

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRETT ANDREW BOLDT,

Defendant and Appellant.

A131940

(Contra Costa County
Super. Ct. No. 1013002)

Defendant Brett Andrew Boldt was convicted by a jury for crimes arising from a brutal attack he perpetrated upon his older half-brother, Robert Boldt. Defendant contends the judgment should be reversed, alleging *Doyle* error and prosecutorial misconduct in closing argument. Defendant also challenges the trial court's imposition of a probation fee and attorney fees for lack of evidence of ability to pay. Additionally, defendant asserts the abstract of judgment and sentencing minute order must be corrected in certain respects to conform to the oral pronouncement of judgment, and the Attorney General concurs on this point. Having considered defendant's contentions in light of the record before us, we affirm the judgment and amend the abstract of judgment and sentencing minute order, as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2010, the District Attorney of the County of Contra Costa (DA) filed an information alleging defendant committed the following crimes on or about April 11, 2010: battery causing serious bodily injury on Robert Boldt (Penal Code sections 242, 243,

subdivision (d)¹) (count 1); attempted mayhem on Robert Boldt (§§ 203, 664) (count 2); and assault by force likely to produce great bodily injury on Robert Boldt (§ 245, subd. (a)(1)) (count 3). Also, the information alleged defendant personally inflicted great bodily injury upon the victim in the commission of the above offenses (§12022.7, subd. (a)); defendant suffered a prior prison conviction (§ 667.5, subd. (b)); and defendant is statutorily ineligible for probation (§1203, subd. (e)(4)) on account of his prior convictions.

Subsequently, these allegations were tried before a jury in March 2011. Robert Boldt, the alleged victim, testified that at the time of the attack he had been living with his girlfriend Darlene and her 21-year old son Carson at a house on David Street in Concord for about three years. A few weeks before the attack, Robert and Darlene allowed defendant, Robert's half-brother, to move in with them. On the day of the attack, defendant left home in the afternoon to attend a barbeque at a friend's house. That evening Robert stayed home, drank a few beers and watched TV with Darlene. They went to bed about nine or ten o'clock in the evening. After going to bed, they received a telephone call. The caller informed Robert that defendant became drunk and belligerent at the barbeque and was asked to leave. Soon after the telephone call, defendant arrived home. Robert got up, let defendant in and asked him if he was all right. Defendant appeared somber. Defendant went into the kitchen to get a beer. Robert asked defendant if he needed another beer. Defendant became upset when Robert asked that question.

Robert went back to bed, but wondered if defendant entered the house through the back gate and left the gate open providing an avenue for the dogs to escape from the yard. He got up to make sure the back gate was secure. Robert went into the kitchen/dining area, intending to exit the sliding glass door into the back yard but he encountered defendant in the kitchen. Defendant was agitated, confrontational and hostile. Robert told defendant to get out. Defendant yelled at Robert, "came in really close and then spat in [Robert's] face." Robert used his forearm to push defendant away from him, backed him against an island in the kitchen, and told him to calm down. Defendant apologized and appeared remorseful, so Robert removed his arm from defendant, thinking the situation had been resolved.

¹ Further statutory references are to the Penal Code unless otherwise noted.

Defendant immediately sprang forward and head-butted Robert in the face. Robert fell against the sliding glass door and onto the floor. Defendant jumped on Robert and began gouging at his eyes and digging his fingers into his eye sockets. Robert grabbed defendant's wrists to prevent defendant from gouging his eyes. Defendant opened his mouth wide. Robert knew defendant was going to bite his face but he could not let go of defendant's wrists to push defendant's head away fearing that defendant would continue to gouge out his eyes. Defendant bit Robert at least twice on the face.²

Darlene was present during the assault. She screamed at defendant and pulled him away from Robert. Robert thought defendant might attack Darlene so he grabbed a full bottle of beer and struck defendant on the back of the head twice; on the second blow, the bottle broke. Defendant grabbed Robert, pushed him over the side of the couch and jumped on top of him, pinning him on the couch. Defendant struck Robert about the eyes with his closed fist, repeatedly landing "haymakers" with his arm fully extended upwards at each blow. Darlene grabbed defendant, allowing Robert to roll off the couch and run towards back door. Darlene sat on defendant and Carson stood over him with a baseball bat. Robert, concerned for everyone's safety, grabbed a golf club from the garage and came back into the house. Carson signaled to Robert the situation was under control. When defendant saw Robert with a golf club, he lunged at him, saying, "I'll kill you." Robert called the police and ambulance service. Robert's eyes were bleeding and they were "beginning to close up." Robert was taken by ambulance to John Muir Hospital. When he arrived at the emergency room, his eyes were completely swollen shut and he could not see out of them. Robert had blurry vision for about a month after leaving the hospital. Almost a year after the attack his eyes feel fatigued and sensitive to light; he gets headaches in bright sunlight. One of his eyes does not move independently in its socket; he has to turn his head to change

