Filed 9/10/19 P. v. McCombs CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANDRE LAMAR McCOMBS, Defendant and Appellant.	B289732 (Los Angeles County Super. Ct. No. BA425802)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed and remanded with directions.

Jennifer A. Gambale, under appointment by the Court of Appeal, for Defendant and Appellant Andre Lamar McCombs.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Andre Lamar McCombs appeals from his judgment of conviction of one count of willful infliction of corporal injury on a cohabitant resulting in a traumatic condition (Pen. Code, § 273.5)[1] and one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). He contends the trial court erred by admitting the hearsay statements of victim Sheryl W. (Sheryl), whom the court found was unavailable to testify at trial due to wrongdoing by McCombs. Substantial evidence supports the court's ruling that Sheryl's statements were admissible because McCombs caused her not to attend trial.

In addition, McCombs contends, the People concede, and we agree remand is necessary to allow the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.) which amended sections 667 and 1385, effective January 1, 2019, whether to strike the prior serious felony conviction enhancements the trial court imposed pursuant to section 667, subdivision (a)(1). On remand, the court should also determine whether to impose an additional term of imprisonment for the section 12077.7, subdivision (e), enhancement that the jury found to be true.

Further, in accordance with our opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), McCombs is entitled to an opportunity to request an ability to pay hearing in the trial court as to the restitution and parole revocation fines and the court facilities and operations assessments imposed. In all other respects, we affirm.

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[1] All undesignated references to code provisions are to the Penal Code.

FACTUAL BACKGROUND[2]

On May 17, 2014, Sheryl's next door neighbor was hosting a gathering in his backyard when he heard a woman screaming from the direction of Sheryl's home. Through Sheryl's window, the neighbor saw Sheryl covered in blood. Approximately three minutes later, a car exited Sheryl's driveway. The neighbor did not see who was driving.

A police officer responded to the scene and found Sheryl on her knees in the kitchen, her face covered in blood. She was saying, "Help me. Help me." The officer saw a dented toaster with blood on it on the kitchen floor. The officer asked her, "Who did this to you? Who hurt you?" She responded it was her boyfriend "Andre." After the ambulance came, she again confirmed that Andre attacked her.

On May 21, 2014, while Sheryl was still hospitalized for her severe facial injuries, Los Angeles Police Detective Mark Fassam conducted a recorded interview with her that was later transcribed. In the interview, Sheryl identified McCombs as her attacker. She stated that after returning to her home from a party, the two argued because McCombs thought she had been flirtatious with someone at the party. She asked McCombs to leave her alone. The next thing she knew, a police officer was next to her telling her she had been unconscious.

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[2] Because McCombs's appeal does not challenge the sufficiency of the evidence supporting his convictions, we do not summarize all the evidence admitted at trial.

Sheryl indicated that McCombs had left her home in her car. He took her cell phone and car keys, and he was answering calls to her cell phone until her son retrieved her phone and keys.

According to Sheryl, McCombs had been drinking, and when he was drinking, "[h]e just turns on a whole different persona." She stated that a couple of weeks earlier, while under the influence of alcohol, McCombs had hit her leg with his fist, leaving a bruise. She stated McCombs was "very dangerous" and she was "very afraid."

Sheryl stated she was willing to assist in the prosecution of McCombs. However, she subsequently did not make herself available to the police and did not attend either the preliminary hearing or the trial on the charges against McCombs arising from the incident.

PERTINENT PROCEDURAL HISTORY

A. *The Charges Against McCombs*

McCombs was charged with willfully inflicting corporal injury resulting in a traumatic condition upon his cohabitant (§ 273; count 1) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 2). The information further alleged that during the commission of both offenses, McCombs inflicted great bodily injury on the victim, in violation of section 12022.7, subdivision (e). As to both counts, it was further alleged McCombs served two prior prison terms for felony convictions (§ 667.5, subd. (b)) and had suffered two prior serious felony convictions (§ 667, subd. (a)) and two prior serious and/or violent felonies under the three strikes law (§§ 667, subds. (b)-(j), 1170.12).

