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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NICO URIEL HABECKER,

Defendant and Appellant.

H037027

(Santa Cruz County

Super. Ct. No. F20204)

A jury convicted defendant Nico Uriel Habecker of one felony count of driving under the influence (Veh. Code, § 23152, subd. (a)), one felony count of driving with a blood alcohol content greater than 0.08 percent (Veh. Code, § 23152, subd. (b)), and two misdemeanor counts: possession of a deadly weapon, metal knuckles, (former Pen. Code, § 12020, subd. (a)(1))¹ and hit and run driving (Veh. Code, § 20002, subd. (a)). The jury acquitted defendant of one misdemeanor count of possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)). In a bifurcated proceeding, the jury found true enhancement allegations that defendant was driving with a blood alcohol content of 0.15 percent or higher (Veh. Code, § 23578), that defendant had three prior drunk driving convictions (Veh. Code, § 23550, subd. (a)), and that he had one prior conviction for assault with a deadly weapon (§ 245, subd. (a)(1)).

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

The court denied defendant's motion to strike his strike prior and sentenced him pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12) to four years (two times the middle term) for driving under the influence. The court imposed a similar four-year term for driving with a blood alcohol content greater than 0.08 percent, but stayed that sentence pursuant to section 654. The court imposed two 180-day jail terms for the hit and run and the possession of metal knuckles, to be served concurrently with the sentences on the felony counts.

On appeal, defendant contends that the trial court committed prejudicial error when it instructed the jury with a modified version of CALCRIM No. 2500, the instruction on possession of metal knuckles. Defendant contends that his counsel was ineffective when he agreed that the court could tell the jury pool that defendant was charged with *felony* drunk driving. He argues that most jurors know that driving under the influence is a misdemeanor and that since the trial of the prior conviction allegations was bifurcated, telling the jurors that he was charged with felony drunk driving caused them to speculate that he had prior drunk driving convictions. Defendant challenges the determination of his conduct credits on equal protection grounds and asserts that the abstract of judgment must be corrected to reflect the correct amount of the court facilities fee imposed by the court. We agree with his last contention and will order the clerk of the superior court to correct the abstract of judgment. Finding no other error, we will affirm the judgment.

FACTS

Prosecution's Case

Motor Vehicle Accident

On December 17, 2010 at approximately 6:30 p.m., Sharon Kruse and her friend, Rose Marie Hill, went out to dinner. Kruse was driving her Honda Civic on Walnut

Street, a one-way street in Soquel; Hill was in the front passenger seat. The sun had already set and it was raining off and on.

Walnut Street ends where it intersects with Robertson Street. There are two turn lanes at the intersection: one for left turns and one for right turns. Before they reached the intersection, Kruse looked in her rear view mirror and noticed that the car behind her did not have its headlights on. Kruse pulled into the left turn lane and stopped at the stop sign. While she was checking for cross traffic, she was rear-ended by the car behind her, a white Ford Explorer (SUV).

Kruse stepped out of her car, walked back to the SUV, and asked the driver whether he and his passenger “were okay.” The driver, whose window was down, did not look at or respond to Kruse; he sat there, “staring straight ahead . . . totally ignoring [her].” The driver did not speak to Kruse or offer to exchange information. Kruse remained at the driver’s door for about 30 seconds and looked at the driver that entire time. At trial, Kruse identified defendant as the person who was driving the SUV at the time of the collision.

Defendant’s male passenger (Passenger)² stepped out of the SUV, walked up to Kruse’s car, and said there was no damage. Kruse pointed to a crack in her bumper and they both bent down to see if there was any other damage.³ Passenger offered to give her some touch-up paint. Kruse told Passenger she was going to call the police because she thought defendant was drunk. Passenger walked back toward the SUV. Kruse thought

² Defendant told the investigating officer that he did not know his passenger’s name. Since the passenger has never been identified, we shall refer to him as “Passenger,” even though, as we shall explain, Passenger ended up driving the SUV later that evening.

³ Kruse testified that in addition to a “big crack” in her bumper, the accident caused seven or eight scratches in the area below the trunk lid.

he was going to retrieve insurance information. Instead, Passenger got into the passenger seat of the SUV and defendant drove off.

While Kruse was talking to Passenger, Hill called 911. Kruse got the SUV's license plate number and provided it to the dispatcher. Although Hill did not see defendant up close, she saw Passenger get out of the passenger side of the SUV after the collision and speak with Kruse and was able to describe Passenger.

Police Investigation

Two California Highway Patrol (CHP) officers responded to the scene of the accident: Officer Alexis Lucero-Garcia (Garcia) and Officer Santiago Pineda. The officers arrived at 6:35 p.m. and started interviewing Kruse and Hill under a large tree.

Sixteen minutes later, the officers and the two women heard a loud, rumbling noise; they looked down the street and saw defendant's SUV driving up Walnut Street toward them. Officer Garcia recognized the noise and testified that the SUV was having problems with its transmission. Kruse said, "I think that's the car that hit me." Hill stepped into the street and confirmed that it was the same license plate number. As the SUV drove past them, Kruse observed that defendant and Passenger had switched places. This time, a woman was sitting on defendant's lap in the front passenger seat of the SUV.

