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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON LAMAR GILMER,

Defendant and Appellant.

B293319

(Los Angeles County
Super. Ct. No. KA116539)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Jr., Judge. Affirmed with sentence modifications.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Michael R. Johnsen,

Supervising Deputy Attorney General, Theresa A. Patterson,
Deputy Attorney General, for Plaintiff and Respondent.

A trial judge imposed a 17 year, 4 month prison sentence upon Brandon Lamar Gilmer (defendant) after the jury convicted him of three counts of robbery. On appeal, he challenges (1) the imposition of certain assessments and fines, and (2) the court's decision to stay (rather than strike) a deadly weapon enhancement. We reject his first challenge, but accept his second. Because the trial court also erred in calculating one fine, we affirm with directions to modify the various errors in the sentence.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In August 2017, defendant demanded cash from the clerk of a tobacco store at knifepoint and five days later demanded cash from the clerks in a liquor store at gunpoint. Both robberies were caught on video.

II. Procedural Background

The People charged defendant with three counts of robbery (Pen. Code, § 211),¹ one for each clerk. The People further alleged that defendant “personally used” a “deadly and dangerous” weapon in committing the tobacco store robbery (§ 12022, subd. (b)(1)), and “personally used” a firearm in committing the liquor store robbery (§ 12022.53, subd. (b)).

A jury convicted defendant of all three counts of robbery and found all allegations true.

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

The trial court sentenced defendant to 17 years and four months in state prison. Specifically, the court imposed a sentence of 12 years for one of the liquor store counts (comprised of a two-year base sentence plus 10 years for the firearm enhancement), plus a consecutive sentence of four years and four months for the second liquor store count (comprised of one-third the midterm sentence of three years and one-third of the 10-year firearm enhancement), plus a consecutive sentence of one year for the tobacco store count. The court stayed the deadly weapon enhancement on the tobacco store count. Also, the court imposed a total of \$633 in assessments and fines comprised of (1) \$210 in court facilities and court operations assessments (that is, \$70 for each count) (Gov. Code, §§ 70373, 1465.8), (2) a restitution fine of \$300 (§ 1202.4), and (3) a theft fine of \$123 consisting of a base fine of \$30 (that is, \$10 for each count) plus \$93 in penalty assessments and statutory surcharges (§ 1202.5).

Defendant filed a timely notice of appeal.

DISCUSSION

I. Assessments and Fees

Relying upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant asserts that the trial court erred in imposing the \$510 in assessments and fines without first determining that he had the ability to pay them.²

We reject defendant's challenge. *Dueñas* held that trial courts may not impose three of the standard criminal

² To the extent defendant argues that the trial court should have conducted an ability to pay hearing before imposing the theft fine, he forfeited that argument by not requesting the ability to pay hearing to which section 1202.5 entitled him. (§ 1202.5; see also *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154.)

assessments and fines—namely, the \$120 court operations assessment, the \$90 criminal convictions assessment, and the \$300 minimum restitution fine—without first ascertaining the “defendant’s present ability to pay.” (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) We have elsewhere held that *Dueñas* was “wrongly decided.” (*People v. Hicks* (2019) 40 Cal.App.5th 320, 322.) But even if we assume *Dueñas*’s validity, the trial court’s failure to conduct an ability to pay hearing when imposing \$510 in monetary obligations was harmless because defendant will earn more than twice that amount as prison wages prior to his release. (Accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 139 [“The idea that [defendant] cannot afford to pay \$370 while serving an eight-year prison sentence is unsustainable.”].) What is more, the record also contains evidence that defendant, at the time of his crime, was employed—he testified that he worked two fulltime jobs in private security. Because defendant “points to no evidence in the record supporting his inability to pay” (*People v. Gamache* (2010) 48 Cal.4th 347, 409), and hence no evidence that he would suffer any consequence for nonpayment, a remand would serve no purpose.

To the extent defendant asserts that \$510 in monetary obligations independently constitutes cruel and unusual punishment, we also reject that assertion. Whether such an obligation is excessive for these purposes turns on whether it is “grossly disproportional to the gravity of [the] defendant’s offense.” (*United States v. Bajakajian* (1998) 524 U.S. 321, 334, (*Bajakajian*), superseded by statute on other grounds as stated in *United States v. Jose* (2001) 499 F.3d 105, 110.) Factors relevant to gross disproportionality include “(1) the defendant’s culpability; (2) the relationship between the harm and the

penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. [Citations.]” (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Under this standard, a defendant's ability to pay is *a* factor, not *the only* factor. (*Bajakajian*, at pp. 337-338.) Applying these factors, we conclude that the minimum monetary obligations totaling \$510 are not grossly disproportionate to his crimes of robbery of three people at two different locations with a knife and then a gun.

However, as the People correctly note, the trial court erred in imposing a theft fine (plus the related penalty assessments and statutory surcharges) for each count. Section 1202.5 provides for the imposition of a theft fine “[i]n any *case*,” not any *count*. (§ 1202.5, subd. (a); *People v. Crittle* (2007) 154 Cal.App.4th 368.) So, the theft fine must be reduced from \$123 to \$41.

II. Stay of Deadly Weapon Enhancement

Defendant also argues that the trial court erred in *staying* the mandatory deadly weapon enhancement rather than *striking* it. As the People concede, defendant is correct. (See, e.g., *People v. Haykel* (2002) 96 Cal.App.4th 146, 151; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364-365.) We may correct this error on appeal (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Bradley* (1998) 64 Cal.App.4th 386, 391). Accordingly, we order that the deadly weapon enhancement alleged as to count 1 be stricken.

DISPOSITION

The trial court is ordered to strike the deadly weapon enhancement (§ 12022.5, subd. (a)) pertaining to count 1 and to reduce the theft fine imposed pursuant to section 1202.5 and the related penalty assessments and surcharges from \$123 to \$41. The \$41 should be set forth as: \$10 theft fine pursuant to section 1202.5; \$10 for a state penalty assessment pursuant to section 1464, subd. (a)(1); \$2 for a 20 percent state surcharge pursuant to section 1465.7; \$5 for a state courthouse construction penalty pursuant to Government Code section 70372, subd. (a)(1); \$7 for an additional penalty pursuant to Government Code section 76000, subd. (a)(1)); \$2 for an additional penalty pursuant to Government Code section 76000.5, subd. (a)(1); \$1 DNA penalty pursuant to Government Code section 76104.6 subd. (a)(1)); and \$4 for a DNA state-only penalty pursuant to Government Code section 76104.7, subd. (a). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