Filed 3/6/18 P. v. Poole CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DIVINE POOLE, Defendant and Appellant.	B276630 (Los Angeles County Super. Ct. No. YA092649)

APPEAL from a judgment of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed in part and remanded with directions.

Phillip A. Treviño, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Divine Poole appeals the judgment entered following a jury trial in which he was convicted of one count of first degree burglary. (Pen. Code, § 459.)[1] The trial court sentenced appellant to a term of 16 months (one-third the midterm of four years) to run consecutively to the sentence in Los Angeles County Superior Court Case No. TA137598-02. The court awarded no custody credits.

Appellant contends the prosecutor improperly used a peremptory challenge to excuse the sole African-American juror from the venire, and the trial court erred in denying appellant's *Batson-Wheeler*[2] motion. We disagree and affirm the judgment of conviction. The Attorney General contends the trial court imposed an unauthorized sentence and erroneously ruled that appellant was not entitled to any custody credits. We disagree that the sentence the court imposed was unauthorized, and conclude that the prosecutor's failure to object at sentencing forfeited the issue. However, we remand the matter for the recalculation and award of credits in the aggregate for this case and case No. TA137598.

DISCUSSION

I. *Batson-Wheeler*

Appellant contends that structural *Batson-Wheeler* error resulted from the prosecutor's use of a peremptory challenge to excuse the sole African-American prospective juror from the jury

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[1] Undesignated statutory references are to the Penal Code.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

venire. He asserts that the trial court erred in finding appellant had not established a prima facie case of discrimination, the prosecutor's reasons for excusing the juror were "not rational or otherwise supported by the record," and a comparative juror analysis reveals the only possible reason for excusing the sole African-American in the venire to be racial bias. Appellant's argument lacks merit.

A. *Relevant background*

Voir dire commenced in the case on Friday, March 18, 2016, and resumed Monday, March 21, 2016. The jury venire included only two African-Americans: Prospective Jurors 8089 and 8673. During voir dire on Friday, Prospective Juror 8089 described her past employment with the Los Angeles County Superior Court as a senior superior court manager. She revealed that she had been the victim of a rape in 1978 and had suffered several residential and vehicle burglaries. She also expressed reluctance to serve on the jury because of various medical and job-related conflicts. Neither party sought to excuse the juror.

Later in the day on Friday, Prospective Juror 8673 informed the court that she recognized the name of one of the witnesses as someone she might know. The juror explained that she knew the witness through another friend, and had socialized with her "[a]bout a couple times" through that friend. The juror felt she would give the witness "enhanced credibility" because of their acquaintance. After confirming that the witness and the juror knew each other, the court determined "[i]t would be unfair for [Prospective Juror 8673] to sit on this matter." At the trial court's request, both counsel stipulated to excusing the juror.

On Monday, March 21, 2016, Prospective Juror 8089 advised the court and counsel that she knew the victim in the

case, who was the financial secretary of the juror's senior citizens' group at church. Prospective Juror 8089 had talked with the victim, they had "done events together," they "go on trips together," and they both took part in the social activities of the senior club. The juror explained that she donates money to the senior club, and the victim manages that money. In response to questioning by the court, the juror stated she could be fair and could follow the court's instruction to "judge the testimony of each witness by the same standards, setting aside any bias or prejudice." But she stressed that she did "have a relationship" with the victim, and the victim's "credibility is strong with me because [of] the function she does. She's our financial secretary, and she does an excellent job with it." Because of this relationship, the juror felt that the victim would be "starting off at a higher point of credibility" than the other witnesses.

The prosecutor moved to dismiss Prospective Juror 8089 for cause. Defense counsel opposed the motion, stating that the victim in the case was not a percipient witness, but would only identify her jewelry taken in the burglary, and her credibility was not in dispute. Defense counsel explained that she had stipulated to excusing Prospective Juror 8673 even though she was one of only two African-Americans in the venire because that juror was acquainted with a percipient witness in the case.

The prosecutor pointed out that Prospective Juror 8089 was not only acquainted with the victim, but had a fiduciary relationship with her—"the highest form of trust there is"—and had already admitted that this witness would start out with greater credibility than other witnesses. The prosecutor added, "I realize this juror may be sympathetic towards my victim and may even help me, but I want a clean trial. I want a clean appellate

record. That's why I think she should be disqualified." Defense counsel continued to oppose dismissal for cause, noting that Prospective Juror 8089 was the only remaining African-American juror in the venire after the stipulated dismissal of Prospective Juror 8673.

