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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FELIX BEJARANO, Defendant and Appellant.	B248327 (Los Angeles County Super. Ct. No. NA089353)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Arthur Jean, Jr., Judge. Affirmed as modified.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

A jury convicted defendant Felix Bejarano of attempted murder, mayhem, and three counts of resisting arrest. The jury found true allegations that defendant personally used a deadly weapon (a glass bottle) in connection with the attempted murder and mayhem counts, and that he personally inflicted great bodily injury on the victim in connection with the attempted murder count. The court found prior conviction allegations true, including a juvenile adjudication that qualified as a strike, and sentenced defendant to 27 years in prison.

On appeal, defendant contends the evidence used to prove the juvenile adjudication was insufficient because it was not part of the record of conviction and did not show defendant was 16 years old at the time of the offense. Defendant challenges the denial of his *Pitchess* motion for review of police personnel records,[1] and also contends his mayhem conviction must be reversed because the trial court improperly denied the prosecutor's request to amend the information to eliminate that charge. In addition, defendant argues he is entitled to three additional days of presentence credit.

We agree defendant is entitled to additional presentence credits, and we agree with respondent that the trial court should have imposed two additional mandatory fees. We otherwise affirm the judgment.

FACTS

On June 20, 2011, Leonora Powell was driving down Long Beach Boulevard in Long Beach when she saw two men fighting in the middle of the street. One of them was defendant. The second man was on the ground and defendant was hitting him with his fists. Ms. Powell shouted to them to "stop fighting before I call the police." She then parked her car in a red zone in front of a nearby market, intending to go into the store. She got out of the car, and saw the man on the ground "hollering 'help,' " and the defendant beating him. She again yelled out, "you guys should stop fighting." The defendant stopped and put his head down, and Ms. Powell continued to walk toward the

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

store. Then, defendant punched her from behind on the side of her head. She ran for her car, and defendant followed her. He was so close that she was "scared to get in my car," and she continued into the store. She asked the store clerks to call the police because she saw defendant trying to get into her car, and at first she thought he was going to steal it.

Defendant pursued Ms. Powell into the store. Defendant told the store clerks, "Don't move. Stay where the fuck you at." Defendant started "yanking and pulling on the soda machines and rampaging there." Ms. Powell continued to move through the store and defendant continued to move toward her and "continued to rampage," knocking things off the shelves. Ms. Powell "ended up behind the counter" and could not get away.

Defendant pursued Ms. Powell behind the counter, hit her with his fist "upside my head," and said, "Don't move, bitch." Then defendant "started just throwing everything up under the counter saying, 'Where is the fucking gun? Where is the fucking gun?' " Ms. Powell tried to move, and defendant hit her again and said, "Don't fucking move, bitch." Then he picked up a large glass bottle of hot sauce and struck Ms. Powell over the head with it. The bottle did not break, so defendant "hit it across the counter" and broke the bottle. Defendant stabbed Ms. Powell with the jagged edge of the bottle in several places, "[i]n the neck area and the back area, up under [her] breast area." She had a defensive wound on her hand from "trying to cover up," and "the whole cartilage of my ear was cut." There was also a cut "in my head" and "one behind my ear." She thought defendant "was getting ready to kill me." She kept saying, "help, help, help, help," and then "it just stopped."

Ms. Powell saw defendant leave the store. She fell, but then staggered to the front door. She walked over to her car, and saw "my blouse just full of red." She saw her reflection in the car and saw "my neck hanging open." She grabbed her neck and "blood shot everywhere." Bystanders came to her aid and started calling 911. A police car was turning the corner, and Ms. Powell flagged it down. A bystander told the officer that defendant had gone down the street.

Ms. Powell was taken by ambulance and treated at a hospital. That day she had two surgeries, and later had plastic surgery. Her "whole ear [cartilage] was cut off." (Ms. Powell was asked if there was "a piece of your ear that was actually missing," and she answered, "Yes. That they had to put together.") All the nerves in her neck were cut, and she has permanent numbness.

Officer Jeffrey Meyer was the first officer to arrive. Ms. Powell said, "He did it" and pointed to defendant, who was standing on the sidewalk south of her car. Defendant looked at Officer Meyer, raised his hands, turned around and started running southbound on Long Beach Boulevard. The officer pursued defendant to the 9th Street intersection, got out of his car, and, at gunpoint, ordered defendant to stop and lie down on the ground. Defendant again displayed his empty hands and continued across 9th Street to the intersection with 8th Street. "[H]e wasn't sprinting, but he wasn't at a slow walk either." Officer Meyer followed, and again ordered defendant to stop. He did not, and the officer used his taser. One of the darts from the taser struck defendant in the back, but to no effect. Defendant stopped for "just a slight time," and "kind of swung his hand back like he was grabbing for one of the wires or the dart." Then defendant continued down Long Beach Boulevard.

