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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ERICK VIVEROS,

Defendant and Appellant.

2d Crim. No. B275791
(Super. Ct. No. 2013023875)
(Ventura County)

Erick Viveros appeals from the judgment entered after a jury had convicted him of sexual offenses committed against two children - Y. and A. - who were under the age of fourteen years. The convictions were for one count (count 1) of forcible sodomy (Pen. Code, § 286, subd. (c)(2)(B))[1] and five counts (counts 3-7) of commission of a lewd act. (§ 288, subd. (a).) Appellant was acquitted of committing a lewd act as charged in count 2. The jury found true allegations that he had committed the offenses

[1] All statutory references are to the Penal Code unless otherwise stated.

against more than one victim. (§ 667.61, subds. (b), (c), (e)(4).) He was sentenced to prison for 75 years to life and was ordered to make direct restitution of $200,000 to each of the two children.

Appellant contends that (1) the police interrogated him in violation of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]); (2) his confession was involuntary; (3) the trial court erroneously admitted evidence of uncharged sexual acts committed by his brother and nephew; (4) the trial court had a duty to instruct the jury sua sponte not to speculate why other persons (e.g., his brother and nephew) have not been charged with a crime; (5) the trial court erroneously admitted evidence of unadjudicated sexual offenses committed by him when he was under the age of 14 years; (6) the fines, fees, and direct victim restitution ordered by the trial court were improperly imposed and must be stricken; (7) the order of direct victim restitution violated his right to a jury trial pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; and (8) the trial court erroneously calculated his presentence custody credits. Only the last contention has merit. We recalculate appellant's presentence custody credits and affirm the judgment in all other respects.

Evidence Presented at Trial

Y. was born in February 2004. At the time of trial in February 2016, she was 12 years old. Appellant is her uncle. At the beginning of 2013, Y. was alone watching television in her living room. Over her clothing, appellant touched her vaginal and anal area. She told a detective: "[H]e just throwed me on the ground. . . . [H]e wanted to take my pants, but I took his hand off." This was the basis of count 3.

On another occasion, appellant got behind Y. while she was standing outside on a patio. He touched her buttocks over her clothing. Y. told him to stop, but he kept doing it. Appellant pulled her inside and tripped her with his feet. She fell to the ground. He pulled her pants down and put his penis inside her anus. Y.'s anal area was purple and red. It "really hurt" when she defecated. This act of forcible sodomy was the basis of count 1.

Count 4 was based on the forcible touching of Y.'s buttocks. Appellant got behind her and with his hand "squished" her buttocks "really hard and it hurt." Appellant did not remove her pants. "[H]e just put his hand in. And then he just squished it."

At a sleepover party when Y. was in third grade, appellant kissed her on the mouth. Y. told a detective that appellant and his younger brother, J., were "pulling pants down, touching butts" with their hands. Only appellant touched her buttocks. During closing argument, the prosecutor said that "Count 5 is for the conduct against [Y.] during the sleepover."

A. was born in September 1999. At the time of trial, she was 16 years old. Appellant is her uncle. When A. was six to eight years old, appellant forced her to engage in sexual intercourse. He was not charged with this offense.

In December 2011, A. went hiking with her family, including appellant. She ran ahead of everyone. Appellant caught up to her, grabbed her from behind, "dry humped" her, turned her around, grabbed her buttocks, and forced his tongue inside her mouth. When he "dry humped" her, his penis under his clothing was touching her clothed buttocks. This was the basis of count 6.

At the same sleepover party during which appellant kissed Y. on the mouth, appellant put his fingers and penis inside A.'s anus. These acts were the basis of count 7.

Alleged Miranda Violation

Without giving *Miranda* warnings, police officers questioned appellant at length. He confessed to having committed numerous sexual acts against children. Appellant claims that, because he was in custody, the questioning violated *Miranda*. We disagree.

Facts Relating to the Questioning

The following facts are based on evidence presented at a pretrial hearing conducted pursuant to Evidence Code section 402. The evidence included a video recording and 152-page transcript of appellant's questioning. At trial the video recording was played for the jury and the transcript was received in evidence.

