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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOEL CASTANEDA, Defendant and Appellant.	B292848 (Los Angeles County Super. Ct. No. LA047078)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael K. Kellogg, Judge. Affirmed.

Peter Gold, 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, Taylor Nguyen and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

This is the latest appeal in a case that began with Joel Castaneda's 2006 initial (and reversed) convictions of first degree murder (Pen. Code, § 187) and attempted premeditated murder (§§ 664 & 187). It arises from the trial court's 2018 denial of appellant's motion for disclosure of juror identifying information, originally filed following his re-conviction in 2011. Appellant contends the trial court abused its discretion in denying the motion. Appellant further contends that *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) requires a remand to allow him to request a hearing on his ability to pay fees and assessments imposed by the trial court.

The motion does not present facts sufficient to establish good cause to release juror personal identifying information and we see no abuse of discretion in the trial court's denial of the motion. Appellant has forfeited his *Dueñas* claim. We affirm the judgment of conviction.

BACKGROUND

Appellant committed the crimes in this case in 2004, when he was 18 years old.[1] In 2006, he was convicted, but we reversed those convictions on appeal. In 2009, appellant was retried, but the jury deadlocked. In 2011, he was tried for a third time and again convicted. In 2013, we reversed the trial court's denial of appellant's new trial motion and motion for disclosure of juror

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[1] In a petition for writ of habeas corpus filed while this appeal was pending, appellant contends his counsel was ineffective for failing to request a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261. On May 24, 2019, we ordered that petition (B297736) be considered (but not consolidated) with this appeal. We will rule on the petition by separate order.

identifying information, and remanded for a new hearing on those motions and a new sentencing hearing. In 2018, the trial court again denied appellant's new trial motion. The trial court struck the Penal Code section 12022.53 firearm enhancements and sentenced appellant to a total term of 25 years to life in state prison. The trial court also imposed various fines and fees.

At the 2011 retrial, appellant was represented by retained counsel Colleen O'Hara. In the new trial motion prepared and filed by O'Hara on appellant's behalf, O'Hara raised a number of grounds for a new trial, including juror misconduct. O'Hara also filed a motion for disclosure of juror identifying information pursuant to Code of Civil Procedure section 237[2] (the disclosure motion). This exact disclosure motion is the subject of this appeal.

O'Hara identified three instances of potential juror misconduct: (1) a statement during trial by a juror that indicated prejudgment of the case and statements by some jurors at the outset of deliberations that indicated prejudgment of the case; (2) coercion of four jurors which resulted in their changing their votes from not guilty to guilty; and (3) concealment of information during voir dire by Juror No. 9, which was revealed during deliberations. O'Hara personally heard the remark made during trial. She relied on post-verdict statements made in the courtroom by Juror No. 1 to establish the other instances of potential misconduct. O'Hara filed a declaration in support of the

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[2] Further undesignated statutory references are to the Code of Civil Procedure.

disclosure motion, but it stated only "This declaration incorporates all facts."[3]

The prosecutor filed an opposition to the new trial motion which also included arguments in opposition to the disclosure motion. The prosecutor also contended that although two jurors remained in the courtroom after the verdict to speak to both counsel, Juror No. 1 was not one of the two who stayed. The prosecutor indicated that he did not hear a remark by any of the two jurors about concealment of information during voir dire. Regarding the allegation that one juror indicated some jurors were coerced by being shouted down, the prosecutor directly stated that he did not hear "any statements which indicated anything of this sort by either of the two jurors who did remain." The prosecutor did not file a declaration to support these factual claims.

In 2011, the trial court decided the disclosure motion at the hearing on the new trial motion. Although initially represented by O'Hara at the hearing, appellant discharged her and represented himself for much of the 2011 hearing on the motions.

In 2011, after a two-day hearing, the trial court denied the request for juror personal identifying information and denied the motion for a new trial in its entirety.

Appellant appealed, and in 2013 we reversed the trial court's order based on violations of appellant's right to counsel during the proceedings on the new trial motion. We found that the denial of right to counsel issues affected the separate

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[3] She filed an identical motion in support of the new trial motion.

disclosure motion, and we treated it "as part of the new trial motion as to which a new hearing is required."

