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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID CASTOR,

Defendant and Appellant.

A104026

(Lake County  
Super. Ct. No. CF31278.01)

David Castor appeals from convictions of felony possession of a controlled substance and misdemeanor evasion of a police officer, driving with a suspended license and possession of drug paraphernalia. He contends the trial court improperly denied his motion for a directed verdict of acquittal because the evidence was insufficient to establish he was the driver of the car in question; violated his constitutional right to confrontation of witnesses by permitting eyewitness testimony that he was the driver; abused its discretion in allowing the eyewitness testimony; abused its discretion in denying probation; and erroneously denied 33 days of credit for time served. Respondent concedes the last of these contentions. We shall order the judgment modified to reflect the correct calculation of credits and affirm.

STATEMENT OF THE CASE

Appellant was charged by information filed on April 7, 2003, with felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); misdemeanor evasion of a police officer (Veh. Code, § 2800.1, subd. (a)); misdemeanor driving with a suspended license, with a prior conviction of the same offense (Veh. Code, § 14601.1,

subd. (a)); and misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364).

Jury trial began on June 3, 2003. On June 4, at the conclusion of the prosecution's case, appellant's motion for entry of a judgment of acquittal (Pen. Code, § 1118.1) was denied.<sup>1</sup> Jury deliberations began on June 5 and, after about two and one-half hours, the jury found appellant guilty as charged on all counts. The court found the alleged prior conviction to be true.

On August 8, the court denied probation and sentenced appellant to the two-year middle term on the conviction for possession of a controlled substance, with concurrent 90-day jail terms on the misdemeanor convictions. Appellant was awarded six days of presentence custody credit. Several fines and fees were imposed.

Appellant filed a timely notice of appeal on September 2, 2003.

#### STATEMENT OF FACTS

At about 7:30 p.m. on September 16, 2002, Lake County Deputy Sheriff Richard Ward was driving south on Big Canyon Road toward Middletown, in uniform and in a marked patrol vehicle. It was dusk. Ward noticed a brown Chevrolet Cavalier driving behind him without its headlights on. He pulled to the right side of the road and waited for the car to pass, then proceeded to follow it. He observed that the driver of the car had shoulder length hair but could not tell the driver's gender, age or race.

As Ward followed, the car started to pull away and Ward turned on the solid red light on his vehicle to initiate an enforcement stop. The car pulled away at about 45 to 50 miles per hour. Ward activated all his vehicle's lights (red, blue and yellow) and his siren, but the Chevy continued to pull away, so Ward called central dispatch to say he was in a vehicle pursuit. The Chevy was driving into the opposing lane of traffic, trying

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<sup>1</sup> The motion was based on the argument that the prosecution had not proved one of the elements of the Vehicle Code section 2800.1 offense, that the officer was wearing a distinctive uniform. The court found there was sufficient circumstantial evidence to reasonably infer the officer was wearing a uniform. Although the court did not recall Ward testifying that he was wearing a uniform, the record reflects that he did so testify.

to evade Ward. At this point, Ward had driven just under a quarter of a mile since activating the first red light. The road was mountainous, downhill, with a lot of curves, through a rural area with very few houses or businesses and no street lighting. After about one-half mile, the car abruptly pulled into the other lane of traffic and the driver got out, ran forward, turned to look at Ward, then continued to run downhill into a ravine.

Ward stopped his vehicle less than 10 feet behind the Chevy, having contacted dispatch as he was pulling in because he anticipated the driver leaving the car. Ward and the Chevy's driver exited their vehicles simultaneously, but Ward stopped to notify dispatch, so that when he began to chase the driver, the driver was about 20 to 25 yards away. From the reports of Ward's calls to dispatch, it appeared that he first notified dispatch of the vehicle pursuit at 7:37 p.m., then of the foot pursuit at 7:38 p.m. Neither of these calls included a description of the suspect.

As soon as the driver exited his car and turned toward Ward, Ward recognized him as appellant. Ward had previously come into contact with appellant in May 2002 on at least three separate occasions, within arms-reach in well-lit conditions.

Ward chased the driver, who jumped over a fence and ran into the brush line, looking back at Ward again when Ward called for him to stop. Ward continued to follow him into approximately eight-foot-high Manzanita brush, losing sight of him within seconds, after about 50 yards, but following the sound for about 300 to 350 yards before losing contact with him. At this point, Ward tried to inform dispatch that the suspect was David Castor, give a clothing description and inform additional units of his location, but he was unable to call out on his radio from the hilly, mountainous area.

Ward returned to his patrol car and contacted central dispatch with the Chevy's license plate number at 7:50 p.m. Department of Motor Vehicle (DMV) records indicated the license plate was associated with a Pontiac, with a different vehicle identification number from that on the Chevy, registered to owner Jaime Louis Hernandez. At 7:53 p.m., Ward requested a DMV check on the driver's license status of David Castor. This was the first time appellant's name was mentioned in Ward's communications with dispatch. After checking on appellant's status, Ward called in the

vehicle identification number on the Chevy, which DMV records showed as belonging to registered owner Patricia Radcliff, with a release of liability to David Castor. A subsequent review of law enforcement records showed that this car had not been reported stolen between September 16 and the date of trial. At 7:58 p.m., Ward reported to dispatch that the suspect was wearing blue jeans. Although this was the only clothing description reflected in the dispatch records, Ward testified that he additionally reported a black shirt and that the dispatch log would not necessarily be a full report of his call.

