Filed 9/30/19 P. v. Davidson CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JHON DAVIDSON, Defendant and Appellant.	2d Crim. No. B288690 (Super. Ct. No. BA456222) (Los Angeles County)

A jury convicted appellant Jhon Davidson of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4);[1] count 1) and rape of an intoxicated person (*id.*, subd. (a)(3); count 2). The trial court sentenced appellant to the middle term of six years in state prison on each count, but stayed the sentence on count 2 pursuant to section 654. The court also imposed a $300 restitution fine (§ 1202.4), an $80 court security fee (§ 1465.8,

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

subd. (a)) and a $60 criminal conviction assessment (Govt. Code, § 70373).

Appellant contends one or both of his convictions must be reversed because (1) the trial court erred by admitting a recorded telephone conversation between appellant and the victim, S.H.; (2) the statutory provisions governing rape of an intoxicated person are unconstitutionally vague; (3) the mental state required for rape of an intoxicated person is too low; (4) the court erred by instructing the jury that a mistake of fact must be reasonable (CALCRIM No. 1002); (5) defense counsel rendered ineffective assistance of counsel by eliciting testimony about appellant's criminal history; (6) the court improperly excluded a statement made by S.H. to appellant's original defense attorney; and (7) CALCRIM No. 362 presents an irrational understanding of awareness of guilt.

In supplemental briefing, appellant argues, based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), that the trial court violated his due process rights by imposing $440 in fines and assessments without first determining his ability to pay that amount. We conclude none of appellant's contentions has merit and affirm the judgment.

FACTS

Appellant met S.H. at a gas station on November 7 or 8, 2016. While S.H. was waiting for a friend, appellant pulled up in a van and they started chatting. Appellant was "kind of nice" to S.H., and she gave him her phone number.

Appellant called S.H. the next day and asked to see her. They exchanged text messages and S.H. agreed to meet him at her apartment later that night. Appellant offered to bring marijuana, but S.H. suggested that he bring alcohol instead.

Appellant arrived sometime before midnight. He and S.H. started discussing politics. Appellant poured her two full glasses of brandy, which she drank. S.H. then proposed that they go to the building's rooftop to "take a look and get a breather." Appellant agreed, and he, S.H. and her roommate, V.G., went up to the roof.

At some point, appellant asked to have sex with S.H. She refused, telling him she was celibate and had not had sex in six years. Appellant became upset and gave her a look, "kind of like what you mean we ain't going to have sex?" But S.H. did not think his reaction was "strong enough" to demand that he leave.

The alcohol S.H. had drunk "kicked in" while they were on the rooftop, and she spent most of the time talking with her roommate. V.G. noticed S.H. was very drunk and asked her if she was going to be okay. S.H. said, "I don't feel well at all. . . . I need to go downstairs and throw up."

V.G. and S.H. went downstairs while appellant stayed on the roof. S.H. vomited in the bathroom and felt "really weak." Appellant knocked on the apartment door, and S.H. let him in. Appellant sat down next to S.H. and began touching her. S.H. told appellant not to touch her and said, "No, I don't want to have sex with you."

Appellant did not appear to take S.H. seriously. S.H. then began "zoning out." S.H., who was 41, had been drinking for years, but had "never had this feeling." She was "either extremely drunk or something happened to [her], like someone did something to [her]." S.H. passed out, but remembered trying to push someone off her.

When S.H. awoke, she was lying on her bed "butt naked." Her underwear was on the floor, the covers were "messed up,"

and appellant, who was completely clothed, was standing over her.

S.H.'s vagina and "booty hole" both "felt like somebody had went inside." She asked appellant several times if they had had sex. He denied having sex with her, but admitted to "playing with [her] vagina." She told him to leave, but then called him on the phone, "beg[ging] . . . for the truth." She kept asking if they had sex, and he kept saying "no." Finally, he said he would "tell [her] the truth."

S.H. began recording the phone call. Appellant admitted they had sex, and acknowledged she was "drunk . . . out of [her] head" at the time. S.H. asked appellant why he had sex with her when she was "out of [her] head." He replied, "Because I got horny when you just tell me to come here. I got weak and shit. I got real weak, and I said, 'Fuck it. I'm here. Just here. Just here.' And I did it, and it felt good. It felt good to me."

