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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFERSON CHARLES MORTON,

Defendant and Appellant.

A140517

(Napa County  
Super. Ct. No. CR148165)

After being convicted of attempted criminal threats (Pen. Code,<sup>1</sup> § 422), multiple counts of commercial burglary (§ 459) and petty theft (§ 666), and two counts of obstructing or delaying a peace officer (§ 148, subd. (a)(1)), defendant Jefferson Charles Morton appealed. (*People v. Morton* (March 28, 2013, A128706 [nonpub. opn.] (*Morton I.*)) In 2013, we reversed the convictions of five of those counts and remanded the matter for resentencing. Defendant now contends the trial court committed sentencing error. We shall order the judgment modified to reduce the court security fee and criminal conviction assessment and shall strike the no-contact orders the trial court imposed. In all other respects, we shall affirm the judgment.

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

## I. BACKGROUND

### A. Initial Proceedings and Appeal

For the background of this case, we begin by quoting from our opinion in *Morton I.*<sup>2</sup>

Defendant was charged by information with making criminal threats, a felony ([ ] § 422) (count one); second degree commercial burglary, a felony (§ 459) (counts two, three, four, five, six, seven, and eight); petty theft with a prior, a felony (§ 666) (counts nine, ten, eleven, twelve, and thirteen); and resisting, obstructing, or delaying a peace officer, a misdemeanor (§ 148, subd. (a)(1)) (counts fourteen, fifteen, sixteen, and seventeen). The information also alleged prior convictions and prison terms. (§§ 667.5, subd. (b) & 1203, subd. (e)(4).) At trial, count one was amended to allege attempted criminal threat.

Defendant had several prior convictions, including two in 1994 for misdemeanor sexual battery. (§§ 243.4, subd. (a) & 17, subd. (b)(4).) As a result of that conviction, defendant was required to register as a sex offender. (§ 290, subd. (c).)[ ]

In the late summer or fall of 2009, two women in the City of Napa had disturbing encounters with defendant. One of them, Sandra S.,<sup>3</sup> met him in the pool area of her apartment complex. Their conversation was pleasant at first. Defendant then mentioned he had been falsely accused and arrested or held for “those murders of the girls.” He said he was the boyfriend of “the girl at Shelter Creek,” or had some other association with her. Sandra was confused because she thought there had been only one suspect in the murders defendant was discussing. Sandra was uncomfortable, and in an effort to get away politely, she commented on defendant’s ring and said his wife was probably waiting for him. Defendant said “I’m not married, my mother gave me this ring, but I’ll

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<sup>2</sup> Empty brackets [ ] denote deletions from our opinion in *Morton I.* As a result of the deletions, the numbering of footnotes has been altered. We take judicial notice of the appellate record in *Morton I.*

<sup>3</sup> In the interest of privacy, we will refer to Sandra S. and the other woman, Kathleen W., by their first names. We intend no disrespect.

take it off if it makes you uncomfortable.” At one point in the conversation, Sandra folded her arms across her chest, and defendant said, “Thank you for being modest.”

A day or two later, defendant knocked on Sandra’s apartment door and asked if she was home. Sandra’s adult daughter said Sandra was not home. Although Sandra had not invited defendant to visit her, he told Sandra’s daughter that she had done so. Defendant made Sandra uncomfortable, and she asked the manager what she knew about him. The manager called the police. Sandra told the police about her contacts with defendant.

The other woman, Kathleen W., met defendant at the city library. He came up to her as she looked for a book and told her he had been watching her and he thought she was adorable. As she checked a book out, he approached her again and introduced himself. She dropped her library card, which had her name on it. Defendant picked it up and looked at it before returning it to her. On another occasion, he spoke to her at a store, and asked her to have coffee with him. She said she was busy. He wrote his phone number on a piece of paper and gave it to her. Kathleen ended the conversation. The next time Kathleen encountered defendant, at the Silverado Plaza shopping center, defendant approached and asked why she had not called him. She told him she had been busy. Defendant said he still wanted to see her, and wrote his number down for her again, asking her to call him so they could get together. Kathleen again said she was busy.

