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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL CORDERO,

Defendant and Appellant.

B287571

(Los Angeles County
Super. Ct. No. KA111919)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed in part; reversed in part and remanded with directions.

Stephen M. Vasil, 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, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Raul Cordero appeals from the judgment entered following his conviction of lewd and lascivious acts on a child under 14. Cordero admitted he suffered three prior convictions of violent or serious felonies under the three strikes law (§§ 667, subds. (b)-(j), 1170.12),¹ including a murder conviction and two robbery convictions. The trial court sentenced him to 25 years to life on the underlying offense, plus an additional 15 years for three 5-year sentence enhancements based on his convictions of prior serious felonies under section 667, subdivision (a).

On appeal, Cordero contends his trial attorney provided ineffective assistance of counsel by failing to object to two instances of prosecutorial misconduct in the prosecutor's rebuttal argument, and by failing to request a curative instruction after the trial court sustained his objection to a third instance of argued misconduct. Given that Cordero's attorney may have made a tactical decision not to object or request a curative instruction as to two of the claimed areas of misconduct, Cordero has not met his burden to show ineffective assistance of counsel. As to the third asserted instance, the prosecutor did not commit misconduct.

Cordero also contends the trial court erred in sentencing him to five-year sentence enhancements for the two robberies under section 667, subdivision (a), for having suffered two prior serious felony convictions, without alleging the enhancements in the information. We agree the sentence is an unauthorized sentence because it violated the requirement in section 1170.1,

¹ All further undesignated statutory references are to the Penal Code.

subdivision (e), that sentence enhancements under the three strikes law be pleaded and proved.

In addition, Cordero contends, the People concede, and we agree remand is necessary to allow the trial court, under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amended sections 667 and 1385, to exercise its discretion whether to strike the remaining prior serious felony conviction enhancement the trial court imposed pursuant to section 667, subdivision (a)(1). Further, he requests we remand for the trial court to conduct a hearing on his ability to pay the court facilities and operations assessments, restitution and parole revocation fines, and sex offender fine imposed by the trial court, in accordance with our opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

We affirm the convictions, but reverse the sentence and remand for resentencing. On remand, the trial court should exercise its discretion whether to impose the five-year sentence enhancement for Cordero's prior murder conviction. The trial court should also afford Cordero an opportunity to request a hearing and to present evidence demonstrating his inability to pay the applicable assessments and restitution fines. However, Cordero has forfeited his challenge to imposition of the sex offender fine because the statute provides for an ability to pay hearing, and he failed to object in the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The amended information charged Cordero with lewd and lascivious conduct on a child under the age of 14 (§ 288, subdivision (a)). It also alleged Cordero suffered three prior

convictions of violent or serious felonies under the three strikes law: a 1978 murder conviction (§ 187) and two 1982 robbery convictions (§ 211). The amended information alleged the murder conviction was a serious felony within the meaning of section 667, subdivision (a)(1), and Cordero suffered four prior felony convictions for which he served separate prison terms within the meaning of section 667.5, subdivision (b).

Cordero pleaded not guilty and denied the special allegations.

B. *The Prosecution Case*

1. *Roxanne's testimony*

Cordero lived in a three-bedroom house with his girlfriend, Roxanne Martinez (Martinez); Martinez's adult daughter Rene;² Rene's boyfriend, Mark Diaz; and Rene's children, Justine and Lilly. Cordero and Martinez shared one bedroom; Rene and Diaz shared the second bedroom; and Justine and Lilly shared the third bedroom. Martinez's niece, Roxanne, and her family slept in the living room of Cordero's house for approximately one year, until the summer of 2015.

While Roxanne was living in Cordero's house, Cordero had asked her for her cell phone number. He sent her text messages saying things like, "[H]i" and, "[H]ow [are you] doing?" Roxanne thought "it was weird" he sent her text messages, but she also thought "it was nice of him." Roxanne never responded to Cordero's messages because she "didn't know what to say." He asked Roxanne if he could take photographs of her, and she said

² The record does not reflect Rene's last name. We use the spelling in the reporter's transcript.

he could. Cordero would take photographs of her face while she was watching television. Even though other people were around, Cordero only took photographs of Roxanne. Cordero asked Roxanne to send him text messages with photographs of herself. Roxanne “thought it was weird” Cordero took photographs of her and wondered why he wanted them.

After Roxanne and her family moved out of Cordero’s house, Roxanne returned on August 8, 2015 for a sleepover with her younger cousin Lilly. Roxanne was 11 years old at the time. Between 8:00 and 10:00 that night, Roxanne was in the living room watching television when Cordero came into the living room through a back door and asked her if she wanted money and candy. Roxanne responded that she did, and Cordero gave her candy and a few dollars in change. Cordero “wanted . . . to kiss” Roxanne, but she “pulled back,” shook her head, and said “no.” Cordero “pulled [her] back and made [her] kiss him” on the lips. Cordero left, Roxanne put the money and candy in her backpack, and she fell asleep. Lilly was asleep in the living room during the encounter.

At approximately 3:00 the next morning Roxanne felt something and woke up to find Cordero “[k]neeling down beside the couch” at her face level. Roxanne “didn’t know what he was going to do, and [she] was scared,” so she pretended to be asleep. Cordero pulled up Roxanne’s shirt and kissed her right hip. He told Roxanne she was “beautiful” and “special.” Cordero also put each of Roxanne’s fingers in his mouth one by one and sucked on them. Cordero asked Roxanne if he could lift up her shirt to kiss her, but she said “no.” Cordero then pulled Roxanne’s hair out of her face and kissed her on the mouth. The kiss lasted five seconds, and Cordero put his tongue in Roxanne’s mouth.

Cordero told Roxanne she was “unique,” and he would marry her if anything happened to Martinez. Roxanne felt uncomfortable while Cordero was kissing her. The encounter ended with Cordero telling Roxanne, “I’ll leave you alone now,” then kissing the top of each of her feet.

