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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIA DEL ROSARIO MARTINEZ et al.,

Defendants and Appellants.

2d Crim. No. B227669
(Super. Ct. No. 2010002043)
(Ventura County)

Maria Del Rosario Martinez appeals a judgment following her conviction of carjacking (Pen. Code, § 215, subd. (a))[1] (count 2); second degree robbery (§ 211) (count 3); unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) (count 4); possession of a firearm by a felon (§ 12021, subd (a)(1)) (count 7); possession of a controlled substance--cocaine (Health & Saf. Code, § 11350, subd. (a)) (count 10); and possession of a controlled substance--methamphetamine (*id.*, § 11377, subd. (a)) (count 11); with findings that a principal in the carjacking and robbery offenses was armed with a firearm.

[1] All statutory references are to the Penal Code unless otherwise stated. References to section 667.5 are to the version in effect prior to January 1, 2012. References to sections 12021, 12022.53, and 12023 are to versions in effect prior to repeal effective January 1, 2012.

Emmanuel Vasquez appeals a judgment following his conviction of carjacking (§ 215, subd. (a)); second degree robbery (§ 211); unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)); armed criminal action (§ 12023); possession of a firearm by a felon (§ 12021, subd. (a)(1)); and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); with findings that in committing carjacking and robbery, Vasquez personally used a firearm (§ 12022.53, subd. (b)).

The trial court sentenced Vasquez to an aggregate prison term of 21 years 4 months. Martinez received an aggregate sentence of 13 years. Both of their sentences included a one-year consecutive sentence based on trial court findings that Martinez and Vasquez had each served a prior prison term. (§ 667.5, subd. (b).) In sentencing Martinez, the court imposed two $570 drug program fund fees (Health & Saf. Code, § 11372.7), a $200 restitution fine, and a $2,000 parole revocation fine (§§ 1202.4, 1202.45).

We conclude, among other things, that: 1) the trial court did not err by denying a motion for a mistrial based on the claim that an in-court identification of Vasquez was unduly suggestive; 2) the court erred by imposing one-year prior prison terms pursuant to section 667.5, subdivision (b) without obtaining any admission from the defendants or proof that the defendants had served prior prison terms; 3) the abstract of judgment for Martinez is incorrect with respect to counts 7, 10, and 11; 4) the court erred by imposing a drug program fee on the wrong count; and 5) the court erred by imposing a $2,000 parole revocation fine. We remand for resentencing. In all other respects, we affirm.

FACTS

On the evening of January 17, 2010, Leonardo Castillo borrowed his cousin's Honda Accord so he could meet a girlfriend. Castillo's gray sweatshirt and a small "headband" flashlight were in the vehicle. He drove to the residence in the "300 block of Canterbury Way" in Oxnard, California. Castillo stopped the car and waited inside the vehicle with the engine running.

A young man and a lady approached the car. The man opened the door and held a gun to Castillo's head and told him to "get out." Castillo grabbed the gun. A piece of the weapon known as "the slide" came off and Castillo held it in his hand. Castillo got out of the car, the man holding the gun got in, and the woman entered the vehicle from the passenger side door. The woman then moved to the driver's seat and the two of them drove away.

Oxnard Police Officer Joseph Floriano was in his patrol car when he received a call about the stolen Honda at 6:00 p.m. At 7:15 p.m., he spotted the vehicle. It was "stopped" approximately "two to three feet away from the curb" near Bonita Avenue in Oxnard, but he noticed that "the brake lights were on." He thought the driver might try to drive away. He and his partner approached the car with guns drawn. Vasquez was sitting in the driver's seat of the Honda and he was wearing the gray sweatshirt that belonged to Castillo. Martinez was in the passenger seat, and as the police approached, she started throwing items into the street. These items included two cell phones and an envelope containing bags of "usable quantities" of cocaine and methamphetamine.

Floriano searched the vehicle and found a purse. Inside the purse was a "silver-colored handgun" with a missing "slide."

As Vasquez got out of the car, the police saw "two bindles fall from his lap." Vasquez also had a glass "methamphetamine pipe."

