's attention. (*Id.* at p. 362.) Having not done so "despite having been present in court a dozen times before his trial began," defendant could not challenge on appeal the trial court's failure to hear his *Marsden* motion. (*Ibid.*)

The circumstances here are analogous to those in *Jones*. The trial court scheduled a hearing on defendant's *Marsden* motion for the same day it would hear the defense's evidentiary motions. On the scheduled day, the trial court continued the hearing on "the motions that currently are on calendar." Subsequent minute orders reflected the trial court hearing and ruling on the evidentiary motions, with no mention of the *Marsden* motion, which appears to have been lost amidst the continuance and other motions.

As in *Jones*, we conclude the trial court's failure to hear the *Marsden* motion was " 'probably inadvertent,' " and it was defendant's duty to remind the trial court of the *Marsden* motion before trial began. Defendant did not avail himself of the multiple opportunities to do so in his pretrial appearances before the trial court. Thus, we deem his claim abandoned.[3]

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[3] Although the record before us does not reflect it, we recognize the possibility that defendant affirmatively withdrew his *Marsden* request, which would also constitute abandonment

Defendant argues that his circumstances are closer to those in *Armijo*, in which the Court of Appeal concluded a defendant had not abandoned his *Marsden* claim by failing to bring it to the trial court's attention. (*Armijo*, *supra*, 10 Cal.App.5th at p. 1183.) In *Armijo*, the defendant sent a letter to the trial court claiming that his assigned counsel was inadequate and requesting a new attorney. (*Id.* at pp. 1176-1177.) The trial court did not hold a hearing on the defendant's request and "made no mention of the letter in any of the subsequent proceedings in the case." (*Id.* at p. 1177.)

The Court of Appeal noted that, as in *Jones*, "it appears the trial court's failure to hold the hearing was inadvertent," and the defendant "did not press for a *Marsden* hearing" in any proceeding after he sent his letter requesting new counsel. (*Armijo*, *supra*, 10 Cal.App.5th at p. 1182.) The Court of Appeal nonetheless found *Jones* distinguishable on two bases. (*Armijo*, *supra*, 10 Cal.App.5th at pp. 1182-1183.) First, in *Jones* the defendant's counsel "was fully aware of the *Marsden* request" and thus "[t]he failure to press for the *Marsden* hearing or remind the court about it lies largely with the defendant's counsel. Here, by contrast, there is no indication from the record that [defense counsel] knew that [the defendant] had written to the trial court about her and was seeking substitute counsel." (*Ibid.*) Second, the trial court's silence regarding the defendant's letter (which

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of his claim. (*Armijo*, *supra*, 10 Cal.App.5th at p. 1182.) It is also possible defendant told his counsel privately that he did not wish to pursue the request further, which could explain why defense counsel apparently did not raise the issue again in the trial court. Given the record, however, we have proceeded on the assumption that defendant did not withdraw his request.

the trial court in fact did not receive until after the pretrial conference at which the defendant appeared) may have led the defendant to believe the trial court had denied his request, "which may have suggested to [the defendant] that it would have been futile to ask the court at that point to appoint new counsel." (*Id.* at p. 1183.) The Court of Appeal concluded, "Under these circumstances, we do not believe that the fault for the trial court's failure to hold a *Marsden* hearing should rest with [the defendant]." (*Ibid.*)

The circumstances that distinguished *Armijo* from *Jones* are not present in the instant case. As in *Jones*, defendant's counsel was aware of the *Marsden* motion because the trial court expressly mentioned it in a proceeding the day after it was filed and scheduled a hearing on it. Thus, defense counsel was responsible for reminding the trial court of the need to hold that hearing. (*Armijo*, *supra*, 10 Cal.App.5th at p. 1182.) Also, because the trial court scheduled the hearing, defendant had no reason to think his request had been denied summarily, as was possible in *Armijo*.

