

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO MAGANA LEMUS,

Defendant and Appellant.

E062798

(Super.Ct.No. FSB1003341)

OPINION

APPEAL from the Superior Court of San Bernardino County. Harold T. Wilson, Jr., Judge. Affirmed with directions.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

In August 2010, defendant and appellant Ricardo Magana Lemus got into a fight with Carlos Aguilera over a card game. Aguilera, Aguilera's girlfriend (the victim), and

their six-month-old infant hid from defendant in a bedroom. Defendant armed himself with a gun and fired into the bedroom. The victim was shot in the head and died almost instantly. Defendant fled to Mexico and was not apprehended for several years.

Defendant was found guilty of second degree murder and personal and intentional use of a handgun causing great bodily injury or death. Defendant makes the following claims on appeal: (1) the trial court erred by failing to instruct the jury on involuntary manslaughter; (2) the admission of gruesome autopsy photographs over his objection were prejudicial; (3) he is entitled to presentence custody credit for time spent in custody in Mexico awaiting extradition; and (4) the minute order from sentencing must be amended to reflect the trial court's oral pronouncement of sentence regarding his ability to pay appointed counsel fees and investigation fees.

We agree with defendant that he is entitled to additional custody credits, and that the minute order from sentencing must be corrected to reflect the trial court's oral pronouncement of sentence. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was found guilty of second degree murder within the meaning of Penal Code section 187.¹ The jury found true the allegation that he personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). Defendant was sentenced to 15 years to life on the second degree murder, plus 25 years

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

to life on the gun enhancement, for a total state prison sentence of 40 years to life. Defendant was awarded 354 actual days of custody credit and no conduct credits pursuant to section 2933.1.

B. FACTUAL HISTORY

On August 8, 2010, Sonija Gamino, her husband (defendant), her daughter Katia, and their three other children lived in a one-bedroom apartment located on West King Street in San Bernardino. Defendant's cousin Manuel also lived with them. On that day, Sonija's brother (Aguilera) his girlfriend (the victim), and their baby were visiting. They all were getting along during the day.

Later in the evening, defendant and Aguilera started playing cards and drinking beer. Katia was sleeping on the floor in the living room near where they were playing cards. Sonija and two of the other children were sleeping on a bed by the kitchen. Sonija and Katia fell asleep but were awakened by defendant and Aguilera arguing over money. Defendant and Aguilera started fist fighting. Sonija and the victim separated them. The victim took Aguilera and the baby into the bedroom and locked the door.

Defendant was still upset. It was the most angry Sonija had seen him in the 13 years they had been together. Defendant tried to open the door to the bedroom but it was locked. Defendant got more angry and went outside.

Defendant got a gun and returned inside the apartment.² Sonija heard the sound of defendant cocking the gun as he entered the apartment. Katia was scared so she went outside. Sonija told all of the other children to leave the house. As Katia left, she saw defendant headed toward the kitchen, which was next to the bedroom. Sonija saw defendant walking toward the bedroom door; he was yelling and screaming.

Katia and Sonija went to the neighbor's house. They told the neighbor to call the police. Sonija heard a gunshot once she was outside the house. She did not see defendant fire the gun. She heard Aguilera scream. Katia heard a gunshot and then saw defendant leave the house. He got in his car and drove off. He said nothing to Katia and Sonija. Aguilera came outside with the baby right after defendant left and told them that the victim was hurt. Aguilera was crying.

Katia went back to the apartment and saw the victim lying on the floor; she was not moving and was not talking. Aguilera came back inside. He put the victim on the bed. He spoke to the victim but she was not responding. Katia did not see defendant after that night until she visited him in jail a few months before the trial.

Aguilera recalled that he, the victim and their baby arrived at defendant's apartment around 3:30 p.m. on August 7, 2010. At some point in the evening he and defendant played a card game; they were playing for money. They got into a fist fight because Aguilera wanted to keep playing cards and defendant wanted to quit. Aguilera owed defendant \$30 or \$40 but did not want to pay him; he wanted to win the money

² Katia told a police officer prior to trial that defendant retrieved the gun from a shelf in the living room.

back. They started cursing at each other and then they started fist fighting. Aguilera went in the bedroom with the victim and the baby. He yelled to defendant to calm down; that he would pay him his money. The victim locked the door to the bedroom.

