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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY GABRIEL PEREYRA,

Defendant and Appellant.

E053632

(Super.Ct.No. RIF147603)

O P I N I O N

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge.

Affirmed in part and reversed in part with directions.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez, Vincent P. LaPietra, and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Henry Gabriel Pereyra guilty as charged of battery with injury on a peace officer, forcibly or violently resisting a peace officer in the performance of his duties, and unlawfully using a controlled substance, methamphetamine. (Pen. Code, §§ 243, subd. (c)(2), 69; Health & Saf. Code, § 11550, subd. (a); counts 1, 2, & 3.) Defendant was sentenced to three years on count 1, a consecutive eight-month term on count 2, and 90 days in jail on count 3. The crimes occurred on December 18, 2008, when defendant confronted several police officers who were responding to a 911 call involving defendant's brother.

In this appeal, defendant claims his misdemeanor conviction in count 3 must be set aside. We agree and reverse defendant's conviction in count 3. No evidence supporting the charge was adduced at the preliminary hearing on the felony charges in counts 1 and 2, and the information was erroneously amended to add the misdemeanor charge before trial, over defense counsel's objection. (Pen. Code, § 1009.)¹

Defendant also claims the court abused its discretion in refusing to continue the trial for two weeks, after the jury was selected, to allow him to locate a defense witness. We find no abuse of discretion or due process violation in the denial of the continuance. Next, defendant claims that the cumulative effect of multiple trial errors deprived him of his fundamental right to a fair trial. We find no individual or cumulative trial error. We

¹ All further statutory references are to the Penal Code unless otherwise indicated.

also reject defendant's claim that his separate sentence on count 2 should have been stayed under section 654.

Lastly, defendant claims and the People agree that defendant is entitled to monetary credit against his fines for excess presentence custody credits. (§ 2900.5.) We agree and modify the judgment to deem defendant's \$380 in fines paid in full.

II. FACTUAL BACKGROUND

A. Prosecution Evidence

Around 10:00 p.m. on December 18, 2008, Riverside Police Officer Daniel Floyd received a dispatch that Alvaro Pereyra, defendant's brother and a parolee at large, had assaulted his daughter in Riverside. Officer Floyd believed that defendant may have been living at the home and knew that defendant had a history of violent contacts with the police. A police helicopter was called to watch the perimeter of the home because there was an outstanding warrant for Alvaro's arrest, and Officer Floyd believed that Alvaro might attempt to escape.

As the police helicopter circled overhead, Officer Floyd approached the home, along with his partner Officer Evan Wright and a third officer, Camillo Bonome, Jr. Before approaching the home, the officers met nearby and developed a plan of action due to the potential for violence against themselves and other police officers. They discussed a "team take down" if it became necessary. When the officers approached the home, the front door was open but a metal security door was closed. Officer Bonome knocked on the door, and defendant eventually answered.

As defendant approached the door, Officer Bonome said hello and told defendant they needed to speak to Alvaro Pereyra. From behind the metal security door, defendant said, “Fuck you. What the fuck do you want?” and “My name is Henry Pereyra, motherfuckers, fuck you.”

Defendant then swung the metal security door open with enough force to cause it to hit the house and bounce back and stepped out onto the porch area “in a fighting stance.” Defendant was highly agitated, breathing heavily, and his fists were “balled up” in front of him.

Thinking he and the other officers were about to be attacked, Officer Floyd grabbed defendant’s right arm and put him in a wristlock, but defendant broke free of the officer’s grip. Officer Bonome got behind defendant and tried to place defendant in a carotid restraint. Defendant pushed Officer Bonome against the wall, and Officer Wright began punching defendant in the face. Defendant continued to resist the officers and fell to the ground with Officers Wright and Bonome. On the ground, defendant tried to head-butt Officer Bonome and bit the officer’s finger. Officer Floyd then struck defendant twice on his left leg with his baton and punched him in the stomach. Around this time, Officer Olivas arrived and assisted the other officers in restraining defendant.

Defendant was handcuffed, placed in a police car, and transported to the hospital for evaluation. The officers denied hitting defendant with a scooter that was on the porch or using a taser or pepper spray to restrain him.