Defendant argues that in *Jones* it was defense counsel that requested the continuances of the *Marsden* hearing, and thus it was his responsibility to ensure the trial court held the hearing. Here, in contrast, defendant's counsel "did not take responsibility for a hearing on appellant's *Marsden* motion, or undertake to ensure that appellant's rights with regard to the motion were vindicated." Although defendant does not so state, we presume he is arguing that because his trial counsel did not request a continuance or otherwise take any action regarding the *Marsden* request, trial counsel did not take responsibility for ensuring the trial court heard the request.

We reject this argument. Neither *Jones* nor *Armijo* require defense counsel to take some affirmative action, such as seeking a continuance, to assume responsibility for the defendant's *Marsden* motion. *Jones*, in stating that it was defendant's duty to remind the trial court of the pending *Marsden* request, did not differentiate between the defendant himself and defendant's counsel. (*Jones*, *supra*, 210 Cal.App.4th at p. 362.) In *Armijo*, defense counsel was not responsible for the Marsden request because defense counsel was not aware of the request. (*Armijo*, *supra*, 10 Cal.App.5th at pp. 1182–1183.) Here, where defense counsel knew of the request, and could act to ensure the trial court heard it, defense counsel bore a responsibility to do so.

Defendant also notes that in *Jones*, just before the jury panel was called in, the trial court stated: " 'If anybody has anything else that they want to say [regarding pretrial issues], put it on the record, make a pitch, or whatever. So feel free.' " (*Jones*, *supra*, 210 Cal.App.4th at pp. 360-361.) The *Jones* court noted that the defendant "was present but remained silent." (*Id.* at p. 361.) Here, defendant argues the trial court never gave him the opportunity to address the court in this way.

We do not read *Jones* to require an express invitation to speak from the trial court before a defendant has a duty to remind it of any overlooked matters. The *Jones* court listed five other pretrial appearances by the defendant at which he (or his counsel) failed to raise the issue of the *Marsden* request, with no indication that the trial court invited the defendant to speak at any of them. (*Jones*, *supra*, 210 Cal.App.4th at p. 360.) Regardless, in both *Jones* and the instant case defense counsel was aware of the pending *Marsden* request and certainly knew

how to raise the issue with the trial court without an invitation to do so.

B. The Trial Court Properly Admitted Defendant's Statements To The Police

Defendant argues that the trial court erred in admitting statements he made during a police interview. Defendant claims the interviewing detective improperly persuaded him to waive his *Miranda* rights, then coerced him to confess through promises of leniency. Both the validity of a *Miranda* waiver and the voluntariness of a confession are subject to our independent review on appeal. (*People v. Mayfield* (1993) 5 Cal.4th 142, 172; *People v. Wall* (2017) 3 Cal.5th 1048, 1066 (*Wall*).) We conclude defendant's arguments lack merit.

1. Defendant validly waived his *Miranda* rights

a. Additional background

Detective Ninette Toosbuy of the Los Angeles Police Department interviewed defendant at the police station a few hours after his arrest. Toosbuy and defendant conversed for approximately 20 minutes before she advised him of his *Miranda* rights and explained to him why he had been arrested. During those 20 minutes, they talked about defendant's job, from which he had just been laid off, and Toosbuy gave him some suggestions as to where else he might seek employment. Toosbuy asked about defendant's relationship with his girlfriend and defendant described disagreements he and his girlfriend had over religion. Toosbuy asked how many children defendant had, their ages, and where they lived. Toosbuy asked defendant if he had served in the military and whether he was taking any medications.

Defendant said he drank too much soda, leading to a lengthy discussion of the harms of soda and Toosbuy's recommendation that defendant switch to unsweetened ice tea. Toosbuy asked defendant about his level of education and criminal history, and defendant described a past domestic violence arrest. Toosbuy confirmed defendant's preferred name ("Eric").