Officer Meyer followed in his car, and called for a unit to assist him. At 7th Street, he used his taser again. Again the taser had no effect on defendant, who made the same "circular motion or reaching behind," as if reaching for the wires, as before. He then walked into a store, went behind the counter, looking around, and came back out. When defendant came back out, Officer Meyer again ordered him at gunpoint to stop. Instead, defendant crossed Long Beach Boulevard, hopping the fence at the light-rail tracks to get to the other side, and started northbound.

Officer Ted Petropulos arrived and ran after defendant. Defendant went to the door of a store that several employees were holding shut from the inside, and then turned toward Officer Petropulos, put his hands up in a fighting motion with fists and said, "Let's go." Officer Petropulos took out his baton and struck defendant on the top of his left shoulder. Defendant punched Officer Petropulos in the face with his left closed fist.

Meanwhile, Officer Meyer went up to 8th Street and came around to the other side of the boulevard. He saw defendant with legs apart, arms raised in front of him, and fists clinched, facing Officer Petropulos; saw Officer Petropulos strike defendant in the left forearm with his baton; and saw defendant punch Officer Petropulos with his left closed fist. Defendant's blow "kind of stunned" Officer Petropulos, who took a step back. Officer Meyer then came up and struck defendant in the right lower leg and the right arm with his baton. This seemed to have no effect.

After defendant punched Officer Petropulos, the officer "went in again to hit [defendant]," who was "kind of like a boxer back and forth." Officer Petropulos was "going for the upper body and struck him on the head." This blow glanced off and hit Officer Meyer on the left wrist. Officer Petropulos told defendant to get down, and then struck him again in the right arm. Officer Meyer heard Officer Petropulos tell defendant at least twice to get down, but defendant did not do so. Defendant ran between the two officers, southbound, where another officer used his taser. Defendant "clinched up tight but eventually reached up and ripped the prongs out of his chest."

By this time, Officer Christopher Castillo had arrived. He saw Officer Petropulos chasing defendant; saw defendant take an aggressive stance toward Officer Petropulos; saw Officer Petropulos take out his baton and start to swing at defendant; and saw defendant punch Officer Petropulos in the face. Officer Castillo had his baton out, saw another officer use a taser to no effect, and swung his baton twice to defendant's left arm, but these blows were ineffective. He aimed for defendant's arm a third time, but defendant lowered his body and Officer Castillo struck some part of his face.

Defendant then ran southbound "to where another officer then hit him with his baton at which time he continued to run and cut toward the parking lot there at the Quarter Master [where] Sergeant Faris tackled him to the sidewalk." Defendant was shouting, "fuck you, you fucking pigs."

Officer Meyer got on top of defendant's legs to stop him from kicking. Other officers were trying to pull his arms out from underneath his body. Defendant refused orders to put his hands behind his back, and several officers were yelling, "Stop

resisting." He did not. The officers got a handcuff on one wrist, but "were still having troubles getting the left arm out to handcuff him." When Sergeant Faris had control of defendant's right arm, Officer Meyer "did a drive stun" with his taser into defendant's right calf four times, ordering him to stop resisting and bring his other hand out. This had no effect. Defendant was trying to move his legs and his upper body and trying to push himself up off the ground.

Officer Castillo managed to grab defendant's left arm, and tried to pull it behind his back, but defendant kept pulling his arm back under his chest, multiple times. Officer Castillo used a taser one time (a drive stun) on defendant when he was trying to control defendant's left arm. Officer Castillo sustained three scratch marks to his forearm and another to his hand.

Officer Meyer saw at least two baton strikes while the police were wrestling with defendant on the ground. Officer Petropulos said that he delivered baton strikes to defendant's rib cage during this stage of the attempt to subdue him, but "[n]othing seemed to work." Three or four officers finally were able to get defendant's left arm out and handcuff him. Then they applied a hobble restraint to defendant's legs. Officer Meyer said that at least six officers were involved in the effort to get defendant under control.

Defendant was taken to a hospital. An officer assigned to guard him overheard defendant talking with hospital staff about "not knowing why he was in the hospital and what he had done because he had been on a methamphetamine bender for several days." Surgery was performed on his left forearm; the bone was shattered and a metal bar was inserted from his elbow to his wrist.