Following our 2013 remand, appellant relied on the 2011 motion for disclosure of juror information, and on the juror misconduct section of the 2011 new trial motion, and the declarations attached thereto. Appellant was represented on remand by Carlo Spiga. Spiga did not discuss the issue of jury misconduct in his arguments to the court. He stated "I, also, with respect to all the other issues in the motion for a new trial that was filed by Miss O'Hara, whether I argue them or not, if they have not been previously dealt with by the Court of Appeal and if I don't address that issue, I do renew those arguments." The prosecutor, in her argument, stated "The jury misconduct claims, I think, were thoroughly argued in [prosecutor] Mr. Harmon's brief." Ultimately, the court denied the new trial motion without specifically addressing the jury misconduct claims or the disclosure motion.

DISCUSSION

I. *The Trial Court Did Not Abuse Its Discretion In Denying The Disclosure Motion.*

After a verdict is recorded in a criminal case, an attorney may petition the court for access to jurors' sealed personal identifying information "for the purpose of developing a motion for new trial or any other lawful purpose." (§ 206, subd. (g).) A petition for disclosure of juror information "shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (§ 237, subd. (b).)

To demonstrate good cause under section 237 based on juror misconduct, a defendant must set forth a sufficient showing to support a reasonable belief that misconduct occurred and that further investigation is necessary to provide the court with adequate information to rule on a motion for a new trial. (*People v. Munoz* (2019) 31 Cal.App.5th 143, 165.) The alleged misconduct must be of such character as is likely to have influenced the verdict. (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) There is no good cause where the allegations of misconduct are speculative, conclusory, vague or unsupported. (*Munoz,* at p.165.)

Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." " 'This statute distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ." ' [Citation.] ' "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent." ' " (*People v. Danks* (2004) 32 Cal.4th 269, 302 (*Danks*).)

" ' "The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." ' " (*Danks*, *supra*, 32 Cal.4th at p. 302.) " '[N]o evidence is admissible to show the *[actual] effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined.' " (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "'Thus, where a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, 'open to [corroboration by] sight, hearing, and the other senses' [citation], which suggests a *likelihood* that one or more members of the jury were influenced by improper bias." (*Ibid*.)

We review the trial court's ruling on a motion for disclosure of juror identifying information for an abuse of discretion. (*People v. Johnson* (2013) 222 Cal.App.4th 486, 492 (*Johnson*).)

A. *Counsel's Declaration Was Inadequate.*

Section 237 requires a disclosure motion to be supported by a declaration that "includes facts sufficient to establish good cause for the release of the juror's personal identifying information." Declarations in support of a motion for disclosure may be made on information and belief; it need not be based on personal knowledge. (*Johnson, supra,* 222 Cal.App.4th at p. 493.) Even under this relaxed standard, O'Hara's 2011 declaration was wholly deficient to establish good cause, and this deficiency was not remedied on remand.

A statement that "This declaration incorporates all facts" in the motion is meaningless here where the motion itself does not clearly distinguish between facts, inferences and argument, or between what O'Hara directly observed and what she was told.

To give just one example, the motion states: "Juror Number 9 lost credibility with the other jurors after he told them for the first time during deliberations that he had considered becoming a gang member." Is this counsel's opinion or a statement by Juror No. 1? For this reason alone, the trial court did not abuse its discretion in denying the disclosure motion. However, considering the claims on the merits as well, we see no abuse of discretion.

B. *The Jurors' Statements Do Not Show Prejudgment.*

A trial court is required "to admonish the jurors not 'to form or express any opinion about the case until the cause is finally submitted to them,' [so] a juror who prejudges a case and so fails to deliberate is also guilty of misconduct." (*People v. Linton* (2013) 56 Cal.4th 1146, 1194.) However, "[j]urors are allowed to reflect about the case during the trial and at home. [Citation.] In fact, it is unrealistic to expect them not to do so." (*Id.* at p. 1195.)

Appellant contends there were two instances of prejudgment shown by Juror No. 1's statement, one in open court during the defense case and one in the jury room at the very outset of deliberations. Neither statement is sufficient to support a reasonable belief that prejudgment occurred.

