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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN PARDO MEJIA,

Defendant and Appellant.

A132998

(Alameda County Super. Ct. No. C162655)

After a jury trial defendant was convicted of attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)),<sup>1</sup> first degree burglary (§ 459), and infliction of corporal injury on a spouse (§ 273.5, subd. (a)), with enhancements for infliction of great bodily injury (§ 12022.7, subd. (e)), personal use of a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), and discharge of a firearm causing great bodily injury (§§ 12022.7, subd. (e), 12022.53, subd. (d)). In this appeal he complains of juror misconduct, an error in the calculation of his presentence credits, and lack of evidence of his ability to pay a probation investigation fee. We find that juror misconduct occurred, but was not prejudicial to defendant. Defendant forfeited his challenge to the probation investigation fee by failing to object at trial. We must remand the case for a recalculation of presentence credits to account for defendant's incarceration in Mexico awaiting extradition. We affirm the judgment in all other respects.

<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

## STATEMENT OF FACTS

Defendant and the victim, Lorena Pardo, were married in 1988, and had two children, a daughter Diana and a younger son Alejandro.<sup>2</sup> Lorena testified that throughout their relationship defendant was “aggressive” with her; he “always shouted and battered” her. In early 1990, the police were called to their home in Oakland after defendant hit and kicked Lorena in the face and ribs, causing a subsequent surgery.

On September 15, 2002, during a gathering of friends at their house, defendant began “arguing with” Lorena about a friend and neighbor named Lalo, who defendant said “was looking” at her. Lorena briefly left their home with the children, but when she returned defendant continued the argument until Lorena again departed to stay with a neighbor. Later, Lorena returned to the house again, whereupon defendant pushed her by the shoulder into a fence. Defendant was subsequently arrested for assault and spent about a week in jail. After defendant was released he stayed with his sister. He warned Lorena to stay away from Lalo.

On September 25, 2002, defendant came to the house with his mother and informed Lorena that he “wanted to come back.” Lorena asked defendant to leave, and told him, “we need to get divorced.” Defendant said to Lorena, as he had many times before, that she “could not be separated from him,” and if she “tried to separate from him he would kill” her. Defendant left the living room briefly, but returned with a knife in his fist. He tried to hug and kiss Lorena, but she pulled away and said, “Let me go.” As they struggled defendant lifted the knife in front of Lorena and began a stabbing motion. She grabbed the knife blade and cut her hand. Defendant said, “I told you that if you don’t come back to me, I will kill you.” While still holding the knife blade, Lorena tried to calm defendant down by telling him, “I’m going to go back with you.” Defendant “calmed down a little bit and let [her] go,” although he still held the knife. When Lorena went to the kitchen to wrap the wound to her hand, defendant put the knife “in the kitchen sink.”

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<sup>2</sup> For the sake of clarity and convenience we will refer to the victim by her first name.

Lorena and defendant then took their son to school, where she ran into the school kitchen with a friend and called the police. Lorena was taken to the hospital for treatment of the wound to her hand. Defendant was subsequently arrested, and a restraining order was issued against him on October 25, 2002.<sup>3</sup>

Defendant thereafter lived temporarily with his sister and her family. On the morning of November 6, 2002, defendant, accompanied unwillingly by his nephew Andres Gomez, and wearing a beige suit, gloves, dark glasses and a long wig, drove to Lorena's house in a borrowed van. He had a hunting knife and a gun in his possession. Defendant forced Gomez to knock on Lorena's front door and ask for "DMV papers." Defendant was standing on the porch, behind Gomez, out of Lorena's view.