Officer Bonome was treated at the hospital for a bite injury to his finger. At the hospital, defendant told Officer Bonome he had hepatitis C and hoped he had given it to the officer.

Defendant had a blood-alcohol content of 0.13 percent. He also had methamphetamine and its metabolite, amphetamine, in his system at concentrations indicating he had recently used methamphetamine. Toxicologist Ola Bawardi testified that methamphetamine is known to cause aggressive and violent behavior.

In June 2008, Officers Floyd and Wright attempted to serve defendant with a warrant at his home. When they arrived at the home, a process server who had just attempted to serve defendant with a domestic violence restraining order was “running down the driveway” and told the officers that defendant was in the home and was armed with a sword or a spear. Using tear gas, a SWAT (Special Weapons and Tactics) team forced entry into the home and took defendant into custody.

In January 2008, Officer Jeffrey Adcox assisted another officer who had detained defendant in a traffic stop. Defendant was very irate and “almost out of control” and was put in handcuffs. After the detaining officer decided to release defendant and defendant’s handcuffs were removed, defendant swung his elbow at the officer who had detained him. He also hit Officer Adcox twice in the chest and once in the neck area with his elbow.

B. *Defense Evidence*

The defense claimed the officers used excessive force and defendant struck the officers in self-defense during the December 18, 2008 incident. Defendant's niece and two nephews, Raquel, Angel, and Abel Pereyra, each testified that they saw the officers pull defendant out of the doorway and beat him.

Defendant testified that the officers ripped open the door, pulled him out of the house, and began beating and choking him after he came to the door and identified himself. Defendant denied biting one of the officers. Defendant admitted he "could have" been high on methamphetamine on December 18, but he was not drunk.

Defendant also claimed that Officer Adcox beat him while he was in handcuffs during the traffic stop incident in January 2008. In the June 2008 SWAT team incident, he did not want to answer his door when the warrant was being served because he was fearful of the police.

III. DISCUSSION

A. *Defendant's Misdemeanor Conviction in Count 3 Must be Reversed*

On the first day of trial in December 2009, the prosecutor moved to amend the information to add count 3, the misdemeanor charge of unlawfully using methamphetamine. (Health & Saf. Code, § 11550, subd. (a).) Citing *People v. Thiecke* (1985) 167 Cal.App.3d 1015, defense counsel objected to the amendment on the ground that no evidence supporting the charge was adduced at the preliminary hearing on the felony charges, counts 1 and 2. The prosecutor conceded that no evidence supporting

count 3 was adduced at the preliminary hearing, but argued that none was necessary because count 3 was a misdemeanor. Over defense counsel’s objection, the court granted the motion and ordered the amended information filed.

Defendant claims his conviction in count 3 must be set aside because no evidence supporting the charge was adduced at the preliminary hearing. We agree.²

Felonies must be prosecuted by indictment or information, based on a showing of probable cause at a preliminary hearing and an order holding the defendant to answer the charge. (Cal. Const., art. I, § 14; Pen. Code, §§ 737-739, 872; *People v. Martinez* (2000) 22 Cal.4th 750, 758 [explaining process of charging felonies by information].)

Misdemeanors, by contrast, may be prosecuted by written complaint without an order holding the defendant to answer based on a showing of probable cause at a preliminary hearing. (Pen. Code, § 740; *Medellin v. Superior Court* (1985) 166 Cal.App.3d 290, 292.)

But when, as here, a misdemeanor charge is prosecuted by information as part of a “felony case” (§ 691, subd. (f) [defining felony case as including criminal action in which misdemeanor is charged in conjunction with felony]), the misdemeanor charge must be supported by a showing at a preliminary hearing of probable cause to believe the defendant is guilty of the charge and an order holding the defendant to answer the charge based on the probable cause showing. (*Griffith v. Superior Court* (2011) 196 Cal.App.4th 943, 953-954; §§ 737-740, 872.) As the *Griffith* court put it, “no crime, *be it*

² At oral argument, the Attorney General conceded the issue.

a felony or a misdemeanor, can be included in an information unless it has been supported by a showing of probable cause at the preliminary hearing. (§§ 737-740, 871-872.)” (*Griffith v. Superior Court, supra*, at p. 954, italics added.)³

In addition, section 1009 expressly prohibits amending an information “to charge *an offense* not shown by the evidence taken at the preliminary examination.” (Italics added.) Felonies and misdemeanors are “public offenses.” (§§ 15, 16.) Thus, by necessary implication, section 1009 prohibits amending an information to add a felony or a misdemeanor charge unless the charge is supported by a showing of probable cause at a preliminary hearing. (§§ 738-739, 872, 1009.)

