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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELMER ORELLANA, Defendant and Appellant.	B292481 Los Angeles County Super. Ct. No. NA102911

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed.

The Law Offices of Michelle T. LiVecchi-Raufi and Michelle T. LiVecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Elmer Orellana of the voluntary manslaughter of Jesus Pimentel. The jury found true an allegation that Orellana used a knife in the killing. On appeal, Orellana contends the trial court violated his confrontation clause rights by admitting the testimony of a deputy coroner who had not personally conducted Pimentel's autopsy. Orellana also argues the court erred in instructing the jury on false statements and flight, and that those form instructions misstate the law. Finally, Orellana asserts he was entitled to a hearing on his ability to pay a court fine and fees. We find no error and affirm Orellana's conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND

1. *Pimentel is stabbed to death*

Around 7:45 p.m. on the evening of October 25, 2015, Ery Reyes was walking down Maine Avenue in Long Beach. A man—later identified as Jesus Pimentel—came out of a nearby alley, holding the left side of his chest with both hands. Reyes saw blood. Pimentel told Reyes someone had stabbed him. Pimentel asked Reyes for help. Pimentel fell to the ground.

Reyes called 9-1-1. Pimentel "started to lose his breathing, and his eyes went backwards." Reyes began to press on Pimentel's chest. As instructed by the 9-1-1 operator, Reyes got a towel and put it on Pimentel's wound.

Long Beach Police Officer Kalid Abuhabwan and his partner Sergeant Robert Ryan arrived at the scene around 7:49 p.m. Abuhabwan and Ryan saw Pimentel, unconscious, lying on his back with a stab wound on the left side of his chest. Abuhabwan saw a large pool of blood. Abuhabwan relieved Reyes of his life-saving efforts and continued to apply pressure to Pimentel's wound until paramedics arrived and took him to the hospital. Officer Ernesto Perez searched the area and found an eight and a half-inch butcher knife.

In the meantime, around 8:22 p.m. that night, Officers Juan Ortiz and Robert Torres went to the area of Anaheim Street and Cedar Avenue in Long Beach in response to a "person with a knife" call. Ortiz started walking toward a taco restaurant. Orellana came out of the restaurant and walked toward the officers. In response to Ortiz's question, Orellana said he had a knife in his satchel. The officers arrested Orellana.[1]

Pimentel died. An autopsy revealed he had suffered "copious bleeding" after a knife or sharp instrument "incised" his heart and left lung.

2. *Orellana tells detectives his version of what happened*

About two weeks after the homicide, detectives interviewed Orellana in an interrogation room at the jail. Detective Oscar Valenzuela—who speaks Spanish—interpreted for his fellow detectives and Orellana. Orellana told the detectives that, on the afternoon of the day in question, he saw "a whole bunch of guys" sitting in the park, "throwing gang signs." Orellana had found two knives in a trash bin.

At some point Orellana went to a nearby laundromat. When he returned to the park, it was starting to get dark. The same group was still there. They started saying they were Sureños, from Barrio Pobre and 18th Street. A man Orellana

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[1] Witnesses described an incident after 8:00 p.m. that night—separate and apart from the Pimentel stabbing—involving a victim named Cesar Antonio Herrera Lopez. Herrera said Orellana "struck" at him with a knife. Herrera also said there had been another attack by Orellana a day or two earlier. The People charged Orellana with two counts of assault with a deadly weapon on Herrera. The jury acquitted Orellana on those counts.

knew as "Snide" arrived with another man. Orellana referred to Snide as "the person . . . that allegedly . . . passed away" and "the one who died," meaning Pimentel.

Orellana had found a cell phone and he showed it to Pimentel. Pimentel asked Orellana if he was selling the phone and Orellana said yes. Pimentel offered to pay Orellana in methamphetamine but Orellana said he wanted cash. Pimentel agreed to give Orellana $40 for the phone.

Pimentel had Orellana follow him to a nearby table. Another man there, whom Pimentel called his "homeboy," told Orellana "to get lost from the park." If he didn't, the man said, "they were gonna kill me." Pimentel—who by that time had the phone—told Orellana "to consider it a loss." Pimentel's gang member friends "started kicking [Orellana] out" of the park, saying if they saw him again they'd kill him. "[T]hey kept acting . . . as if they had a weapon" and "insulting" Orellana. Orellana admitted, however, that he never saw Pimentel with a weapon.

