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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO BELTRAN, Defendant and Appellant.	B229725 (Los Angeles County Super. Ct. No. KA088180)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed as modified.

Victoria H. Stafford, 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 Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Arturo Beltran was convicted by jury in counts 1-2 of committing lewd acts upon G.B., a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1] In count 4, he was convicted of the same offense against D.B. In count 3, defendant was convicted of sodomy of G., a child under the age of 10 (§ 288.7). In count 5, defendant was convicted of continuous sexual abuse of D. (§ 288.5.) In count 6, as to G., and counts 7-15, as to D., defendant was found guilty of aggravated sexual assault (rape) of a child (§ 269, subd. (a)(1)). As to all counts, the jury found defendant had committed offenses upon multiple victims (§ 667.61, subd. (b)). The trial court sentenced defendant to state prison for a total term of 130 years to life.

In his timely appeal, defendant raises the following issues: (1) removal of a sitting juror during deliberations violated defendant's rights under the Fifth, Sixth, and Fourteenth Amendments; (2) it was prejudicial error to instruct on expert witness testimony as to a nonexpert law enforcement officer; (3) the standard jury instruction on the use of prior statements by witnesses violated the right to a jury trial and due process of law; (4) the multiple victim findings under section 667.61 must be stricken as to counts 1 and 4; (5) custody credits were incorrectly calculated; (6) the section 290.3 fine must be reduced to $300; and (7) the magistrate's arbitrary rejection of a plea bargain was an abuse of discretion.

We order modification of the pretrial custody credits and the amount of assessments on the section 290.3 fine. In all other respects, we affirm.

FACTS

Defendant's family consisted of his wife, R.L., (mother) and five children—four girls and one boy. The family shared one bedroom of a two bedroom apartment in La Puente. The four daughters slept in one bed. Defendant and mother slept on a mattress on the floor next to the girls' bed. The son slept on a mattress in the closet. The oldest

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

daughter, D., was 19 at the time of trial in 2010; the son was 18; twin daughters, N. and G., were 11; and the youngest daughter, A., was 9.

On one occasion, mother returned from an errand and found defendant and D., who was 11 or 12 at the time, lying down in the bedroom closet where the son normally slept. Mother later asked D. if defendant had touched her, but she said he had not.

A. asked mother if defendant was her father. Mother told her that defendant was her father, but A. did not believe her. A. also asked defendant, who said he was her father. Later, A. said she had seen defendant touch G. and D.

Mother spoke to G. after hearing A.'s accusation. G. admitted defendant had touched her and gestured to her crotch with her hand to indicate where she had been touched. She looked as though she were going to cry.

Mother also spoke with D., who at first denied being touched by defendant, but when pressed, admitted she had been touched but explained that she did not have the courage to tell mother. Mother called her sister, who told her to speak to her pastor, who in turn told her to report it to the authorities. The police were contacted and D., G., and A. were interviewed.

Offenses Against D.

The molestation of D. began when she was 10 or 11 years old, when defendant touched the lower portion of her legs, moving his hand up. Shortly thereafter, defendant called D. into the bedroom closet. He had her pull down her pants and get on her knees. Defendant pulled down his shorts and tried to put his penis in her "butt." Defendant stopped quickly when mother entered the room. D. later denied to mother that anything happened in the closet, because defendant had told her not to say anything.

Defendant placed his penis in D.'s vagina for the first time when she was 11 years old. He continued to have sexual intercourse with D., with varying frequency, until she was 16. He had intercourse with her more than three times per year when D. was between 11 and 14 years old. He always used a condom. Defendant told her she would

be ashamed if it was ever revealed she engaged in sex with her father. He also said he would kill the family and himself. Portions of some molestations of D. were observed by N. and A. When D. was 17, defendant mistakenly suspected she was pregnant and had his wife take her to the doctor.

Offenses Against G.

