Filed 3/23/17 P. v. Castaneda CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN JOSEPH CASTANEDA, Defendant and Appellant.	B267831 (Los Angeles County Super. Ct. No. KA103337)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed as modified with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Kevin Joseph Castaneda, of 12 counts of sexual assault against 2 young children: 4 counts of sexual intercourse or sodomy with a child aged 10 or younger (Pen. Code,[1] § 288.7, subd. (a)); 4 counts of oral copulation or sexual penetration with a child aged ten or younger (§ 288.7, subd. (b)); 3 three counts of lewd or lascivious acts with a child under fourteen (§ 288, subd. (a)); and 1 count of oral copulation with a child under 14 (§ 288a, subd. (c)(1)). Defendant was infected with the human immunodeficiency virus when he committed the crimes. The jury found defendant guilty of willfully exposing another person to an infectious disease, a misdemeanor. (Health & Saf. Code, § 120290.) The jury further found true an allegation defendant committed oral copulation in violation of section 288a, subdivision (c)(1), (count 5) with knowledge he was so infected. (§ 12022.85, subd. (a).) Defendant was sentenced to state prison for 220 years to life plus 3 years. We modify defendant's presentence custody credit. We affirm the judgment in all other respects.

---

[1] Further statutory references are to the Penal Code except where otherwise noted.

II. THE EVIDENCE

Defendant was in a relationship with Mia Doe's older sister M.H. When Mia was eight and nine years old, she lived with her father. But she stayed with defendant and M.H. most weekends. During those weekend visits, defendant repeatedly sexually molested Mia. On each of more than 10 occasions defendant touched Mia's breasts and digitally penetrated her vagina. He also put her hand on his penis and moved her hand up and down. There were additional acts of molestation on three occasions. Once—not the first or last time defendant molested her—defendant put his penis between her buttocks cheeks and rubbed his penis up and down. On another occasion he put the tip of his penis in her anus. The very last time defendant sexually assaulted Mia, he put his penis in her vagina. Mia described the molestations as occurring both before and after February 13, 2008, the date her niece was born to defendant and M.H. Mia was eight years old when a niece was born. It was a significant event in Mia's life. Defendant and M.H. separated in the spring or summer of 2010. Mia reported the abuse when she was 11 years old, on December 16, 2010.

Defendant subsequently moved in with the family of five-year-old Isaiah Doe. Over approximately a four-month period, from May to August 2013, defendant repeatedly molested Isaiah. This included multiple acts of touching, sodomy and oral copulation.

Dr. James Jones, a clinical psychologist, testified regarding Child Sexual Abuse Accommodation Syndrome. Dr. Jones discussed the behavior of children who have been sexually abused and the mechanisms they adopt to cope with the trauma. Defendant testified in his own defense. He denied any inappropriate conduct with either child.

III. DISCUSSION

A. Instructional Error

1. Unanimity Instruction

Defendant was charged in multiple counts with acts of molestation against the victims that were repeated over a period of time. (In contrast, counts 12 and 13 alleged sexual intercourse with and sodomy of Mia, both of which acts occurred only once.) The repetitive acts included sexual penetration of Mia as alleged in counts 7 and 10. The trial court gave a unanimity instruction that specifically referenced each count to which it applied *except* count 10. Because, as discussed below, there was evidence defendant sexually penetrated Mia on multiple occasions, it was error to omit count 10 from the unanimity instruction. (*People v. Jones* (1990) 51 Cal.3d 294, 321-322 (*Jones*); *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 646-647 (*Milosavljevic*).)

Defendant had a state constitutional right to a unanimous verdict beyond a reasonable doubt as to each charged act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *Jones, supra*, 51 Cal.3d at pp. 305, 321.) In *Russo,* our Supreme Court explained the

reasoning underlying the unanimity requirement: "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) For example, in *People v. Diedrich* [(1982)] 31 Cal.3d 263, the defendant was convicted of a single count of bribery, but the evidence showed two discrete bribes. We found the absence of a unanimity instruction reversible error because without it, some of the jurors may have believed the defendant guilty of one of the acts of bribery while other jurors believed him guilty of the other, resulting in no unanimous verdict that he was guilty of any specific bribe. (*Id.* at pp. 280-283.) 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.)" (*People v. Russo, supra*, 25 Cal.4th at p. 1132.)