Roxanne tried unsuccessfully to wake up Lilly, then went back to sleep. At 7:00 a.m. Roxanne told Lilly and Rene what had happened. Rene told Diaz and called Roxanne’s father. Roxanne did not see Cordero that morning because he left town with Martinez at 5:00 a.m. Roxanne and her family reported the incident to the police several weeks later.

Roxanne did not want Cordero to kiss her or touch her. But she did not tell Cordero to stop because she was “scared” and “didn’t know what to say.” Cordero had not previously tried to touch her inappropriately.

2. *Diaz’s testimony*

At the time of his testimony, Diaz was in custody. The prosecutor asked him, “How do you feel about being here?” Diaz responded, “I really don’t want to . . .” The prosecutor then asked, “Is that why you are wearing county blues because you don’t want to be here?” Diaz responded, “Yes. Just difficult.”³ When the prosecutor asked Diaz whether he was willing to testify honestly, Diaz responded, “Yes.”

Sometime after midnight on August 9 Diaz came out of his room and saw Cordero “hopping” or “quickly running” from the living room to the kitchen. Diaz went back to his room, but

³ Diaz was in custody after he failed to appear in response to a trial subpoena, and he was later picked up on an arrest warrant.

returned an hour later and saw Cordero run from the living room to the kitchen. Around 3:00 a.m. Diaz saw Cordero again run from the living room to the kitchen. Diaz noticed Cordero was walking barefoot, which was unusual because it was cold and Cordero did not normally walk around barefoot. Diaz thought Cordero's behavior was "weird" because Cordero typically spent time in the garage if he was awake late at night, not the living room. Cordero told Diaz he wanted to "show [him] some plumbing outside," which Diaz described as "a phoney [*sic*] conversation." Diaz stayed in the living room the rest of the morning.

Later that morning, after Cordero and Martinez had left for a vacation, Diaz was awakened by Rene screaming his name. Rene told Roxanne to explain to Diaz what had happened, and she did. Rene then called Martinez, who returned later that day without Cordero.

On cross-examination, Diaz testified he had lived in the house with Cordero for two to three years prior to the incident. Diaz and Cordero had disagreements during that time, and Cordero did not want Diaz living there. Diaz admitted he had taken and sold Cordero's belongings. Diaz also acknowledged he had prior convictions for receiving stolen property and petty theft with a prior conviction.

C. *The Defense Case*

Cordero testified in his own defense. He denied touching Roxanne, sucking on her fingers, kissing her on the lips, and putting his tongue in her mouth. He had asked Roxanne for a kiss because he treated her like a daughter. He also admitted giving money and candy to Roxanne, but stated he regularly gave

money and candy to both Roxanne and Lilly for completing household chores.

On the night of the incident Cordero heard noises and a door opening around midnight, so he went to see what was happening. He left his room without shoes to find out why there were noises. Cordero saw Diaz in the living room watching television and laughing with Roxanne, so he went back to sleep. At 2:30 a.m. Cordero took a shower and packed up the car because he and Martinez were planning to leave at 3:00 a.m. for a vacation. He walked around the house while he was loading the car. Cordero also locked up his belongings because he was concerned someone in the house would steal them.

Cordero spoke with Diaz at 3:00 a.m. about how Diaz should operate the sprinklers in the yard while Cordero was away. When Cordero previously went on vacation, nobody in the house tended to the grass, and it died. Cordero had earlier explained the sprinkler system to Diaz, but felt he had to explain it again at 3:00 a.m. before his departure because Diaz was “a stupid fucker” and “lazy.”

Cordero and Martinez were driving in Arizona when Martinez received a call from Rene. Martinez pulled over and told Cordero what Rene had said. Cordero responded, “Oh, fuck” and “I’m fucked, and we’re through.” When he heard the allegations, he wanted to kill himself. Cordero got out of the car, and Martinez drove back to California herself. Cordero cared about Martinez and did not want her to take the blame for Roxanne’s accusations. When Martinez asked if the allegations were true, Cordero told her, “No. That’s not what happened.” He said “I’m fucked” to mean the accusation would always follow

him, even if he were acquitted of the charge, because “[t]hat’s society.”

Cordero described himself as “a bad person” and a “fucked up person” who does “bad things.” He used to be a gang member, but “retired” from gang life because he was “too old.” He “used to hurt” sex offenders while he was serving a prison sentence for robbery, and he “despise[d] motherfuckers that did that.” Cordero did not believe sex offenders had any “reason to live.” Cordero explained he would “kill or die” for family. If someone were to slap a family member, Cordero would hurt the person, who would end up “leaking somewhere.” When Cordero learned Roxanne’s father had physically abused her, he told Roxanne, “I have a bat.”

Cordero had difficulties with Diaz. He caught Diaz stealing his belongings to buy drugs. Another time Cordero told Diaz he wanted to buy drugs, so Diaz took him to his drug source. When they arrived at the source’s house, Cordero saw his belongings were there. The source recognized Cordero and told him Diaz brought the items there. The source was surprised Diaz “was still walking around” after stealing from Cordero. The source recognized Cordero from an earlier incident in which Cordero threatened the source with a weapon and told him to “shut the fuck up” because he was disturbing Cordero and his family.

Cordero did not like Diaz because he stole from his own family, which was worse than the robberies Cordero committed. Cordero told Martinez, “I am going to fuck him up and hurt him.” But Martinez made him promise not to hurt Diaz.

D. *The Verdict and Sentence*

The jury convicted Cordero of lewd and lascivious acts on a child under 14 (§ 288, subd. (a)). Cordero admitted the special allegation he suffered three prior convictions of violent or serious felonies under the three strikes law, including the 1987 murder conviction and two 1982 robbery convictions. Cordero also admitted the special allegation he served four prior prison terms. The trial court sentenced Cordero to 25 years to life under the three strikes law for lewd and lascivious acts on a child, plus three consecutive five-year terms under section 667, subdivision (a)(1). The court exercised its discretion to strike the prior prison term enhancements. The court sentenced Cordero to a total aggregate sentence of 40 years to life.