The SUV entered the right turn lane and stopped at the stop sign. But the SUV did not proceed further due to mechanical difficulty. Officer Garcia pulled her patrol car behind the SUV. Passenger stepped out of the driver's side of the SUV and talked to Officer Garcia. Kruse told the officers that defendant and Passenger had switched places and that the person who was driving at that time was the passenger when she got hit.

Officer Garcia talked to Passenger. Passenger and Officer Garcia looked at the SUV's front bumper; Passenger also looked at the rear and the passenger sides of the SUV. Officer Garcia observed damage to the SUV's front bumper and license plate that was consistent with being in a rear-end collision. The officer saw transmission fluid

leaking from the SUV, became concerned that the SUV would not stay in gear on the sloping road, and decided to push the SUV forward with the patrol car. While Officer Garcia pulled the car forward, Passenger “took off” running down Robertson Street. Both officers gave chase, but were unable to find Passenger. Defendant remained at the scene while the officers chased Passenger.

Hill testified that Passenger was the one driving when the two men returned to the scene; she corroborated Kruse’s testimony that Passenger was driving the SUV when it returned to the accident scene. Kruse and the officers described defendant and Passenger for the jury; they all stated that defendant and Passenger looked very different from one another.

DUI Investigation

After Officer Pineda returned to the accident scene, he began to question defendant. Officer Pineda observed that defendant’s eyes were red and watery, noted that his speech was slurred, and smelled a strong odor of alcohol coming from the SUV, so he started a DUI investigation.

Defendant said he was “hammered” and “wasted”; he admitted drinking three and one half shots of vodka, but denied driving that day. Officer Pineda conducted a series of field sobriety tests, which defendant failed. The officer did two preliminary alcohol screening tests of defendant’s breath at 7:39 p.m. and 7:43 p.m., with readings of 0.20 percent and 0.199 percent blood alcohol respectively. Based on these results, Officer Pineda arrested defendant for driving under the influence. The officer did further breath testing at the CHP station at 8:31 p.m. and 8:35 p.m., with readings of 0.18 percent and 0.17 percent blood alcohol respectively. Scot Armstrong, a senior criminalist with the Department of Justice Crime Lab, testified that it would take about 14 drinks for a person of defendant’s size to get to the blood alcohol level shown on the tests done at the CHP station.

Vehicle Impound and Search

Since the SUV was not drivable, the officers decided to store it. The back seat of the SUV was filled with defendant's belongings. Defendant told the officers he was moving out of his girlfriend's house and said all of the items belonged to him. While conducting an impound search, the officers found: (1) metal knuckles at the bottom of a box located behind the driver's seat, and (2) 174 grams of marijuana in a box in the rear cargo area.

Defendant denied driving at the time of the collision. He said Passenger was driving and that he (defendant) was asleep and woke up after he felt a "bump." Defendant did not know who Passenger was or the name of the woman who had been sitting on his lap. When Officer Pineda showed him the metal knuckles, defendant did not deny owning them and said, "oh."

Defendant's Case

Heather Little testified on defendant's behalf. She was sitting on defendant's lap when the SUV returned to the accident scene. Little had been visiting a female friend who lived nearby. Twenty-five to 30 minutes before the SUV returned to the scene, Defendant and Passenger stopped by her friend's house. Little did not see the SUV pull up; she did not see which man was driving when they arrived. But when they were inside her friend's house, Passenger had the car keys.

Little had given her car keys to an unidentified male. About 10 minutes after defendant and Passenger arrived, Little asked them to give her a ride to a restaurant so she could retrieve her keys. Passenger drove to the restaurant; the back seat was filled with defendant's things, so Little rode on defendant's lap in the front seat.

Little was not in the SUV at the time of the rear-end collision. Little did not see defendant or Passenger drink alcohol while they were at her friend's house. She never

saw defendant or Passenger drinking. Defendant was awake the entire time. She did not know Passenger's name.

Defense investigator David Pacini testified that Kruse was not willing to speak with him, and that she had a right to refuse to speak with him. Defendant did not testify.

DISCUSSION

Jury Instruction Regarding Metal Knuckles

Background

The trial court instructed the jury regarding illegal possession of a weapon with CALCRIM No. 2500, as follows: “The defendant is charged in Count 3 with unlawfully possessing a weapon, specifically metal knuckles. ¶ To prove that the defendant is guilty of this crime, the People must prove that: ¶ 1. The defendant possessed metal knuckles; ¶ 2. The defendant knew that he possessed metal knuckles; ¶ AND ¶ 3. The defendant knew that the object was a pair of metal knuckles that could be used[f]or purposes of offense or defense.[] ¶ The People do not have to prove that the defendant intended to use the object as a weapon. ¶ *Metal knuckles means any device or instrument made wholly or partially of metal which is worn for the purposes of offense or defense in and on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow. The metal contained in the device may [hold,] support the hand or fist, provide a shield to protect it, or consist of projections or studs which could contact the individual receiving the blow.* ¶ The People do not have to prove that the object was concealable[or] carried by the defendant on his person, or displayed/visible. ¶ Two or more people may possess something at the same time. ¶ A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it/ or the right to control it, either personally or through another person.” (Italics added.)

