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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARLIN JONES, Defendant and Appellant.	B292624 (Los Angeles County Super. Ct. No. BA465564)

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

Taylor Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant Marlin Jones was convicted of misdemeanor simple assault (Pen. Code, § 240[1]) and felony criminal threats (§ 422, subd. (a)). Defendant asserts several errors occurred below, including that the trial court improperly gave jury instruction CALCRIM No. 359 regarding out-of-court statements; the trial court erred in allowing the victim to testify with a support person present; certain video evidence was unduly prejudicial and should not have been admitted; inconsistencies in the evidence rendered the evidence inherently improbable and insufficient to support the verdict; and the court erred in imposing certain fines and fees. We consider each of defendant's arguments, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The District Attorney for the County of Los Angeles (the People) filed an information charging defendant with felony assault with a deadly weapon, a knife, on victim S.[2] for an incident on February 5, 2018 (§ 245, subd. (a)(1), count 1), and felony criminal threats to S. for an incident on February 13, 2018 (§ 422, subd. (a), count 2). The information also alleged that each count was a serious felony under section 1192.7, subdivision (c). Defendant pled not guilty and the case proceeded to a jury trial.[3] The following evidence was presented.

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

[2] We refer to the victim, S.S., and a witness, Angel T., by first name or initial to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

[3] A previous trial ended in a mistrial after the late production of video evidence.

A. February 5, 2018 incident (count 1, assault)

1. *Prosecution case*

S. testified that she lived in an apartment building in Los Angeles, in apartment 224, on the second floor of the building. The building had a locked gate with a security guard at night, and there was a courtyard outside. S.'s apartment was near the elevator on the second floor. Defendant lived in the apartment directly across the hall from S.

S. testified that on the evening of February 5, 2018, sometime after 7:00 p.m., she entered the building to go to her apartment; she saw defendant outside the building. Defendant saw S. and called her a "fat Kool-Aid bitch." S. kept walking, but defendant followed her and said he was going to kill her. S. went to the elevator, and her friend Angel, who also lived in the building, was in the elevator with her. S. did not recall if anyone else was in the elevator.

S. testified that when she reached the second floor, defendant "was there still" holding a "knife with a blade" down on his right side. The knife was hinged, and the blade was out, pointing toward S. Defendant told her that "[t]onight was going to be my night for him to kill me." Defendant did not move the knife as he spoke, he just held it at his side. Defendant appeared angry, and his voice was loud. S. and Angel went into S.'s apartment and closed the door. S. testified that she was scared.

Defendant then hit S.'s door and the wall between her apartment and the hallway. He banged and yelled for approximately one to three minutes. After he stopped banging, defendant continued to tell S. that tonight was her night and that he was going to kill her. When prompted with her preliminary hearing testimony, S. recalled that defendant also said he would

also kill all the people on the second floor. S. heard a sound like someone "stabbing my door." Afterward, S. looked at the door and there were three stab marks on the door. S. testified that she did not want to see the stab marks, so she covered them with stickers. The jury was shown two photographs of the door; one photograph showed a sticker on the door, and the door had marks on it. S. agreed that the photographs showed her apartment door. The testimony did not establish when the photographs were taken.

S. testified that she called 911 about five minutes after she went into her apartment. The 911 call was played for the jury and admitted as an exhibit; a transcript was also admitted. S. testified that the voices on the recording were hers, Angel's, and the 911 operator's. On the call. S. reported that the man next door "just pointed a blade out on me." She said, "I'm going to die." S. gave her name, the address, and a description of defendant. S. asked another person, presumably Angel, what defendant was wearing; she told the 911 operator she was asking her neighbor. When S. was having trouble providing information, the operator asked to speak with the neighbor. The operator asked Angel, "Did you see what happened?" Angel responded that "[t]he guy pulled out a knife on her and was just harassing her," and he "was hitting her door and stuff." S. also told the operator, "[H]e does all the time. He does all the time to me. He slashes my door and stuff. I don't know why he does these things to me."

On cross-examination, S. said she recalled encountering defendant on the street outside, and he followed her and Angel to S.'s apartment. Defendant followed her through the main entry, through the patio area, through the mail room, and to the elevator. S. could not recall if defendant entered the elevator

with her and Angel. Defense counsel asked S. if she told the police officer that defendant entered the elevator with her and pulled a knife on her in the elevator. S. said yes. Defense counsel pointed out that S. had testified that defendant was in the hallway—not the elevator—when he had the knife, and asked which version was accurate. S. said both were accurate; defendant pulled out the knife while in the elevator, and he still had it when they exited the elevator on the second floor.