B. *The Prosecution's Motion To Admit Sheryl's Hearsay Statements*

The prosecution filed a pretrial motion to admit the out-of-court statements Sheryl made at the hospital to Fassam on May 21, 2014. The motion alleged Sheryl was legally unavailable to testify as a result of McCombs's wrongdoing, and thus McCombs had forfeited his Sixth Amendment right of confrontation that otherwise would have required exclusion of the testimonial hearsay. The motion included excerpts from 87 phone calls purportedly made by McCombs to Sheryl while he was in custody awaiting trial and while an active criminal protective order prohibited McCombs from contacting Sheryl. The motion stated that Fassam verified that the phone number McCombs called was registered to Sheryl, and a response to a subpoena issued to Sprint Communications confirmed the same. According to the prosecution, "[d]uring these unlawful conversations, [McCombs] encouraged [Sheryl] not to attend court, to evade service, and to leave town. Consequently, [Sheryl] has not appeared in court and has evaded service of subpoenas several times over the course of the last year. . . . In light of [McCombs's] misconduct, The People anticipate [Sheryl] will be unavailable to testify, despite The People's exercise of due diligence in securing her attendance."

Included in the motion were the following excerpts of transcribed phone conversations that the prosecution asserted were between Sheryl and McCombs while he was in jail pending trial. The prosecution's position was that McCombs and Sheryl used code in their conversations that included referring in the third person to a person named "Pam" when in fact they were talking about Sheryl herself.

October 9, 2016

"M[3]: . . . [W]hen I go to preliminary they gon have to show up. If they don't show up, they gon have to kick it loose.

"W: Mm-hmm (affirmative). That's why she said the detective was at the door, talkin bout he gon subpoena her. And she was like okay. She said she was trying to find her an attorney. . .

"M: Right, right, right. . . . Please, uh, I appreciate whatever that she can do for me. Whatever she can do, man, I appreciate it. . . .

. . .

"M: . . . And another thing that they'll do too, . . . you gotta watch . . . You might have to, you might have to go to Kelly for a little while or something like that. You know what I'm saying? Just chill out.

"W: Mm-hmm (affirmative) . . ."

October 10, 2016

"M: Okay, just tell Pam that, ah, don't come. Don't come. Don't come. Don't come. Don't come. When you talk to Pam, just tell her, Don't come. At all[.] Period.

"W: Okay. Okay.

. . .

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[3] "M" apparently refers to the male voice (McCombs) and "W" is the female voice on the recorded calls.

"W: You okay? How are you doing?

"M: I'm just trying to hold on. Just, um, when you talk to Pam you know what I'm saying tell her don't even um worry about it don't, she ain't gotta trip. Don't come at all. So. You know what I'm saying?

"W: Okay.

"M: Don't try to, uh, r-respond to anything or whatever the case may be, you know, just . . .

"W: Okay.

"M: Just kick—

"O: This call is being recorded."

October 13, 2016

"M: . . . [G]o talk to Timmy and you know, um, see what's going on. See what needs to done, um, 'cause the only thing that I can really think of, you know, is that, um, you know they trying to buy time and everything. . . . [I]f they can't find the person you know what I'm saying, that to come to court then it ain't nothing that they can really do.

"W: Mm-hmm (affirmative). Okay.

"M: You know, so. But then you know, so I guess it's like a catch-22, you know? But I don't know, man.

"W: Yeah, 'cause if she don't go [inaudible].

"M: Right. Yeah.

"W: Mm-hmm (affirmative).

"M: . . . [I]t's better.

"W: What?

"M: All the way. It's all the way better.

"W: If she do?

"M: No, . . . if they don't.

"W: Oh okay. Mm-hmm (affirmative).

"M: I think if they don't. You know what I'm saying?

"W: Mm-hmm (affirmative)."

October 14, 2016

"M: Just gotta wait until I go to court and see what happens.

"W: And when you going? Next Friday?

"M: Uh huh.

"W: Mmm. And I can't go huh?

"M: Huh?

"W: I can't go.

"M: Yeah, I know.

"W: You know I would be there with you though.

. . .

"M: I said it's done. . . . [W]e just gotta . . . wait and see, you know what I'm saying? Uhh, just tell Pam, you know what I'm saying that, uhh, she don't have to come to court at all period, so.

"W: Ok.

"M: That's just uhh.

"W: That's what, that's what she was saying.

"M: Yeah.

"W: Mmm. She said she just keeping a low profile.

. . .

"W: . . . I can't send no letters. I can't come down there. So, you know I'm out of town so, it's kind of hard.

"M: . . . I figured you would just sit and wait, that's all you can do.

"W: Right, that's what I'm doing.

"M: Until I figure something out."

October 19, 2016

"M: . . . Let me tell you something, girl. Let me tell you something. Listen, listen, listen to what I'm saying. Listen to what I'm saying. Listen to what I'm saying. I asked you, I said, do you want to drive, or do you want me to drive? And what did you say?

. . .

"W: I'm letting you drive.

"M: Okay. Leave everything else alone.

