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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS DIAZ, Defendant and Appellant.	B241557 (Los Angeles County Super. Ct. No. VA118303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Modified and, as modified, affirmed with directions.

Koryn & Koryn and Daniel G. Koryn, 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, Susan Sullivan Pithey and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose Luis Diaz appeals from the judgment entered following his convictions by jury on four counts of sexual intercourse with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a); counts 1, 2, 11, & 12), four counts of sodomy with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a); counts 3, 4, 13, & 14), eight counts of oral copulation with a child 10 years old or younger (Pen. Code, § 288.7, subd. (b); counts 5 – 8 & 15 – 18), and four counts of lewd act upon a child (Pen. Code, § 288, subd. (a); counts 9, 10, 19, & 20) with, as to each of the last four counts, a multiple victim finding (Pen. Code, § 667.61, subd. (b)). The court sentenced appellant to prison for 380 years to life. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established as follows. L. M. was born on November 20, 2003. Between November 20, 2009 and November 19, 2010, i.e., when L. M. was six years old, appellant had sexual intercourse with her twice (counts 1 & 2), sodomized her twice (counts 3 & 4), engaged in oral copulation with her four times (counts 5 – 8), and committed a lewd act upon her twice (counts 9 & 10). K. M. (L. M.'s sister) was born on January 8, 2005. Between January 8, 2010, and January 7, 2011, i.e., when K. M. was five years old, appellant similarly had sexual intercourse with her twice (counts 11 & 12), sodomized her twice (counts 13 & 14), engaged in oral copulation with her four times (counts 15 – 18), and committed a lewd act upon her twice (counts 19 & 20).

Los Angeles County Sheriff's Deputy Jose Diaz testified at trial as follows. About 10:30 p.m. on January 18, 2011, Deputy Diaz was at a Hawaiian Gardens residence. Deputy Diaz spoke with appellant in a patrol car and told appellant that he was being detained for a child abuse investigation. Deputy Diaz, reading from a "SH-AD 477" card, advised appellant of his *Miranda* rights and appellant said he understood them. The last question was "to the effect of do you wish to speak to us." Deputy Diaz did not ask

appellant if appellant "wish[ed] to waive and give up those rights." After Deputy Diaz asked appellant if he wanted to speak with Deputy Diaz, appellant said he "would speak with us." Deputy Diaz then interviewed appellant for about 20 minutes. Deputy Diaz only obtained background information and did not specifically question appellant regarding the girls' allegations.

Los Angeles County Sheriff's Detective Claudia Garcia testified at trial as follows. On January 19, 2011, Garcia and Los Angeles County Sheriff's Detective Scott McCormick interviewed appellant at the Lakewood sheriff's station.

Garcia reminded appellant of his *Miranda* rights. At the beginning of the interview, Garcia attempted to read appellant his *Miranda* rights, but McCormick told Garcia that that "had already been taken care of" and "they did read [appellant] his right from patrol so if he remembers them." Garcia asked appellant if appellant "remember[ed] when they read you your rights," appellant replied, "Yes, in the patrol car," and Garcia said, "Okay, it's the same thing." Garcia asked appellant if appellant understood "what they told you," and appellant replied, yes. Garcia told appellant, "okay, then it's the same thing." Garcia asked appellant if appellant knew why appellant was there, and the interview followed. Appellant was very comfortable during the interview and, at times, laughed.

The interview lasted about 80 minutes. Garcia surreptitiously recorded the interview. The recording contained all but about the last five minutes of the interview because "the recording failed." A transcript (People's exhibit No. 9B) accurately reflected the interview.

The transcript reflects appellant told detectives the following. Appellant touched the girls while playing with them in their residence but he also sexually touched them. Both girls kissed him on the mouth and that was how it started. The older girl (Lorranne) touched appellant's penis more than once. Appellant thought the younger girl (K.) touched his penis twice. Appellant touched the girls' vaginas over, and through one side, of their panties. Appellant did not penetrate the girls with his penis; "it was just with the

tongue." Appellant put his penis on "it" "over the panties" when playing with the girls. The girls would lie on top of him. Appellant became excited, which was natural.

Appellant also told detectives the following. Each girl orally copulated appellant two or three times. Appellant orally copulated the girls two or three times. Appellant also said he orally copulated the girls about 10 times. Appellant did not put his penis in the girls' vaginas, but he put his penis "over on top" while playing. Appellant was sorry for what he did. According to appellant, the inappropriate touching started about a week before the detectives' interview. Appellant began playing with the girls in about June 2010. Appellant touched the girls once a week. Appellant's conscience began gnawing at him; he had experienced a moment of weakness. Appellant sodomized each girl once. Appellant sexually played with the girls about 10 times.