A felony complaint was filed against defendant. At the preliminary hearing, the evidence included testimony from Ms. Powell that defendant inflicted seven stab wounds on her, and that her "whole ear cartilage was cut off." The court found sufficient cause to believe defendant guilty of all the crimes charged, including mayhem. The information charged defendant with attempted willful, deliberate and premeditated murder, mayhem,

and three counts of resisting an executive officer (Officer Petropulos, Sergeant Faris, and Officer Castillo), along with related allegations and prior conviction allegations.[2]

Defendant filed two *Pitchess* motions, seeking material in the personnel records of the three police officers named in the information. Both were denied.

On the day jury selection began, the court refused to allow the district attorney to amend the information to eliminate the mayhem count. The record shows only that the court said, "People seek to file an information dropping count 3. The new information is rejected. I require the People to go forward on the original information." Defense counsel responded, "There was no objection to the filing of the amended complaint." The transcript then shows, "(Off the record.)"

At trial, the evidence showed the facts we have described. In addition, defendant testified on his own behalf. He described stress in his family and work life. His wife "had kicked [him] out." He said he was not a drug addict, but he was using methamphetamine for four or five days before the crimes and did not sleep at all. He was in the streets all the time, was not wearing shoes and did not know when or where he lost them. He remembered being scared and fighting with the man in the middle of Long Beach Boulevard, but remembered nothing after that, until he woke up in the hospital. He remembered nothing of the events to which Ms. Powell testified, and said, "I don't remember anything with the cops."

Defendant also testified that in 2004 he was convicted of taking someone's car without permission, and admitted that in 1997, when he was about 17, he had a sustained petition for robbery in juvenile court.

The jury convicted defendant on all counts, and found true allegations of personal use of a deadly weapon and personal infliction of great bodily injury on Ms. Powell. The jury could not reach a verdict on the allegation that the attempted murder was willful,

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[2] Defendant was also charged with assault by means likely to produce great bodily injury in connection with the man he was fighting with in the street just before his assault on Ms. Powell, but the court dismissed that charge during the trial for insufficient evidence.

deliberate and premeditated, and the court struck the allegation under Penal Code section 1385. (Further statutory references are to the Penal Code unless otherwise specified.)

At the sentencing hearing, the court received two exhibits in evidence concerning defendant's prior juvenile adjudication. (We will describe these exhibits (prison records and a fingerprint card) in our legal discussion, *post*.) Defense counsel argued the exhibits were "insufficient to prove the priors," because "for one, we don't have the court documents," and the document submitted "shows that he was received there [at the Department of the Youth Authority]," but "really doesn't show that adjudication." The court disagreed and found the priors to be true.

The court denied defendant's request to strike the prior juvenile adjudication, saying, "[t]his crime is so horrendous that the court declines to strike the strike." The court sentenced defendant to a total of 27 years, consisting of the high base term of nine years for the attempted murder, doubled for the strike to 18 years, plus consecutive one-year and three-year terms for the deadly weapon and great bodily injury enhancements, plus consecutive terms of eight months (doubled to 16 months) on each of the three counts of resisting arrest, plus one year for the prison prior. The court's minute order, but not its oral pronouncement, reflects a sentence on the mayhem count of the upper term of eight years, doubled to 16 years and stayed under section 654 (see pt. 4, *post*, of our legal discussion).

The court also ordered custody credits and fines we will describe in the legal discussion, *post*, and made other orders not at issue in this appeal.

Defendant filed a timely appeal.

DISCUSSION

1. The Prior Juvenile Adjudication

a. The evidence

The prosecutor presented two to prove the prior juvenile adjudication. Exhibit 21 consisted of two pages. The first page was a letter from the Division of Juvenile Justice, certifying that: "Our records indicate that [defendant] was committed to the Department

of Corrections and Rehabilitation –Division of Juvenile Justice (formerly the Department of the Youth Authority) by the Juvenile Court of Los Angeles County on March 12, 2001 [*sic*] for PC211 Robbery, 2nd degree (F); VC 10851 (a) Vehicle Theft (F); PC 664/487h(a) Attempted Grand Theft-Vehicle (F) and was discharged from the Department of the Youth Authority on March 12, 2001. Since [defendant's] commitment ended in 2001, we are unable to supply you with the regular material, as under the present policy, we do not retain case files on discharged wards beyond the period of seven years." The second page of exhibit 21 was a certified copy of a record for defendant listing the three offenses as stated in the letter, and showing the date of commitment as July 24, 1997, defendant's date of birth as March 9, 1980, and a "dishonorable discharge" date of March 12, 2001.