. . .

"M: . . . [S]ee you got a motor, and that motor runs and it's kind hard to you know what I'm saying to hit that kill switch, you know what I'm saying, so you can kill the motor, and then, find out what's going on. So instead of going through—

"W: I wasn't even saying nothing.

"M: . . . [A]m I talking or are you talking, Pam? Am I talking or you talking?

"W: You talking.

"M: You need to—you need to kick back and just chill for a minute.

"W: Okay.

"M: And just do it. Just, just do what I ask you to do. If I need you to do something, just take care of it for me. That's it.

"W: Okay.

. . .

"W: Yeah, but she told us she didn't remember anything. And then, he said, well, we're going to have to subpoena you, and . . . he was like, that's my card, and she told him to put the card in the mailbox because she didn't open the door.

"M: Hmm.

"W: . . . [I]f you heard anything else, that's some bullshit because she already . . . told you, what she was going to do. (***) on a low profile anyway, all this week, keeping her door closed.

"M: All right.

"W: . . . [S]he said that's what you told her to do. So she said she's just been keeping her—staying out the way."

November 9, 2016

"M: . . . [I]f she don't come and show up or whatever the case may be, you know what I'm saying, there's really nothing too much that they can do, you know.

"W: If she don't what?

"M: If she don't come.

"W: Okay. Uh-huh. Mm-hmm.

"M: You know, if she, she don't come or whatever the case may be not going to be really too much, you know what I'm saying, that, that can be done.

"W: Yeah, okay. Well they try to go anyway.

"M: Huh?

"W: Can they go anyway without me?

"M: No, . . . they need you.

"W: Okay.

"M: They need you, so—

"W: Okay.

"M: . . . [S]he have—might have to get (***). You know what I'm saying? . . . [G]o out with, . . . damn, I can't even think of his name.

"W: Kelly?

"M: . . . [G]o to . . . where they got that condo at.

"W: Mm-hmm.

"M: Yeah.

"W: Right, okay. Okay. Well, my other friend just got here (***) here.

"M: Huh?

"W: My other friend just got out here, so she out, um, in the Valley, so maybe I'll go stay at her house.

"M: Well, . . . like I said, I really won't know nothing . . . until Monday.

"W: Okay.

"M: Monday, and then—and then, after that, you know what I'm saying, just got to watch. You know what I'm saying? Tell her—tell her, when you talk to her, tell her when she go through that door, to watch the door. Better be looking out. You know what I'm saying?

"W: Okay.

"M: So they—they'll be posted and everything else trying to watch and see.

"W: Okay. (***).

"M: So just keep that door closed and everything, so she'll be all right.

"W: Mm-hmm. Okay.

. . .

"M: . . . [E]verybody's saying the same thing . . . it looks good on my behalf and, you know, long as no—

"W: (***).

"M: . . . long as Pam don't come, you know what I'm saying? I'm all right."

November 19, 2016

"M: . . . [I]t has to come out, but if, if she don't come to court, you know what I'm saying, there's really nothing they can do . . .

. . .

"M: . . . [I]t's better, you know what I'm saying, if she don't come to court. I got a better chance at winning the case."

November 29, 2016

"M: . . . I can't do too much without Pam's help, and if I have her help, then, I, I can make some stuff happen, but she, she has to pay attention. She has to listen, so—

"W: And she's been listening.

. . .

"W: Don't do that, though. Don't get yourself upset. You're getting upset for nothing. You really are. I love you.

"M: If you love me, well, then, show it. I'm in a situation where I can't do nothing. My hands is tied."

November 30, 2016

"M: Okay. Well, if you're not bitter towards me, then why, why you don't answer when I call, babe?

"W: Well, (***) means that I'm bitter?

"M: Huh?

"W: I said, so my answering or missing a call means that I'm bitter? I can't call you back.

"M: Yeah, I know. So that's why it's more important for you to answer my calls, just in case I find out something—

"W: That (***).

"M: —and then, I can tell you, and then, we can . . . we're supposed to be working on it together.

"W: Yeah, we are, but if I miss a call, or if I don't pick up the phone, it doesn't mean (***).

. . .

"M: . . . I'm supposed to go . . . through my, uh, pretrial, and then . . . the lawyers say . . . if . . . the people don't come, you know what I'm saying, I got a better chance, you know, and—

"W: Mm-hmm."

December 8, 2016

"M: . . . I'm just letting you know . . . she still have to pay—

"O: This call is being recorded.

"M: —she still have to pay attention . . . to . . . those, um, people staring to pop or whatever the case may be.