² Darlene Baxter testified that defendant's whole body was on top of Robert on the kitchen floor and his hands were "going on Rob's face and head." Darlene's son Carson testified that Robert was holding defendant's wrists and trying to push defendant's hands away from his face. Also, both testified that later in the struggle, defendant held Robert defenseless on the couch and punched him repeatedly in the face with great force.

his direction of sight. Robert testified that he had no idea why defendant attacked him that night.

Concord Police Officer Samuel Figueroa responded to the scene and contacted Robert at a neighbor's house about 12:30 a.m. Officer Figueroa did not smell any alcohol on Robert and he did not appear to be under the influence of alcohol. Robert was crying, emotional and appeared to be in extreme pain; he was bleeding from the nose, eyes and mouth, and the blood was "free flowing" from his wounds. Robert told Officer Figueroa that his brother attacked him, bit him on the face and tried to gouge out his eyes. Robert told Officer Figueroa defendant "attacked me like an animal." Officer Figueroa testified that photographs taken at the hospital and shown to the jury accurately showed the extent of Robert's injuries that evening, except the blood had been cleaned from his face.

Dr. Brian McGuinness, a trauma surgeon at John Muir Medical Center, treated Robert on the evening in question. According to Dr. McGuinness, Robert presented with facial trauma and head injuries around his right eye, cheekbones and face, including abrasions, swelling, bruising and scrapes. Robert had "fractures around his face, mainly around his orbit. [¶] . . . [¶] The eyeball sits in a socket, so the nose side of the socket was broken and then the downward cheek side of the socket was broken." Dr. McGuinness prescribed anti-nausea and pain medications, as well as antibiotics, and referred Robert for plastic surgery. The type of injuries Robert sustained required "a lot of force in a specific area."

Concord Police Officer Danielle Cruz responded to John Muir Medical Center on the evening in question and made contact with Officer Gordon. Gordon was with defendant at the emergency room when Cruz arrived.³ Cruz observed defendant on a gurney awaiting

³ Concord Police Officer Courtney Gordon did not testify at trial. However, at a pre-trial hearing held pursuant to Evidence Code section 402, Officer Gordon testified that on the night in question she drove defendant to the hospital after he was placed under arrest. At the hospital, Officer Gordon read defendant his *Miranda* rights and defendant told her he did not wish to make a statement. A few minutes later, defendant asked Officer Gordon about the victim's injuries and she replied she did not know the extent of the victim's injuries. Defendant then stated, "Did you see that guy's face, it's justice, pure justice. Did

treatment. Officer Cruz watched defendant while Gordon attended to another matter. She remained with defendant for about 15-20 minutes. While awaiting treatment, Cruz observed defendant chatting with hospital staff and, in Cruz's opinion, defendant appeared "smug" and appeared to be under the influence of alcohol. Defendant was taken by staff to the x-ray room and Cruz accompanied them. As a nurse wheeled defendant back from the x-ray room, a security guard asked Cruz why defendant was in custody. Cruz told the security guard defendant had tried to gouge out a family member's eyes. Defendant spontaneously stated: "I didn't try to gouge them out, I tried to bite his eyes out and you should have seen who won the fight." Defendant was "smug and smirking" when he made this remark.⁴

On March 24, 2011, the parties concluded presentation of evidence and the jury heard closing argument. The following day, the jury returned guilty verdicts on all counts and found true the great bodily injury allegation. Defendant waived his right to a jury trial on the prior prison allegation and the trial court found the allegation true. On April 25, 2011, the trial court sentenced defendant to a total term of seven years imprisonment. Defendant filed a timely notice of appeal on April 26, 2011.