1. *The statement during trial does not indicate prejudgment of the case.*

The disclosure motion states that during the defense case, when either Octavio Cortez or Patricia Ruiz was testifying, O'Hara asked for a sidebar concerning the witness's dishonesty in claiming a lack of memory. As she got up, she heard an unidentified juror say something like "She's trying to find some evidence." Most of the jurors "erupted into laughter." Appellant

told counsel he had heard the same statement. According to O'Hara, the bailiff told appellant she had heard the same statement. The motion does not indicate whether appellant and/or the bailiff heard laughter.[4]

Appellant contended that this statement showed prejudgment of the case and that the laughter could signify the other jurors' agreement with the sentiment. We do not agree.

This statement is far from the unequivocal references to guilt found in the cases cited by appellant. (*In re Hitchings* (1993) 6 Cal.4th 97, 113 [allegations that before individual was picked as a juror she "expressed the opinion that petitioner was guilty" would show prejudgment]; *People v. Brown* (1976) 61 Cal.App.3d 476, 479 (*Brown*) [juror statement during prosecution case that " ' "[h]e is guilty" ' " and " ' "[t]here is no doubt about it" ' " showed improper prejudgment]; *Deward v. Clough* (1966) 245 Cal.App.2d 439, 443 [prejudgment when juror stated on last day of trial " ' "I don't see why they don't open up the jury room now. We could bring in a verdict already" ' "].)

Taken in context, the remark in this case is most reasonably understood as referring to the defense witnesses' evasive testimony, and defense counsel's use of the witnesses'

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[4] Although not determinative of our decision, we note that during the Ruiz sidebar, the court noted, "We're back in the hallway again doing a sidebar and the jury was grumbling. It's obvious they're getting upset with the fact that we're handling so much out of their presence." The court concluded by saying "Let's get it to the jury before we hear more moans and groans when we're in the hallway." The court did not mention any laughter. This suggests that O'Hara may have misinterpreted the jury's reaction.

prior statements to refresh their recollection and when that failed, to provide substantive evidence.[5] This was an indirect and time-consuming process. Thus, regardless of whether the juror's comment was made during Cortez's examination or Ruiz's, that comment is most reasonably understood as referring to counsel's difficulty in getting Cortes or Ruiz to offer any substantive testimony. It is not reasonably understood as showing prejudgment about appellant's guilt or innocence, or even about the overall strength of the defense case.

2. *It is not misconduct for a juror to express an opinion on guilt early in deliberation.*

The disclosure motion states: "[A]t the outset of the jury deliberation process, Juror Number 1 said that 'many of the jurors announced that it would have to be a guilty verdict,' before any substantive discussion of the case began." Presumably the quotation marks around "many . . verdict" were meant to indicate that this was a statement by Juror No. 1, but it is not clear who said "at the outset of the jury deliberation process" and "before any substantive discussion of the case began," nor is it clear what the speaker meant by those phrases. The statement seems to indicate that the jurors were in the jury room for the purpose of deliberating. Thus, the jurors' statements about guilt would seem to be the beginning of a substantive discussion of the case. There is no requirement that jurors discuss specific pieces of evidence or issues of law before discussing their opinions on guilt

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[5] The trial court found the witnesses' continued claim of a lack of recall was feigned.

or innocence. Simply holding and expressing an opinion about guilt or innocence at the start of deliberations is not misconduct.[6]

As our Supreme Court has explained: "[A] juror who forms an opinion regarding the strength of the prosecution's case before the start of deliberations has not necessarily prejudged the case. As this court recently explained, '[t]he reality that a juror may hold an opinion at the outset of deliberations is . . . reflective of human nature. It is certainly not unheard of that a foreperson may actually take a vote as deliberations begin to acquire an early sense of how jurors are leaning. We cannot reasonably expect a juror to enter deliberations as a *tabula rasa,* only allowed to form ideas as conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination.' " (*People v. Merriman* (2014) 60 Cal.4th 1, 101.)

The statement in the disclosure motion does not show anything more than some form of early polling or discussion of opinions on the ultimate question in the case. That is not improper.

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[6] Appellant has not cited any cases finding prejudgment based on a jurors' expression of opinion at the outset of deliberations. The cases cited by appellant all involve statements made before trial or while trial was still ongoing. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 113 [statement made before individual was picked as a juror]; *Brown*, *supra*, 61 Cal.App.3d at p. 479 [juror statement during prosecution case]; *Deward v. Clough*, *supra*, 245 Cal.App.2d at p. 443 [juror statement on last day of trial].)