Exhibit 22 included (1) the district attorney's December 13, 2011 letter to the Department of Justice requesting certified copies of defendant's fingerprints in connection with his 2004 and 1997 convictions, and (2) a certified copy of defendant's fingerprint card dated May 13, 1997, showing the charge of "212.5(C) PC Robbery/2nd DEG/NO WPN," and showing "date arrested or received" as "05/13/97." The following page is a copy of the back of the fingerprint card, showing "date of offense" as "05/13/97."

b. The law

A prior juvenile adjudication constitutes a prior serious felony conviction for purposes of sentence enhancement if, among other things, "[t]he juvenile was 16 years of age or older at the time he or she committed the prior offense." (§ 667, subd. (d)(3)(A).) The prosecution must prove this and every other element of a sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) Defendant contends the prosecution did not do so in this case, because the evidence used to prove the strike was not part of the "record of conviction" and therefore could not be used to prove the juvenile adjudication. And, he says, even if the evidence could be so used, it was insufficient to show he was 16 years old at the time of the offense. We disagree on both points.

The governing legal principles are these.

First, in *People v. Guerrero* (1988) 44 Cal.3d 343, 356 (*Guerrero*), the Supreme Court held a trial court may "look beyond the judgment to the entire record of the conviction in determining the truth" of prior conviction allegations. (The case involved whether a prior burglary conviction was for burglary of a residence.) "To allow the trier to look to the record of the conviction – *but no further* – is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Ibid*.)

Second, "[p]rison records certified under section 969b are also admissible to prove that the defendant was convicted of a particular offense." (*People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1090 (*Ruiz*); *People v. Matthews* (1991) 229 Cal.App.3d 930, 937 (*Matthews*) ["section 969b supplements *Guerrero* by permitting properly certified prison records in addition to the 'record of conviction' to be used to prove a prior conviction"; "section 969b is a recognized statutory exception to the hearsay rule"].)[3]

Third, in *People v. Martinez* (2000) 22 Cal.4th 106 (*Martinez*), the court explained that *Guerrero* considered only "the permissible scope of proof to establish the *substance* of a prior conviction, i.e., the nature and circumstances of the underlying conduct." (*Martinez,* at p. 117.) *Guerrero* did not consider "matters of proof relating to other aspects of a prior conviction, such as the identity of the defendant or service of a prior prison term." (*Martinez*, at pp. 117-118.) Consequently, "[*Guerrero*'s] limitations apply only to proof of 'the circumstances of the prior crime.' [Citation.]" (*Id.* at p. 118.) *Martinez* pointed out that the justifications for *Guerrero*'s rule limiting proof of the

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3 Section 969b states: "For the purpose of establishing prima facie evidence of the fact that a person . . . has been convicted of an act punishable by imprisonment . . . and has served a term therefor in any penal institution, . . . the records or copies of records of any state penitentiary [or] reformatory . . . in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

substance of a prior conviction – i.e., preventing relitigation of the circumstances of a crime committed years ago, raising double jeopardy and speedy trial issues – did not apply in the *Martinez* case, which involved the identity of the defendant, not the circumstances of his crime. "Permitting the prosecution to introduce evidence other than the record of conviction or certified prison records under section 969b to show the identity of the person who served prison terms for prior convictions does not implicate these concerns." (*Ibid.*; see *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1476 (*Dunlap*) [finding no logical support for statement that the fact of a prior conviction can be proved only by the record of conviction or certified prison records; "[p]rovided that other types of evidence (e.g., other official records) satisfy applicable rules for admissibility, they may be relied on to establish a prior conviction."].)

Under section 969b and the cases discussed above, the certified documents from the Division of Juvenile Justice (exhibit 21) were prison records, admissible to prove the juvenile adjudication. Defendant says this is not so, because "[p]ost-judgment documents from the Department of Corrections and Rehabilitation are not a part of the 'record of conviction,' and cannot be relied upon to determine whether defendant's juvenile adjudication constitutes a prior strike." The cases we have just described – *Ruiz*, *Martinez*, and *Dunlap* – all show that defendant is simply wrong.

Defendant relies on *People v. Lewis* (1996) 44 Cal.App.4th 845, 852 (*Lewis*), where the court said that "documents prepared after conviction and sentencing are not part of the 'record of conviction.' " The defendant in *Lewis* had been convicted of "attempted aggravated escape" in Louisiana, and the trial court had to look to hearsay documents that were outside the record of conviction to determine whether the offense qualified as a serious felony assault that qualified as a strike under California law. Here, the certified documents from the Division of Juvenile Justice establish defendant committed robbery, and the trial court did not have to go beyond those records to determine "the *substance* of a prior conviction" – i.e., the fact defendant committed a prior strike offense. (*Martinez, supra,* 22 Cal.4th at p. 117.) *Martinez, Ruiz* and *Matthews* establish that section 969b allows properly certified prison records to be used

to prove the previous conviction. (*Ruiz, supra*, 69 Cal.App.4th at p. 1090; *Matthews, supra,* 229 Cal.App.3d at p. 937.)

