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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ALLEN SETTLE, Defendant and Appellant.	B288503 (Los Angeles County Super. Ct. No. MA072291)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Remanded with directions.

Marilee Marshall, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Attorney General, and David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

Richard Allen Settle appeals from the judgment entered following his conviction after a jury trial for second degree murder and arson of a structure with special findings by the jury in a bifurcated proceeding that he had suffered one prior serious felony conviction within the meaning of the three strikes law and Penal Code section 667, subdivision (a),[1] and had served a prior separate prison term for a felony, as defined in section 667.5, subdivision (b). Settle contends the trial court committed prejudicial error in admitting statements he made to detectives during a custodial interview before they had advised him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*) and by denying his mistrial motions after two prosecution witnesses violated a court order by referring to his criminal background. Relying on this court's decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Settle also contends the trial court violated his right to due process by imposing certain fines and assessments absent evidence of his ability to pay them.

We affirm Settle's convictions and remand for the trial court to correct an unauthorized sentence and to consider whether to exercise its discretion under the recent amendments to section 667, subdivision (a), and 1385 to dismiss the prior serious felony enhancement it imposed. We also direct the trial court to give Settle the opportunity to request a hearing to present evidence demonstrating his inability to pay any applicable fines, fees and assessments.

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[1] Statutory references are to this code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information filed October 30, 2017 charged Settle with the murder of his grandmother, Patricia Blackburn (§ 187 subd. (a)) and arson of an inhabited structure (§ 451, subd. (b)). The information specially alleged Settle had suffered two prior convictions for serious or violent felonies within the meaning of the three strikes law (§ 667, subds. (b)-(h); 1170.12), two prior convictions for serious felonies within the meaning of section 667, subdivision (a), and had served a prior separate prison term for a felony within the meaning of section 667.5, subdivision (b). Settle pleaded not guilty and denied the special allegations.

2. *The Evidence at Trial*

a. *Blackburn's murder and fire at her mobile home*

Sometime in July or August of 2015 Settle moved into his grandmother's mobile home at Thousand Elms Mobile Lodge in Palmdale. In October 2015 Settle and Blackburn had an argument, and Settle left her home and moved in with his girlfriend, Christina Whitaker.

On October 29, 2015 at or near 1:00 a.m., Whitaker dropped Settle off at a friend's mobile home at Thousand Elms so Settle could collect some of his belongings. Settle later drove back to Whitaker's home in Blackburn's blue truck.

During that same morning, Blackburn's caregiver, Tina Young, called Blackburn to speak with her before going to her home to take her to an appointment. Settle answered the phone and told Young not to come over because Blackburn had cancelled the appointment. Young went to Blackburn's home anyway and found the front door locked and the shades lowered; no one was

home. Young became concerned because Blackburn rarely left her home and had not told Young she was going out of town.

On October 30, 2015 at 7:30 a.m., one of Blackburn's neighbors looked out her kitchen window and saw Settle walking away from Blackburn's mobile home toward Blackburn's blue truck. Two minutes later, the neighbor noticed smoke coming from Blackburn's home and called the 911 emergency number. Firefighters found Blackburn's charred corpse bound to a chair in the living room. An electrical cord had been tied tightly around Blackburn's neck. A propane torch was found on the floor by her feet.

b. *Forensic evidence*

A specialist in arson investigation determined the fire had been started by someone using a blue propane torch to ignite a pile of toilet paper placed underneath Blackburn's feet. All of the gas stovetop's knobs had been turned to the "on" position, leading the investigator to conclude that "somebody wanted to blow up the trailer."

The coroner opined Blackburn died before the fire started because no soot was found in her lungs, indicating she had not been breathing at the time of the fire. He concluded Blackburn died from ligature strangulation,[2] which could have occurred days before the fire.

No sufficient DNA sample was collected from the electrical cord found around Blackburn's neck, and no DNA profile could be made using DNA samples from the stovetop burner knobs. Cell

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[2] The coroner explained "ligature" refers to anything that can be tied tightly around one's neck. Here, the electrical cord was used as a ligature.

phone tower records placed Settle in Palmdale during the early morning hours of October 29, a few hours before the fire at Blackburn's home started.