Garcia testified that during the last unrecorded minutes of the interview, appellant said he had not had sex or a female partner for the last 15 years and that was why he probably had sexually assaulted the two girls. Appellant also told Garcia that appellant made the girls watch pornography. On January 20, 2011, McCormick went to the above mentioned Hawaiian Gardens residence where appellant lived. McCormick searched appellant's bedroom where the molestations occurred. McCormick found pornographic DVD's in the bedroom. Appellant presented no defense evidence.

ISSUES

Appellant claims (1) detectives violated his *Miranda* rights, (2) the trial court erred and violated his constitutional rights by giving CALJIC No. 2.20.1 to the jury, (3) the prosecutor committed misconduct during closing argument, (4) appellant's sentence was cruel and unusual punishment, and (5) appellant is entitled to additional precommitment credit. Respondent claims the Penal Code section 1202.45 parole revocation fine must be increased.

DISCUSSION

1. *There Was No Need to Readvise Appellant of His Miranda Rights.*

a. *Pertinent Facts.*

On April 2, 2012, appellant made a pretrial motion to suppress, on *Miranda*[1] grounds, the statements he made to the detectives. During the hearing on the motion, counsel for the parties represented to the court the facts that occurred at the scene and later at the station as pertinent to the *Miranda* issue, and the testimony at trial of Deputy Diaz and Garcia concerning the pertinent facts was essentially the same as the above mentioned representations of counsel at the hearing. The prosecutor indicated to the court that about 19 hours passed from the time of Deputy Diaz's advisement to the time of Garcia's interview at the station. After argument, the trial court, relying in part on *People v. Pearson* (2012) 53 Cal.4th 306 (*Pearson*), denied appellant's suppression motion. Appellant's ensuing statement to the detectives was admitted into evidence as reflected in the Factual Summary.

b. *Analysis.*

Appellant claims that, because the detectives did not readvise appellant of his *Miranda* rights prior to the detectives' interview of appellant, the trial court erroneously denied his suppression motion. We reject the claim.

The prosecution bears the burden of demonstrating the validity of a defendant's *Miranda* waiver by a preponderance of the evidence. The question is whether the alleged waiver was voluntary, knowing, and intelligent under the totality of the circumstances surrounding the interrogation. (*People v. Williams* (2010) 49 Cal.4th 405, 425.) "In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda v. Arizona, supra,* 384 U.S. 436, the scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially

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[1] *Miranda v. Arizona* (1966) 384 U.S. 346 [16 L.Ed.2d 694] (*Miranda*).

supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.)

" '[R]eadvisement is unnecessary where the subsequent interrogation is "reasonably contemporaneous" with the prior knowing and intelligent waiver. [Citations.] The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights.' [Citations.]" (*Pearson*, *supra*, 53 Cal.4th at pp. 316-317.)

In the present case, there is no dispute that on January 18, 2011, Deputy Diaz properly advised appellant of his *Miranda* rights at the scene and appellant understood the advisement. Appellant concedes he impliedly waived his rights at the scene. We accept the concession. An express waiver was not required before Deputy Diaz could talk with appellant because appellant subsequently talked with him. (*People v. Riva* (2003) 112 Cal.App.4th 981, 989 (*Riva*).)

About 19 hours passed from the time of the *Miranda* advisement at the scene to the time of Garcia's January 19, 2011 interview of appellant at the sheriff's station. This was a shorter period than that at issue in *Pearson*, *supra*, 53 Cal.4th at p. 317 (27 hours) or *People v. Mickle* (1991) 54 Cal.3d 140, 171 (36 hours). Appellant was in custody the entire time. Appellant has not directed our attention to any evidence that appellant was in custody for any reason other than the alleged sexual abuse of the children.

Garcia reminded appellant of his *Miranda* rights. McCormick told Garcia that appellant already had received an advisement. Appellant did not dispute this at the station. Appellant indicated he remembered when the rights previously had been read to him, and Garcia told appellant it was the same thing. Garcia asked appellant if appellant

understood the earlier advisement, and appellant replied yes. Garcia again told appellant, "it's the same thing." Garcia asked appellant if appellant knew why appellant was there. Appellant never indicated he did not know why he was at the station. The interview ensued.