Detectives Escalante and Chacon went to the front door of appellant's residence. Detective Dobrosky was nearby, "keeping an eye on one of the picture windows." They were dressed in "business attire with jackets." Escalante knocked on the door, and appellant opened it. Escalante identified herself. She asked appellant "if he would come out to talk with us." She said she "wanted to talk to him about [Y.], his niece." Escalante did not say that he had to talk to her.

Appellant, who was 19 years old, came outside. Escalante said that she "really wanted to talk to him at the police station, and he agreed to go." Escalante asked if he had transportation. Appellant replied that he did not. "[S]o [she] offered him a ride, and he accepted." Escalante did not say that he was under arrest.

Appellant inquired if he could go inside the residence and get his wallet. Detective Dobrosky asked family members to retrieve the wallet. Dobrosky said to appellant, "'No, we can have them bring your wallet.'" When appellant's mother started sobbing and hugging appellant, Detective Escalante told her: "'You're being too dramatic for me.'" "'We've got to take him.'"

Detective Escalanate drove appellant to the police station in an unmarked vehicle. She led him to an interview room. When Detective Dobrosky entered the room, Escalante left. Detective McArthur was also present in the interview room.

Before the questioning began, Detective Dobrosky said to appellant, "[T]hank you for coming down here on your own free will." Dobrosky closed the door to the interview room and "demonstrated that it opened from the inside." He stated, "[T]his is not locked or anything like that." Appellant said it was "okay" to close the door.

Dobrosky asked appellant if he understood that he was not under arrest. Appellant responded, "Yes." Dobrosky continued, "[S]o pretty much what that means is you're free to leave at any time. . . . You understand that? Appellant replied, "Yeah." Dobrosky declared, "[Y]ou can also decide which answer or which questions you want to answer." Appellant said, "Okay."

Appellant immediately admitted that he had sexually molested his niece, Y., by "grabbing her butt" for "a couple years." When he did this, he would get an erection. Appellant said that he had not done anything else sexual to Y., who at the time of the questioning was about 10 years old. Detective Dobrosky responded, "I know there's something a little more that you're not telling me. . . . [T]here's something that you're kind of holding back on, and I understand that." Appellant admitted that he had

put his fingers inside Y.'s vagina and anus. He had touched her there every weekend for the past four years.

Detective McArthur said that appellant was lying. He asked appellant to "get it all out there." Appellant said that two months ago he had put his penis inside Y.'s anus. A year earlier, when he was 18 and his niece A. was about 12 or 13 years old, appellant, his younger brother J., and his nephew N. took "turns" having anal intercourse with A. At that time J. was 16 and N. was 17 years old. On another occasion within the past year, appellant "humped" A., reached "through her clothes," and touched "her vagina and her ass." Appellant said he "would just like hump her on a daily . . . basis." Three years ago he kissed and "humped" another niece who at the time of the questioning was 15 years old. Appellant acknowledged that he was "turned on by the little girls." He said: "It's wrong. I need help. That's for sure."

Appellant asked, "Am I going to get arrested for this?" The detectives did not answer his question. A few minutes later, Detective Dobrosky told appellant that he was under arrest. Dobrosky read the *Miranda* warnings. Appellant said that Dobrosky could continue questioning him.

At the Evidence Code section 402 hearing, appellant testified as follows: When the police arrived at his residence, "They just told me if I wanted to talk to them about [Y.]." Detective Escalante offered to give him a ride to the station and said, "We could also give you a ride back later." Appellant said, "Okay." He went to the station because he was scared and "felt [he] had to go with the police." During the questioning, he did not believe he was free to leave. "I thought that if I would leave, they would just arrest me right away." But Detective Dobrosky

said he was "free to leave at any time." Dobrosky "seemed pretty pleasant" during the questioning.

Trial Court's Ruling

The trial court concluded: "I really don't think we get close to a *Miranda* violation here." "I don't think a reasonable person under similar circumstances would come to the conclusion that they were in custody."