In the context of child molestation cases, our Supreme Court has observed that victims often testify to repeated acts of molestation. Often, the victims testify without reference to specific details, dates or distinguishing circumstances. (*Jones, supra,* 51 Cal.3d at p. 299; see *People v. Matute* (2002) 103 Cal.App.4th 1437, 1445.) In such a case, our Supreme Court has explained, "The unanimity instruction assists in focusing the jury's attention on each [repeated] act related by the victim and charged by the People." (*Jones*, *supra*, 51 Cal.3d. at p. 321; see *People v. Fernandez* (2013) 216 Cal.App.4th 540, 557.) A jury so

instructed may find a defendant guilty of more than one indistinguishable, repeated offense provided the victim has: described the kind of acts committed with sufficient specificity to distinguish between various types of proscribed acts; described the number of acts with sufficient certainty to support each count charged; and described the general time period in which the act occurred to assure the acts are within the applicable statute of limitations. (*Jones, supra*, 51 Cal.3d. at pp. 316, 321; *People v. Hord* (1993) 15 Cal.App.4th 711, 719-720.) A unanimous verdict can be reach in two ways. The jurors may unanimously agree which specific act constituted the offense. Alternatively, unless the evidence precludes it, the jury may unanimously agree the defendant committed all the acts described by the victim. (*Jones, supra*, 51 Cal.3d. at pp. 321-322.) As our Supreme Court explained: "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal.App.3d [839,] 855-856[, disapproved on another point in *People v. Frazer* (1999) 21 Cal.4th 737, 765] [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be give a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all of the acts described by the victim." (*Id.* at pp. 321-322; see *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1124-1125.) Because child molestation cases usually turn on the victim's credibility, the jury will either

believe the child's testimony that the defendant committed repetitive acts of molestation or disbelieve it. (*Jones*, *supra*, 51 Cal.3d. at p. 322; see *People v. Moore* (1989) 211 Cal.App.3d 1400, 1414.)

Mia testified that on each of the more than 10 occasions when defendant molested her, he sexually penetrated her, that is, he digitally penetrated her vagina. She gave specific details as to the time, place and circumstances of four such incidents. The first incident, defendant's initial assault, occurred when Mia was eight or nine. The assault occurred at defendant's father's house in Rosemead. M.H. was pregnant and sleeping on the floor. The second incident also occurred in Rosemead. Defendant additionally rubbed his penis between her buttocks' cheeks. The third incident occurred in Rosemead as well. Defendant also sodomized Mia during this incident. And the fourth incident, the last time defendant molested her, occurred at defendant's cousin's house in El Monte. This was the time he also had sexual intercourse with Mia. M.H. had gone out that night. Mia's niece, who had been born by then, was in her crib next to the bed.

Consistent with *Jones, supra*, 51 Cal.3d at pages 321-322, the jury was instructed: "The People have presented evidence of more than one act to prove that the defendant committed the [acts charged in counts 1 through 5, 7 through 9 and 11]. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved

that the defendant committed at least the number of offenses charged." (CALCRIM No. 3501.)

Defendant asserts the failure to give a unanimity instruction as to count 10 is subject to the *Chapman* harmless error standard of review. The Courts of Appeal disagree as to the standard of prejudice that applies to a unanimity instruction error. (Compare, e.g., *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [harmless beyond a reasonable doubt standard] with *People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562 [reasonable probability of a more favorable result standard].) We need not resolve that conflict. The present error was harmless under either standard.

Despite the instructional error, there is no likelihood the jury failed to reach a unanimous decision on count 10. The jury was instructed on unanimity as to every other count alleging repetitive acts of molestation against the two victims. The instruction signaled to the jury that unanimity was required as to each count that rested on a victim's allegation of repeated acts. The jury was specifically instructed on unanimity as to the sexual penetration charged in count 7. Nothing in the attorneys' jury arguments suggested the unanimity instruction did not also apply to the sexual penetration alleged in count 10. In fact, defense counsel specifically referenced the unanimity instruction in relation to count 10. He told the jury: "Then we get to count 10, the allegation of digital penetration. Again, you are limited in the unanimity instruction that this would have to have happened between 2007 and 2008 . . . ." No objection to this argument was interposed. There is no reason the jury would have applied the unanimity requirement in convicting defendant as alleged in count 7 but failed to apply it as to count 10. (See *People v. Hajek*

(2014) 58 Cal.4th 1144, 1220, disapproved on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 [“““Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.”””]; accord, *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 433 (*Bryant*).) In other words, as instructed, the jury understood that to find defendant guilty of counts 7 and 10, it was required to unanimously agree defendant committed sexual penetration. And it warrants emphasis this occurred in the context of Mia’s testimony the sexual penetrations occurring on at least 2 specific times or at least 10 occasions.