We hold no readvisement of appellant's *Miranda* rights was necessary. (Cf. *Pearson, supra,* 53 Cal.4th at pp. 316-317.) The fact the advisement at the scene and the interview at the station were not conducted by the same person does not compel a contrary conclusion. (Cf. *People v. Miller* (1996) 46 Cal.App.4th 412, 418.) Nor does the fact that there might not have been an additional factor(s) demonstrating no readvisement was necessary. (*Pearson, supra,* 53 Cal.4th at p. 317.)[2] Appellant again impliedly and validly waived his *Miranda* rights at the station when he allowed Garcia to interview him. (Cf. *Riva, supra,* 112 Cal.App.4th at p. 989.) Appellant's waiver of his *Miranda* rights was voluntary, knowing, and intelligent under the totality of the circumstances surrounding Garcia's interview of appellant. No violation of appellant's *Miranda* rights occurred.

2. *The Trial Court Did Not Err by Giving CALJIC No. 2.20.1 to the Jury.*

During its final charge to the jury, the trial court without objection gave CALJIC No. 2.20.1, regarding the evaluation of testimony of a child ten years of age or younger. The written instruction stated, "In evaluating the testimony of a child ten years of age or younger you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. *A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult.* You should not discount or distrust the testimony of a child

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[2] Appellant does not direct our attention to anything in the record that supports his suggestion that the "tape recorder was turned off," appellant believed the recorder was turned off, or appellant believed he was speaking off the record when the tape recorder was turned off; therefore, he believed his statements off the record would be inadmissible.

solely because she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge." (Italics added.)

Appellant complains that, by giving CALJIC No. 2.20.1, the trial court erred and violated his constitutional rights to a jury trial, to present a defense, to confront witnesses, and to due process. Appellant's complaint, which pertains only to the above italicized language, is that "[i]f a child's age and level of cognitive development cause her to *perform* differently than an adult, her testimony *must* reflect an impaired ability to perceive, understand, remember, or communicate." (First italics added.) He also argues that "even if a reasonable juror would comprehend the *performance* language of CALJIC No. 2.20.1 to refer only to the child witness's demeanor and not to the content of his or her testimony, the child's demeanor is a relevant consideration for the jury to take into account in assessing credibility . . . ." (Italics added.)

However, the challenged sentence in CALJIC No. 2.20.1 "does not instruct the jury that it may not consider a child's age and cognitive ability in deciding his/her credibility as a witness." (*People v. Harlan* (1990) 222 Cal.App.3d 439, 455 (*Harlan*).) The word "perform" refers to nonverbal action, i.e., to the demeanor and the manner of the testimony, not to the content of the testimony. The trial court also gave the jury CALJIC No. 2.20, that told the jury that, in determining the believability of a witness, the jury could consider the "demeanor and manner of the witness while testifying." Nothing in CALJIC No. 2.20.1 prevented the jury from considering a child witness's ability to perceive, understand, remember, or communicate, or from considering any other factor relevant to credibility.

Appellant concedes "the arguments he is making against CALJIC No. 2.20.1 . . . have been rejected by several appellate courts," i.e., in *People v. Jones* (1992) 10 Cal.App.4th 1566, *Harlan*, and *People v. Gilbert* (1992) 5 Cal.App.4th 1372. Based on those cases, we reject his arguments as well. The court did not err, constitutionally or otherwise, by giving CALJIC No. 2.20.1 to the jury. Moreover, there was ample

evidence of appellant's guilt, including his statements to the detectives. No prejudicial instructional error occurred. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

3. *No Prosecutorial Misconduct Occurred.*

At the beginning of the prosecutor's closing argument, the following occurred: "[The Prosecutor]: I'd just like everyone to take a few seconds to clear their mind. The defendant's argument – defense's argument, rather, was full of misrepresentations and full of misquotes. [¶] [Appellant's Counsel]: Objection. [¶] The Court: Overruled. [¶] [Appellant's Counsel]: Calls for aspersions as to my own credibility. [¶] The Court: Overruled."

The prosecutor then stated without objection, "You heard the evidence, you listened to the witnesses, you listened to the audio recording and followed along with the transcript, you know what the evidence is. What the attorneys say is not evidence, and rely on your memory. If you need a readback, you can always request that. [¶] But contrary to what the defense is claiming, this case is very simple. It's straightforward. The truth is clear. You heard from two credible, young victims what happened to them. You have the defendant's own statements to corroborate what they stated happened."