Defendant began calling Kathleen and leaving messages, sometimes up to three a day. After defendant had left many messages for Kathleen, he left one telling her he was upset that she was not returning his calls and saying, “[M]aybe this is your way of letting me know that I’m not a priority.” She found the message “almost scary,” called him back, and left a message saying she did not want to be in a relationship, that she was busy, and that she did not want him to call. He continued to leave messages for her, often telling her he had been thinking of her or that he liked the way she moved and walked. The messages seemed to her to be “kind of off.”

In the late summer, Kathleen saw defendant as she was on a river trail where she often walked. He asked her why she had not returned his calls. She asked him how he had gotten her phone number, and he said he had found it in the phone book. She said she had been busy and was not available. He kept walking with her. He told her he had mistakenly been put on death row for the brutal murders of two women. He seemed agitated as they spoke. There was no one else on the trail, and Kathleen was frightened. Defendant continued to walk with her, and told her he had not committed the crimes. He told her, "Men can be very evil. Men can be very, very evil." After the conversation in which defendant talked with Kathleen about the murders, she called the police because she was frightened. She saw defendant several more times on the river trail.

Detective Darlene Elia of the Napa Police Department worked with those required to register as sex offenders, including defendant. In August 2009, she began getting calls from businesses letting her know that defendant was acting strangely. She also received Sandra and Kathleen's reports about defendant's behavior. She was concerned because defendant's behavior appeared to be "escalating," and she believed he might be fantasizing about harming women. On September 17, 2009, she met with defendant, a sheriff's detective, and a parole agent. She asked defendant about the incidents with Sandra and Kathleen, and told him the police would place a notice in the newspaper to let the public know about his behavior. She believed that there was a risk to the community and that it was her duty to notify the public pursuant to section 290.45, which authorizes law enforcement agencies to provide information to the public about sex offender registrants "when necessary to ensure the public safety based upon information available to the entity concerning that specific person." (§ 290.45, subd. (a).)

Elia originally planned to make a newspaper notification, but the newspaper refused to print it. Elia prepared flyers with information about defendant and decided to post them at Silverado Plaza, a shopping center defendant frequented and where businesses had complained of his activities. She and another police officer went to businesses at Silverado Plaza on September 23, 2009, and asked to have the flyers posted in their windows. Later that day, defendant went to various businesses in Silverado Plaza

and pulled down the flyers. He was yelling and seemed angry. He tore down posters in Starbucks, Great Clips, and High Tech Burrito. A bystander near the Starbucks saw him “reaching around inside the stores and pulling fliers off”; she saw him enter Starbucks and tear down a flyer. Defendant did not say anything before taking down the poster in High Tech Burrito. Outside the Starbucks, he yelled, “[T]his isn’t justice.” In Great Clips, he tore the posters down, saying “[W]e’re all friends around here, I don’t know why you’d let these people put this poster up about me.” Some of the business owners called the police to report defendant’s actions, and expressed concern because defendant had been so upset.

The next day, September 24, 2009, Elia and the other officer returned to Silverado Plaza and posted flyers in various businesses. Before posting the flyers, they obtained permission from the store managers. The flyers had been modified to say they were the property of the police department and should not be removed or destroyed without authorization. The same day, defendant entered several businesses. He walked into a Radio Shack and removed the flyers. A police officer who was watching defendant saw that he had a conversation in the Radio Shack, but he could not hear the conversation. Defendant left the Radio Shack, looking agitated, and the officer went into the store and told the people there that he was with the police and that defendant was being watched. Defendant went into Great Clips and tore the flyers down, saying “It’s not very nice,” and “[W]e’re all friends around here,” in an angry tone, then left the store. He did not ask for permission to remove the posters.<sup>4</sup> He went into New York Pizza Kitchen, appearing agitated and speaking loudly. Referring to the flyer in the window, he said to the owner, “You don’t have to do this. You don’t have to go there.” To appease him, the owner removed the flyer. The employees of the Starbucks in the shopping center locked the door, with employees and customers inside. Defendant tried to get in, shook the door