Toosbuy then advised defendant of his *Miranda* rights. After doing so, she asked, "Are you comfortable? Are you okay talking with me today?" Defendant responded, "Yeah." Toosbuy proceeded with the interview, during which defendant admitted to sexually abusing his daughter.

b. Analysis

Defendant argues that he waived his *Miranda* rights as a result of Toosbuy's "clever softening-up technique of engaging in ingratiating conversation with [defendant] for nearly 20 minutes—which comprised approximately one-third of the interview—before advising appellant of his *Miranda* rights." He argues that under *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), his waiver therefore was invalid.

In *Honeycutt*, police arrested the defendant after he fatally injured a man. (*Honeycutt*, *supra*, 20 Cal.3d at p. 154.) A detective interviewed the defendant later that day. (*Id.* at p. 158.) The detective "had known [defendant] through police contacts for about 10 years." (*Ibid.*) The detective "engaged defendant in a half-hour unrecorded discussion." (*Ibid.*) According to the detective's testimony, he and the defendant "discussed unrelated past events and former acquaintances and, finally, the victim. [The detective] mentioned that the victim had been a suspect in a homicide case and was thought to have homosexual tendencies." (*Ibid.*) The detective did not bring up

the offense for which the defendant was in custody, "but by the end of the half-hour [the] defendant indicated that he would talk about the homicide." (*Ibid.*) The police then advised defendant of his *Miranda* rights, which the defendant expressly waived before confessing to the murder. (*Id.* at p. 159.)

The Supreme Court held that, under these circumstances, the defendant's waiver of his rights was involuntary and therefore invalid. (*Honeycutt*, *supra*, 20 Cal.3d at pp. 160-161.) The Court stated that "in making his decision to waive a suspect should have that knowledge of his rights afforded him by *Miranda*. The self-incrimination sought by the police is more likely to occur if they first exact from an accused a decision to waive and then offer the accused an opportunity to rescind that decision after a *Miranda* warning, than if they afford an opportunity to make the decision in the first instance with full knowledge of the *Miranda* rights." (*Id.* at p. 160.) "When the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id.* at pp. 160-161.)

Honeycutt is clearly distinguishable because in that case the defendant agreed to discuss the crime for which he had been arrested, thus waiving his right to remain silent, before the police had advised him of his rights. Here, in contrast, neither Toosbuy nor defendant even mentioned the crimes for which he had been arrested during their pre-advisements conversation, and defendant did not agree to talk with Toosbuy about those crimes

until after Toosbuy provided the advisements. Thus, defendant did not make a "decision to waive without a *Miranda* warning," unlike the *Honeycutt* defendant. (*Honeycutt*, *supra*, 20 Cal.3d at p. 160.)

Moreover, subsequent Supreme Court decisions have held *Honeycutt* squarely to its facts. For example, the Court declined to apply *Honeycutt* in a case missing *Honeycutt*'s "two salient features," namely pre-advisement discussion of " 'unrelated past events and former acquaintances" and "disparage[ment of] victims." (*People v. Scott* (2011) 52 Cal.4th 452, 478 (*Scott*).) In another case, the Court declined to apply *Honeycutt* when the police during the pre-advisement conversation did not discuss the victim and there was no evidence "that the manner in which [the police] engaged in small talk overbore defendant's free will." (*People v. Gurule* (2002) 28 Cal.4th 557, 603 (*Gurule*).)

The instant case also lacks *Honeycutt*'s "two salient features." Toosbuy did not discuss shared past events and acquaintances with defendant; indeed, Toosbuy and defendant had no prior relationship. She also did not disparage the alleged victim, whom she mentioned only briefly in asking defendant the age and location of his children. Moreover, we cannot conceive how such amicable conversation as occurred here might overcome a suspect's free will. Defendant argues that *Honeycutt* nowhere states that a police officer must disparage the victim for its holding to apply, but the presence or absence of such conduct is critical to the Supreme Court's interpretation of *Honeycutt* in later opinions, as reflected in *Scott* and *Gurule*.