S. testified that defendant never touched her with the knife, and he never lunged at her with the knife. When asked to clarify how much time passed between the incident and when S. called police, S. guessed that it was "less than half an hour." Defense counsel showed S. several videos from the security camera in the elevator, and S. said she recognized herself and Angel. S. agreed that the video showed her and Angel in the elevator six times that evening. The record suggests (but does not make entirely clear) that defendant was *not* in the elevator with S. and Angel in any of the video clips.[4]

When asked about the marks on her door, S. stated that defendant made the marks on February 5. She said she covered the marks with stickers. Defense counsel pointed out that the photo in exhibit 2 showed a sticker on the door above one of the

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[4] Defendant asserts in his opening brief that the "surveillance cameras from . . . seven (7) locations do not show [defendant] in any of them." He cites exhibit 10, a compact disc with nine separate video files, each with a running time of about one and a half hours. Defendant does not cite any particular file or video time stamp to support his argument, nor is it clear from the record what portions of the videos were shown to the jury. Defendant also cites a page from the transcript that does not address the surveillance videos.

marks. Counsel asked, "How is it possible when the officers arrived on February 5 that there are already stickers on that door?" S. said she could not remember when she put the stickers on the door. Defense counsel also asked S. about her convictions for prostitution, violating a restraining order, and theft.

On redirect, the prosecutor asked S. if the videos of S. and Angel in the elevator on February 5 refreshed S.'s recollection about whether defendant was in the elevator with her. S. said yes. The prosecutor asked what S. remembered, and S. said, "He was in the elevator with me." Shortly thereafter, when asked about when defendant held the knife at his side with the blade pointing toward her, S. testified, "That happened coming out of the elevator . . . he was in the hallway of the elevator." On re-cross, defense counsel asked if defendant was in the elevator or not, and S. said, "He was in there." S. also stated that she first saw defendant with the knife outside the building near the street, and he had it as he followed S. into the building and into the upstairs hallway. S. then testified, "I didn't see him taking the stairs, but by the time I was outside the elevator, he was there already." On re-direct, S. said she *saw* defendant holding the knife outside, but he first *threatened* her with the knife in the upstairs hallway as she got off the elevator.

Karla Acosta testified that she was the property manager of the apartment building. She said there are video security cameras throughout the property. The building had only one elevator, and a single public entrance that was accessible from the street. A security guard was posted at the entrance from 12:30 a.m. to 6:00 a.m. daily. Acosta said she was asked to preserve video from February 5 and February 13, 2018.

Acosta testified that defendant was the resident of apartment 222 in February 2018, and S. was the resident in apartment 224. A camera had been installed to capture video of the hallway on the second floor in the area of defendant's and S.'s apartment doors, but it was not functioning in February 2018.[5] Acosta said that on December 10, 2017, "somebody pulled the camera down." Acosta testified that when she realized the camera was not working, she reviewed footage from another camera, which showed "one of my tenants pulling . . . the other camera down." The video was played for the jury. Acosta testified that she recognized the person in the video as defendant, so she told defendant he would be liable for the cost of replacing the camera. Acosta said defendant "did admit that he yanked the camera."

Acosta testified that Angel was also a resident of the building in February 2018. A video was played for the jury showing two people enter and exit the elevator on the evening of February 5.[6] Acosta identified the two people as S. and Angel.

On cross-examination, Acosta testified that additional video showed S. in the elevator several times on the evening of February 5; the video does not show defendant in the elevator. Acosta testified that eight different cameras would capture a person walking from the street, into the building, and up to apartment 224. She provided video from these various cameras to police following the February 5 incident between S. and

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[5] Acosta initially testified that there were two cameras facing the apartment doors and neither was functioning, but she later clarified that only one camera captured the area of defendant's and S.'s apartment doors.

[6] Acosta testified that the time stamp on the videos is generally incorrect by up to an hour.

defendant. On re-direct, Acosta clarified that she gave the police all video from that evening that showed S. or defendant. Acosta testified that video played for the jury also showed S. and Angel walk toward the mail room on the first floor, and then walk toward the courtyard.

2. *Defense case*

The defense called Los Angeles Police Department (LAPD) officer Chad Scott, who testified that he responded to the 911 call on February 5, along with a partner and a sergeant. Scott said he and his partner met with S. at the scene. Defense counsel asked whether Scott's partner asked S. if she had been drinking; Scott said yes. Scott testified that at one point in the interview, S. was laughing.[7] Scott also spoke with Angel.

Defense counsel asked Scott if S. had reported that defendant entered the elevator with her. Scott replied, "No." Instead, "[b]ased off of the entirety of the investigation of [what] she was saying to me and piecing together the investigation, I repeated back to her my best understanding of what had occurred [to] which she replied yes." Scott testified that he did get the impression that S. said defendant pulled the knife on her in the elevator. Scott saw S.'s door, and it had stickers on it. He testified that he "didn't examine the door for stab marks," but "there were marks on the door."