Lorena opened the door slightly, whereupon defendant rushed past Gomez, grabbed her, and pushed her into the house. He pointed the gun at Gomez and directed him to "come in." In the living room, defendant placed the gun against Lorena's head, squeezed her neck, and told her to, "Shut up." Lorena began struggling to try to escape from defendant. She yelled for help from a neighbor, who called the police. Defendant pushed Lorena by the neck into the kitchen, where he punched her in the face, breaking her nose. Defendant then looked for a suitcase in the closet as he continued to point the gun at Lorena. Lorena ran for the door and yelled for help, but defendant caught her, threw her to the floor near the couch, and started hitting her until she lost consciousness. When Lorena "couldn't get up," defendant proceeded to shoot her three times from about eight to ten feet away. Defendant then rushed out of the house. As defendant ran away he told Gomez that he was "going to Mexico," and warned him "not to say anything about it or he was gonna be back."

Lorena awoke and ran "out to the street to find help." A neighbor called the police. Lorena was taken to the hospital, where she was treated for exceedingly serious gunshot wounds to her head, which resulted in the loss of her right eye, a bullet that remains in her scalp, and a fractured nose, among other injuries.

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<sup>3</sup> The case was ultimately dismissed for excessive delay in prosecution.

Defendant was arrested in Mexico in March of 2008. He was extradited to the United States in June of 2009.

The defense was primarily based on testimony presented by defendant. He recounted his relationship with Lorena, including the two incidents that occurred in September of 2002. On September 15, 2002, defendant acknowledged that he acted like “a fool” by pushing Lorena during an argument over a gesture made to her by Lalo. Defendant testified that on September 25, 2002, he and Lorena argued over a house they owned in Mexico, and rumors he heard that she “was hanging out with Lalo.” Lorena insulted defendant, which caused him to become angry and depressed. He “grabbed a knife,” and told Lorena he “would rather commit suicide” than have her involved with Lalo. Lorena pulled the knife away from him, and in the process injured her hand. Defendant admitted that the incident was caused by his jealousy and anger.

Defendant testified that on November 6, 2002, he drove to Lorena’s house in a borrowed car, wearing a wig and sunglasses, so the neighbors would not recognize him and call the police to report his violation of the restraining order. He wanted to take Lorena “out of there” and away from Lalo so they “could go live elsewhere.” Based on their previous conversations, defendant believed Lorena wanted to leave with him. He did not intend to kill Lorena. Defendant borrowed a gun because he was “afraid of Lalo,” who he thought might be at the house with Lorena. Defendant denied that he was in possession of a knife. He asked his nephew Gomez to accompany him to the front door so Lorena would “feel comfortable” and know he “was not going to do anything to her.”

Once defendant entered the house, Lorena screamed and ran to the kitchen. He followed Lorena, and asked her to “pack up her things,” so they “could move and rent a house” somewhere else. Lorena told defendant to “do it yourself,” and asked him, “How do you know Alejandro’s your son?” He became enraged and began hitting her. Defendant testified that he was “blinded,” and shot her, without knowing “how it happened.”

## DISCUSSION

### *I. Juror Misconduct.*

Defendant claims that the trial court erred by denying his motion for mistrial based on misconduct committed by two of the jurors. The misconduct issue arose during trial, initially with a note from Juror Number 11, who expressed concern with the accuracy of Lorena's testimony as translated from Spanish to English. When examined by the court, the juror clarified that she questioned the testimony of the witness, particularly Lorena's assertion that she yelled, "Ayuda me," meaning "Help me," when she was attacked by defendant. Juror Number 11 indicated that she would not say "help me," if someone was attacking her, but rather, "stop it." The juror also mentioned that "she change a lot of things," referring to either Lorena or the translator. The court advised Juror Number 11 that the "translation is what it is," and no questioning of the witnesses from the jurors was permitted.

During testimony the following day, Juror Number 5 complained to the court by letter that Juror Number 7 "keeps talking about the case, despite . . . admonitions" not to do so. In response to an inquiry by the court Juror Number 5 stated that Juror Number 7 made comments such as "it doesn't look good for the guy" or "This doesn't feel right." The other jurors advised Juror Number 7 to refrain from commentary on the evidence until deliberations. The court questioned other jurors, who reiterated that on multiple occasions Juror Number 7 made inappropriate comments on the state of the evidence, and was "stopped" by others or told to "just keep it to yourself." The jurors uniformly informed the court that their impartiality had not been influenced by Juror Number 7's comments, and they had not prejudged the case.