The trial court imposed a \$30 court facilities assessment (Gov. Code, § 70373) and a \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)). The court imposed a restitution fine of \$300 (§ 1202.4, subd. (b)) and imposed and suspended a parole revocation restitution fine in the same amount (§ 1202.45). The court also imposed a sex offender fine of \$300, plus penalty assessments, for a total of \$1,230.⁴ (§ 290.3, subd. (a)). Cordero

⁴ The penalty assessments included a \$300 base fine under section 290.3, “(1) a 100 percent state penalty assessment (§ 1464, subd. (a)(1)) equal to \$300; (2) a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)) equal to \$210; (3) a 20 percent state surcharge (§ 1465.7) equal to \$60; (4) a 50 percent state court construction penalty (Gov. Code, § 70372) equal to \$150; (5) a 20 percent additional penalty for emergency medical services (Gov. Code, § 76000.5) equal to \$60; (6) a 10 percent additional DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)) equal to \$30; and (7) a [40] percent additional state-only DNA penalty (Gov. Code, § 76104.7[, subd. (a)]) equal to [\$120].” (*People v.*

did not object to imposition of the assessments and fines or raise his inability to pay.

Cordero timely appealed.

DISCUSSION

A. *Cordero Has Not Shown His Attorney's Failure To Object to the Prosecutor's Closing Argument and To Request a Curative Instruction Was Ineffective Assistance of Counsel*

Cordero contends his trial attorney provided ineffective assistance of counsel by failing to address three instances of prosecutorial misconduct committed by the prosecutor in his rebuttal argument, including his arguments: (1) the jury could disbelieve Cordero if they disliked him; (2) Roxanne would not make up allegations against Cordero because she would have been fearful he would retaliate against her; and (3) Diaz testified while in custody because was afraid of Cordero. Cordero acknowledges his attorney did not object to the first and second asserted errors and did not request a curative instruction as to the third. The People contend the prosecutor did not commit misconduct, Cordero's attorney may have had strategic reasons for failing to object or request a curative instruction, and Cordero was not prejudiced. Given that Cordero's attorney may have made a tactical decision not to object or request a curative instruction as to the first and third argued instances of misconduct, Cordero has not met his burden to show ineffective assistance of counsel. With respect to the prosecutor's argument

Johnson (2015) 234 Cal.App.4th 1432, 1457-1458, quoting *People v. Hamed* (2013) 221 Cal.App.4th 928, 940-941.)

Roxanne had a motive not to fabricate her testimony, the prosecutor properly asked the jury to draw inferences from the record.

1. *Applicable law*

“Under California law, to establish reversible prosecutorial misconduct a defendant must show that the prosecutor used “deceptive or reprehensible methods” and that it is reasonably probable that, without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] A prosecutor’s misconduct violates the federal Constitution if the behavior is “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” (People v. Caro (2019) 7 Cal.5th 463, 510 (Caro); accord, People v. Bell (2019) 7 Cal.5th 70, 111 (Bell).) “[W]hen attacking the prosecutor’s remarks to the jury, the defendant must show that, “[i]n the context of the whole argument and the instructions” [citation], there was “a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.” (Bell, at p. 111 [prosecutor’s coin-toss analogy to explain reasonable doubt standard was “problematic,” but not misconduct because it was not reasonably likely the jury would have understood argument to mean they could decide case by flipping a coin]; accord, People v. Cortez (2016) 63 Cal.4th 101, 130-131 [prosecutor’s statement in rebuttal argument that jury could find proof beyond a reasonable doubt if they looked at the evidence and concluded “[they knew] what happened, and [their] belief [was] not imaginary” did not constitute misconduct because there was no reasonable likelihood jurors understood argument to mean they could convict based on “nonimaginary”

belief supported by preponderance of evidence or strong suspicion]; cf. *People v. Centeno* (2014) 60 Cal.4th 659, 665, 670 [prosecutor's use of hypothetical in closing argument explaining concept of reasonable doubt using outline of shape of California with incomplete and inaccurate information constituted misconduct because it was not supported by evidence and was misleading].)

"To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and request an admonition." (*Caro, supra*, 7 Cal.5th at p. 510; accord, *People v. Dalton* (2019) 7 Cal.5th 166, 259; *People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).) It is undisputed Cordero's attorney did not object to two of the asserted improper arguments made by the prosecutor and did not request a curative instruction as to the third. Therefore, Cordero forfeited any claim the prosecutor committed prejudicial misconduct and the trial court erred in not instructing the jury to disregard the arguments.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show (1) his or her "counsel's representation fell below an objective standard of reasonableness under prevailing professional norms" and (2) he or she "suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*People v. Johnson* (2016) 62 Cal.4th 600, 653 (*Johnson*); accord, *People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.)

"On direct appeal, if the record "sheds no light on why counsel acted or failed to act in the manner challenged," we must reject the claim "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no

satisfactory explanation.”” (Caro, *supra*, 7 Cal.5th at p. 488; accord, Mickel, *supra*, 2 Cal.5th at p. 198 [“a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had “no rational tactical purpose” for an action or omission”]; Lopez, *supra*, 42 Cal.4th at p. 972 [“except in those rare instances where there is no conceivable tactical purpose for counsel’s actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal”].) We presume “that counsel’s actions fall within the broad range of reasonableness, and afford ‘great deference to counsel’s tactical decisions.’” (Mickel, at p. 198; accord, Bell, *supra*, 7 Cal.5th at p. 125 [“Unless a defendant establishes the contrary, we shall presume that ‘counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.’”].)

As the Caro court explained in rejecting the defendant’s argument his counsel’s failure to object or request an admonition as to the prosecutor’s penalty phase closing argument, “This is not the rare case where there ‘could be no satisfactory explanation’ for the failure to object or request admonitions, which may have arisen from a desire not to call attention to the allegedly faulty arguments. [Citation.] The failure to object only rarely constitutes ineffective representation.” (Caro, *supra*, 7 Cal.5th at p. 514; accord, Lopez, *supra*, 42 Cal.4th at p. 972 [“[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.”].)