Pimentel asked Orellana if he wanted a beer. Pimentel went to buy the beer and Orellana waited in an alley for him to return. Eventually Pimentel said to Orellana, "Let's go." Orellana followed Pimentel to an area behind some apartments. Pimentel told Orellana if he didn't leave, his "homies were gonna come kill me." Pimentel was "acting as if he had a . . . weapon" and "sort of wanting to come at" Orellana. Orellana reached into his bag and "grabbed the knife." When Orellana "saw that [Pimentel] was gonna . . . knock [him] out from a single blow," Orellana stabbed Pimentel. Orellana told the detectives, "I reacted first and stabbed him." Then Orellana "took off running."

3. *Orellana's conviction and sentence*

The jury convicted Orellana of voluntary manslaughter as a lesser crime to murder. The jury found true the allegation that, in the commission of the crime, Orellana personally used a deadly

and dangerous weapon. The trial court sentenced Orellana to 12 years in the state prison: the upper term of 11 years for the offense and one additional year for the weapon use. The court imposed a restitution fine of $300, a court operations assessment of $40, and a criminal conviction assessment of $30.[2] The court stayed a parole revocation restitution fine of $300. Orellana's counsel did not object to the fine or any of the fees.

DISCUSSION

1. *The trial court did not violate Orellana's confrontation clause rights*

Orellana contends the trial court—in admitting the testimony of a deputy coroner who did not perform Pimentel's autopsy—improperly admitted testimonial, case-specific hearsay. We disagree.

a. *The testimony of deputy medical examiner Dr. Pedro Ortiz*

On the first day of trial, the prosecutor told the court he had learned only several days earlier that the coroner who performed the autopsy on Pimentel's body, Dr. Poukens, was "absen[t]." So, the prosecutor said, he planned to call a substitute coroner. Defense counsel filed a motion "to exclude testimony related to the autopsy report from any medical examiner or pathologist who was not present at the autopsy."[3] The trial court denied the motion, stating, "Under California law, that has been held to be nontestimonial."

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[2] The court also ordered Orellana to reimburse the arresting agency for $266.52 in booking fees. Orellana does not challenge this fee on appeal.

[3] The record on appeal does not include this written motion.

Dr. Pedro Ortiz testified he had been a deputy medical examiner at the Los Angeles County coroner's office for 28 years. Ortiz had performed about 7,000 autopsies. Ortiz had read the file for Pimentel's autopsy. It included an anatomic summary and 40 photographs of the autopsy.

Ortiz defined stab wounds and "sharp instrument injuries" for the jury. He also defined defensive wounds, and testified he did not see any in the photographs of Pimentel's body. As the prosecutor displayed for the jury a photograph of the body, Ortiz pointed out the "sharp force injury" as well as the suture wound and other marks of "the therapeutic interventions" by medical personnel. Testifying about a close-up photograph of Pimentel's chest, Ortiz estimated the stab wound was about one inch long and a quarter inch wide. Ortiz stated that—based on his review of the file, reports, and photographs—in his opinion Pimentel died "as a result of being stabbed in the chest," adding, "He experienced copious bleeding after the heart and left lung were incised by the knife or the instrument." Ortiz testified he "looked to [Dr. Poukens's] conclusion" then "made [his] own conclusion."

On cross-examination Ortiz testified Pimentel had amphetamine (the metabolite of methamphetamine) as well as "the active component" of marijuana in his system. The court sustained the prosecutor's relevance objection to defense counsel's question about "the [e]ffects that amphetamine and methamphetamine have on the body."