C. *Shouting and Screaming Is Not Misconduct.*

The motion states Juror No. 1 said that "all of the other jurors were horrified and screamed at Juror Number 9 and berated him." The motion further states that "Juror Number 9 changed his vote after being screamed at by his fellow jurors." Referring to the other three jurors, the motion states "Juror Number 1 told me that he and other jurors had 'shouted them down' until they changed their votes to guilty."[7] These descriptions are not sufficient to support a reasonable belief that juror misconduct in the form of coercion occurred.

As our Supreme Court has repeatedly observed, "jurors, without committing misconduct, may disagree during deliberations and may express themselves vigorously and even harshly: '[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means.' [Citation.] During deliberations, expressions of 'frustration, temper, and strong conviction' may be anticipated but, in the interest of free expression in the jury room, such expressions normally should not draw the court into intrusive inquiries." (*People v. Engelman* (2002) 28 Cal.4th 436, 446; see *People v. Keenan* (1988) 46 Cal.3d 478, 541 ["Even if the described 'threat' occurred, we must conclude as a matter of law that it was not prejudicial misconduct which impeaches the verdict. The outburst described in [the] declarations was particularly harsh and inappropriate, but as the trial court suggested, no reasonable juror could have taken it

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[7] To the extent appellant contends that the 2011 disclosure motion shows that Juror No. 1 used the word "coerce," appellant is mistaken.

literally. Manifestly, the alleged 'death threat' was but an expression of frustration, temper, and strong conviction against the contrary views of another panelist."].)

Appellant's reliance on *People v. Gainer* (1977) 19 Cal.3d 835 to show error is misplaced. That case concerns the effect of an *Allen*-type[8] instruction directed at minority jurors on a deadlocked jury. (*Id.* at pp. 848–849.) As for appellant's reliance on *State v. Vergilio* (N.J. Super. Ct. App. Div. 1994) 261 N.J. Super. 648 [619 A.2d 671]), it goes without saying that this case is not "authority" in California. Further, the facts of *Vergilio* are significantly different than the facts in this case.

D. *Juror No. 9's Nondisclosure Did Not Conceal Bias and So Could Not Amount to Prejudicial Misconduct*

The disclosure motion states "Juror Number 1 . . . told me that during deliberations, Juror Number 9 told the other jurors that he did not believe that [appellant's] former interest in becoming a gang member meant that he was a gang member at the time of the shooting. Juror Number 9 said that he had this opinion because he himself had considered becoming a gang member in his youth." O'Hara argued that this statement showed that Juror No. 9 had "conceal[ed] this information during the voir dire process. [The prosecutor] and I asked many gang-related questions and Juror Number 9 never disclose that he had considered joining a gang at one point in time." Appellant does not contend that jurors were specifically asked if they had ever considered joining a gang. He claims that Juror No. 9 should have volunteered this information in response to the prosecutor's statement that "if there is something that you think right now

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8 *Allen v. United States* (1896) 164 U.S. 492.

that is going to cause you to not be fair to one of the sides, we need to know about it." This is not a sufficient showing to support a reasonable belief that Juror No. 9 committed misconduct by failing to disclose to the court and counsel that he once considered joining a gang.

A juror who conceals relevant facts or gives false answers during voir dire commits misconduct. (*In re Hitchings*, *supra,* 6 Cal.4th at p. 111.) However, " 'an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias.' " (*In re Cowan* (2018) 5 Cal.5th 235, 248.) The test for prejudice " 'asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias.' " (*Ibid.*)

During voir dire, in response to the prosecutor's statement that "if there is something that you think right now that is going to cause you to be not be fair to one of the sides, we need to know about it," Juror No. 9 volunteered that his son had been approached by gang members to join their gang, and the son was attacked and harassed when he said no. Juror No. 9 had earlier recounted that one of his nephews had been shot and killed in 2007 and he believed it was gang-related. O'Hara described Juror No. 9's voir dire responses as showing "that he disliked gangs."

In this context, it would be unreasonable to conclude that Juror No. 9 deliberately concealed the information that he had considered but rejected the idea of joining a gang when he was young. Juror No. 9 ultimately rejected gang membership, which shows an unfavorable attitude towards gangs. It is consistent with his other express statements and experience, and reinforces

that the juror lived in an environment where gangs were an unavoidable part of his daily life. There was no reason for him to conceal his thoughts. Thus, the most reasonable interpretation of his failure to bring up this topic is that he did not remember it or think it responsive to the questions.