When questioned, Juror Number 7 denied that he made any "explicit" comments on the evidence or expressed opinions, although he admitted stating to other jurors that "it looks bad for the defendant." The court then excused Juror Number 7 from service for commenting on the merits of the case before hearing all the evidence. Juror Number 11 was also excused by the court, for the stated reason that she declined to accept the translation "provided by the court's translators," and "tried to pass that on to her fellow

jurors when they asked her to stop.” The court repeated the admonition for the jurors “not to discuss the matter” among themselves until presentation of all of the evidence and the commencement of deliberations with all the jurors present.

The defense subsequently moved for a mistrial on the ground that dismissing the jurors was “not sufficient” to protect defendant’s right to an impartial trial. The court found that discharge of the two jurors did not affect the impartiality of the remaining jurors, and denied the motion.

Defendant argues that Juror Numbers 7 and 11 committed misconduct, which created a “presumption of prejudice” that was not rebutted by the prosecution. He claims that Juror Number 7 improperly commented on the evidence, particularly by stating his view to other jurors that “it doesn’t look good for the defense.” Defendant adds that Juror Number 11 “also clearly committed misconduct” by “questioning the translation of testimony” adduced from “Spanish speaking witnesses.” He maintains that the “numerosity” of the jurors’ “improper comments, and their inherently dangerous impact on the other jurors” required the court to declare a mistrial rather than merely discharge the offending jurors.

We proceed with our review in accordance with the fundamental premise that “An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ‘capable and willing to decide the case solely on the evidence before it’ [citations].” (*In re Hamilton* (1999) 20 Cal.4th 273, 293–294; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1303.) “When even one juror lacks impartiality, the defendant has not received a fair trial.” (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1111.)

“We first determine whether there was any juror misconduct. Only if we answer that question affirmatively do we consider whether the conduct was prejudicial.” (*People v. Collins* (2010) 49 Cal.4th 175, 242.) “To succeed on a claim of juror misconduct, ‘defendant must show misconduct on the part of a juror; if he does, prejudice is presumed; the state must then rebut the presumption or lose the verdict. [Citation.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1178.) “[I]n determining

whether misconduct occurred, ‘[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]’ [Citation.]” (*People v. Majors* (1998) 18 Cal.4th 385, 424–425.)

We agree with defendant and the trial court that juror misconduct occurred. (*In re Stankewitz* (1985) 40 Cal.3d 391, 399–400.) Contrary to explicit instructions given by the court, and the exhortations of fellow jurors, Juror Number 7 repeatedly expressed improper opinions about defendant’s guilt before all of the evidence was presented and the case was submitted for deliberations. (See *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 69–70; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1054.) The court was also justified in finding that Juror Number 11 committed misconduct by willfully failing to follow the instruction to accept the translation of the complaining witness’s testimony, and by proposing her own view of the translation for consideration by the other jurors. (See *People v. Wilson* (2008) 44 Cal.4th 758, 834–835; *People v. Ledesma* (2006) 39 Cal.4th 641, 738; *People v. Engelman* (2002) 28 Cal.4th 436, 442; *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303.)

When advised of potential juror misconduct, the court conducted an appropriate inquiry to determine if the jurors should be discharged and whether the impartiality of the other jurors had been affected. (*People v. Fuiava* (2012) 53 Cal.4th 622, 702; *People v. Kaurish* (1990) 52 Cal.3d 648, 694.) The offending jurors were then discharged, replaced with alternates, and the reconstituted jury was firmly admonished to disregard inappropriate comments on the evidence made before the conclusion of the case.