"W: Mm-hmm.

"M: You know, just pay attention and . . . if it gets down to—

"W: She's not even in town.

"M: Huh?

"W: She's not in town. That trip you told her to take, she was going to go ahead and get her flight tickets."

December 20, 2016

"M: . . . I gotta do the . . . preliminary hearing so I'm going to try to get a lawyer. . . . [W]hat they going to try to do is try to contact her whatever the case may be, . . . because it's not like they really wanted [unintelligible] at the preliminary hearing.

"W: I'm not even in town.

"M: I know, that's a good thing. Okay, . . . that's a good thing . . .

. . .

"M: . . . [S]he got to be looking up because I know they going to try to . . . pop up, you know what I'm saying, and come up with whatever the case may be, but, uh, babe, if I can't do this with you, I'm, I'm not going to do it.

"W: What you mean, you ain't going to do it?

"M: I'm not going to do it.

"W: You not going to do what?

"M: I'd rather be in the grave."

December 22, 2016

"W: . . . [W]e need to focus on you getting out of there.

"M: Yeah.

"W: That's the important thing.

"M: Well, we already know what the deal is with that, so.

"W: What is it?

"M: Well, we'll see if that, that new law supposed to kick in January the 4th . . . that Prop 57 and see if I fall up under that . . . and then, um, if I don't have uh, a victim coming to court or anything like that, you know what I'm saying, then I can possibly get it dismissed."

January 10, 2017

"M: . . . So, everything is good with you?

"W: Uh, yeah. Yeah.

"M: I been, uh, [unintelligible].

"W: Just staying out the way.

"M: Oh well, that's good, you know what I'm saying, that's how you do, keep your head above water [unintelligible], you know, just try to stay focused."

At the hearing on the prosecution's motion, Fassam testified he tried to serve Sheryl with a subpoena to attend McCombs's preliminary hearing. Fassam telephoned Sheryl multiple times and visited her home approximately four or five times to notify her of the pending hearing and to serve her with a subpoena. On one occasion, a woman who identified herself as Sheryl opened the main door but refused to open the screen door. Fassam identified himself as the police detective who had dealt with her case, reminded her they had met before, and asked her to open the door so he could serve the subpoena. Sheryl refused, saying she did not remember him and did not remember anything. She seemed afraid and did not want to continue the conversation. Fassam was never able to serve her with the subpoena, and she did not appear at the preliminary hearing.

Olivia Fisher, an investigator with the Los Angeles County District Attorney's office, testified she was supposed to serve Sheryl with a subpoena compelling her attendance at McCombs's trial. Fisher attempted to contact Sheryl by telephone and also called Sheryl's two sons and left voicemail messages. Neither Sheryl nor her sons ever returned Fisher's calls. Fisher visited Sheryl's home 18 times at different times of the day and left her business card approximately five times, but Fisher was never able to contact anyone. She testified that the police detective assigned to the case also sent a police unit to Sheryl's home on

the weekend, but that effort to serve Sheryl was not successful either.

The prosecution argued it had satisfied its obligation to demonstrate both that Sheryl was legally unavailable to attend trial and that McCombs's misconduct was a cause of her unavailability. The court asked the prosecution, "What leads you to believe that the person that the defendant was speaking to on the phone was in fact this victim?" The prosecution responded, "I have subpoenaed to the court file . . . . records from T-Mobile. Every single transcript that I put in my motion was to the exact number of the (323) 901-XXXX. I have the subscriber information which defense counsel has a copy of it which shows that that particular number is in fact listed to [Sheryl]. That in conjunction with the actual contents of the call makes it clear that the defendant is speaking to the victim in this case." Further, the prosecution pointed to a "DMV printout" for Sheryl's son (as evidenced by his birth certificate) which showed the son's address matched the address on the T-Mobile subscriber records.

McCombs's counsel objected to the court "considering the DMV printouts without foundation being laid for them." He also objected to the admission of the birth certificate, which the prosecution had represented was a certified copy, but which certification defense counsel had not seen. He asserted that the female voice in the phone calls never identified herself as Sheryl and McCombs never referred to her as Sheryl, and the prosecution had not put forth any evidence that it was Sheryl's voice on the calls. McCombs did not object to the court's consideration of the T-Mobile records. Nor did he object that the prosecution had not introduced the recordings themselves or the full transcripts into evidence, but rather merely set forth within

the motion excerpts of some of the conversations. McCombs argued he did not engage in misconduct because he did not threaten, bribe or entice Sheryl to ensure she did not attend the preliminary hearing or trial; he argued Sheryl decided for herself that she did not want to participate.