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[7] Citing a sidebar discussion and attorney argument, defendant states in his brief on appeal that S. was "flirting" with Scott's partner, Officer Hodge. When counsel asked Scott if S. was flirting with his partner, Scott replied, "No." At sidebar, the court sustained an objection regarding whether S. "made a comment about the looks of one of the officers," and such evidence was not before the jury.

On cross-examination, Scott testified that when he first spoke with S., "she was shook and upset." Her story was "all over the place." As they talked, S. began to calm down. Scott did not think S. appeared intoxicated; his partner asked S. whether she had been drinking almost immediately after they arrived as a routine question. Scott said S. reported that defendant called her a "stupid, fat bitch" and told her to "suck my dick, bitch." S. described the knife as a blue switchblade.

B. February 13, 2018 incident (count 2, criminal threats)

1. *Prosecution case*

S. testified that on February 13, at about 4:40 a.m., she called 911 when defendant threatened her again. At trial, S. said she could not remember what happened before the 911 call. An audio recording of the 911 call was played for the jury, and a transcript was admitted as an exhibit. During the call, S. told the 911 operator that the person "across the hall from me" was "hitting my door," and he "says he's gonna kill me." She asked that police come to the apartment, repeating, "please, please." S. stated that she had recently filed a police report when "he pulled a knife on me." S. asked the operator, "Can you hear him?" The operator responded, "No." S. supplied information about her location, and said, "Please come on. Please, please, please. He's already pulled a knife on me and everything. Please."

The recording refreshed S.'s recollection, and she testified that defendant "hit[ ] my door" and said more than once that "he's going to kill me." The police came to the apartment, and S. reported what happened. S. told the officer that defendant said, "In Jesus name, I'm going to kill you." S. never saw defendant during the incident, but she knew it was him by his voice; he

sounded loud and angry. She said that when she called 911, the banging and yelling were loud. S. testified that when defendant was yelling, she was in fear and she believed he would carry out his threats.

Enrique Hidalgo Flores testified that he was the nighttime security guard at the apartment building. Hidalgo testified that one evening (the date is not clear from the testimony), he heard "a lot of movement upstairs." Hidalgo found defendant on the second floor, shirtless, "sweating and talking very loud and walking up and down." Hidalgo was scared. He went downstairs to call the police, but they were already there, "[l]ike someone else called them." Cross-examination and re-direct focused on whether defendant was pacing back and forth when Hidalgo saw him, or simply walking in one direction. Hidalgo clarified that defendant was pacing.

LAPD officer Eduardo Garcia testified that he responded to the call on February 13. When he arrived at the apartment building at approximately 4:52 a.m., Garcia spoke with Hidalgo. Hidalgo reported that a man was yelling and banging on doors, and directed Garcia to apartment 222. Garcia testified that he was equipped with a body-worn camera that he activated upon arriving at the building. A portion of the video was played for the jury. It showed Garcia's perspective as he walked into the building and encountered Hidalgo, who reported that a tenant was banging on doors and acting out. Hidalgo directed Garcia to apartment 222.

Garcia testified that when he and other officers went to the second floor, they saw "a suspect at the doorway matching the description" provided by Hidalgo. A still photo from the body camera footage was admitted, showing defendant standing in a

doorway. Garcia said defendant seemed "a bit agitated, yet somewhat cooperative still." "He was sweating profusely," even though it was a cold night in February. Garcia also talked to S.; "Her voice was shaky, and in my opinion, she appeared afraid." Garcia testified on cross-examination that he never saw defendant with a knife. The People rested.

The defense did not call any additional witnesses.

C. Verdict and sentence

On count 1, the jury found defendant guilty of the lesser included offense of misdemeanor simple assault. (§ 240.) On count 2, the jury found defendant guilty of felony criminal threats. (§ 422, subd. (a).) The court sentenced defendant to the high term of three years in prison on count 2, plus a concurrent term of six months on count 1. The court also imposed various fines and fees, which we discuss in more detail below. Defendant timely appealed.

DISCUSSION

Defendant asserts several errors on appeal: a jury instruction was erroneously given; a support person present while S. testified was unwarranted; evidence that he pulled down the security camera was unduly prejudicial; the evidence was not sufficient to convict him; cumulative errors require reversal; and the trial court erred in imposing certain fines and fees. We consider each of his arguments, and find no error.

A. Jury instruction CALCRIM No. 359

1. *Background*

Before closing arguments, the court and counsel discussed jury instructions. As to count 1, assault with a deadly weapon, the court proposed giving a slightly modified version of

CALCRIM No. 359, "Corpus Delicti: Independent Evidence of a Charged Crime." As modified, the instruction stated,

"The defendant may not be convicted of the crime alleged in Count One, assault with a deadly weapon, based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed.