The police at the scene detained Martinez and Vasquez for an "in-field showup" identification. Police Officer Christina Garcia drove Castillo to that area. She testified that she told Castillo that "[she was] taking him to a location; [she had] a person or persons stopped that may or may not be involved in his incident; he is to look at the person and let [her] know what he thinks." When Castillo saw Vasquez, he said, "'That's him. He is wearing my gray sweater.'" Garcia asked Castillo if he was "sure that the male was the one who had placed the gun to his head earlier." Castillo responded, "[Y]es." He also identified Martinez and said he was "sure." He told Garcia that Martinez was wearing the same clothing that she wore during the carjacking.

After arresting Vasquez and Martinez, the police searched Vasquez at the jail and found Castillo's small flashlight.

At trial, Castillo identified Vasquez and Martinez as the individuals who committed the carjacking. Vasquez moved for a mistrial claiming the procedure the prosecutor used to obtain the in-court identification was improper. The court denied the motion.

DISCUSSION

The In-Court Identification

Vasquez contends the trial court erred by denying his motion for a mistrial because Castillo's in-court identification of Vasquez was conducted in a manner that was unduly suggestive and "constitutionally unreliable." We disagree.

At trial the prosecutor asked Castillo, "The man who pressed that gun up against your head, is he sitting here in court today?" Castillo: "It was dark, and then they get light, so there is a lot of changes." Later, after a recess, the prosecutor asked Castillo, "Is this the man who held the gun to your head?" Castillo: "Yes. It seems to be."

Vasquez's counsel requested a sidebar conference and said, "I want on the record that when Mr. Castillo said that, the district attorney walked directly behind my client." The Court: "Yes. That's fair."

The next day Vasquez's counsel moved for a mistrial claiming Castillo's in-court identification of Vasquez "was the result of a taint and should be excluded." He told the court that during the recess Castillo remained on the witness stand and saw Vasquez and Martinez who were "in custody" being escorted to "a holding cell immediately outside of the courtroom." He argued that the prosecutor's conduct of walking behind Vasquez and asking the question to Castillo was "inappropriate." The prosecutor responded, "I walked up behind Mr. Vasquez, I pointed at Mr. Vasquez to eliminate any confusion on the part of this witness as to who I was talking about . . . ."

The trial court denied the motion. It found the defense had a fair opportunity to cross-examine Castillo and make its "point in front of the jury." Witnessing the defendants being escorted to the holding cell would show they were in

custody. But that was something the witness "probably figured by the fact that we're here."

"Defendant bears the burden of showing unfairness as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) "'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances . . . .'" (*Ibid.*) "'If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.'" (*Ibid.*)

Vasquez claims the prosecutor's act of standing behind him was highly suggestive. The Attorney General responds that because Castillo "could not definitively answer the question," the prosecutor's action was necessary and "no more suggestive than necessary to make the point." The trial court did not find any misconduct by the prosecutor. There were two defendants in this case and the prosecution asked the witness to make two identifications. The prosecutor claimed he stood behind Vasquez to avoid "confusion." Vasquez claimed that Castillo's observation of the defendants being taken to the holding cell during the break was suggestive. But the trial court correctly noted that any witness would be able to figure out that the individuals at the defense table are the ones who were arrested and charged by the prosecution.

"[A]ny in-court identification . . . carries with it the stigma of the inevitable suggestion that the state thinks the defendant has committed the crime." (*Baker v. Hocker* (9th Cir. 1974) 496 F.2d 615, 617.) But to establish a due process violation, "more than suggestion is required." (*Ibid.*) The in-court identification process provides greater protection for defendants than police station line-ups. Here the trial court noted that the defense had effectively cross-examined Castillo. "The risk of a mistaken identification becoming irreparably 'fixed' . . . is far less present in the court proceeding because, as here, the identification can be immediately challenged by cross-examination." (*Ibid.*) The court also correctly recognized that the jury could evaluate the credibility of Castillo's change in testimony and the method the prosecutor used to obtain Castillo's

qualified response that Vasquez "seems to be" the perpetrator. "Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116.)