The court overruled the objection to the DMV printouts, finding they were certified documents and self-authenticating. The court found "[t]hese phone calls were made all to the telephone number in which [Sheryl] is the subscriber. I'm satisfied by a preponderance of the evidence that it was the defendant that was talking to [Sheryl]." The court agreed with defense counsel that the phone calls revealed "no threats" to Sheryl, but found a preponderance of the evidence supported the finding that McCombs was the reason Sheryl had not come to court "based on all of his persuading and his cajoling." Thus, the court ruled Sheryl's recorded statement describing McCombs's attack on her was admissible.

C. *Jury Verdict, Court Trial on Priors, and Sentencing*

After a six-day jury trial, at which McCombs testified on his own behalf, the jury found McCombs guilty on both counts. As to both offenses, the jury found true the allegation that McCombs personally inflicted great bodily injury upon Sheryl within the meaning of section 12022.7, subdivision (e).

In a bifurcated proceeding, McCombs waived his right to a jury trial on the prior conviction and prior prison term allegations. Following a court trial, the court found true each of those allegations.

At sentencing, where McCombs represented himself, the court sentenced McCombs as a third strike offender to a total of 35 years to life in prison, consisting of 25 years to life on count 1, with 10 additional years imposed consecutively for the two five-year enhancements (§ 667, subd. (a)(1)). The court imposed and stayed pursuant to section 654 an identical sentence as to count 2.

The court imposed the minimum restitution fine of $300 (§ 1202.4, subd. (b)), and imposed and suspended a corresponding $300 parole revocation fine (§ 1202.45). The court also imposed a court operations assessment of $40 for each count (§ 1465.8, subd. (a)(1)) and a criminal conviction assessment of $30 for each count (Gov. Code, § 70373, subd. (a)(1)). McCombs did not object to the imposition of these fines and assessments or request a hearing to determine whether he had the ability to pay them.

McCombs timely appealed.

DISCUSSION

I. *The Trial Court Did Not Err in Admitting Sheryl's Statements Pursuant to the Forfeiture by Wrongdoing Doctrine*

McCombs argues the trial court violated his Sixth Amendment right to confront and cross-examine witnesses by admitting Sheryl's recorded police interview at trial. He contends the court erroneously determined the "forfeiture by wrongdoing doctrine" applied. McCombs asserts the recorded phone calls purportedly between McCombs and Sheryl do not show McCombs engaged in wrongdoing intended to cause Sheryl's unavailability as a witness at trial.

The confrontation clause generally bars admission of testimonial hearsay[4] unless "the declarant is unavailable, and . . . the defendant has had a prior opportunity to cross-examine." (*Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354; 158 L.Ed.2d 177] (*Crawford*); see *People v. Banos* (2009) 178 Cal.App.4th 483, 494 (*Banos*).) However, "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." (*Crawford*, at p. 62; see *People v. Jones* (2012) 207 Cal.App.4th 1392, 1398 (*Jones*).) "That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis v. Washington* (2006) 547 U.S. 813, 833 [126 S.Ct. 2266; 165 L.Ed.2d 224] (*Davis*).) "'[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.'" (*Jones,* at pp. 1398-1399, quoting *Davis*, at p. 833.)

In California, the forfeiture by wrongdoing doctrine is codified in Evidence Code section 1390 as a hearsay exception. (*People v. Kerley* (2018) 23 Cal.App.5th 513, 550.) Evidence Code section 1390 provides in part: "(a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. [¶] (b)(1) The party seeking to introduce a statement pursuant to subdivision (a) shall

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[4] It is undisputed that Sheryl's recorded statements to the police four days after her attack were testimonial.

establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing." Thus, the prosecution was required to establish by a preponderance of the evidence in a foundational hearing that McCombs engaged in wrongdoing that was intended to, and did, make Sheryl unavailable as a witness.[5] (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1147, disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390 ["[a]t a hearing to determine whether forfeiture by wrongdoing has occurred, the preponderance of evidence standard applies"]; *Kerley,* at pp. 554-555 ["[u]nder section 1390, the People were required to establish by a preponderance of the evidence that [defendant] had engaged in wrongdoing . . . that was intended to, and did, make her unavailable as a witness"]; see *Banos, supra,* 178 Cal.App.4th at p. 502 [same]; *People v. Perez* (2018) 4 Cal.5th 421, 455 fn. 3 ["[a] defendant may . . . forfeit a confrontation clause challenge by engaging in wrongdoing that renders the declarant unavailable with an intent to prevent that declarant's in-court testimony"].) We review for substantial evidence the trial court's express or implied findings as to those factual issues.