Appellant also admitted S.H. had told him not to touch her. S.H. said, "You raped me. I mean I just – I can't believe that you actually raped me." Appellant responded, "I can't believe I fucking did this [unintelligible]." He then acknowledged he had not used a condom and that S.H. "could be pregnant right now."

S.H. went to the hospital after the phone call, which occurred just a few hours after the incident. She reported she had been raped and had yet to shower. S.H. told Amanda Murray, a sexual assault nurse, that she had invited appellant for drinks, that she passed out, and that when she woke up "there was a funny feeling in her vagina."

Murray conducted a physical exam, which revealed an abrasion to S.H.'s right inner thigh, and an abrasion or bruising to her right labia minora. Although these injuries were consistent with sexual assault, they also were consistent with

someone having sex after a protracted period of abstinence. Murray took several vaginal swabs, which revealed a "sperm fraction" matching appellant's DNA.

Appellant was arrested on April 6, 2017. He told Detective Sandra Lopez in a taped interview that S.H. "got drunk" and said, "'[L]et's do it.'" Appellant said he immediately left S.H.'s apartment and "did not have sex with her." Appellant subsequently stated he was unsure if they had engaged in intercourse. After further questioning, appellant admitted they had sex, but said "it was consensual." Appellant initially denied having sex with S.H. because he did not "want to get in trouble . . . for doing something wrong."

At trial, appellant testified S.H. became "woozy" when they were on the rooftop above her apartment. She went downstairs, and he later followed her. He stated S.H. "looked sick" and "in semi bad shape." While "acting inebriated," S.H. asked appellant to take off her dress. Appellant complied, and S.H. touched his genitals. When he expressed discomfort, S.H. told him "it's okay." Appellant then began to kiss her. She pulled him close and told him to "give it to [her]."

Appellant conceded S.H. "seemed like she" was "drunk out of her head." He nonetheless had sex with her and said she appeared to be physically engaged in the activity. After they were finished, appellant left the room and S.H. began vomiting. S.H. asked him, "What were we doing?" He told her they had sex, and she walked him to the door.

A forensic chemist testified S.H.'s likely blood alcohol content (BAC) at the time of the incident was around .23. At this level, a typical person might black out or pass out. The chemist noted, however, S.H.'s BAC may have been reduced by as much

as 50 percent if she vomited up half of the alcohol. In that case, a typical person would not be dysfunctional.

DISCUSSION

The combined briefing in this appeal exceeds 290 pages. The People persuasively argue that a number of appellant's arguments were forfeited or that any possible error was harmless. We dispose of all but one of the arguments on the merits. As we shall explain, the alleged *Dueñas* error is harmless beyond a reasonable doubt.

Admission of the Recorded Phone Call

Before trial, the prosecutor asked the trial court to admit the recorded phone call between appellant and S.H. Defense counsel orally opposed the request. The court allowed the recording, stating "the law is clear that this particular call should be admitted."

Appellant contends the admission of the recording violated the Invasion of Privacy Act (§ 630 et seq.). Section 632 "prohibits eavesdropping or intentionally recording a confidential communication without the consent of *all* parties to the communication." (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 928; § 632, subd. (a).) It also provides that "[e]xcept as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial, administrative, legislative, or other proceeding." (§ 632, subd. (d).)

Section 632 is subject to certain exceptions. Under section 633.5, "one party to a confidential communication is permitted to record the communication secretly 'for the purpose of obtaining evidence reasonably believed to relate to the commission by any other party to the communication' of certain crimes, including

'any felony involving violence against the person.'" (*In re Trever P.* (2017) 14 Cal.App.5th 486, 490.) If section 633.5 applies, the evidence is admissible in a prosecution for the specified crimes. (*Trever P.*, at p. 490.)

