Filed 4/16/18 P. v. Linares CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALEX DEJESUS LINARES, Defendant and Appellant.	B269256 (Los Angeles County Super. Ct. No. YA092231)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas J. Griego, Judge. Affirmed in part, reversed in part, and remanded.

Susan Wolk, 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, Michael C. Keller and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

We affirm appellant's conviction of three felony charges: first degree residential burglary (Pen. Code, § 459; count 1),[1] making a criminal threat (§ 422, subd. (a); count 2), and attempting to dissuade a witness (§ 136.1, subd. (a)(2); count 4). We find that the trial court did not prejudicially err in admitting and excluding portions of telephone calls appellant made while incarcerated. We also find that appellant's right to a public trial was not violated by the trial court's limited exclusion of a small child during the playing of a portion of a jailhouse telephone call. We further find the trial court was correct in admitting "other acts" evidence pursuant to Evidence Code sections 1101, subdivision (b), and 1109, that there was no prejudicial prosecutorial misconduct, that a witness did not render an improper opinion, and that there was no instructional error.

We do, however, reverse appellant's sentence and remand for resentencing. The trial court improperly imposed a full-term consecutive sentence on count 2 and erred in not staying the sentence for count 2 pursuant to section 654. Moreover, we find that the trial court did not understand that it had discretion to impose either a full midbase term or a concurrent sentence on count 4. Finally, the trial court did not have jurisdiction to grant the People's motion to recall appellant's sentence and resentence him. We remand to allow the trial court to correct these sentencing errors.

---

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

FACTUAL AND PROCEDURAL BACKGROUND

Employing the familiar rule that the record be reviewed in the light most favorable to the judgment, (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 87), the evidence produced at trial established the following:

Events of March 31, 2015

Y. and appellant had a prior relationship and appellant was the father of Y.'s son, Alex. The relationship had been rocky and they broke up sometime before March 31, 2015.

During the days leading up to March 31, appellant and Y. had discussed her giving him gas money to use to visit Alex. These discussions ended when Y. told appellant that she did not have any money to give him and that he should get money from the "other girl that he was with." Appellant became angry and left.

Early on the morning of March 31, 2015, appellant went to Y.'s home, threatened her, demanded that she give him the gas money, and left. Appellant returned at approximately 8:00 that morning and began banging loudly on the door and window. Y. asked appellant to stop, but he continued banging and started ringing the doorbell as well. Appellant continued to demand gas money.

Appellant eventually broke down the door and entered the house acting "aggressive" and "pissed off." Y. called "911" and retreated to a bedroom because she and her son were frightened. While she was in the bedroom, appellant threatened to break the bedroom door down, and stated he was going to send people to beat her up and would try to kill her if she "snitched" and attempted to call the police.

Appellant left after Y.'s brother, Fabian, informed him that the police were on their way. Officer Joel Marquez of the Inglewood Police Department was dispatched to the disturbance and stopped appellant in his vehicle as he was driving away at a high speed. After being stopped, appellant admitted to being angry, yelling outside, breaking the door off the jamb and "forcing" his way inside and said that that had been a mistake.

Events of April 15, 2015

Y. and Fabian went to court on April 15, 2015, pursuant to a subpoena to appear at appellant's preliminary hearing related to the incident on March 31, 2015. As they were returning from lunch, they saw appellant standing next to their car talking on a telephone. Appellant looked at them and said, in a threatening way, "if you go back to court, you'll see what happens." Y. and Fabian both took this as a threat and were frightened.

Criminal Proceedings

Appellant was charged by information with first degree burglary (§ 459; count 1), making a criminal threat toward Y. (§ 422, subd. (a); count 2), making a criminal threat toward Fabian (§ 422, subd. (a); count 3), attempting to dissuade Y. from giving testimony as a witness (§ 136.1, subd. (a)(2); count 4), and attempting to dissuade Fabian from giving testimony as a witness (§ 136.1, subd. (a)(2); count 5). The information further alleged that the burglary constituted a violent felony because another person was present in the residence during the commission of the offense, within the meaning of section 667.5, subdivision (c)(21).

A jury convicted appellant of counts 1, 2, and 4. Appellant was sentenced as we detail below.

A timely appeal was filed.

DISCUSSION

I. TRIAL ISSUES

A. The Jailhouse Telephone Calls Were Properly Admitted

Appellant raises numerous issues on appeal related to recordings of nine jailhouse telephone calls admitted into evidence at trial. These calls covered the following subjects: (1) appellant's extreme anger, including threats of bodily injury, at Y. for calling the police; (2) appellant's belief that Y. was to blame for his legal problems because she called the police; (3) appellant's belief that Y. should post his bond because it was her fault that he was in jail; (4) appellant's belief that he would not be convicted of burglary and Y. would not appear to testify against him; and, (5) appellant's demeaning attitude toward both Y. and Inez P., a former girlfriend and victim of his domestic violence.

We find no error in the admission of the jailhouse telephone calls or in the procedures employed by the trial court in determining their admissibility.

1. Appellant Was Provided With an Adequate Opportunity to Be Heard

Appellant first argues that he was denied due process and the trial court committed judicial misconduct by denying him a fair opportunity to be heard on various issues regarding the jailhouse telephone calls. We disagree.

As the United States Supreme Court noted in *Mathews v. Eldridge* (1976) 424 U.S. 319, due process is a flexible concept with requirements that can vary with the situation. (*Id.* at pp. 334–335.) The California Supreme Court has defined due

process as "whatever is necessary for fundamental fairness." (*People v. Marshall* (1990) 50 Cal.3d 907, 925.)

Section 1044 vests the trial court with both the authority and the obligation to "control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) In exercising this discretion, a trial court "must be impartial and must assure that a defendant is afforded a fair trial." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.) If that is done, the trial court's determinations will be upheld on appeal. (*People v. Calderon* (1994) 9 Cal.4th 69, 79.)