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<sup>4</sup> A private investigator testified on defendant’s behalf that an employee of the salon told her a few days after the incident that defendant asked for permission to remove the posters from the salon, although he did not receive permission.

violently, and yelled something about the flyers, then walked away, saying, “[I]t’s your life.” He appeared to be getting increasingly agitated.

Defendant entered a restaurant named Hop Hing’s, and asked the owner, Bailey Huang, to remove the poster. He became upset when Huang refused. Defendant said something like, “I feel sorry for your family and feel sorry for the restaurant.” He mentioned feeling sorry for Huang’s children. He left the restaurant saying something to the effect that it was not over yet. He did not take down any flyers before leaving. Huang asked one of the employees to take over the cooking, then went out and confronted defendant. Huang testified that he asked defendant exactly what he had meant by what he said in the store, saying something like, “[D]id you threaten me?” A police officer who was following defendant testified that Huang came out of the restaurant, telling defendant something like, “[Y]ou will not threaten my family.” Defendant immediately said, “[T]hat’s not what I meant.” Huang was visibly upset; his fists were clenched and his face appeared red. He testified that defendant’s statement had bothered him “[a] little bit.” When asked if defendant’s words had made him afraid, he testified, “I wasn’t afraid for myself, but I was more upset about, you know, he was threatened my restaurant [*sic*], I was kinda more upset about that.” His family sometimes came to the restaurant on weekends to visit and play.

The police officer who had been following defendant arrested him. The parties stipulated that “the police seized three posters which were the property of the Napa Police Department from Mr. Morton on September 24th, 2009.”

Dr. David Kan testified on defendant’s behalf as an expert in forensic psychiatry. He opined that defendant was diagnosable with Asperger’s disorder. As the basis for that diagnosis, he explained that defendant had difficulties with peer-appropriate relationships; difficulties with social interaction, including difficulty maintaining eye contact and connecting emotionally or socially with other people; and persistent repetitive body movements. When Dr. Kan met with defendant, he noted that it was difficult for defendant to maintain the normal back-and-forth of conversation, and that defendant “didn’t understand what [Kan] was trying to tell him socially.”

The jury found defendant guilty of attempted criminal threats (count one), five counts of second degree commercial burglary (counts two, three, six, seven, and eight), five counts of petty theft (counts nine, ten, eleven, twelve, and thirteen), and two counts of obstructing or delaying a peace officer (counts fourteen and sixteen). It found him not guilty on the remaining counts. The court found the prior conviction and prison term allegations to be true. Defendant was sentenced to serve five years in prison for the felonies, with a consecutive 326-day jail term for the misdemeanors. [We end our quotation from our opinion in *Morton I.*]

The court calculated the original sentence as follows: One of the burglary counts, count two, was used as the base term, for which the court imposed the midterm of two years. (§§ 459, 461, subd. (b).) The court imposed a concurrent two-year term for count three, burglary; a consecutive four-month term (one-third the midterm) for count one, attempted criminal threats; a consecutive eight-month term (one-third the midterm) for count six, burglary; concurrent two-year terms for counts seven and eight, burglary; and additional consecutive one-year terms for each of his two prior prison terms. The court imposed and stayed sentences for the theft counts (counts nine, ten, eleven, twelve, and thirteen) pursuant to section 654. The court imposed an additional term of 326 days in county jail for count fourteen, obstructing or delaying a peace officer, and a concurrent 326-day jail term for count sixteen. The court granted 326 days of custody credits, and applied that credit to the county jail time associated with counts fourteen and sixteen, so defendant was deemed to have served his time in county jail.