Relying on *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529, the People argue that defendant is entitled to a reversal of his misdemeanor conviction in count 3 only if he can show “he was deprived of a fair trial or otherwise suffered prejudice” as a result of there having been no evidence adduced to support the misdemeanor charge at the preliminary hearing on the other felony charges. The People further argue that defendant has not shown he was prejudiced by the amendment of the information to add count 3 immediately before trial. We disagree that defendant was required to show he was prejudiced by the amendment in order to be entitled to a reversal of the conviction.

³ This has been the law for over 100 years. (*In re Sing* (1910) 13 Cal.App. 736, 740; *Gardner v. Superior Court* (1912) 19 Cal.App. 549, 551-552.) Nor can the rule be circumvented by section 954, which permits joinder of charges “connected together in their commission” (*People v. Medellin, supra*, 166 Cal.App.3d at pp. 293-294.) In order to be prosecuted in the same information, felony and misdemeanor charges “connected together in their commission” must be supported by a showing of probable cause at a preliminary hearing. (*Id.* at pp. 293-295.)

The issue in *Pompa-Ortiz* was whether the defendant’s rape conviction was reversible per se—that is, without a showing of prejudice—given that the defendant was deprived of his right to a *public* preliminary hearing on the charge. (*People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 522, 526.) The court concluded that the conviction was not reversible per se, but was reversible only if the defendant could show the denial of his right to a public preliminary hearing prejudiced him at his subsequent trial. (*Id.* at pp. 529-530.) *Pompa-Ortiz* has no application here, because it did not involve a violation of section 1009, or the amendment of an information to add a felony or misdemeanor charge not supported by evidence taken at the preliminary hearing. Indeed, “[i]t is as a matter of law irrelevant whether a defendant is prejudiced by being prosecuted for an offense not shown by the evidence at the preliminary hearing.” (*People v. Burnett* (1999) 71 Cal.App.4th 151, 177, citing *People v. Winters* (1990) 221 Cal.App.3d 997, 1006-1007 & *People v. Bomar* (1925) 73 Cal.App. 372, 378.)

As aptly stated by the court in *People v. Graff* (2009) 170 Cal.App.4th 345, 364: “““Before any accused person can be called upon to defend himself on any charge prosecuted by information, he is entitled to preliminary examination upon said charge, and the judgment of the magistrate before whom such examination is held as to whether the crime for which it is sought to prosecute him has been committed, and whether there is sufficient cause to believe him guilty thereof. These proceedings are essential to confer jurisdiction upon the court before whom he is placed on trial.””” Within this context, “jurisdiction” “refer[s] to the situation where a court that has jurisdiction over

the subject matter and parties ‘has no “jurisdiction” (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.]” (*People v. Burnett, supra*, 71 Cal.App.4th at p. 179.) And while the court has jurisdiction in the fundamental sense, the action by the court is viewed as being in excess of its jurisdiction. (*Ibid.*) As applied here, the trial court could not “act without the occurrence of certain procedural prerequisites”; that is, it could not entertain a criminal charge not shown by the evidence at the preliminary hearing.

An act in excess of the court’s jurisdiction is not void but is only voidable. As such, the doctrine of waiver may apply. (*People v. Burnett, supra*, 71 Cal.App.4th at p. 179.) Here, however, the defendant did not waive or forfeit his claim that the information was unlawfully amended to add count 3. As indicated, defense counsel opposed the prosecutor’s motion to amend the information to add count 3 on the ground that no evidence was adduced to support the misdemeanor charge at the preliminary hearing. This preserved the claim for appeal. (Evid. Code, § 353.) Because the court acted in excess of its jurisdiction in allowing the information to be amended to add count 3, the judgment of conviction on count 3 must be reversed.