Contrary to appellant's assertions, we find he received due process and the trial court did not fail in its duty to rule on his objections. (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1217.) The issue of the jailhouse telephone calls was re-litigated at almost every court session. The trial court conducted eight hearings consuming almost 90 pages of the reporter's transcript regarding both the overall admissibility of the jailhouse telephone calls and the portions that would be admitted. The trial court carefully reviewed the material related to the jailhouse calls before ruling on the evidentiary objections posited by appellant's counsel. The trial court repeatedly invited counsel to state her objections and *never* precluded her from making an objection. Even toward the end of the proceedings, the trial court was willing to revisit its rulings and allow the defense to add material. Respondent concedes that appellant preserved all issues regarding the admissibility of the jailhouse calls.

Although appellant complains that the trial court would not allow him to litigate the complete record of each call line-by-line, a trial court is not obligated to follow an attorney's desired procedure in conducting its review of proffered evidence as long as the procedure employed is fair. The trial court noted that the total unredacted jail calls totaled nearly three hours. A line-by-line analysis of this material would have taken a great deal of mid-trial court time and would have been both unnecessary and inappropriate. We find no error.

2. The Jailhouse Telephone Calls Were Admissible

a. The Admission of the Jailhouse Telephone Calls Did Not Violate the Confrontation Clause

Appellant argues that the jailhouse telephone calls should not have been admitted because they violated his right to confront and cross-examine witnesses under the Sixth Amendment as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36, and its progeny. We find this argument unpersuasive.

The Confrontation Clause of the Sixth Amendment precludes the introduction of the testimonial statements of a witness unless that witness is unavailable and the defendant had the prior opportunity to cross-examine the witness. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) Only testimonial statements are excluded under the Confrontation Clause. (*Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Arceo* (2011) 195 Cal.App.4th 556, 573.) While the exact outer parameters of what constitute testimonial statements are subject to debate, (see *Michigan v. Bryant* (2011) 562 U.S. 344, 353–354; *People v. Rangel* (2016) 62 Cal.4th 1192, 1216), it is clearly established that a statement will not be considered testimonial

unless the primary purpose was to create an "out-of-court substitute for trial testimony." (*Michigan v. Bryant, supra,* 562 U.S. at p. 358; *People v. Rangel, supra,* 62 Cal.4th at p. 1216.) One of the hallmarks of such a statement is whether the conversation in question involved an agent of the police. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1217, abrogated on other grounds in *People v. Rangel*, *supra*, 62 Cal.4th at p. 1216.)

Virtually every case that has examined jailhouse telephone calls has concluded that they are non-testimonial and not subject to the Confrontation Clause. (See e.g., *United States v. Jones* (4th Cir. 2013) 716 F.3d 851; *United States v. Berrios, et al.* (3rd Cir. 2012) 676 F.3d 118; *United States v. Castro-Davis* (1st Cir. 2010) 612 F.3d 53; *McClurkin v. State* (Md.App. 2015) 222 Md. 461; *United States v. Thurman* (W.D. KY 2013) 915 F.Supp. 836; *Malone v. Kramer,* (E.D.Cal. Apr. 6, 2010) 2010 WL 1404286 at *17 , *aff'd,* 453 Fed.Appx. 754 (9th Cir.2011), *cert. denied,* 558 U.S. 1034, 132 S.Ct. 1642, 182 L.Ed.2d 239 (2012); *Ibarra v. McDonald* (N.D.Cal. 2011) 2011 WL 1585559; *Johnson v. Stolc* (W.D. Wash. 2010) 2010 WL 4236934.)

We likewise conclude the jailhouse telephone calls here were not testimonial. The calls involved appellant and, at various times, his girlfriend, Kelly, his mother, and his brother. There was no evidence that any of these people were agents of law enforcement. There is also nothing to suggest that the primary purpose of the calls was to generate an "out-of-court substitute for trial testimony." First, the telephone calls were always initiated by appellant and he obviously would not have knowingly created damaging trial evidence against himself. Second, there is no evidence that any law enforcement agency had any part in the telephone calls other than to allow an outside

company to set up a payphone system for the benefit of the inmate population as a whole.

Appellant argues the calls were testimonial because the parties to the calls were warned they were being recorded and the recordings might be used as evidence. However, as the court noted in *United States v. Jones*, *supra*, 716 F.3d 851, "just because recorded statements are used at trial does not mean they were 'created for trial' [citation]." (*Id.* at p. 856.) The court in *Jones* held that the advisory given to parties to jailhouse telephone calls does not render them testimonial. (*Ibid.*) The same is true here.

b. Recognized Hearsay Exceptions Allowed the Admission of the Jailhouse Telephone Calls

Appellant further contends the calls should have been excluded as hearsay. (*People v. Arceo*, *supra*, 195 Cal.App.4th at p. 573; *People v. Garcia* (2008) 168 Cal.App.4th 261, 291.) The trial court determined the calls fell within recognized hearsay exceptions under California law, and we will only disturb that ruling upon a showing of abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) We find no such abuse.

"Evidence of a statement made by a defendant in a criminal action is not made inadmissible by the hearsay rule when offered against that defendant, and may therefore be admitted for the truth of the matter asserted in the statement." (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 892; Evid. Code, § 1220.) Appellant's statements here fall squarely within this hearsay exception and were properly admitted. We also find no error in the trial court's determination that statements of the other participants in the conversations provided context and gave

meaning to appellant's statements, and were therefore admissible under Evidence Code section 356.

c. Evidence Code Section 352 Does Not Preclude Admission of the Jailhouse Telephone Calls

Appellant argues that the jailhouse telephone calls should have been excluded as more prejudicial than probative under Evidence Code section 352. Again, we disagree.