2. *The prosecutor's argument the jury should not believe Cordero if they dislike him*

a. The prosecutor's argument

In his closing argument, the prosecutor argued Roxanne's testimony was credible in light of Diaz's testimony. In response, Cordero's attorney argued Cordero "took the stand, and he told you who he was. You might not like it. It might make you very uncomfortable. But there's one thing for certain, he did not take that stand and craft something for you or concoct a story. He didn't lie. He was raw and unfiltered." Cordero's attorney continued, "For 40 minutes he didn't put any of his profanity in check. He didn't put his opinions about anybody in the courtroom in check. None of it. And he made no apologies. . . . This is the type of guy that will own up to anything he does."

Acknowledging Cordero's demeanor, his attorney explained, "The wrong reason to convict in this case, in any case, is if you don't like him. 'I don't like Mr. Cordero. I am gonna vote guilty.' That's the wrong reason to do a guilty verdict."

The prosecutor argued in rebuttal, "Has the witness been convicted of [a] felony? Well, yes, he has actually. He has been convicted of robbery. And this goes to what the defense said. And toward the end, the defendant [*sic*] said, it's the wrong reason to convict Mr. Cordero because you don't like him. He's right. You shouldn't convict because you don't like him. . . . The People are asking you to convict Mr. Cordero because of what Roxanne testified he did to her. But even though you shouldn't use that you don't like him and he's been convicted of felonies, and convict [*sic*] for no reasons, you can use that whether you believe his testimony. *And if you don't like the guy, you don't have to believe his testimony.* And he's the only one saying

Roxanne is lying. *Like the defense counsel said, if you absolutely detest him, you can use that to not believe his testimony. You do not have to believe his testimony.*” (Italics added.)

b. Jury instructions

Immediately preceding closing arguments, the trial court instructed the jury with CALCRIM No. 200, stating in part, “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant or alleged victim” The court also instructed the jury that “[i]f you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” The court further instructed the jury with CALCRIM No. 226, which provides in part, “You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have.”⁵ Further, the court instructed the jury with CALCRIM No. 222 that “[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence.”

⁵ The trial court also instructed the jury prior to trial that “[i]t would be a violation of your sworn duty to base a verdict on or be influenced by sentiment, pity, passion, prejudice, public opinion, public feeling, guesswork, or speculation. Now, remember what I just said here. It would be a violation of your sworn duty to base a verdict on or be influenced by these emotions. It’s okay to feel these emotions, just as long as your final determination is based on the evidence and not emotion.”

- c. The failure of Cordero's attorney to object did not constitute ineffective assistance of counsel

Cordero contends his attorney's failure to object to the prosecutor's argument the jury could disbelieve Cordero if they disliked him constituted ineffective assistance of counsel because it encouraged the jurors to rely on their emotional response to Cordero as a person instead of evaluating the evidence. Cordero also asserts the argument was misleading because the prosecutor suggested Cordero's attorney agreed with the prosecutor's statement of the law by stating, "Like the defense counsel said, if you absolutely detest him, you can use that to not believe his testimony." But even if the prosecutor's argument constituted prosecutorial misconduct,⁶ Cordero's claim of ineffective assistance of counsel fails because "the record sheds no light on why defense counsel failed to object or request an admonition." (*Caro, supra*, 7 Cal.5th at p. 514.)

Affording great deference to defense counsel, we cannot say Cordero's attorney had ""no rational tactical purpose"" for his failure to object. (*Mickel, supra*, 2 Cal.5th at p. 198; accord, *Caro, supra*, 7 Cal.5th at p. 514.) As the Supreme Court concluded in

⁶ The People argue the prosecutor's argument was not improper because he only asked the jury to consider Cordero's prior convictions for credibility, which would have been proper, not his other misconduct. But the prosecutor emphasized in his closing argument other actions Cordero had taken would make the jurors feel "uncomfortable," a reference to prior acts of violence committed by Cordero. Indeed, the prosecutor in his rebuttal argument, just before stating the jury could disbelieve Cordero if they did not like him, noted Cordero had "hurt and committed violence against" other people and had a history of "beating up child molesters."

Caro, Cordero's attorney may have decided not to object to the prosecutor's statements "from a desire not to call attention to the allegedly faulty arguments." (*Caro*, at p. 514.) By objecting to the prosecutor's argument, Cordero's attorney would have highlighted that Cordero had a felony conviction for robbery, had done things the jury would find "uncomfortable," and was not a likeable person. Instead, Cordero's attorney could have made a tactical decision to rely on the jurors following the court's instruction they should "not let bias, sympathy, prejudice, or public opinion influence [their] decision," including bias against a witness; and in judging the credibility of witnesses they should "set[] aside any bias or prejudice [they] may have."

3. *The prosecutor's argument Roxanne was credible because she would fear retaliation from Cordero if she lied about his conduct*

a. The prosecutor's argument

In his rebuttal argument, the prosecutor asserted Roxanne was a credible witness, stating, "[D]oes it make sense that a person like Mr. Cordero—and I'm talking about the person that you saw testify on the stand. The person who is willing to commit an act of violence against lots of people, according to his testimony, in prison, out of prison. He's gonna kill or die for people. This person, Mr. Cordero, is this the kind of person that you make up a crime about? Is this the kind of person that lies down idly by when someone accuses him of doing something that he didn't do? . . . The other side is this. The defense—the defense is that she's lying. Why would Roxanne, who knows Mr. Cordero—you only saw him for, you know, 40 minutes yesterday on the stand. Roxanne [had] known him for a year at

least. Lived with him for at least a year, at least. And came to visit his house afterwards. She knows him better than all of us probably do. Why in the world would she ever want to lie against somebody like that?”

The prosecutor continued, “The defense is saying she came forward and lied about all of this [about] a man who admitted on the stand that he kills or dies for his family. That admitted on the stand that he went to a drug dealer’s place, and the drug dealer gave him his stuff back because he knew who he was. Who admitted on the stand, who admitted he would fuck people up repeatedly. Talked about fucking people up in prison. Who said that Roxanne had to make him promise—the older Roxanne, had to make him promise not to harm her family. This is the kind of guy that you are gonna lie about?”