The People claim the recording in this case falls within the section 633.5 exception because its purpose was to obtain evidence of rape. Appellant maintains the exception does not apply because neither of his rape convictions qualifies as a "felony involving violence against the person." (*Ibid.*) He points to section 667.5, subdivision (c), which lists the felonies that are "violent" for purposes of sentencing under section 667.5 and the Three Strikes law (§1170.12, subd. (b)(1)). Rape of an unconscious or intoxicated person is not included. (See § 667.5, subd. (c).)

Section 633.5 does not define the phrase "felony involving violence against the person," except to state it "includ[es], but [is] not limited to, human trafficking, as defined in [s]ection 236.1, a violation of [s]ection 653m, or domestic violence as defined in [s]ection 13700, or any crime in connection therewith." Human trafficking is not specifically listed as a violent felony under section 667.5, subdivision (c), and at least some of the section 236.1 felony offenses, including violations of subdivisions (a), (b) and (c)(1), do not qualify as such. The making of annoying phone calls in violation of section 653m and certain domestic violence crimes (§ 13700) also are not violent felony offenses under section 667, subdivision (c). The Legislature has nonetheless determined these crimes "involv[e] violence against the person." (§ 633.5.)

There is no indication the Legislature intended to limit application of section 633.5 to the violent felonies enumerated in section 667.5, subdivision (c). To the contrary, when section 633.5 was enacted in 1967, section 667.5 did not exist. (See

People v. Jones (1993) 5 Cal.4th 1142, 1147 [section 667.5 enacted in 1976 as part of the Determinate Sentencing Act].) Not only does section 633.5 specifically encompass some felonies excluded from section 667.5, subdivision (c), but one of appellant's convictions – the felonious rape of an intoxicated person (§ 261, subd. (a)(3)) – is listed as a violent sex offense in section 667.6.[2] (See *id.*, subd. (e)(1).)

As we stated in *People v. Pelayo* (1999) 69 Cal.App.4th 115, "[v]iolent sex crimes are treated differently. The Legislature enacted section 667.6 in 1979 to significantly increase prison terms for persons convicted of certain violent sex offenses." (*Id.* at p. 123.) "Section 667.6, subdivision (c) provides that if a person is convicted of a violent sex offense against a single victim on one occasion, the trial court may, in its discretion, impose a full, separate and consecutive sentence for such an offense. Alternatively, it may sentence the defendant more leniently in the manner prescribed by section 1170.1. [Citations.]" (*Id.* at pp. 123-124.)

Before S.H. passed out, she made it clear she did not want to have sex with appellant. She also recalled trying to push someone off her. When S.H. awoke, she was lying naked on her bed. The covers were in disarray and it felt like her vagina and anus had been penetrated. Appellant admitted to "playing with

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[2] At oral argument, appellant's counsel noted that rape of an unconscious person (§ 261, subd. (a)(4)) is not a violent sex offense, but did not discuss whether rape of an intoxicated person (*id.*, subd. (a)(3)) qualifies as one. Section 667.6, subdivision (e)(1) provides that "[r]ape in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261" is a violent sex offense. (See *People v. Rodriquez* (2012) 207 Cal.App.4th 204, 212.)

[S.H.'s] vagina," but repeatedly denied having sex with her. S.H. was not convinced.

By the time appellant agreed to "tell . . . the truth," S.H. reasonably believed she had been raped while intoxicated. Appellant conceded in his reply brief and at oral argument that S.H. could have "had a reasonable belief she had been subjected to non-consensual sexual intercourse while unconscious or intoxicated." S.H. recorded the phone call to obtain evidence relating to the commission of a "felony involving violence" against her. (§ 633.5; see *In re Trever P.*, *supra*, 14 Cal.App.5th at p. 490.) S.H. immediately reported the rape to authorities and appellant was later convicted of a violent sex offense. (§§ 261, subd. (a)(3), 667.6, subd. (e)(1).) We conclude the section 633.5 exception to the section 632, subdivision (d) exclusionary rule applies under these circumstances. The recording was properly admitted.[3]

Constitutional Challenge to Section 261, Subdivision (a)(3)

Section 261, subdivision (a)(3) provides: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance . . . and this condition was known, or reasonably should have been known by the accused." Appellant argues the statute is unconstitutionally vague because

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[3] Given our conclusion, we do not address the People's alternative argument that the right to truth-in-evidence provision, enacted through Proposition 8, abrogates section 632, subdivision (d)'s exclusionary rule in criminal proceedings. That issue is pending review in the Supreme Court. (*People v. Guzman* (2017) 11 Cal.App.5th 184, review granted July 26, 2017, S242244.)

it criminalizes sexual intercourse where a defendant "'reasonably should have known'" the victim was intoxicated. He also argues the statute violates due process because it effectively applies a civil negligence standard to the crime of rape.

