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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW AARON BROWN,

Defendant and Appellant.

A144660

(Humboldt County
Super. Ct. No. CR1403934)

Defendant Matthew Aaron Brown appeals following his conviction of second degree murder. He contends the trial court erred when it precluded him from testifying regarding his knowledge of the victim's prior violence against third parties, as relevant to his claim of self-defense. Although the trial court erred, the error was not prejudicial. We direct the court to correct an error in the abstract of judgment regarding custody credits.

PROCEDURAL BACKGROUND

In August 2014, an information was filed in Humboldt County Superior Court charging appellant with committing the murder (Pen. Code § 187, subd. (a))¹ of Neil Decker on July 18, 2014. The information also included firearm use allegations (§ 12022.53, subs. (c), (d)).

A jury found appellant not guilty of first degree murder but guilty of second degree murder. The jury also found true the firearm use allegations.

¹ All undesignated statutory references are to the Penal Code.

The trial court imposed a prison term of 15 years to life for the second degree murder, plus a consecutive term of 25 years to life under section 12022.53, subdivision (d). The court stayed a 20 year to life term on the section 12022.53, subdivision (c) enhancement.²

This appeal followed.

FACTUAL BACKGROUND

Background to Shooting

Scott Johnson and his girlfriend Johanna Hames lived in a house on Johnson's rural property near Alderpoint in Humboldt County. The victim, Neil Decker, was a close friend of Johnson and did odd jobs for him. Decker lived with his girlfriend Melisa Toner near Johnson and visited Johnson's home regularly.

Appellant was a family friend of Johnson who in 2013 came to work on a cleanup crew on Johnson's property. Appellant almost immediately began dating Kara Williams Kesler, who lived in a trailer in front of Johnson's home. Appellant moved in with Kesler and worked as a caretaker of Johnson's property. Appellant called Johnson "Pops" and then later "Dad."

Appellant, Decker, Kesler, Hames, and Toner were all methamphetamine users. Appellant and Decker disliked each other and had an ongoing feud. They came into particular conflict regarding the gate to Johnson's property. Appellant would get irritated when Decker left the gate open, and Decker would get irritated when appellant would lock the gate and interfere with Decker's comings and goings. Sometimes Decker would use bolt cutters to cut the lock.

Kesler testified Decker called appellant names, including "Bitch Boy." She heard Decker threaten appellant, including threats by Decker to sexually assault appellant. She

² The parties agree the abstract of judgment fails to accurately reflect the credits awarded by the trial court. Appellant should have received 233 days of custody credits, rather than the 223 days reflected on the abstract. We will direct the trial court to correct the abstract of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

testified appellant was scared of Decker and “truly terrified” of being sexually assaulted by Decker.

On one occasion, appellant and Decker had a physical altercation due to Decker’s anger about appellant locking the gate. According to Kesler, Decker wanted to fight but appellant said he did not want to fight. Decker tackled appellant, causing them to roll down a hill together. Appellant again said he did not want to fight and ran to Johnson’s house. The next day, Decker called appellant a “motherfucker” and acted as if he were going to pull out a gun, in order to scare appellant.

Subsequently, appellant and Decker were involved in an incident in which appellant sprayed another person with bear spray and Decker then sprayed appellant with pepper spray.

After the pepper spray incident, appellant began to carry a shotgun all the time. Kesler believed Decker wanted to beat up appellant; appellant did not want to fight. Neither Toner nor Hames had seen Decker with a gun.

Around the same time as the pepper spray incident, appellant began dating another woman and he moved out of the trailer he shared with Kesler. He moved in with Sarrie Stillwell³, who lived in a trailer on her family’s property in Alderpoint. Appellant told Sarrie people were trying to “kick him off the mountain.”

The Shooting

On July 18, 2014, Hames asked appellant to come and talk to Johnson about appellant’s failure to do his work and his possession of tools belonging to Johnson. Appellant had recently been fired from his caretaker job because he had failed to do his work and had removed tools from a locked tool shed. When appellant arrived at Johnson’s house at about 8:30 p.m., he was carrying a shotgun over his shoulder. Johnson and Hames were at the house, along with Decker, Toner, Kesler, and Kesler’s new boyfriend Kai.

³ We refer to Sarrie Stillwell by her first name to avoid confusion with Michael Stillwell.