Defendant began molesting G. when she was in the third grade, by putting "his front private part" in her "butt." He did this more than one time. They engaged in many acts of anal and vaginal intercourse. She described how defendant cleaned her after the acts. She was afraid to tell her mother what was happening. G. did go to the doctor when she was nine or ten years old, after experiencing pain while urinating and blood in her urine. The doctor said she had a vaginal infection with premenstrual bleeding, told her to drink more water, and prescribed an ointment.

On one occasion N., who was then eight years old, saw defendant on top of G. in the closet. When A. was also eight, she saw defendant touching G.'s genital area.

Discovery of the Offenses and Investigation

The police investigation into the molestation began in September 2009, after A.'s disclosure that she had seen defendant touching G. and D., and the girls' admissions of the offenses. Due to the lapse in time between the last offense and the reporting of the molestations, the investigating officer concluded a sexual assault examination would not yield biological evidence or reveal significant unhealed injuries.

Defense

Defendant denied the molestations in his testimony. Mother was jealous and threatening, and she had admitted having an affair. Defendant had recommended that mother take D. to the doctor when she was 17 years old.

DISCUSSION

I. Removal of Juror No. 10 During Deliberations

Defendant argues the trial court committed prejudicial error by removing Juror No. 10 during deliberations after the juror disclosed he had been falsely accused of rape, which he had not mentioned during jury selection. Defendant contends there is no evidentiary support for a finding that Juror No. 10 committed misconduct, was biased, or refused to deliberate.

A. Background

On the second day of deliberations, the foreperson sent the trial court a note indicating Juror No. 10 had been previously accused of rape and some jurors thought the juror might be biased. Separately on the note, Juror No. 10 asked to speak to the court.

The trial court spoke on the record with Juror No. 10 and the foreperson on the next court day. Juror No. 10 said he had been accused of a sexual assault when he was 14 or 15 years old. He and four buddies were walking home from school when a girl said "hi" to one of them. The boys continued home without incident. The next day, Juror No. 10 and his friends were called into the dean's office because the girl said they had all raped her. Juror No. 10 was "kicked out" of school for a short time. The girl later admitted making up the story. Juror No. 10 told the court he "just don't trust that because

in my opinion, if somebody said something, then she coerced somebody else . . . ." There was no police involvement in the incident.

The trial court asked if Juror No. 10 had misunderstood the court's inquiry during jury selection regarding revealing that type of information. The juror said it did not occur to him at all during jury selection, but jury deliberations "brought it up." Juror No. 10 said he did not know whether he could completely set aside that incident, but if he were instructed to do so, he believed he could comply with the court's order. He did not think it had affected him, but someone else had brought up that he may be biased, and he wanted the court to decide. He said he had participated in the deliberations, including discussing the issues with the other jurors.

The trial court next inquired of the foreperson regarding Juror No. 10. The foreperson said Juror No. 10 revealed the prior sexual assault allegation during deliberations and stated he was basing his evaluation of this case on his prior experience. All the other jurors feel Juror No. 10 is biased. Once Juror No. 10 mentioned the prior accusation against him, the foreperson halted deliberations and sent the note to the court. Juror No. 10 has stopped participating in deliberations. The foreperson thought Juror No. 10 "has mental issues over this, psychological issues."

The trial court considered lengthy argument by the prosecutor and defense counsel. The prosecutor urged the juror be removed for bias, reasoning if the incident was not playing a role in Juror No. 10's mind, he would not have mentioned it during deliberations. The foreperson was credible in describing how Juror No. 10 was affected by the incident, as reflected in his attitude toward deliberations. Defense counsel argued Juror No. 10 should remain, because the juror told the court he could follow the court's instruction to set aside the experience. The foreperson was not clear as to how Juror No. 10 was refusing to participate in deliberations. Juror No. 10 was trying to be diligent in having the court decide the existence of bias.