We also note that the Supreme Court has held that police "may speak freely to a suspect in custody" in advance of advising him of his rights provided " ' "the speech would not reasonably be

construed as calling for an incriminating response." ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1086-1087.) Police may do so even if their intent is to "establish a rapport" with the suspect and convince him to view the police officers favorably; although this may be deceptive, it does not "establish that defendant's free will was overborne" such that any subsequent confession is invalid. (*Id.* at p. 1088.) Toosbuy's conduct complied with this authority.

We thus conclude that *Honeycutt* is inapplicable and defendant validly waived his *Miranda* rights.

2. Detective Toosbuy did not coerce defendant to confess with promises of leniency

Defendant argues that Toosbuy coerced his confession with implied promises that he would receive less punishment if he admitted to the allegations against him. We disagree.

" '[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.' " (*Wall*, *supra*, 3 Cal.5th at p. 1066.)

" 'However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police,

prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible." ' " (*People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*).)

Defendant identifies numerous portions of his police interview in which he contends Toosbuy implied that defendant would receive more lenient treatment if he confessed. For ease of analysis we group these statements by theme, and discuss each theme in turn.

a. Statements that defendant could move forward with his life by admitting to his crimes

Defendant identifies statements by Toosbuy suggesting that by "tak[ing] responsibility" he could "move forward" with his life. Toosbuy said, "after you've committed a mistake, okay, if you continue to deny and lie about it, it remains part of your future and it's just hanging there in front of you." Toosbuy continued, "But once . . . you admit it and take responsibility, you know what, it instantly becomes part of your past, and then you can try to move forward. Do you see what I'm saying? And that's why I'm here talking with you today. Because I want you to be able to take that and make it part of your past, okay." Defendant identifies other passages in which Toosbuy similarly encouraged defendant to admit to the allegations so he could "move forward."

Toosbuy also said "I want to be able to solve this problem, okay. And it is [a] problem until it's addressed and you take responsibility for it." Later, she said that "this is not going away until you take responsibility for it."

Defendant argues that by these statements, Toosbuy "implied that by admitting the allegations against him,

[defendant] could salvage his life and put the prosecution behind him—that he could make the whole thing go away." Because, defendant contends, he could not realistically put the matter behind him and move forward "unless the charges went away," Toosbuy's statements necessarily implied that if he confessed he would not be subject to a harsh penalty. Defendant also contends these statements implied "that there was a solution for [defendant] if he made a confession" and "admitting the allegations was the best way" for defendant to address those allegations. "This implied," argues defendant, "that [defendant] would receive the most benefit, and therefore be treated the most leniently, if he confessed."

We disagree with defendant's characterization of Toosbuy's statements. In context, it is clear that in referring to defendant "mov[ing] forward" or "solv[ing] this problem," Toosbuy was talking about defendant relieving his conscience and possibly rectifying his relationship with his daughter, the victim of his crimes. For example, after saying that if defendant did not "take responsibility to move forward . . . this will haunt [you] for the rest of your life," Toosbuy further said, "If you don't handle it, what's going to happen? It's never going to go away. It's always going to be there in [your] conscience nagging at your heart." Toosbuy also said, "I know that you want [your daughter] to be able to forgive you and be able to move forward, too. And I think a huge step for her was to come forward and tell me [what happened]. [¶] And the other huge step is for her to understand that you are going to take responsibility, okay."

It is permissible for an interviewing officer to "describe the moral or psychological advantages to the accused of telling the truth." (*People v. Carrington* (2009) 47 Cal.4th 145, 172

(*Carrington*).) Here, the only benefits Toosbuy specified were psychological and moral—a relieved conscience and reconciliation with defendant's daughter. In encouraging defendant to "move forward," Toosbuy never mentioned any potential legal consequences that he might avoid. (Cf. *People v. Jimenez* (1978) 21 Cal.3d 595, 611-612 [police implicitly promised leniency when they informed defendant he was at risk of the death penalty, then implied he could avoid that fate by confessing], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1404 [police implicitly promised leniency when "they specifically set forth the possibility of a firearm enhancement . . . and implied that [an interview subject] could reduce that possibility" by confirming certain facts].) Under those circumstances, we cannot conclude that Toosbuy " 'clearly implied' " a promise of leniency or legal advantage. (*Wall*, *supra*, 3 Cal.5th at p. 1066.)