"That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

"This requirement of other evidence does not apply to proving the identity of the person who committed the crime. If other evidence shows that the charged crime was committed, the identity of the person who committed it may be proved by the defendant's statements alone.

You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Defense counsel said he was confused about the instruction, and asked for a moment to review it. The court said it had some reservations about giving the instruction because the case also involved a charge of criminal threats, but stated that the court has a sua sponte duty to give CALCRIM No. 359 whenever the prosecution's case involves extrajudicial statements. (See, e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1170, 1180 (*Alvarez*).) Defense counsel said he objected to the instruction on the basis that it could "confuse the jury about the requisite burden of beyond a reasonable doubt" because it stated that "other evidence may be slight." The court noted that the final paragraph of CALCRIM No. 359 instructed the jury that they may not convict defendant unless the People proved guilt beyond a reasonable

doubt. The court overruled the objection and gave the instruction.

2. *Discussion*

On appeal, defendant asserts that the trial court erred by giving CALCRIM No. 359, because it "created an unacceptable risk . . . that the jury convicted him on less than proof beyond a reasonable doubt for every element of the crimes." He asserts that CALCRIM No. 359 "is circular, superfluous, confusing and ambiguous when used in a criminal threats case to admit prior (uncharged) criminal threats." He acknowledges that the court correctly instructed the jury with CALCRIM Nos. 220 (proof beyond a reasonable doubt), 200 (some instructions may not apply), 875 (assault with a deadly weapon), and 1300 (criminal threat). Defendant asserts that these instructions "do not obviate" the confusing nature of CALCRIM No. 359 "when applied to prior uncharged criminal threats."

"In determining the correctness of jury instructions, we consider the instructions as a whole. [Citation.] An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.)

Here, the instruction was not ambiguous or misleading. "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant." (*Alvarez, supra,* 27 Cal.4th at pp. 1168-1169.) "This rule is

intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Id.* at p. 1169.) Thus, "[w]henever an accused's extrajudicial statements form part of the prosecution's evidence," the trial court is required to "*instruct* sua sponte that a finding of guilt cannot be predicated on the statements alone."[8] (*Id.* at p. 1170 [emphasis in original].)

Several extrajudicial statements were associated with the February 5 assault, such as defendant calling S. a fat bitch, saying he would kill her, and telling her that tonight was her night. The trial court therefore gave CALCRIM No. 359, because extrajudicial statements were part of the prosecution's evidence relating to the February 5 assault. We therefore reject defendant's argument that CALCRIM No. 359 was erroneously given.

CALCRIM No. 359 is an accurate statement of the law. (*People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498.) Defendant asserts that giving the instruction was erroneous nonetheless, but reaches this conclusion by conflating the two charged

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[8] For the first time in his reply brief, defendant cites *People v. Carpenter* (1997) 15 Cal.4th 312, 394 (abrogated by *People v. Diaz* (2015) 60 Cal.4th 1176), which states that the corpus delicti rule does not necessarily apply "to a statement that is part of the crime itself." Defendant did not assert in his opening brief that the instruction was incorrectly given for this reason. In his reply brief, defendant cites and quotes *Carpenter* without making any argument. We do not consider arguments asserted for the first time in a reply brief, and failure to develop an argument forfeits the issue on appeal. (See *People v. Mickel* (2016) 2 Cal.5th 181, 197; *People v. Aguayo* (2019) 31 Cal.App.5th 758, 768.)

counts—assault and criminal threats—and arguing that the instruction was confusing as to criminal threats. We disagree.

The first paragraph of the instruction states, "You may rely on the defendant's out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed." Defendant asserts that this language "instructs the jury that it can rely on a defendant's extrajudicial statements (e.g., defendant's prior criminal threats with which he was never charged) to convict him only after the jury concludes that 'other evidence; shows that the charged crime (i.e. the criminal threat on February 13, 2018) was committed." He then asserts that "the jury cannot legitimately find that the charged crime 'was committed' to begin with unless the jury *first* finds beyond a reasonable doubt that the charged crime in fact occurred." Defendant concludes that the instruction is "hopelessly circular . . . especially when applied to a criminal threats case, as here."

The record does not support defendant's argument. The instruction was not given for count 2, the criminal threats allegation arising from the February 13 incident. Instead, the instruction, as modified by the court and given to the jury, explicitly references count 1, assault. "When reviewing ambiguous instructions, we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights." (*People v. Rogers* (2006) 39 Cal.4th 826, 873.)