Aguilera heard kicking at the door; he assumed it was defendant. The victim was standing by the door. She had her back to the door and was holding the baby. Aguilera heard a shot and the victim fell to the ground. Aguilera grabbed the baby. The victim had blood coming from her head; she was not moving or talking.

Aguilera exited the bedroom; defendant and Manuel were in the living room. Aguilera could not recall if defendant was holding a gun. Aguilera asked defendant why he had shot the victim. Defendant said nothing, grabbed his keys and ran out.

Aguilera was five feet four inches tall; the victim was a little bit shorter. Aguilera drank eight or nine beers but he did not know how many beers defendant drank. Aguilera thought defendant was drunk. In the 15 years Aguilera knew defendant, he had never seen him so angry. Aguilera had seen defendant with a gun one month prior to the shooting.

Miguel Contreras lived next door to defendant and his family in 2010. His apartment shared a wall with defendant's apartment; he heard some running and punching on the walls in the early morning hours of August 8, 2010. Soon thereafter, two of the neighbor girls came to his door; they looked scared. Shortly thereafter Sonija and her two younger children also came to his apartment. Sonija told Contreras to call the police because defendant and Aguilera were fighting. She also stated that defendant had a gun. Contreras's girlfriend called the police.

Contreras heard a shot. Immediately thereafter Contreras observed defendant run to his truck and drive off. Defendant said nothing; he just ran to his vehicle. Contreras believed he heard more than one gunshot.

San Bernardino Police Detective Michele Mahan helped secure the murder scene. Defendant's wallet, which contained money and credits cards, was found in the residence. His birth certificate was also found. Also found on the floor near the bedroom was a magazine for a gun, a live cartridge casing and an expended casing. There was blood on the bed in the bedroom. There was a reddish smear on the door frame of the bedroom. A photograph of the door was shown to the jury. What appeared to be a bullet hole was in the door. Detective Mahan testified the door appeared to be a typical-sized door, which she stated was between seven to eight feet tall. She measured from the top of the door to the bullet hole and it was 29 inches beneath the top of the door.³

San Bernardino City Police Sergeant Robert Sullivan investigated the victim's murder. Defendant's car was found in Orange, California the day after the victim's murder. No evidence was found in the car. The gun used to shoot the victim was never found. Sergeant Sullivan opined the live round that was found on the floor in the apartment was deposited on the floor when defendant cocked the gun, but there was already a live round in the chamber. The live round would drop out and the new round

³ Defendant has asked this court to take judicial notice that a "standard" door is six feet eight inches tall, relying upon websites for home improvement stores. We decline to take judicial notice. The jury was presented with a photograph of the door and the testimony of Detective Mahan with no further evidence or objection by defendant in the trial court.

would be loaded. The magazine found on the floor was likely caused by defendant accidentally hitting the button to release the magazine while shooting the gun.

Sergeant Sullivan was an expert in firearms and had previously testified in court as a firearms expert. Sergeant Sullivan opined that a .32-caliber Walther semiautomatic pistol was used to shoot the victim. This type of weapon required a person to “cock” the weapon by pulling back the slide on the top of the gun to strip a round from the magazine. The person would then have to pull the trigger for the round to discharge from the gun. Cocking the gun with a live round in the chamber would not cause the round shoot out of the gun. The magazine found in the apartment belonged to a Walther gun. The ammunition inside was .32 caliber.

City of San Bernardino Homicide Detective John Munoz attended the autopsy performed on the victim. Three photographs of the autopsy were shown to the jury. One photograph depicted the bullet wound, with the victim’s hair shaved around the bullet wound. It showed the side of the victim’s face. Another photograph depicted a close-up of the bullet in the victim’s brain. Detective Munoz explained the third picture showed a trajectory rod used during the autopsy to show the route the bullet traveled through the victim’s brain. The photograph appeared to show the side of the victim’s head with the hair pulled off the scalp. The photographs fairly depicted what Detective Munoz had seen at the autopsy. The cause of death was a gunshot wound to the victim’s head.