b. *The controlling authorities*

The Sixth Amendment to the federal Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses. (*People v. Lopez* (2012) 55 Cal.4th 569, 576.) In the seminal case of *Crawford v. Washington* (2004) 541 U.S. 36, the high court held the Sixth Amendment "bars the admission at trial of a testimonial out-of-court statement against a criminal

defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*Lopez*, at pp. 576, 580-581.) *Crawford* declined to provide a comprehensive definition of "testimonial," and the high court has not articulated one on which a majority of the justices agree. (*People v. Sanchez* (2016) 63 Cal.4th 665, 687 (*Sanchez*); *People v. Leon* (2015) 61 Cal.4th 569, 602-603 (*Leon*).) But it is clear a testimonial statement has two " 'critical components' ": it must be made with some degree of formality or solemnity, and its primary purpose must pertain in some way to a criminal prosecution. (*People v. Edwards* (2013) 57 Cal.4th 658, 705; *Leon*, at p. 603.) We independently review Orellana's confrontation clause claim. (*People v. Hopson* (2017) 3 Cal.5th 424, 431.)

Both the United States Supreme Court and our California Supreme Court have addressed the application of *Crawford* to forensic reports. (See *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. 647.) In several cases, our state high court has considered whether a pathologist may testify about statements in an autopsy report prepared by another, nontestifying pathologist. In *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), the court held factual observations about the condition of the victim's body, made by a nontestifying pathologist and recorded in an autopsy report, were not testimonial because they lacked formality and criminal investigation was not the autopsy's primary purpose. (*Id*. at pp. 619-621.) The court distinguished statements describing anatomical and physiological observations from statements setting forth the pathologist's conclusions. (*Id*. at pp. 619-620.) The *Dungo* court noted the former "are less formal than statements setting forth a pathologist's expert conclusions" and "are not testimonial in nature." (*Id*. at p. 619.) So the testifying

pathologist's "description to the jury of objective facts about the condition of [the victim's] body, facts he derived from [the nontestifying expert's] autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine [the nontestifying expert]." (*Id.* at p. 621.)

In *People v. Leon*, the court explained: "It is clear that the admission of autopsy photographs, and competent testimony based on such photographs, does not violate the confrontation clause. . . . It is also clear that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. . . . The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence." (*Leon*, *supra*, 61 Cal.4th at p. 603, italics omitted; see also *People v. Gonzalez* (2019) 34 Cal.App.5th 1081, 1090.)

People v. Sanchez, *supra*, 63 Cal.4th 665, considered gang expert testimony, not autopsy reports. But its analysis is relevant. *Sanchez* explained that, "[i]f an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Id.* at p. 684.) For example, testimony that "hemorrhaging in the eyes was noted during the autopsy of a suspected homicide victim would be a case-specific fact." (*Id.* at p. 677.) However, an expert may "rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so" without violating either hearsay rules or the confrontation clause. (*Id.* at p. 685, italics omitted; *People v. Perez* (2018) 4 Cal.5th 421, 456 (*Perez*).)

In the 2018 cases of *People v. Perez* and *People v. Garton* (2018) 4 Cal.5th 485 (*Garton*), our Supreme Court held pathologists' testimony about autopsy reports prepared by

nontestifying pathologists did not constitute reversible error. In *People v. Perez*, the testifying pathologist's description of hemorrhaging in the victim's eyes, the depth of knife wounds, and internal injuries "related case-specific facts about the victim's body that were taken directly from [the nontestifying pathologist's] autopsy report and no other sources," and therefore constituted hearsay under *Sanchez*. (*Perez*, *supra*, 4 Cal.5th at p. 456.) Nevertheless, declining to address "*Dungo*'s continued viability," *Perez* concluded any federal constitutional error was harmless beyond a reasonable doubt. (*Ibid*.) It was undisputed the victim had been choked and stabbed, and the depth of the stab wounds, the eye hemorrhages, and the details of the internal injuries were such "minor pieces of evidence" in light of the other evidence presented at trial that they had no effect on the jury's guilt determination. (*Id*. at p. 457.) Nor was it error for the testifying pathologist to rely on hearsay in forming his opinion about the cause of death. (*Ibid*.)