At the request of the prosecution, over defendant's objection, the court added the following language, which is not part of CALCRIM No. 2500: "The definition of metal knuckles focuses on their physical characteristics without reference to the possessor's intent to do further act [*sic*] or achieve a future consequence, it is a general intent crime, a defendant's intended use is not an element of the crime, and there is no requirement that the possessor intended to use the object in a violent manner. [¶] Typical metal knuckles are manufactured as weapons, are deemed dangerous so that mere possession is illegal regardless of the defendant's purposes."

At trial, defendant objected to the court giving the "special instruction on the metal knuckles." He argued that the relevant parts of the special instruction restate "what's already in the instructions," that the language used in the instruction came from a case challenging the sufficiency of the evidence and was not intended to be used as a jury instruction, and that giving two instructions on the same crime "suggests to the jury some heightened level of seriousness that would . . . certainly drive them towards a conviction of that charge." Defense counsel did not provide a citation for the case he referred to in argument.

On appeal, defendant contends that the "prosecutor's instruction on metal knuckles was unfairly argumentative and misstated the law in a manner that lowered the prosecution's burden of proof."

Standard of Review

" " "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." ' ' ' (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Errors in jury instructions are questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) We determine the correctness of the challenged instruction “in the context of the instructions as a whole and the trial record,” and not “ ‘in artificial isolation.’ ” (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

Legal Principles Governing Possession of Metal Knuckles

Former section 12020, which governed the crime at issue, provided in relevant part: “(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison: [¶] (1) . . . gives, lends, or possesses . . . any metal knuckles,”⁴ Former section 12020, subdivision (c)(7) contained a definition of metal knuckles,⁵ which was set forth verbatim in the CALCRIM No. 2500 portion of the instruction and which we have italicized above.⁶

“The offense defined by [former] section 12020, subdivision (a)(1) is a general intent crime.” (*In re Martin Alonzo L.* (2006) 142 Cal.App.4th 93, 96 (*Martin Alonzo*),

⁴ Former section 12020, subdivision (a)(1) was repealed operative January 1, 2012 and reenacted with respect to metal knuckles as section 21810 without substantive change. (Stats. 2010, ch. 711, § 4; see § 21810.)

⁵ Former section 12020, subdivision (c)(7) was repealed operative January 1, 2012 and reenacted as section 16920 without substantive change. (Stats. 2010, ch. 711, § 4; see § 16920.)

⁶ There appears to have been a typographical error in the written instructions, which stated in part: “The metal contained in the device may *hald* [sic] support the hand or fist,” (Italics added.) When reading the instruction to the jury, the court stated: “The metal contained in the device may *hold*, support the hand or fist,” (Italics added.) The statutory definition provides that “The metal contained in the device may *help* support the hand or fist,” (Former § 12020, subd. (c)(7); italics added.) Defendant does not raise any claim of error related to the typographical error in this portion of the written instruction or the reading of the instruction.

citing *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 (*Rubalcava*.) The statute does, however, contain a knowledge requirement. A person “ ‘who does not know that he is carrying or wearing the weapon or that the instrument may be used for purposes of offense or defense is thus not guilty of violating section 12020. [Citation.]’ ” (*Martin Alonzo, supra*, at p. 97, citing *Rubalcava, supra*, at p. 332.)

As noted, the parties did not provide the trial court with a legal citation for the language that defendant challenges. But our research readily disclosed the sources of the specially-drafted portion of the instruction on possession of metal knuckles.

The first paragraph of the challenged instruction is based on *Martin Alonzo*, where the court addressed the question whether the minor’s wallet, which had metal spikes on it, met the statutory definition of metal knuckles. (*Martin Alonzo, supra*, 142 Cal.App.4th at p. 95.) The *Martin Alonzo* court analogized the crime of possessing metal knuckles to possession of a concealed dirk or dagger, which the Supreme Court had addressed in *Rubalcava*. (*Id.* at p. 96.) Quoting *Rubalcava*, the court stated: “[T]he definition of metal knuckles focuses on their physical characteristics without reference to the possessor’s ‘intent to do a further act or achieve a future consequence.’ [Citations.] ‘Accordingly, [the] defendant’s intended use is not an element of the crime, and “no further mental state beyond willing commission of the act proscribed by law” is necessary. [Citation.]’ [Citation.] Thus, there is no requirement that prosecution show the possessor intended to use the object in a violent manner.” (*Ibid.*, citing *Rubalcava, supra*, 23 Cal.4th at pp. 328-329.) The challenged instruction uses this language almost verbatim.

The second paragraph of the challenged instruction is based on *In re David V.* (2010) 48 Cal.4th 23, 26 (*David V.*), where our State Supreme Court explained: “Typical metal knuckles, manufactured as weapons, are deemed inherently dangerous so that mere possession is illegal regardless of the defendant’s purposes.” The second paragraph of

the instruction uses this language almost verbatim, except that it leaves out the word “inherently.”

Since the challenged instruction was based on these Supreme Court authorities and tracked the language of *Rubalcava* and *David V.* almost verbatim, we reject defendant’s contention that it misstated the law.