"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." (Evid. Code, § 352.) A trial court's rulings under Evidence Code section 352 are reviewed for abuse of discretion. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

The jailhouse telephone calls were highly probative of appellant's willingness to do violence to Y. and Inez and of his desire to prevent Y. from testifying, which was directly relevant to counts 2 and 4. Further, we discern no likelihood that the statements were likely to produce an emotional bias against appellant. Because the statements were properly admitted, there is no need to address appellant's argument that he was prejudiced by their admission.

3. The Trial Court Properly Excluded Portions of the Jailhouse Calls

Appellant asserts the trial court erred in excluding portions of five jailhouse telephone calls, which he contends were admissible under Evidence Code section 356. Appellant, however, advances no plausible explanation as to how the excluded portions put the admitted statements in context.

Indeed, they do not.[2] Insofar as appellant sought to introduce these statements as affirmative evidence of a defense he "might" argue, they were properly excluded as self-serving inadmissible hearsay.

B. The Other Acts Evidence Was Properly Admitted

Appellant contends the trial court improperly admitted evidence of an incident involving appellant and his former girlfriend, Inez P. We disagree.

1. Factual Background

At trial, the People presented evidence that, in January 2015, appellant had an argument with his then-girlfriend, Inez. After Inez attempted to walk away, appellant violently grabbed her arm and pushed her in front of an oncoming car. When Inez threatened to call the police, appellant grabbed her phone and broke it.

2. The Other Acts Evidence Was Admissible

a. *Evidence Code Section 1109*

Evidence Code section 1101, subdivision (a), prohibits the admission of character evidence to prove conduct on a specific occasion. Evidence Code section 1109 creates an exception to this

---

[2] For example, appellant sought to introduce an additional potion of Exhibit 16H, as follows: "Well, tell her do it or fuck whatever. *But she's still going to get it*. I'm not going to fuck. She's playing games. Come on now. What the fuck this bitch - this bitch wants to wait until what? I have three days left and then fucking bail me out? What the fuck is the point?" Those statements, appellant contends, actually referenced an intent to take the car that he believed was purchased with money that "should" have gone to post his bail. We find this a fanciful interpretation of appellant's statements and that they clearly do not pertain to an automobile.

prohibition in domestic violence cases and allows the introduction of past acts of domestic violence to prove a defendant's propensity to commit acts such of domestic violence, subject to an determination that the evidence is otherwise admissible under Evidence Code section 352. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232–1233; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1137–1139, p. 1137, fn. 6.)

There are a number of factors that appellate courts have considered in determining whether admission of this type of evidence is proper, including the temporal relationship of the events, whether reports of the events came from separate sources, the consumption of trial time, and whether there is a common thread running through the events. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 533–535 (*Johnson*); *People v. Morton* (2008) 159 Cal.App.4th 239, 248.) We review the admission of this evidence for abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864; *Johnson*, *supra*, 185 Cal.App.4th at p. 531.)

Here, the incidents with Inez and Y. were not remote in time as they were separated by approximately three months. There is also no suggestion that Y. and Inez knew each other or collaborated in fabricating their stories, and the relevant testimony did not consume a substantial amount of trial time. Finally, there was a common thread running between the incidents with Y. and Inez. There was substantial evidence that appellant has a significant problem with anger management, which is manifested in his relationship with women. The incidents with Y. and Inez both fit within this pattern, and this is exactly the type of evidence that the Legislature intended to make admissible through the enactment of Evidence Code section

1109. (*Johnson, supra*, 185 Cal.App.4th at p. 532.) We find no abuse of discretion.

b. Evidence Code section 1101, subdivision (b)

We also find the trial court properly admitted evidence of the events involving Inez to show appellant's intent, pursuant to Evidence Code section 1101, subdivision (b). Evidence Code section 1101, subdivision (b), clarifies subdivision (a), by allowing the admission of evidence for a "non-character" purpose, such as proving intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1059.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' " (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402; *People v. Sedillo*, *supra*, 235 Cal.App.4th at p. 1059.)

Here, appellant admitted to the violent entry of Y.'s home and expressing his anger toward her. The *only* real question for the jury, as to each count, was his intent in doing so. The Inez incident clearly showed that appellant intended to control the actions of women with whom he had been involved through the use of threats, force, and violence. Thus, evidence of that incident was highly relevant to appellant's intent, and the court did not abuse its discretion in admitting the evidence under Evidence Code section 1101, subdivision (b).

C. Appellant's Right to a Public Trial Was Not Violated

Appellant contends his right to a public trial was violated by the trial court's limited exclusion of a small child during the playing of a particularly offensive jailhouse telephone call. We disagree and find that there was no violation.

1. Factual Background

Prior to the playing of one of the jailhouse calls, the trial court called the parties to the bench and expressed concern that a young child was in the audience and the recording contained many obscenities. Appellant's trial counsel initially stated that she had no "input" into the court's decision, but subsequently objected to the extent the court were to exclude members of appellant's family. After checking the courtroom, appellant's counsel informed the trial court that the only people there were members of appellant's family. The trial court indicated it was disinclined to allow the child to hear the recording.

The record is silent as to what happened next. Respondent, however, concedes that Inez and her children were removed from the courtroom. The parties also apparently agree that Inez returned to the courtroom the next day.

2. Appellant's Request for a Settled Statement on Unreported Proceedings Was Properly Denied

In an attempt to fill this gap in the record of the proceedings, appellant sought a settled statement pursuant California Rules of Court, rule 8.346(a). The trial court denied the request and appellant contends that this was error. We are not persuaded.