Miranda Warnings Were Not Required

" 'Before being subjected to "custodial interrogation," a suspect [must be given *Miranda* warnings, i.e., he] "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."' [Citations.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400.) "An interrogation is custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] The test for *Miranda* custody is, "'would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."' [Citation.] The objective circumstances of the interrogation are examined, not the "'subjective views harbored by either the interrogating officers or the person being questioned."' [Citation.]" (*People v. Kopatz* (2015) 61 Cal.4th 62, 80.) "In deciding the custody issue, the totality of circumstances is relevant, and no one factor is dispositive. [Citation.]" (*People v. Boyer* (1989) 48 Cal.3d 247, 272, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's determination that a defendant did not undergo

custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1400.)

Appellant was not subjected to custodial interrogation. A reasonable person in his position would have felt free to end the questioning and leave. Detective Escalante asked appellant to go to the station. She did not demand that he go there. She gave him the option of driving to the station in his own vehicle. When appellant said he did not have transportation, she offered him a ride. Appellant could have declined the offer.

When appellant asked to get his wallet, Detective Dobrosky replied that family members would bring it. Dobrosky's reply did not transform the encounter into a custodial situation. We agree with the trial court's reasoning: "The wallet statement doesn't really push me towards the conclusion that it is custodial . . . . I think that a reasonable interpretation of that is that law enforcement doesn't want somebody that's being questioned to go in the house. They might get a weapon."

When appellant's mother started sobbing and hugging appellant, Detective Escalante told her: "'You're being too dramatic for me.'" "'We've got to take him.'" Escalante's statements would not have led a reasonable person in appellant's position to believe that he was not free to leave. The statements were directed at the mother, not appellant. He had already consented to go to the police station. A reasonable person would

have interpreted the statements as designed to stop mother from interfering.

Before the questioning began, Detective Dobrosky made sure appellant understood that he was not under arrest, that he was free to leave at any time, and that the door to the interview room was unlocked. He "demonstrated that [the door] opened from the inside." Appellant said it was "okay" to close the door. After appellant had confessed, he asked, "Am I going to get arrested for this?" His question shows he understood that he was not yet under arrest and therefore not yet in custody.

Accordingly, based on the totality of the circumstances, we conclude that *Miranda* warnings were not required because appellant was not subjected to custodial interrogation.

Voluntariness of Confession

Irrespective of whether a *Miranda* violation occurred, appellant argues that his confession was involuntary. "A criminal conviction may not be founded upon an involuntary confession. [Citation.] 'The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. [Citations.] In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his . . . will was overborne."' [Citation.] . . . '"On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review."' [Citation.]' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 436.)

Appellant asserts, "Based on appellant's lack of sophistication and Dobrosky's ploy to extract from appellant more

and more incriminating statements, this court should conclude appellant's will was overborne and the statement was not voluntary." The issue is forfeited because in the trial court appellant did not object on this specific ground. "A judgment will not be reversed on grounds that evidence has been erroneously admitted unless 'there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion . . . .*' (Evid.Code, § 353, subd. (a). Emphasis added.) Specificity is required both to enable the [trial] court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854; see also *People v. Williams*, *supra*, 49 Cal.4th at p. 435 ["A defendant ordinarily forfeits elements of a voluntariness claim that were not raised below"].)

Furthermore, appellant did not obtain a ruling on the voluntariness of his confession. The trial court's ruling was limited to the *Miranda* issue: "It was not a custodial interrogation. [¶] So my ruling is that there was no *Miranda* violation." Appellant did not ask the court to rule on whether his confession was voluntary. "Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance. [Citation.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 481, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920 & fn. 3; see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

Appellant has also failed to show that his confession was involuntary. "'Voluntariness does not turn on any one fact, no

matter how apparently significant, but rather on the "totality of [the] circumstances.'" [Citations.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 267.) In his reply brief appellant notes, "The officer's [*sic*] never threatened appellant, they spoke politely, they never yelled, they asked appellant if he wanted food or drink or wanted to use the bathroom." The confession was not involuntary because Detective Dobrosky allegedly used a "ploy to extract" incriminating information from appellant. "'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable."' [Citations.]" (*People v. Cunningham* (2015) 61 Cal.4th 609, 643.) There is no evidence that Dobrosky used such a ploy. "[T]he totality of the circumstances of the interrogation support the conclusion [appellant's] statements . . . were voluntary and not the product of psychological inducement." (*Ibid*.)