Having found misconduct, we must “ ‘determine whether the misconduct was prejudicial. . . .’ [Citation.]” (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467.) “Prejudice is presumed where there is misconduct. This presumption can be rebutted by a showing no prejudice actually occurred or by a reviewing court’s examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party.” (*People v. Loot* (1998) 63 Cal.App.4th 694, 697.) “ ‘[W]hether an individual verdict must be overturned for jury misconduct or irregularity “ ‘ “is resolved by reference to the substantial likelihood test, an objective standard.” ’ ” [Citation.] Any

presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.] [Citation.] We independently determine whether there was such a reasonable probability of prejudice.” (*People v. Harris, supra*, 43 Cal.4th 1269, 1303–1304.)

In our review of the trial court’s decision to deny the motion for mistrial and proceed with the trial, we follow the established standard that a “ ‘trial court should grant a motion for mistrial “only when ‘ “a party’s chances of receiving a fair trial have been irreparably damaged” ’ [”] [citation], that is, if it is “apprised of prejudice that it judges incurable by admonition or instruction” [citation].’ [Citation.]” (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 138; see also *People v. Elliott* (2012) 53 Cal.4th 535, 575; *People v. Clark* (2011) 52 Cal.4th 856, 990.) “Among the factors to be considered when determining whether the presumption of prejudice has been rebutted are ‘the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.’ [Citation.]” (*People v. Loot, supra*, 63 Cal.App.4th 694, 698.) “Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.] [¶] The standard is a pragmatic one, mindful of the ‘day-to-day realities of courtroom life’ [citation] and of society’s strong competing interest in the stability of criminal verdicts [citations].” (*In re Hamilton, supra*, 20 Cal.4th 273, 296.) “ ‘A trial may proceed if the court, after considering factors such as the communication’s nature, the jurors’ responses, and the curative ability of instructions [citation], finds that the jury can (and will) remain impartial and render a verdict based solely on the evidence, not the improper contact.’ [Citations.]” (*People v. Harris, supra*, 43 Cal.4th 1269,

1304.) “Whether misconduct warrants a mistrial is a decision which is within the sound discretion of the trial court.” (*People v. Bennett* (2009) 45 Cal.4th 577, 595.)

Upon our review of the record we are persuaded that the presumption of prejudice was rebutted in the present case. First, the misconduct was not serious in nature. The misconduct committed by the two jurors did not infect the trial with prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Their comments, while repeated, were limited to improper expressions of views on the evidence presented in contravention of the instructions given by the trial court. Even before the court interceded, the jurors were aware of the misconduct, and so advised Juror Numbers 7 and 11 by requesting them to “stop immediately.” After the two jurors were excused, the remaining jurors were thoroughly examined by the court. Without exception, the jurors unvaryingly expressed both awareness of the misconduct and the ability to disregard the inappropriate comments of the discharged jurors. With an additional instruction the court reinforced the directive “not to discuss the matter among yourselves or with anyone else until it’s finally submitted to you and then[n] only when all 12 jurors and no one else are present in the jury deliberation room.” We presume the jurors followed the instruction as given, and have every reason based on the record to determine that they did so. (*People v. Cain* (1995) 10 Cal.4th 1, 34.) We find no substantial likelihood that one or more jurors were actually biased against the defendant. The trial court therefore did not err by denying the motion for mistrial.

## ***II. The Award of Presentence Credits.***

Defendant also challenges the trial court’s award of presentence credits. He was granted 775 days of presentence credit for time spent in custody from June 29, 2009, to the date his sentence was imposed on August 12, 2011, along with conduct credit of 116 days – calculated at 15 percent of his days in custody – for a total of 891 days of presentence credits. He claims that he is entitled to an additional award of presentence credits for days he spent in custody in Mexico after his arrest and before his extradition to Alameda County. Defendant submits that he spent a total of “1230 days in custody,”

including his incarceration in Mexico, and is “entitled to 184 days of conduct credits, for a total of 1,414 days credit against his sentence,” based on the date of his “original arrest in Mexico” on “March 31, 2008,” and an extradition date of “June 23, 2009.” He requests that we amend the abstract of judgment accordingly to reflect the “correct amount” of his additional presentence credits.<sup>4</sup>