Appellant went upstairs to see Johnson in his bedroom. Decker and Hames were in the office adjacent to the bedroom. Hames testified Decker heard appellant mention him; Decker went to the bedroom, had an exchange with appellant, and then returned to the office. Appellant and Johnson discussed the tools that appellant had taken. Appellant mentioned a welder Decker sold to Johnson; Decker overheard the remark and entered the bedroom a second time, saying “Why are you talking about this? This is none of your business.” Hames described Decker as annoyed but calm; Kesler, who also was present at that point, described Decker as angry. After some further exchange about the welder, Hames heard appellant swear at Decker. Hames testified that “it hadn’t been like an angry, cussing conversation, so to hear [appellant] cuss at [Decker], I know it took me by surprise, because it had been a conversation between three guys about some stupid welder.”

The next thing Hames heard from Johnson’s bedroom was a gunshot. Hames went to the bedroom and saw Decker grabbing his chest. Toner ran to the bedroom, saw Decker fall to the floor, and heard him say, “He shot me in my fucking heart.” Johnson angrily said to appellant, “You just killed my best friend!” Hames screamed at appellant, “You shot Neil!” Johnson struggled with appellant over the shotgun. Appellant seemed frightened and said to Johnson, “What are you doing, Dad?” After Johnson got the shotgun, appellant jumped from a balcony to the ground outside. Decker died from a single shotgun wound to the chest.⁴

According to Sarrie Stillwell, appellant was wearing a bulletproof vest when he left to go to Johnson’s house the day of the shooting. Appellant and Sarrie had used methamphetamine together earlier in the day. When appellant returned, he looked scared and told Sarrie he had shot Decker because Decker “came at him” and he “had to defend himself.”

Several days later, appellant was found hiding in a cabin. Following his arrest, he was interviewed by the police. Appellant claimed he was not present at the shooting, he

⁴ Johnson was not available to testify regarding the shooting because he was killed four days later.

knew nothing about it, and people were trying to set him up. Appellant claimed he was “a fall guy” because he was an “outsider.” He acknowledged a history of conflict with Decker, including a physical fight and spraying Decker with bear mace when Decker tried to “jump” him.

Prior Violent Acts By Decker

Appellant presented evidence at trial regarding prior violent acts by Decker.

Michael Stillwell testified regarding an occasion when he did a marijuana deal with Decker’s then girlfriend while Decker was in jail. When Decker got out of jail he told Stillwell he should not have done the deal with the girlfriend. Decker hit Stillwell with a bottle, splitting open the back of his head. Stillwell never told appellant about the incident.

Greg Benson, who said Decker was his best friend, testified Decker once accidentally shot him. He explained that Decker was putting a gun down when it fell over and fired; the bullet grazed Benson. Benson said Decker did not own guns or like them, and he did not know why Decker had the gun that misfired.

A defense investigator testified Kesler told him Decker was a bully who intimidated appellant with behavior such as “chest bumping, feigning reaching behind his back as though for a handgun in his waistband, things of that nature.”

There was also testimony that the Alderpoint area had a reputation for guns and violence; a police sergeant referred to the area as the “wild west” due to its lawlessness.

Appellant’s Testimony

Appellant testified he was raised in Southern California and came to Humboldt County to work for Johnson. He looked up to Johnson.

Johnson told appellant the police did not come out to the area and people took the law into their own hands. For example, Johnson told him about an incident when a neighbor stuck a gun in a person’s mouth over a property dispute. Johnson told appellant about an incident when Decker shot Benson. He heard from Stillwell’s daughter (presumably Sarrie) about “aggression” by Decker involving Stillwell.

Appellant said Johnson had a handgun hidden under his bed's headboard, as well as other guns elsewhere on the property. Appellant had seen Decker with a gun.

Appellant recalled an occasion in November 2013 when Decker left Johnson's house with three others, saying they were going to look for someone named Quentin. They had guns. Later appellant saw Decker and one of the others (named Bob) in a car with a blindfolded person who he was told was Quentin. Decker and Bob told appellant they had kidnapped Quentin to force him to show them the location of the body of someone named Garrett Rodriguez.

About two months before the shooting, appellant pepper or bear sprayed Bob because Bob was coming at him, and then Decker pepper sprayed appellant. About one month before the shooting, appellant and Decker had a physical fight after arguing about appellant closing the gate to the property. Decker backed appellant up against a machine, appellant struck Decker once, Decker tackled appellant, and appellant ran away. After the fight, Decker swore he would kill appellant. Appellant acquired a gun that he carried with him everywhere, "just waiting for that day that [Decker] was going to kill [him]."