The trial court stated it had listened carefully to the two jurors. Juror No. 10 described a prior experience in which he claims to have been falsely accused of a crime—essentially the same defense tendered by defendant. The court doubted Juror

No. 10 had a simple memory lapse in failing to disclose the incident during jury selection. The prior incident had a lingering effect on him, because the juror raised the incident during deliberations. The court found that Juror No. 10 deliberately withheld the information in response to "a series of different questions posed by this court," "such as have you or anyone close to you been arrested, accused, charged, or brought to trial. Whether or not you, yourself or anyone close to you have been affected by conduct similar to the allegations in this case. Whether or not there is anything about the nature of the charges which may prevent you from being fair." The court stated that those standard questions were asked of all the jurors, including Juror No. 10, who failed to disclose the incident. The fact Juror No. 10 raised the false accusation against him during deliberations lead the court to conclude the juror was biased and had not followed the court's instructions. Juror No. 10 was ordered removed in order to ensure the integrity of the process, and the jury began deliberations anew after an alternate was seated as a juror.

B. Standard of Review and Relevant Principles

The controlling standard for removal of a sworn juror was settled in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 (*Barnwell*). Rejecting a substantial evidence standard of review, the court instead adopted "the more stringent demonstrable reality standard" which "more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Ibid.*)

The demonstrable reality test "requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053.)

In applying the demonstrable reality test, "the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides. A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality.

"The evidence bearing on the question whether a juror has exhibited a disqualifying bias during deliberations may be in conflict. Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it. (See, e.g., [People v.] *Thomas* [(1990)] 218 Cal.App.3d 1477, 1482–1485 [bias against police officers].) In such a case the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony. The trial court may also draw upon the observations it has made of the jurors during voir dire and the trial itself. Naturally, in such circumstances, we afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

C. Analysis

The trial court made two findings in removing juror No. 10. First, the court found Juror No. 10 had deliberately failed to disclose that he had been falsely accused of a sexual assault. Second, the juror demonstrated bias by raising that prior incident during deliberations. We conclude both finding satisfy the demonstrable reality standard for removal of a juror during deliberations.

The trial court created a record of remarkable clarity for purposes of review of this sensitive issue. The court articulated the contents of the jury communications and conducted a full, on-the-record examination of Juror No. 10 and the foreperson. The court allowed the prosecutor and defense counsel to make extensive arguments regarding

whether Juror No. 10 should be removed. The court's ruling unambiguously set forth its reasoning and conclusion. We are satisfied this is the type of record envisioned by our Supreme Court in adopting the demonstrable reality standard for removal of a juror.

The trial court noted in its ruling that the jurors had been asked during voir dire whether they or anyone close to them had "been arrested, accused, charged, or brought to trial."[2] It is undisputed that Juror No. 10 made no mention during jury selection that he had been the victim of a false accusation of rape. During the court's investigation of the issue of juror bias, Juror No. 10 admitted he had been falsely accused of rape. When asked if he misunderstood the court's inquiry during voir dire, Juror No. 10 said it did not occur to him to reveal the incident, and he did not recall it during questioning. He did bring up the accusation during deliberations.

We agree with the trial court's rejection of Juror No. 10's explanation for not mentioning the accusation against him during voir dire. The issue of prior accusations was directly presented to the prospective jurors. Juror No. 10 had been falsely accused or rape, yet he remained silent on the subject. The court's conclusion that this constituted misconduct is supported by facts in the record which satisfy the demonstrable reality standard.

Intentional concealment of material information by a juror may justify removal, although juror removal may not be based on mere inadvertent or unintentional failures to disclose information. (*People v. Wilson* (2008) 44 Cal.4th 758, 823 (*Wilson*); *People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) Where, however, a potential juror is not

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2 The record on appeal does not include a reporter's transcript of entire voir dire of the jury. The absence of a complete record, in and of itself, is sufficient to defeat defendant's contention. "An appellant has the burden to provide a record sufficient to support its claim of error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Absent an indication in the record that an error occurred, we must presume that there was no error. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373–374; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)" (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678.)

questioned on a topic, there is no concealment of information justifying removal of the juror. (*Wilson*, *supra*, at p. 823.) Juror No. 10 was directly asked in jury selection if he or anyone close to him had been accused of a crime, or affected by conduct similar to that involved in the case. Juror No. 10 heard the questions but did not reveal his own similar experience. The trial court witnessed the juror during jury selection and heard the improbable explanation for the juror's conduct when the issue of misconduct arose. Based on the direct questions asked in the selection process and the juror's lack of a reasonable response, the court's finding of deliberate concealment of material information is established as a demonstrable reality.