DISCUSSION

A. Doyle Error

1. *Background*

During her closing argument, defense counsel told the jury that it could not convict defendant on any of the charged offenses if he acted in self-defense. Counsel argued that the victim was not credible and that the prosecution failed to prove beyond a reasonable doubt that defendant did not act in lawful self-defense. The prosecutor acknowledged, in rebuttal, counsel's claim defendant acted in self defense, comparing it to a "magic trick [with] three parts. The first part is the promise. I'm going to make this coin disappear. The

you see his face? I think I bit his face clean off. You know what, he's nothing. He's lower than scum."

⁴ Defendant did not testify at trial. The only defense witness was Concord Police Detective David Ishikawa, who was assigned to conduct a follow-up investigation on the assault in question. Detective Ishikawa testified that he interviewed Robert and Darlene separately and asked them about the use of a beer bottle during the incident. Both told him Robert used the beer bottle in his own defense.

second part is the turn. Look over there. The third part is the prestige. There goes the coin. I'm a magician." The prosecutor then reviewed the evidence and jury instructions at some length, arguing why the jury should not accept defendant's claim of self defense. The prosecutor asserted the evidence of defendant's intentional infliction of injury upon the victim was clear, stating: "Look at the photos. . . . Interpret the evidence. The fractures are consistent with both the gouging and the punching. . . . [¶] Like I said, you don't get to contrive self-defense and make it up after the fact. At no point did the defendant mention self-defense to Officer Cruz at that time." Defense counsel objected (stating, "That's improper"), the court overruled the objection, and the prosecutor continued: "He made a statement, a voluntary spontaneous statement speaking his mind and he said, 'My intent was to bite out, bite out, my brother's eyes,' not defend myself."

2. *Analysis*

Defendant contends the prosecutor's remark that he did not mention self-defense in his spontaneous statement to Officer Cruz was an improper comment on his post-*Miranda* silence constituting prejudicial *Doyle* error. We are not persuaded that the prosecutor's remark necessarily amounted to *Doyle* error, but even if it did, reversal is not warranted.

In *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), the high court held that it is a violation of due process for the prosecution to use a defendant's silence following *Miranda* warnings to impeach the defendant's subsequent explanation at trial. (*Doyle, supra*, 426 U.S. at p. 619.) The *Doyle* rule is premised on the recognition that it is fundamentally unfair to " 'permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.' " (*Ibid.*) However, the high court subsequently limited the reach of *Doyle* in *Anderson v. Charles* (1980) 447 U.S. 404 (*Anderson*).

In *Anderson*, defendant, on trial for murder, testified he took the victim's unattended vehicle from a particular location. (*Id.* at pp. 404-405.) During cross-examination, the prosecutor asked defendant why he didn't tell officers where he got the car at the time of his arrest. In addition, the prosecutor impeached defendant with his post-*Miranda* statement to

an investigating officer that he stole the car at a different location. (*Id.* at pp. 405-406.) The high court found no *Doyle* error. The *Anderson* court reasoned that “*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances[,] . . . [but] does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all. [Citations.]” (*Anderson, supra*, 447 U.S. at p. 408.)⁵ Moreover, the high court also declined to distinguish for purposes of *Doyle* analysis impermissible cross-examination on defendant’s “failure to tell the police the story he recounted at trial” and permissible cross-examination on his prior inconsistent statement to the investigating officer. (*Anderson, supra*, 447 U.S. at p. 408.) Rather, the high court concluded the cross-examination, “*taken as a whole*, does ‘not refe[r] to the [respondent’s] exercise of his right to remain silent; rather [it asks] the [respondent] why, if [his trial testimony] were true, he didn’t tell the officer that he stole the decedent’s car from the tire store parking lot instead of telling him that he took it from the street.’ [Citation.] . . . The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement.” (*Anderson, supra*, 447 U.S. at pp. 408-409.)