Defendant was arrested in Mexico and brought back to the United States in January 2014. Defendant presented no evidence.

DISCUSSION

A. FAILURE TO INSTRUCT ON INVOLUNTARY MANSLAUGHTER

Defendant contends the trial court committed prejudicial error when it refused his request to instruct the jury on involuntary manslaughter. Specifically, he contends the jury could have found him guilty of involuntary manslaughter based on misdemeanor brandishing of a firearm. He also contends they could have found him guilty of involuntary manslaughter, based on an assaultive felony, as the jury could have had reasonable doubt that he acted with implied malice if he did not intentionally fire the gun.

1. *ADDITIONAL FACTS*

At the end of the presentation of evidence, defense counsel requested that the trial court give an involuntary manslaughter instruction. Specifically, he asked for CALCRIM No. 580, involuntary manslaughter as a lesser included offense; CALCRIM No. 253, which defines criminal negligence; and CALCRIM No. 510, excusable homicide by accident. Defense counsel argued there was no evidence as to what actually took place when the gun discharged. It was undisputed that a bullet went through the door and struck the victim in the temple. However, defense counsel argued, “At the same time, we do not know, we do not have evidence, we have peripheral evidence that might be considered circumstantial evidence that it was from a gun that [defendant] was holding.” Defense counsel argued that it could “just as well have been an accidental discharge of that firearm as it was a deliberate discharge of that firearm.”

The People disagreed there was no evidence of what happened when the firearm discharged. The People referred to evidence of where the bullet hole was in the door; the

evidence of the magazine, spent cartridge and live round; and the fact that the gun would not discharge unless the trigger was pulled. Defense counsel responded that Manuel and defendant may have wrestled over the gun and it accidentally fired. Sergeant Sullivan speculated as to what had happened. Defense counsel argued, “My speculation is just as good as Sergeant Sullivan’s speculation.” The People argued that defense counsel was providing only speculation that did not support the involuntary manslaughter instruction.

The trial court ruled, “The Court has heard the position of both parties. [Defense counsel], the Court is going to . . . deny your request for CALCRIM 580, which is involuntary manslaughter, and the companion instruction, CALCRIM 253, criminal negligence, 510, excusable homicide. Court finds there is insufficient evidence to support the position of placing those instructions or that lesser before the jury.”

The jury was instructed on first and second degree murder. They were instructed on voluntary manslaughter under a theory of heat of passion or sudden quarrel. The jury was also instructed on the gun allegation pursuant to section 12022.53, subdivision (d). The jury was instructed that in order to prove the allegation, the jury had to find defendant personally discharged a firearm, he intended to discharge the firearm, and such act caused the death of a person.

2. ANALYSIS

“[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence; . . . an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. . . .” (*People v. Sedeno* (1974) 10 Cal.3d 703, 720, overruled on other points in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12,

and in *People v. Breverman* (1998) 19 Cal.4th 142, 176.) “The court must, . . . , instruct the jury on lesser included offenses when there is substantial evidence raising a question as to whether all the elements of a charged offense are present [citations] and when there is substantial evidence that defendant committed the lesser included offense, which, if accepted by the trier of fact, would exculpate the defendant from guilt of the greater offense.” (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

“The elements of murder are an unlawful killing committed with malice aforethought. [Citation.] The lesser included offense of manslaughter does not include the element of malice, which distinguishes it from the greater offense of murder. [Citation.] One commits involuntary manslaughter either by committing ‘an unlawful act, not amounting to a felony’ or by committing ‘a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.’ [Citation.] If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant’s constitutional right to have the jury determine every material issue. [Citation.] Malice is implied, however, when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.” (*People v. Cook, supra*, 39 Cal.4th at p. 596.)

We need not determine whether the evidence warranted instruction on involuntary manslaughter because, even if it did, and the trial court erred by refusing the instruction, any conceivable error was harmless.