For similar reasons, we hold it was not improper for Toosbuy to say, "This is not the time and place to start running away from the truth because it's not going to help you. It's really not going to help you." Defendant argues "[t]his was a representation that telling the truth would help [defendant's] situation but, more importantly, that if he did not make a full confession, he would suffer for it." Again, in the absence of any suggestion that Toosbuy was referring to something other than the psychological and moral benefits of telling the truth, benefits she expressly identified earlier in the interview, we disagree that this statement was a " 'clearly implied promise of leniency or advantage.' " (*Wall*, *supra*, 3 Cal.5th at p. 1066.)

b. Statements that others would want an explanation for defendant's crimes

Toosbuy told defendant that "when a group of people take a look at this," they would wonder whether defendant molested his daughter for "shits and giggles" or for some other reason, such as defendant's difficult relationship with his daughter's mother or his financial troubles. Later, she said it was important "for anybody who looks at this from the outside" to be able to understand how defendant "got into this situation." Defendant argues that "a group of people" referred to "the prosecution, the members of the criminal justice system or even the jury," and Toosbuy's statements implied "that if [defendant] had a good enough explanation for the alleged conduct, he would be treated less harshly."

Even accepting this characterization, Toosbuy's statements were proper under *Holloway*, *supra*, 33 Cal.4th 96. In that case, police suggested to a suspect that the killings of which he was accused "might have been accidental or resulted from an uncontrollable fit of rage during a drunken blackout, and that such circumstances could 'make[ ] a lot of difference.' " (*Id.* at p. 116.) The Supreme Court held that this "f[e]ll far short of being promises of lenient treatment in exchange for cooperation." (*Ibid.*) "To the extent [the officer's] remarks implied that giving an account involving blackout or accident might help defendant avoid the death penalty, he did no more than tell defendant the benefit that might ' "flow[ ] naturally from a truthful and honest course of conduct" ' [citation], for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision." (*Ibid.*)

The Court acknowledged that "[t]he line 'can be a fine one' [citation] between urging a suspect to tell the truth by factually outlining the benefits that may flow from confessing, which is permissible, and impliedly promising lenient treatment in exchange for a confession, which is not." (*Holloway*, *supra*, 33 Cal.4th at p. 117.) The Court concluded, however, that the officers had not "crossed that line by mentioning a possible capital charge or suggesting that defendant might benefit in an unspecified manner from giving a truthful, mitigated account of events." (*Ibid.*)

Here, also, at most Toosbuy's statements implied that if defendant provided a truthful account that mitigated his conduct, he might be regarded more favorably by the unspecified "group of people," which in turn might lead to some unspecified benefit. In so suggesting, Toosbuy did not promise leniency in exchange for a confession, but merely outlined the benefits of telling the truth. (*Holloway*, *supra*, 33 Cal.4th at p. 117.)

c. Statements regarding counseling and posting bail

Toosbuy said she thought defendant needed psychological counseling, which defendant argues "held out the possibility that counseling may be the primary sanction appellant would receive." Toosbuy also told defendant he had "the possibility of bailing out" of jail. Defendant contends that Toosbuy knew that given the seriousness of defendant's alleged crimes he would be unlikely to be able to afford bail, and therefore she was suggesting "that [defendant] could be subject to more lenient treatment than actually was possible."

We reject defendant's characterization of these statements. Stating that defendant needed counseling did not suggest that he

also would not be subject to criminal penalties. Stating that defendant had a possibility of posting bail was accurate, even if under the circumstances it was unlikely he would be able to do so. Regardless, even accepting that these statements suggested that in Toosbuy's opinion defendant should receive a light penalty, there was no implication that the reduced penalty was contingent on his cooperation.