Nothing in the record suggests that, despite the instruction's express statement that the instruction related to count 1, the jury would mistakenly believe the instruction applied to count 2. "We presume that jurors understand and follow the

court's instructions." (*People v. Pearson* (2013) 56 Cal.4th 393, 414.) Thus, defendant's argument that the instruction is circular and nonsensical as it might pertain to count 2 is unavailing.

Defendant further argues that the instruction was erroneous because "the prosecution specifically stated that it would not use any [Evidence Code section] 1101(b) evidence. . . . Yet that is exactly what the prior uncharged criminal threats were."[9] He reasons that "CALCRIM No. 359 impermissibly allows the prosecution to circumvent the admissibility requirements for prior bad acts under Section 1101(b)." This argument is also not supported by the record, which does not suggest that the prosecution or court relied on CALCRIM No. 359 or the corpus delicti rule in introducing or admitting character evidence under Evidence Code section 1101. Defendant does not assert that any evidence was inadmissible under Evidence Code section 1101. And as the Attorney General points out, defendant "may not bootstrap an evidentiary or prosecutorial misconduct claim to his claim of instructional error."

For the first time in his reply, defendant asserts that CALCRIM No. 359 "failed to specify the 'other evidence' and the 'defendant's out-of-court statements that the jury could possibly consider so the modified version given to the jury "should have been further modified" to specify the "other evidence." He also asserts for the first time in his reply brief that CALCRIM No. 359 should be modified for use in cases that include charges of criminal threats. We do not consider new issues raised for the first time in a reply brief. (See *People v. Mickel, supra,* 2 Cal.5th at p. 197.) Furthermore, defendant cites no authority supporting

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[9] Evidence Code section 1101 addresses the admissibility of character evidence to prove conduct.

his arguments for additional modifications to the instruction. Thus, we find no error with respect to this jury instruction.

B. Support person for S.

Defendant contends that the trial court erred in allowing S. to testify with a support person near her because only elder adults and juveniles are allowed by statute to be accompanied by a support person, and no evidence was presented that S. was an elder adult. He also asserts that the presence of the support person prejudiced the jury against him, because it "played on the jury's sympathies" for S. The Attorney General asserts that defendant has forfeited this argument, that defendant has misinterpreted the statute, and there was no prejudice.

1. *Background*

Before trial, the prosecutor told the court that S., as a victim of a violent crime who suffers from anxiety, requested that a support person be present during her testimony. Defense counsel objected on the basis that "this is not a sex case. The complaining witness is not a child. There's been no evidence before the court of her actual need for a support person at this time." The court stated that it was allowing the support person to accompany S. "over the defense objections." The court noted that defense counsel argued that the jury would perceive the support person as suggesting that defendant was dangerous and the witness was too frightened or vulnerable to testify alone. The court rejected this argument, stating that the support person would "just be a silent presence in the courtroom in the vicinity of the witness."

After the jury was dismissed for the day on July 10, the first day S. testified, the court thanked the support person who sat near S. during her testimony. The court said that any doubt

about whether a support person was needed "was resolved in its entirety by what I saw from the witness today. She's very, very upset, trembling, her speech is halting. She is obviously in need of whatever support, silent support, the individual can give her." The court also noted that "the jury doesn't know who that silent presence is. She wasn't identified. She's very unobtrusive." The record does not make clear whether the support person was present on the second day S. testified, July 12.

2. *Discussion*

Section 868.5, subdivision (a) (section 868.5(a)) states that "a prosecuting witness in a case involving a violation or attempted violation of Section 187, 203, 205, or 207, subdivision (b) of Section 209, Section 211, 215, 220, 236.1, 240, 242, 243.4, 245 [assault], 261, 262, 266, 266a, 266b, 266c, 266d, 266e, 266f, 266g, 266h, 266i, 266j, 266k, 267, 269, 273a, 273d, 273.5, 273.6, 278, 278.5, 285, 286, 287, 288, 288.5, 288.7, 289, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, 311.10, 311.11, 422 [criminal threats], 646.9, or 647.6, former Section 277, 288a, or 647a, subdivision (1) of Section 314, or subdivision (b), (d), or (e) of Section 368 [crimes against elder or dependent adults] *when the prosecuting witness is the elder or dependent adult*, shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at the trial, or at a juvenile court proceeding, during the testimony of the prosecuting witness." (Emphasis added.)

Defendant, noting the language italicized above, asserts that "according to the plain language of the statute, only juveniles and elder adults are allowed support persons." The Attorney General asserts that defendant forfeited this challenge to the presence of a support person at trial, because "defense

counsel's objection at trial did not mention anything about the statute being limited . . . to the elderly." Instead, defendant objected below that S. was not a child, a sex crime was not at issue, and the presence of the support person could prejudice defendant.