People v. Garton held the testifying coroner's own opinions—based on an autopsy report a retired coroner had prepared—were not objectionable insofar as the testifying coroner did not directly or implicitly convey any statements the nontestifying coroner had made. (*Garton*, *supra*, 4 Cal.5th at pp. 504, 506.) Without mentioning *Dungo*, *Garton* reasoned statements made in the autopsy report and related by the testifying coroner "did communicate out-of-court statements to the jury because the autopsy report contained the out-of-court statements of [the nontestifying coroner]. . . . Because these facts were offered for their truth, they were hearsay." (*Garton*, at p. 506.) But *Garton* concluded that, even if those statements were testimonial, any error was harmless beyond a reasonable doubt. Only a few of the testifying coroner's statements

amounted to hearsay, and the state of the victim's body and the manner in which she died were undisputed. (*Id*. at p. 507.)

c. Orellana's confrontation clause claim here fails

Dr. Ortiz's testimony did not violate the Sixth Amendment. Dr. Ortiz testified he had looked at 40 photographs from the autopsy. Four of those photographs were marked as exhibits and shown to the jury. The photographs show Pimentel's torso with a clearly visible wound to the right of his left nipple, about halfway between the nipple and the center of his chest. Two close-up photographs show the length and width of the wound. If Dr. Poukens's autopsy report stated the depth of the stab wound, Dr. Ortiz did not relate that information. Dr. Ortiz did testify a sharp instrument had pierced Pimentel's heart and lung, resulting in "copious bleeding." But even if this were testimonial hearsay, jurors could use their own common knowledge to conclude that, if someone is stabbed in the left chest with a large kitchen knife, "copious bleeding" would result.

Moreover, first responder Officer Abuhabwan—who was present at trial and subject to cross-examination—testified he found the victim lying on his back and "[t]here was a large pool of blood." Detective Scott Lasch—who testified at trial as well—told the jurors he saw Pimentel's body at the hospital and observed "a puncture wound to the left part of his chest just to the right of his nipple line." Lasch also was present for part of the autopsy.

In addition, Orellana himself told the police he had stabbed Pimentel in the chest with one of the two knives he had found, and he confirmed the knife Officer Perez found nearby that night was that knife. Jurors saw photos of the eight and one-half inch knife. Here, as in *Perez* and *Garton*, "the state of [the victim's] body and the manner in which [he] died" were not in dispute. (*Garton*, *supra*, 4 Cal.5th at p. 507; *Perez*, *supra*, 4 Cal.5th at p. 457 ["evidence bearing no connection to the hearsay

statements, such as photographs and police testimony, showed that someone had choked [the victim] and stabbed her multiple times"].)

Orellana's appellate brief never mentions—much less distinguishes—*Dungo*, *Leon*, *Perez*, and *Garton*.[4] Orellana argues, "Without Oritiz's [*sic*] testimony, the jury may have found that there was insufficient evidence that appellant committed the homicide." Orellana also says Dr. Ortiz "testified Pimentel's death was a homicide not a suicide." These statements are mysterious. As we have said, Orellana *told the police* he stabbed Pimentel. This is not a whodunit. Nor is there any evidence Pimentel stabbed himself with Orellana's knife.

Orellana also argues the "proper coroner may have had information to help" the jury determine whether he acted in reasonable or unreasonable self-defense. This argument also is meritless. The trial court instructed the jurors with CALCRIM Nos. 505 and 571—self-defense and imperfect self-defense, respectively. In convicting Orellana of the lesser offense of voluntary manslaughter, the jurors presumably found he acted in imperfect self-defense—that is, with a sincere but unreasonable belief that he faced an imminent deadly threat and that the immediate use of deadly force was necessary. (See CALCRIM No. 571.)

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[4] As we noted, under *People v. Dungo*, factual observations about the condition of a victim's body are not testimonial hearsay. (*Dungo*, *supra*, 55 Cal.4th at pp. 619, 621.) Although our Supreme Court did not rely on *Dungo* in its 2018 decisions in *People v. Perez* and *People v. Garton*, the court has not repudiated or overruled *Dungo*, and we are bound by it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As for ordinary (or "perfect") self-defense, Orellana never told the detectives that Pimentel attacked him or even touched him. Instead, he told them Pimentel "was gonna hit me" "with his hand," and he "made moves" as if he had a weapon behind his back. Orellana said, "I could tell he wanted to knock me out with–with–with his hand. And then–uh–I don't know what he was gonna take out, if a knife or–or–or something, I reacted first and stabbed him." Orellana added, "I thought, thank God I was able to–uh–uh–save my life because I reacted first before he did." Moreover, according to Orellana's own version of events, he had several opportunities to get away from Pimentel. Even after Pimentel and his gang member companions told Orellana they were going to beat or kill him, Orellana waited for Pimentel to return from the liquor store and then followed him to the area behind the apartments. No reasonable jury could have found on the evidence in this case that Orellana acted in perfect self-defense.