Sexual Acts Committed by Appellant's Brother and Nephew

Appellant contends that the trial court erroneously admitted A.'s testimony concerning sexual assaults committed against her by appellant's brother, J., and nephew, N. The assaults were committed during the sleepover when A. was in sixth grade. Appellant also contends that the court erroneously admitted evidence of an act of masturbation committed by N. in A.'s and appellant's presence.

A.'s Testimony

A. was lying in the same bed with Y. and L., appellant's cousin. L. was born in 2003. Appellant came into the bedroom and kissed Y. and L. on the lips. A. said, "'Stop, they're really young.'" Appellant put his tongue inside A.'s mouth, removed her

pajama bottoms, and put his fingers inside her anus. Appellant removed his pants, got behind A., and "[s]tarted penetrating" her with his penis. A. "told him it was hurting." Appellant "went on for a little longer and then stopped." He put his clothes on and went into the living room.

N. "came into the room, . . . and [appellant] was on watch to make sure no one [else] came into the room." N. pulled down A.'s pajama bottoms and put his penis inside her anus. Later that night, N. again entered the bedroom and put his penis inside her vagina. N. left and J. entered the bedroom. J. put his fingers inside A.'s vagina. He unsuccessfully tried to put his penis inside her anus.

On another occasion when she was about 10 years old, A. went to a park with N. and appellant. N. masturbated, ejaculated into a shirt, and threw the shirt at A.'s hair.

Forfeiture and Claim of Ineffective Counsel

Appellant acknowledges that his counsel did not object to the admission of the evidence in question. In the absence of an objection, appellant has forfeited his claim that the trial court erroneously admitted the evidence. (Evid. Code, § 353, subd. (a).)

Appellant claims that, because his counsel did not object or request a limiting instruction, he was denied his constitutional right to effective assistance of counsel. The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense."

As to the evidence of N.'s and J.'s sexual assaults against A., appellant has failed to show that counsel's performance was

deficient. Counsel knew that the trial court had ruled that appellant's confession was admissible. In his confession, appellant made clear that he, N., and J. had been acting in concert. Appellant said that N. was "the first one to take off [A.'s] pants" and "have sex with her." At that time, appellant was "[r]ight there" in the bedroom. Appellant continued: "And then after I saw that he, he could, like, fuck[] her, I went after that." "I went, like, oh, okay. I'm gonna do that shit too." When appellant had finished, J. went after him. "We would take turns" having sex with A. All three of them "did it in her ass" a "couple of times."

Thus, counsel could have reasonably concluded that the sexual assaults by J. and N. were admissible because they were inextricably intertwined with appellant's assault of A. Counsel also could have reasonably believed that the evidence was admissible to show that appellant had aided and abetted the sexual assaults by J. and N. A. testified that, when N. "came into the room," appellant "was on watch to make sure no one [else] came into the room." "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.)

As to A.'s testimony concerning an act of masturbation committed by N., we need not determine whether counsel was deficient in failing to object or request a limiting instruction. The evidence was not prejudicial. To prove prejudice, appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v.*

Washington, *supra*, 466 U.S. at p. 694.) The admission of the masturbation evidence does not undermine our confidence in the outcome.

No Duty to Instruct Sua Sponte Pursuant to CALCRIM No. 373

Appellant argues that the trial court had a duty to give CALCRIM No. 373 sua sponte. The purpose of the instruction is to prevent the jury from speculating why other persons (e.g., N. and J.) have not been charged with a crime. CALCRIM No. 373 provides: "The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has/those other persons have) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged."

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] . . . .'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Appellant has not shown that CALCRIM No. 373 is a "general principle[] of law relevant to the issues raised by the evidence" and "necessary for the jury's understanding of the case." (*Ibid.*) The Bench Notes for CALCRIM No. 373 state, "The

court has no sua sponte duty to give an instruction on unjoined co-participants . . . ."