Ward testified that he had appellant's name in mind as the person he had chased before dispatch gave him the name David Castor in relation to the Chevy's vehicle identification number. Ward stated that he was "able to visually identify him when he turned and looked at me." Ward's written report of the incident did not mention that he had recognized the driver of the Chevy from prior contacts.

Ward found a bundle of blue clothes on the passenger seat of the Chevy and, inside the bundle, two baggies containing a white powdery substance and a glass pipe commonly used to smoke methamphetamine. The baggies were subsequently confirmed to contain 2.08 grams of a substance containing methamphetamine. Ward found a number of documents with appellant's name on them lying "loosely" in the trunk of the car, including a 1992 California income tax return and a 1992 W-2 wage and tax statement; a 1992 renter's credit check; an envelope addressed to the Franchise Tax Board with the name "D. Castor" on the return address; an unsigned 1993 child support order naming the respondent as David Castor; and a 1994 document entitled "Family Support Division" addressed to David Castor.

### Defense

Kenneth Fulks testified that he hired appellant to help him move from Stockton to Clearlake on September 14, 15 and 16, 2002. He met appellant when he asked a group of men outside his new neighbor's house if one of them would like to help unload his truck and appellant volunteered. Fulks knew this was on September 14, because he bought pizza and soda for appellant's birthday on September 15, and remembered appellant was with him the day before and day after this. On September 14, appellant went with Fulks

to Stockton and stayed overnight at Fulks's home. On September 15, they packed the tools in Fulks's garage and drove to Clearlake in the evening, unloaded, and returned to Stockton. While he was in Stockton on September 16, Fulks picked up a check from the office of his realtor, from whom he had borrowed several thousand dollars over the course of two months for moving expenses. Later that day, the realtor brought another check to Fulks's house. Fulks and appellant packed additional items and, in the evening, Fulks and appellant drove to Clearlake again. They arrived in Clearlake at 11:30 p.m.; Fulks was sure of the time, having checked his watch because he was asking appellant to continue helping him. Appellant could not continue, so Fulks dropped him off at the Tower Mart and paid him \$300, and they parted ways. Fulks unloaded his vehicle and the next morning returned to Stockton. Fulks did not see appellant driving a brown Chevrolet Cavalier during the three days appellant was with him.

Fulks initially testified that he did not leave appellant alone at his home in Stockton on September 16, then testified that appellant remained at the house when Fulks went to get the check from his realtor. Later, Fulks testified that his realtor brought him one check on September 16, and he guessed he got another from the realtor's office but was not sure of this. He did not recall when he had last received a check from the realtor prior to September 16, saying it "could have been any day." He did not recall telling a district attorney's investigator that he had gotten some money from his realtor the day after he paid appellant, and stated that if he had said this, he was mistaken. Two checks from the realtor to Fulks, dated September 16, were introduced into evidence. Fulks testified that he took the checks to the bank to cash them, although he then stated he did not really remember going but was sure he did because he needed the money. He did not specifically recall taking appellant to the bank with him, but was "sure" he did because he "most likely" would have done so. Fulks stated that he did not think he would have to remember "all this stuff."

The next time Fulks saw appellant was months later, in about mid-March. Appellant came to Fulks's house and asked if Fulks remembered him, then asked if Fulks remembered appellant helping him move in September and buying appellant pizza on his

birthday. Fulks indicated he remembered. He did not remember what days of the week appellant worked for him.

Phil Adams testified that appellant's Chevy was parked in his driveway for a couple of months prior to September 2002. The car did not have a license plate in the back; Adams was not sure about the front. Appellant did not leave the car keys with Adams, and Adams did not know whether the car was locked. In mid-September, Adams was moving to a different residence and needed to tow a truck out of the driveway, but the truck was blocked by appellant's car. Adams had not seen appellant in a couple of months and did not know where to find him. On September 14, Adams had a friend, Travis Crain, move appellant's car onto the street. Adams had to work the following day, then on the afternoon of September 16, went back to his old residence and discovered appellant's car was not there. Adams next talked to appellant a couple of weeks later, and when he told appellant that his car was gone, appellant acted "surprised" but not upset. Appellant did not suggest the car might have been stolen and he and Adams discussed the possibility that the car might have been towed.

Travis Crain testified that he moved a brown car out of Adams's driveway, which was steep, on about September 14, 2002. The car was unlocked and Crain left it unlocked at the bottom of the hill.

### Rebuttal

District attorney investigator John Flynn testified that Fulks told him he received the two checks from his realtor the day after he dropped appellant off at the Tower Mart. Flynn obtained from the realtor copies of checks he had written to appellant, which showed, in addition to the two checks dated September 16, checks written on August 23, 24 and 26 and September 4, 6, 11, 12 and 19.

## DISCUSSION

### I.

As indicated above, appellant moved for a directed verdict of acquittal at the end of the prosecution's case in chief. He contends the trial court erred in denying this motion because the evidence was insufficient to establish that appellant was the driver of

the vehicle Officer Ward pursued, in that Ward's identification of appellant lacked sufficient foundation and was unreliable.