In *Milosavljevic, supra*, 183 Cal.App.4th at pages 647-648, our colleagues in the Court of Appeal for the Fourth Appellate District, Division One, reached an opposite conclusion. In *Milosavljevic,* the trial court gave a unanimity instruction but omitted one count to which it applied, a charge of administering an intoxicating agent to assist the commission of a felony against Jane Doe XI. (*Id.* At pp. 644-645.) The Court of Appeal held that because there was evidence the defendant had administered the intoxicating agent to Jane Doe XI on multiple occasions, it was prejudicial error not to instruct on unanimity as to that count. (*Id.* at p. 647.) Further, “[W]e cannot presume the jurors inferred that the court’s omission of count 52 from its unanimity instruction was merely an oversight by the court and, on their own, decided to require unanimity regarding the specific act constituting that offense.” (*Id.* at p. 648.) There is no indication, however, that in *Milosavljevic* a unanimity instruction *was* given as to a second count of administering an intoxicating agent. Hence in *Milosavljevic,* unlike here, there was no reason for the jury to *assume* the unanimity instruction applied.

Moreover, in the present case, there was no evidence that might have led the jurors to disagree as to the particular acts of sexual penetration defendant committed. (See, e.g., *People v. Gordon, supra,* 165 Cal.App.3d at pp. 855-856 [defendant raised separate defenses to two offenses].) There was no evidence or argument from which the jury could have concluded defendant committed one act of sexual penetration but not others. The only question was whether or not defendant in fact committed all of the alleged acts of sexual penetration. Mia testified sexual penetration occurred on each of the more than 10 occasions that defendant molested her. She gave specific details about four of those occasions. Defendant offered only one defense to all of the charges—he did not do it. He did not present any defense that would have caused the jury to doubt his culpability for any specific molestation act as distinguished from any other. The jury disbelieved him. The jury found him guilty on all counts. In other words, the jury's verdict implies it did not believe the only defense offered. There is no likelihood the jury failed to reach a unanimous agreement defendant committed at least 2 specific acts of sexual penetration. In the alternative, there is no likelihood the jury failed to find defendant committed all or at least 2 of the 10 acts of sexual penetration to which Mia testified. (*Jones, supra,* 51 Cal.3d at pp. 321-322; *People v. Fernandez*, *supra*, 216 Cal.App.4th at pp. 557-558; *People v. Napoles* (2002) 104 Cal.App.4th 108, 119-120.)

2. Elements of Sexual Penetration Instruction

As discussed above, counts 7 and 10 both charged defendant with sexual penetration of Mia in violation of section 288.7, subdivision (b). Mia's niece was born on February 13, 2008. This was a significant event in Mia's life. Count 7 applied to acts of sexual penetration defendant committed on or prior to that date. Count 10 applied to acts of sexual penetration defendant committed after February 13, 2008. The differing date ranges were reflected in the charging document as well as the jury's verdict forms.

The trial court instructed the jury on the elements of sexual penetration as "charged in count 10," but failed to specify that the instruction also applied to count 7. The jury instruction did not reference specific dates. The jury was instructed: "The defendant is charged in count 10 with engaging in sexual penetration with a child 10 years of age or younger in violation of Penal Code section 288.7(b). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant engaged in an act of sexual penetration with Mia Doe; [¶] 2. When the defendant did so, Mia Doe was 10 years of age or younger; [¶] 3. At the time of the act, the defendant was at least 18 years old." (CALCRIM No. 1128.) In her closing argument, Deputy District Attorney Lisa Coen noted: "Counts 7 and 10 are related to Mia. They are sexual penetration."

Defendant cites *People v. Cummings* (1993) 4 Cal.4th 1233, 1312-1315, for the proposition the trial court's error was reversible per se. We disagree. The instructional error did not entirely preclude the jury's consideration of substantially all of the elements of the offense as was the case in *Cummings*. Here,

the jury was instructed on all the elements of sexual penetration. The instruction merely failed to specifically reference one of the two counts to which it applied. Where, as here, the effect of the omission can be assessed in the context of the record, it is not reversible per se; it is subject to harmless error analysis. (See *People v. Aranda* (2012) 55 Cal.4th 342, 367-368; *People v. Mil* (2012) 53 Cal.4th 400, 413-414; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1575, 1576 [failure to define materiality, an element of perjury].)

We conclude the error was harmless under any prejudiced based standard of reversible error. No doubt, the jury understood that the crime charged in count 7 required proof of the same elements as the *identical* offense charged in count 10. As our Supreme Court observed in *People v. Hajek, supra,* 58 Cal.4th at page 1220, """"[J]urors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."""" (See, *Bryant, supra*, 60 Cal.4th at p. 433; *People v. Hajek, supra,* 58 Cal.4th at p. 1220.)