After the court denied the motion to excuse Prospective Juror 8089 for cause, the prosecutor exercised a peremptory challenge against the juror. Appellant objected on *Batson-Wheeler* grounds contending: "If there is one African-American [juror], and the prosecutor is attempting to excuse her, I think there's a prima facie case." The trial court acknowledged that Prospective Juror 8089 was the only African-American in the venire, but noted the prosecutor had excused five other jurors on Friday, and it was only after the new revelations surfaced that the prosecutor sought to dismiss this juror. Finding no pattern of discrimination, the trial court concluded that appellant had failed to establish a prima facie case. Nevertheless, the court invited the prosecutor "to state [his] reasons for the excusal just in case the appellate court disagrees."

The prosecutor first reiterated his objection that the victim and Prospective Juror 8089 had a fiduciary relationship, with the victim being "in charge of managing this juror's money . . . . Like I said, I want a nice, clean trial and appellate record. I understand the court's previous ruling regarding my for cause challenge. I just don't want to mess around with this juror." The prosecutor then cited the juror's employment background and the rape case as further grounds for dismissing her.

Defense counsel responded that, because Prospective Juror 8089 was "a prime prosecution witness [*sic*] in that she has a relationship with the alleged victim in this case," the prosecutor's

challenge against this juror must be deemed "solely motivated by race." The trial court denied the *Batson-Wheeler* motion, reiterating its finding that the defense had failed to make a prima facie showing, and adding that it found the prosecutor's justification to be race-neutral.

B. *The trial court did not err in denying the defense* Batson-Wheeler *motion*

Both the federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race. (*People v. Scott* (2015) 61 Cal.4th 363, 383 (*Scott*); *Batson, supra*, 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler, supra*, 22 Cal.3d at pp. 276–277.) "The familiar *Batson*/*Wheeler* inquiry consists of three distinct steps. The opponent of the peremptory strike must first make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. If a prima facie case of discrimination has been established, the burden shifts to the proponent of the strike to justify it by offering nondiscriminatory reasons. If a valid nondiscriminatory reason has been offered, the trial court must then decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 42 (*Zaragoza*); *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) There is a rebuttable presumption that a party properly exercised its peremptory challenges, and the burden is on the party opposing a challenge to demonstrate impermissible discrimination. (*People v. Parker* (2017) 2 Cal.5th 1184, 1211 (*Parker*).) Indeed, "[t]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent

of the strike." (*Lenix*, *supra*, at pp. 612–613; *People v. Manibusan* (2013) 58 Cal.4th 40, 75.)

This case concerns only the first step of the *Batson-Wheeler* inquiry:[3] that is, whether the trial court correctly determined that appellant failed to make a prima facie case of discriminatory purpose based on the totality of the relevant facts, including any nondiscriminatory reasons for the challenge that were clearly established in the record. (*Scott*, *supra*, 61 Cal.4th at p. 384; *Zaragoza*, *supra*, 1 Cal.5th at p. 43.) Here, the trial court ruled that appellant could not establish a prima facie case because there could be no pattern of discrimination with only one African-American juror in the venire. However, because "a *Wheeler/Batson* violation may occur with a single discriminatory challenge," (*People v. Williams* (2006) 40 Cal.4th 287, 313) the trial court needed to go further in assessing the totality of relevant facts to determine if appellant had made a prima facie showing. Since the trial court applied the wrong standard, we review the record de novo to determine whether it supports the trial court's ruling. (*People v. Bonilla* (2007) 41 Cal.4th 313, 342

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[3] The trial court's invitation to the prosecutor to state his reasons for excusing the prospective juror did not constitute an implicit finding that appellant had established a prima facie case of intentional racial discrimination. To the contrary, the court explicitly found no prima facie showing had been made and *then* asked the prosecutor if he "want[ed] to state [his] reasons . . . just in case the appellate court disagrees." (See *People v. Taylor* (2010) 48 Cal.4th 574, 613–614 & fn. 9 [even though the trial court had found no prima facie case of discrimination, by asking the prosecutor to state her reasons for the challenges the trial court had followed " 'better practice' "].)

(*Bonilla*); *Scott*, *supra*, at p. 384.) In so doing, " 'we review the ruling, not the court's reasoning, and, if the ruling was correct on any ground, we affirm.' " (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12, quoting *People v. Geier* (2007) 41 Cal.4th 555, 582.)