Our role is not to create rules concerning where prosecutors may stand when questioning witnesses. That is a matter we leave to the sound discretion of the trial court. The prosecutor's action was not significantly different than requiring a defendant to stand, a procedure that courts have routinely done. (*People v. Davis* (2009) 46 Cal.4th 539, 611 ["For purposes of an in-court identification, '[f]orced exhibition of . . . a physical characteristic[] does not constitute a fundamental unfairness which is a violation of due process'"]; *State v. Graham* (1988) 13 Conn.App. 554, 561; *State v. Smith* (1986) 200 Conn. 465, 468-469.) In both cases, the witness is directed to look at the defendant. Courts have recognized that an in-court identification may be suggestive, but it has "no greater tendency to suggestiveness than an identification of an accused seated at counsel table." (*Graham*, at p. 561.) "'There is no constitutional requirement that an in-court identification confrontation be conducted as a lineup or be otherwise free of suggestion.'" (*Smith*, at pp. 469-470.) "The innate weakness in any in-court testimonial identification is grounds for assailing its weight rather than its admissibility." (*Id.* at p. 470.)

But even if Vasquez had shown the prosecutor's action was unduly suggestive, he has not shown from "the totality of the circumstances" constitutional unreliability. (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1222.) The evidence of his guilt is compelling. The police apprehended Vasquez and Martinez after the carjacking in the car taken from Castillo. Vasquez was wearing Castillo's gray sweatshirt and he had Castillo's flashlight. During a struggle with the gunman, Castillo had removed a slide from the perpetrator's gun. In searching the stolen vehicle, police found a gun with a removed slide. That gun matched the "basic description" of the weapon which Castillo had provided to police. Castillo positively identified Vasquez and Martinez during the in-field identification and told police he was "sure" they were the perpetrators. He identified clothing they were wearing. He positively identified Martinez at trial.

Vasquez has not shown "'a very substantial likelihood of irreparable misidentification.'" (*Manson v. Brathwaite, supra,* 432 U.S. at p. 116.)

The One-Year Prior Prison Terms (§ 667.5, subd. (b).)

Appellants claim that during sentencing the trial court improperly added a consecutive one-year prior prison term to their sentences. The Attorney General agrees. They are correct.

Section 667.5, subdivision (b) provides in relevant part that "where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony . . . ." The "penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action." (*Id.,* subd. (d).)

Here the prosecution charged the prior prison term enhancement for both appellants. But, as all parties on appeal correctly note, there is nothing in the record to indicate that appellants ever admitted that they suffered a prior prison term. This issue was never tried. There is also nothing in this record to indicate that appellants were ever advised of their right to a trial on this issue. Consequently, the trial court's finding and imposition of the one-year enhancement were error. (*People v. Mosby* (2004) 33 Cal.4th 353, 362.) The one-year consecutive sentences are stricken and the matter is remanded to the trial court to allow appellants to decide whether they will admit the prior prison terms charged by the prosecution or request a trial on this issue. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234-1236.)

Martinez's Abstract of Judgment (Counts 7, 10, & 11)

Martinez claims that her abstract of judgment is incorrect because it reflects that she received "consecutive full term" sentences for her convictions on counts 7, 10, and 11. But at the sentencing hearing, the trial court imposed only "one-third the midterm" for each of these offenses.

The Attorney General agrees that the abstract reflects a different sentence than the one imposed by the trial court on these three counts. On remand it must be

corrected to be consistent with the trial court's sentence on counts 7, 10, and 11, as reflected in the reporter's transcript of the sentencing hearing. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

The Drug Program Fund Fee

A trial court may impose a drug program fund fee where the defendant has been convicted of a drug possession offense. (Health & Saf. Code, § 11372.7.)

Martinez notes that here the trial court imposed a $570 drug program fund fee pursuant to Health and Safety Code section 11372.7 for her conviction on count 11--possession of a controlled substance. The court also imposed this same fee on "count 8." But, as she correctly notes, she was not charged or convicted on count 8. She claims the fee imposed on count 8 must be stricken. She is correct.

The Attorney General agrees that the trial court erred by imposing this fee on a count for which Martinez was neither charged nor convicted. But she argues: 1) the court mistakenly referred to count 8, but intended to impose the fee for Martinez's conviction on count 10--possession of a controlled substance; and 2) consequently, on remand, the fee for count 8 should be stricken, but it should be imposed on count 10.