Young testified she had seen a blue propane torch in Settle's closet when she cleaned his room after he had moved out.

c. *Settle's arrest and interrogation*

On October 31, 2015 Settle was arrested and placed in custody at Twin Towers Correctional Facility in Los Angeles. On November 1, Los Angeles County Sheriff's Sergeant Robert Gray and Detective Kevin Acebedo interviewed Settle in jail. Before advising Settle of his rights under *Miranda,* the following discussion took place:

"GRAY: Hey, Richard.

"ACEBEDO: Richard. How are you?

"GRAY: My name's Bob Gray.

"ACEBEDO: Kevin Acebedo. We're from, we're from the Sheriff's Homicide.

"SETTLE: Hey, man.

"GRAY: What's wrong?

"SETTLE: What's wrong?

"GRAY: Yeah, what's wrong, Richard?

"SETTLE: Fuck you, man. You're gonna say I tried to kill my grandmother, man. Fuck this shit, man.

"GRAY: Well, we're trying to figure out what happened. We didn't say, we didn't say you—

"SETTLE: You didn't have to do all this, you just had to ask me to come in, man. You think I would've came in?

"GRAY: I don't know, bro.

"SETTLE: All you had to do was ask me.

"GRAY: Alright, relax—

"ACEBEDO: Okay.

"SETTLE: Or call my number.

"ACEBEDO: Well, take, take it easy, we're not—

"SETTLE: Hey, don't lie to everybody and tell them you called my number and I'm not answering.

"ACEBEDO: But we're not. We're not the ones who put you here.

"GRAY: Who, who said that?

"SETTLE: That's what I was told.

"GRAY: No, no, no, no, no.

"SETTLE: My neighbor said that you said you called my number and I didn't answer.

"GRAY: No, I don't even have your number.

"SETTLE: She also said that you went through her phone, well, how would you—why didn't you get my number?

"ACEBEDO: Went through her phone?

"GRAY: No. What neighbor is this?

"SETTLE: The little—that girl—the fucking—

"GRAY: Alright, well obviously we got off on the wrong foot here.

"SETTLE: Look, man, I'm gonna tell you straight up. I was supposed to come in just for a detainment 'cause some lazy fucking sheriff didn't want to sit there and fucking wait, I'm charged now, so I have nothing to say to you."

The detectives then partially advised Settle of his rights under *Miranda*, and the interview continued.

d. *Pretrial proceedings to exclude Settle's custodial statements*

Before trial defense counsel moved to exclude all of Settle's statements made during the custodial interview, arguing the

statements had been obtained in violation of *Miranda*. Detective Acebedo testified he gave Settle a *Miranda* advisement following "a brief little bit of conversation," but admitted the advisement had failed to mention Settle's right to appointed counsel. The court granted the defense motion to exclude all statements made after the incomplete *Miranda* advisement.

Defense counsel argued the entire interview should be excluded, insisting the pre-*Miranda* statements were also inadmissible as the product of an improper custodial interrogation. The court declined to exclude the pre-*Miranda* portion of the interview, concluding Settle's statements were not the product of interrogation and thus did not violate *Miranda*. The People played the audio tape of the pre-*Miranda* portion of Settle's interview at trial.

e. *Settle's motion for mistrial*

The court granted Settle's pretrial request to bifurcate trial of his prior convictions and to admonish the witnesses not to mention his criminal history. Notwithstanding the court's order, two prosecution witnesses alluded to Settle's criminal past at trial. The court denied Settle's motions for mistrial, ruling the witnesses' statements were not prejudicial because they were brief, general and vague and did not refer to a specific prior conviction.

3. *Settle's Theory of the Case*

Settle did not testify or present any evidence at trial. His counsel argued that, because Settle was the only suspect detectives had considered in the case, they had tailored the evidence to frame him as the murderer and arsonist.