Our colleagues in the Fourth Appellate District rejected both arguments in *People v. Linwood* (2003) 105 Cal.App.4th 59 (*Linwood*). First, the court concluded the requirement that a defendant reasonably should have known the victim was too intoxicated to resist sexual intercourse is not unconstitutionally vague because jurors are able to resolve that factual issue. (*Id.* at p. 68; *People v. Rodriguez* (1986) 42 Cal.3d 730, 782 ["[T]he average juror has the ability to cull from everyday experience a standard by which to assess the ability of a defendant to know the status of his or her victim"].) As the court observed, "[t]here are commonly recognizable indications of a person's intoxication, including an odor of alcohol, slurring of speech and unsteadiness, that enable one to reasonably determine if another no longer has the ability to resist." (*Linwood*, at p. 70; see *People v. Thompson* (2006) 142 Cal.App.4th 1426, 1438-1439.)

Second, the court determined section 261, subdivision (a)(3) "uses a criminal negligence standard rather than a civil negligence standard on the accused's knowledge of the victim's disabling intoxication." (*Linwood*, *supra*, 105 Cal.App.4th at p. 71.) It recognized "the '"reasonably should have known" formulation departs somewhat from the usual description of criminal negligence.' [Citation.] But at issue is the defendant's awareness of the state of the victim's intoxication and it is appropriate that an objective standard be applied. 'Criminal negligence . . . is a standard for determining when an act may be punished under the penal law because it is such a departure from what would be the conduct of an ordinarily prudent or careful

person under the same circumstances.' [Citation.]" (*Id.* at pp. 71-72, fn. omitted; see *Williams v. Garcetti* (1993) 5 Cal.4th 561, 574.)

Appellant cites no authority, and we have found none, disapproving *Linwood* or otherwise suggesting the challenged statute is unconstitutional. Accordingly, we have no reason to deviate from that decision.

Challenge to CALCRIM No. 1002

The trial court instructed the jury with CALCRIM No. 1002, which sets forth the elements of rape of an intoxicated person. (See § 261, subd. (a)(3).) The court included a bracketed, optional portion of the instruction, which states: "The defendant is not guilty of this crime if he actually and reasonably believed that the woman was capable of consenting to sexual intercourse, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty."

Appellant contends the trial court erred by instructing the jury that a mistake of fact must be reasonable to serve as a defense to rape of an intoxicated person. He claims the plain language of section 26, which creates the mistake-of-fact defense, does not allow for a reasonableness requirement.

We agree with the People that accepting appellant's argument would require us to depart from long-standing Supreme Court precedent. (See *People v. Mayberry* (1975) 15 Cal.3d 143, 155 ["[A] defendant's belief must be . . . reasonable in order to negate criminal intent"] (*Mayberry*); *People v. Martinez* (2010) 47 Cal.4th 911, 954 ["[A] defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual

intercourse is a defense to rape"]; *People v. Maury* (2003) 30 Cal.4th 342, 424 ["A defendant relying on a *Mayberry* defense must produce some evidence of the victim's equivocal conduct that led him reasonably to believe she consented to the act"]; *People v. Williams* (1992) 4 Cal.4th 354, 360 ["*Mayberry* is predicated on the notion that under section 26, . . . reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent"] overruled on other grounds in *Barnett v. Superior Court* (2010) 50 Cal.4th 890; accord *People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1250 ["Actual rape of an intoxicated person . . . is a general intent crime, and, thus, is subject to a mistake-of-fact defense *only* if the mistake was objectively reasonable"]; *People v. Raszler* (1985) 169 Cal.App.3d 1160, 1164 ["[S]ection 26 does not expressly require that the vitiating mistake be reasonable, but we may assume for purposes of this decision that it must"].)