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[5] A threshold requirement is that Sheryl actually have been "unavailable" as a witness at trial. (*Banos, supra*, 178 Cal.App.4th at p. 502 ["The first component to the forfeiture by wrongdoing is that the defendant must have rendered the witness unavailable to testify"].) "Under Evidence Code section 240, subdivision (a)(5), a person is "'unavailable as a witness'" if she is absent and the proponent of her statement, although exercising due diligence, has been unable to secure her attendance at trial." (*People v. Byron* (2009) 170 Cal.App.4th 657, 670.) McCombs does not argue on appeal that the prosecution failed to make this showing.

(See *Kerley,* at p. 559 ["[s]ubstantial evidence supports the trial court's implied finding that [defendant] murdered [the victim] at least in part to keep her from . . . testifying against him"]; *Banos,* at p. 502 [concluding substantial evidence supported the trial court's finding that defendant killed the victim to prevent her from testifying]; *People v. Cromer* (2001) 24 Cal.4th 889, 902 ["the trial court's resolution of disputed factual issues . . . is reviewed deferentially on appeal under the substantial evidence standard"].)

A. *Substantial Evidence Supports the Trial Court's Finding that Sheryl Was the Woman Conversing with McCombs*

McCombs contends that at the foundational hearing on the admissibility of Sheryl's statements to the police, the prosecution failed to present sufficient evidence that McCombs was speaking to *Sheryl* in the numerous recorded phone conversations from McCombs's pretrial custody period. First, McCombs notes that the prosecution did not present the actual recordings of the purported phone calls between McCombs and Sheryl; rather, the prosecution proffered only written excerpts from the transcripts of the calls. McCombs contends "no evidence was introduced that the summary provided by the prosecution was an accurate depiction of any telephone conversation that took place." However, McCombs did not make any such objection during the hearing, and therefore he has forfeited this claim on appeal. (Evid. Code, § 353; *People v. Cordova* (2015) 62 Cal.4th 104, 135.)

Second, although the prosecution presented evidence that the phone number McCombs called on each occasion was registered to Sheryl, McCombs argues "there was nothing to say someone else had no access to [the] phone." In arguing there was insufficient proof that it was Sheryl who participated in the

conversations, McCombs relies on the fact that Sheryl's name was never mentioned and there was no discussion of the incident in question during any of the calls.

The prosecution bore the burden of establishing that the two participants in the recorded phone conversations were McCombs and Sheryl. Evidence Code section 403, subdivision (a), provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: ¶] . . . [¶] (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself." That burden was sufficiently met.

"A foundation [for the identity of a person participating in a phone conversation] may be laid by circumstances and the contents of the conversation itself. [¶] . . . The identity of the person may be established by proof of recognition of his voice, *or by other circumstances which satisfactorily indicate the identity of the individual*.'" (*People v. McGaughran* (1961) 197 Cal.App.2d 6, 16; see *People v. Coddington* (2000) 23 Cal.4th 529, 591, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046 [circumstantial evidence was sufficient basis for concluding identity of person on telephone call]; *People v. King* (1963) 218 Cal.App.2d 602, 610 ["The identity of a person who made a telephone call may be established by circumstantial evidence"].)

Substantial evidence supports the trial court's determination that the phone conversations in question were

between McCombs and Sheryl. The phone calls were all made to Sheryl's cell phone number. Although neither the man nor the woman on the call ever used the name "Sheryl," it is apparent they were attempting to speak in code by referring in the third person to a woman named "Pam" whom McCombs did not want to come to court. Some of the time, they forgot to use the third person when referring to "Pam." In one call, McCombs said to the woman on the phone, "[A]m I talking or are you talking, Pam?" On another occasion, when McCombs said, "[I]f she don't come and show up . . . there's really nothing too much that they can do," Sheryl responded, "Can they go anyway without me?" McCombs then replied, "No, . . . they need you." In that same phone call, McCombs suggested that "she" go stay at someone's condo, and Sheryl responded, "maybe I'll go stay" at another friend's house. In yet another conversation, when McCombs warned that "they [are] going to try . . . to contact her" because "they" really wanted "her" at the preliminary hearing, Sheryl responded, "I'm not even in town," to which McCombs replied, "[T]hat's a good thing." Given that Sheryl was the sole victim of the crime and no one witnessed the attack, Sheryl is obviously the one person that her assailant would not want to testify. The prosecution did not need to call a witness to testify that it was Sheryl's voice on the recordings, given the circumstantial evidence from which the trial court reasonably inferred that Sheryl was the person to whom McCombs was speaking.