B. The Court Properly Refused to Continue the Trial for Two Weeks, Following Jury Selection, to Allow the Defense to Locate a Witness

In June 2009, six months before trial in December 2009, a *Pitchess*⁴ motion was granted, allowing the defense to discover the names, addresses, and telephone numbers of any persons who had, within five years prior to December 18, 2008, filed complaints of excessive force against Officers Floyd, Wright, and Bonome. The discovery led to the identification of Ms. Solario as a defense witness. Ms. Solario was a defendant in a case involving a claim of excessive force on the part of Officer Floyd, Wright, or Bonome.

In the present case, Ms. Solario appeared in court in response to a subpoena and was placed on call. Then, after the jury selection but before any evidence was presented, the defense was unable to locate her. At that point, defense counsel told the court he believed Ms. Solario was a material defense witness and asked the court to continue the trial for two weeks so the defense could locate her. Counsel also told the court that defendant was objecting to any further continuances.

The court refused to grant the continuance, finding that Ms. Solario was not necessarily a material witness for the defense, and there was no showing of good cause for the continuance in part because defendant was objecting to any further continuances. Defendant now claims the court abused its discretion and violated his Fifth, Sixth, and Fourteenth Amendment rights to present relevant exculpatory evidence in refusing to

⁴ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

continue the matter as his counsel requested. We find no abuse of discretion or constitutional violation.

A continuance of a trial may be granted only upon a showing of good cause (§ 1050, subd. (e)) and the party requesting the continuance bears the burden of demonstrating good cause (Cal. Rules of Court, rule 4.113). When as here, a continuance is sought to secure the attendance of a witness, the defendant must show: (1) he exercised due diligence to secure the witness's attendance; (2) the witness's expected testimony was material, not cumulative; (3) the testimony could be obtained within a reasonable time; and (4) the facts to which the witness would testify could not otherwise be proven. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

In determining whether to grant or deny a continuance, the court “““must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.””” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105.) The determination whether to grant or deny a continuance rests within the sound discretion of the court and is reviewed for an abuse of discretion. (*People v. Cruz* (2008) 44 Cal.4th 636, 687.) “[A]n order of denial is seldom successfully attacked.” (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

On rare occasions, the denial of a request for continuance “may be so arbitrary as to deny due process.” (*People v. Beames* (2007) 40 Cal.4th 907, 921.) In determining

whether the denial of a continuance is so arbitrary as to deny due process, we look to the particular circumstances of the case and the reasons presented for the request. (*People v. Frye* (1998) 18 Cal.4th 894, 1013.)

Here there was no abuse of discretion or due process violation in the court's denial of the requested two-week continuance to locate Ms. Solario. First, there was no showing that Ms. Solario would likely be available to testify in two weeks' time, or any reasonable time. There was no showing of her willingness to testify or that her appearance was likely to be procured, despite her earlier appearance in response to the subpoena. Given this circumstance, the court reasonably denied the continuance based on its inconvenience to the jurors and the court. (*People v. Fudge, supra*, 7 Cal.4th at p. 1105.)

Moreover, Ms. Solario's expected testimony—that one of the three officers who restrained defendant used excessive force against her on another occasion—did not amount to material, exculpatory evidence. Ms. Solario did not witness the incident in which the officers allegedly used excessive force in restraining defendant. Thus, her testimony could have been easily impeached, and the court reasonably determined that the defense was unlikely to benefit from her testimony. (*People v. Fudge, supra*, 7 Cal.4th at p. 1105.) As the court put it, “. . . I disagree necessarily that she may be material or could be important to your defense”

Thus here, the denial of the continuance was not an abuse of discretion. (*People v. Livingston* (1970) 4 Cal.App.3d 251, 255 [no abuse of discretion in refusing to continue

trial when no showing that witness's testimony was material to the defense or that witness could be located within a reasonable time].) For the same reasons, the denial did not deprive defendant of his due process right to present material, exculpatory evidence in his defense.