In sum, Dr. Ortiz's testimony about the condition of the victim's body and the cause and manner of death was based on his own conclusions, drawn from photographic evidence and Dr. Poukens's report. This testimony did not violate Orellana's confrontation clause rights. Photographs, and expert conclusions drawn from them, are not hearsay. (*Leon*, *supra*, 61 Cal.4th at p. 603.) As Justice Liu noted in *Garton*, autopsy photographs are not hearsay because they are not out-of-court statements: " 'Only people can make hearsay statements; machines cannot.' " (*Garton*, *supra*, 4 Cal.5th at p. 506.) Dr. Ortiz's reliance on hearsay in formulating his opinions did not run afoul of the confrontation clause. (*Perez*, *supra*, 4 Cal.5th at p. 457, citing *Sanchez*, *supra*, 63 Cal.4th at p. 685 and Evid. Code, § 802.)

2. *CALCRIM Nos. 362 and 372 are accurate statements of the law and the trial court did not err in giving them*

Orellana contends the trial court erred in instructing the jury with CALCRIM Nos. 362 (Consciousness of Guilt: False Statements) and 372 (Defendant's Flight) because those instructions "embody irrational permissive inferences in violation of due process." We find no error.

The form jury instructions published by the Judicial Council of California and embodied in CALCRIM have been on the books for many years. They are constantly updated by the Advisory Committee on Criminal Jury Instructions. "On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt." (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.)

a. *CALCRIM No. 362*

CALCRIM No. 362 is the successor to CALJIC No. 2.03, which "[t]he California Supreme Court has consistently upheld . . . against various and sundry attacks." (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103 & fn. 3.) "Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 . . . , none is sufficient to undermine our Supreme Court's approval of the language of these instructions." (*Id.* at p. 1104.)

"[F]alse statements made by a defendant at the time of arrest are admissible—not for the truth of the statements—but to show consciousness of guilt." (*People v. Kimble* (1988) 44 Cal.3d 480, 496.) In determining whether a defendant's post-arrest statement was false, jurors may consider its inconsistency with

the testimony of other witnesses and physical evidence. (*Id*. at pp. 497-498.)

In his closing argument, the prosecutor told the jury there were "contradiction(s) in [Orellana's] story" and he was "making up" parts of it. The prosecutor listed a number of inconsistencies, including Orellana's statement to detectives that Reyes was not a passerby walking down Maine but rather a "homie" of Pimentel who came out of a nearby house, then "took something out" from behind Pimentel's back after the stabbing that looked like a 9-millimeter gun. The prosecutor noted Orellana told the police Reyes had left the scene with the gun, but both Reyes and Abuhabwan testified at trial that Reyes was still there, applying pressure to Pimentel's wound, when police arrived.[5] Orellana also told the detectives that, after stabbing Pimentel with the knife, he threw it at Pimentel's back. The prosecutor noted Orellana told four different stories about why he did that.

On this record, the trial court did not err in giving the jury CALCRIM No. 362. Whether what Orellana told the detectives was innocent misrecollection or a purposeful misstatement was for the jury to decide.

b. *CALCRIM No. 372*

Appellate courts also have upheld CALCRIM No. 372—as well as its predecessor, CALJIC No. 2.52—against constitutional challenge. (*People v. Mendoza* (2000) 24 Cal.4th 130, 179-181; *People v. Price* (2017) 8 Cal.App.5th 409, 454-458; *People v. Paysinger*, *supra*, 174 Cal.App.4th at pp. 29-30.)

Orellana told the detectives he "took off running" after stabbing Pimentel and then throwing his knife at Pimentel's back. At one point, Orellana said he ran "[b]ecause the gang members were coming." However, Orellana used his remaining

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[5] Police found no firearms at the scene.

knife to cut off the legs of his pants after he ran away. He threw the pant legs away. When asked why, Orellana said, "I'd rather be in shorts. I don't like being in pants." Orellana denied that his alteration of his pants had anything to do with changing his appearance.