The purpose of a settled statement is to make up for the absence of a reporter's transcript of oral proceedings that actually occurred, *not* to act as a mechanism for putting things in the record that were never there. (See *People v. Griffin* (2004) 33 Cal.4th 536, 554, fn. 4, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824.) Neither side contends that anything after the trial court issued its order was placed on the record but not reported. Indeed, a review of the reporter's

transcript shows the proceedings were fully reported and that nothing was placed on the record regarding the exclusion of the child aside from what was included in the reporter's transcript. Furthermore, appellant can point to no prejudice from the trial court's failure to make a settled statement since respondent has conceded that Inez and her children were directed to leave the courtroom.

3. Appellant's Right to a Public Trial Was Not Violated

Both a defendant and the public are entitled to a public trial. (*Waller v. Georgia* (1984) 467 U.S. 39; *People v. Esquibel* (2008) 166 Cal.App.4th 539, 552 (*Esquibel*); *Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247.) However, that right is not absolute and may be subject to "reasonable restrictions that are necessary or convenient to the orderly procedure of trial . . . ." (*Esquibel, supra*, 166 Cal.App.4th at p. 552.)

Appellant characterizes the trial court's order as a "closure" order. It was not. Unlike such cases as *Waller v. Georgia*, *supra*, 467 U.S. 39, and *In re Oliver* (1948) 333 U.S. 257 (*Oliver*), the trial court in this case did *not* close the proceedings to the public, thereby conducting a "secret trial." (*Oliver*, *supra*, 333 U.S. at pp. 267–269.) The trial court simply excluded one small child from a portion of the proceedings during which the tape recording of a particularly offensive jail call was going to be played. This order did not explicitly apply to Inez. More importantly, the order did not apply to any other person. Anyone other than the small child was free to enter the courtroom and observe the proceedings.

The Court of Appeal in *Esquibel*, *supra*, 166 Cal.App.4th 539, distinguished between "total" closures, which it characterized as "almost always a per se violation of the

constitutional rights of the accused" and partial closure, which may be justified by a showing that the exclusion was necessary to protect some " 'higher value.' " (*Id.* at p. 552.) In *Esquibel*, two spectators who were apparently friends of the defendant were excluded by the court during the testimony of the paralyzed seven-year-old victim of a gang-related shooting. There was no showing that the excluded spectators had intimidated the complaining witness or had engaged in any type of misconduct. Noting that there was no general exclusion of the public or press, no exclusion of any other spectator connected with the defendant, and that the exclusion order was limited in duration to the testimony of the one witness, the Court of Appeal found that there was no abuse of discretion. As the Court of Appeal in *Esquibel* observed, the power to make limited exclusions such as the one in the case at bench rests in the trial court's "broad discretion to control courtroom proceedings . . . ." (*Ibid.*)

This case is similar. Here, there was a reason to exclude the young child: the trial court's determination that it would be inappropriate and harmful to expose the child to the vulgarity included in appellant's angry telephone call.[3] The exclusion order was limited to the short period during which one phone call was played. The remainder of the general public and news media was free to attend the proceeding and, if they chose, to hear the playing of the jail call. More importantly, the portion of the trial during which the child was excluded involved only the audiotape

---

[3] In another, albeit vastly different, context, the United States Supreme Court has stated that safeguarding the physical and psychological well-being of a minor is a compelling interest. (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 607.)

of one of appellant's jailhouse telephone calls; it did not involve the taking of any testimony. (*Esquibel, supra*, 166 Cal.App.4th at p. 551.) We find no abuse of discretion under these circumstances.

D. There Was No Improper Opinion Evidence

Appellant argues that he was prejudiced when the trial court erroneously allowed Officer Marquez to testify that appellant was arrested after officers determined that a crime had been committed. We disagree.

A peace officer may not express an opinion about whether a defendant is guilty, (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 77), or about whether a particular crime has been committed, (*People v. Torres* (1995) 33 Cal.App.4th 37, 44). The rationale for this rule is that such opinions are of no value to a jury because the jury is just as competent as an expert is to determine a defendant's guilt or innocence of a crime. (*Id.* at pp. 46–47.)

Here, Officer Marquez testified that he and another officer determined that a crime had been committed and appellant was then arrested. Officer Marquez did not testify which crime he thought appellant committed, or that he thought appellant was guilty of any crime. Under these circumstances, we find no error. Furthermore, given the overwhelming evidence, bolstered by appellant's admission that he was guilty of *some* criminal conduct, any error was harmless.

E. There Were No Instructional Errors

Appellant urges a number of instructional errors. We find none.

"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." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; *People v. Covarrubias* (2016) 1 Cal.5th 838, 873–874.) A trial court may properly refuse an instruction that is an incorrect statement of the law. (*People v. Peoples* (2016) 62 Cal.4th 718, 768.)

1. CALCRIM No. 375

Appellant argues the trial court erred in giving a modified version of CALCRIM No. 375, which is a limiting instruction for the use of evidence of other acts. Specifically, he contends it was error to include in the instruction reference to the jailhouse telephone calls.[4] We disagree.

We agree that the reference to the jailhouse telephone calls in this jury instruction was somewhat confusing, but we find that it was not prejudicial. Appellant's sole argument here, that CALCRIM No. 375 lowered the prosecution's burden of proof, has been repeatedly rejected by the appellate courts of this state. (See e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1259–1260.) It is well-established that proof of other acts is governed by the preponderance of evidence standard except when such other crimes or bad acts are offered as factors in aggravation in a capital case. (*Ibid.*) Appellant has demonstrated no prejudice from giving CALCRIM No. 375.

---

[4] The fact that CALCRIM No. 375 was requested by the prosecution is of no moment. (See Evid. Code, § 355 [requiring that a limiting instruction be given at the request of any party].) The instruction was properly given and there was no error.

Appellant also asserts that the trial court should have given this limiting instruction at the time the evidence was presented rather than at the conclusion of the trial. However, trial counsel made no such request. Furthermore, whether the instruction is given at the time of the presentation of the evidence or at the conclusion of the trial is in the sound discretion of the trial court. (*People v. Dennis* (1998) 17 Cal.4th 468, 533–534.) There was no abuse here.