C. *There Was No Individual or Cumulative Trial Error*

Defendant next claims that several cumulative errors undermined the fundamental fairness of his trial in violation of his Fifth, Sixth, and Fourteenth Amendment rights, mandating reversal of all of his convictions. In addition to the denial of his request for a two-week trial continuance to procure the testimony of Ms. Solario, defendant claims the prosecution committed a *Brady*⁵ violation in failing to turn over Officer Bonome's belt recorder to the defense until the middle of trial. Defendant also claims the court erroneously denied his request to recall Officer Bonome to impeach him with statements he made, as recorded on the belt recorder, and erroneously denied his request to instruct the jury pursuant to CALCRIM No. 306 that it could consider the late disclosure of the belt recorder in weighing the officer's testimony. We address these claims in turn and find no individual or cumulative error.

1. Background

Officer Bonome testified on December 9, 2009. He said he was wearing a belt recorder, or audio recorder on his belt, when he and the other officers restrained defendant, but he did not activate or turn on the belt recorder until he was at the hospital.

⁵ *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

The defense presented its case the next day, December 10. On the morning of December 11, the prosecutor told the court and counsel that she had just received a copy of Officer Bonome's belt recording from the Riverside Police Department. The prosecutor had requested a copy of the recording in January 2009, a month after the incident, but the police department advised her there was no recording. The prosecutor explained that, after Officer Bonome testified that he turned on the recorder at the hospital, she again asked the police department for a copy of the recording, obtained it, and promptly gave it to defense counsel.

The audio recording showed that the belt recorder was not initially activated at the hospital as Officer Bonome testified, but was turned on as defendant was being placed in the patrol car and before Officer Bonome and defendant were at the hospital. Defense counsel moved for a mistrial based on the late discovery of the recording, and the court denied the motion. The court noted that although it was "disturbed" by the time it took the police department to turn over the recording to the district attorney's office, the prosecutor promptly turned the recording over to the defense as soon as it was available. The court also denied counsel's request to instruct the jury on the late discovery of the recording.

Alternatively, defense counsel sought to recall Officer Bonome to impeach him with statements he made after the incident, as recorded on the belt recorder. After a transcript of the recording was made, the court denied counsel's request. The court ruled that the recording contained nothing inconsistent with Officer Bonome's or the other

officers' testimony, and the recording was not exculpatory to the defense but was "collateral impeachment at best."

2. There Was No *Brady* Violation

As indicated, defendant claims the prosecution committed a *Brady* violation in failing to discover and turn over Officer Bonome's belt recorder to the defense until the middle of trial. We find no *Brady* violation, because the belt recording was not material to the question of defendant's guilt or punishment.

Brady claims involve mixed questions of law and fact and as such are subject to independent review on appeal. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*)). The trial court's findings of fact, though not binding on appeal, "are entitled to great weight when supported by substantial evidence." (*Ibid.*)

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady, supra*, 373 U.S. at p. 87.) The duty to disclose material evidence encompasses impeachment and exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676), exists even in the absence of a request by the defense (*United States v. Agurs* (1976) 427 U.S. 97, 107), and extends to evidence known only to police investigators and not to the prosecutor (*Kyles v. Whitley* (1995) 514 U.S. 419, 438). Thus, under *Brady*, a prosecutor "has a duty to learn of any favorable evidence known to the others acting on

the government's behalf in the case, including the police.” (*Kyles v. Whitley, supra*, at p. 437; see also *In re Brown* (1998) 17 Cal.4th 873, 879.)

Evidence is favorable to the defendant or material to his or her guilt or punishment “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” (*Kyles v. Whitley, supra*, 514 U.S. at pp. 433-434.) Thus, “strictly speaking, there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

“Prejudice, in this context, focuses on ‘the materiality of the evidence to the issue of guilt or innocence.’ [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction ‘more likely’ [citation], or that using the suppressed evidence to discredit a witness’s testimony ‘might have changed the outcome of the trial’ (*ibid.*). A defendant instead ‘must show a “reasonable probability of a different result.”’ [Citation.]” (*Salazar, supra*, 35 Cal.4th at p. 1043.)