However, the certified documents from the Division of Juvenile Justice did not state the date of the offense, and therefore did not prove that defendant was 16 years or older at the time of the offense. To prove the date of the offense, the prosecutor submitted a certified copy of defendant's fingerprint card from the files of the state Department of Justice, Bureau of Criminal Identification. As we have seen, this fingerprint card, dated "1997/05/13," shows the robbery charge, the arrest date ("05/13/97"), defendant's date of birth ("03/09/80") and, on the back side, the "date of offense" as "05/13/97."

Defendant does not challenge the authenticity of the copies of the fingerprint card, but merely repeats his claim that "neither item would have been part of the record on appeal of [defendant's] juvenile adjudication," again citing *Lewis*, and therefore "could not be used to prove the underlying facts of a juvenile adjudication." For the reasons we have already explained, defendant is wrong: in this case, we are not concerned with proof of the circumstances of the past offense or whether it qualified as a strike; we are concerned only with defendant's age when he committed it. That question does not raise any concerns about relitigating the circumstances of defendant's crime.

In short, the only conceivable issue is whether the fingerprint card was admissible evidence of the date of the offense. Defendant did not challenge the admissibility of the evidence on hearsay grounds before the trial court, and he does not do so here, so the issue is waived. We note, however, that defendant does not dispute that it was prepared contemporaneously with defendant's arrest by an official charged with the duty of recording the information on it. (See Evid. Code, § 1280 ["Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of

preparation were such as to indicate its trustworthiness."]; § 664 [presumption that official duty has been regularly performed]; *Dunlap, supra,* 18 Cal.App.4th at pp. 1476-1481 [no error in admission of CLETS rap sheet, under the official records exception to the hearsay rule, to show the defendant served prison terms for his prior convictions].)

We are aware of cases holding that a fingerprint card "did not constitute reliable evidence of the nature of the conviction." (*People v. Miles* (2008) 43 Cal.4th 1074, 1093-1094; see *People v. Jones* (1999) 75 Cal.App.4th 616, 634.) But the fingerprint card in this case was not used to establish the "nature of the conviction." Here, the fingerprint card was being used only to establish the date of defendant's offense, not, as in *Miles* and *Jones*, to establish that the conduct underlying the federal conviction constituted a serious felony in California. Moreover, it is undisputed that, unlike in *Miles* or *Jones*, the card was prepared contemporaneously with defendant's arrest by an official whose duty it was to complete it accurately. We see no reason to doubt the accuracy of the basic facts recorded, including the dates of birth, offense, and arrest. Absent any rebuttal – and there was none – the trial court was entitled to conclude that defendant was 16 years or older when he committed the offense.

2. The *Pitchess* Motion

Defendant contends the trial court erred by denying his *Pitchess* motion for discovery without conducting an in camera review of the requested police personnel records. We see no error.

Under *Pitchess*, a defendant who shows good cause may obtain information in a police officer's confidential personnel records. A showing of good cause "is measured by 'relatively relaxed standards.' " (*People v. Gaines* (2009) 46 Cal.4th 172, 179.) In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026 (*Warrick*), the Supreme Court concluded that any "plausible" showing that "might or could have occurred" is sufficient to require in camera review. "A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense." (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.)

Defendant filed two *Pitchess* motions. The first was denied without prejudice. The second motion, at issue in this appeal, sought records related to any complaints "alleging any use of unnecessary force or violence, improper tactics, dishonesty or false police reports." Defense counsel's declaration stated, upon information and belief, that "the officers fabricated the [police] reports"; that witnesses observed the officers using excessive force while they attempted to subdue defendant; that defendant denied "that he challenged Officer Petropulos to fight" and denied taking aggressive action as stated by Officer Castillo; that defendant "was attempting to flee from the beating being administered by officers" when he was tackled by Sergeant Faris; that he did not resist Sergeant Faris; that he "repeatedly attempted to defend himself, but made no aggressive movements and used no force when making such attempts"; and "[i]f Defendant used force against the officers, such force was in defense of Defendant's person against acts of excessive and illegal force used by the officers against Defendant."