Constrained by *Mayberry* and its progeny, we reject appellant's challenge to the mistake-of-fact instruction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Claim of Ineffective Assistance of Counsel

Prior to trial, the prosecution sought to introduce evidence of appellant's prior criminal convictions should he choose to testify. The trial court stated it would allow evidence of the 2007 and 1993 forgery convictions and the 2007 perjury conviction, but would exclude the others, including "the 1999 and 1992 convictions for domestic batteries."

During appellant's testimony, defense counsel asked appellant about his prior forgery and perjury convictions. Counsel then asked appellant whether he had been convicted of "corporal injury to a spouse" in 1999. After appellant said "[y]es," the trial court interrupted and reminded defense counsel at

sidebar of the prior exclusion of that conviction. At counsel's request, the court instructed the jury to "disregard that last question."

Appellant contends defense counsel rendered ineffective assistance by asking him about the prior domestic violence conviction. An ineffective assistance of counsel claim requires a showing that "counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial." (*People v. Seaton* (2001) 26 Cal.4th 598, 666, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674].)

The People respond that the trial court properly admonished the jury to disregard the question regarding the conviction, thereby curing any possible prejudice. We agree. "The California Supreme Court has consistently found vague and fleeting references to a defendant's past criminality to be curable by appropriate admonition to the jury." (*People v. Franklin* (2016) 248 Cal.App.4th 938, 955 (*Franklin*); see *People v. Collins* (2010) 49 Cal.4th 175, 197-199 [witness's reference to defendant's incarceration in state prison was "brief and ambiguous" and "any prejudicial effect could be cured by an admonition"]; *People v. Valdez* (2004) 32 Cal.4th 73, 123 [Detective's fleeting reference to jail was not "'so outrageous or inherently prejudicial that an admonition could not have cured it'"].)

In *Franklin*, the defendant claimed his counsel was ineffective because counsel allowed the admission of three references to the defendant's criminal history. (*Franklin*, *supra*, 248 Cal.App.4th at p. 954.) In rejecting this argument, the court stated: "Given the ambiguity of these passing statements, . . . any possible prejudice was removed by the [trial] court's clear admonition to disregard any testimony about appellant's prior criminal conduct and not consider such evidence in deciding the

charges. Because we presume the jury followed those instructions [citation], we deem any possible prejudice from these remarks to have been cured." (*Id.* at p. 956, fn. omitted.)

Here, defense counsel's reference to the 20-year-old domestic violence conviction was similarly fleeting. Immediately after appellant acknowledged the conviction, the trial court intervened and, at defense counsel's request, admonished the jury to "just disregard that last question." In so doing, the court cured any potential harm. (See *Franklin*, *supra*, 248 Cal.App.4th at p. 956.) In the absence of prejudice, appellant's ineffective assistance claim fails. (*In re Fields* (1990) 51 Cal.3d 1063, 1079; *People v. Camel* (2017) 8 Cal.App.5th 989, 991-992.)

Exclusion of S.H.'s Threats to Appellant's Prior Counsel

During the preliminary hearing, appellant was represented by Gloria Blume. After an acrimonious cross-examination, S.H. confronted Blume in the hallway. Appellant, Blume, S.H., Emily Spear (the prosecutor) and Detective Sandra Lopez (the investigating officer) were all present.

Blume reported to law enforcement that S.H. stated, "I'm going to get you. I'm going to be on you." Appellant claimed S.H. said, "Imma catch you on 8th Street." S.H. admitted she was upset with Blume for "presenting false evidence" during the hearing, but said she "did not threaten [Blume] explicitly or implicitly." Spear and Detective Lopez did not hear any specific statements or threats.

Different attorneys appeared at trial. The prosecution asked the trial court to exclude testimony about the hallway incident, arguing in part that it would necessitate a "'trial within a trial.'" The prosecution claimed the rape trial would require "at most, six witnesses," while the hallway incident would require "more than five witnesses."