Here, the prosecutor did not violate *Brady* in failing to discover the belt recording at an earlier date, because the recording did not constitute material impeachment

evidence. (*Salazar, supra*, 35 Cal.4th at pp. 1049-1052.) In other words, it is not reasonably probable that defendant would have realized a more favorable result had the recording been discovered earlier and had defense counsel been able to use it to impeach any of the officers' testimony. (*Ibid.*)

To be sure, defendant is heard crying on the recording and saying he had just been beaten up by the officers, and the officers are heard laughing as they placed defendant in the patrol car. Defendant, his niece, and two nephews each testified that the officers pulled defendant out of the doorway and began beating him.

But Officer Bonome is heard saying on the recording that defendant swore at the officers when defendant answered the door, and that defendant "*came out and challenged us.*" (Italics added.) The recording thus corroborated the officers' testimony that defendant physically challenged them when he answered the door.⁶

In sum, defendant has not established the third element of his *Brady* claim—that the belt recording contained *material* evidence in the sense that a different result was probable had the defense been allowed to use the recording as impeachment evidence. (*Salazar, supra*, 35 Cal.4th at p. 1052.)

⁶ The recording also bolstered Officer Bonome's overall credibility because it corroborated the officer's testimony that defendant bit the officer's finger. On the recording, the officer is heard saying that defendant "just fucking bit my hand and shit." The recording also corroborated Officer Bonome's testimony that defendant told him he wished he would contract hepatitis C. Defendant is heard saying, "I wish these officers get my blood on them so they could die. It is incurable, my disease."

3. The Refusal to Allow the Impeachment Evidence

Independent of his *Brady* claim, defendant claims the court abused its discretion in refusing to allow his counsel to recall Officer Bonome to impeach the officer with the contents of the belt recording. There was no abuse of discretion. Under Evidence Code section 352, a court has broad discretion “to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) As the court concluded, the contents of the belt recording were collateral to whether the officers used excessive force and whether defendant challenged the officers to a fight, because the recorder was not activated until after the officers restrained defendant and were placing him in the patrol car. Additionally, whether the officers used excessive force and whether defendant stepped onto the porch and challenged the officers to a fight was explored at length through the testimony of Officers Floyd, Wright, and Bonome; defendant; his niece; and two nephews.

4. The Refusal to Give the Late Discovery Instruction

As his fourth and final claim of cumulative trial error, defendant claims the court erroneously refused to give a modified version of CALCRIM No. 306 concerning the late disclosure of the belt recording. Here, too, we find no error.

As modified by the defense, CALCRIM No. 306 would have told the jury: “Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair

trial. [¶] *An attorney for the People failed to disclose:* the existence of a belt recording made by Officer Bonome that began after [defendant] was handcuffed and prior to transport to the hospital within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any of that late disclosure.” (Italics added.)

Defendant claims the instruction was erroneously refused because, though the prosecutor promptly turned over the belt recording to the defense as soon as she was able to obtain it from the police department, the police department unreasonably delayed in turning over the recording to the prosecutor. Defendant is mistaken. By its terms, CALCRIM No. 306 addresses a *party’s* failure to comply with the disclosure requirements of section 1054.1 et seq. (Bench Notes to CALCRIM No. 306 (2009-2010) p. 87 [“[t]his instruction addresses a failure to comply with Penal Code requirements.”].) It is not directed to the failure of an investigating agency, such as the Riverside Police Department, to promptly turn over discoverable evidence to a party.

Indeed, section 1054.5, subdivision (b) gives the court discretion to advise the jury of a *party’s* untimely disclosure of evidence in violation of section 1054.1 et seq. (See Bench Notes to CALCRIM No. 306, *supra*, p. 87.) Nothing in the discovery statutes gives the court discretion to advise the jury that an investigating agency, such as the police department, failed to timely turn over evidence to a party.

Further, section 1054.1 requires the prosecutor to disclose “[a]ll relevant evidence seized or obtained as a part of the investigation of the offenses charged” (§ 1054.1, subd.