B. *Substantial Evidence Supports the Finding that McCombs Intended To, and Did, Dissuade Sheryl from Cooperating with Law Enforcement or Testifying at Trial*

McCombs also argues that, even assuming the woman on the recordings is Sheryl, those conversations do not show

McCombs committed a wrongful act that caused Sheryl to become unavailable at trial. He contends the forfeiture by wrongdoing doctrine applies only where a defendant kills, physically abuses, threatens, bribes, or intimidates a witness so that he or she does not testify in a court proceeding. McCombs relies on *Giles v. California* (2008) 554 U.S. 353, 374 [128 S.Ct. 2678; 171 L.Ed.2d 488], in which the Supreme Court explained that the forfeiture by wrongdoing doctrine is "aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them." He contends there was no such wrongful act here: McCombs's words were not threatening, and he merely shared with Sheryl his belief that it would be better for his criminal case if she did not come to court.

McCombs's interpretation of the wrongdoing by forfeiture doctrine is too narrow, and his characterization of his conduct too generous. As the Supreme Court affirmed in *Giles v. California*, *supra*, the doctrine is grounded in "'the ability of courts to protect the integrity of their proceedings.'" (554 U.S. at p. 374.) The doctrine is triggered whenever "defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims." (*Davis, supra*, 547 U.S. at p. 833.) Thus, "[o]ne who obtains the absence of a witness by wrongdoing, *whatever the nature of the wrongdoing*, 'forfeits the constitutional right to confront []' that witness." (*Jones, supra*, 207 Cal.App.4th at p. 1399, quoting *Davis,* at p. 833, italics added.) There is no authority limiting the application of the forfeiture by wrongdoing doctrine to situations where a defendant killed, abused, threatened, bribed, or intimidated a witness. (See *Jones*, at p. 1399 [rejecting defendant's contention that the doctrine applies only "to statements by victim witnesses who were murdered to

prevent their testimony and not to statements by corroborating witnesses whose testimony was prevented by means other than murder"]; *State v. Maestas* (N.M. 2018) 412 P.3d 79, 81 [holding that "wrongdoing, for purposes of the forfeiture-by-wrongdoing exception, need not take the form of overt threat of harm; various forms of coercion, persuasion, and control may satisfy the requirement"].)

Here, the "wrongdoing" by McCombs consisted of his active and persistent efforts to dissuade Sheryl from attending trial and testifying against him. Those efforts constitute criminal conduct: Section 136.1, subdivision (a)(1), makes it a misdemeanor to "[k]nowingly and maliciously prevent[] or dissuade[] any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." Malice, for purposes of this offense, "means an intent to vex, annoy, harm, or injure in any way another person, *or to thwart or interfere in any manner with the orderly administration of justice*." (§ 136, subd. (1), italics added; see *People v. Wahidi* (2013) 222 Cal.App.4th 802, 807, 809 [affirming conviction under section 136.1, subdivision (a)(2), for attempting to dissuade a witness from testifying at the preliminary hearing where defendant thwarted the orderly administration of justice by approaching victim at victim's mosque before the preliminary hearing and suggesting the matter could be settled out of court].) Threats of force or acts of force are not required for such an offense; rather, the offense becomes punishable as a felony rather than a misdemeanor when accomplished by force or threats of force or violence. (§ 136.1, subd. (c)(1).)

Substantial evidence supports the trial court's findings that, in McCombs's phone conversations with Sheryl over a

three-month period, McCombs successfully dissuaded Sheryl from coming to court. McCombs's and Sheryl's efforts to veil the true meaning of their communications were not successful. It is apparent that McCombs communicated to Sheryl on numerous occasions that he did not want her to come to court, he wanted her to avoid contact with the authorities, and she should leave town to avoid both. The Supreme Court has recognized that domestic violence victims are "notoriously susceptible to intimidation or coercion" by their abuser to prevent them from testifying at trial. (*Davis, supra*, 547 U.S. at pp. 832-833; see also *Giles v. California, supra*, 554 U.S. at p. 377 ["[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions"].) An abuser typically uses many tools other than physical violence to control his or her victim, including psychological coercion. In this case, McCombs alternated between bullying, persuading and begging Sheryl with the intent to prevent her from coming to court to testify against him. The recorded phone calls constitute substantial evidence that McCombs intended to procure, and succeeded in procuring, Sheryl's absence at the preliminary hearing and at trial. Because she was unavailable at trial due to McCombs's wrongdoing, the trial court did not err in admitting Sheryl's statements to the police.