We recognize *Anderson* can be distinguished on the present record because the prosecutor here did not use defendant’s voluntary post-*Miranda* statement to impeach his testimony at trial. Nevertheless, the Supreme Court in *Anderson* declined to find *Doyle* error in circumstances where “a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent,” and “*taken as a whole*, [the prosecutor’s cross-examination] does ‘not refe[r] to the [defendant’s] exercise of his right to remain silent” and does not attempt to “to draw meaning from silence. . . .” (*Anderson, supra*, 447 U.S. at pp. 408-409.) Applying the underlying rationale of *Anderson*, which counsels us to view the prosecutor’s comment in the context of the rebuttal argument “taken as a whole,”

⁵ California law accords on this point. (See *People v. Osband* (1996) 13 Cal.4th 622, 694 [prosecutor did not commit *Doyle* error by questioning defendant about his prior inconsistent statements regarding his presence at two crime scenes].)

arguably no *Doyle* error occurred because the prosecutor was not referring to defendant's "exercise of his right to remain silent" or attempting "to draw meaning from silence" (*id.* at p. 409), but rather was attempting to "impeach" counsel's claim defendant acted in self defense based on the tone, tenor and content of defendant's volunteered statement.⁶

However, we need not resolve the question of whether Anderson and its progeny would support defendant's contention that *Doyle* error occurred here. If we assume the prosecutor's comment in rebuttal amounted to *Doyle* error, the next step would be to determine whether the error was harmless. The test for determining whether a constitutional error is harmless is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Neder v. United States* (1999) 527 U.S. 1, 15 (*Neder*) (quoting *Chapman v. California* (1967) 386 U.S. 18, 24.) When deciding whether a prosecutor's reference to a defendant's post-arrest silence was prejudicial, we may consider " 'the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt.' (Citations)." (*U.S. v. Bushyhead* (9th Cir. 2001) 270 F.3d 905, 913.)

In this case, no witness commented at trial that defendant remained silent or failed to speak regarding a particular matter, thus the jury heard no evidence regarding defendant's post-arrest silence. In addition, the prosecutor did not entreat the jury to draw an inference of guilt from defendant's silence. Indeed, in her entire summation of the case, the prosecutor made one reference to defendant's "silence" when she remarked, "At no point did the defendant mention self-defense to Officer Cruz at that time." Rather, the prosecutor's comment was principally directed at defendant's brutal and vindictive boast in the same officer's presence that "I tried to bite [the victim's eyes out]." Thus the prosecutor's comment, in context, focused on the affirmative statement made by defendant

⁶ Defendant cites no case law, and we have found none, specifically addressing the scenario here, where the prosecutor, while introducing evidence of defendant's voluntary post-*Miranda* statement[s], comments upon what defendant omitted to say at the time defendant volunteered the statement[s].

and argued that the very nature and tenor of defendant's statement indicated his intentional use of force far beyond that reasonably necessary to defend against a perceived danger.⁷

Furthermore, the case against defendant was overwhelming and there was scant evidence to support his counsel's argument that he acted in self-defense. This was not a case where the evidence was in equipoise on the issue of self-defense or one in which the jury was faced with a credibility determination on the question. Indeed, defendant presented no evidence at trial to support his counsel's assertion in closing argument that he acted in self-defense. By contrast, the victim testified that defendant bit him on the face and tried to bite out his eyes and this was corroborated by defendant's gratuitous boast that "I tried to bite [the victim's eyes out]." The victim further testified that defendant pinned him to the sofa with his hands underneath his body in a defenseless position, and then proceeded to pound him on his eyes with closed fists and with great force, until Darlene Baxter managed to pull defendant off. Darlene and her son Carson corroborated the victim's testimony on that point. The full extent of the facial injuries sustained by the victim was corroborated by the responding police officer, the examining doctor, and the photographic evidence presented to the jury. In sum, the ferocity of defendant's attack upon his brother, the extreme level of violence unleashed by defendant, and the extent of the facial injuries inflicted upon the victim belie defense counsel's claim that the force used by defendant was proportionate to any danger posed by the victim. Accordingly, we conclude beyond a reasonable doubt any *Doyle* error committed by the prosecutor in rebuttal did not contribute to the jury's decision to reject defense counsel's assertion of self-defense. (*Neder, supra*, 527 U.S. at p.15.)

⁷ The jury was instructed on the right to self-defense pursuant to CALCRIM 3470; the instruction stated in pertinent part: "The defendant acted in lawful self-defense/ or defense of another if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. *The defendant used no more force than was reasonably necessary to defend against that danger.*" (Italics added.)