Appellant claims that his counsel was ineffective for not requesting CALCRIM No. 373. The claim fails because appellant has not shown that he was prejudiced by counsel's silence. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) In view of appellant's confession, the absence of the instruction does not undermine our confidence in the outcome. (*Id*. at p. 694.)

Admission of Sexual Offenses Committed by Appellant When He Was Under the Age of 14 years

Appellant contends that, pursuant to Evidence Code section 1108, the trial court erroneously admitted evidence of unadjudicated sexual offenses committed by him when he was under the age of 14 years. Section 1108 permits the admission of evidence of other sexual offenses to show propensity "if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."[2] (*Id*., subd. (a).) The most serious unadjudicated sexual offense was appellant's forcible rape of A. when she was six to eight years old. Appellant is six years older than A. Thus, appellant was 12 to 14 years old when the rape occurred.

Appellant maintains that the unadjudicated sexual offenses were inadmissible pursuant to *People v. Cottone* (2013) 57 Cal.4th 269. There, our Supreme Court held "that the presumption of incapacity set forth in Penal Code section 26(One) applies when

[2] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

the prosecution seeks to prove that the defendant committed an unadjudicated sexual offense before reaching age 14. The presumption must be overcome before the evidence may be admitted." (*Id*. at p. 281.) The court further held "that upon the defendant's timely objection, the trial court must find by clear and convincing evidence that the defendant had the capacity to commit an unadjudicated juvenile offense before admitting that evidence under section 1108." (*Id*. at p. 292.)

The issue is forfeited because, although defense counsel objected, he did not object on the ground stated in *Cottone*. (Evid. Code, § 353, subd. (a).) Counsel was unable to cite any case authority in support of his objection. He said, "I think that the Court is riding on a blank slate here." Neither the trial court, the prosecutor, nor defense counsel, was aware of *Cottone*, even though it had been decided more than two years earlier.

Appellant claims that he was denied his constitutional right to the effective assistance of counsel. Appellant has failed to show that he was prejudiced by counsel's allegedly deficient performance. In view of appellant's confession, our confidence in the outcome is not undermined by the admission of unadjudicated sexual offenses committed by him when he was under the age of 14 years. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Fines, Fees, and Victim Restitution

The probation report contains a list of recommendations, including appellant's payment of fines, fees, and direct restitution of $200,000 to Y. and $200,000 to A. pursuant to section 1202.4. The court said that it had "read and considered the report." After imposing a prison term of 75 years to life, the court stated, "Each of the other terms listed in the [probation] report will be

imposed." The court did not specify these "other terms." Appellant did not object.

A minute order and the abstract of judgment show that the court imposed the fines, fees, and victim restitution recommended by the probation report. But appellant claims that they were "not actually imposed by the trial court at the time of sentencing." Thus, they "must be stricken and the matter remanded to the trial court for a reasoned consideration and a clear and complete oral recitation on the record." Appellant continues: "The clerk chose to interpret the trial court's vague reference to 'terms' in the 'report' as a reference to every suggestion for a fine set forth by the probation officer . . . . [¶] . . . [M]any of the 'recommendations' by the probation officer involved either discretionary choices by the trial court as to amounts, or the court's discretion whether to impose or not impose certain fines." "To allow the fines to survive scrutiny when there is no indication imposition [of] each fine was the result of an actual exercise of the trial court's discretion would be a deprivation of due process and [the] right to be present during the imposition of judgment." Moreover, where, as here, "the fines and fees are not actually imposed by the trial court at the time of sentencing," a defendant's "constitutional right to have representation of counsel at sentencing . . . has been abridged." Finally, as to the direct restitution order of $200,000 to each victim, appellant maintains, "The trial court's failure to demonstrate a rational basis for the awards deprived appellant of due process requiring the restitution awards be reversed."

We reject appellant's argument that at the time of sentencing the trial court did not actually impose the fines, fees, and victim restitution recommended by the probation report.

When the court sentenced appellant to 75 years to life and then said, "Each of the other terms listed in the [probation] report will be imposed," it must have been referring to the recommended orders listed in the report. There are no other "terms" in the report to which the court could have been referring. The prosecutor asked, "He is ordered to register [as a sex offender] pursuant to [section] 290 as required by law[?]" The court replied, "That's one of the terms in the report." The report's recommendation that appellant register as a sex offender is included in the same list as the recommendation that he pay fines, fees, and direct victim restitution.