The determination of the existence of a prima facie case requires consideration of the entire record of voir dire as of the time the *Batson-Wheeler* motion was made. (*Lenix*, *supra*, 44 Cal.4th at p. 624; *Scott*, *supra*, 61 Cal.4th at p. 384.) However, our Supreme Court has declared certain types of evidence to be particularly relevant. (*Bonilla*, *supra*, 41 Cal.4th at p. 342; *Scott*, *supra*, at p. 384.) "Among these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong." (*Scott,* at p. 384; *People v. Sánchez* (2016) 63 Cal.4th 411, 434; *Parker*, *supra*, 2 Cal.5th at pp. 1211–1212.)

Here, appellant's claim of discrimination rests solely on the fact that the prosecutor excused the only African-American juror in the venire, and appellant himself is African-American. As he argued below, appellant contends that a prima facie case of discrimination must be presumed any time the prosecutor uses a peremptory challenge to excuse the sole member of an identifiable group to which the defendant also belongs. "But a prima facie case of discrimination can be established only if the *totality* of the relevant facts gives rise to an inference of discriminatory purpose." (*Zaragoza*, *supra*, 1 Cal.5th at p. 43.)

That appellant and Prospective Juror 8089 are both African-American does not by itself establish a prima facie case of discrimination. (*Parker*, *supra*, 2 Cal.5th at p. 1213.) And the simple fact that the prosecutor excused the only African-American prospective juror is also insufficient to support an inference that this juror was challenged because of her race. As the high court has explained, even though the exclusion of a single prospective juror may be the result of improper group bias, " ' "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. . . . 'As a practical matter, . . . the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.' " ' " (*Id.* at p. 1212, quoting *Bonilla*, *supra*, 41 Cal.4th at p. 343.)

A court "may also consider nondiscriminatory reasons 'that are apparent from and "clearly established" in the record [citations] and that necessarily dispel any inference of bias.' " (*Zaragoza*, *supra*, 1 Cal.5th at p. 43, quoting *Scott*, *supra*, 61 Cal.4th at p. 384.) Here, the trial court had abundant information from which to conclude the prosecutor's peremptory challenge to Prospective Juror 8089 was not racially motivated, but rather was based on a concern about the juror's relationship with the victim: This juror not only knew the victim, but the victim occupied a position of financial trust with respect to this juror. They had talked with each other, socialized, had "done events together," belonged to the same club at church, and had even "go[ne] on trips together." Although the juror stated she could be fair, she admitted the victim's credibility was "very strong with [her]" based on the relationship. Moreover, the prosecutor and defense counsel had already stipulated to excuse the only other African-American prospective juror for the very

same reason—that she had socialized with a witness "a couple times" and would give the witness "enhanced credibility."

Appellant charges the prosecutor could have had no legitimate reason for excusing this juror because no "forthright prosecutor" would have concerns about this "pro-prosecution" juror's presence on the jury. But it is not the prosecutor's duty to secure a conviction at any cost. Rather, "[t]he role of a prosecutor is to see that justice is done. (*Berger* [*v.*] *United States* [(1935) 295 U.S. 78, 88.)] 'It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' [(*Ibid.*)]" (*Connick v. Thompson* (2011) 563 U.S. 51, 71.) Under this standard, any prosecutor should have grave concerns about seating a juror who has an ongoing relationship with the victim of the crime being prosecuted, even if that juror might have a favorable view of the prosecution's case.[4]

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[4] We further reject appellant's strident claims that the trial court made a "critical factual error" in assessing the *Batson-Wheeler* challenge, and the prosecutor's reasons for excusing Prospective Juror 8089 cannot be reconciled with the prosecutor's failure to strike Prospective Juror 7803. Both of these assertions are false when considered in light of the record. The asserted "critical factual error" is appellant's claim that the trial court found that the prosecutor only challenged Juror 8089 after learning she was a rape victim. The record, however, plainly demonstrates that the prosecutor did not seek to excuse Prospective Juror 8089 until he learned that she had a relationship with the victim. Similarly, appellant's assertion that the prosecutor's challenge to Juror 8089 "cannot possibly be

II. The Sentencing Issue

The Attorney General contends the trial court erred in failing to pronounce a single, aggregate sentence in this case and case No. TA137598, and in failing to exercise its discretion to designate a new principal term. However, because the prosecutor did not object to the sentence or the trial court's reasoning at the sentencing hearing, the issue has been forfeited. Respondent nevertheless maintains the matter must be remanded for resentencing, arguing that the trial court appeared to believe it lacked authority to redesignate the principal term, and thus imposed an unauthorized sentence.[5] To the contrary, while the trial court did not clearly articulate its reasons for its sentencing decision, the sentence the trial court imposed is consistent with the proper exercise of the court's discretionary sentencing choices. Respondent further asserts that the trial court erroneously failed to calculate or award appellant any custody credits. We agree, and remand the matter to allow the trial court to recalculate appellant's total custody credits for this case and case No. TA137598.