(c)) provided the evidence is “in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies” (§ 1054.1). There was no showing that the prosecutor knew the police department had the recording. When the prosecutor requested the recording in January 2009, she was told it did not exist. She requested the recording again after Officer Bonome testified he activated his belt recorder at the hospital. The prosecutor complied with section 1054.7 in turning the recording over to the defense as soon she became aware of its existence.

In refusing to give the instruction, the court said, “I don’t find that the People acted inappropriately,” The court was correct and did not err in refusing to give CALCRIM No. 306.

5. No Cumulative Trial Error

Because we have rejected defendant’s claims of individual trial error, we perforce reject his claim of cumulative trial error. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

D. *The Separate Eight-month Term on Count 2 Was Properly Not Stayed* (§ 654)

Defendant claims his consecutive eight-month term on count 2 should have been stayed as a matter of law under section 654, because he indisputably had the same intent and objective in obstructing the officers in the performance of their duties (§ 69; count 2) as he had in biting Officer Bonome’s finger, that is, as he had in committing battery with injury on Officer Bonome (§ 243, subd. (c)(2); count 1). We conclude that separate punishment was properly imposed on count 2.

Section 654 precludes multiple punishment for two or more offenses that are part of an indivisible course of conduct. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Offenses are part of an indivisible course of conduct if the defendant harbored a single intent and objective in committing the offenses. (*Ibid.*) Whether the defendant entertained multiple criminal objectives is a factual question for the court, and the court's findings will be upheld on appeal if they are supported by substantial evidence. (*Ibid.*; see also *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

In imposing a three-month term on count 1 and a separate eight-month term on count 2, the court implicitly determined that defendant harbored separate intents and objectives in committing counts 1 and 2. Substantial evidence supports this determination.

After Officer Bonome knocked on defendant's front door, and as defendant was approaching the door, Officer Bonome told defendant that he and the other officers needed to speak to defendant's brother, Alvaro Pereyra. Defendant then swore at the officers, swung open the metal security door, stepped out onto the porch area, and, with his fists balled up in front of him, physically challenged the officers. The court could have reasonably concluded that, in confronting and challenging the officers, defendant intended to obstruct and delay the officers in locating Alvaro. Officer Floyd also testified that he was concerned that Alvaro, a parolee, would flee the residence, and for that reason a helicopter was called to the scene.

Additionally, the court could have reasonably determined that defendant harbored a separate intent and objective in biting Officer Bonome’s finger—that of inflicting injury on the officer (count 1). It was unnecessary to bite Officer Bonome’s finger in order to obstruct or delay the officers in locating Alvaro (count 2). The evidence also showed that defendant had a history of fighting with police officers and disliked police officers.

E. Monetary Credit for Excess Presentence Custody Credits

The court imposed a total of \$380 in fines against defendant, including a \$90 court security fine, a \$200 parole revocation fine, and a \$90 criminal conviction assessment fee. Defendant was entitled to 875 actual custody credits and 874 days of presentence custody credit. (§ 4019.) After application of the 875 days of actual custody credits, the court applied 460 days of the 874 credits toward defendant’s three-year eight-month prison term.

Defendant claims, and the People agree, that the other 414 days of presentence custody credits should have been applied against defendant’s fines at the rate of \$30 per day, or \$12,420, rendering his \$380 in fines paid in full. We agree.

At the time defendant was sentenced in May 2011, section 2900.5, subdivision (a) provided, in pertinent part: “In all felony and misdemeanor convictions . . . when the defendant has been in custody, . . . all days of custody of the defendant, including days . . . credited to the period of confinement pursuant to Section 4019 . . . , shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis . . . at the rate of not less than thirty dollars (\$30) per day 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 on a proportional basis, including, but not limited to, base fines and restitution fines.” (See *People v. McGarry* (2002) 96 Cal.App.4th 644, 647.)

In accordance with section 2900.5, we modify the judgment to deem defendant’s \$380 in fines paid in full.

IV. DISPOSITION

Defendant’s misdemeanor conviction for unlawfully using a controlled substance, methamphetamine (Health & Saf. Code, § 11550, subd. (a)) is reversed. The judgment is also modified to deem defendant’s \$380 in fines paid in full. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.