When appellant arrived at Johnson's house the night of the shooting, he encountered Decker outside. Decker became irritated by appellant's extremely bright head lamp. Appellant was armed with a shotgun and a toy gun that looked real. He went upstairs to meet with Johnson in his bedroom. Decker, who appeared to be angry, entered and exited the bedroom twice. He entered a third time when appellant and Johnson began to discuss a welder that Decker had sold to Johnson. In his testimony, appellant asserted Decker had stolen the welder from Johnson and sold it to someone else. Decker told appellant to "keep [Decker's] name out of [appellant's] mouth." Then Decker said "it's over" and that he was "sick of" appellant. Decker started to come around the bed. He was holding his hand behind his back. Appellant thought Decker was going to kill him "right there," so appellant shot Decker. Appellant admitted he saw no guns in the room and never saw Decker holding a weapon. He claimed he "felt cornered" and was "pretty panicked, pretty scared."

Appellant admitted he lied to the police about the shooting after he was arrested. He said he lied because he was very scared.

DISCUSSION

Appellant contends the trial court erred when it precluded him from testifying he knew about Decker's violent acts against third parties, in support of his self-defense claim. We conclude the trial court erred but the error was not prejudicial.

I. *Summary of the Excluded Testimony*

At trial, appellant presented testimony from Greg Benson regarding an incident in which Decker accidentally shot him. Appellant testified Johnson "told me about [Decker] shooting Mr. Benson," but the trial court sustained the prosecutor's objection to a follow-up question, "What did [Johnson] tell you about the Greg Benson shooting?" The court accepted the prosecutor's argument the testimony was prohibited because it involved "multiple levels of hearsay." In particular, because Benson testified that no one else was present at the shooting, Johnson necessarily heard the story he related to appellant from someone else.

Next, appellant presented testimony from Michael Stillwell regarding an incident in which Decker assaulted him with a bottle. During appellant's testimony, he was asked whether Stillwell had ever told him "anything, any aggression about Mr. Decker?" Appellant answered, "His daughter told me in front of him." Appellant was then asked, "And what did she tell you?" The prosecutor objected that the testimony would involve "multiple levels of hearsay. Mr. Stillwell already testified that he never discussed the matter with" appellant. The trial court sustained the objection. Appellant's counsel continued, "So you were told by -- in front of, and without asking what someone said to you, a conversation that took place in front of Mr. Stillwell with his daughter?" Appellant answered in the affirmative.

Finally, appellant's counsel questioned appellant about his knowledge of Decker's involvement in the kidnapping of a person named Quentin. Appellant testified that in November 2013 he saw Quentin blindfolded in the front passenger seat of a car with Decker and someone named Bob. They told him they had gone to Quentin's house "and

kidnapped him to make him show where Garrett Rodriguez's body was." Appellant had previously seen Decker, Bob, and two others leave Johnson's property saying they were going to go look for Quentin. They had guns. Appellant also attempted to testify he had been told that Quentin had been shot, but the trial court sustained a hearsay objection and struck the testimony.

On appeal, appellant describes the excluded testimony as follows: "the defense was precluded from establishing that appellant knew about three specific acts of violence by Neil Decker -- the supposedly accidental shooting of Greg Benson, the injurious assault with a bottle on Mike Stillwell, and the apparent shooting of Quentin at the time of the kidnapping."

II. *Jury Instructions and Legal Background*

" 'The doctrine of self-defense embraces two types: perfect and imperfect.' " (*People v. Iraheta* (2014) 227 Cal.App.4th 611, 620.) "A killing committed in so-called perfect self-defense is neither murder nor manslaughter, but instead is justifiable homicide. [Citation.] 'For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury.' " (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305, fn. omitted.) "[T]he defendant's fear must be of imminent harm. [Citation.] 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice.' " (*Ibid.*) "If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*).

The trial court instructed the jury concerning justifiable homicide in self-defense in the language of CALCRIM No. 505, informing the jurors that, in order to acquit appellant based on the defense, they had to find he "reasonably believed that he was in imminent danger of being killed or suffering great bodily injury" and he "reasonably believed that the immediate use of deadly force was necessary to defend against that danger." The instruction also stated, "When deciding whether the defendant's beliefs

were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." The jurors were further instructed, "If you find that [Decker] threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." Moreover, "If you find that the defendant knew that [Decker] had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable."

The trial court instructed the jury concerning voluntary manslaughter based on imperfect self-defense in the language of CALCRIM No. 571, informing the jurors that in order to acquit appellant of murder and instead convict him of voluntary manslaughter based on the defense, they had to find he "actually believed that he was in imminent danger of being killed or suffering great bodily injury" and he "actually believed that the immediate use of deadly force was necessary to defend against the danger," but "[a]t least one of those beliefs was unreasonable." The jurors were further instructed, "If you find that [Decker] threatened or harmed the defendant or others in the past, you may consider that information in evaluating the defendant's beliefs." Moreover, "If you find that the defendant knew that [Decker] had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs."