Appellant claims the prosecutor committed misconduct by "improperly maligning defense counsel and the credibility of appellant's defense." We conclude otherwise. First, appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to the prosecutor's comment, which would have cured any harm. Appellant waived the issue of prosecutorial misconduct. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

A prosecutor violates the Fourteenth Amendment to the United States Constitution by committing conduct that infects the trial with unfairness to the degree that due process, the defendant's right to a fair trial, is denied. A prosecutor's misconduct that does not render a trial fundamentally unfair may violate state law if it uses deceptive or reprehensible methods to attempt to persuade the court or jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

When an appellant bases a prosecutorial misconduct claim on the prosecutor's argument, the reviewing courts consider how a reasonable juror would, or could, have understood the statement in the context of the entire argument. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Reviewing courts consider whether there was a reasonable likelihood that the prosecutor's remarks would have been misconstrued or misapplied by the jury, and interpreted in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*).) The prosecutor's remarks are considered in the context of the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) Reviewing courts do not lightly infer that the jury drew the most rather than least damaging meaning from the prosecutor's statements. (*Frye*, at p. 970.)

A prosecutor is given wide latitude during argument. A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness. (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel. (*People v. Bemore* (2000) 22 Cal.4th 809, 846 (*Bemore*).) Nevertheless, an improper comment occurs only when there is personal attack on defense counsel. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1166-1167.) The prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and *factual* account. (*Bemore*, at p. 846; see *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor said " 'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something . . . .' "].)

In the present case, the prosecutor did not expressly refer to appellant's trial counsel. The prosecutor ultimately referred to the "defense's *argument*." (Italics added.) The prosecutor did not state the defense argument was full of fabrications or lies. The prosecutor stated the defense argument was "full of misrepresentations and full of misquotes." We do not assume the jury drew the most damaging meaning from that statement. The jury reasonably could have understood the statement to mean merely that

the defense argument was full of erroneous representations and quotes, absent any indication any errors were intentional.

The prosecutor's subsequent unobjected-to comments focused attention on the evidence and the fact that what attorneys said was not evidence. Those comments also encouraged the jury to rely on their memories and any readback, and emphasized the case was simple and straightforward. The prosecutor's comments then focused on the credibility of the victims and the corroborating nature of appellant's statements. That is, the challenged comments occurred in the broader context of the prosecutor's argument about the evidence.

The challenged comments were brief and unrepeated, and there was ample evidence of appellant's guilt. (Cf. *People v. Yeoman* (2003) 31 Cal.4th 93, 148-149.) The court instructed the jury to base its decision on the facts and law, and instructed the jury that statements made by attorneys during the trial were not evidence. The jury is presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) No prejudicial prosecutorial misconduct occurred. (Cf. *Frye*, *supra*, 18 Cal.4th at pp. 978-979; *Watson*, *supra*, 46 Cal.2d at p. 836.)

4. *Appellant's Sentence Was Neither Cruel Nor Unusual Punishment*.

The trial court sentenced appellant to prison for 380 years to life. Appellant claims his sentence was cruel and/or unusual punishment under the federal and state Constitutions. He argues, inter alia, if appellant had committed cold-blooded premeditated murder with a firearm, his maximum sentence would have been 50 years in prison and he would have been eligible for parole in 50 years. He also argues he is 40 years old; therefore, his sentence guarantees he will not survive to the time he is eligible for parole.

We reject appellant's claim. It is immaterial appellant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without the possibility of parole, i.e., he will be in prison for the rest of his life. Imposition of a sentence of life without the possibility of parole in

an appropriate case does not constitute cruel or unusual punishment under the state or federal Constitution. Further, a sentence such as the one imposed in this case serves the valid penological purposes of reflecting society's condemnation of appellant's conduct and providing a strong psychological deterrent to those considering engaging in such conduct. (Cf. *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.) Appellant did not commit a homicide, but he committed multiple sexual offenses against children. Appellant's sentence did not constitute cruel or unusual punishment under either the federal or state Constitutions.

5. *Appellant Is Entitled to Additional Precommitment Credit.*

In the present case, the trial court awarded appellant 467 days of custody credit pursuant to Penal Code section 2900.5, subdivision (a), and there is no dispute as to the validity of that award. However, the trial court did not award appellant any Penal Code section 4019 conduct credit. Respondent concedes it appears appellant is entitled to additional Penal Code section 4019 conduct credit (*People v. Brewer* (2011) 192 Cal.App.4th 457, 460-464), limited to 15 percent of his custody credit (Pen. Code, § 2933.1, subd. (c)). Appellant is entitled to 70 days of conduct credit. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 816-817.) We will amend the judgment accordingly.