In *Morton I*, we reversed the convictions as to five of the counts, and affirmed as to the others. Specifically, we concluded the evidence did not support the felony convictions of theft and burglary from Radio Shack (counts two and nine), the felony conviction of attempted criminal threats (count one), and the misdemeanor convictions for obstructing a peace officer in the performance of her duties (counts fourteen and sixteen). Because the trial court had used count two as the base term, we remanded the matter for resentencing.

## **B. Resentencing**

The resentencing hearing took place on October 18, 2013. The trial court resentenced defendant to five years for the remaining counts, the same term that was originally imposed for the felony counts. The trial court used count three, one of the burglary counts, as the base term, and sentenced defendant to the midterm of two years for count three, with consecutive eight-month terms (one-third the midterm) for the other three burglary counts, stayed sentence on the theft counts pursuant to section 654, and added a consecutive one-year term for a prior prison term allegation, for a total term of five years. The court gave defendant 326 days in custody credits. Among the fines and fees, the court imposed a court security fee (§ 1465.8) and criminal conviction assessment (Gov. Code, § 70373) of \$390 each. The trial court also ordered defendant to “have no contact with the victims directly or indirectly.”<sup>5</sup>

## **II. DISCUSSION**

### **A. Time Served in Excess of Sentence**

At the resentencing hearing, the court stated that it was “sentencing [defendant] as of April 2010,” the time of the original sentencing hearing, and gave him credit for 326 days served as of that date.<sup>6</sup> The court also imposed fines and fees. Defense counsel informed the court that defendant had completed his term of imprisonment and was on parole supervision. The trial court stated that the parole board would decide how the credit for time served would affect defendant’s time on parole.

Defendant contends he did not receive full credit for the 326 days, and that the excess time served should have been used to reduce his fines. He relies on section 2900.5, which provides that when a defendant is convicted, the days he or she has spent in custody from the date of arrest “shall be credited upon his or her term of

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<sup>5</sup> The minute order from the sentencing hearing identified the victims as Kathleen and Sandra.

<sup>6</sup> The Attorney General asserts this number should have been 321 days, and in his opening brief, defendant likewise uses the number 321. Our review of the original sentencing hearing, however, shows that the trial court awarded 326 days of presentence credit.

imprisonment, or credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence. . . . In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine . . . .”

(§ 2000.5, subd. (a).) As a general rule, credits may be applied to reduce the period of parole. (§ 2900.5, subd. (c); *In re Reina* (1985) 171 Cal.App.3d 638, 642; *In re Ballard* (1981) 115 Cal.App.3d 647, 650; *In re Sosa* (1980) 102 Cal.App.3d 1002, 1006.)

Defendant argues that he had been released from parole supervision by the time he was resentenced and the trial court should therefore have applied his presentence custody credits to reduce his fines.

The Attorney General, on the other hand, contends the credits were used to reduce defendant’s period of parole, and moves to dismiss the appeal as to this issue on that ground. In support of her motion to dismiss, the Attorney General attaches a “DSL Release Date Calculation” as of March 28, 2014 (the Calculation), prepared by the California Department of Corrections and Rehabilitation (CDCR) after defendant was resentenced. We take judicial notice of this Calculation, which appears to show that defendant was released on parole on November 3, 2012. Defendant contends the Calculation shows the CDCR applied only 163 days of his presentence credit to his period of parole.

We first note that defendant’s contention that he had already been discharged from parole supervision at the time of the resentencing hearing appears to be incorrect. He relies on the following statement in the abstract of judgment: “As of 10/18/13 Term has been served/on Parole.” This language appears to indicate not that he had been discharged from parole as of the date of the resentencing hearing, but that he had served his term of imprisonment and was on parole at that time. This conclusion is buttressed by defense counsel’s statement at the resentencing hearing that defendant was still on

parole.<sup>7</sup> Thus, defendant has not established the predicate for his argument that, because he was neither in prison nor on parole, the trial court should have applied his presentence credits to reduce his fines.

