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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALON ONEIL FOSTER,

Defendant and Appellant.

B284966

Los Angeles County  
Super. Ct. No. MA064946

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Strassner, Temporary Judge (see Cal. Const., art. VI, § 21). Affirmed as modified.

Patrick J. Hoynoski, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Alon Oneil Foster appeals from a conviction for domestic violence. Appellate counsel filed a brief in which he raised no issues and asked us to review the record independently under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Our review of the record revealed an unauthorized \$500 domestic violence fee under Penal Code section 1203.097. We therefore modify the judgment to strike it. We also direct the trial court to correct the sentencing minute order to reflect the deletion of this fee and to correct a typographical error. As modified, we affirm the judgment.

## PROCEDURAL BACKGROUND

By information filed April 18, 2017, defendant was charged with one count of kidnapping (Pen. Code, § 207, subd. (a));<sup>1</sup> count 1) and one count of domestic violence (§ 273.5, subd. (a); count 2). The information alleged that defendant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) and had a prior strike conviction (§ 667, subds. (b)–(j) and § 1170.12, subd. (b)). Defendant moved to bifurcate his strike prior and waived his right to a jury trial on the prior conviction allegation.

On August 1, 2017, the jury found defendant not guilty of kidnapping but guilty of domestic violence. The jury found the great bodily injury allegation not true. After the jury was

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

discharged, defendant admitted his prior conviction in case No. MA013670 from April 18, 1997.

Before sentencing, defendant's trial counsel moved to dismiss his prior strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. On August 17, 2017, after denying the *Romero* motion, the court sentenced defendant to eight years in state prison. The court selected the high term of four years, doubled to eight years due to the prior strike conviction. (§ 667, subds. (b)–(i); § 1170.12, subds. (a)–(e)). The court imposed a \$300 restitution fine (§ 1202.4, subd. (b)), a \$300 parole/post-release community supervision/mandatory supervision restitution fine<sup>2</sup> (§ 1202.45), a \$40 court operations assessment fee (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373), and a \$500 domestic violence fee (§ 1203.097).

Defendant filed a timely notice of appeal and we appointed counsel to represent him. On March 19, 2018, appellate counsel filed a brief in which he raised no issues. (*Wende, supra*, 25 Cal.3d at p. 441.) We notified defendant that his counsel had failed to find any arguable issues and that he had 30 days to submit by brief or letter any arguments he wished this court to consider. We have not received a response from defendant. After reviewing the record, we asked the parties to address whether the court could impose a \$500 domestic violence fee under section 1203.097 on a defendant sentenced to state prison.

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<sup>2</sup> This fine was stayed unless parole, post-release community supervision, or mandatory supervision is revoked.

## **FACTUAL BACKGROUND**

At around 1:00 a.m. on November 24, 2014, Sheila A. and defendant, who had been dating on and off for years, drove to the Food 4 Less in Palmdale in Sheila's car to get food. Sheila was the driver. Defendant became upset during the drive. Once they got to the Food 4 Less parking lot, Sheila got out of the car and ran. Fearing for her safety, she banged on the door of the Food 4 Less to ask for help, but the store was closed. When Sheila walked away, defendant pulled her by her hair and jacket towards the car, removing a chunk of her hair. According to Sheila, she voluntarily got in the passenger seat of her car, with defendant in the driver's seat.

While driving away, defendant slapped Sheila in the face, hurting her and breaking her glasses. Defendant also put his forearm around her neck and squeezed, strangling her; Sheila begged him to stop. When defendant released his grip and slowed down the car, Sheila jumped out of the moving vehicle, landing on her hands and knees. Unable to see in the dark and without her glasses, she crawled to a fence to hide, fearing for her life and hoping to be rescued. Eventually, defendant drove back to where Sheila was hiding, and Sheila got in the car because she wanted to go home. Back in the car, defendant strangled her again and punched her repeatedly in the face.

Aaron P., Sheila's brother-in-law and next-door neighbor, received multiple calls from Sheila that night, the first of which was placed when Sheila was at the Food 4 Less. Aaron testified that on these calls, he heard screaming and punching, which had prompted him to call the police. When defendant and Sheila arrived at Sheila's home, Sheila called Aaron again and asked him to come over, which he did.

At Sheila's house, Aaron encountered defendant and Sheila, where he saw that Sheila had visible injuries. After a confrontation between defendant and Aaron, Sheila and her son went to Aaron's house. Aaron called the police again, and defendant left the area.

That night, paramedics took Sheila to the hospital. There, Renee Withers, a nurse in the forensic services unit who testified in this case, conducted a forensic examination of Sheila. Throughout the examination, in which Withers documented Sheila's injuries and interviewed her, Sheila was crying and angry, repeatedly saying she did not want to die. Withers determined Sheila's injuries were consistent with her account of being punched, being strangled, having her glasses broken, and jumping out of a moving car. Specifically, Sheila had bruising on her face, a swollen eye, linear abrasions on her neck and face, missing hair on her head, and difficulty swallowing.

In court, Sheila testified defendant hit her only once and that she did not remember whether he did anything to her throat. She could not remember why defendant hit her or the accounts she gave to Aaron and Withers. Sheila also testified that all of her injuries were sustained from her glasses breaking and from jumping out of the car. However, according to Withers's testimony, Sheila's injuries could not have come from being struck just once or just from falling out of the car. Instead, her injuries were consistent with being hit repeatedly, strangled, and jumping out of a car. And although Sheila testified she was very drunk that night, Sheila told Withers she had only had two mixed drinks, and Withers did not notice any signs of intoxication during the forensic examination.

## DISCUSSION

“In passing sentence, the court has a duty to determine and impose the punishment prescribed by law.” (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) An unauthorized sentence may be challenged “for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court.” (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; see also *People v. Smith* (2001) 24 Cal.4th 849, 854 [trial court’s erroneous imposition of a parole revocation fine may be corrected on appeal].)

Our review of the record revealed that the sentencing minute order and the abstract of judgment include a \$500 domestic violence fee under section 1203.097.<sup>3</sup> A fee may be imposed under this statute only when a defendant is “granted probation.” (§ 1203.097, subd. (a); see also *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.) Here, however, defendant was denied probation and sentenced to state prison. Because defendant was not placed on probation, the \$500 fee imposed under section 1203.097 was not authorized by law and must be stricken.

We also note that the sentencing minute order of August 17, 2017, indicates that defendant’s prison term would be “doubled pursuant to Penal Code sections 667(b) through (l) and 1170.12(a) through (e).” But section 667’s final subdivision is (j), and only section 667, subdivisions (b)–(i) apply in this case. Accordingly, the minute order should be amended to correctly denote subdivisions (b)–(i) of section 667.

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<sup>3</sup> At the sentencing hearing the court orally imposed a “domestic-violence payment of \$500.”

Having undertaken an examination of the entire record pursuant to *Wende*, we find no other “arguable error that would result in a disposition more favorable to defendant.” (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 930.)

## **DISPOSITION**

The judgment is modified to strike the \$500 domestic violence fee imposed under section 1203.097. The trial court shall correct the minute order for August 17, 2017, to reflect deletion of this fee and to reflect that defendant's sentence was imposed under section 667, subdivisions (b)–(i). As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these changes and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, 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.