The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621; *People v. Breverman*, *supra*, 19 Cal.4th at p. 176.) Reversal is required if it is reasonably probable the jury would have returned a different verdict absent the error committed by the trial court. (*Watson*, at pp. 836-837; see *People v. Prince* (2007) 40 Cal.4th 1179, 1267.) Under this standard, “[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.” (*People v. Lewis* (2001) 25 Cal.4th 610, 646; see also *People v. Coffman* (2004) 34 Cal.4th 1, 96-97.)

Here, defendant was additionally charged with the firearm enhancement pursuant to section 12022.53, subdivision (d). Section 12022.53, subdivision (d), requires imposition of an additional, consecutive 25-years-to-life term when the defendant “personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice” (§ 12022.53, subd. (d); *People v. Garcia* (2010) 28 Cal.4th 1166, 1171.)

Defendant’s theories of involuntary manslaughter all relied upon an accidental discharge of the firearm. Defendant’s counsel argued in closing argument that there was

only circumstantial evidence of what happened when the gun was fired. Defense counsel argued it was impossible to find that defendant intentionally shot the gun; although defendant was pulling the slide on the gun, Sonija had testified she had never seen defendant use a gun in the 13 years they were together. The magazine and live round on the floor were evidence that defendant did not know how to operate the gun. He did not know there was a live round and ejected it from the gun. Defendant did not know how to operate the gun. Defense counsel argued, “In finishing up, the gun issue does require—the gun issue requires, defendant personally discharged a firearm, but intended to discharged the firearm. Again, it comes back to it could have been an accidental discharge.”

The jury had to independently determine, by finding the section 12022.53, subdivision (d) enhancement true, that defendant intentionally fired the gun. Since the jury determined defendant intentionally discharged the firearm under the separate gun enhancement, it necessarily rejected that defendant accidentally discharged the firearm. No instruction on involuntary manslaughter would have changed that result. Any conceivable error was harmless.

B. GRUESOME PHOTOGRAPHS

Defendant contends three photographs depicting the victim during the autopsy were improperly admitted because they were irrelevant, gruesome and more prejudicial than probative. We have reviewed the photographs and conclude they were properly admitted into evidence.

1. *ADDITIONAL FACTS*

During the cross-examination of Sergeant Sullivan, he was asked about whether a bullet was found during the autopsy on the victim. Sergeant Sullivan explained an autopsy was performed in order to determine the cause of death. Sergeant Sullivan indicated a bullet fragment was removed from inside the victim's head. The bullet was toward the back of her head.

During cross-examination of Detective Mahan, she was asked about trajectory of bullets. She acknowledged that putting a rod through the bullet hole in the bedroom door would show the trajectory of the bullet (whether the bullet was traveling up or down) but she admittedly did not perform that measurement. She also acknowledged that such rods can be used during an autopsy to show the trajectory of the bullet.

Thereafter, the People sought to admit four photographs of the victim from the autopsy; defendant's counsel objected. Defendant's counsel stated, "[Exhibits] 8 and 9 show the victim. No. 8 shows the victim without any hair shaved away from the wound, the bullet wound, presumably. 9 shows hair shaved away to expose the bullet wound, presumably. [¶] Then 21 shows, I believe the brain with the skull removed. There is a, seemingly, a trajectory rod that is inserted in the brain to track the path of the bullet. And 22 seems to show the brain, and I believe it would show something to the effect of where the bullet eventually lodged inside the brain. [¶] So, because of the gruesome nature of 21 and 22 certainly—and, again, somewhat gruesome, the bullet wound itself, I'll object under [Evidence Code section] 352 and [the] gruesome nature of the photo[s]."

The People stated Exhibit No. 21 was “not showing of a brain. It is showing of a skull cap being pulled back and shows a bare skull with a pencil rod going through a hole” Further, the photographs had evidentiary value. They showed the pattern of how the bullet entered the victim’s brain. They were especially probative based on the testimony of Detective Mahan. Defendant’s counsel argued that he did not open the door to the photographs being admitted by asking about a trajectory rod through the door during cross-examination.