The trial court further found that Juror No. 10 was biased. "A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge. (*People v. Ayala* (2000) 24 Cal.4th 243, 272 [(*Ayala*)]; *People v. Nesler* (1997) 16 Cal.4th 561, 581 [(*Nesler*)] (lead opn.).)" (*Barnwell*, *supra*, 41 Cal.4th at p. 1051.) "Bias may be established by the testimony of other jurors. (*Ayala,* at p. 272; *Nesler,* at p. 581.)" (*Barnwell*, *supra,* at p. 1051.)

The trial court properly found a demonstrable reality of bias on the part of Juror No. 10. The juror failed to disclose the false accusation against him, despite the direct questions of the court. Once deliberations began, Juror No. 10 brought up his experience, and he admitted to the court it had affected his deliberations. Although the juror was not convinced he was biased, he told the court other jurors believed he was, and he wanted "you guys" to decide if he should be on the case. The foreperson confirmed Juror No. 10 brought up the prior incident, and Juror No. 10 stated he was relying upon it in evaluating the evidence. According to the foreperson, all the other jurors believed Juror No. 10 was biased, and the juror was not deliberating.

The trial court reasoned that Juror No. 10's bias was established by his reference during deliberations to the juror's experience as the victim of a false sexual assault allegation. The court ruled that removal of Juror No. 10 was necessary to ensure that both sides of the case received a fair trial by an impartial jury. The court's ruling, clearly articulating an express finding of bias, is more compelling than the implied finding of

bias deemed sufficient to justify removal of a juror in *Barnwell*. (See *Barnwell, supra*, 41 Cal.4th at p. 1053 [upholding removal of juror under demonstrable reality test due to jurors general "'disbelief of police officers' testimony,'" although the trial court did not expressly reject juror's disclaimer of bias against officers' testimony].)

II. Instruction on Expert Witness Testimony

Detective Terrance Smith, a peace officer for 19 years with 3 years' experience in the Special Victims Bureau of the Los Angeles County Sheriff's Department, explained in his testimony that he did not refer D. and G. for sexual assault examinations because of the delay between the molestations and reporting the offenses. Detective Smith testified it was his opinion that it was unlikely an examination would reveal biological evidence, the area heals quickly absent significant damage, and "in my opinion, a sexual assault exam would have been more intrusive to my victim than productive since so much time elapsed." At the request of the prosecution, and over defense objection, the trial court instructed the jury on expert testimony pursuant to Judicial Council of California Criminal Jury Instructions (2009-2010) CALCRIM No. 332.[3] Defendant contends on appeal the instruction deprived him of his constitutional rights to a fair trial and confrontation.

We review the trial court's determination that a witness was a qualified expert under the deferential abuse of discretion standard, reversing only when the witness

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[3] CALCRIM No. 332 provides in relevant part as follows: "(A witness was/Witnesses were) allowed to testify as [an] expert[s] and to give [an] opinion[s]. You must consider the opinion[s], but you are not required to accept (it/them) as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

clearly lacks qualifications as an expert. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062-1063; *People v. Chavez* (1985) 39 Cal.3d 823, 828.) When expert testimony is admitted, the trial court has a sua sponte duty to instruct substantially as follows: "Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable. [¶] No further instruction on the subject of opinion evidence need be given." (§1127b.)

"'The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness"' (*People v. McDonald* (1984) 37 Cal.3d 351, 367)." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*) [upholding ruling admitting officer's testimony that it is not unusual for a parent to refrain from reporting a known molestation of his or her child to refute inference that parent did not believe child's complaint of molestation].)