2. CALCRIM No. 105

The trial court instructed the jury with CALCRIM No. 105, which concerns witness credibility. Appellant correctly observes that the written version of the jury instruction differs from the version given orally. Specifically, the written version omitted two "bullet points," which instructed the jury to consider whether the witness admitted to being untruthful and whether the witness engaged in conduct that reflects on his or her believability.

To the extent that written instructions differ from the oral instructions, the written instructions are given "priority" by reviewing courts. (*People v. Wilson* (2008) 44 Cal.4th 758, 803–804.) Thus, failure to include these "bullet points" in the written instructions was error.

However, this error was harmless beyond a reasonable doubt, and appellant does not argue otherwise. The jury was orally instructed that it could consider both factors and there is no suggestion that it was confused or that it did not do so. (See *People v. Wilson*, *supra*, 44 Cal.4th at p. 804.) We think nothing more needs to be said on this point.

3. CALCRIM Nos. 225 and 251

Appellant next claims the court erred by instructing the jury with versions of CALCRIM No. 225 and CALCRIM No. 251

that include the phrase "specific intent *or* mental state." According to appellant, the inclusion of the disjunctive "or" allowed the jury to consider appellant's purported mental state of "anger" to prove the specific intent element required for a violation of section 422. Appellant, however, does not dispute that the jury was properly instructed on the specific intent required to prove a violation of section 422. This was sufficient. (*People v. Nelson* (2016) 1 Cal.5th 513, 542–544.)

Citing *People v. Hill* (1967) 67 Cal.2d 105, 118, appellant argues that the trial court had a duty to specify which charged crimes were specific intent crimes and which were general intent crimes. The argument fails because the trial court correctly instructed the jury that *all* of the charged crimes were specific intent crimes. Taken together, there is no "reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Nelson*, *supra,* 1 Cal.5th at p. 544, citing *People v. Rundle* (2008) 43 Cal.4th 76, 149.)

4. CALCRIM No. 357

Appellant also challenges the court's instruction with CALCRIM No. 357, which concerns adoptive admissions. Appellant argues that the instruction is "irrelevant." He further asserts the instruction "gives an aura of consciousness of guilt," but fails to explain how. We find no error.

The jail calls are replete with statements made to appellant that led to adoptive admissions, including his responses to numerous statements accusing him of unlawfully entering into Y.'s house by breaking down the door. The unlawful entry of the residence of another is an element of residential burglary, and appellant's failure to deny these accusations operated as adoptive admissions. The trial court would have been remiss if it did not

give this instruction because the instruction cautions the jury that statements cannot be considered adoptive admissions unless the jury determines that they fall within a strict legal definition.

5. CALCRIM No. 371

Appellant finds fault with the trial court's instruction with CALCRIM No. 371, which instructed the jury as to how to consider evidence that appellant tried to "hide evidence or discourage someone from testifying against him." Again, we find no error.

Here, evidence that appellant attempted to dissuade Y. from testifying had to be placed in proper context for the jury. CALCRIM No. 371 served the important function of warning the jury that appellant's attempt to intimidate Y. was not sufficient to prove he was guilty of breaking into her house. It also informed the jury that it had to first find appellant attempted to dissuade Y. from testifying before concluding there was any significance to the evidence as it related to the other charge.

Appellant's argument that giving this instruction lessened the People's burden as to the witness intimidation counts also fails. The jury acquitted appellant of attempting to intimidate Fabian, something that would not have happened if it had misunderstood the burden of proof.

There was no error in giving this instruction. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1222–1224.)

6. CALCRIM No. 372

Appellant also challenges CALCRIM No. 372, the "flight" instruction, asserting there was no basis for the instruction. We disagree.

CALCRIM No. 372 must be given *sua sponte* when there is evidence from which the jury could reasonably infer that the

defendant's flight reflected consciousness of guilt and the prosecution intends to argue that this evinces guilt. (§ 1127c; *People v. Howard* (2008) 42 Cal.4th 1000, 1020–1021.)

Here, there was evidence from which the jury could infer consciousness of guilt. The evidence established that appellant was told the police had been called and was seen leaving the scene at a high rate of speed. The prosecution relied on these facts to argue appellant's guilt. Under these circumstances, it would have been error to *not* give CALCRIM No. 372.

Appellant relies on *People v. Bradford* (1997) 14 Cal.4th 1005, 1055 (*Bradford*), to support his contention. That case does not aid his argument. In *Bradford*, the Supreme Court rejected an argument that the "flight" instruction should either not be given or should be modified if there is a possible alternative explanation for the defendant's departure from a crime scene. The Supreme Court found that giving the instruction was appropriate whenever there is evidence from which the jury *could* infer consciousness of guilt. Such is the case here.

7. CALCRIM No. 852

Appellant concedes that it was proper to give CALCRIM No. 852, which instructs on the uses and limitations of "other acts" evidence of domestic violence introduced to show a defendant's propensity to commit such acts. However, he argues that it was error to refer to counts 4 and 5 in the instruction, which related to the April 15, 2015, incident where appellant allegedly threatened Y. and Fabian about returning to court to testify.

A limiting instruction such as CALCRIM No. 852 generally should be given when evidence of other acts of domestic violence is introduced. (*People v. Falsetta* (1999) 21 Cal.4th 903, 923–

924.) Indeed, it has been argued in other cases that a *defense* attorney's failure to request such an instruction can constitute ineffective assistance of counsel. (See, e.g., *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318–1319.)

Assuming that appellant is correct that this instruction should not have referred to count 5—which charged him with an attempt to dissuade Fabian from testifying or cooperating—there was no prejudice because appellant was acquitted of that charge.