In addition, we have examined the Calculation and, on its face, it shows defendant received his full presentence credits. In the Calculation, the CDCR sets forth defendant's five-year sentence, then gives him presentence credit of 326 days, in addition to post-sentence credit and conduct credit. Based on these credits, the CDCR calculated an "earliest possible release date" of May 24, 2012. That date was 163 days before November 3, 2012, the date defendant was actually released from custody and placed on parole. The CDCR therefore deducted 163 days from his parole period. Defendant has not met his burden to show he did not receive the benefit of his conduct credits.<sup>8</sup>

#### **B. Reduction of Fees**

At resentencing, the trial court imposed a criminal conviction assessment (Gov. Code, § 70373) of \$390 and a court security fee (§ 1465.8) of \$390, the same amounts it had imposed at the original sentencing hearing. Defendant contends the trial court erred in failing to reduce these fees to account for the convictions that were reversed. The Attorney General concedes this point.

At the time defendant was originally sentenced, section 1465.8, subdivision (a)(1), and Government Code section 70373, subdivision (a)(1), required the imposition of a fee of \$30 for certain convictions, including those committed by defendant.<sup>9</sup> The original

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<sup>7</sup> This conclusion is also supported by the Calculation, which indicates defendant would have a "Discharge Review" on November 3, 2013. And according to a declaration of the Deputy Attorney General accompanying the motion to dismiss, defendant was discharged from parole on March 25, 2014.

<sup>8</sup> We deny the Attorney General's motion to dismiss the appeal as to this issue.

<sup>9</sup> Defendant was convicted on March 26, 2010, and the original sentencing took place on April 29, 2010. Effective October 19, 2010, section 1465.8 was amended to provide for a \$40 court security fee. (Stats. 2010, ch. 720, § 33, p. 5020 & § 40, p. 5025.) Because the date of the conviction controls the operation of the statute, we agree with defendant that the \$30 fee in effect at the time of his conviction should be applied. (See *People v. Phillips* (2010) 186 Cal.App.4th 475, 477–478 [construing analogous provision

assessments of \$390 were based defendant's 13 convictions. In *Morton I*, however, we reversed five of those convictions. The criminal conviction assessment and court security fee should accordingly have been reduced to account for the fact that defendant had sustained only eight convictions. We shall therefore order the criminal conviction assessment and court security fee reduced to \$240 each, which we have calculated by multiplying the \$30 base fee by defendant's eight convictions.

### **C. Protective Orders**

At the sentencing hearing, the trial court stated, "I'll still make orders that Mr. Morton have no contact with the victims directly or indirectly." The minute order stated, "Defendant to have no contact with victims Kathleen [ ] or Sandra [ ], directly or indirectly."<sup>10</sup> The abstract of judgment noted that the "victim" was the Napa Police Department, and that defendant was to have no contact with "victim" or with Kathleen or Sandra.

Defendant contends the trial court lacked authority to impose protective orders that extended past the pendency of the criminal proceedings. In the circumstances of this case, he is correct. As explained in *People v. Robertson* (2012) 208 Cal.App.4th 965, 996, cited by the Attorney General: "Several statutes permit entry of a protective order under certain circumstances in a criminal case. However, the no-contact order that was imposed in this case was not authorized by any of those statutes. For example, section 136.2, subdivision (a) authorizes issuance of a protective order during the duration of criminal proceedings. Yet, this statute does not authorize issuance of a protective order against a defendant who has been sentenced to prison unless the defendant has been convicted of domestic violence. [Citations.] Section 1203.1, subdivision (i)(2), which authorizes a no-contact order in some sex offense cases, only

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of Government Code section 70373]; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413–1414.)