The discussion in *McAlpin* is instructive. "Most jurors, fortunately, have been spared the experience of being the parent of a sexually molested child. Lacking that experience, jurors can rely only on their intuition or on relevant evidence introduced at trial. It is reasonable to conclude that on the basis of their intuition alone many jurors would tend to believe that a parent of a molested child, naturally concerned for the welfare of the child and of other children, would promptly report the crime to the authorities, just as a parent would be likely to do if the child complained of someone who had beaten him or stolen his pocket money. Yet here the prosecution had evidence to the

contrary—the expert opinion of Officer Miller that in fact it is not at all unusual for a parent to refrain from reporting a known child molestation, for a number of reasons. Such evidence would therefore 'assist the trier of fact' (Evid. Code, § 801, subd. (a)) by giving the jurors information they needed to objectively evaluate Anita's credibility." (*McAlpin*, *supra*, 53 Cal.3d at p. 1302, fn. omitted.)

Jurors here heard of evidence of molestations but no testimony regarding physical injury or scientific evidence, such as DNA or blood typing. In order to explain the absence of medical or biological evidence, Detective Smith, relying on his experience of a peace officer and investigator in the Special Victims Bureau, explained that due to the passage of time between the acts and the reporting, he did not expect a sexual assault examination to reveal biological evidence or evidence of injury. The trial court could reasonably determine that Detective Smith's testimony would assist the jury in determining whether to discount the victims' testimony due to the lack of corroborating medical or scientific evidence. The court therefore properly instructed the jury on consideration of expert testimony.

Rejection of the claim on the merits under state law "necessarily leads to rejection" of the constitutional "'gloss'" defendant attaches to the argument. (*People v. Lewis* (2006) 39 Cal.4th 970, 990, fn. 5 (*Lewis*).) "No separate constitutional discussion is required in such cases, and we therefore provide none." (*Ibid.*)

Moreover, any error was plainly nonprejudicial under both the state and federal Constitutions. Defendant cannot point to any portion of the prosecutor's argument to the jury in which the challenged instruction was mentioned or Detective Smith was described as an expert. The prosecution case was strong, and its witnesses consistent in describing the pattern of conduct engaged in by defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.) We are satisfied the instruction played no role in defendant's trial.

III. CALCRIM No. 318 as a Denial of the Right to a Jury Trial and Due Process

Defendant argues that CALCRIM No. 318 lessens the prosecution's burden of proof and effectively tells the jury that if a witness made an out-of-court statement, it may conclude the statement was true simply because it was made.

CALCRIM No. 318 provides as follows: "You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those) statement[s], you may use (that/those) statement[s] in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in (that/those) earlier statement[s] is true."

There is nothing in the permissive language of the instruction to support the interpretation suggested by defendant, nor does the instruction undercut the other instructions requiring the prosecution to prove guilt beyond a reasonable doubt. As defendant acknowledges, his argument was rejected in *People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028-1029. We agree with the holding in *Hudson* and reject the contention.

IV. Penal Code Section 667.61 Allegations in Counts 1 and 4

Defendant next contends the multiple victim allegations under section 667.61, subdivision (b) were dismissed on the prosecutor's motion before trial as to counts 1 and 4. Defendant reasons that the multiple victim findings in those counts must therefore be reversed.

As the Attorney General points out, the prosecutor did not move to dismiss the allegations under subdivision (b) of section 667.61. Instead, the prosecutor moved to dismiss the allegations under subdivisions (a) and (d) of the statute in counts 1 and 4. The trial court clarified that the allegations under subdivision (b) of the statute remained. The contention has no merit.

V. Reduction of the Section 290.3 Fine

The trial court imposed a $500 sex offense fine under section 290.3, subdivision (a),[4] without mention of penalty assessments. The abstract of judgment reflected a $500 fine, plus a penalty assessment of $1400 and a 20 percent surcharge of $100 for a total of $2,000. Defendant argues the base fine must be reduced to $300, plus penalty assessments of $780 for a total of $1,080.