4. *Jury Instructions, Verdict and Sentencing*

The court instructed the jury on, among other things, second degree murder (CALCRIM Nos. 500, 520), arson of an inhabited structure (CALCRIM No. 1502) and the lesser included offense of simple arson (CALCRIM No. 1515). The jury found Settle guilty of second degree murder and simple arson.

In a bifurcated proceeding the jury found Settle had suffered one prior serious or violent felony conviction within the meaning of the three strikes law and one serious felony within the meaning of section 667, subdivision (a), and had served a prior separate prison term for a felony within the meaning of section 667.5, subdivision (b). The court denied Settle's motion to dismiss his prior serious felony conviction under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508 and sentenced him an aggregate state prison term of 48 years to life: an indeterminate term of 30 years to life for second degree murder (count one) (15 years to life, doubled under the three strikes law), plus five years for the prior serious felony conviction, plus one year for the prior prison term, and a consecutive 12-year determinate term for arson of a structure (count two) (the upper term of six years doubled). In addition, the court ordered Settle to pay a $10,000 restitution fine pursuant to section 1202.4, a court facilities assessment of $30 (Gov. Code § 70373, subd. (a)) and a court operations assessment of $40 (§ 1465.8). The court imposed and stayed a $10,000 parole revocation restitution fine (§ 1202.45).

DISCUSSION

1. *The Court's Ruling Admitting Settle's Pre-Miranda Statements, Even If Error, Was Harmless*

a. *Governing law and standard of review*

Miranda admonitions (advising a defendant of his or her right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel) must be given, and a suspect in custody must knowingly and intelligently waive those rights before being subjected to either express questioning or its "functional equivalent." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297]; *People v. Ray* (1996) 13 Cal.4th 313, 336.) "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda, supra,* 384 U.S. at p. 444.)

"When there is custody but not *interrogation Miranda* does not apply." (*People v. Harmon* (1992) 7 Cal.App.4th 845, 853.) "Interrogation includes both express questioning and 'words or actions . . . the police should know are reasonably likely to elicit an incriminating response from the suspect.'" (*People v. Enraca* (2012) 53 Cal.4th 735, 752; accord, *People v. Elizalde* (2015) 61 Cal.4th 523, 531; see *Davis v. United States* (1994) 512 U.S. 452, 458 [114 S.Ct. 2350, 129 L.Ed.2d 362]; *Rhoda Island v. Innis, supra,* 446 U.S. at p. 301.) Determining whether the words or actions of the police were likely to lead to an incriminating response focuses on the perception of the suspect, rather than the intent of the officers involved. (*Innis,* at pp. 300-301; *People v. Huggins* (2006) 38 Cal.4th 175, 198.) Whether particular questioning or statements amount to interrogation or its

functional equivalent depends on the "total situation," including the length, place and time of the questioning; the nature of the questions; the conduct of the police; and all other relevant circumstances. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880, 68 L.Ed.2d 378]; *People v. Stewart* (1965) 62 Cal.2d 571, 579.)

"'"Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response."'" (*People v. Huggins, supra,* 38 Cal.4th at p. 198, quoting *People v. Haley* (2004) 34 Cal.4th 283, 301.) An officer engaging in "small talk" with a suspect in custody is not considered to be interrogating the suspect provided that the officer's speech would not reasonably be construed as calling for an incriminating response. (See *People v. Gamache* (2010) 48 Cal.4th 347, 388 [defendant's incriminating statement in response to officer's innocuous question about the defendant's military service was admissible at trial because the question constituted "small talk"]; see *People v. Andreasen* (2013) 214 Cal.App.4th 70, 89 [officer's use of conversation concerning neutral topics about the defendant's interests and life in an effort to calm the violent defendant did not amount to interrogation]; see also *People v. Mickey* (1991) 54 Cal.3d 612, 644 [officer's "small talk" with defendant while defendant was in custody was not interrogation because the conversation concerned "'home town talk, [defendant's] father, friends, relations, people that they knew mutually"'].)