A defendant must "'bring errors to the attention of the trial court, so that they may be corrected or avoided.'" (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) Regarding the admission of evidence, "the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) Here, defendant's objections to the support person in the trial court provided the court no basis to decide the issue defendant asserts on appeal: that support persons are allowed only for elderly or dependent adult witnesses. Because defendant did not cite this reasoning as the basis for his objection below, the issue has been forfeited.

Even if the issue were not forfeited, however, defendant's interpretation of section 868.5(a) is incorrect. We review questions of statutory construction de novo. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 234.) To interpret a statute, we "first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.'" (*People v. Gonzales* (2018) 6 Cal.5th 44, 49-50.) "'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.'" (*People v. Arias* (2008) 45 Cal.4th 169, 177.)

Here, the statute is not ambiguous. In section 868.5(a), the list of crimes and placement of commas makes clear that the limitation for "elder or dependent adult[s]" only applies to crimes

under section 368. The statute states that a support person is allowed for "a prosecuting witness in a case involving a violation or attempted violation of" more than 50 separate statutes, separated by commas. At the end of the list is "subdivision (b), (d), or (e) of Section 368 when the prosecuting witness is the elder or dependent adult." Section 368, titled "Crimes against elder or dependent adults," enumerates specific crimes against elder or dependent adults, such as willfully allowing an elder or dependent adult to suffer physical pain (subd. (b)), or "theft, embezzlement, forgery, or fraud" against an elder or dependent adult by a non-caretaker (subd. d)) or a caretaker (subd. (e)). The subject matter of section 368, along with the comma placement in section 868.5(a), make clear that the limiting language allowing a support person "when the prosecuting witness is the elder or dependent adult" applies only to crimes under section 368.

In addition, the legislative history supports this interpretation. (See *People v. Arias, supra,* 45 Cal.4th at p. 177 ["If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy."].) Prior to 2008, section 868.5(a) allowed for support persons in relation to certain crimes, not including section 368. In 2008, S.B. 1343 added to the statute the entire phrase, "or subdivision (b), (d), or (e) of Section 368 when the prosecuting witness is the elder or dependent adult." (Stats. 2008, ch. 48 (S.B.1343), § 1.) Defendant has not pointed us to any authority (and we have found none) suggesting that the language added in 2008 was intended to modify any other portion of section 868.5(a).

We therefore reject defendant's argument that the trial court erred in allowing S. to have a support person nearby while

testifying because she was not an elder or dependent adult. We also find no support for defendant's claim that he was prejudiced by the presence of the support person. The trial court made clear that the support person was silent and unobtrusive, and the jurors were not aware of the reason the person was there. Thus, there is no support for defendant's argument that the support person "played on the jury's sympathies."

C. Evidence of damage to the hallway camera

Defendant further contends that the trial court erred in admitting evidence that he pulled down one of the video cameras in the apartment building two months prior to the charged crimes, and that he was prejudiced as a result. We find neither error nor prejudice.

1. *Background*

At an Evidence Code section 402 hearing before trial, the court and parties discussed the prosecution's intent to introduce evidence of the incident two months before the charged crimes in which defendant "disabled a security camera in the hallway where the alleged assault occurred." Defense counsel acknowledged that the evidence was not being brought as character evidence under Evidence Code section 1101, subdivision (b), but argued that the evidence was more prejudicial than probative under Evidence Code section 352.

The court held the evidence was admissible because "it's circumstantial evidence of motive and consciousness of guilt. It's just general garden variety circumstantial evidence." The court acknowledged defendant's arguments that it was not clear that defendant was the person who disabled the camera, and that there was no evidence defendant intended to assault anyone at the time the camera was disabled. The court stated that these

issues addressed the weight of the evidence, not its admissibility. The court also invited defense counsel to submit a limiting instruction clarifying that the evidence should not be considered as evidence of the defendant's character or proclivity to commit crime.

As summarized above, apartment manager Karla Acosta testified that on December 10, 2017, "somebody pulled the camera down" that would have captured events in the hallway near S.'s and defendant's apartments. Acosta said she recognized defendant as the person who pulled the camera down, and defendant "did admit that he yanked the camera." The video showing the camera being pulled down was played for the jury.

2. *Discussion*

On appeal, defendant argues that the trial court erred in admitting the evidence "for the purpose of motive and consciousness of guilt," because "neither motive nor consciousness of guilt are elements of the crimes with which appellant was charged," so "the probative value of the 2017 camera damage is minimal at best." He also asserts that "any consciousness of guilt would have occurred *after* committing the guilty act – not *before*." He further contends that the evidence was highly prejudicial because it "did not clearly show" that defendant was the person tampering with the camera, and it was likely to "inflame the jury with a desire to punish [defendant] for the property damage." We review the trial court's rulings on the admissibility of evidence for an abuse of discretion. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.)