- b. The prosecutor’s argument Roxanne would fear retaliation by Cordero if she lied about his conduct was based on reasonable inferences from the evidence

Cordero contends the prosecutor’s argument that Roxanne would not lie about what Cordero did because she feared him was improper because it was not based on evidence in the record. This contention lacks merit because the prosecutor’s argument was based on reasonable inferences from the evidence.

“[T]he prosecutor “enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom.”” (*People v. Powell* (2018) 6 Cal.5th 136, 183; accord, *People v. Armstrong* (2019) 6 Cal.5th 735, 797 [the prosecutor “may invite the jury to accept reasonable inferences from the record, even if the evidence is in dispute”];

People v. Morales (2001) 25 Cal.4th 34, 44 [“At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom.”].) However, “[s]tatements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.” (*Armstrong*, at p. 797; accord, *Powell*, at p. 183.)

Here, Roxanne testified as to the August 9 incident that when Cordero came over to her in the living room, she “was scared.” She also testified Cordero offered to protect her from her father, stating, “I have a bat.” Further, it was accurate for the prosecutor to point out that Roxanne had lived with Cordero for over a year and “knows him better than all of us probably do.” Thus, the jury could make a reasonable inference that Roxanne was at times scared of Cordero and aware of his prior conduct.

Because the prosecutor’s argument was not improper, “there was no reason for a defense objection,” and “the failure to object did not result in a violation of defendant’s constitutional right to the effective assistance of counsel.” (*Lopez, supra*, 42 Cal.4th at p. 968 [prosecutor’s arguments in sexual abuse trial against priest that defendant should not receive favorable treatment as a priest, noting publicized crimes by other priests, did not improperly associate defendant with pedophilic priests, so failure to object did not support claim of ineffective assistance of counsel].) Moreover, even if the argument was improper, it would have been a reasonable tactical decision by Cordero’s attorney not to highlight that Roxanne feared Cordero by objecting to the question. (*Caro, supra*, 7 Cal.5th at p. 514; *Mickel, supra*, 2 Cal.5th at p. 198.)

4. *The prosecutor's argument Diaz was testifying in custody because he feared Cordero*

a. The prosecutor's argument and jury instruction

In his rebuttal argument, after asserting Roxanne would not lie about Cordero's conduct, the prosecutor argued as to Diaz, "And that, ladies and gentlemen, explains also why Mark Diaz showed up in custody. He didn't want to be here testifying against Mr. Cordero. He was afraid of him too." Cordero's attorney objected that the "[f]acts [were] not in evidence," which objection the trial court sustained. The court instructed the jury, "Ladies and gentlemen, you will—I read to you a jury instruction about someone testifying in custody. You will evaluate the testimony just like any other witness, taking into account that jury instruction, and you will rely on the evidence as presented to you in the case and the law as given to you by the judge."

Just prior to closing arguments, the trial court had instructed the jury with CALCRIM No. 337, as modified: "When Mark Diaz testified, he was in custody. The fact that a witness is in custody does not by itself make a witness more or less believable. Evaluate the witness's testimony according to the instructions I have given you."

b. The failure of Cordero's attorney to request a curative admonition did not constitute ineffective assistance of counsel

Cordero contends the prosecutor committed misconduct by referring to a fact not in the record, that Diaz had been brought into custody because he was fearful of testifying against Cordero. Although Cordero is correct on this point, the trial court sustained his attorney's objection. Cordero argues the court's

admonition did not cure the error because the court only told the jury not to consider that Diaz was in custody in assessing his credibility. The court did not instruct the jury to disregard the argument Diaz was fearful of Cordero, which suggested Cordero had threatened Diaz.

Even if the trial court's admonition did not fully address Cordero's objection, Cordero's attorney could have decided it was tactically unwise to request a further admonition, which would have focused the jury even more on the possibility Diaz feared Cordero and that there was a basis for the fear. Cordero contends there could be no plausible tactical reason for his attorney to refrain from requesting a curative admonition because he had already objected to the argument. But given the lack of a record showing why Cordero's counsel did not request an additional admonition, we cannot say Cordero's attorney had ""no rational tactical purpose"" for his failure to request a further admonition. (*Mickel, supra*, 2 Cal.5th at p. 198; accord, *Caro, supra*, 7 Cal.5th at p. 514.) Further, in light of the trial court's limited instruction admonishing the jury not to consider the fact Diaz was in custody in judging his credibility and the evidence the jury could properly consider about Cordero's prior convictions, Cordero cannot show he ""suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome."" (*Johnson, supra*, 62 Cal.4th at p. 653; accord, *Mickel*, at p. 198.)⁷

⁷ Because we conclude Cordero's attorney did not provide ineffective assistance of counsel as to any of the three asserted instances of prosecutorial misconduct, we do not reach Cordero's argument the cumulative impact of the errors violated Cordero's right to due process.

B. *The Trial Court Erred in Imposing Five-year Sentence Enhancements Under Section 667, Subdivision (a), for Cordero's Prior Robbery Convictions Where the Information Only Alleged the Enhancement as to His Prior Murder Conviction*

Cordero contends the trial court's imposition of two 5-year sentence enhancements under section 667, subdivision (a), for his prior robbery convictions was an unauthorized sentence because it violated the requirement in section 1170.1, subdivision (e), that sentence enhancements be pleaded and proved. Cordero is correct.⁸

1. *Proceedings below*

The amended information alleged Cordero suffered three prior strike convictions under the three strikes law, including a 1978 murder conviction and two 1982 robbery convictions. The amended information also alleged the murder conviction was of a serious felony within the meaning of section 667, subdivision (a). After the jury found Cordero guilty of the underlying crimes, Cordero waived his right to a jury trial on the priors allegations. Cordero admitted he suffered three prior strike convictions "pursuant to [section] 667[, subdivision] (d) and . . . section 1170.12[, subdivision] (b)," including the murder conviction and two robbery convictions. Cordero also admitted he had four prison priors within the meaning of section 667.5, subdivision (b). Cordero did not specifically admit his prior strike convictions

⁸ We do not reach Cordero's additional argument the sentence violated his due process rights under the United States and California Constitutions.

were serious felonies pursuant to section 667, subdivision (a). The court accepted the admissions.