II. *A Limited Remand Is Required for the Trial Court To Consider Whether To Strike the Section 667, Subdivision (a), Enhancements*

At the time McCombs was sentenced, the court had no discretion to forego imposition of section 667, subdivision (a),

enhancements for qualifying prior serious felony convictions. In 2018 the Governor signed into law Senate Bill No. 1393 which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements "in the furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1 & 2.) Senate Bill No. 1393 applies retroactively to McCombs because his sentence was not final before January 1, 2019. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272 [S.B. No. 1393 applies retroactively]; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [absent contrary legislative intent, "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies"].) As the Attorney General concedes, remand is required for the trial court to exercise its discretion whether to impose or strike the prior serious felony enhancements.[6]

III. *McCombs Is Entitled to a Hearing on His Ability To Pay the Assessments and Fines Imposed*

McCombs requests we remand the case for the trial court to conduct an ability to pay hearing in accordance with our opinion in *Dueñas, supra*, 30 Cal.App.5th 1157, because he was indigent at the time of sentencing. We agree McCombs should have an

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[6] Although the jury found true the section 12022.7, subdivision (e), enhancements as to both counts, the trial court did not impose any additional term of imprisonment for these enhancements, and the record is silent on the issue. On remand, the trial court is instructed to consider whether to impose or strike these enhancements.

opportunity on remand to request a hearing and present evidence demonstrating his inability to pay the $300 restitution fine, the $300 parole revocation fine (stayed pending any revocation of parole), the $60 in criminal conviction assessments, and the $80 in court operations assessments.

In *Dueñas*, *supra*, 30 Cal.App.5th 1157, this court concluded "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed . . . upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Id*. at p. 1168.) Thus, we held the trial court must conduct an ability to pay hearing to ascertain a defendant's present ability to pay before it imposes these assessments. (*Ibid.*) Further, although section 1202.4, subdivision (c) bars consideration of a defendant's inability to pay when imposing a restitution fine unless the court is considering imposing more than the minimum fine required by statute, in light of the due process issues we held "the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172.)

A. *McCombs Did Not Forfeit His Right to an Ability To Pay Hearing*

The Attorney General contends McCombs forfeited his objections to the trial court's imposition of the fines and assessments because he failed to object to their imposition at sentencing. However, at the time McCombs was sentenced, *Dueñas* had not yet been decided. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) in rejecting this forfeiture argument, "no California court prior to

Dueñas had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (See also *People v. Santos* (Aug. 15, 2019, H045518) __Cal.App.5th __ [2019 Cal.App. Lexis 759] [forfeiture doctrine did not apply because *Dueñas* holding was not reasonably foreseeable]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 [same]; contra, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [same].) As in *Castellano*, we decline to find McCombs forfeited his constitutional challenge to the imposition of the assessments and restitution fine.

B. *McCombs Is Entitled to an Opportunity on Remand To Show He Lacked the Ability To Pay*

The Attorney General contends McCombs's due process claim arising from the imposition of the assessments and restitution fine fails because the record does not establish that he would be unable to pay them.

The information in the record regarding McCombs's ability to pay at the time of sentencing is limited. The record is devoid of evidence regarding McCombs's financial assets at the time of sentencing or any other time. McCombs must be afforded the opportunity to have a determination of his ability to pay made upon a fuller record by the trial court, where the burden will be upon McCombs to establish his indigence. (See *Castellano*, *supra*, 33 Cal.App.5th at p. 490 ["[A] defendant must in the first

instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court"].)

We reject the Attorney General's additional contention McCombs has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the fines and assessments. "[T]he defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.)

As McCombs's conviction and sentence are not yet final, we remand the matter to the trial court so that he may request a hearing and present evidence demonstrating his inability to pay the fine and assessments imposed by the trial court. "If the trial court determines [McCombs] is unable to pay, the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as The People can show that [McCombs's] ability to pay has been restored." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.)

DISPOSITION

McCombs's convictions are affirmed, but we remand for the trial court to exercise its discretion whether to impose or strike the prior serious felony enhancements pursuant to section 667, subdivision (a). The trial court is also instructed to consider whether to impose or strike the section 12022.7, subdivision (e) enhancements. The trial court must also afford McCombs the opportunity to request a hearing on his ability to pay the fines, fees and assessments previously imposed. If the court determines he is unable to pay, the assessments may not be imposed, and the court must stay the execution of the fines. Following McCombs's resentencing, the trial court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

STONE, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.