Penal Code section 1118.1 provides, in pertinent part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

"It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.) To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* [(1980)] 26 Cal.3d [557], 578, italics added; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 315-319.) The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' (*People v. Johnson, supra*, at p. 577.) The substantial evidence test applies both when an appellate court is reviewing on appeal the sufficiency of the evidence to support a conviction and when a trial court is deciding the same issue in the context of a motion for acquittal under Penal Code section 1118.1 at the close of evidence." (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

Appellant points out that many courts have expressed concerns about eyewitness testimony. In *People v. Cardenas* (1982) 31 Cal.3d 897, our Supreme Court stated: "The only incriminating evidence introduced by the prosecution against appellant was the identification testimony of the eyewitnesses [fn. omitted]. Both this court and the United States Supreme Court have recognized that eyewitness identifications are often unreliable. (*United States v. Wade* (1967) 388 U.S. 218, 228; *People v. Bustamonte*

(1981) 30 Cal.3d 88, 98.) [¶] As the Supreme Court noted in *Wade*, “[the] vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. [Fn. omitted.] Mr. Justice Frankfurter once said: “What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy . . . .” [Citation.]’ (*United States v. Wade, supra*, 388 U.S. at p. 228.)” (*People v. Cardenas*, at p. 908.) In *People v. Palmer* (1984) 154 Cal.App.3d 79, 86, the court noted the “admonition of our Supreme Court that the defendant who most needs protection from erroneous identification is one who is implicated primarily or solely by eyewitness testimony. (*People v. Bustamonte* [ *supra*,] 30 Cal.3d [at p.] 101.)”

Appellant additionally cites cases finding eyewitness testimony by law enforcement officers particularly problematic. In *United States v. Butcher* (9th Cir. 1977) 557 F.2d 666, police officers who had had contact with the defendant prior to the robbery with which he was charged identified him as the perpetrator in a surveillance photograph. The court stated that although this lay opinion testimony by the officers was “constitutionally permissible,” it “did increase the possibility of prejudice to the defendant in that he was presented as a person subject to a certain degree of police scrutiny.” (*Id.* at p. 669.) Although *Butcher* held that admission of the testimony, if error, was not prejudicial, the court expressed the opinion that “use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution.” (*Id.* at p. 670; see *United States v. Young Buffalo* (9th Cir. 1979) 591 F.2d 506, 513 [admission of testimony of estranged wife and probation officer that person in surveillance resembled defendant not prejudicial]; *United States v. Calhoun* (6th Cir. 1976) 544 F.2d 291, 296-297 [admission of testimony of parole officer identifying person in surveillance photograph as defendant constituted abuse of discretion].) The focus of these cases is not on the perception of the officer making the identification, but the potential prejudice to the defendant from suggesting to the jury that he or she had prior contacts with law enforcement officers.

Appellant notes that some California cases have viewed a law enforcement background as enhancing the value of an eyewitness identification. Appellant cites *People v. Palmer, supra*, 154 Cal.App.3d 79, 84, which stated: “No eyewitness professed any expertise in identification nor claimed a law enforcement background (a factor deemed significant in evaluating eyewitness testimony in *People v. Roberts* (1967) 256 Cal.App.2d 488, 491 [(*Roberts*)], and *People v. Yeats* (1984) 150 Cal.App.3d 983, 992 [(*Yeats*)].)”

*Roberts*, in fact, did not attribute any particular expertise to police officers as eyewitnesses; it merely held that the testimony of two police officers who identified the defendant after direct observations and review of surveillance photographs “must be deemed substantial evidence.” (*Roberts, supra*, 256 Cal.App.2d at p. 491.) The cases cited by *Roberts* for this proposition express the general principle that the testimony of one witness is sufficient to establish a fact in evidence. (*People v. Sanders* (1962) 206 Cal.App.2d 479, 482; *People v. Muse* (1961) 196 Cal.App.2d 662, 664.) *Roberts* found prejudicial an error in failing to give a requested jury instruction that pinpointed the theory of the defense case by directing the jury to acquit if it had a reasonable doubt as to whether the officers could identify the defendant from the concealed place from which they had observed the offense. (*Roberts*, at p. 494.)

In *Yeats, supra*, 150 Cal.App.3d 983, the only positive identification of the defendant was by the victim, a police officer. *Yeats* held the trial court erred in failing to give requested jury instructions correlating the issues of identity and reasonable doubt, but found the error harmless because “the conviction was based upon an in-court identification by a victim with a high level of training in making accurate observations, who had an adequate opportunity to observe the defendant at the scene, and who made a positive pretrial identification from a proper photographic lineup.” (*Id.* at p. 991.)

In the present case, it might be said that the identification was made by a person with training in making accurate observations. Moreover, unlike the situation in *Yeats*, Ward was testifying to his recognition of a suspect with whom he had had prior encounters, not to his perception of the characteristics of a stranger. Whether Ward had

adequate opportunity to visually recognize the suspect, and whether he did so before learning appellant's name was associated with the Chevy, were questions of fact for the jury.