3. Lesser Included Offense Instruction

Defendant asserts the trial court should have instructed on the lesser included offense of a violation of section 289, subdivision (h)[2] as to the sexual penetration counts. Defendant's theory is as follows. Defendant was charged in counts 7 and 10

---

[2] Section 289, subdivision (h) states, "Except as provided in Section 288, any person who participates in an act of sexual penetration with another person who is under 18 years of age shall be punished by imprisonment in the state prison or in a county jail for a period of not more than one year."

with sexual penetration of a child who was 10 years or younger; a violation of section 288.7, subdivision (b).[3] Defendant argues that the jury should have been instructed as to counts 7 and 10 on the lesser included offense of the charged crimes, violations of section 289, subdivision (h). Section 289, subdivision (h) only requires the victim be under the age of 18 years of age. In other words, the charged offense requires the victim be 10 years of age or younger. (§ 288.7, subd. (b).) The alleged lesser included offense does not have the 10 years or younger element; the victim need only be less than 18 years of age. (§ 289, subd. (h).) Defendant asserts there was evidence Mia was 11 years old when at least 1 act of sexual penetration occurred. We need not determine whether a violation of section 289, subdivision (h) is a lesser included offense. That is because there is no substantial evidence to require a lesser included offense instruction premised on section 289, subdivision (h).

With respect to the evidentiary basis for a lesser included offense instruction, our Supreme Court has explained: "A trial court has a sua sponte duty to 'instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' (*People v. Birks* (1998) 19 Cal.4th 108, 118.) Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422.) 'The rule's

---

[3] Section 288.7, subdivision (b) provides, "Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life."

purpose is . . . to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence.' (*People v. Breverman* (1998) 19 Cal.4th 142, 161.) In light of this purpose, the court need instruct the jury on a lesser included offense only '[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of the lesser offense. (*People v. Webster* (1991) 54 Cal.3d 411, 443.)" (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) Our review is de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Cook* (2006) 39 Cal.4th 566, 596.)

There was no substantial evidence Mia was 11 years old when at least 1 act of sexual penetration occurred. First, the jury specifically found the latest date on which defendant committed any criminal act against Mia was December 31, 2008. Mia did not turn 11 until June 21, 2010. Second, both prior to and during trial, Mia said the abuse occurred when she was eight and nine years old. These events transpired both before and after Mia's niece was born on February 13, 2008. Mia's ninth birthday was on June 21, 2008. Third, defendant testified the last time Mia spent the weekend with him was prior to January 7, 2010. Defendant was arrested on January 7, 2010, and was in custody for more than four months. He had no contact with M.H. or Mia after his release. As noted, Mia did not turn 11 until June 21, 2010.

However, defendant argues: "[M.H.] was born on July 18, 1989. . . . She claimed she dated [defendant] from the age of 17 to 20. . . . That placed the date range for their dating from July 4, 2006 to July 3, 2010. [Mia] was 11 from June 22, 2010 to July 3, 2010." There was no substantial evidence defendant committed

an act of sexual penetration against Mia between June 22 and July 3, 2010. Defendant also asserts, "[M.H.] said her daughter was two-years-old when she and [defendant] broke up. [Mia] said the abuse stopped when her sister and [defendant] broke up. The daughter turned three on February 13, 2011. [Mia] turned 11 on June 21, 2010." There was no substantial evidence defendant committed an act of sexual penetration against Mia between June 21, 2010 and February 13, 2011. Defendant's included offense contentions have no merit.

4. Supplemental Instruction

Before counsel gave their closing arguments to the jury, the trial court instructed, "It is alleged that crimes occurred on or between certain dates. The People are not required to prove that the crimes took place exactly on a specific day but only they happened within the range of dates alleged." Defendant was represented by Richard Coberly. After, Mr. Coberly gave his closing argument to the jury, Deputy District Attorney Lisa Coen requested an amended instruction be read to the jury. Mr. Coberly objected that the amended instruction would confuse the jury. Mr. Coberly reasoned that it conflicted with the unanimity instruction. The trial court nevertheless instructed the jury as follows: "[T]he court is going to re-read instruction number 207 and you'll disregard the court's previous reading. '[¶] . . . [¶] It is alleged that the crimes occurred on or between certain dates as to counts 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, and 14. The People are not required to prove that the crimes took place exactly on a specific day, but only that they happened within the range of dates alleged. [¶] It is further alleged that the crimes in counts 12 and

13 occurred on or between certain dates. The People are not required to prove the crimes took place exactly on a specific date but only that they happened *reasonably close to the range of dates*.'" (Italics added.)