Defendant argues that the instruction “misstated the law in a manner that lowered the prosecution’s burden of proof” because the use of the phrase “ ‘**mere possession is illegal** regardless of the defendant’s purposes’ ” omitted the knowledge element of the offense. However, when describing the three basic elements of the offense, the court instructed the jury that “the People must prove” that “defendant knew that he possessed metal knuckles” and that he “knew that the object was a pair of metal knuckles that could be used[f]or purposes of offense or defense.” Thus, the court clearly instructed on the knowledge element of the offense. The court also instructed the jury to “[p]ay careful attention to all of these instructions and consider them together.” (See also CALCRIM No. 200.) When viewed as a whole, the instruction on possession of metal knuckles did not fail to instruct the jury on the knowledge element or lessen the prosecution’s burden of proof.

Defendant argues that the instruction was argumentative. He asserts that the phrase “ ‘mere possession’ . . . is illegal” because the item is “ ‘deemed dangerous’ ” was “simply editorializing on the prosecutor’s part” and “played no legitimate role in guiding the jury to a verdict.” We disagree. First, as we have stated these phrases are based on the language in *David V.* Second, as the court explained in *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404-1405 (*Fannin*) some prosecutions under former section 12020, subdivision (a)(1) involved ordinary objects with innocent uses that were also capable of being used as weapons. “[W]hen the prosecution contends an ordinary object like a bicycle lock is a kind of slungshot, it must prove the defendant possessed the object as a slungshot. On the other hand, when the defendant is charged with possessing a slungshot

like the rawhide and metal device described in [*People v. Mulherin*] (1934) 140 Cal.App. 212], which had no conceivable innocent function, proof of mere possession is sufficient.” (*Fannin, supra*, at p. 1405; see e.g., *David V., supra*, 48 Cal.4th at pp. 24-25 [bicycle footrest in minor’s pocket did not qualify as metal knuckles under definition in former section 12020, subd. (c)(7)] & *Martin Alonzo, supra*, 142 Cal.App.4th at pp. 96-97 [challenging sufficiency of the evidence to support finding that minor knew that his spiked wallet could be used as a weapon].) But, in the case of metal knuckles, it has been held that the prosecution need only show that the device in question meets the statutory definition of metal knuckles, “because metal knuckles are in a class of instruments that have no legitimate use.” (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 546, fn. 3.)

Defendant does not dispute that the device the officers found in his car was in fact metal knuckles, which was manufactured as a weapon and deemed inherently dangerous. He does not contend that the item had an innocent use or that the prosecution was required to prove that he possessed it as a weapon. Since there is no dispute regarding these points, instructing the jury that “ ‘mere possession’ . . . is illegal” because the item is “ ‘deemed dangerous’ ” was not argumentative.

For these reasons, we conclude that the court did not err when it instructed the jury with the modified version of CALCRIM No. 2500.

Ineffective Assistance of Counsel

Defendant contends his counsel was ineffective when, at the beginning of trial, he agreed that the jury should be told that defendant was charged with *felony* driving under the influence. Defendant contends that: (1) after the trial of the prior conviction allegations was bifurcated, there was no need to tell the jury that the offense had been charged as a felony; (2) that the jury’s exposure to the “ ‘felony’ designation” encouraged speculation that defendant had prior convictions for driving under the influence; and (3) that defense counsel was incorrect when he concluded that the jury would inevitably

learn that the crime had been charged as a felony since there was no reason that such information needed to be on the verdict form.

Background

Before trial, the court granted defendant's motion to bifurcate the trial of the prior conviction allegations.

During motions in limine, the court stated: "Now, I usually tell the jury what the charges are . . . and the question that arose in my mind . . . is: This driving under the influence offense is only a felony because of the priors, correct?" After the prosecutor confirmed that was correct, the court stated, "And most jurors know that driving under the influence of alcohol is not a felony. So if I identify that crime as a felony, it's going to immediately make people wonder what don't we know about this case. And I've ruled that the priors are bifurcated, so I wanted to get your input on the subject. Typically . . . , I tell [the jurors] that the defendant . . . is facing charges of driving under the influence and driving with more than an ounce of marijuana and possession of brass knuckles, and that would be about all I'd say." Defense counsel responded, "I suspect the verdict form is going to say driving under the influence as a felony, and so they're going to be exposed to that at some point. . . . [¶] . . . [¶] . . . I think they're going to find out sooner or later, so why not tell them that in the beginning."

After the jury pool entered, the court told prospective jurors that the trial "involves charges of felony driving under the influence of alcohol, felony driving with blood alcohol level of above .08, hit and run driving, and possession of more than an ounce of marijuana, and possession of brass knuckles." When instructing the jury, the court referred to the felony charges as "driving under the influence" and "driving with a blood alcohol level of 0.08 percent or more," without stating that offenses had been charged as felonies. On the other hand, the verdict forms described each of the drunk driving offenses as "a FELONY."

Legal Principles Governing Ineffective Assistance of Counsel Claims

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*)). “Judicial scrutiny of counsel’s performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” (*Strickland*, at p. 689.)