Appellant argues on appeal that the excluded testimony was relevant to his claim of self-defense. The trial court excluded the testimony as hearsay. Evidence Code section 1200, subdivision (a) defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evidence Code section 1200, subdivision (b) states, "Except as provided by law, hearsay evidence is inadmissible." On the other hand, evidence not offered for its truth is not barred by the hearsay rule. (*People v. Boyette* (2002) 29 Cal.4th 381, 429 (*Boyette*); see also *People v. Marsh* (1962) 58 Cal.2d 732, 737-738

(*Marsh*.) This includes statements offered for the purpose of “show[ing] the effect of the statements on” a defendant, where relevant to the issues at trial. (*Boyette*, at p. 429.)

We review the trial court’s ruling on the admissibility of testimony for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

III. *Analysis*

The trial court erred. “ ‘A person claiming self-defense is . . . ‘entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear.’ ” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) “Antecedent threats as well as the victim’s reputation for violence, prior ‘assaults, and other circumstances [are] relevant to interpreting the attacker’s behavior.’ [Citations.] While such considerations alone do not establish a right of self-defense [citation], they illuminate and reflect on the reasonableness of [a] defendant’s perception of both the imminence of danger and the need to resist with the degree of force applied.” (*Humphrey, supra*, 13 Cal.4th at p. 1094.)

In the present case, appellant’s testimony regarding what he heard about Decker’s past violence towards other persons would have been inadmissible hearsay to prove the truth of the incidents described to appellant. However, the testimony was relevant to support his claim he actually believed he was in imminent danger at the time of the shooting. As appellant argues, “appellant’s testimony was offered to prove that he was aware of Neil Decker’s violent acts against third parties, that his knowledge about those incidents contributed to his fear of imminent harm at the time of the shooting, and that therefore he shot Decker in either reasonable or unreasonable self-defense.” The testimony at issue was admissible on that ground. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271 [“Because the reasonableness (or unreasonableness) of [a self-defense] claim is tested from the defendant’s perspective, . . . a trier of fact may consider a victim’s prior threats and violence to corroborate the defendant’s testimony that he feared for his or another’s life.”]; see also *Humphrey, supra*, 13 Cal.4th at p. 1094; *People v. Davis* (1965) 63 Cal.2d 648, 656 (*Davis*); *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1219–1220.) Indeed, the trial court’s instructions on both perfect and imperfect self-defense properly

recognized the relevance of appellant’s knowledge of past violence by Decker towards third parties.

Respondent acknowledges that “[w]hen a defendant claims either self-defense or imperfect self-defense in a murder prosecution, evidence of the victim’s violent character may be relevant to show that the victim was the aggressor.” Nevertheless, respondent argues the trial court did not err because “[i]t was only when appellant attempted to recount hearsay statements *made by others to him* that the trial court sustained objections for multiple hearsay.” Respondent cites *People v. Arias* (1996) 13 Cal.4th 92, 149, for the proposition that multiple hearsay “is admissible for its truth only if each hearsay layer separately meets the requirements of a hearsay exception.” Respondent’s argument is misplaced. Because the testimony about what appellant heard from others was admissible to show appellant’s state of mind and not the truth of the statements made by others, the statements were not hearsay and no hearsay exception was necessary to justify their admission. (See *Boyette, supra*, 29 Cal.4th at p. 429; *Marsh, supra*, 58 Cal.2d at p. 738.)⁵

Although the trial court erred, we conclude the error was harmless. The erroneous exclusion of evidence does not require reversal except where the error caused a “miscarriage of justice.” (Evid. Code, § 354.) “[A] ‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to

⁵ Respondent is mistaken in analyzing the admissibility of the testimony under Evidence Code section 1250. That hearsay exception applies to an out of court statement that is literally a statement “of the declarant’s then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health).” Such a statement is offered for its truth—to prove the declarant’s state of mind at the time of the statement, where the declarant’s mental state at the time is at issue in the action. (*People v. Ruiz* (1988) 44 Cal.3d 589, 608; see also *People v. Kovacich* (2011) 201 Cal.App.4th 863, 884–885.) In the present case, the statements by others to appellant were offered to show he had heard Decker had been violent towards others, as relevant to appellant’s state of mind at the time of the shooting. Appellant was not even the “declarant” within the meaning of Evidence Code section 1250, and his state of mind *when he heard the statements* was not at issue.

the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; accord *People v. Richardson* (2008) 43 Cal.4th 959, 1001.)⁶