The People argued in their sentencing memorandum Cordero should be sentenced to three 5-year sentence enhancements under section 667, subdivision (a). Cordero filed a *Romero* motion⁹ to dismiss his prior convictions and to stay imposition of the five-year enhancements as cruel and unusual punishment, in which he stated, “[I]t appears there are three five-year priors for sentencing purposes under [section] 667[, subdivision] (a)(1) . . . , thus carrying [an] additional consecutive sentence of 15 years.” Cordero listed the “three five-year priors” as the murder and robbery convictions.

At the sentencing hearing, the trial court denied Cordero’s motion to dismiss the prior convictions. After sentencing Cordero to 25 years to life under the three strikes law, the court inquired, “The defendant admitted three five-year priors pursuant to [section] 667[, subdivision] (a)(1). Meaning, that there were—even though only one [section] 667[, subdivision] (a) prior was alleged. You are aware of that?” The prosecutor responded, “Correct.” The court asked, “But he can admit three?” The prosecutor responded, “Yes.” The court inquired further, “Those being the three strikes?” The prosecutor responded, “Correct. He admitted to the actual crimes that qualify for [section] 667[, subdivision] (a)(1).” The court responded, “And the court did make that determination and does. So the court imposes five years per prior for a total of 15 years.”

⁹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

2. *Imposition of the five-year sentence enhancements for Cordero's robberies violated section 1170.1, subdivision (e)*

“Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial.” (*People v. Mancebo* (2002) 27 Cal.4th 735, 750 (*Mancebo*); accord, *People v. Houston* (2012) 54 Cal.4th 1186, 1227 [“A defendant has a due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes.”].) Where a statute requires an enhancement or special circumstance be pleaded and proved, imposition of a sentence based on an unpleaded enhancement or circumstance violates the pleading provision of the sentencing statute. (*Mancebo*, at p. 743 [sentencing of defendant to unpleaded circumstance of gun enhancement violated explicit pleading provisions of one strike law]; *People v. Nguyen* (2017) 18 Cal.App.5th 260, 267 (*Nguyen*) [trial court erred in imposing five-year sentence enhancement under § 667, subd. (a), where information alleged prior strike, but not prior serious felony conviction].)

In *Mancebo*, the Supreme Court reversed the imposition of an enhanced sentence based on a multiple victim circumstance that was not alleged in the information. (*Mancebo, supra*, 27 Cal.4th at p. 743.) The court’s holding turned on its interpretation of section 667.61, former subdivisions (f) and (i), of the one strike law. (*Mancebo*, at p. 749.) Specifically, section 667.61, former subdivision (i), required that “[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in

open court or found to be true by the trier of fact,” and former subdivision (f) provided that “circumstances specified in [former] subdivision (d) or (e) which are required for the punishment [be] pled and proved”¹⁰ (*Mancebo*, at p. 749.)

The information in *Mancebo* alleged the special circumstances that supported a sentence of 25 years to life under section 667.61, former subdivision (e), including use of a firearm, kidnapping, and tying or binding, but not the multiple victim enhancement. (*Mancebo*, *supra*, 27 Cal.4th at p. 740.) However, the trial court sentenced the defendant to a prison term of 25 years to life based in part on the multiple victim enhancement, to enable the court to apply the alleged firearm use enhancement to increase the defendant’s sentence by an additional 10 years. (*Ibid.*)

The *Mancebo* court observed, “[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms” (*Mancebo*, *supra*, 27 Cal.4th at p. 745.) The court concluded the People made a discretionary charging decision not to allege the multiple victim enhancement in the information, explaining: “There can be little doubt that the prosecution understood the One Strike law’s express pleading requirements

¹⁰ Former subdivisions (d) and (e) of section 667.61 set forth the circumstances that support imposition of a sentence of 25 years to life for specified crimes.

and knew how to comply with them. We agree with the Court of Appeal's conclusion that the People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision. Not only is this conclusion supported by the record, but [the People do] not contend, much less suggest, how the failure to plead the multiple victim circumstance was based on mistake or other excusable neglect. . . . [¶] . . . Because the People elected to plead the enhancement allegations in this manner [relying on the firearm special circumstance], the express provisions of [the sentencing statute] restricted the trial court to this application." (*Id.* at p. 749.)

The Court of Appeal in *Nguyen, supra*, 18 Cal.App.5th at pages 262, 264-266, applied the Supreme Court's reasoning in *Mancebo* to facts similar to those at issue here, concluding imposition of a five-year enhancement under section 667, subdivision (a), was an unauthorized sentence where the information alleged the defendant had a prior conviction of a strike under the three strikes law, citing to sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1), as well as a prison prior under section 667.5, subdivision (b), but not a prior serious felony conviction under section 667, subdivision (a). The defendant admitted he had a prior conviction for first degree burglary, the burglary was a serious felony, and he had been sentenced to prison for the offense. (*Nguyen*, at p. 264.) During the admission colloquy and at sentencing, the prosecutor represented the defendant was admitting a "nickel prior" under section 667, subdivision (a), without objection by defense counsel. (*Nguyen*, at pp. 264-265.)

The *Nguyen* court explained that section 1170.1, subdivision (e), similar to the one strike law provision at issue in *Mancebo*, provides, “All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” (*Nguyen, supra*, 18 Cal.App.5th at p. 265.) The court observed, “[W]hen, as here, the People allege a prior serious felony conviction, and when they cite the three strikes law but do *not* cite the prior serious felony conviction statute, we can only conclude that they have made ‘a discretionary charging decision.’” (*Id.* at p. 267.) On this basis, the court modified the judgment to strike the five-year term under section 667, subdivision (a), and added a one-year term for the prior prison term enhancement, concluding “the trial court erred by imposing the unpleaded five-year prior serious felony conviction enhancement.” (*Nguyen*, at pp. 270, 272.)¹¹