<sup>10</sup> Although neither woman was a victim of the crimes of which defendant was convicted, at the original sentencing hearing, the trial court had ordered defendant to have no contact with Kathleen or Sandra, directly or indirectly.

applies where the defendant is granted probation. Section 1201.3, subdivision (a) authorizes a no-contact order for a period of up to 10 years but only when the defendant was convicted of a sexual offense involving a minor victim. We are not aware of any statute that would provide a basis for the trial court to issue a no-contact order in this case during sentencing, much less one of unlimited duration.” Nor was there any showing that defendant had threatened either Kathleen or Sandra or tried to dissuade them from participating in the criminal proceedings. (*Ibid.*; and see § 136.2, subd. (a); *People v. Ponce* (2009) 173 Cal.App.4th 378, 382–383; *People v. Therman* (2015) 236 Cal.App.4th 1276, 1278–1279 [postjudgment protective orders authorized only in limited circumstances].) Like the court in *People v. Robertson*, 208 Cal.App.4th 965, we are not aware of any statute that would authorize stay-away orders of unlimited duration in the circumstances of this case.

The Attorney General makes no attempt to defend the orders, arguing rather that the issue is moot because defendant has been released from parole. Nothing in the record indicates the court intended the stay-away orders to be treated as conditions of his parole or to be limited to his parole period. Accordingly, the stay-away orders must be stricken.<sup>11</sup>

#### **D. Five-Year Sentence**

Defendant contends the trial court abused its discretion in imposing a five-year term at the resentencing hearing. He argues that the conduct behind the crimes of which he stood convicted was “relatively trivial” and that the court improperly based its sentence on its concerns about his conduct toward Kathleen and Sandra, which was not the basis of his burglary and theft convictions. Moreover, defendant contends, Kathleen and Sandra’s fear and discomfort with the encounters stemmed from his Asperger’s

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<sup>11</sup> Because we strike the orders on this ground, we need not consider defendant’s challenge to the stay-away order as it related to the Napa Police Department on the ground that it was unconstitutionally vague and uncertain. We deny the Attorney General’s motion to strike as moot the arguments about the protective orders.

disorder, which prevented him from being “socially adept,” and the trial court abused its discretion in relying upon his “profound social ineptness” in setting the sentence.

To recap: At the original sentencing hearing, the trial court imposed a prison sentence of five years for the felony convictions and a 326-day jail term for the misdemeanors. In *Morton I*, we reversed three of the felony convictions and both misdemeanors and remanded the matter to the trial court for resentencing. (*Morton I*, slip op., p. 26.)

At the resentencing hearing, the trial court noted that it could not impose a greater sentence than the original sentence. The court went on to explain that at the original sentencing hearing, “I felt that the case was not an aggravated case, but it was a serious case, and that’s why I sent him to prison. And that I feel that Mr. Morton has some issues. That he was acting very irrationally with regards to these two victims, and that they were very scared of Mr. Morton, and that he presented a danger to those two young females. And so I don’t believe that it’s appropriate to—for me to lessen Mr. Morton’s parole time. I don’t. I just don’t feel that that’s appropriate. Now maybe parole will do that because of his extra time credits. I don’t know. But I’m not going to get involved with it.” Therefore, the court explained, “I would reconfigure my sentence to effectuate a five-year term. That’s what I intend to do today and follow the basic sentencing scheme that I had previously. That’s what I believe is appropriate because of the facts in this case and because of Mr. Morton’s dangerous behavior.” The court also explained, “[Five years plus time served for the misdemeanors is] what I sentenced him to, and that’s what I felt was the appropriate sentence. Now I still intend to sentence him to five years and to the time that he served previously. The question is how can I do that. And since there is no authority to sentence him to a greater term . . . then I’m just going to give him credit for time served for that time and let parole deal with that.”