The trial court excluded the testimony, agreeing the hallway incident had "almost zero relevancy," and any possible relevance "would be greatly overweighed by the amount of time it would take, the confusion it would take, the trial within a trial." The court observed: "Basically, what it shows is that if there is an aggressive cross-examination of the victim that the victim will react by lashing out. . . . And you're going to probably see her lashing out, from what I understand about the manner in which she conducts her business anyway." The court did state, however, the testimony might be admissible if S.H. "comes in as deferential and sweet and exhibiting no temper, it might be relevant to show that . . . she's changed her manner of testifying from one proceeding to the other. Because that would go to the elements that the jury has to look at in evaluating credibility."

Appellant contends the trial court abused its discretion by excluding the testimony under Evidence Code section 352. He maintains evidence of S.H.'s threats to former defense counsel was relevant to her credibility.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court's decision on this issue will not be disturbed on appeal absent "a showing the . . . court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Appellant has not shown the trial court acted in an arbitrary or capricious manner. The trial court reasonably concluded the admission of testimony regarding the hallway

incident would require a time-consuming trial within a trial, would likely confuse the jury and would have little, if any, relevant impact on S.H.'s credibility. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 291 [Evidence Code section 352 properly invoked to avoid "a lengthy evidentiary detour into a matter that was only marginally relevant and might well have confused the jury"].)

Challenge to CALCRIM No. 362

Appellant asserts the jury was improperly instructed with CALCRIM No. 362, which states: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Appellant argues this instruction violated his right to due process because it allowed the jury to make improper permissive inferences of his guilt from his inconsistent statements to the police. He notes that CALCRIM No. 362's predecessor, CALJIC No. 2.03, used the phrase "consciousness of guilt," whereas CALCRIM No. 362 references an awareness of guilt.

The California Supreme Court has rejected constitutional challenges to CALCRIM No. 362 and CALJIC No. 2.03. (See *People v. Moore* (2011) 51 Cal.4th 386, 413-414; *People v. Howard* (2008) 42 Cal.4th 1000, 1024-1025; *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) In *People v. McGowan* (2008) 160 Cal.App.4th 1099, the court observed that "[a]lthough there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 [citation], none is sufficient to undermine our Supreme Court's

approval of the language of these instructions." (*Id.* at p. 1104; *People v. Burton* (2018) 29 Cal.App.5th 917, 923-926 ["reject[ing] the claim that CALCRIM No. 362 as drafted is [constitutionally] infirm"].)

As appellant acknowledges, his argument also is contrary to *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, which determined the "aware of his guilt" language in a related "flight" instruction (CALCRIM No. 372) does not impermissibly presume the existence of guilt or lower the prosecution's burden of proof. (*Hernandez Rios*, at pp. 1158-1159.) Under this decision, the use of the term "aware of his guilt" in the CALCRIM instructions on false statements, flight and fabrication of evidence, respectively, is entirely consistent with the use of the term "consciousness of guilt" in the predecessor line of CALJIC instructions. (*Ibid.*)

Challenge to Restitution Fine and Assessments

Citing *Dueñas*, appellant contends the trial court violated his federal and state due process rights by imposing the $300 restitution fine and $140 in assessments without first determining his ability to pay. (See *Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) The People claim appellant forfeited the issue by failing to raise it in the trial court. We need not reach this claim because any error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 140 (*Johnson*).)

Appellant is serving a six-year prison term. "Wages in California prisons currently range from $12 to $56 a month." (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035.) Since the challenged fine and assessments total $440, appellant will have sufficient time to earn this amount while incarcerated, even assuming he earns the minimum wage. Consequently, any

argument that appellant is unable to pay the fine and assessments is foreclosed. (*Ibid.* [*Dueñas* error harmless beyond a reasonable doubt where defendant was sentenced to six years in prison and ordered to pay $370 in fines and fees; *Johnson*, *supra*, 35 Cal.App.5th at pp. 139-140 [*Dueñas* error harmless where defendant was sentenced to eight years in prison and ordered to pay $370 in fines and fees]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's prison wages].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Katherine Mader, Judge
Superior Court County of Los Angeles

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

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