Appellant complains that the foundation for Ward's identification was insufficient, in that there was no testimony about what appellant looked like when Ward last saw him or how that appearance compared to his appearance on the day of the present offenses, or about the length of Ward's prior contacts with appellant. He relies upon *People v. Mixon* (1982) 129 Cal.App.3d 118, in which two police officers identified the defendant as the subject partially depicted in a surveillance photograph. The officers' personal knowledge of the defendant was explored at a hearing outside the presence of the jury. One of the officers had seen the defendant numerous times in his 10 years on the police force, including two weeks before the robbery, had been within speaking distance of the defendant several times and was familiar with his features, but had not conversed with him. The other officer became acquainted with the defendant about eight years before the hearing and had seen him "quite a few" times, although not very often in the year preceding the robbery; he had been the defendant's counselor at CYA and had spoken to him face-to-face for periods of up to two hours. Both officers quickly identified the subject in the photograph as the defendant. (*Id.* at pp. 129-130.) *Mixon* held the prosecution had established a personal knowledge foundation for the officers' identification, based on their prior contacts with the defendant, and the testimony could be useful to the jury because it could aid in identifying the partially depicted subject in the photograph. (*Id.* at p. 131.)

In the present case, Ward testified on direct examination that he had come into contact with appellant in May 2002, about four months before the date of the offenses, on at least three separate occasions, within arms-reach in well-lit conditions. On redirect examination, Ward acknowledged that he did not put in his report that he had had prior contact with appellant. Ward explained that he knew people in the community because he lived and worked there, and that if he knew someone by name he would refer to the

person by name in a report without providing details about how he came to know the person.

The prosecution did not attempt to provide more detail about Ward's prior contacts with appellant, in accordance with pretrial discussions on this issue. The issue, as the court presented it in a conference outside the presence of the jury, was that Ward's contacts with appellant occurred when he was working at the county jail and appellant was an inmate. Ward had also seen photographs of appellant posted at the police station related to outstanding warrants. The parties discussed the problem that mentioning Ward had had contact with appellant while appellant was in jail would be prejudicial, but that not mentioning the circumstances of the contact would leave the jury to potentially prejudicial speculation. The prosecutor proposed that he would not ask where the contact occurred and would tell the police officer not to volunteer it, leaving defense counsel to decide as a tactical matter whether she wanted to pursue the subject on cross-examination. Defense counsel agreed this was "reasonable."

While the details surrounding the officers' knowledge of the defendant in *Mixon* was clearly greater than that presented here, the testimony in the present case was sufficient to establish a foundation for Ward's identification. Ward had had contact with appellant on at least three occasions, only about four months before the present offense, and these contacts occurred at arms-length and in well-lit conditions. This was sufficient basis to establish Ward's personal knowledge of appellant's appearance.

Appellant further argues the identification was unreliable for a number of reasons, including that Ward's description of the suspect was vague; Ward did not mention appellant's name in his calls to dispatch immediately before or after the foot pursuit; the incident occurred at dusk, in an area without artificial lighting; the incident lasted only a matter of minutes; and Ward was focused on the chase through difficult terrain. Appellant additionally points out that the incident report in which Ward's calls to central dispatch were documented shows a birthdate of September 15, 1960, next to the request for appellant's driver's license status. Appellant takes this to indicate that Ward did not independently recognize appellant—since the officer would have had no reason to know

appellant's birthdate—but rather concluded the driver was appellant after learning from dispatch that the Chevy was registered to appellant. Ward testified, however, that he did not include a date of birth in his request, that appellant's name first came up when he asked for the license check and not from any source over the radio, and that he requested the VIN check after checking on appellant's driver's license.

These were all factors bearing on the weight of Ward's testimony, and they were pointed out to the jury by defense counsel in closing argument. Ward was clear that he recognized appellant as soon as the driver of the car turned to him. He was also clear that he gave appellant's name to dispatch before receiving any information from dispatch tying appellant to the Chevy. It was for the jury to determine whether Ward's testimony was credible. “Although the appellate court must ensure the evidence is reasonable in nature, credible, and of solid value (*People v. Johnson, supra*, 26 Cal.3d at p. 576), it must be ever cognizant that ‘ “it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends . . . .” ’ (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds, *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) Thus, if the verdict is supported by substantial evidence, this court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact-finder. (*People v. Samuel* (1981) 29 Cal.3d 489, 505; *People v. Kerr* (1951) 37 Cal.2d 11, 15.)” (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304.)

Appellant additionally argues the other evidence in the case failed to corroborate Ward's identification: the license plate on the car belonged to a different car owned by a different person; items in the car's trunk with appellant's name on them were several years old; and the record supports a conclusion that Ward formed his opinion that the driver was appellant after investigation of the car's VIN and search of the trunk brought appellant's name into the picture.

Again, these points were made to the jury at trial. Appellant put forth his alibi and his theory that his car had been stolen and driven by someone else at the time of the incident at issue. The strength of his alibi was undermined by Fulks's uncertainty as to

many details of the days he said he spent with appellant; his stolen car theory was undermined by the fact that the car was never reported stolen. In any event, it was for the jury to determine the credibility of the witnesses and persuasiveness of the theories presented. Substantial evidence supports the conclusion that appellant was the driver of the car.

## II.

Appellant next contends his constitutional right to confront witnesses against him was violated by limitations the trial court placed on his cross-examination of Ward. He complains that defense counsel was prohibited from cross-examining Ward about his prior contacts with appellant and urges that such cross-examination would have undermined Ward's credibility by "eliciting his bias and demonstrating unreliability based on failures of recollection regarding appellant and the alleged contacts."