"In reviewing a trial court's *Miranda* ruling, we accept the court's resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence,

and we independently determine, from the undisputed facts and facts properly found by the trial court, whether the challenged statement was illegally obtained." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105.)

b. *Even if the detectives' inquiries were more than "small talk," any error in admitting Settle's statements was harmless beyond a reasonable doubt*

Settle contends the trial court erred in admitting the pre-*Miranda* portion of his interview with the detectives because Sergeant Gray's question "what's wrong" constituted impermissible custodial interrogation. Settle argues the question was designed to elicit an incriminating response because the detectives knew Settle was angry he had been arrested and was unlikely to give a benign response to the question. However, as the trial court found, in context Sergeant Gray's introductory question, "What's wrong?" was permissible small talk, designed not to interrogate but to "make sure everything was all right [with Settle]" before the interrogation began. (See *People v. Andreasen*, *supra,* 214 Cal.App.4th at p. 89.)

Sergeant Gray's statement, "Well, we're trying to figure out what happened," presents a much closer question. Despite being framed as a declarative statement, Sergeant Gray's comment signaled his desire to learn about the circumstances of Blackburn's murder and thus reasonably could have been interpreted by Settle as an attempt to elicit an incriminating response. (*People v. Davis* (2005) 36 Cal.4th 510, 555 [officer's declarative statement to suspect that indirectly accused the suspect of committing the alleged shooting constituted interrogation]; *People v. Sims* (1993) 5 Cal.4th 405, 443-444

[confronting suspect with evidence linking him to crimes is a "'technique of persuasion'" likely to induce the defendant to incriminate himself, even if the officer did not ask the suspect questions]; *In re Albert R.* (1980) 112 Cal.App.3d 783, 790 [officer statements may amount to custodial interrogation without being phrased in questioning form].)

Nonetheless, we need not decide whether Sergeant Gray's statements crossed the line between small talk and interrogation. Even if Settle's response to Sergeant Gray was the product of custodial interrogation in violation of *Miranda,* any error in admitting the statements was harmless beyond a reasonable doubt. (*People v. Case* (2018) 5 Cal.5th 1, 22 [erroneous admission of a defendant's pretrial statements obtained in violation of *Miranda* "'is reviewed for prejudice under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] . . . . That test requires the People . . . "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"'"]; see *People v. Cunningham* (2001) 25 Cal.4th 926, 994; *People v. Bradford* (2008) 169 Cal.App.4th 843, 855 ["[w]e must reverse a conviction that rests on evidence from an interrogation conducted in violation of *Miranda* unless admission of the evidence was harmless beyond a reasonable doubt"].)[3]

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[3] There are two formulations of the *Chapman* beyond-a-reasonable-doubt standard: (1) "Under this test, the appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621.) (2) Federal constitutional error is properly

None of Settle's statements implicated Settle in the murder of Blackburn or the arson of her mobile home. At most, they revealed his anger at being arrested rather than being asked to give a voluntary statement. Therefore, the statements cannot be considered incriminating.

Settle disputes this conclusion by emphasizing that the prosecutor referred to the statements in closing argument to demonstrate his guilt. In particular, in response to defense counsel's argument that Settle was the only suspect detectives had considered in the case, the prosecutor stated that at one point Young was also a potential suspect. The prosecutor continued, "However, Mr. Settle didn't do himself any favors 'cause and you have this transcript when he's brought in on November 1st by homicide detectives. . . ." The prosecutor then read from the transcript of the interview and said, "Well, that's good. No evidence is coming from this exchange. I guess he's not a suspect anymore. Really?"

It appears the prosecutor's point was to emphasize that police do not stop questioning a suspect simply because he denies involvement, although that is by no means clear. Whatever the reason for the prosecutor's emphasis on Settle's custodial statements, however, Settle did nothing more than adamantly deny involvement in the murder and arson. Under these

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found harmless under the *Chapman* standard if a thorough examination of the record demonstrates beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. (See *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.)

circumstances the admission of Settle's limited custodial statements was harmless beyond a reasonable doubt.