The Attorney General contends the $500 fine was properly imposed, because defendant suffered more than one conviction. The Attorney General is correct. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1371; *People v. O'Neal* (2004) 122 Cal.App.4th 817, 822.) Defendant recognized these authorities in his reply brief and makes no further argument on the merits of the section 290.3, subdivision (a) fine. The Attorney General, however, calculates the total penalty assessments should be $1,300, bringing the total of the fine plus assessments to $1,800.

In our view, the proper assessments added to the $500 section 290.3 fine are as follows: a $500 state penalty (§ 1464, subd. (a)(1)); a $350 county fee (Gov. Code, § 76000, subd. (a)(1)); a $100 state surcharge (§ 1465.7, subd. (a)); a $150 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $50 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $50 state only DNA penalty (Gov. Code, § 76104.7, subd. (a)); and a $100 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)).

The correct assessments total $1,300. The judgment is corrected accordingly. There is no need to remand the matter to the trial court for further proceedings on these

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[4] Section 290.3 provides in pertinent part as follows: "(a) Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine."

assessments. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1373; *People v. Sharret* (2011) 191 Cal.App.4th 859, 863-864, 870-871.)

VI. Correction of Presentence Custody Credits

Defendant contends, and the Attorney General agrees, that defendant was entitled to actual credit for time served of 458 days, plus 68 days of section 2933.1 credits for a total of 526. The trial court had given credit for 430 days served and 64 days under section 2933.1 for a total of 494. We agree with the calculations and order the judgment amended accordingly.

VII. Magistrate's Rejection of the Plea

In a supplemental opening brief, defendant argues the preliminary hearing magistrate abused his discretion and violated due process by rejecting a plea agreement. We disagree that defendant has established reversible error on appeal.

A. Background

Defendant was originally represented by the public defender. Prior to the preliminary hearing, private counsel substituted in and was responsible for representing defendant through the preliminary hearing. The record reflects private counsel was granted multiple continuances until a bench officer denied another defense motion to continue and transferred the cause to the magistrate for preliminary hearing on December 14, 2009.

Once in the preliminary hearing court, defense counsel again sought a further continuance either for additional discovery or to work on a settlement. Counsel stated an offer of 20 years in state prison had been made at the last appearance, but that offer was no longer available after the continuance, and the new offer was for 24 years in prison.

Defense counsel indicated the magistrate was aware counsel had been attempting for several hours to advise defendant regarding the offer and communicating with defendant's family. Counsel requested additional time to speak to the family and further discuss the terms of the settlement. Counsel requested another seven- to ten-day continuance, repeating a complaint about delays in obtaining discovery.

The prosecutor advised the magistrate that other judicial officers had already ruled on discovery, prior continuances had been granted, and a request to continue on that day had been denied. She represented that the victims had been sitting in court all morning, defendant did not need to plead, and "we don't need anybody to go back there and twist his arm. If he doesn't want to take the offer, that's fine."

The magistrate allowed defense counsel to respond. Counsel said defendant had signed off on the change of plea form, and if there was not going to be a continuance, defendant would accept the offer. The magistrate said the law does not require completion of all possible discovery before a preliminary hearing. Defense counsel had the investigating officer's summary of the case. The case arrived in the magistrate's court at 11:20 a.m. and conversations continued until noon. The parties had been ordered to return at 1:30 p.m. and it was now 2:25 p.m. The prosecution was free to rescind its previous offer of 20 years because that was an executive decision. Defense counsel had substituted in on November 2, and it was now six weeks later and the preliminary hearing had not yet been held.

Attention then turned to taking defendant's guilty plea, with the magistrate advising the prosecutor that "I don't take a lot of waivers, so if you want things done in a more formalized manner, I will call upon you at that point in time, and you can ask whatever questions or go down the usual checklist." The prosecutor asked, "Can I just take the entire plea?" The magistrate agreed, "but let me get one thing out of the way first, and then I'll let you jump in."

After defense counsel conferred with defendant, counsel indicated they were ready to proceed. The magistrate asked defendant if he had signed and placed his initials on the waiver of rights form. Defendant replied, "Yes."