“ ‘Tactical errors are generally not deemed reversible; and counsel’s decision-making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” ’ ” (*People v. Hart* (1999) 20 Cal.4th 546, 623-624 (*Hart*)). Case law recognizes that “counsel’s omission legitimately may have been based in part on considerations that do not appear on the record, including confidential communications from the client.” (*People v. Lucas* (1995) 12 Cal.4th 415, 443.) “ ‘Finally, prejudice must be affirmatively proved; the record must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ’ ” (*Hart, supra*, at p. 624.)

Standard of Review

“A claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review,” (*In re Alcox* (2006) 137 Cal.App.4th 657, 664.)

Analysis: Counsel’s performance was not deficient

In our view, defense counsel’s decision to diffuse any potential harm or avoid any surprise associated with describing the drunk driving offenses as felonies on the verdict forms by acknowledging the nature of the offenses at the start of the trial, before the jury was impaneled, was inherently tactical. As noted, counsel’s knowledgeable tactical choices generally do not support a conclusion that counsel’s performance was deficient. (*Hart, supra*, 20 Cal.4th at pp. 623-624.)

But defendant also argues that defense counsel’s performance was deficient because he failed to request that the word “felony” be omitted from the verdict forms. The verdict in a criminal case need not be written and there is no statutory provision for submitting written forms to the jury. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 42, p. 66.) But it has long been the practice, in the interests of accuracy and convenience, for the court to provide the jury with written forms of possible verdicts. (*Id.* at pp. 66-67, citing *People v. Mack* (1931) 115 Cal.App. 588, 592, *People v. Mundt* (1939) 31 Cal.App.2d 685, 688, and other cases.) Although the use of written verdict forms is universal, no specific format is required. (Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2012) § 33.28, pp. 985-986.) In our experience, it is commonplace for the verdict forms to indicate whether the offense has been charged as a felony or a misdemeanor. Given this practice, we cannot say that defendant’s representation fell below an objective standard of reasonableness under prevailing professional norms because counsel assumed the forms would indicate that the offenses

were felonies or counsel failed to request that the word “felony” be removed from the verdict forms. Moreover, nothing in the record suggests that the jury speculated regarding the reason or reasons the drunk driving offenses were charged as felonies or even knew that driving under the influence is a misdemeanor unless the defendant has three or more prior convictions for driving under the influence within 10 years of the offense at issue or other aggravating circumstances apply. (Veh. Code, §§ 23550, 23550.5.) Finally, defense counsel may have concluded that informing potential jurors that the charged offenses included two felonies, would have impressed on them that the charges were serious and caused them to review the evidence with great care.

Citing *People v. Cooper* (1991) 53 Cal.3d 771, 831 (*Cooper*) and *People v. Corona* (1978) 80 Cal.App.3d 684, 906 (*Corona*), defendant argues that although his counsel’s failure to object to the “ ‘felony’ designation” was tactical, it “was grounded in a misunderstanding and was unreasonable.” Defendant’s reliance on both cases is unavailing.

The defendant in *Cooper* was convicted of four counts of first degree murder and one count of attempted murder. (*Cooper, supra*, 53 Cal.3d at p. 793.) On appeal, he asserted that the trial court erred when it failed to instruct on second degree murder. The Supreme Court concluded that any error was invited, since the record showed that counsel believed that it was in the defendant’s interest in the circumstances of that case not to have the second degree murder instructions and that defense counsel “made a deliberate choice for an express tactical reason [the Court had] recognized as valid.” (*Id.* at p. 831.) Although the defendant in *Cooper* did not claim ineffective assistance of counsel, the court stated in dicta that even if the defendant could prove “that counsel misunderstood the law when he invited any error, [the] defendant could not show prejudice.” (*Id.* at p. 832.) Nothing in *Cooper* supports the conclusion that defense counsel’s performance here fell below an objective standard of reasonableness when he failed to object to including the felony designations in the verdict forms.

The defendant in *Corona, supra*, 80 Cal.App.3d 684 was convicted of 25 counts of first degree murder. The court concluded that the defendant had been denied his right to the effective assistance of counsel and reversed the judgment because counsel's lack of diligence in investigating the facts or the law relating to the defendant's mental state deprived the defendant of a hearing on his mental competence to stand trial and the defenses of diminished capacity and legal insanity. The court explained, "[E]ven the tactical and strategic determinations of trial counsel must have some rational support founded on reasonable, sound, legal principles and fully developed facts. Therefore, when trial counsel fails to acquire facts necessary to a crucial defense or to follow the facts already in his possession or to develop facts to which his attention is called, or when he fails to do the requisite legal research to learn the applicable law, his failure to raise a defense or defenses which could have been established by making the aforesaid requisite efforts cannot be justified by reference to trial strategy or tactics." (*Id.* at p. 706.) The court's decision was also based on counsel's failure to raise any of the defenses he had promised in his opening statement and a serious conflict of interest between the defendant and his counsel arising out of counsel's agreement to defend the case in exchange for exclusive literary and property rights to the defendant's life story. (*Id.* at pp. 719-727.)