In support of his claim of prejudice, appellant argues that, although he was permitted to present evidence of his perceptions of danger at the time of the shooting and his recollection of Decker’s past violence and threats towards him, he was unable to show he was aware of Decker’s past violence towards others on three occasions, two of which included alleged shootings. In fact, appellant was permitted to testify without objection that Michael Stillwell’s daughter told him about Decker’s “aggression.” Similarly, appellant testified without objection that Johnson “told [him] about [Decker] shooting Mr. Benson.” It was only when appellant was asked to relate what he was told by Stillwell’s daughter and Johnson that the People made objections that were sustained. Appellant argues, “[t]he jury could only have understood the trial court’s rulings sustaining the hearsay objections as rendering the testimony inadmissible.” However, the People only objected to the follow-up questions asking appellant to relate the particular statements made by Stillwell’s daughter and Johnson. Appellant provides no basis for this court to assume the jury imputed the trial court’s ruling to the prior unobjected-to testimony.

Thus, the jury actually heard that appellant knew about Decker’s violence towards Michael Stillwell and shooting of Benson. The trial court did not permit appellant to relate precisely what he was told about those incidents, but, as appellant directs our attention to no offer of proof below, we have no basis to conclude he would have described those incidents in terms more egregious than those used in the descriptions by Stillwell and Benson at trial. (See *People v. Brady* (2005) 129 Cal.App.4th 1314, 1332 [“ ‘An offer of proof should give the trial court an opportunity to change or clarify its ruling

⁶ We reject appellant’s contention the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 applies because the error violated appellant’s constitutional rights. The trial court’s erroneous “ ‘[a]pplication of the ordinary rules of evidence’ ” did not constitute an “error[] of constitutional dimension.” (*Boyette, supra*, 29 Cal.4th at pp. 427–428.)

and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued.’ ”.) As to the third incident involving the kidnapping of Quentin, the only excluded testimony was that appellant was “just told that [the blindfolded person] was shot.” Although it could be inferred from the context that Decker may have had some involvement, appellant apparently would not have testified he was told that Decker was the one who shot the blindfolded person.

Accordingly, for the purposes of our prejudice analysis, the only arguably significant effect of the trial court’s erroneous rulings was the exclusion of appellant’s testimony he was told Quentin had been shot by an unidentified person in unidentified circumstances. Although appellant’s knowledge Decker may have been somehow associated with a prior shooting was relevant support for appellant’s claim of fear at the time he shot Decker, it is not reasonably probable admission of that detail would have changed the outcome of the trial in light of the totality of the evidence.

At the outset, we note the evidence supporting appellant’s claim of *imminent* fear at the time of the shooting was weak. There was no testimony Decker was armed, and only appellant testified to any threatening statements or gestures by Decker immediately prior to the shooting. Appellant admitted he did not see any guns in the room and he never testified he thought Decker had a gun or other weapon, although it appears the defense intended the jury to infer he believed so.

By comparison, there was extensive evidence in the record that appellant had good reason to fear Decker. Appellant and his girlfriend testified in detail regarding Decker’s prior violence and threats. The reasonableness of appellant’s fear of Decker was corroborated by the testimony showing Decker had some propensity to violence, especially Stillwell’s testimony regarding Decker’s assault. And appellant was permitted to testify he was aware of Decker’s violence towards Stillwell and the shooting of Benson, although appellant was not permitted to relate what he was told about those

incidents. Appellant also testified in detail about Decker's involvement with an armed group that kidnapped Quentin.

In light of the evidence at trial, *if the jury had been inclined to believe appellant's version of events at the time of the shooting*, it is unlikely they would have rejected his claim of self-defense based on a lack of evidence appellant had reason to fear Decker. That is, when viewed in light of the totality of the evidence, the verdict suggests the jurors most likely rejected appellant's self-defense claim because they were skeptical of appellant's account of the shooting and his claim he feared imminent harm. It is not reasonably probable the additional information that appellant was told Quentin had been shot would have changed the jury's findings, because that testimony was relevant only to an issue that was already well supported in the record—appellant's general fear of Decker—rather than the weakly-supported and decisive issue of what happened at the time of the shooting. (See *Davis, supra*, 63 Cal.2d at p. 658 [“After a review of the entire record we are persuaded that the uncontradicted testimony going to the deceased's character as a violent, dangerous man, and defendant's knowledge and reasonable belief to that effect, is so conclusive that the erroneous exclusion of further similar evidence could not have affected the jury's determinations.”].) Accordingly, the trial court's errors in excluding aspects of appellant's testimony were not prejudicial.

DISPOSITION

This matter is remanded to the trial court with directions to correct the abstract of judgment to reflect an award of 233 days of custody credits. The trial court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A144660)