The trial court ruled, “Exhibit No. 8 is just duplicative, so the Court would exclude Exhibit No. 8. It’s covered by Exhibit No. 9. The Court will find that the probative value outweighs any prejudicial nature of the photographs. The Court will allow 9, 21 and 22.”

We have reviewed the exhibits. Exhibit No. 22 shows the bullet lodged in the victim’s brain and does not show the victim’s face or hair. Exhibit No. 21 shows the rod entering the victim’s head, with the hair pulled away from the skull. The rod goes straight into the skull. Exhibit No. 9 depicts a very small bullet hole and small portion of the victim’s hair shaved. The photograph shows the victim’s face.

2. ANALYSIS

“Whether the trial court erred in admitting into evidence the challenged photographs of the murder victims depends upon two factors: (1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in determining that the probative value of each photograph outweighed its prejudicial effect.” (*People v. Ramirez* (2006) 39 Cal.4th 398, 453, impliedly overruled on another ground in *People v. Farley* (2009) 46 Cal.4th 1053.)

“‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

“‘[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.’” (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) “[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims’ bodies to determine if the evidence supports the prosecution’s theory of the case.” (*Id.* at p. 624.) “A trial court’s decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value.” (*Id.* at pp. 624-625.)

Here, the photographs were relevant to show that a murder did, in fact, occur; and the location of the bullet wound. This was relevant to show cause of death and to confirm where the victim was shot. Additionally, the photograph with the rod through the bullet wound was relevant to show that the bullet entered perpendicular to the skull. This was relevant as to how the gun was shot, tending to show it was not accidental. The fact that there was no testimony by a forensic expert did not render the photographs irrelevant. The photograph clearly shows the rod going straight into the victim’s head,

which the jury could reasonably conclude showed that the bullet was fired straight through the door. Additionally, Sergeant Sullivan testified regarding the recovery of a bullet from the victim's skull; that testimony was corroborated by the photograph of the bullet in the victim's skull.

Moreover, the three photographs were not overly prejudicial and "are not of such a nature as to overcome the jury's rationality." (*People v. Gurule, supra*, 28 Cal.4th at p. 625.) The trial court here reasonably could determine that the probative value of the photographs outweighed their potentially prejudicial effect. The photograph showing the bullet wound in the victim's head was not bloody and the scalp was only partially shaved. Further, the bullet imbedded in her brain only shows a close-up of the bullet and very little of the surrounding area. While the photograph of the rod entering the victim's skull and the hair being detached from the scalp is admittedly more disturbing, it was not so prejudicial as to warrant exclusion. We thus conclude that the trial court did not abuse its discretion under Evidence Code section 352 in admitting the photographs into evidence.

Moreover, "even if we were to agree . . . that the trial court erred in admitting the photograph in question, we nonetheless would conclude that any error in admitting the photograph clearly was harmless under the *Watson* standard." (*People v. Scheid* (1997) 16 Cal.4th 1, 21.) "Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded." (*Ibid.*)

Here, the only dispute was whether defendant intentionally fired the gun into the bedroom. There was little or no evidence supporting that it was an accidental shooting. The photographs did not reasonably impact the jury's decision that the defendant intentionally shot into the bedroom. Even if the photographs were erroneously admitted, any error was harmless.

C. CUSTODY CREDITS

Defendant contends he should have been awarded custody credits for the time he spent in a Mexican jail awaiting extradition to California.

According to the probation report, defendant was arrested in Mexico on April 30, 2013. He was extradited to the United States on January 28, 2014. The probation department provided in their report dated January 16, 2015, that defendant was entitled to 354 days of actual custody credits and no conduct credits. The trial court awarded defendant 354 days of actual custody credits on January 16, 2015. This did not include the time defendant was in custody in Mexico.

San Bernardino Police Detective Jason King was asked during his testimony why defendant was arrested in Mexico. He responded, "They arrested him on a federal warrant for unlawful flight to avoid prosecution in connection with a murder warrant that was issued for his arrest out of San Bernardino County."