We agree with defendant that he is entitled to credit for the actual days of presentence custody in Mexico related to the charges for which he has been convicted in the present case. Section 2900.5 awards credit for all days spent in presentence custody, and “applies to all defendants.” (*People v. Johnson* (2010) 183 Cal.App.4th 253, 289.) “Generally, a defendant is entitled to presentence credit for *any time* spent in custody before trial. (§ 2900.5, subd. (a).)” (*People v. Mercurio* (1985) 169 Cal.App.3d 1108, 1110, italics added.) In *In re Watson* (1977) 19 Cal.3d 646, 651–652, the California Supreme Court granted the defendant credit pursuant to section 2900.5 for 285 days of pretrial time served in a Texas jail resisting extradition to California, with the explanation: “The crucial element of the statute is not where or under what conditions the defendant has been deprived of his liberty but rather whether the custody to which he has been subjected ‘is attributable to charges arising from the same criminal act or acts for which the defendant has been convicted.’ [Citation.] In recognition of this element the courts have placed the emphasis on the *fact* of the defendant’s custody prior to the commencement of his sentence regardless of the particular locale, institution, facility or environment of his incarceration.” (See also *In re Rojas* (1979) 23 Cal.3d 152, 156; *People v. Pottorff* (1996) 47 Cal.App.4th 1709, 1719; *People v. Mercurio, supra*, at pp. 1110–1111; *In re Jordan* (1975) 50 Cal.App.3d 155, 157–158.)

Thus, as a general principle a defendant is “entitled to credit on a California sentence for time served in other states.” (*People v. Sewell* (1978) 20 Cal.3d 639, 644.) In light of the dual purpose of the law which is to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a

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<sup>4</sup> We observe that a challenge to an award of presentence conduct credit may be raised at any time. (*People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12.)

longer overall confinement than their wealthier counterparts, and to equalize the actual time served in custody for given offenses, we perceive of no reason to treat differently presentence custody served in Mexico rather than another state. (See *In re Atilas* (1983) 33 Cal.3d 805, overruled on other grounds in *In re Joyner* (1989) 48 Cal.3d 487, 495; *People v. Riolo* (1983) 33 Cal.3d 223, 228; *People v. Pottorff*, *supra*, 47 Cal.App.4th 1709, 1715.)

We cannot amend the abstract of judgment as defendant requests, however, for several reasons. First, the record before us requires some clarification of the dates on which defendant was arrested in Mexico and extradited to California. Also, the nature of defendant's incarceration in Mexico is not precisely defined for us. "Section 2900.5, subdivision (b), authorizes presentence credit '*only* where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.' (Italics added.)" (*People v. Goodson* (1990) 226 Cal.App.3d 277, 281.) A defendant is not entitled to presentencing credit for a period of custody already credited against a sentence imposed for unrelated charges where the defendant cannot show he or she would have been at liberty during that period but for a restraint imposed in connection with the later-sentenced conviction. (*In re Joyner*, *supra*, 48 Cal.3d 487, 489, 492.) "[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193–1194; *id.* at p. 1180.) Defendant is entitled to credit for his presentence incarceration in Mexico, but only to the extent he proves that his custody is attributable to proceedings related to the same conduct for which he has been convicted in the present case. Finally, a defendant is entitled to presentence *conduct credits* " 'unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned' ([§ 4019], subd. (b)) or has 'not satisfactorily complied with the reasonable rules and regulations established by the [local custodial authority]' (*id.*, subd. (c) [current and former versions of statute identical in these respects])." (*People v. Lara*

(2012) 54 Cal.4th 896, 903; see also *People v. Sage* (1980) 26 Cal.3d 498, 501; *People v. Peace* (1980) 107 Cal.App.3d 996, 1008.) While the People have the burden of proof that the defendant has forfeited credits through misconduct, the trial court must determine the extent to which defendant is entitled to conduct credits under section 2933.1 during his incarceration in Mexico.<sup>5</sup> (See *People v. Johnson* (1981) 120 Cal.App.3d 808, 815.) We therefore remand the case to the trial court to make the relevant factual findings and calculate custody credits. (See *People v. Kunath* (2012) 203 Cal.App.4th 906, 911–912; *People v. Fares* (1993) 16 Cal.App.4th 954, 957–958.)