2. *The Trial Court Did Not Abuse Its Discretion in Denying Settle's Motions for Mistrial*

a. *Relevant proceedings*

At a pretrial conference defense counsel requested the witnesses be advised not to mention Settle's past incarceration or his parole status at the time he was alleged to have committed the charged offenses. The court granted the request and advised the prosecutor to admonish the witnesses to comply with the court's order.

During the direct examination of Trishia Duer, a Thousand Elms resident and a friend of Settle's, the prosecutor asked, "And did you tell detectives that when Richard learned that you had called 911 he began . . . crying, and Richard said he knew he would be taken to jail by the deputies?" Duer answered, "He was already upset and crying, but because of his past, he was concerned that because of his past it would make the present—make like they would not be on his side." Defense counsel immediately requested a sidebar conference. Outside the presence of the jury the court observed that Duer's comment alluded to Settle's past criminal behavior but found the comment to be "innocuous enough the way it stands." The court attempted to resolve the matter by directing the prosecutor to remind the witness not to mention any details of Settle's criminal history. Defense counsel moved for a mistrial because, in his view, Duer's comment was not innocuous and would inevitably lead the jury to speculate as to what Settle's past was. The court denied the motion, finding that the statement "ha[d] nothing to do with

[Settle's] criminal history" and only alluded generically to his "past."

The People called Los Angeles County Sheriff's Deputy James Al-Kassab to testify. During the direct examination Al-Kassab testified he had been dispatched to Thousand Elms on October 31, 2015 to locate Settle. Asked whether he was provided with a description of Settle's physical appearance, Al-Kassab responded, "We were told specifically by name who to look for, but we had to look up a picture of the defendant I believe from a prior booking photo."

Defense counsel renewed his motion for mistrial, arguing that Al-Kassab's reference to Settle's booking photo was prejudicial because it would lead the jury to infer that Settle had suffered a prior arrest. The court offered to admonish the jury to disregard the reference and to remind them there was no evidence Settle had any criminal history. Defense counsel declined the offer for an admonition in order not to highlight the reference. The court denied the motion. To cure any possible taint from the response, the court agreed with the prosecutor's proposal to inquire whether Al-Kassab had used departmental resources to try and obtain a photograph of Settle prior to driving to Thousand Elms. Al-Kassab replied, "Yes." The prosecutor clarified, "And departmental resources can include a . . . DMV photograph, is that correct?" Al-Kassab again responded affirmatively.

Following Settle's conviction, his defense counsel moved for a new trial, arguing the court had erred in denying his second motion for mistrial. Settle insisted the deputy's reference to his booking photo was incurably prejudicial because it caused the jury to infer he had suffered a prior arrest and was therefore a

criminal capable of killing his grandmother. The court denied the motion, ruling the brief reference to the booking photo in no way "could have risen to the level to have substantially prejudiced the rights of the defendant." The court also emphasized it had offered to admonish the jury to disregard the reference, but defense counsel declined the offer.

b. *Governing law and standard of review*

A trial court should grant a motion for mistrial "only when a party's chance of receiving a fair trial has been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555 (*Bolden*); accord, *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 291 ["we have stated that a trial court should grant a mistrial only if the defendant will suffer prejudice that is incurable by admonition or instruction"].) "There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580.)

"A witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice." (*People v. Ledesma* (2006) 39 Cal.4th 641, 683; see *People v. Rices* (2017) 4 Cal.5th 49, 92 ["[a] court should grant a mistrial motion based on a witness's statement if it judges the defendant has been prejudiced in a way that an admonition or instruction cannot cure"].) But a brief and nonresponsive statement may generally be cured by admonishment. (*People v. Price* (1991) 1 Cal.4th 324, 328.) It is only in the "exceptional case" that the improper testimony is of such a character that its effect cannot be removed by the court's instructions to the jury to disregard it. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.)