Relying on *People v. Sharret* (2011) 191 Cal.App.4th 859, Martinez argues that the Attorney General has waived the claim that the fee may now be imposed on count 10. In *Sharret,* the trial court imposed a drug program fee on one count but omitted it for another. The prosecutor did not object and the record was silent as to why the court did not impose the second fee. The Court of Appeal held that the Attorney General waived the claim that the sentence should be corrected so that the fee could be imposed on the second count on remand. It noted that trial courts have "discretion to not impose the drug program fee." (*Id.* at p. 864.) The fee may only be imposed when the defendant has the ability to pay it. (Health & Saf. Code, § 11372.7, subd. (b).) Consequently, when the record is silent and no fee is imposed for the conviction on a particular count, the appellate court presumes the trial court found inability to pay. (*Sharret,* at p. 864.)

Here, by contrast, the trial court determined Martinez had the ability to pay a second fee because it imposed it, albeit, on the wrong count. It exercised its discretion

and decided the fee was appropriate, but it made a "numbering" error. This mistake is easily corrected. We strike the fee for count 8. On remand the trial court has discretion to impose a drug program fee for count 10.

The Restitution and Parole Revocation Fines

Martinez contends the trial court's imposition of a $200 restitution fine (§ 1202.4) and a $2,000 parole revocation fine (§ 1202.45) must be stricken. She claims: 1) the trial court did not intend to impose a restitution fine under section 1202.4, and consequently that fine and the parole revocation fine are invalid; and 2) the court's sentencing error may not be corrected on remand because these are discretionary fines and the prosecution did not object to the sentencing error.

Martinez notes that in imposing the $200 fine, the trial court said, "Payment is stayed pending successful completion of *parole*." (Italics added.) She argues this demonstrates that the court was attempting to impose a $200 parole revocation fine, not a restitution fine. We disagree.

The trial court used an incongruous phase. But it unequivocally stated, "The defendant is ordered to pay *a restitution fine* in the amount of $200 . . . ." (Italics added.) Moreover, as the Attorney General notes, the restitution fine is not a discretionary fine in this case, and any sentencing error is not waived and must be corrected.

Where the defendant is convicted of a crime, the court must impose a restitution fine "unless it finds compelling and extraordinary reasons for not doing so." (§ 1202.4, subd. (b).) Here the trial court made no such "exceptional finding" in the record, consequently the restitution fine was mandatory. (*People v. Rodriguez* (2000) 80 Cal.App.4th 372, 375.) Where a restitution fine is imposed, the court must also "impose the section 1202.45 fine" and failure to do so must be corrected. (*Id.* at p. 374.)

Here the trial court imposed a $200 restitution fine under section 1202.4 and a $2,000 fine under section 1202.45. As Martinez correctly notes, this constitutes sentencing error because the section 1202.45 fine must be "the same amount as" the fine "imposed pursuant to subdivision (b) of Section 1202.4." (§ 1202.45.)

The Attorney General notes that the abstract of judgment reflects that both fines were imposed for the same amount--$2,000. She argues that this shows that the trial court intended to impose two fines in the amount of $2,000 and that we should rely on the abstract of judgment

But where there is a conflict between the fines imposed during sentencing and those reflected in the abstract, the court's oral pronouncement of sentence as shown by the reporter's transcript controls. (*People v. Zackery*, *supra*, 147 Cal.App.4th at p. 385.). Here because the trial court imposed a $200 section 1202.4 fine, the $2,000 fine imposed under section 1202.45 must be stricken. On remand it must be corrected to $200 and the abstract must also be modified.

Disposition

The one-year prior prison terms (§ 667.5, subd. (b)), imposed against Martinez and Vasquez, the drug program fund fee (Health & Saf. Code, § 11372.7) imposed against Martinez on count 8, and the $2,000 parole revocation fine (§ 1202.45) imposed against Martinez are stricken. The matter is remanded for resentencing consistent with this opinion. The trial court shall modify the abstracts of judgment to conform to its sentences. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.*

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Allan L. Steele, Judge

Superior Court County of Ventura

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