However, with respect to count 4, there can be little question the instruction was appropriate. Appellant's threat to Y. could well have had the effect of placing her in reasonable fear of "imminent" serious bodily injury or disturbing her mental or emotional calm. As such, his conduct would fall within statutory descriptions of domestic violence found in section 13700, subdivisions (a) and (b), and Family Code section 6211. Both of these statutes are incorporated into the definition of domestic violence found in Evidence Code section 1109. (Evid. Code, § 1109, subd. (d)(3); see *Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 852–853.) Thus, the other acts of domestic violence admitted into evidence would be relevant to count 4.

Further, given the parties agreed that CALCRIM No. 852 should be given as to counts 1 and 3, it would have been anomalous and confusing to exclude count 4 when the protections and limitations of CALCRIM No. 852 applied equally to that count.

Perhaps in recognition of this, appellant's argument regarding the application of CALCRIM No. 852 to count 4 is that this use of propensity evidence constituted a "new factual theory" against which appellant's trial counsel was unprepared to defend and which appellant's trial counsel did not explore during the

taking of evidence. Appellant cites no authority for this proposition, nor does he attempt to explain how it is judicial error for his trial counsel to fail to anticipate how the prosecution might argue properly admitted evidence. There was no such error.

8. CALCRIM No. 1700

In supplemental briefing, appellant forwards the novel argument that the court's instruction that violations of sections 273.5 and 422 can support a burglary conviction was error because it was misleading and lowered the prosecution's burden of proof. Appellant's theory is that since these crimes are so-called "wobblers," which can be either felonies or misdemeanors, they cannot support a burglary charge because they are not theft-related and are not *necessarily* felonies. We disagree.[5]

Appellant's argument relies on an erroneous understanding of the legal status of "wobblers." A "wobbler" is a felony for all purposes until judgment; if reduced to a misdemeanor at judgment, it is a misdemeanor for all purposes *thereafter*, but the reduction is not given retroactive effect to issues arising before the reduction. (*People v. Banks* (1959) 53 Cal.2d 370, 381–382.) The charges under sections 273.5 and 422 in this case had not been adjudicated and were alleged as felonies. Therefore, they properly supported the burglary charge.

An argument analogous to the one posited by appellant was rejected in *People v. Moomey* (2011) 194 Cal.App.4th 850 (*Moomey*). In that case, the defendant was charged with being an

---

[5] This argument was never advanced in the trial court, but respondent does not argue waiver or forfeiture, so we address its merits.

accessory after the fact to a felony—second degree burglary—in violation of section 32. The defendant argued that he could not be an accessory after the fact to a felony because the underlying second-degree burglary was a "wobbler." The Court of Appeal rejected this argument, ruling that the commission of a "wobbler" is a "felony at the time it is committed and remains a felony unless and until the principal is convicted and sentenced to something less than imprisonment in state prison (or the crime is otherwise characterized as a misdemeanor). Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect." (*Moomey, supra,* 194 Cal.App.4th at p. 857.) Because the "wobbler" second-degree burglary was a felony for all purposes, the court in *Moomey* held that it could support a violation of section 32.

We find appellant's argument similarly unavailing.

F. There Was No Prejudicial Prosecutorial Misconduct

Appellant advances three areas of alleged prosecutorial misconduct: (1) the prosecutor's reference to appellant having made telephone calls from the "Department of Corrections" in opening statement; (2) the prosecutor's having played a portion of a jailhouse telephone call that had been redacted; and, (3) the prosecutor's having allegedly "vouched" for his case. We find that that none of these actions constituted prejudicial prosecutorial misconduct.

"A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the

trier of fact." (*People v. Avila* (2009) 46 Cal.4th 680, 711.) In evaluating a claim of prosecutorial misconduct, a reviewing court evaluates "whether there was a reasonable likelihood that the jury construed . . . the remarks in an objectionable fashion." (*People v. Booker* (2011) 51 Cal.4th 141, 184–185.) Such is not the case here.

1. There Was No Prejudicial Misconduct in the Prosecutor's Opening Statement

During his opening statement, the prosecutor erroneously stated that the jury would hear telephone calls that appellant made while in the "Department of Corrections." The prosecutor misspoke; appellant was in Los Angeles County Jail when he made the telephone calls, a facility that is operated by the Los Angeles County Sheriff's Department, not the California Department of Corrections and Rehabilitation. From this, appellant argues that the jury could have inferred that appellant was a convicted felon which, in turn, "tainted the entire trial."

Appellant did not object to this at trial and did not seek an admonition, which forfeits the claim. (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) This requirement is particularly applicable to this case, where a simple admonition correcting the misstatement could have cured it. Moreover, *not* objecting to the misstatement would have been a sound tactical choice by defense counsel because doing so would have called greater attention to the fact that appellant had been in custody.

Nonetheless, there are numerous reasons why the misstatement was not prejudicial. First, we doubt the jury was legally sophisticated enough to know that commitment to the "Department of Corrections" meant that appellant had suffered a felony conviction for which he had been sent to state prison.

Further, the taped telephone calls repeatedly referenced the fact that appellant was in the county jail facilities which were operated by the Los Angeles County Sheriff's Department. The jury also was instructed that what the attorneys say during opening statements is not evidence, and we presume the jury followed this instruction. (*People v. Holt* (1997) 15 Cal.4th at p. 662; *People v. Valdez* (2011) 201 Cal.App.4th at p. 1437.) Finally, the record is replete with evidence that established that appellant was *not* a convicted felon.

Based on the record before us, we cannot find that this brief accidental misstatement constituted prejudicial prosecutorial misconduct.

2. There Was No Prejudicial Prosecutorial Misconduct in the Accidental Playing of One Redacted Portion of the Jailhouse Telephone Calls

The prosecutor neglected to stop the tape of the jailhouse telephone call that was included in Exhibit 16A at the appropriate time, and a portion of the tape that was supposed to be redacted was accidentally put before the jury. That portion informed the jury that Y. had obtained a restraining order against appellant.