### ***III. The Probation Investigation Fee.***

We turn to defendant’s contention that the trial court erred by imposing a \$250 probation investigation fee pursuant to section 1203.1b. He maintains that the record fails to contain substantial evidence of his ability to pay the fee, as required by the statute. He further complains that he did not receive a “hearing at which the court was to determine his ability to pay.” The Attorney General responds that defendant “waived his claim by failing to object below.”

Section 1203.1b, subdivision (a), provides, in pertinent part: “In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, . . . the probation officer, or his or her authorized representative, 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 any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact supervision pursuant to Sections

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<sup>5</sup> As applicable to defendant, “section 2933.1, subdivision (a) provides, ‘any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933.’ ” (*In re Borlik* (2011) 194 Cal.App.4th 30, 36; see also *In re Pope* (2010) 50 Cal.4th 777, 779.)

11175 to 11179, inclusive, whichever applies. . . . The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”<sup>6</sup>

Our threshold inquiry into the forfeiture issue begins with recognition of the rule that, “Generally, an appellant forfeits claims of error through inaction that prevents the trial court from avoiding or curing the error. [Citation.] This general waiver or forfeiture rule is ‘grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. [Citations.]’ [Citation.] This court will not reverse erroneous rulings that could have been, but were not, challenged below.” (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1214.) Strong policy reasons exist “for such a rule: It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.” (*People v. Vera* (1997) 15 Cal.4th 269, 276.) “In contrast, an objection may be raised for the first time on appeal where it concerns an ‘unauthorized’ sentence . . . .” (*People v. Sexton* (1995) 33 Cal.App.4th 64, 69, quoting from *People v. Scott* (1994) 9 Cal.4th 331, 354.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed

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<sup>6</sup> The section makes further provision for the conduct of the hearing and defines “ ‘ability to pay’ ” as the “overall capacity of the defendant to reimburse the costs” (§ 1203.1b, subd. (e)), including, but not limited to the defendant’s: “(1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant’s financial capability to reimburse the county for the costs.” (§ 1203.1b, subd. (e)(1)–(4).)

under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing.” (*People v. Scott, supra*, at p. 354; see also *People v. McGee* (1993) 15 Cal.App.4th 107, 117.)

Here, defendant objects to the lack of a hearing and evidence in the record to support a finding of his ability to pay the fee. His contention is not one that raises a jurisdictional defect or challenges the imposition of the probation investigation fee under any circumstance in the particular case. Rather, defendant has presented a claim of sufficiency of the evidence to support the fee, an issue that cannot be addressed or resolved without examination of the specific facts presented below. (See *People v. Russell* (2010) 187 Cal.App.4th 981, 993; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine — § 1202.5, subd. (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee—Gov. Code, § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468–1469 [restitution fine—Gov. Code, former § 13967, subd. (a)].) By his failure to object, defendant forfeited any claim that the probation investigation fee order was merely unwarranted by the evidence, as distinct from being unauthorized by statute. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075; *People v. Smith* (2001) 24 Cal.4th 849, 852.)

Defendant seeks relief from the general forfeiture rule by pointing out subdivision (b) of section 1203.1b provides that, “When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative.” Here, the probation report recommended imposition of a probation investigation fee in the amount of \$250, and defendant was advised of the right to a hearing “with counsel concerning his ability to pay.” The record contains no reference to defendant’s waiver of his rights delineated in

section 1203.1b, and no evidence that defendant has the ability to pay appears in the record.