Section 2900.5, subdivision (a) provides that "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, *including, but not limited to*, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or

similar residential institution, all days of custody of the defendant,” is entitled to credit against his term of imprisonment. (Italics added.) Subdivision (b) provides, “For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.”

“[T]he courts have . . . given the term ‘custody’ as used in that section a liberal interpretation.” (*In re Watson* (1977) 19 Cal.3d 646, 651.) “[A] defendant convicted of a felony is entitled to credit pursuant to section 2900.5 against his sentence for the presentence time spent in jail in a foreign jurisdiction resisting extradition to this state on charges of which he has been ultimately convicted.” (*Id.* at p. 654.)

We may correct the erroneous award of custody credits on appeal. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.)

We agree with defendant that the evidence established he was arrested due to a federal warrant on April 30, 2013. The People argue remand to the trial court to determine the correct amount of time that defendant spent in custody in Mexico in this case is appropriate. They contend it must be determined by the trial court in the first instance if defendant was arrested and served time in custody based only on this case and whether he actually remained in custody from April 30, 2013, until January 28, 2014.

It is inconceivable that defendant was released from custody prior to being extradited to the United States, and Detective King testified defendant was arrested on the

federal warrant. We shall direct the trial court to modify defendant's sentence to include the 274 days he served in custody in Mexico.

D. ABILITY TO PAY FEES

Defendant contends this court should order the minute order from sentencing on January 16, 2015, be modified to reflect the oral pronouncement of sentence that the trial court found he did not have the ability to pay his appointed counsel's fees or the investigation report fees.

According to the minute order dated January 16, 2015, the order of the court was as follows: "The Court finds that the Defendant does have the present ability to pay appointed counsel fees in the amount of \$750.00 through Central Coll." Further, the minute order states, "The Court finds that the Defendant has the present ability to pay the costs of conducting the pre-sentence investigation and preparing the report pursuant to Section 1203.1(b) of the Penal Code. Therefore the Defendant is ordered to pay \$665.00 through Central Collections." The fee does not appear on the abstract of judgment.

At the time of sentencing, the trial court stated in open court that it had read and considered the presentence investigation report submitted by the probation department. The probation department recommended the trial court find that defendant had the ability to pay the appointed counsel fees in the amount of \$750 and that he could additionally pay the investigation fees. However, according to the reporter's transcript, the trial court stated in open court, "Find that [defendant] does *not* have the ability to reimburse for appointed counsel fees or reimbursement for sentencing—or presentence investigation, 665." (Italics added.)

Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) “Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts.” (*Id.* at p. 185.)

Here, the trial court stated defendant did not have an ability to pay the fees. Although the probation report recommended that defendant pay the fees, the trial court stated on the record it had considered the probation report. The trial court rejected the recommendation but the minute order incorrectly recorded the court’s order. We can correct this error on appeal.

The People have cited to *In re Kyle E.* (2010) 185 Cal.App.4th 1130, 1136 through 1137, for the proposition that when the oral pronouncement of sentence cannot be reconciled with the written order, remand is appropriate for the trial court to issue a proper order. However, *Kyle E.* involved a visitation order, which improperly delegated authority to a legal guardian and child protective services. The appellate court found the oral pronouncement of sentence was vague and could not be reconciled with the written order and remanded for a new visitation order. (*Id.* at p. 1136.)

In this case, the oral pronouncement was not vague. The trial court stated it had reviewed the probation department’s report and that it had considered the report in

reaching its decision. The trial court stated on the record that defendant did not have the ability to pay. We will order the trial court to amend the minute order.⁴

DISPOSITION

We order the trial court to amend the minute order from sentencing on January 16, 2015, to strike that the trial court found defendant had the ability to pay the appointed counsel fees in the amount of \$750 and the investigation fees in the amount of \$665. Defendant is also entitled to 274 additional days of custody credit. Further, the trial court is ordered to amend the abstract of judgment to include the \$60 court security fee that was ordered by the trial court. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.

⁴ We also note that the court security fee in the amount of \$60 that was imposed by the trial court at the time of sentencing was not added to the Abstract of Judgment and will order that the Abstract of Judgment be amended to reflect that amount.