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' . . . ' "[T]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" ' [(*Davis v. Alaska* (1974) 415 U.S. 308, 315-316, quoting 5 J. Wigmore (3d ed. 1940) Evidence, § 1395, p. 123 (emphasis in original).)]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' [(*Davis v. Alaska*, at p. 318.)]" (*Delaware v. Van Arsdall*, at p. 680.) The Confrontation Clause, however, does not "prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance." (*People v. Box* (2000) 23 Cal.4th 1153, 1203; *Delaware v. Van Arsdall*, at p. 679.)

Appellant's argument misstates what occurred in the present case. As indicated above, at the beginning of trial, the attorneys discussed with the court how to handle

Ward's eyewitness testimony. The prosecutor stated that he expected the court would not want Ward to mention on direct examination that his prior contact with appellant occurred when appellant was in jail, but that he would ask Ward questions like how many feet away from appellant he was "to give it a flavor for whether or not he did know it was the Defendant and had the opportunity to make those observations." Defense counsel, after noting that she had only learned about the issue that morning and that the sole issue in the case would be identity, stated that having Ward refer to prior contact with appellant without further explanation would leave room for the jury to speculate about the nature of the contact. Counsel stated she was "not happy" with either Ward stating that the contacts occurred at the jail, which would potentially prejudice appellant, or leaving the matter open to speculation, and that she was "not sure" what to do with the situation. The court asked whether appellant planned to testify, in which case a prior misdemeanor conviction for receiving stolen property might be admitted for impeachment and might lessen the impact of Ward's reference to a jail setting for his contact with appellant.

After discussion with appellant, defense counsel stated appellant was likely to testify and indicated she was "not sure" the prejudice from reference to jail by Ward would be worse than having the jury speculate as to the nature of the officer's contact with appellant. At this point, the prosecutor suggested that he would not ask Ward where the contact occurred and would direct Ward not to volunteer it unless directly asked, leaving defense counsel to make a tactical choice as to what to ask Ward on cross-examination. Defense counsel agreed, "that's reasonable." The court expressed concern that any questioning be limited to where the contact occurred and not the reasons for appellant being in jail, and defense counsel commented that she "might not even go there," but knew to be "very, very careful with it." The court then raised the question of photographs of appellant Ward had seen at the police station and defense counsel moved to exclude this evidence. The court stated that the prosecution should avoid this subject, at least initially.

The trial court here did not prevent defense counsel from questioning Ward as to the circumstances of his contacts with appellant; the decision whether and how to cross-

examine Ward was expressly left to defense counsel. The court required only that counsel avoid informing the jury *why* appellant was in jail if counsel chose to elicit from Ward the fact that this was where his contact with appellant occurred.

Appellant argues defense counsel did not make a tactical decision to forego cross-examining Ward on the foundation for his identification of appellant, but rather “had no reasonable alternative in light of the court ruling allowing Deputy Ward’s testimony.” This argument is really an attack on the underlying decision to admit the eyewitness testimony. Given the decision to admit this evidence, as discussed with the trial court, the defense had two alternatives: elicit from Ward the information that his prior contact with appellant was at the county jail, or leave the circumstances of the contact unexplained and risk the jury’s speculation about these circumstances. That the choice was difficult does not make the court’s ruling unconstitutional. “ ‘[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ ” (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) “The criminal process, like the rest of the legal system, is replete with situations requiring ‘the making of difficult judgments’ as to which course to follow. [(*McMann v. Richardson* (1970) 397 U.S. 759, 769.)] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.” (*McGautha v. California* (1971) 402 U.S. 183, 213.) Here, the trial court made a decision appellant did not like in allowing the eyewitness testimony, but it did not prevent the defense from cross-examining Ward.

### III.

Appellant also contends the trial court abused its discretion in admitting Ward’s eyewitness testimony. Appellant contends the evidence was more prejudicial than probative.

Evidence Code section 352 provides: “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.” “We will not disturb a trial court’s exercise of discretion under Evidence Code section 352 ‘ “except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ (People v. Rodrigues (1994) 8 Cal. 4th 1060, 1124.)” (People v. Jones (1998) 17 Cal.4th 279, 304; People v. Harrison (2005) 35 Cal.4th 208, 230.)

Appellant relies upon *United States v. Calhoun, supra*, 544 F.2d 291, 295-297. In that case, the trial court permitted the prosecution to introduce testimony from the defendant’s parole officer—without revealing his relationship as such—that the person depicted in a surveillance photograph was the defendant. The court questioned the necessity for the evidence, as the jury was able to view the photograph and draw its own conclusions; while there was some evidence the defendant’s appearance was different around the time of the charged robbery than at trial, the parole officer was unable to recall certain aspects of the defendant’s appearance at that earlier time; and there was no reason the prosecution could not have used a different identification witness whose relationship with the defendant did not implicate the defendant’s criminal history.

The present case presents an entirely different situation. Ward’s testimony provided information the jury could not possibly have gathered in any other way: Ward was not identifying appellant from a photograph the jury could have reviewed, but was relating his observation, at the time of the offense, of a person he recognized as appellant. This observation was of obvious probative value, as Ward was the only witness who observed the driver of the car. Whether Ward’s identification was accurate was a question for the jury to evaluate in light of both the circumstances in which Ward saw the driver at the time of the offense and the circumstances in which the officer had previously become familiar with appellant’s appearance. The jury was told that Ward had had several contacts with appellant only months before the incident, at arms-length and in

well-lit conditions. Defense counsel chose not to probe more deeply into the details of the prior contacts by asking questions such as how long the interactions lasted or what appellant's appearance was on the prior occasions. The prosecutor had agreed to tell Ward not to volunteer where the contact with appellant occurred unless directly asked. In any event, as defense counsel recognized at trial, it is not obvious that revealing the contact occurred when appellant was in jail would necessarily be more prejudicial than leaving it to the jury to speculate how Ward might have come into contact with appellant. Given the high probative value of Ward's testimony, we find no abuse of discretion in allowing Ward's testimony.