As the trial court noted, it could not impose a greater sentence than it originally imposed after we reversed some of defendant’s convictions. It is also true, however, that “so long as the new term of imprisonment does not exceed the original aggregate term of imprisonment” a defendant is not, as a matter of law, penalized for taking a successful

appeal. (*People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1556–1557 (*Begnaud*); *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258–1259 (*Burbine*)). After reversal of the conviction underlying the base term, “ ‘it then becomes necessary for the trial court to select the next most serious conviction to compute a new principal term’ and in doing so the trial court can modify the sentence.” (*Begnaud*, at p. 1558.) At resentencing after such a reversal, the components of the term “ ‘are properly viewed as interdependent when calculating and imposing sentence, and an aggregate term of imprisonment under the determinate sentencing law constitutes a total prison term which is ‘a single term rather than a series of separate terms.’ [Citations.]” [Citations.]’ [Citations.]” (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 613 (*Castaneda*)). Thus, trial courts have discretion “to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court. [¶] . . . [¶] . . . [U]pon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant’s sentence on the counts that were affirmed, including the term imposed as the principal term.” (*Burbine, supra*, 106 Cal.App.4th at pp. 1258–1259.)

At resentencing, “ ‘[a] judge’s subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge’s experiences with prior cases and the record in the defendant’s case, cannot be ignored. A judge’s subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria. [Citations.] . . . “In making its sentencing choices in the first instance the trial court undoubtedly considered the overall prison term to be imposed and was influenced in its choices by the length of the enhancements.” [Citations.]’ ” (*Castaneda, supra*, 75 Cal.App.4th at p. 614; accord, *People v. Kelly* (1999) 72 Cal.App.4th 842, 847 [“While it must follow the pertinent statutory guidelines, the court may keep in mind the length of a sentence it thinks appropriate for a defendant and rule accordingly.”].)

The trial court has “broad discretion” under the sentencing scheme. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*)). Its discretion “must be exercised in a

manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’ [Citation.] . . . [A] trial court will abuse its discretion under the [current sentencing] scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]” (*Ibid.*)

We are also mindful that, on appeal, “‘[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.] Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)

Applying these standards, we cannot conclude the trial court abused its sentencing discretion. Defendant argues that the crimes of which he was convicted amounted to “no more than misdemeanor conduct,” analogous to destruction or removal of a public notice (§ 616), and suggests that they should have been punished no more severely. In *Morton I*, however, we considered and rejected, albeit reluctantly, defendant’s claim that he should have been charged with misdemeanor destroying or taking down a public notice or vandalism (§ 594, subd. (a)) rather than felony burglary and theft. (*Morton I*, slip op. at p. 11.) Further, the court did not treat defendant’s crimes as aggravated, but rather imposed the middle term. Finally, in imposing sentence for the four counts of burglary, the trial court could properly note that defendant’s behavior was irrational when considering the public interest. We recognize that the court referred to defendant’s behavior toward Kathleen and Sandra, who were not the actual victims of his crimes. However, his behavior toward them was part of the reason the police posted the flyers, and his crimes can reasonably be seen as involving continuing irrational, uncontrolled

behavior. It was not outside the bounds of reason for the court to consider this in exercising its sentencing discretion as part of its “ ‘individualized consideration of the offense, the offender, and the public interest.’ ” (*Sandoval, supra*, 41 Cal.4th at p. 847.)

Nor was the court required, as defendant suggests, to reduce his sentence due to his “profound social ineptness.” Having been convicted of burglary and theft, defendant was subject to punishment for his crimes. In these circumstances, the court could rationally conclude that the public interest would not be served by reducing the period in which defendant was subject to parole supervision. (See § 3000, subd. (a)(1) [“It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees . . . .”].)

### **III. DISPOSITION**

The judgment is modified to reduce the criminal conviction assessment (Gov. Code, § 70373) to \$240 and the court security fee (§ 1465.8) to \$240. The stay-away orders are stricken. In all other respects, the judgment is affirmed.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Streeter, J.

A140517