Defendant does not cite any legal authority that suggests that counsel's failure to object to the inclusion of the felony designation in the verdict forms was unreasonable or that it was based on some misunderstanding of the law related to the offenses charged. The alleged errors of counsel do not rise to the same level as those in *Corona*.

For these reasons, we conclude that defendant has failed to demonstrate that counsel's performance was deficient.

Analysis: Prejudice

Even if we were to conclude that counsel's performance was deficient, defendant has not shown prejudice. The only time the court referred to the drunk driving charges as felonies was in its opening remarks to the jury pool before jury selection began and in the verdict forms. The court did not describe the offenses as felonies when it instructed the jury on the offenses. The court also instructed the jury on the presumption of innocence, not to be biased against defendant because he has been arrested or charged with a crime, to rely on the law presented to them by the court in the instructions and not to do any independent research. As noted before, nothing in the record suggests that the jury speculated regarding the reasons the drunk driving offenses were charged as felonies.

The primary factual issue for the jury was whether defendant or Passenger was driving the SUV when the collision occurred. Kruse identified defendant in court and testified that defendant was behind the wheel at the time of the collision. Immediately after the collision, Kruse spoke to defendant through the open driver's door window; she also spent three minutes in close proximity to Passenger as they examined the damage to Kruse's car. Although Hill did not see defendant up close, she saw Passenger get out of the passenger side of the SUV after the collision and speak with Kruse at the back end of Kruse's Honda. Hill was able to describe Passenger; she testified that Passenger was the one driving when the two men returned to the scene and corroborated Kruse's testimony that Passenger was driving the SUV when it returned to the accident scene. Kruse and the officers described defendant and Passenger; they all told the jury that defendant and Passenger looked very different from one another. We note also that defense counsel did an excellent job of arguing the facts in closing argument, pointing out every aspect of the witnesses' testimony that raised any doubt regarding Kruse's and Hill's ability to perceive and the accuracy of their identifications.

For these reasons, we conclude that defendant has not met his burden of demonstrating that “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides, supra*, 35 Cal.4th at p. 93.)

Conduct Credits (Pen. Code, § 4019)

At sentencing, defendant received credit for 168 actual days in custody, plus 84 days of conduct credit “calculated at the 50 percent rate for a total of 252 days.” Defendant acknowledges that under former section 2933, subdivision (e)(3), his conduct credit award was correct at the time of sentencing in June 2011 because of his prior strike conviction. But he argues that the conduct credit limit for defendants with prior strike convictions was abrogated by subsequent legislation in October 2011. He argues that even though the Legislature expressly stated that the October 2011 amendments were to apply prospectively only, failure to afford him the benefit of those statutory changes violated his right to equal protection under both the state and federal Constitutions.

Legislative Changes Relating to Section 4019 Conduct Credits

Section 4019 provides for presentence conduct credits for both “good behavior” and satisfactory performance of labor assigned to the defendant while in local custody. (§ 4019, subds. (b) & (c).) Defendants can earn conduct credit prior to the imposition of a sentence and may also earn conduct credit when a jail sentence is a term or condition of probation. (*People v. Daniels* (2003) 106 Cal.App.4th 736, 740.)

Our State Supreme Court recently construed former section 4019 in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). The Court explained that “[s]ince 1976, . . . section 4019 has offered prisoners in local custody the opportunity to earn ‘conduct credit’ against their sentences for good behavior. Conduct credits encourage prisoners to

conform to prison regulations, to refrain from criminal and assaultive conduct, and to participate in work and other rehabilitative activities.” (*Brown*, at p. 317. fn. omitted.)

Section 4019 has been amended multiple times in recent years. Under the version of section 4019 in effect prior to January 25, 2010, a criminal defendant was entitled to “two days of conduct credits for every four days spent in local custody.”⁷ (*Brown, supra*, 54 Cal.4th at p. 318.)

In 2009, the Legislature amended former section 4019, “increasing the rate at which prisoners in local custody could earn conduct credits,” (hereafter 2009 amendments). (*Brown, supra*, 54 Cal.4th at p. 318.) “Under the new formula,” operative January 25, 2010, “eligible prisoners could earn two days of conduct credit for every two days spent in local custody.”⁸ (*Ibid.*; see Stats. 2009, 3d Ex. Sess., 2009-2010, ch. 28, § 50, eff. Jan. 25, 2010 [former section 4019, subs. (b)(1), (c)(1) & (f)].) However, “[p]risoners who were required to register as sex offenders, had been committed for serious felonies or had prior convictions for serious or violent felonies, were not eligible for credit at the increased rate.” (*Brown, supra*, at p. 319, fn. 5, citing former § 4019, subs. (b)(2), (c)(2).) Such prisoners earned conduct credit at a less favorable rate of two days for every four days actually spent in local custody. (Stats. 2009, 3d. Ex Sess., 2009-2010, ch. 28, § 50 [former section 4019, subs. (b)(2), (c)(2), (f)].)

⁷ “The relevant language of the version of section 4019 in effect [prior to January 25, 2010] provided: ‘It is the intent of the Legislature that if all days are earned under this section, *a term of six days will be deemed to have been served for every four days spent in actual custody.*’ ” (*Brown, supra*, 54 Cal.4th at p. 318, fn. 4, citing former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4553.)