Appellant further contends that the prejudicial effect of Ward's eyewitness testimony was amplified when the trial court failed to reread the officer's testimony as requested by the jury. Shortly after the jury began deliberations, it requested a read-back of "Kenny Fulks' testimony about dropping David Castor off and their conversation at Tower Mart." While waiting for the reporter to find the relevant portions of the testimony, the jury requested a copy of the jury instructions. After a lunch break, the requested portions of the testimony were read to the jury and the instructions were provided. After a short period of deliberations, the jury requested "Officer Ward's report of car stop and subsequent chase." With the agreement of counsel, the court told the jury that the physical report was not in evidence but they could consider witness's testimony about the report. The jury then requested a read-back of "Officer Ward's testimony of car stop and events that followed." The court and counsel agreed that this general request would involve most of Ward's testimony and the court reporter estimated read-back would take about 90 minutes. The court proposed letting the jury know the length of the testimony they requested and asking whether they wanted to hear this or make a more focused request. Counsel agreed. The court then told the jury that its request would cover most of Ward's testimony and take about 90 minutes to read back, and stated: "Now, I wasn't sure if that's what you meant or if your subject of inquiry could actually be more focused than that which would allow us to get into certain aspects of the testimony on a more limited—or whether it was just a general request to have it all read

back.” The court directed the jury to think about it and inform the court so it could provide the testimony. Minutes later, the jury returned a guilty verdict.

“After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.” (Pen. Code, § 1138.)

“Pursuant to section 1138, the jury has a right to rehear testimony and instructions on request during its deliberations. (*People v. Wader* (1993) 5 Cal.4th 610, 661; *People v. Pride* (1992) 3 Cal.4th 195, 266.) Although the primary concern of section 1138 is the jury’s right to be apprised of the evidence, a violation of the statutory mandate implicates a defendant’s right to a fair trial conducted ‘ “substantially [in] accord[ance with] law.” ’ (*People v. Weatherford* (1945) 27 Cal.2d 401, 420; *People v. Butler* (1975) 47 Cal.App.3d 273, 280.)” (*People v. Frye* (1998) 18 Cal.4th 894, 1007.)

Defense counsel did not object to the court’s response to the jury’s request to hear Ward’s testimony; as stated above, she agreed to the court’s proposed response. Appellant relies upon caselaw stating that the jury’s right under Penal Code section 1138 cannot be waived by defense counsel’s acquiescence in the instructions. (*People v. Butler, supra*, 47 Cal.App.3d at pp. 283-284; *People v. Litteral* (1978) 79 Cal.App.3d 790, 796-797.) On the other hand, our Supreme Court has found waiver in such circumstances (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193; *People v. Price* (1991) 1 Cal.4th 324, 414) and has expressed doubt whether *Butler* and *Litteral* correctly allowed a defendant to raise a violation of the jury’s right to read-back of evidence (*People v. Hillhouse* (2002) 27 Cal.4th 469, 505).

In any event, appellant recognizes that the court’s action—telling the jury how long the requested testimony would take and asking the jury to decide whether it wanted to refine its request—is not error. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 506; *People v. Anjell* (1979) 100 Cal.App.3d 189, 202-203.) Appellant claims, however, that

in the context of this case, the failure to reread testimony of the sole eyewitness denied him a fair trial. We are not persuaded. In *Anjell*, the jury requested readback of three witnesses' testimony. The court told the jury it would take one and one-half to two hours to read the testimony of one of the witnesses, three to three and one-half hours for the second and one to one and one-half for the third. The court assured the jurors they could hear the testimony if they wanted to, but directed them to discuss what they needed given the time estimates. This is precisely what happened in the present case: The court simply told the jurors how long the testimony it requested would take and asked them to decide whether they wished to hear the entire testimony or define more narrowly the portions with which it was concerned.

This case is quite unlike *People v. Henderson* (1935) 4 Cal.2d 188, 194, upon which appellant relies. There, the jury was misled: It asked for a readback of testimony regarding the time the offense occurred and was given only some, not all, of the relevant testimony. Nothing of this sort happened here. Appellant further cites the dissenting opinion of Justice Peters in *People v. Gonzales* (1968) 68 Cal.2d 467, 473-475. In *Gonzales*, when the jury asked for readback of testimony, the judge advised that the reporter's notes would not be available until the next day, the jury could not be released until a verdict was reached, it would be unfair to terminate deliberations simply because the jury did not want to wait for the testimony, and the jurors should discuss what they wanted to do. The jury retired and reached a verdict 15 minutes later. While Justice Peters found the trial court's response to the jury coercive, the majority did not. In any event, the readback requested in the present case would not have imposed anything like the hardship threatened to the jury in *Gonzales*.