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squared" with allowing Juror 7803 to sit is contradicted by the fact that the prosecutor excused both Jurors 8089 and 7803.

[5] Inexplicably, appellant did not respond to the Attorney General's argument, having filed no reply brief, even though a remand for resentencing would carry the possibility of a longer sentence. (See *People v. Serrato* (1973) 9 Cal.3d 753, 764, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

A. *Relevant proceedings*

In case No. TA137598, which was filed on July 6, 2015, appellant was charged with three counts of attempted murder (§§ 664, 187, subd. (a)) and three counts of attempted second degree robbery (§§ 664, 212.5, subd. (c)).[6] On February 24, 2016, appellant pled guilty to one count of attempted second degree robbery, and the trial court dismissed the remaining counts pursuant to the parties' plea agreement. The court sentenced appellant to the midterm of two years in state prison and awarded him 478 days of credit.

Prior to sentencing in the instant matter, the prosecution submitted a sentencing memorandum in which it recommended a midterm sentence of four years for the current offense. In accordance with section 1170.1, subdivision (a), the district attorney urged the court to "pronounce a single aggregate term with Defendant's mid-term sentence on the instant burglary as the principal term," and the prior convictions for violating sections 212.5 and 245, subdivision (a)(2) as subordinate counts to be served at one-third the midterm.[7] The defense sentencing memorandum recommended the low term of two years, to be served concurrently with the two-year sentence in case No. TA137598.

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[6] The complaint was subsequently amended to add two counts of assault with a firearm in violation of section 245, subdivision (a)(2).

[7] Appellant was convicted of only one count of attempted second degree robbery (§§ 664, 212.5, subd. (c)); the two counts of assault in violation of section 245, subdivision (a)(2) were dismissed pursuant to the plea agreement.

After sentencing appellant to a 16-month term consecutive to appellant's two-year sentence in case No. TA137598, the court declared, "I'd also note for purposes of sentencing, the People had requested I resentence him, give him four years on this case with a recalculation, but I note the case of *People v. Miller* [(2006) 145 Cal.App.4th 206, a] 2006 case from the 6th appellate district, the principal term is the longest term actually imposed. You received two years, which is 24 months on the attempted robbery. I imposed an additional 16 months, which is less. That's why I imposed that as a subordinate term."[8]

B. *Consecutive sentencing of multiple felonies in different proceedings*

Section 669, subdivision (a) provides in pertinent part: "When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the

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[8] The minute order reflects that the court calculated the 16-month sentence by selecting one-third the midterm of 48 months, and the abstract of judgment indicates that appellant was sentenced to the midterm of 16 months. The abstract of judgment is on preprinted Judicial Council form CR-290.1, entitled "Felony Abstract of Judgment—Determinate [¶] Single, Concurrent, or Full-Term Consecutive Count Form [¶] (*Not to be used for multiple count convictions or for 1/3 consecutive sentences*)." Since the sentence imposed for the burglary was a one-third the midterm consecutive sentence, the trial court used the wrong form for the abstract.

terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

As relevant here, section 1170.1, subdivision (a) in turn provides that when a person is convicted of two or more felonies and a consecutive term of imprisonment is imposed under sections 669 and 1170, "the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, [and] the subordinate term . . . . The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes . . . . The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed." (§ 1170.1, subd. (a).)

In such circumstances, " 'the judgment or aggregate determinate term is to be viewed as interlocking pieces consisting of a principal term and one or more subordinate terms.' " (*People v. Baker* (2002) 144 Cal.App.4th 1320, 1328.) Thus, the sentences on all determinately sentenced counts in all of the cases "must be combined as though they were all counts in the current case," and the trial court must redesignate the count which represents the principal term in the combined cases. (Cal. Rules of Court, rule 4.452.) While the court must designate the term with the greatest punishment imposed (including conduct enhancements) as the principal term, "[i]f two terms of imprisonment have the same punishment, either term may be selected as the principal term." (*Ibid.*)

C. *Respondent forfeited any challenge to the sentence by failing to object at the sentencing hearing*

As our Supreme Court has repeatedly observed, a party to a criminal case who fails to challenge an assertedly erroneous ruling of the trial court in that court forfeits the right to raise the claim on appeal. (*People v. McCullough* (2013) 56 Cal.4th 589, 593; *In re Sheena K.* (2007) 40 Cal.4th 875, 880.) In *People v. Scott* (1994) 9 Cal.4th 331, 354, the high court held that "[a] party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' if the party did not object to the sentence at trial. ([*People v.*] *Scott, supra*, 9 Cal.4th at p. 353.) The rule applies to 'cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons' (*ibid.*), but the rule does not apply when the sentence is legally unauthorized (*id.* at p. 354)." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *McCullough*, *supra*, at p. 594.)