In his reply brief, defendant also identifies statements by Toosbuy in which she described possible outcomes when a case goes to court, including jail, probation, or "walk[ing]." Defendant argues that this also was an implied promise of leniency. We reject this argument for two reasons. First, in context it was evident Toosbuy was speaking generally, because she referred to the "hundreds and hundreds of cases" she had presented and said, "they don't all turn out the same." Shortly thereafter, she said, "Which [it] is going to be for you, I have no idea." At no point did she say or imply that a particular outcome depended on defendant's cooperation.

Second, "[a]n improper promise 'must be causally linked' to the defendant's confession to warrant exclusion under the Fifth Amendment." (*Wall*, *supra*, 3 Cal.5th at p. 1066.) Toosbuy made the statements about possible outcomes after defendant had already confessed to sexually abusing his daughter. Thus, even if we could interpret her statements as promising leniency in exchange for cooperation, those statements could not have caused him to confess.

d. Statements purportedly minimizing or excusing defendant's misconduct

Defendant identifies portions of the interview in which Toosbuy purportedly implied that, from the perspective of "the

legal authorities" (this is defendant's term), defendant's actions were excusable or less serious than they actually were, and that he was not a bad or evil person. Accepting this characterization as accurate for the sake of argument, we fail to see how such statements imply a promise of leniency in exchange for cooperation.

Defendant argues that by these statements Toosbuy was suggesting she was trying to help him, and that defendant "would be given a chance to redeem himself and salvage his life if he would admit Karen's allegations." Defendant contends that the only way Toosbuy could help him would be "[b]y doing her best to see that he was not treated harshly," and therefore her implied promises of aid necessarily also promised more lenient treatment.

We see no promise of aid, implied or otherwise, in statements merely minimizing or excusing defendant's actions. Moreover, as we have discussed, to the extent Toosbuy suggested she wished to help defendant, it was to achieve the psychological and moral benefits of telling the truth, in this case relieving his conscience and reconciling with his daughter. This did not constitute a promise of leniency. (*Carrington*, *supra*, 47 Cal.4th at p. 172.)

C. Defendant Fails To Show That The Trial Court Did Not Instruct The Jury On The Elements Of The Charged Offenses

Defendant asserts that the trial court neglected to instruct the jury orally on the elements of the offenses of which he was charged. As we discuss further below, those instructions were not included in the reporter's transcript on appeal. However, there are indications in other portions of the record that the trial

court read the instructions to the jury. We therefore conclude defendant has failed to show error.

1. Additional background

The reporter's transcript for the morning session of trial on March 29, 2017 reflects the following: the trial court discussed the proposed jury instructions with counsel outside of the presence of the jury. The trial court stated its intention to instruct the jury with the relevant instructions numbered between CALCRIM Nos. 200 and 370 and then dismiss the jury for a break while the court and counsel edited and discussed the "final charging instructions."

The trial court then brought in the jury and read the instructions through CALCRIM No. 370. The instructions read by the court did not include the instructions on the charged offenses or the lesser offenses, which numbered between CALCRIM Nos. 1082 and 3517. The court told the jury, "I still have to go through the remaining instructions with the attorneys and read them to you after editing." The court stated, "I will have you come back in half-an-hour and that will give me enough time [to] get them done." The court dismissed the jury, instructing them to "please be outside the doors at 11:15."

The reporter's transcript does not contain any further morning proceedings, including any proceedings taking place after 11:15.[4] The transcript resumes with the afternoon session on March 29. The transcript reflects that the trial court began

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[4] The record does not indicate whether these proceedings are missing from the reporter's transcript because they were never transcribed, or because they were transcribed but not included in the record on appeal for some unknown reason.

the afternoon proceedings by reading a revised version of CALCRIM No. 252, one of the instructions between CALCRIM Nos. 200 and 370 that it previously had read to the jury during the morning session, but gave no further instructions, including any instructions regarding the charged and lesser offenses. The parties then gave their closing arguments, which were transcribed.