We find no abuse of discretion. Video evidence played a central role in the trial. The jury saw video from multiple cameras in the surveillance system in the building, as well as

video captured by Officer Garcia's body-worn camera. Defense counsel used video from February 5 to follow S.'s path from the street, into the building, up the elevator, and toward her apartment. There was no video of the hallway directly outside the apartment units, however, and therefore no video proving or disproving the allegation that defendant banged on S.'s door after she and Angel went inside. The fact that the video camera had been pulled down was relevant to assessing the evidence in the case.

In addition, there was evidence that the problems between S. and defendant were ongoing. S. said in her 911 call on February 5, "[H]e does all the time. He does all the time to me. He slashes my door and stuff. I don't know why he does these things to me." In closing arguments, the prosecutor stated that in light of the ongoing issues, defendant may have pulled down the camera to avoid detection of his ongoing actions toward S. The evidence was therefore probative of the issues between defendant and S. that led to the two charged incidents that occurred about a week apart.

Even if we were to assume that the trial court erred in admitting the evidence, it was not so prejudicial that reversal is warranted. "Ordinarily, the erroneous admission of evidence is reviewed for prejudice under the standard described in *People v. Watson* (1956) 46 Cal.2d 818 [(*Watson*)], which requires reversal only if the defense shows it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.] However, when the error involves a defendant's federal constitutional rights, such as a violation of the privilege against self-incrimination, the error is reviewed for prejudice under the standard described in *Chapman*

v. California (1967) 386 U.S. 18, 24," under which "the prosecution must prove beyond a reasonable doubt that the erroneous admission of [the evidence] did not contribute to the guilty verdict." (*People v. Roberts* (2017) 13 Cal.App.5th 565, 576-577.) As defendant's constitutional rights are not implicated here, we review for prejudice under the *Watson* standard.

Defendant asserts that it is reasonably probably the verdict would have been more favorable absent the error, because the evidence "was designed to portray [defendant] as an incorrigible derelict bent on committing mischievous acts." We disagree. The parties made clear that the video was not being presented as character evidence under Evidence Code section 1101. There was no suggestion at trial that the video supported a conclusion that defendant was generally a bad person, or that he should be convicted on any basis other than the elements of the charged crimes. Moreover, as discussed below, there was ample evidence to support the verdict, even without evidence of the camera being pulled down. In addition, the jury did not appear to be inflamed by the evidence, as it found defendant not guilty of felony assault with a deadly weapon, and guilty only of the lesser-included charge of simple assault. Thus, even if admission of the evidence was erroneous, the error would not warrant reversal.

D. Sufficiency of the evidence

Defendant asserts that the evidence was not sufficient to support his conviction on either count because S.'s testimony was inherently improbable. We find sufficient evidence supports the verdict.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a

reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

"'"To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'"' (*People v. Maciel* (2013) 57 Cal.4th 482, 519.) "We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Regarding the conviction for simple assault for the February 5 incident, defendant points out that S. testified that defendant followed her and Angel from outside the entrance of the building to the second floor, while defendant was shouting at S. and calling her names. However, the surveillance videos did not show that defendant was following S. and Angel through the building. Defendant also asserts that "[t]here were five different versions of [S.'s] story concerning whether [defendant] was in the elevator." He also argues that S.'s testimony about the knife was inconsistent, and that no knife was ever found or admitted as evidence.

Defendant argues that S.'s testimony regarding the February 13 incident was also inherently improbable, because S.

testified that defendant was banging on her door and yelling when she called 911. However, when S. asked the 911 operator if she could hear defendant, the 911 operator could not. In addition, no banging or yelling is audible on the recording of the 911 call. Defendant asserts that this conflict in the evidence renders S.'s testimony inherently improbable.

S.'s testimony was not inherently improbable, although it was inconsistent in certain details and sometimes conflicted with other evidence. Regarding the February 5 incident, defense counsel at trial argued that the jury should reject S.'s version of the facts because it contradicted the video evidence. However, the basic facts in the testimony itself—that defendant encountered S., yelled at her, threatened to kill her, and had a knife—were not inherently improbable. Regarding the February 13 incident, the fact that defendant's banging and yelling were not audible to the 911 operator or on the audio recording does not render S.'s testimony inherently improbable. "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The conflicts in the evidence do not warrant reversal.

For the first time in his reply brief, defendant asserts that the jury did not believe defendant had a knife on February 5, as evidenced by the verdict of not guilty on the charge of assault with a deadly weapon. He argues there was also no evidence that defendant moved his body in a way that threatened S., and therefore the evidence was insufficient to support a conviction for simple assault. To the extent this argument raises new issues not addressed in the opening brief, we do not consider it. *(People v. Mickel, supra,* 2 Cal.5th at p. 197.)