At the hearing on defendant's motion, the trial court said: "I don't think you've even come close, [counsel], I truly don't. The situation the police faced out there was very difficult – difficult one. Clearly your client hurt some people before they even got there and for you to go on this fishing expedition, that's what it is in my view, is uncalled for." Counsel argued that what defendant was "trying to do is run away from a beating at a certain point," and "what happened before really doesn't excuse what happened after, it's during the apprehension of [defendant] that this took place." The court observed that "[w]hat happened before gives enormous context, enormous context to what happened after." Defense counsel agreed "that it's an egregious case," but pointed out that "when the first officer approached [defendant], he approached him with the baton in hand . . . ." The court interrupted and observed, "I certainly hope so. I certainly hope so. Given what they had to face, you bet they would. If I were out there, so would I. In fact, I'd probably approach him with a cannon."

On appeal, defendant argues, as he did below, that he was "trying to avoid an unlawful beating." He further contends that, "[f]airly construed, [he] alleged that Officer Petropulos approached him with a raised baton and began striking him without

provocation," and the other two officers then beat him and tackled him "as he tried to escape the officers' unreasonable and unlawful use of force."

We find defendant's claim implausible "by any rational standard." (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1315 (*Thompson*).) This is because defendant's scenario entirely omits any explanation (or denial) of any of the horrific events that occurred before and when Officer Petropulos arrived to take up the pursuit of defendant.

Defendant's scenario said nothing at all about why the police came to the scene in the first place, or why Officer Petropulos "approached him with a raised baton." Defendant's account begins with Officer Petropulos, and with defendant's denial "that he challenged Officer Petropulos to fight as stated in his report." But he did not deny (as Officers Castillo and Petropulos testified at the preliminary hearing) that he was running across Long Beach Boulevard and jumped a fence; he did not deny that Officer Petropulos chased after him, jumped the fence and continued following defendant; he did not deny that he tried to get into a store, and then turned around and came toward Officer Petropulos; and he did not deny that he took a fighting stance toward Officer Petropulos, with his hands up in a fighting position.

The police reports are not in evidence. But in addition to the lack of explanation or denial of what occurred immediately before Officer Petropulos approached him with raised baton, we see from the trial testimony that defendant's scenario also did not explain anything that happened before Officer Petropulos arrived and began chasing defendant. Thus defendant's scenario did not explain why (or deny that) he raised his hands and ran away from Officer Meyer, the first police officer to arrive at the scene of the assault on Ms. Powell. (Officer Meyer is not one of the officers defendant was accused of resisting.) Defendant did not explain why (or deny that) Officer Meyer pursued defendant in his car, and twice ordered him, at gunpoint, to stop and lie down. Defendant did not explain why (or deny that) he twice displayed his empty hands to Officer Meyer. Defendant did not explain why (or deny that) Officer Meyer twice used his taser on defendant to no effect. All of this occurred, according to police (and without contradiction by defendant), while defendant was running southbound down Long Beach

Boulevard, before he crossed the street and went northbound, at which time Officer Petropulos arrived and "approached [defendant] with a raised baton."

Even ignoring the trial testimony about defendant's flight from Officer Meyer before Officer Petropulos arrived – not to mention defendant's own trial testimony that he was high on methamphetamine and remembered nothing of his assault on Ms. Powell or his encounter with the police – defendant's scenario was implausible because it did not explain what he was and had been doing before Officer Petropulos suddenly decided (in defendant's version of events) to beat him up, forcing him to flee. In short, defendant's scenario "is not internally consistent or complete" and "does not explain his own actions in a manner that adequately supports his defense" (*Thompson, supra,* 141 Cal.App.4th at p. 1317), namely, that he was trying to flee from a beating by the police.

As the court said in *Thompson*: "*Warrick* did not redefine the word 'plausible' as synonymous with 'possible,' and does not require an in camera review based on a showing that is merely imaginable or conceivable and, therefore, not patently impossible. *Warrick* permits courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*Thompson, supra,* 141 Cal.App.4th at pp. 1318-1319.)

Using common sense in determining what is plausible, we have no difficulty concluding defendant's scenario is not. While the threshold is low, defendant has not satisfied it. As in *Thompson*, defendant "did not present a specific factual scenario that is plausible when read in light of the pertinent documents and undisputed circumstances" (*Thompson, supra,* 141 Cal.App.4th at p. 1316), because he gave no explanation (credible or otherwise) of the events preceding Office Petropulos's approach with his baton. Of course it is possible that an officer would beat a citizen without provocation and cause him to flee. As *Thompson* said, "virtually anything is possible." (*Id.* at p. 1318.) But when defendant gives no explanation of what went before, the scenario is neither consistent nor complete, and we conclude it is "not plausible by any rational standard." (*Id.* at p. 1315.) There was no error in denying defendant's *Pitchess* motion.