We do not find this error prejudicial. The same evidence was also in unredacted portions of later recordings that were properly admitted, so the error did not expose the jury to any excluded evidence. Moreover, the jury was admonished to disregard the improperly played portion of this telephone call. Jurors are presumed to have followed judicial admonitions to disregard improper evidence. (*People v. Holt*, *supra*, 15 Cal.4th at p. 662; *People v. Valdez*, *supra*, 201 Cal.App.4th at p. 1437; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) There is nothing

in the record to suggest that the jury did not follow the admonition in this case.

3. There Was No Improper "Vouching" for a Witness

Although appellant mentions "vouching" in his discussion of prosecutorial misconduct, he does not explain how the prosecutor improperly "vouched" for witnesses or his case, and our review of the record fails to disclose any such "vouching."

Even if it had, appellant concedes that his trial counsel did not object to the supposedly improper "vouching" remarks. Therefore, any objection that he may have had is forfeited. (*People v. Mendoza* (2016) 62 Cal.4th 856, 906; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1166, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

II. SENTENCING ISSUES

A. Factual Background

1. The October 5, 2015, Sentencing Hearing

The jury's verdict did not include a finding that there was a person present at the time of the burglary in count 1, within the meaning of section 667.5, subdivision (c)(21), which would have had the effect of making that count a violent felony. The primary impact of this finding would have been the application of section 2933.1, which would have placed a limitation on the amount of conduct credits available to appellant.

At the beginning of the sentencing hearing, the prosecutor asked that the trial court find that a person was present pursuant to section 667.5, subdivision "(c)(2)(1) [*sic*]."[6] The trial court agreed that there had been no such jury finding, but declined to make the finding. The trial court ruled that the

---

[6] Presumably, the prosecutor was referring to section 667.5, subdivision (c)(21).

allegation was not applicable to this case and, by extension, that appellant would be entitled to full conduct credits.

The trial court imposed an aggregate sentence of eight years and eight months, comprised of the high term of six years on count 1, first degree residential burglary (§ 459), a full middle term consecutive sentence of two years on count 2, making a criminal threat (§ 422, subd. (a)), and a consecutive sentence of one-third the middle term of eight months on count 4, attempting to dissuade a witness (§ 136.1, subd. (a)(2)). A sentence of one year was imposed for a misdemeanor probation violation and run concurrently with the felony sentence. Appellant was awarded 189 days of actual custody and 189 days of conduct credits.

2. The November 9, 2015, Sentencing Hearing

On the People's motion, the trial court recalled appellant's sentence, ostensibly pursuant to section 1170, subdivision (d)(1), on November 9, 2015. At the People's request, the trial court then found true the section 667.5, subdivision (c)(21), "person present" allegation and reduced appellant's conduct credits to 15 percent pursuant to section 2933.

B. Sentencing Errors

Appellant argues the trial court erred in sentencing.

1. Section 1170.15 Was Misapplied to Count 2

Appellant contends the trial court erred by applying section 1170.15 to count 2. We agree.

"[S]ection 1170.15 provides that when a defendant is convicted of a felony and also convicted of a second felony for a violation of section 136.1 (dissuading a witness) involving a witness to the first felony, 'the subordinate term for each consecutive offense' of dissuading a witness must be the full middle term for the dissuading a witness count plus any

enhancements applicable to that count." (*People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1478–1479.) "This language requires the trial court to impose the full middle term of imprisonment only if a consecutive sentence is imposed. The section does not require the trial court to impose a consecutive sentence, but instead indicates that if the trial court chooses consecutive sentencing it must impose a full-term sentence for the witness dissuasion count." (*Id*. at p. 1479.)

Appellant was convicted of burglary in count 1, and of violating section 136.1, dissuading a witness, Y., in count 4. In addition, Y. was the victim of, and a witness to, the underlying felony burglary in count 1. Accordingly, this case falls within the purview of that alternative sentencing scheme. However, the trial court apparently misunderstood that this sentencing scheme applied to the term for count 2, making a criminal threat (§ 422, subd. (a)), because it imposed a full consecutive term on that count. We agree with appellant, that the trial court had no authority to impose a full term sentence on count 2. (§ 1170.1, subd. (a).) Respondent requests that we either apply the sentencing scheme to count 4, or remand the matter so that the trial court can make such a correction. We choose to do the latter, as we find the trial court did not understand it also had discretion to impose a concurrent sentence on count 4.

At the sentencing hearing, the trial court stated that it was "required" to impose a full mid-term sentence, indicating that it mistakenly believed that it had no discretion to impose a concurrent sentence. "Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.]"

(*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) As a result, the matter is remanded to allow the trial court to exercise its discretion to determine whether the sentence on count 4 should be a full term midbase consecutive sentence or instead a concurrent term. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1263.)

2. Section 654 is Applicable to Count 2

The trial court imposed separate consecutive sentences on counts 1 and 2, which charged residential burglary and making a criminal threat respectively. Appellant contends that the sentence as to count 2 must be stayed pursuant to section 654. We agree.

Section 654 bars separate punishments for multiple crimes that are " 'incident to one objective.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The application of section 654 to a particular case is a factual determination made by the trial judge and is entitled to a reviewing court's deference. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) However, section 654's prohibition on multiple punishment precludes separate punishment for both a burglary and that burglary's "target" crime. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

In this case, the trial court applied an erroneous test, holding that section 654 was not applicable because the burglary in count 1 was "completed" at the time of entry. There is no question but that a burglary *is* completed upon entry with felonious intent. (*People v. Escobar* (1992) 7 Cal.App.4th 1430, 1437.) However, the question in section 654 analysis is different: it is whether the crimes were incident to a single objective, not whether one crime was "completed" before the other was committed.