After the trial court gave the amended instruction, Mr. Coberly further argued to the jury: "As you just heard, there has been a change in the instructions so I just want to make sure that yesterday, if I said anything about those particular two instructions, that now we do have new instructions. [¶] And based on those new instructions, . . . the timeline is a little bit different. Still, the state of the evidence that you've heard hasn't changed. You've heard from one side a bunch of different dates, somewhere between 2007 and 2008. [¶] And you've heard from another side, our side, that [Mia's niece] did not live at the Rosemead residence until she was at least one year's old. And you've also heard that in the first initial report that [Mia] said things happened between April and June of 2010. [¶] Keep in mind, that for the latter part of that report, you would run into her birth[]date and her turning 11. [¶] Now, that is if you find that she's credible at all. Because, again, when it comes to [Mia], she has told multiple stories; and her multiple stories have also included her openly telling us in court, that when she talks about these things, she has two responses that she can give. She can giggle or she can cry. [¶] And, again, for you, she chose to cry. For the D.A., she chose to giggle. [¶] And with that, I again thank you . . . ."

CALCRIM No. 207 states: "It is alleged that the crime occurred on [or about] ____ <*insert alleged date*>. The People are

not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day." This is a correct statement of the law. (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304.) As the Court of Appeal explained in *Rojas,* "CALCRIM No. 207 accurately states the general rule that when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened reasonably close to that date. (§ 955; *People v. Richardson* (2008) 43 Cal.4th 959, 1027; *People v. Jennings* (1991) 53 Cal.3d 334, 358-359 . . . .)" (*People v. Rojas, supra,* 237 Cal.App.4th at p. 1304.) Here, the trial court modified the instruction to apply to an alleged range of dates.

Defendant argues the instruction as to counts 12 and 13 was an inaccurate statement of the law. This objection was not raised in the trial court. At trial, defense counsel's objection was premised only on jury confusion. As a result, the present argument has been forfeited. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 901; *Bryant, supra*, 60 Cal.4th at p. 418.) We thus limit our review to whether defendant's substantial rights were affected (§ 1259), that is, whether giving the modified CALCRIM No. 207 instruction as to counts 12 and 13 resulted in a miscarriage of justice. (*People v. Townsel* (2016) 63 Cal.4th 25, 59-60; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.)

We find no miscarriage of justice. The jury specifically found as to multiple counts that defendant committed the charged offenses against Mia when she was younger than 11. As discussed above, substantial evidence supported that finding. There was no substantial evidence to the contrary. Defendant asserts Mia told law enforcement officers defendant committed

the offenses between April and June 2010. But Mia did not turn 11 until June 21, 2010. There was no substantial evidence defendant committed an act charged against him during the 10 days from June 21, 2010 to and including June 30, 2010. In fact, defendant testified he went to jail in January 2010 and he did not see Mia after that. It is not reasonably probable the jury's verdicts would have been more favorable to defendant had the trial court not given the supplemental instruction.

B. Sentencing and Abstract of Judgment Error

1. Presentence Custody Credit

The trial court gave defendant credit for 702 days in presentence custody. However, as reflected in the probation officer's report, defendant was: arrested on October 2, 2013; arraigned on October 4, 2013; and sentenced 703 days after his arrest, on September 4, 2015. Therefore defendant was entitled to credit for 703 days in presentence custody. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) The judgment must be modified and the abstract of judgment amended to so provide.

The Attorney General notes that another section of the probation officer's report cites the police report as saying defendant was arrested on October 10, 2013. Because the reference to an October 10 arrest date is inconsistent with two other referenced dates, including the arraignment date, we assume it is in error. Defendant could not have been arrested on October 10, 2013, but arraigned on October 4, 2013. Such

evidence, an arraignment preceding an arrest, is inherently improbable.

2. Abstract of Judgment

The abstract of judgment must be amended in two additional respects so that it reflects the trial court's oral pronouncement of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) First, the abstract must include the conviction and base sentence on count 5. Second, it must omit from section 3 the reference to a 15-year enhancement under section 667.61, subdivisions (b) and (e).

IV. DISPOSITION

The judgment is modified to reflect 703 days of presentence custody credit. The judgment is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to amend the abstract of judgment to: reflect the conviction and base sentence on count 5; omit the reference to a 15-year enhancement under Penal Code section 667.61, subdivisions (b) and (e); and reflect 703 days of presentence custody credit and a total credit of 808 days.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.