Counsel posits a different test for prejudice, arguing that if Juror No. 9 had made his nondisclosure during voir dire, the other jurors would have had time to get used to it. She speculates that the "shock" of learning this information during voir dire "caused Juror Number 9 to be coerced by the other jurors into changing his vote to guilty." This is not the test for prejudicial misconduct based on concealment of information. Further, the causal link is speculative in light of Juror No. 1's statement that at the time of the disclosure a total of 4 jurors, including Juror No. 9, wanted to vote not guilty, and the other jurors yelled at all of them until the 4 changed their votes to guilty.[9]

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[9] In two footnotes in his briefing appellant argues he wanted juror identifying information to follow up on one juror's statement that defense counsel's cross-examination of trial witnesses was "exasperating." He asserts, without citation to authority, that any negative juror reaction to her style of inquiry or her performance would support a claim for ineffective assistance of counsel. Our Supreme Court has explained that in appropriate circumstances trial courts should consider a claim of ineffective assistance of counsel in a new trial motion because justice is expedited when the issue can be resolved promptly at the trial level. (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Appropriate circumstances occur when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion. If the court is able to

II. ***Appellant Has Forfeited His Dueñas Claim.***

Appellant contends a remand is necessary under *Dueñas* to give him the opportunity to request a hearing on his ability to an $80 fee (Pen. Code, § 1465.8, subd. (a)(1)), a $60 assessment (Gov. Code, § 70373), and a $500 restitution fine (Pen. Code, § 1202.4, subd. (b)). Respondent contends appellant has forfeited this claim by failing to request a hearing in the trial court. Appellant replies that *Dueñas* was decided after he was sentenced in this case, and so he did not forfeit this claim.

As we previously explained in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154–1155: "*Dueñas* was foreseeable. Dueñas herself foresaw it. The *Dueñas* opinion applied 'the *Griffin-Antazo-Bearden* analysis,' which flowed from *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891, 76 S.Ct. 585], *In re Antazo* (1970) 3 Cal.3d 100 [89 Cal.Rptr. 255, 473 P.2d 999], and *Bearden v. Georgia* (1983) 461 U.S. 660 [76 L.Ed.2d 221,

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determine the effectiveness issue on such motion, it should do so. (*Ibid;* see also *People v. Watts* (2018) 22 Cal.App.5th 102, 117-118.) Here the trial court "expressed its confidence in the quality of O'Hara's representation" when appellant indicated after trial that he wanted to discharge her. That observation supports denial of the claim of ineffective assistance of counsel as raised in the new trial motion. As for the motion seeking juror personal identifying information, that one or more jurors may have disliked her style of inquiry or manner of performance is not sufficient, standing alone, to establish ineffective assistance of counsel. Ordinarily defense counsel's particular style of defense is not a basis for a claim of ineffective assistance of counsel. (*People v. McDermott* (2002) 28 Cal.4th 946, 993 [the manner of cross-examination is within counsel's discretion and rarely implicates ineffective assistance of counsel].)

103 S.Ct. 2064]. (*Dueñas*, *supra,* 30 Cal.App.5th at p. 1168.) The *Dueñas* opinion likewise observed ' "[t]he principle that a punitive award must be considered in light of the defendant's financial condition is ancient." [Citation.] The Magna Carta prohibited civil sanctions that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood. [Citation.]' (*Dueñas, supra*, 30 Cal.App.5th at p. 1170.) [¶] *Dueñas* applied law that was old, not new. We therefore stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they would like appellate review of that issue."

We also agree with our colleagues in the First District Court of Appeal that when the record shows that a defendant "had some past income-earning capacity, [and] going forward we know he will have the ability to earn prison wages over a sustained period" any error in the denial of a hearing on ability to pay is harmless beyond a reasonable doubt. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139–140 [$370 in fines and fees could be repaid over eight-year prison sentence].) That is the situation here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

I concur:

WILEY, J.

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BIGELOW, P.J., Concurring:

I concur. I write separately to add that I believe the imposition of the assessments and restitution fine did not violate appellant's Due Process rights, as articulated in *People v. Hicks* (2019) 40 Cal.App.5th 320.

BIGELOW, P. J.