In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1401, without discussion of the issue of forfeiture, the court struck a probation supervision fee imposed under section 1203.1b. The court found there was “no evidence in the record that anyone, whether the probation officer or the court, made a determination of [defendant’s] ability to pay the \$64 per month probation supervision fee.” (*Ibid.*) Nor, the court observed, was “there any evidence that probation advised him of his right to have the court make this determination or that he waived this right. In short, it appears that the statutory procedure provided at section 1203.1b for a determination of [defendant’s] ability to pay probation related costs was not followed. Moreover, these costs, which are collectible as civil judgments, cannot be made a condition of probation.” (*Ibid.*) “For all these reasons,” the court concluded, the “\$64 monthly probation supervision fee cannot stand.” (*Ibid.*)

A forfeiture was found in *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068-1070 (*Valtakis*), however, where the defendant entered a negotiated plea, and the probation report recommended that he pay a probation fee of \$250 under section 1203.1b, as well as other fees and fines, but contained no determination of ability to pay and no advisement of a right to a separate hearing on the issue. The trial court placed the defendant on three years’ probation, and ordered him to pay certain fees, the costs of any drug or alcohol testing, and a probation service fee of \$250, without objection by the defense. (*Valtakis, supra*, at p. 1069.) On appeal, the defendant sought to strike the probation fee of \$ 250 as imposed without compliance with section 1203.1b. (*Valtakis, supra*, at p. 1069.) This court concluded that “consistent with the general waiver rules of *People v. Welch* (1993) 5 Cal.4th 228 [19 Cal.Rptr.2d 520, 851 P.2d 802] (*Welch*) and *People v. Scott* (1994) 9 Cal.4th 331 [36 Cal.Rptr.2d 627, 885 P.2d 1040] (*Scott*),” the “defendant’s failure to object at sentencing to noncompliance with the probation fee procedures of Penal Code section 1203.1b waives the claim on appeal . . . .” (*Id.* at p. 1068, fn. omitted.) The unauthorized-sentence exception” to the forfeiture rule was determined not to apply, as the procedurally and factually flawed “probation fee *could*

have been lawfully imposed had an ability to pay appeared, a clearly fact-bound determination.” (*Id.* at p. 1072.)

The court in *Valtakis, supra*, 105 Cal.App.4th 1066, 1073, then turned to an examination of the “statutory language that ‘[t]he probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount,’ and that ‘[t]he defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.’ [Citations.]” (*Ibid.*) The defendant in *Valtakis* reasoned that without notice, “one cannot intelligently waive the right and therefore must be able to assert it for the first time on appeal.” (*Ibid.*) The court responded: “We disagree. The last quoted sentence, standing alone, is arguably ambiguous enough to allow his interpretation, for it might refer to waiver in the trial court or might also encompass waiver on appeal. But, observing our duty to avoid an absurd construction whenever possible (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071 [22 Cal.Rptr.2d 278, 856 P.2d 1134]), we read the language as pertaining to waiver in the trial court, not on appeal.” (*Ibid.*) The court mentioned three reasons to support its decision that a defendant and his counsel may not “stand silent as the court imposes a fee—even a nominal one like the \$250 here—and then complain for the first time on appeal” that some aspect of the statutory procedure was not followed (*id.* at p. 1075): First, the “antiwaiver language” in section 1203.1b was not designed to abrogate the usual appellate rule “of *Welch, supra*, 5 Cal.4th 228, and *Scott, supra*, 9 Cal.4th 331,” that a claim is waived if not raised in the proceedings below; second, “the waiver language does not speak to appellate review;” and third, “to construe the language as abrogating *Welch* and *Scott* (and now *People v. Tillman*[(2000)] 22 Cal.4th 300) would work results horribly at odds with the overarching cost conservation policy of the section.” (*Valtakis, supra*, at p. 1075.) The court declared: “*Valtakis*’s failure to object to the fee below has waived the claim on appeal.” (*Id.* at p. 1076.)

We agree with the reasoning in *Valtakis*, and conclude that by failing to object below defendant forfeited his claim of noncompliance with the notice and hearing requirements related to ability to pay the probation investigation fee.

**DISPOSITION**

The case is remanded to the trial court for recalculation of presentence custody credits in accordance with the views expressed herein, and for correction of the abstract of judgment. The court shall thereafter forward the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.