Appellant further argues that the prejudicial effect of Ward's testimony was enhanced by the trial court's failure to instruct the jury sua sponte to consider the officer's testimony as it would any other witness at trial. As the trial court did not err in admitting the testimony, this contention is unavailing. To the extent appellant is claiming the failure to give such a sua sponte instruction as a separate ground for reversal, we are not persuaded. Assuming both that the claim is cognizable on appeal despite appellant's

failure to request the instruction below, and that the instruction should have been given (see *People v. Hill* (1998) 17 Cal.4th 800, 842-843 & fn. 8, 846 [trial court should have instructed jury to give no extra weight to testimony of courtroom bailiff, who testified about incriminating remarks defendant made to him during the trial]), we find no prejudice. Ward's testimony was inherently prejudicial because it was the eyewitness testimony that directly identified appellant as the driver of the car. It was persuasive because it was based on recognition of appellant as someone Ward knew, rather than identification of a stranger. There was no question the car was appellant's, and appellant's theory that the car had been stolen was undermined by the fact the car had not been reported stolen. Appellant's alibi was weakened by Fulks's uncertainty as to details of the events he described. There is no reasonable probability the jury would have reached a different conclusion about appellant's guilt if it had been instructed to view Ward's testimony as it would any witness's.

#### IV.

Appellant argues that the trial court abused its discretion in denying him probation. "Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. (Pen. Code, § 1203.1; *People v. Welch* (1993) 5 Cal.4th 228, 233.) The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. (Pen. Code, § 1203.1, subd. (b); Cal. Rules of Court, rule 414; *People v. Warner* (1978) 20 Cal.3d 678, 682-683.)" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) "[A] decision denying probation will be reversed only upon a clear showing of abuse and that the court acted in a capricious or arbitrary manner. (*People v. Edwards* (1976) 18 Cal.3d 796, 807; *People v. Hernandez* (1980) 111 Cal.App.3d 888, 898.) A heavy burden is placed on a defendant in attempting to show an abuse of discretion in denying a request for probation. (*People v. Goodson* (1978) 80 Cal.App.3d 290, 295.)" (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.)

In denying probation here, the trial court noted that the offenses themselves—a small amount of contraband in the felony offense and misdemeanor evasion of an

officer—would weigh “very strongly” toward granting probation for an individual with a “pretty clear record and background.” It was appellant’s background that caused the court to deny probation. The court described this background as including possession of a weapon in 1982; spousal abuse in 1984; battery in 1985; spousal abuse in 1987 and 1991<sup>2</sup>; burglary, receiving stolen property, carrying a concealed weapon and resisting an officer in 1992<sup>3</sup>; evading a police officer and being under the influence of a controlled substance in 1998; battery on a spouse in 1999; driving with a suspended license in 2000; receiving stolen property in 2001; and “a couple” of driving with a suspended license offenses in 2002 and 2003. The court acknowledged the convictions were misdemeanors, but stated, “there has been a lot of probation and a lot of opportunities, but there has been a track record now that has been developed showing a basic inability to abide by the rules of society and abide by what the law requires. It is not really a big burden to do those things, you know. It is not, the burden not to commit offenses.”<sup>4</sup>

Appellant contends that the court improperly considered dismissed counts in reviewing his criminal history. (See *People v. Harvey* (1979) 25 Cal.3d 754, 758; *People v. Jones* (1980) 108 Cal.App.3d 9, 16-17.) The probation report reflects that the 1984 spousal abuse to which the court referred was dismissed; also, although charged with burglary and possession of stolen property in 1991 and 1992, appellant was in fact

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<sup>2</sup> The latter offense was actually in 1992.

<sup>3</sup> The convictions for carrying a concealed weapon and resisting a peace officer, to which the court attributed a date of 1992, in fact occurred in 1994.

<sup>4</sup> The probation report listed appellant’s prior record as consisting of a 1982 conviction for possession of a concealed weapon; a 1982 conviction for possession of a firearm; a dismissed count of spousal abuse in 1984; a 1985 battery conviction; a 1987 conviction for spousal abuse; March 1993 convictions for receiving stolen property; 1994 convictions for carrying a concealed weapon and resisting a peace officer; a 1999 conviction for driving under the influence; a 1999 conviction for spousal battery; a 2000 conviction for driving on a suspended license; a 2001 conviction for receiving stolen property; and a 2002 conviction for driving on a suspended license. The report also listed pending charges, with a date of March 15, 2003, for driving on a suspended license after a DUI and driving without a license.

convicted of two counts of receiving stolen property. As appellant did not object to the court's reference to these counts at sentencing, however, any error is waived. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352.)<sup>5</sup> In any event, it is not improper for a court to consider prior arrests that did not result in convictions in deciding whether to grant or deny probation. (*Loder v. Municipal Court* (1976) 17 Cal.3d 859, 867-868; *People v. Phillips* (1977) 76 Cal.App.3d 207, 214.) The trial court's point here—that appellant had an extensive criminal history, albeit of misdemeanor offenses—was no less well-founded without consideration of the 1984 spousal abuse and 1991 and 1992 charges of burglary and possession of stolen property.

Appellant contends that some of the factors the probation report cited as weighing against probation were not supported by the record. Specifically, he takes issue with the probation report's statement that his prior performance on probation was poor. (Cal. Rules of Court, rule 4.414(b)(2).) According to appellant, he was only placed on formal probation once, in 1993, with the initial period extended until 1998 after a violation. Because the record does not indicate any of appellant's grants of summary or court probation were extended or noted for violations, appellant urges the record suggests these probations were successfully completed.