⁸ “The relevant language of [the version of] former section 4019 [that was effective January 25, 2010,] provided: ‘It is the intent of the Legislature that if all days are earned under this section, *a term of four days will be deemed to have been served for every two days spent in actual custody . . .*’ ” (*Brown, supra*, 54 Cal.4th at p. 319, fn. 5, quoting former § 4019, subd. (f) as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.)

When it amended former section 4019 in 2009, “the Legislature did not expressly declare whether former section 4019 was to operate prospectively or retroactively.” (*Brown, supra*, 54 Cal.4th at p. 320.) The issue in *Brown* was whether the 2009 amendments to former section 4019 were retroactive and therefore applied to the defendant in that case, who had spent time in local custody in 2007 and was sentenced in 2007, prior to the effective date of the amendments at issue in *Brown*. (*Id.* at p. 318.) Construing the statute, the court held that “former section 4019 applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute’s operative date.” (*Ibid.*) The court also rejected the defendant’s equal protection challenge and held “that the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) do not require retroactive application” of the 2009 amendments to section 4019. (*Brown*, at p. 318.)

As the court acknowledged in *Brown*, effective September 28, 2010, the Legislature amended section 4019 again, “to restore the original, lower credit-earning rate.” (*Brown, supra*, 54 Cal.4th at p. 318, fn. 3.) Under the September 2010 amendments, prisoners earned conduct credit at a rate of two days for every four days spent in local custody.⁹ (Stats. 2010, ch. 426, §§ 2, 5 [former § 4019, subs. (b), (c), & (f)].) The provision that treated prisoners differently due to their prior serious felony conviction was eliminated from section 4019. (Stats. 2010, ch. 426, § 2.) At the same time, the Legislature also amended section 2933. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)].) The amendment to section 2933 allowed defendants who were sentenced to prison to earn presentence conduct credit at the rate of one day for every day

⁹ The relevant language of the version of former section 4019 effective September 28, 2010 provided: “It is the intent of the Legislature that if all days are earned under this section, *a term of six days will be deemed to have been served for every four days spent in actual custody.*” (Stats. 2010, ch. 426, § 2 [former § 4019, subd. (f)], italics added.)

of actual custody. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(1), (2)].) But defendants who had prior convictions for serious or violent felonies, who were required to register as sex offenders, or who had been committed for serious felonies, were excluded from this more favorable calculation under former section 2933, and instead earned conduct credit under former section 4019. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(3)].) The September 2010 version of section 4019 expressly applied only to defendants who committed their crimes on or after the effective date of September 28, 2010. (Stats. 2010, ch. 426, §§ 2, 5 [former § 4019, subd. (g)].) The September 2010 version of section 4019 and section 2933 were in effect when defendant committed his offenses in December 2010 and when he was sentenced in June 2011.

Section 4019 was amended again, operative October 1, 2011, and now provides that defendants earn conduct credit at a rate of two days for every two days spent in local custody.¹⁰ (§ 4019, subds. (b), (c), & (f); Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53; *Brown, supra*, 54 Cal.4th at p. 318, fn. 3.) In contrast to the January 2010 version of the statute, the October 2011 version of section 4019 does not disqualify defendants with prior serious felony convictions from this rate. (§ 4019, subds. (b), (c), & (f).) However, the October 2011 version of section 4019 applies only to “prisoners who are confined . . . for a crime committed on or after October 1, 2011,” and the statute specifically provides that any days earned by “a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).) Section 2933 was also amended, operative October 1, 2011, and it no longer provides for presentence conduct credit. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16.)

¹⁰ Section 4019, subdivision (f) currently provides: “It is the intent of the Legislature that if all days are earned under this section, *a term of four days will be deemed to have been served for every two days spent in actual custody.*” (Italics added.)

Analysis

For the reasons stated below, we hold that the prospective application of the October 2011 version of section 4019 does not violate equal protection principles. Consequently, defendant is not entitled to additional conduct credit.

Defendant committed the offenses at issue on December 17, 2010. He was arrested that day and remained in custody until he was sentenced on June 2, 2011, a total of 168 days. All of his local custody was served while the September 2010 version of section 4019 was in effect. Since defendant had a prior conviction for a serious felony, he was not entitled to the one-for-one credits under former section 2933 and section 4019 is controlling. (Stats. 2010, ch. 426, § 1; [former § 2933, subd. (e)(3)].) Under the September 2010 version of former section 4019, defendant was entitled to two days conduct credits for every four days he spent in local custody. (Stats. 2010, ch. 426, §§ 2, 5; [former § 4019, subds. (b), (c), (f)].) The trial court used that formula and awarded him 84 days of conduct credit. On appeal, defendant claims he is entitled to the more favorable formula in the October 2011 version of section 4019 on equal protection grounds, that he was therefore entitled to two days of conduct credit for every two days he spent in local custody, and that he should be awarded an additional 84 days of conduct credit. (§ 4019, subds. (b), (c) & (f).)