It is undisputed Orellana did not remain at the scene until police arrived. Again, whether Orellana ran away because he feared the arrival of gang members—an arrival that apparently never happened—or to avoid detection and arrest was for the jury to determine.

3. *Orellana is not entitled to an ability to pay hearing*

As noted, the trial court imposed a restitution fine of $300 and $70 in court fees. Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Orellana contends the court "violated his constitutional rights to due process and equal protection" by not holding a hearing about his ability to pay that fine and the fees. We disagree.

First, some courts—including our colleagues in Division Two—have held *Dueñas* was wrongly decided. (*People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946. See also *People v. Aviles* (2019) 39 Cal.App.5th 1055. Cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-927 ["urg[ing] caution in following" *Dueñas*; concluding in any event "the due process analysis in *Dueñas*" does not justify extending its holding beyond the "extreme facts" that case presented].) The issue is now before our Supreme Court. (*People v. Kopp*, review granted Nov. 13, 2019, S257844.)

Second, as noted, Orellana did not object to the fine or fees at sentencing. Accordingly, he has forfeited any challenge. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153; but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 488-489.)

Third, the facts in *Dueñas* were very different from those here. Dueñas was a homeless, disabled woman who had committed traffic violations. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160-1162.) Orellana—unlike Dueñas—does not face incarceration because of an inability to pay a restitution fine and assessments. Orellana is in prison because he stabbed Pimentel in the heart, killing him.

Fourth, Orellana has presented no evidence of an inability to pay. "[W]e know he will have the ability to earn prison wages over a sustained period." (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139.) "The idea that he cannot afford to pay [$370] while serving a [12]-year prison sentence is unsustainable." (*Ibid.*)

DISPOSITION

We affirm Elmer Orellana's conviction and sentence.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

I concur:

EDMON, P. J.

LAVIN, J., Concurring and Dissenting:

I agree with the majority's conclusion that Elmer Orellana's conviction should stand. To the extent Dr. Pedro Ortiz's testimony was improperly admitted under *People v. Sanchez* (2016) 63 Cal.4th 665, the error was harmless. (See *People v. Flint* (2018) 22 Cal.App.5th 983, 1004–1006.) I also agree that the challenged jury instructions are accurate statements of the law and the trial court did not err in giving them.

I disagree with the majority's conclusion that Orellana forfeited any challenge to the imposition of the court facilities fee (Gov. Code, § 70373), the court security fee (Pen. Code, § 1465.8), and the restitution fine (Pen. Code, § 1202.4, subd. (b)) by failing to object in the lower court. *People v. Dueñas*, which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1169–1172; see *People v. Brooks* (2017) 3 Cal.5th 1, 92 [" '[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence' "].)

I also disagree that the record establishes Orellana's ability to pay the challenged fees and fine. (See *People v. Rodriguez* (2019) 34 Cal.App.5th 641, 645.) Accordingly, I would remand this matter for the limited purpose of allowing Orellana to assert his inability to pay the assessed fees and fine. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490–491; accord, *People v. Viera* (2005) 35 Cal.4th 264, 305–306 [where defendant was ordered to pay a restitution fine at a time when court could not

consider his ability to pay, defendant was entitled to remand so the court could consider his ability to pay under current statutory criteria].)

I would also hold that if, on remand, the prosecution chooses not to contest Orellana's inability to pay, the court must stay the restitution fine and strike the fees—the best result defendant could obtain after a contested hearing. (See *People v. Viera, supra*, 35 Cal.4th at p. 306 [ordering trial court to reduce restitution fine to statutory minimum if ability to pay is uncontested on remand]; *People v. Wall* (2017) 3 Cal.5th 1048, 1076 ["if the Attorney General chooses not to contest the question of restitution on remand, he should so inform the trial court in writing with notice to [defendant]. In that event, the court shall reduce [defendant's] restitution fine to ... the statutory minimum at the time of his crime, and no hearing will be necessary"].)

LAVIN, J.