B. Prosecutorial Misconduct

Defendant contends the prosecutor committed reversible misconduct, and violated his federal constitutional rights to due process and to present a defense, during his argument in rebuttal to defense counsel's assertion defendant acted in self-defense. Specifically, defendant complains the prosecutor compared defense counsel's assertion of self defense to a "magic trick," and told the jury it was speculative, unsupported by the evidence, a "red herring," and "intellectually dishonest . . . so we throw spaghetti on the wall and see what sticks." Defendant contends these comments by the prosecutor implied that defense counsel was complicit in presenting a fabricated defense, constituting an unwarranted attack on the integrity of defense counsel. For example, defense counsel stated, "If somebody hits you in the back of the head . . . with a deadly weapon, punching them in the face is a reasonable response to that. Think about how Rob reacted after this happened. The fight wasn't over. He was going to continue fighting. And if he got up and he grabbed that golf club and I'm 100 percent sure that as Brett was hitting him [,] he was trying to hit him back, because he was still ready to fight. It was still ongoing." At this juncture, the prosecutor objected "to that portion as vouching," and the trial court overruled the objection, stating, "You can address that in your [rebuttal] argument." In rebuttal, the prosecutor, in an attempt to debunk counsel's assertion of self defense, compared counsel's summary of the facts to a "magic trick," describing it as a "red herring," "intellectually dishonest" and "throwing spaghetti on the wall." We find no misconduct on this record. The prosecutor's entreaty to the jury to reject defense counsel's argument, when considered in the context of the entire argument, was "based on the evidence and [thus] fell within the permissible bounds of argument." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1418.) For example, the prosecutor argued defense counsel's attack on the credibility of prosecution witnesses was part of the "magic trick," and that the victim's credibility on the witness stand was evidenced by how "he got a little choked up," showing "this wasn't easy for him." Similarly, the prosecutor argued the jury should reject the voluntary intoxication defense to the mayhem charge as inconsistent, questioning how "someone can be sober enough to reasonably perceive a threat for self-defense and respond with reasonable force, yet they are just too intoxicated to intend

to commit mayhem” and stating, “red flags should go off. Defense is really trying to throw spaghetti on the wall. . . . Voluntary intoxication is a red herring. Ignore it.” Whereas these comments show the prosecutor capable of floridly mixing his metaphors, they fail to demonstrate he is guilty of misconduct. (Cf. *People v. Najera* (2006) 138 Cal.App.4th 212, 220 [prosecutor’s comments about “giving defendant a break or throwing him a bone” did not constitute misconduct]; and *People v. Kennedy* (2005) 36 Cal.4th 595, 626 [prosecutor’s remarks that defense counsel’s “ ‘idea of blowin’ smoke and roiling up the waters to try to confuse you is you put everybody else on trial’ ” were permissible because arguing the defense is attempting to confuse the jury is not misconduct].)

In sum, having carefully reviewed the closing arguments of the parties in their entirety, and viewing the challenged comments in the context of rebuttal to defense counsel’s argument the jury should find defendant acted in self defense, we conclude the prosecutor’s comments did not exceed the boundary of permissible argument and “it is not reasonably likely” that the jury perceived the prosecutor’s comments as a personal attack on defense counsel’s integrity. (*Cole, supra*, 33 Cal.4th at p. 1203; see also *People v. Medina* (1995) 11 Cal.4th 694, 759 [prosecutor’s observation that “any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something” was “unobjectionable” and did not demean defense counsel’s integrity].)⁸

C. Fees

At sentencing, the court imposed the following fees, which are reflected in the sentencing minute order and recorded in the abstract of judgment: a restitution fine of \$1,400 (§ 1202.4, subd. (b)); a court security fee of \$120 (§ 1465.8); a criminal conviction assessment fee of \$90 (Government Code section 70373); a Criminal Justice Administration fee of \$340; a probation report fee of \$176 (§ 1203.1b); and attorney fees in the amount of \$500.⁹ With respect to the probation report fee, we note that the imposition of such fee in

⁸ Finding any *Doyle* error harmless beyond a reasonable doubt and no prosecutorial misconduct, we have no occasion to evaluate cumulative error, as urged by defendant.