The People contend that, because appellant did not object, he has forfeited his claim that the fines, fees, and direct victim restitution were improperly imposed. The contention has merit. (*People v. Scott* (1995) 9 Cal.4th 331, 354 ["claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner"]; *Id.* at p. 356 ["complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal"]; *People v. Gamache* (2010) 48 Cal.4th 347, 409 [by failing to object at sentencing hearing, defendant forfeited claim that trial court did not take adequate consideration of his ability to pay $10,000 restitution fine].) Appellant does not claim that the fines, fees, and victim restitution were unauthorized by law. (See *People v. Slattery* (2008) 167 Cal.App.4th 1091, 1094-1095 [claim that restitution order was an "'unauthorized sentence,'" i.e., "'could not lawfully be imposed under any circumstances in the particular case,'" may be raised for first time on appeal]; *People v. Scott*, *supra*, 9 Cal.4th at p. 354 ["the 'unauthorized sentence'

concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal"].)

In any event, the trial court did not abuse its discretion in ordering direct restitution of $200,000 to each victim. Section 1202.4, subdivision (f)(3)(F) provides that the restitution order "shall be of a dollar amount that is sufficient to fully reimburse the victim" for "[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288." Although the probation officer did not obtain a statement from the victims, appellant did not challenge the probation report's referral to "the emotional turmoil they have had to endure." Nor did he challenge the report's recommended restitution of $200,000 to each victim for noneconomic losses. "When the probation report includes a discussion of the victim's loss and a recommendation on the amount of restitution, the defendant must come forward with contrary information to challenge that amount. [Citation.]" (*People v. Pinedo* (1998) 60 Cal.App.4th 1403, 1406; see also *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048 ["Absent a challenge by the defendant, an award of the amount specified in the probation report is not an abuse of discretion"].) Accordingly, "[t]he trial court did not abuse its discretion by following the probation officer's recommendation. [Citation.]" (*People v. Pinedo*, *supra*, at p. 1407.)

People v. Valenti (2016) 243 Cal.App.4th 1140, is distinguishable. There, the court concluded that "the People did not present sufficient evidence to justify the awards" of noneconomic victim restitution pursuant to section 1202.4, subdivision (f)(3)(F). Unlike the instant case, in *Valenti* defense counsel objected to the amount of restitution. Counsel protested,

"'We have no foundation for the amounts. . . . [T]hese are just figures that are thrown out with no basis.'" (*Id.* at p. 1180.)

Apprendi Issue

Appellant claims that the noneconomic direct victim restitution orders violated his "constitutional rights to a jury trial pursuant to" *Apprendi v. New Jersey*, *supra*, 530 U.S. 466. "[T]he United States Supreme Court held in *Apprendi*: 'Other than the fact of a prior conviction, *any fact that increases the penalty* for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.)

Apprendi is inapplicable. It does not "have any application to direct victim restitution, because direct victim restitution is not a criminal penalty. . . . [D]irect victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits. It is not increased 'punishment.'" (*People v. Pangan* (2013) 213 Cal.App.4th 574, 585.) Moreover, the amount of direct victim restitution imposed pursuant to section 1202.4, subdivision (f)(3)(F) does not exceed any "prescribed statutory maximum." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.)

Credit for Presentence Custody

The trial court found that appellant is entitled to credit for 997 days of actual presentence custody but is not entitled to conduct credits. Appellant contends, and the People concede, that he is entitled to credit for 998 days of actual presentence custody and 149 days of conduct credits. We accept the concession.

Disposition

The judgment is modified to grant appellant 1,147 days of total presentence custody credit, consisting of 998 days of actual custody and 149 days of conduct credit. The trial court is directed to amend the abstract of judgment to show this modification. The court shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

David M. Hirsch, Judge

Superior Court County of Ventura

Richard D. Miggins, under appointment by the Court of Appeal for Defendant and Appellant.

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