During closing, the prosecution stated, "[Y]ou have heard some various jury instructions on various charges. In counts 1, 2, 3, 8 and 9 the defendant is charged with continuous sexual abuse, and this is the instruction that you will also have in the back." The prosecution then discussed the elements of that charge, followed by the elements of oral copulation with a child under 10 years old.

Defense counsel, in his closing, stated, "You were given an instruction, 1128, on these counts, these are counts 4, 5, and 6, and this instruction provides you with the elements that need to be proven beyond a reasonable doubt for this charge as to these counts." Later, defense counsel stated, "you have been provided with lesser charges" including oral copulation with a person under the age of 18, and referred to CALCRIM No. 1082. Shortly thereafter, defense counsel stated, "you have also been given an instruction on the lesser charge of lewd act with a child under the age of 14."

After the parties completed their closing arguments, the trial court provided final instructions to the jury regarding the process of deliberating and returning a verdict. Those instructions were included in the reporter's transcript. The trial court did not instruct the jury regarding the charged and lesser offenses at this time.

The record indicates the trial court provided the jury with written instructions including the instructions for the charged and lesser offenses. Defendant does not challenge the written instructions.

2. Analysis

Defendant argues that because the reporter's transcript does not contain the trial court's reading of the instructions on the charged and lesser offenses, the trial court never read those instructions to the jury. Defendant argues this was reversible error, citing *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 (*Murillo*). In *Murillo*, the trial court provided a full set of written instructions to the jury, but inadvertently failed to read one of the instructions orally. (*Id.* at pp. 1106-1107.) Division Four of this court held that if a trial court "fails to read an instruction it had said it would use," then "it is not possible to determine if the jurors actually read their written copy" of the instruction. (*Id.* at p. 1107.) Under those circumstances, the reviewing court must assume the jurors did not read the written instruction, and "approach the case as though the instruction was not given at all." (*Ibid.*)

Murillo is inapplicable here. It is evident from the reporter's transcript of the closing arguments and the proceedings earlier that day that the trial court read the instructions on the charged and lesser offenses, even if we have no transcript of that reading in the record on appeal. The trial court stated it would read the instructions, taking a short break beforehand to work out the final instructions with counsel. Although the reporter's transcript does not include any morning proceedings following that break, during the afternoon session the prosecution and defense counsel referred to the instructions

for both the charged and lesser offenses during closing arguments, and defense counsel identified the CALCRIM number for two of them. Counsel told the jury "[y]ou have heard" or "[y]ou were given" the instructions, indicating the jury received the instructions before closing argument began, that is, sometime before the afternoon session. The logical conclusion is the trial court did as it said it would, reconvening the jury in the late morning after a short break and instructing them on the charged and lesser offenses.

Defendant argues that when counsel referred to the instructions in closing argument, they may have been referring to the written instructions rather than the trial court's oral instructions. This is improbable given the prosecution's statement that the jury "ha[d] heard" the instructions. The only reasonable conclusion is that the trial court read the instructions for the charged and lesser offenses aloud.[5]

D. The Sentencing Minute Order And Abstract Of Judgment Incorrectly Omitted Defendant's Presentence Credits

During sentencing on June 27, 2017, the trial court awarded defendant 517 days of custody credits and 77 days of conduct credits for a total of 594 days of presentence credits. Those credits are not reflected in the minute order of the sentencing hearing, and the abstract of judgment lists zero total

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[5] Defendant claims the purported errors in admitting his statement to the police and failing to instruct the jury properly resulted in cumulative prejudice justifying reversal. Because we conclude the trial court did not err in either regard, we similarly find no cumulative prejudice.

credits. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) We thus direct the trial court to conform the minute order and abstract of judgment to its oral pronouncement.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the June 27, 2017 minute order and the abstract of judgment to indicate an award of 517 days of custody credits and 77 days of conduct credits. The trial court shall forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, J.*

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