The magistrate asked if the interpreter had "read to you the paragraphs on each of the pages with your constitutional rights and consequences." Defendant said, "Yes." The magistrate asked, "While the interpreter was reading these constitutional rights and consequences to you, did you understand them?" Defendant replied, "Not all of it."

The magistrate stated, "Good. Call your first witness" and "[a]ll deals are off the table." Defense counsel said he just needed one moment with defendant, as he had "been over this for two hours." The magistrate replied, "We cannot do that. I've just torn up the waiver of rights form. I'm not going to take a guilty plea from a not guilty man. Never. Call your first witness."

Shortly thereafter, defense counsel explained that defendant wanted the deal and was not rejecting the entire plea. Defendant was asking about restitution, because he does not have money to pay and he is going to be incarcerated. Defendant wanted to plead and would pay the restitution. The magistrate explained that defendant "looked extremely reluctant all the way through this entire process" and denied the request to change his plea, stating "he'll have ample opportunity to plead at some future time after he's seen the evidence, should he wish to do so."

Defendant argues the magistrate abused his discretion when he rejected the plea and tore up the waiver form after defendant stated he did not understand everything the interpreter explained to him in translating the document. Defendant argues "the [magistrate's] conduct here was nothing if not arbitrary," punishing defendant for not understanding the interpreter's translation. Defendant had not claimed he was not guilty, he merely responded honestly to the magistrate's question, and his response was not a rational reason to reject the plea agreement. This was a violation of defendant's right to federal due process, which protects against arbitrary action of the government. Defendant suffered prejudice, in that instead of a 24-year sentence, he now faces 130 years to life. He seeks reversal and remand to the trial court for consideration of the plea bargain.

B. Discussion

The trial court never had an opportunity to rule on the propriety of the actions of the magistrate, as defendant failed to make a motion to dismiss under section 995. Under these circumstances, the issue is forfeited for purposes of direct appeal. "We hold that the failure to move to set aside the information (Pen. Code, § 995) bars the defense from questioning on appeal any irregularity in the preliminary examination (Pen. Code, § 996). We thereby follow a long line of decisions in both this court and the Courts of Appeal, uniformly holding that section 996 forecloses an attack on the preliminary examination in the absence of a motion under section 995. [Citations.]" (*People v. Harris* (1967) 67 Cal.2d 866, 870, fn. omitted; *People v. Pendergrass* (1986) 182 Cal.App.3d 63, 67 ["A failure to move to set aside the information in the superior court bars the defense from questioning on appeal any ruling made at the preliminary hearing."].)

In addition to the issue of forfeiture, defendant cannot establish prejudice, as defined by our Supreme Court, from the magistrate's decision not to complete the plea. "Irregularities in pretrial commitment proceedings that are not jurisdictional in the fundamental sense require reversal on appeal only where the defendant shows he was deprived of due process or suffered prejudice as a result. (*People v. Millwee* (1998) 18 Cal.4th 96, 121, citing *People v. Pompa–Ortiz* (1980) 27 Cal.3d 519, 529.)" (*People v. Lewis*, *supra*, 39 Cal.4th at p. 990.) Defendant suffered no prejudice at trial from the magistrate's decision to terminate the attempt at a guilty plea. We have determined that no error, and certainly no prejudicial error, has been shown at trial. The record of post-preliminary proceedings contains no suggestion that defendant expressed any desire to settle his case without a trial, or that he had an actual interest in the earlier offer of 24 years. Assuming some irregularity occurred at the preliminary hearing—an issue we need not reach—we are satisfied that defendant has not shown the irregularity to be jurisdictional.

DISPOSITION

The trial court is directed to (1) amend the abstract of judgment to reflect that assessments on the $500 Penal Code section 290.3 fine total $1,300, as set forth in this opinion, and (2) amend the award of presentence custody credits to reflect 458 days served, plus 68 days of Penal Code section 2933.1 credits, for a total of 526 days. A copy of the amended abstract of judgment shall be forwarded in a timely fashion to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.