6. *The Restitution Fine Must Be Reduced.*

During the April 30, 2012 sentencing hearing, the following occurred: "[The Court]: There's also a restitution fine in this matter of $200. [¶] The Clerk: 240. [¶] The Court: $240 now. [¶] Parole revocation fee of $200, which will be stayed."

In a footnote in the statement of facts of respondent's brief, respondent claims, "At the sentencing hearing, the trial court stated that the parole revocation fee was $200. . . . Since the parole revocation fee must be in the same amount as the restitution fine (§ 1202.45, subd. (a)), it should be adjusted." For the reasons discussed below, we agree a parole revocation fine must equal a restitution fine, but we disagree the parole revocation fine in this case must be adjusted to $240. Instead, in this case the restitution fine must be adjusted to $200.

Appellant's offenses occurred in 2009, 2010, and 2011. At the time of those offenses, former Penal Code section 1202.4, subdivision (b)(1) stated, in relevant part, "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than *two hundred dollars ($200)*, and not more than ten thousand dollars ($10,000), if the person is convicted of a felony." (Italics added.)

Effective January 1, 2012, the Legislature amended former Penal Code section 1202.4, subdivision (b)(1)[3] to state, in relevant part, "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than *two hundred forty dollars ($240)* starting on January 1, 2012." (Italics added.) (Pen. Code, § 1202.4, subd. (b)(1) as amended by Stats. 2011, ch. 358, § 1, eff. Jan. 1, 2012; *People v. Kramis* (2012) 209 Cal.App.4th 346, 349, fn. 2 (*Kramis*).)

The applicable restitution fine statute was former Penal Code section 1202.4, subdivision (b)(1) as it read at the time of appellant's offenses in 2009, 2010, and 2011 (*Kramis*, *supra*, 209 Cal.App.4th at pp. 349, 351; cf. *People v. Martinez* (2005) 36 Cal.4th 384, 389 (*Martinez*)), not former Penal Code section 1202.4, subdivision (b)(1) as it read at the time of the 2012 sentencing hearing in this case.

The record of the 2012 sentencing hearing in this case reflects the trial court imposed a $200 restitution fine until the clerk indicated the fine should have been $240, at which time the court then said, "$240 now." Fairly read, this colloquy reflects that, because of the clerk's comment, the trial court *ultimately* imposed a minimum $240 former Penal Code section 1202.4, subdivision (b)(1) restitution fine based on that subdivision as it read "now," i.e., at the time of the 2012 sentencing hearing, that is, *based on the subdivision as it read effective January 1, 2012*. The colloquy also reflects, therefore, that the trial court *initially* imposed a minimum $200 former Penal Code section 1202.4, subdivision (b)(1) restitution fine *based on that subdivision as it read*

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[3] Former Penal Code section 1202.4, subdivision (b)(1) was amended again effective January 1, 2013, in respects not pertinent here.

prior to January 1, 2012 (i.e., at the time of appellant's offenses). The restitution fine the trial court initially imposed was the correct one. (*Kramis, supra*, 209 Cal.App.4th at pp. 349, 351; cf. *Martinez, supra*, 36 Cal.4th at p. 389.)

This is not a case in which the trial court, authorized to impose a restitution fine from $200 to $10,000 under former Penal Code section 1202.4, subdivision (b)(1) applicable at the time of appellant's offenses, elected in the exercise of its discretion to impose a fine of $240. It is highly unlikely the clerk recommended that the court impose a $240 fine in the exercise of the court's *discretion*, or that the court accepted such a recommendation. Instead, the record in this case, fairly read, demonstrates the trial court imposed a $240 fine only because it erroneously believed, based on the clerk's suggestion, that the minimum fine required "now" by the subdivision as amended effective January 1, 2012, was $240.

The trial court imposed a minimum $240 former Penal Code section 1202.4, subdivision (b)(1) restitution fine as that subdivision read at the time of appellant's offenses. This was an unauthorized sentence, since the minimum fine under that subdivision was $200. An unauthorized sentence may be corrected at any time. (*People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.) We will modify the judgment by reducing appellant's restitution fine to $200. The Penal Code section 1202.45 parole revocation will then be equal to the restitution fine, as the parole revocation fine must be (*People v. Smith* (2001) 24 Cal.4th 849, 853); therefore, there is no need to modify the parole revocation fine.

DISPOSITION

The judgment is modified by reducing appellant's former Penal Code section 1202.4, subdivision (b)(1) restitution fine from $240 to $200, and by awarding appellant 70 days of Penal Code section 4019 conduct credit and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.