¹¹ Although the defendant in *Nguyen* did not object to imposition of the five-year sentence enhancement, the court concluded he had not forfeited his objection to the sentence because the violation of section 1170.1, subdivision (e), resulted in an unauthorized sentence. (*Nguyen, supra*, 18 Cal.App.5th at pp. 271-272.) Contrary to the People’s contention, Cordero likewise did not forfeit his challenge to the sentence by failing to object in the trial court because a defendant does not forfeit a claim of sentencing error where the sentence “violates mandatory provisions governing the length of confinement.” (*Mancebo, supra*, 27 Cal.4th at p. 749, fn. 7 [defendant did not forfeit argument that failure to allege sentence enhancement under one strike law precluded imposition of enhancement]; accord, *People v. Jimenez* (2019) 35 Cal.App.5th 373, 395 [defendant did not forfeit his challenge to unauthorized sentence

The People urge us not to follow the reasoning in *Nguyen*, arguing *Mancebo* only requires the factual allegations supporting the enhanced sentence be alleged, in this case that Cordero suffered a prior serious felony conviction.¹² We do not read *Mancebo* so narrowly and find the reasoning of the *Nguyen* court persuasive. As the *Nguyen* court observed, the language in the one strike law under section 667.61, former subdivision (i) (“the existence of any fact required [for the special circumstances enhancement] shall be alleged . . . and either admitted . . . or found to be true . . .”), is similar to the language in section 1170.1, subdivision (e) (“[a]ll enhancements shall be alleged . . . and either admitted . . . or found to be true . . .”). (*Nguyen, supra*, 18 Cal.App.5th at p. 266.) And section 667.61, subdivision (f),

where information did not place him on notice of sentence enhancement]; *Nguyen*, at pp. 271-272.)

¹² The People rely on the language in *People v. Thomas* (1987) 43 Cal.3d 818, 826, that “a valid accusatory pleading need not specify by number the statute under which the accused is being charged.” But *Thomas* did not involve a statute with a specific pleading requirement. Moreover, here the violation of section 1170.1, subdivision (e), occurred not by the failure to allege a specific code provision in the information, but the failure to allege if Cordero were convicted, he would be subject to sentencing enhancements for having suffered convictions of two additional prior serious felonies. Indeed, that the information specifically alleged the murder conviction supported an enhancement under section 667, subdivision (a), would have led Cordero to believe that was the only five-year enhancement the People sought to impose. The references in the sentencing memoranda and admission colloquy did not cure the lack of notice in the information.

specifically states the “circumstances specified in subdivision (d) or (e) [must be] pled and proved”

Further, the *Mancebo* court cited approvingly the Court of Appeal opinion in *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1440, in which the court concluded the trial court’s imposition of a sentence enhancement under section 667, subdivision (a), was unauthorized where the information alleged only a prison prior enhancement under section 667.5, subdivision (b). (*Mancebo*, *supra*, 27 Cal.4th at pp. 745-746.) The *Mancebo* court quoted *Haskin*’s holding that “[b]ecause appellant was neither statutorily nor factually charged with, nor consented to, a substituted section 667 enhancement in conjunction with the 1979 offense, the trial court was without authority to impose a sentence greater than that authorized by section 667.5, subdivision (b), the charging statute which appellant admitted.” (*Mancebo*, at p. 746, quoting *Haskin*, at p. 1440; see *People v. Jackson* (1985) 37 Cal.3d 826, 835, fn. 12 [“It is obvious . . . that the enhancement provided by [section 667, subdivision (a),] is subject to equivalent pleading and proof requirements” to those of other enhancements under section 1170.1, former subdivision (f).], overruled on other grounds in *People v. Guerrero* (1988) 44 Cal.3d 343, 348.)

Other courts have similarly relied on *Mancebo* to conclude an enhancement under a statute requiring pleading and proof of the enhancement cannot be imposed unless the enhancement is specifically pleaded. (See *People v. Sawyers* (2017) 15 Cal.App.5th 713, 718, 724, 726 [trial court imposed unauthorized sentence under three strikes law where information alleged prior first degree burglary conviction was serious or violent felony under § 1170, subd. (h)(3), requiring state prison

sentence, without reference to three strikes law]; *People v. Botello* (2010) 183 Cal.App.4th 1014, 1027 [trial court's imposition of firearm enhancement under § 12022.53, subd. (e)(1), for principal armed with a firearm was unauthorized where information alleged personal use of firearm, but not principal armed allegation]; *People v. Arias* (2010) 182 Cal.App.4th 1009, 1019 [trial court imposed unauthorized sentence for willful, deliberate, and premeditated murder because information failed to allege enhancement that murder was willful, deliberate, and premeditated].)

Our opinion in *People v. Riva* (2003) 112 Cal.App.4th 981, 1001, is distinguishable. There we concluded the pleading requirements of section 12022.53, subdivision (j), that the existence of facts necessary to support a firearm enhancement be alleged in the information, were met by the allegations in the information the defendant had used a firearm in the commission of two offenses, but not a third, all of which arose from the same set of facts (shooting at an occupied vehicle). Here, the allegation in the information Cordero suffered a conviction of a serious felony based on his murder conviction cannot satisfy the requirement the information allege he suffered a conviction of robbery as a serious felony. In addition, as part of the plea colloquy Cordero admitted he suffered three prior strikes and served four prior prison terms, but he did not specifically admit he suffered convictions of serious felonies under section 667, subdivision (a). By contrast, in *Riva* the verdict forms asked the jury to determine whether the firearm enhancement allegations were true as to all three counts, and the jury found the allegations were true. (*Riva*, at p. 1000.)

We follow the holdings in *Mancebo* and *Nguyen* and conclude, as did the *Mancebo* court, “the People’s failure to include [the enhancement] allegation must be deemed a discretionary charging decision. . . . [¶] . . . Because the People elected to plead the enhancement allegations in this manner, the express provisions of [the sentencing statute] restricted the trial court to this application.” (*Mancebo, supra*, 27 Cal.4th at p. 749.) We reverse the section 667, subdivision (a), enhancements for the two robbery convictions.¹³

C. *Remand for Resentencing Is Necessary Pursuant to Section 667, Subdivision (a)*

Cordero contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the remaining prior serious felony enhancement imposed pursuant to section 667, subdivision (a), for Cordero’s prior murder conviction.