We review the trial court's ruling denying a motion for mistrial for abuse of discretion. (*Bolden, supra,* 29 Cal.4th at p. 555; *People v. Ayala* (2000) 23 Cal.4th 225, 282.)

c. *Denial of Settle's mistrial motion was not an abuse of discretion*

Settle argues Deputy Al-Kassab's reference to the booking photo was incurably prejudicial because it suggested he was a criminal and therefore a "seriously bad person who would even kill his own grandma." A similar contention was made in *Bolden*, *supra,* 29 Cal.4th at pages 526-527. During the defendant's murder trial, defense counsel moved for a mistrial after a witness briefly mentioned he had earlier found the defendant's address through the Department of Corrections parole office. (*Id.* at p. 554.) Defense counsel argued the witness's reference to the parole office was prejudicial because it implied the defendant had suffered a prior felony conviction. (*Id.* at pp. 554-555.) The trial court denied the motion. The Supreme Court affirmed because "it is doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction." (*Id* at p. 555.)

People v. Collins (2010) 49 Cal.4th 175 (*Collins*) is also instructive. There the court granted the defendant's request to admonish the witnesses not to mention the defendant's prior incarceration. (*Id.* at p. 196.) During the redirect examination a witness testified, "'This was when [the defendant] was still in Susanville [(name of the town where prison is located)] before he got out in December.'" (*Id.* at p. 197.) Defense counsel immediately moved for a mistrial; the court denied the motion because the statement was not so prejudicial as to warrant a new trial. (*Id.* at pp. 197-198.) The next day the court offered to

admonish the jury to disregard the statement, but defense counsel declined the offer to avoid highlighting the statement. (*Id* at p. 198.) The Supreme Court affirmed because the statement was "brief and ambiguous" and any prejudicial effect could have been cured by admonition. (*Id.* at p. 199.)

As in *Bolden* and *Collins*, Deputy Al-Kassab's reference to Settle's booking photo was brief; the taint was reduced based on further questioning; and it was not mentioned by the prosecutor in closing argument. It is thus unlikely the fleeting reference led the jury to conclude Settle was a "bad person" with the propensity to kill his grandmother. On this record the trial court did not abuse its discretion in denying Settle's mistrial motion. (See *People v. Franklin* (2016) 248 Cal.App.4th 938, 955 ["[t]he California Supreme Court has consistently found vague and fleeting references to a defendant's past criminality to be curable by appropriate admonition to the jury"].)[4]

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[4] Settle's challenge to the court's denial of his new trial motion, predicated on the same grounds as the motion for mistrial, fails for the reasons discussed. Settle also contends the errors he has identified, when considered cumulatively, denied him due process. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436 ["[a] claim of cumulative error is in essence a due process claim"].) For the reasons we have explained, none of the errors Settle has alleged, even when considered cumulatively, denied him a fair trial. Accordingly, we reject Settle's claim of cumulative error.

3. *A Limited Remand Is Appropriate*

a. *Remand is appropriate for the trial court to correct sentencing errors and to consider whether to dismiss or strike five-year sentencing enhancements*

As discussed, Settle was sentenced to an indeterminate term of 30 years to life for second degree murder and a consecutive determinate term of 12 years for arson. The court imposed a five-year enhancement on the murder count pursuant to section 667, subdivision (a), because Settle had suffered a prior serious felony conviction and a one-year enhancement because he had served a prior separate prison term for a felony within the meaning of section 667.5, subdivision (b). No enhancements were imposed on the arson count.