⁹ The \$500 attorney fee assessment is recorded in the abstract of judgment but not noted in the sentencing minute order.

the amount of \$176 was specifically recommended in the probation report.¹⁰ With respect to attorney fees, we note the record contains a “Referral to Office of Revenue Collection P.C. 987.8” (referral order), dated April 25, 2011 (date of sentencing), signed by the sentencing judge and by defendant in acknowledgment of receipt thereof, ordering defendant, within 20 working days from the date of the order, or, if in custody, within 20 working days *after release from jail*, to report to the Probation Collection Unit. (Italics added.)¹¹ The order states: “There, a county officer will interview you to determine if you are able to pay all or part of the services of the attorney appointed by the Court to handle your case. If the [Probation Collection Unit] finds you are able to pay a certain amount, and you do not agree, you have the right to a hearing in this Court to decide what amount, if any, you must pay.”

Defendant contends the trial court erred by imposing a probation report fee of \$176 and by ordering him to pay \$500 in attorney fees without making statutorily required findings that he had the ability to pay these fees. However, defendant failed to object at sentencing to the imposition of the challenged fees. By failing to object at sentencing, defendant failed to preserve the issue for purposes of appeal. (See generally *People v. Smith* (2001) 24 Cal.4th 849, 852 [California Supreme Court has created a narrow exception to the

¹⁰ The probation fee statute provides: “In any case in which a defendant is convicted of an offense and is the subject of any . . . presentence investigation and report, . . . the probation officer, . . . taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of *the ability of the defendant to pay* all or a portion of the reasonable cost of . . . conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203.” (§1203.1b, subd. (a) [italics added].)

¹¹ The attorney fee statute states: “In any case in which a defendant is provided legal assistance, . . . upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present *ability of the defendant to pay* all or a portion of the cost thereof. . . . The court may, in its discretion, *order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.*” (§ 987.8, subd. (b) [italics added].) In issuing its referral order, the trial court may have intended to invoke the latter italicized provision of section 987.8, subdivision (b), but that provision does not appear applicable to a defendant who is about to be transferred to state prison to serve a term of seven years.

forfeiture rule for “unauthorized sentences” or sentences “entered in excess of jurisdiction,” which present pure issues of law that can be corrected on appeal “without referring to factual findings in the record or remanding for further findings”).¹² Moreover, the weight of authority demonstrates that the forfeiture rule applies to court-imposed fees challenged on sufficiency of the evidence of ability to pay: “[S]entencing determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the evidence. This includes claims that the record fails to demonstrate the defendant’s ability to pay a fine [citations].” (*People v. Butler* (2003) 31 Cal.4th 1119, 1130–1131 (conc. opn. of Baxter, J.); accord *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071–1072; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469; *People v. McMahan* (1992) 3 Cal.App.4th 740, 750.)¹³

D. Correction of Abstract of Judgment and Sentencing Minute Order

The parties agree that the abstract of judgment should be amended to comport with the oral pronouncement of judgment in the following respects: Item 1 of the abstract of judgment should be amended to show that defendant was convicted in count 2 of attempted mayhem, not mayhem as shown on the abstract of judgment; Item 2 of the abstract of judgment should be amended to reflect that the trial court imposed a great bodily injury enhancement of three years on count 3, not count 2 as shown on the abstract of judgment; and Item 4 of the abstract of judgment, showing that defendant was sentenced under the Three Strikes Law, should be stricken. The parties also concur that the sentencing minute

¹² The issue of whether defendant forfeited his challenge to imposition of a booking fee pursuant Government Code section 29550.2 absent a finding of his ability to pay by failing to object in the trial court is currently pending before the California Supreme Court in *People v. McCullough*, S192513, review granted June 29, 2011.

¹³ Defendant relies upon *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, which holds that defendant did not forfeit the claim there was insufficient evidence of his ability to pay a probation fee by failing to object at sentencing. Because the holding in *Pacheco* is inconsistent with the authorities cited above, which establish that sentencing determinations may not be challenged for the first time on appeal, even if the challenge is to the sufficiency of evidence supporting a defendant’s ability to pay a fine or fee, and presents no reason to reject those authorities, we decline to follow its non-forfeiture holding.

order should be modified to reflect that the trial court imposed the great bodily injury enhancement on count three pursuant to section 12022.7, not section “1222.7” as stated in the sentencing minute order.¹⁴

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract judgment, reflecting the amendments described above, and to send a certified copy of the amended abstract of judgment to the Department of Corrections. Also, the clerk of the Superior Court is directed to modify the sentencing minute order to correct the scrivener’s error identified above.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.

¹⁴ This is patently a scrivener’s error because there is no section 1222.7 in effect in the Penal Code.