The summary of appellant's criminal history shows that he was placed on six months' probation in January 1983 for possession of a concealed weapon; his next offense, battery, occurred in March 1985 (after the probationary period); he was placed on three years' probation in February 1987 for spousal abuse; he was placed on three

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<sup>5</sup> *Harvey* and *Jones* involved consideration at sentencing of facts related to counts dismissed as part of the plea bargain that resulted in the conviction upon which sentence was being imposed, not dismissed counts appearing in the defendant's criminal history. As respondent points out, the record in the present case does not reflect the circumstances under which the counts at issue were dismissed, whether the dismissal was in connection with a plea bargain, or whether the dismissed counts were transactionally related to the counts resulting in convictions. Dismissed counts which are transactionally related to the count to which a defendant pled guilty may be considered at sentencing. (*People v. Bradford* (1995) 38 Cal.App.4th 1733, 1739.)

years' formal probation in March 1993 for two counts of receiving stolen property, subsequently extended to April 1998 after a probation violation; he was placed on three years' summary probation in July 1994, on convictions of carrying a concealed weapon and resisting a peace officer; he was again placed on three years' summary probation in February 1999 for driving under the influence, and on three years' summary probation in September 1999 for spousal battery; he was placed on 24 months' "Court probation" in May 2001, for driving on a suspended license, on three years' summary probation in August 2001 for receiving stolen property, and on two years' summary probation in May 2002 for driving on a suspended license. While the record does not indicate violations of probation, other than of the formal probation granted in 1993, appellant's history clearly demonstrates he was unable to remain free of criminal offenses even during probationary periods.

With respect to the probation department's statement that appellant's ability to comply with reasonable terms of probation was poor (Cal. Rules of Court, rule 4.414(b)(4)), appellant states that he showed insight into his behavior and willingness to comply with terms of probation in his written statement to the probation officer that he had recently realized his problems started with his drug use and he "needed to do something about it." Defense counsel argued at the sentencing hearing that appellant supported himself without public assistance, did not have mental health issues and had support in the community to help him during probation, including his girlfriend and Fulks, both of whom were present in court. The trial court was not required to accept these points, nor to weigh them more heavily than the evidence of appellant's past failure to abide by the law.

Appellant further argues that the probation report ignored mitigating factors relating to the offense. This point begs the question: The trial court made clear that it was not the factors related to the offense, but those related to appellant, that prompted the decision to deny probation.

Appellant also argues the probation department's recommendation to deny probation was based on misleading factors in that the probation report did not accurately

portray appellant's substance abuse history. The supplemental probation report stated that appellant had a "lengthy history of substance abuse, has previously completed a 30-day residential treatment program and continues to use illegal substances," as well as that appellant had a lengthy criminal history and had performed poorly on probation in the past. Appellant points out, as documented in the probation report, that although he began using alcohol, marijuana, methamphetamine, cocaine, LSD and mushrooms in his teenage years and early adulthood, he stopped using all but marijuana and methamphetamine in approximately his early 30's and, for about the last decade, had used only these two substances. The residential treatment program referred to in the probation report was in 1985, some 18 years before trial. Appellant urges that this history suggests the 1985 treatment program helped appellant discontinue some of his substance abuse, his history of substance abuse is more limited than the probation department indicated and appellant would likely comply with a treatment program monitored by a formal grant of probation.

This argument is not persuasive. After attending the 30-day treatment program in 1985, appellant did not stop using cocaine and LSD until 1989, mushrooms until 1992, and alcohol until 1994. He represented that he currently used marijuana once a month and methamphetamine 10 to 12 times a month. The probation department's reference to a lengthy history of substance abuse was not a distortion of this record. Moreover, the details of appellant's substance abuse history were presented in the probation report that the trial court reviewed.

Appellant suggests that the probation department was "concerned and distracted" by the fact that he had failed to contact the department as directed and had missed scheduled appointments. Defense counsel mentioned this aspect of the report at the sentencing hearing and told the court appellant had been "exceptionally cooperative"

with her. The court made no reference to appellant's cooperation with the probation department, or lack thereof, in explaining its decision to deny probation.<sup>6</sup>

#### IV.

Appellant's final contention is that the court erroneously denied him 33 days of credit for presentence time served. Appellant was arrested on March 16, 2003, and released on March 18; remanded into custody on June 27, 2003, and apparently released the same day; then remanded into custody on July 21, 2003, where he remained until August 8, 2003. The period of custody beginning July 21, 2003, was also attributable to a different case, in which appellant was charged with driving with a suspended license and without a license. For this reason, the trial court only awarded credit for the four days of actual custody in March and June, plus two days of conduct credit. This other case, which trailed the present one, was dismissed at sentencing on the present case. Accordingly, respondent concedes appellant is entitled to credit for the full amount of his presentence custody, a total of 33 days.

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<sup>6</sup> Appellant states that the court did not consider his missed probation appointments. At the page of the sentencing hearing transcript appellant cites, the court states that appellant's posttrial missing of a court date for medical reasons was "not a factor" in the court's decision.

The judgment shall be modified to reflect that appellant is entitled to 33 days of presentence custody credit and, as so modified, is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.