The Attorney General contends that "[t]he trial court circularly assumed that the robbery count was the principal term, mandating one-third the midterm of four years, resulting in a term of 16 months, which was less than the 2 years in the robbery case, thus requiring that the trial court find the robbery was the principal term." According to respondent, "[b]ecause the trial court was not aware of its discretion to re-designate the principal term," the case should be remanded to give the trial court an opportunity to exercise that discretion in light of all of the relevant facts.

The record does not support respondent's claim that the trial court was unaware of and thus failed to exercise its discretion. Rather, respondent challenges the manner in which the trial court exercised its otherwise lawful authority and explained its reasoning. (*People v. Scott*, *supra*, 9 Cal.4th at pp. 355–356.) A party "cannot remain mute while the trial court states its reasons for imposing a sentence and then on appeal claim that its statement of reasons was defective." (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1101.) As the Supreme Court explained, "[a]lthough the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*People v. Scott*, *supra*, at p. 353.) Accordingly, the district attorney was required to object in the trial court, and his failure to do so forfeited this claim.

D. *The sentence imposed was not unauthorized*

Respondent asserts that the prosecution may raise the issue of an unauthorized sentence for the first time on appeal. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 190; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589 ["When an illegal sentence 'is discovered while defendant's appeal is pending, the appellate court should affirm the conviction and remand the case for a proper sentence' "]; see also *People v. Serrato*, *supra*, 9 Cal.3d at p. 763 [an unauthorized sentence is subject to judicial correction whenever the error comes to the attention of the trial court or a reviewing court].)

Although the prosecution's recommended sentence would have been lawful under sections 669 and 1170.1, it does not

follow that because the trial court chose a different sentence, the one it imposed was unauthorized. As our Supreme Court has declared, "[a]lthough the cases are varied, a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott*, *supra*, 9 Cal.4th at p. 354.)

Respondent's argument overlooks the fact that the sentence the trial court actually imposed is consistent with the proper exercise of the court's discretionary sentencing choices. The sentencing triad for first degree burglary is two, four, or six years in state prison. (§ 461, subd. (a).) Section 1170.1, subdivision (a) permits the trial court to impose consecutive determinate sentences for multiple convictions arising out of the same or separate proceedings, but "does not mandate the length of the terms selected . . . or require selection of the lower, middle or upper term." (*People v. Miller*, *supra*, 145 Cal.App.4th at p. 216.) Here, the trial court could have arrived at the sentence it imposed by choosing the low term of two years for the first degree burglary, designating the two-year term for the attempted second degree robbery as the principal term, and then sentencing the burglary as the subordinate term at one-third the midterm, or 16 months. That the trial court did not properly articulate its sentencing choices or adequately explain its reasons did not render the sentence unauthorized.

At the start of the sentencing hearing, the court announced it had read and considered the prosecution and defense sentencing memoranda and the probation report. The prosecution sentencing memorandum explained the procedure under section 1170.1, subdivision (a) for imposing either of the sentences in this case and case No. TA137598 consecutive to the

other, and made the sentencing recommendation the Attorney General now advocates. By remaining silent as the trial court imposed what the People now contend is an unauthorized sentence, respondent cannot raise the issue for the first time on appeal.

E. *Remand is necessary for a recalculation of presentence custody credits*

The trial court incorrectly stated that appellant was not entitled to any custody credits because the sentence on the burglary was consecutive to the sentence in case No. TA137598. Upon pronouncing the aggregate sentence under California Rules of Court, rule 4.452, the trial court was required to recalculate and award credits for any time appellant had actually spent in custody. (§§ 2900.1, 2900.5, subds. (a), (d); *People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012.) Accordingly, the matter must be remanded to the trial court for a recalculation of appellant's aggregate credits in the two cases. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 41 ["under section 2900.1, the trial court, having modified defendant's sentence, should have determined all actual days defendant had spent in custody, whether in jail or prison, and awarded such credits in the new abstract of judgment"].)

DISPOSITION

The matter is remanded to the trial court for the recalculation and award of custody credits in the aggregate for this case and case No. TA137598. The trial court is further ordered to prepare a new abstract of judgment and forward the same to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.