3. The Mayhem Charge

Defendant contends we should reverse his mayhem conviction because the trial court had no authority to refuse the prosecutor's request to amend the information to omit the charge. The court's refusal of the prosecutor's request, defendant says, violated the separation of powers in California's Constitution and consequently was an abuse of discretion. We do not agree.

"[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring." (*People v. Birks* (1998) 19 Cal.4th 108, 134.) The prosecutorial discretion to choose the charges from those potentially available "is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch." (*Ibid.*) But, " '[w]hen the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.' " (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552 (*Manduley*).)

Section 1009 reflects this dichotomy. Under section 1009, the prosecutor may amend the information "without leave of court at any time before the defendant pleads . . . ." And the court "may order or permit an amendment of an . . . information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings . . . ." (§ 1009.)

Here, the prosecutor decided to charge defendant with mayhem, and presented evidence supporting the mayhem charge at the preliminary hearing. Defendant was held to answer, and pled not guilty. Once that occurred, the prosecutor had no authority to amend the information without seeking court approval. (§ 1009.) Defendant's argument turns this established, statutory principle on its head: he argues, in effect, that the court can never refuse a prosecutorial request to eliminate a charge from the information, because this would "intrude[] upon the executive's prerogative to determine what charges to pursue." No legal authority, including separation of powers principles, supports this notion.

First, the separation of powers doctrine does not support defendant's claim that the executive prerogative to determine whether to pursue a charge continues unabated throughout a prosecution. The separation of powers doctrine " 'has not been interpreted as requiring the rigid classification of all the incidental activities of government . . . .' " (*Manduley, supra,* 27 Cal.4th at p. 557.) The doctrine " 'recognizes that the three branches of government are interdependent, and it permits actions of one branch that may "significantly affect those of another branch." [Citation.]' [Citation.]" (*Ibid.*) The separation of powers doctrine " ' "is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch." [Citation.]' [Citation.]" (*Ibid.*)

Here, both *Manduley* and section 1009 are clear that, after a defendant has entered a plea to a charge, " 'the process which leads to acquittal or to sentencing is fundamentally judicial in nature' " (*Manduley, supra,* 27 Cal.4th at p. 552), and the matter of amendment of the information is at the trial court's discretion (§ 1009). In short, amendment of the information at this stage is properly within the judicial sphere, and its incidental impact on the prosecutorial charging function does not implicate the separation of powers doctrine.

Second, defendant has otherwise demonstrated no abuse of discretion in the court's refusal to amend the information.

Amendments to the information ordinarily involve the prosecutor seeking to *add* a charge. In that case, the authorities tell us that "[t]he focus of the trial court's exercise of discretion in ruling on a motion to amend should be directed primarily to determining whether, on the facts presented, the requested amendment would prejudice [the defendant's] substantial rights." (*People v. Superior Court* (*Alvarado*) (1989) 207 Cal.App.3d 464, 477.) But that does not mean that the court must allow an amendment in every case where it is not demonstrated that the defendant's substantial rights are prejudiced by the amendment. While refusal to allow an amendment omitting a charge is rare, and a trial court would appropriately do so with caution, such a refusal is within the trial court's discretion.

Here, the record does not show why the prosecutor asked to drop the mayhem count, or the reasons why the court denied the amendment. Certainly there was overwhelming evidence to prove the charge. (In closing arguments, the prosecutor said, "I don't think [defense counsel] is going to spend any time on the mayhem count," and defense counsel said, "[a]s [the prosecutor] aptly said, I am not going to argue with you that what happened didn't happen," and "[t]he only thing that really is at issue here is count 1 [(attempted murder with the premeditation allegation)] and, maybe, counts 6 and 7 [(resisting arrest)].")

Further, while section 1009 contemplates that a court has the discretion to order or permit amendment of the information "for any defect or insufficiency . . . ," here, there plainly was no "defect or insufficiency" in the mayhem charge.

We simply find no basis on which to conclude the court abused its discretion.

4. Sentencing on the Mayhem Conviction

Our review of the record disclosed that the trial court did not orally pronounce sentence on defendant's mayhem conviction. While the court's minute order shows the court selected the upper term of 8 years, doubled to 16 years, stayed under section 654, and the abstract of judgment shows an upper term, stayed, "[t]he clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) Consequently, we requested supplemental briefing on issues of waiver and whether we should reverse and remand for resentencing. We conclude the point is not waived, but that under the circumstances here a remand for resentencing is not required.