Applying the rule defined in *People v. Hester*, *supra*, 22 Cal.4th at page 294, to the facts of this case, we find that the burglary in count 1 and the target crime of criminal threats in count 2 were incident to a single objective or indivisible criminal intent: the threatening and intimidation of Y. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214–1215; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267–268.) Thus, sentencing appellant to separate terms for both crimes violated section 654. Therefore, the sentence for count 2, the criminal threat, must be stayed because count 1 has the longest potential term of imprisonment. (§ 654, subd. (a); *People v. Duff* (2010) 50 Cal.4th 787, 795–796; *People v. Deloza* (1998) 18 Cal.4th 585, 591–592.)

3. The Trial Court Had No Jurisdiction to Modify the Judgment When it Recalled the Sentence on November 9, 2015

Appellant contends that the trial court erred in recalling his sentence and finding that a person was present for purposes of the robbery conviction in count 1. Specifically, appellant contends the trial court had no jurisdiction to so modify the judgment, no authority to recall the sentence based on the People's motion, and improperly increased appellant's sentence. Because we find the first contention meritorious and the trial court's act void, we do not address the other two.

Generally, a trial court is without jurisdiction to modify a sentence once the defendant has begun serving it. (*Holder v. Superior Court* (1970) 1 Cal.3d 779, 783, superseded by statute; see *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455; *Cano v. Superior Court* (1999) 72 Cal.App.4th 1310, 1314.) Further, the filing of a notice of appeal divests the trial court of jurisdiction to make any order that affects the judgment. (*People v. Wagner*

(2009) 45 Cal.4th 1039, 1061; *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923–924; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1824–1825.)

Here, the trial court purported to recall and modify appellant's sentence pursuant to section 1170, subdivision (d), which is an exception to both of these general restrictions on a trial court's power. (*Dix v. Superior Court*, *supra,* 53 Cal.3d at p. 455; *Portillo v. Superior* Court, *supra*, 10 Cal.App.4th at p. 1836.) However, the trial court did not modify the sentence, but instead changed the judgment. It had no jurisdiction to do so, and we find the act void.

A court's authority under section 1170, subdivision (d), is limited: a court may modify a *sentence* but may *not* modify the underlying *judgment* to accommodate a change in sentence. (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471–1473 (*Nelms*); *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496–1500 (*Espinosa*).) In *Nelms*, the trial court recalled the defendant's sentence while the case was pending on appeal and dismissed a count, ostensibly under section 1170, subdivision (d),[7] which resulted in a lower sentence. The Court of Appeal held that this was improper because the dismissal of a count modified the judgment rather than the sentence and was not permitted by section 1170, subdivision (d). (*People v. Nelms, supra*, 165 Cal.App.4th at p. 1472.)

Similarly, in *Espinosa, supra,* 229 Cal.App.4th 1487, the defendant was convicted of first degree murder and sentenced to 26 years to life for that crime and an enhancement. At the time of a restitution hearing—again after the filing of a notice of

---

[7] Current section 1170, subdivision (d)(1), contains the same language as section 1170 at the time *Nelms* was decided.

appeal—the trial court recalled the sentence, purportedly under section 1170, subdivision (d), and reduced the conviction to second degree murder. The Court of Appeal found that the trial court had no jurisdiction to do this because its order modified the judgment, not the sentence, and, therefore, violated the general rule that a court is without jurisdiction to make an order affecting a judgment while the case is pending appeal. (*Espinosa, supra*, at pp. 1496–1499.)

The order of November 9, 2015, purported to change the crime from burglary to a burglary with a finding that a person was present within the meaning of section 667.5, subdivision (c)(21). As in *Nelms* and *Espinosa*, this was a modification of the underlying judgment, not a recall and modification of the sentence. Thus, the trial court had no jurisdiction to make that finding and we find, as in *Nelms* and *Espinosa*, that the order is null and void and of no effect.

DISPOSITION

Appellant's convictions of violating sections 459 in the first degree, 422, and 136.1, subdivision (a)(2), are affirmed. The finding pursuant to section 667.5, subdivision (c)(21), in count 1 is reversed.

The sentencing order of November 9, 2015, is reversed and remanded with directions to: (1) impose and stay the sentence on count 2 pursuant to section 654; and, (2) determine whether the sentence on count 4 is to run consecutively to or concurrently with the sentence on count 1, and if that sentence is to run consecutively, to impose the full midterm sentence of two years pursuant to section 1170.15. Since the "person present" finding pursuant to section 667.5, subdivision (c)(21), has been reversed, the trial court is directed to award appellant conduct credits

pursuant to section 4019, consistent with the rule for awarding credits on remand.[8]

HALL, J.*

We concur:

BIGELOW, P.J. RUBIN, J.

---

[8] Since we find that the trial court was without jurisdiction to modify the judgment at the November 9, 2015, proceeding, appellant is considered to have been in state prison custody since October 5, 2015. Therefore, under the rule stated in *People v. Buckhalter* (2001) 26 Cal.4th 20, the trial court need only add to its original calculation appellant's actual days spent in custody between October 5, 2015, and the date of resentencing.

We note that the trial court awarded 189 days of actual credit and 189 days of conduct credit. We question this calculation. As to the actual days of credit, the record reflects that appellant was arrested on March 31, 2015, and released on bail April 14, 2015. He failed to appear at his preliminary hearing and was rearrested on April 27, 2015, and remained in custody until he was sentenced on October 5, 2015. We count that as 177 days of actual custody credit. In addition, we remind the court that the conduct credit applicable here is awarded pursuant to section 4019. That section provides that "if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f).) As a result, conduct credit is always an even number. If our calculation of 177 days actual time is correct, appellant would be entitled to 176 days of conduct credit, for a total of 353 days credit.

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