At the time of Settle's conviction, imposition of the section 667, subdivision (a), five-year prior serious felony enhancement was mandatory and should have been imposed once to the indeterminate sentence and once to the determinate sentence. (*People v. Misa* (2006) 140 Cal.App.4th 837, 846-847 [defendant, a second strike offender, was subject to a prior conviction enhancement under section 667, subdivision (a), on the torture count, which carries an indeterminate sentence, even though he also received a similar enhancement relating to the determinate sentence on the assault count].) Similarly, a prior prison term enhancement under section 667.5, subdivision (b), must be applied once to the indeterminate sentence and once to the determinate sentence unless the court elects to strike the enhancement under section 1385. (*People v. Minifie* (2018) 22 Cal.App.5th 1256, 1265 ["[b]ecause section 669, subdivision (a), provides for imposition of 'applicable enhancements' to the indeterminate sentence and section 1170.1,

subdivision (a), provides for imposition of 'applicable enhancements' to the determinate sentence, we conclude that the prior prison term enhancements under section 667.5, subdivision (b), are to be applied once to the indeterminate sentence and once to the determinate sentence, unless the court elects to strike the conviction under section 1385"].) The sentence imposed was unauthorized.[5]

Although the trial court was obligated to impose two five-year prior serious felony enhancements when it sentenced Settle, on September 30, 2018 the Governor signed 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. (See Stats. 2018, ch. 1013, §§ 1 & 2.)

In light of the trial court's sentencing errors and its newly granted discretion to dismiss or strike a prior serious felony enhancement, we remand for the court to consider whether to impose the five-year prior serious felony enhancement or the one-year prior prison term enhancement on both, one or none of the two counts as to which Settle was convicted. (See generally *People v. Garcia* (2018) 28 Cal.App.5th 961, 973, fn. 3 [remanding for resentencing when "[t]he record does not indicate that the

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[5] A sentence is "unauthorized" when it "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An appellate court has an obligation to correct an unauthorized sentence whenever the error comes to its attention, whether or not the error was raised on appeal. (See *People v. Cunningham*, *supra*, 25 Cal.4th 926, 1044-1045.) We advised the parties of our concern that the trial court had imposed an unauthorized sentence and invited them to submit supplemental letter briefs addressing the issue.

court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant"].)

b. *Remand is also appropriate for Settle to request a hearing on his ability to pay the fees and assessments imposed by the trial court*

In *Dueñas*, *supra*, 30 Cal.App.5th 1157 this court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant's ability to pay. (*Dueñas*, at p. 1168.) A restitution fine under section 1202.4, subdivision (b), in contrast, is intended to be, and is recognized as, additional punishment for a crime. Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a compelling and extraordinary reason not to impose the restitution fine; inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question raised by these provisions, we held, although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)

Settle requests we remand the case for the trial court to conduct an ability-to-pay hearing in accordance with our opinion in *Dueñas*. The Attorney General contends Settle forfeited the issue by not raising it at trial. Although recognizing we have

rejected similar forfeiture arguments in the past (see *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 ["[w]hen, 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 generally *People v. Brooks* (2017) 3 Cal.5th 1, 92 ["'reviewing 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"]), the Attorney General argues forfeiture should apply in this case because, at the time of his sentencing hearing, Settle had an existing right under section 1202.4, subdivision (d), to challenge imposition of a restitution fine above the $300 statutory minimum.

Although the People are correct Settle could have challenged the trial court's imposition of the restitution and parole revocation restitution fines to the extent they were above the statutory minimum, "neither forfeiture nor application of the forfeiture rule is automatic." (*People v. McCullough* (2013) 56 Cal.4th 589, 593; accord, *In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Here, neither the trial court nor Settle's counsel had the benefit of our decision in *Dueñas*, and the court understandably did not advise Settle he had a due process right to argue he did not have the ability to pay the various fines and assessments imposed. Because we must remand this case in any event to permit the trial court to resolve other sentencing issues, it is appropriate to give Settle the opportunity to make a record on remand as to his ability to pay all applicable fines, fees and assessments. (Cf. *In re S.B.,* at p. 1293 [the purpose of the

forfeiture rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected"].)

DISPOSITION

We affirm Settle's convictions and remand for the trial court to correct its unauthorized sentence and to consider whether to exercise its discretion to dismiss any prior serious felony enhancements. On remand the trial court is to afford Settle the opportunity to request a hearing and to present evidence of his ability to pay any applicable fines, fees and assessments.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.