To the extent this argument is a further assertion that there was insufficient evidence to support the verdict, we reject it. For assault, "the defendant must do an act likely to result in a touching, however slight, of another in a harmful or offensive manner." (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.) S. testified that defendant shouted insults and threats to kill S. as he followed her and Angel from the street, through the building, and up to the second floor. After they sought refuge in S.'s apartment, defendant banged on the door and wall so hard he left marks. This evidence was sufficient to support the simple assault conviction, even if the jury found that defendant was not holding a knife at the time.

E. Cumulative error

Defendant asserts that the cumulative errors in the case rendered his trial fundamentally unfair, requiring reversal. We have found neither errors nor prejudice, and therefore reject defendant's contention.

F. Imposition of fines and fees

At the time of sentencing in September 2018, the court imposed the following fines and fees: A restitution fine of $400 (§ 1202.4, subd. (b)); a parole revocation restitution fine of $400, which was stayed pending successful completion of parole (§ 1202.45); a criminal conviction assessment fee of $60 (Gov. Code, § 70373); and a court operations fee of $80 (§ 1465.8, subd. (a)(1)). Defendant asserts that the imposition of these fines and fees without determining whether defendant had a present ability to pay them was erroneous under the due process reasoning of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). The Attorney General asserts that defendant forfeited

any such challenge by failing to object to the imposition of the fines and fees in the trial court.

In January 2019, Division Seven of this court held in *Dueñas* that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373," and that "the execution of any restitution fine imposed under [section 1202.4] must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.)

Division Two of this court has since concluded that "*Dueñas* was wrongly decided," (*People v. Hicks* (2019) 40 Cal.App.5th 320, 322, review granted November 26, 2019, S258946), and Division One has stated that "the due process analysis in *Dueñas* does not support its broad holding." (*People v. Caceres* (2019) 39 Cal.App.5th 917, 923; see also *People v. Kingston* (2019) 41 Cal.App.5th 272 [254 Cal.Rptr.3d 118, 122] ["We find *Hicks* to be the better reasoned decision."].) Other districts have rejected the reasoning of *Dueñas*. (See, e.g., *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068 ["*Dueñas* was wrongly decided"]; *People v. Allen* (2019) 41 Cal.App.5th 312 [254 Cal.Rptr.3d 134, 145] [citing with approval "the reasoning of the numerous courts that have rejected *Dueñas*'s due process analysis"].)

We need not resolve this split in authority as it applies here, because we agree with the Attorney General that defendant forfeited the issue by failing to object to the imposition of the fines and fees in the trial court. Defendant failed to object to the court's imposition of a restitution fine above the statutory

minimum in section 1202.4. The court imposed a restitution fine of $400, above the statutory minimum of $300.[10] (§ 1202.4, subd. (b).) A defendant's inability to pay "may be considered only in increasing the amount of the restitution fine in excess of the minimum fine [of $ 300]." (§ 1202.4, subd. (c).) Here, defendant did not object to the increase on the basis that he was unable to pay the fine. "Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and demonstrate why it should not be imposed. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154, citing *People v. Avila* (2009) 46 Cal.4th 680, 729.) In addition, as defendant did not object to the $400 restitution fine nor the $400 parole revocation fine based on his lack of ability to pay, "he surely would not complain on similar grounds regarding an additional [$140] in fees." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.) Because defendant did not object to the imposition of fines or fees based on his ability to pay them, his appellate challenge on this basis has been forfeited.

Defendant also asserts that the imposition of fines and fees without determining his ability to pay was "a legal error at sentencing rather than a discretionary error," and therefore the

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[10] Section 1202.4, subdivision (b) allows for a fine of $300 to $10,000 for a felony, and $150 to $1,000 for a misdemeanor. The court did not specify how it reached the figure of $400 for the restitution fine. Because the $400 fine is less than the minimum fines for one felony plus one misdemeanor ($300 plus $150, a total of $450), it appears the court imposed the $400 fine on only one of the two counts. Section 1202.45, subdivision (a), requires that the parole revocation restitution fine be "in the same amount as [the fine] imposed pursuant to subdivision (b) of Section 1202.4."

lack of objection does not forfeit his claim on appeal. However, whether a defendant has the ability to pay fines and fees presents a factual issue, not a question of law based on undisputed facts. Defendant presented no evidence in the trial court regarding his ability to pay. Defendant's contentions that the fines and fees were inappropriately imposed under the reasoning of *Dueñas* have therefore been forfeited.

DISPOSITION

Affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.