"In a case where the court fails to pronounce judgment with respect to counts on which convictions were validly obtained, the Court of Appeal has power to remand for the purpose of pronouncement of a judgment in accordance with the verdict." (*People v. Taylor* (1971) 15 Cal.App.3d 349, 353; see *People v. Price* (1986) 184 Cal.App.3d 1405, 1411 & fn. 6 ["The failure to pronounce sentence on a count is an unauthorized sentence and subject to correction on remand."]; *Hoffman v. Superior Court* (1981) 122

Cal.App.3d 715, 723 [“there was a mandatory duty imposed upon the trial court to pronounce judgment on [the defendant] as to each count of which he stood convicted”].) So the point is not waived.

In this case, however, we find no need to remand the matter to correct the sentence. Where the trial court errs in sentencing, remand is not required where it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error. (*People v. Avalos* (1984) 37 Cal.3d 216, 233 (*Avalos*) [trial court’s improper dual use of facts in imposing both aggravated and consecutive terms was error, but the record showed no reasonable probability of a more favorable sentence absent the error].) While in this case the error is failure to orally pronounce a sentence, no purpose would be served by a remand to do so, because the record is clear that the trial court would have imposed and stayed the sentence that is already reflected in the minute order and the abstract of judgment.

As respondent points out, the trial court had discretion to sentence defendant to the upper, middle, or lower term on the mayhem conviction. But the court’s remarks in sentencing defendant to the upper term on the attempted murder count show no reasonable probability the court would have imposed a middle or lower term on the mayhem conviction. For example, the court described the crime as “so horrendous that the court declines to strike the strike.” The court told the victim that it “[couldn’t] imagine a human being going through this,” and that it would “take that into consideration in the sentence.” The court explained that “I think there was actually premeditation and deliberation in this case,” even though it was not proven, “[c]ertainly enough for aggravation.” And the probation officer’s report included six circumstances in aggravation and none in mitigation.

In addition, defendant in his supplemental brief concedes that “remand is unnecessary even if . . . the trial court [had] a mandatory duty to orally pronounce judgment on each count,” concluding that this court “does not need to remand for resentencing because there cannot be any prejudice to either party,” citing *Avalos*, *supra*, 37 Cal.3d at page 233 (no reasonable probability of a more favorable sentence).

Accordingly, a remand for resentencing is unnecessary.

5. Presentence Custody Credits and Mandatory Assessments

At the sentencing hearing, the court ordered credit for 773 days in custody (673 actual and 100 conduct credits). Defendant argues, and respondent concedes, that he is entitled to 675 days of actual custody credit and 101 days of good time/work time credit. The police arrested defendant on June 20, 2011, and the court sentenced him on April 24, 2013, so he was in actual custody for 675 days (195 days in 2011, 366 days in 2012, and 114 days in 2013). Defendant was subject to the limitation on good time/work time credits in section 2933.1 (15 percent of the actual period of confinement), for a total of 101 days. Consequently, he should have been awarded a total of 776 days of credit.

Respondent contends the trial court failed to impose certain mandatory fees when it sentenced defendant. Section 1465.8 provides that, to assist in funding court operations, a $40 assessment "shall be imposed on every conviction for a criminal offense . . . ." (§ 1465.8, subd. (a)(1).) Similarly, Government Code section 70373 provides that a $30 court facilities assessment "shall be imposed on every conviction for a criminal offense . . . ." (Gov. Code, § 70373, subd. (a)(1).) The transcript of the sentencing hearing reflects only one $40 fee and one $30 fee, even though defendant was convicted on five counts. (The court ordered defendant to pay "$280, $30, $40 and booking fees.") While the court's minute order states that "court operations and criminal conviction assessments are $40 and $30 respectively as to each count, thus total of $200 and $150," the abstract of judgment conforms to the court's oral pronouncement, showing only the $280 restitution fines, a $30 criminal conviction assessment, and a $40 court security fee.

As the court was required to impose the fees upon sentencing defendant, the judgment must be modified to include four additional $40 court operations assessments and four additional $30 court facilities assessments (for total assessments of $200 and $150, respectively). (*People v. Lopez* (2010) 188 Cal.App.4th 474, 480; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.)

DISPOSITION

The judgment is modified to reflect that defendant is entitled to custody credits totaling 776 days (675 actual days and 101 conduct days), and is subject to court operations assessments totaling $200 (§ 1465.8, subd. (a)) and court facilities fees totaling $150 (Gov. Code, § 70373). The trial court is directed to correct the sentencing minute order to reflect the appropriate custody credits and to prepare an amended abstract of judgment reflecting the above modifications in credits and assessments, and to forward the amended abstracts to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

GRIMES, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.