In 2018 the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019.¹⁴ Senate Bill No. 1393 amended section 1385 by deleting

¹³ Because we reverse the serious felony enhancements for both robbery convictions, we need not reach Cordero’s contention (conceded by the People) that the trial court imposed an unauthorized sentence by imposing two prior serious felony enhancements for the robbery convictions because the robbery charges were not brought and tried separately.

¹⁴ In their supplemental letter brief, the People concede remand would be appropriate if Cordero’s conviction did not become final by Senate Bill No. 1393’s effective date of January 1, 2019.

subdivision (b), which prohibited trial courts from exercising discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667.” (§ 1385, former subd. (b).) Senate Bill No. 1393 applies retroactively to Cordero because Cordero’s sentence was not final at the time the new law became effective on January 1, 2019. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272 [Sen. Bill No. 1393 applies retroactively]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [same]; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [Absent contrary legislative intent, “[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.”].) On remand the trial court should consider whether to strike the five-year sentence enhancement imposed based on Cordero’s prior murder conviction.

D. *Cordero Is Entitled to a Hearing on His Ability To Pay the Assessments and Restitution Fines*

Cordero requests in his second supplemental opening brief we remand the case for the trial court to conduct an ability-to-pay hearing in accordance with our opinion in *People v. Dueñas*, *supra*, 30 Cal.App.5th 1157 (*Dueñas*), because he was indigent at the time of sentencing. We agree Cordero should have an opportunity on remand to request a hearing and present evidence demonstrating his inability to pay the \$30 court facilities assessment (Gov. Code, § 70373), \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), \$300 restitution

fine (Pen. Code, § 1202.4, subd. (b)), and \$300 parole revocation restitution fine (Pen. Code, § 1202.45).

In *Dueñas*, *supra*, 30 Cal.App.5th at page 1168, this court concluded “the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed . . . upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution.” However, in contrast to the assessments, a restitution fine under section 1202.4, subdivision (b), “is intended to be, and is recognized as, additional punishment for a crime.” (*Dueñas*, at p. 1169.) 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; rather, inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. As we held in *Dueñas*, to avoid the serious constitutional question raised by imposition of the restitution fines, “although the trial court is required by . . . section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine.” (*Dueñas*, at p. 1172.)

1. *We decline to find forfeiture of Cordero’s arguments as to the assessments and restitution fines under Dueñas*

In their supplemental brief, the People contend Cordero forfeited his objections to the trial court’s imposition of the fines and assessments because he failed to object to their imposition at sentencing. However, at the time Cordero was sentenced, *Dueñas* had not yet been decided. As we explained in *People v.*

Castellano (2019) 33 Cal.App.5th 485, 489 (*Castellano*) in rejecting this argument, “[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay. . . . When, 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.” (Contra, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [same].) As in *Castellano*, we decline to find Cordero forfeited his constitutional challenge to the imposition of the assessments and restitution fines.

2. *Cordero forfeited his challenge to imposition of the sex offender fine based on his inability to pay*

Cordero also seeks an ability to pay hearing as to the sex offender fine the trial court imposed in the amount of \$300, plus penalty assessments and administrative fees, for a total of \$1,230. (§ 290.3, subd. (a).) Cordero contends *Dueñas* supports remand for an ability to pay hearing because, like a restitution fine under section 1202.4, the sex offender fine constitutes punishment. However, section 290.3, subdivision (a), provides that persons convicted of an offense listed in section 290, subdivision (c) (including a violation of § 288, subd. (a)), “shall . . . be punished by a fine of three hundred dollars (\$300) upon the first conviction . . . , unless the court determines that the defendant does not have the ability to pay the fine.” By contrast, section 1202.4, subdivision (c), specifically provides “[a]

defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine"

Thus, unlike the newly announced constitutional principle in *Dueñas*, which Cordero could not reasonably have anticipated at the time of his sentencing, here Cordero possessed an express statutory right to contest his ability to pay under section 290.3, subdivision (a). We agree with the People that Cordero has forfeited his challenge to imposition of the sex offender fine by his failure to argue at the time of sentencing his inability to pay the fine, including penalty assessments and administrative fees. (*People v. Acosta* (2018) 28 Cal.App.5th 701, 705 [noting as to sex offender fine, including penalty assessments and administrative fees, "by failing to object to these fines at sentencing, [a defendant] has waived any claim on appeal that the trial court improperly imposed them"]; see *People v. McCullough* (2013) 56 Cal.4th 589, 593 [defendant forfeited challenge to imposition of booking fee because he failed to raise his ability to pay the fee in the trial court].)

3. *On remand Cordero is entitled to an opportunity to challenge imposition of the assessments and restitution fines*

The People contend the record does not support a remand for an ability-to-pay hearing because Cordero failed to show in the trial court he did not have the financial ability to pay the fines and assessments, nor the future earning capacity to pay, including from wages he would earn while in prison. But the only information in the record regarding Cordero's ability to pay

at the time of sentencing is that he was 58 years old, his employment and financial statuses were unknown, and he had previously worked as a janitor, in construction, and in maintenance.

The People are correct Cordero must in the first instance request an ability-to-pay hearing and present evidence of his inability to pay the fines and assessments. “Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court.” (*Castellano, supra*, 33 Cal.App.5th at p. 490.) However, as discussed in the context of forfeiture, because Cordero was not aware of his ability to challenge the assessments and restitution fines on due process and equal protection grounds, we conclude he should have that opportunity on remand.

We reject the People’s additional contention Cordero has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the fines and assessments fine, including penalty assessments and administrative fees. “[T]he defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.” (*Castellano, supra*, 33 Cal.App.5th at p. 490.)

DISPOSITION

We affirm the judgment of conviction, but reverse the sentence as to the section 667, subdivision (a), enhancements for

the robbery convictions and remand for resentencing. On remand, the trial court should exercise its discretion whether to impose the five-year sentence enhancement for Cordero's prior murder conviction. The trial court should also allow Cordero to request a hearing and present evidence of his inability to pay the court facilities and operations assessments, restitution fine, and parole revocation restitution fine.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.