Similarly, the defendant in *Brown* was sentenced under the pre-January 25, 2010 version of former section 4019, which “entitled him to two days of conduct credit for every four days spent in local custody.” (*Brown, supra*, 54 Cal.4th at p. 318.) On appeal, the defendant in *Brown* argued that he was entitled to the more favorable formula in the 2009 version of section 4019 (operative January 25, 2010) on equal protection and other grounds and that he was therefore entitled to “two days of conduct credit for every two days spent in local custody.” (*Ibid.*) Given the similarity between the different versions of section 4019 at issue in this case and in *Brown*, and the similarity between defendant’s

equal protection argument in this case and the equal protection argument in *Brown*, we find *Brown* controlling.

Regarding the equal protection claim, the *Brown* court explained: “The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Accordingly, ‘ “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” ’ (*Ibid.*) ‘This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ (*Ibid.*)” (*Brown, supra*, 54 Cal.4th at p. 328.) The *Brown* court explained that “the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Id.* at pp. 328-329.)

Defendant, like the defendant in *Brown*, discusses the holdings in *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*) and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*). In *Strick*, “the Court of Appeal rejected the claim that an expressly prospective law increasing conduct credits violated equal protection unless applied retroactively to prisoners who had previously earned conduct credits at a lower rate.” (*Brown, supra*, 54 Cal.4th at p. 329, citing *Strick*, at p. 913.) Defendant argues that *Strick* was wrongly decided, that it is distinguishable, and that its reasoning “makes little sense.” He urges us to follow a rule implied in *Sage*. In response to the same argument, *Brown* found the decision in *Strick* “persuasive.” (*Brown*, at p. 329.) The court explained that *Strick* had reasoned that “ ‘[t]he obvious purpose of the new section,’ . . . ‘is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain

good conduct while they are in prison.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.’ . . . ‘Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ ” (*Ibid.*, quoting *Strick, supra*, at p. 913.)

Brown also rejected the contention that its decision in *Sage* “implicitly rejected the conclusion” that the Court of Appeal reached three years later in *Strick*, namely “that prisoners serving time before and after a conduct credit statute takes effect are not similarly situated.” (*Brown, supra*, 54 Cal.4th at pp. 329-330.) The court explained that the defendant in *Sage*, “had been committed to the state hospital under the mentally disordered sex offender law [citation] and, after being found not amenable to treatment, sentenced to state prison for a felony. The question before the court was whether the defendant was entitled to conduct credit for the time he had spent in county jail before being sentenced. The version of section 4019 then in effect (§ 4019, as amended by Stats. 1978, ch. 1218, § 1, p. 3941) authorized presentence conduct credit for misdemeanants who later served their sentences in county jail but not for felons who were eventually sentenced to state prison. Finding no ‘rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons’ . . . the court held the statute’s unequal treatment of felons and misdemeanants for this purpose violated equal protection.” (*Brown, supra*, at p. 330.) *Brown* observed that “[t]he unsigned lead opinion ‘by the Court’ in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior” and concluded that a “brief allusion to that argument in a concurring and dissenting opinion . . . went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered” the court declined “to read *Sage* for more than it expressly holds.” (*Ibid.*)

Defendant, like the defendant in *Brown*, argues that this case is controlled by *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*). In *Kapperman*, the Supreme Court had “concluded that equal protection required the retroactive application of an expressly prospective statute granting credit to felons for time served in local custody before sentencing and commitment to state prison.” (*Brown, supra*, 54 Cal.4th at p. 330.) *Brown* disagreed with this contention and distinguished *Kapperman* stating, “Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated.” (*Ibid.*)

For these reasons, we reject defendant’s claim that the October 2011 version of section 4019 must be applied retroactively to satisfy equal protection principles. Following *Brown*, we conclude that defendant is not entitled to additional conduct credit under the October 2011 version of section 4019. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Facility Fees (Gov. Code, § 70373)

Defendant argues that the abstract of judgment must be corrected to reflect the correct amount of the Government Code section 70373 facilities fee imposed at the time of sentencing.

At sentencing, the court stated that it was imposing “a \$160 court security fee, a \$120 facility fee,” and other fines and fees. But the abstract of judgment orders defendant “to pay \$160.00 court security fees, \$160.00 ICNA fees,” as well as the other fines and fees imposed by the court. Government Code section 70373, subdivision (a)(1) authorizes a fee of \$30 for each conviction. Since defendant was convicted of four

offenses, he argues that the correct amount of the fee was \$120, as stated by the court. The Attorney General does not respond to this contention.

“ ‘Rendition of judgment is an oral pronouncement.’ ” (*People v. Mesa* (1975) 14 Cal.3d 466, 471, superseded by statute on other grounds as stated in *People v. Turner* (1998) 67 Cal.App. 4th 1258, 1268.) “An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Courts may correct clerical errors in their records at any time and appellate courts that have assumed jurisdiction over a case may order the correction of abstracts of judgment that do not accurately reflect the trial court’s oral pronouncement of judgment. (*Id.* at pp. 185, 187.) We shall order the abstract of judgment amended to conform to the court’s oral pronouncement of judgment.

DISPOSITION

The clerk of the court is directed to amend the abstract of judgment by deleting the “\$160.00 ICNA fees” and adding a \$120 court facility fee in its place. The clerk is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.