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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VICKY LYNN WILLIAMS,

Defendant and Appellant.

B292001

(Los Angeles County
Super. Ct. No. VA146258)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Conditionally reversed and remanded with directions.

Susan L. Ferguson, 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, Senior Assistant Attorney General, Stephanie C. Brenan and Toni

R. Johns Estaville, Deputy Attorneys General, for Plaintiff
and Respondent.

INTRODUCTION

A jury found appellant Vicky Lynn Williams had pummeled a 74-year-old stranger's head, and convicted her of elder abuse likely to cause great bodily harm. There were only two disputed issues at trial. The first was appellant's identity as the perpetrator, which the prosecution sought to prove through an eyewitness identification and appellant's alleged out-of-court statement that she was the person the eyewitness had seen and photographed. In its instructions on eyewitness testimony and on appellant's out-of-court statement, the court instructed the jury that the prosecution had the burden to prove identity and guilt beyond a reasonable doubt. The second disputed issue at trial was the likelihood of great bodily harm, which distinguished the charged offense from a lesser included offense. In instructing the jury how to complete the verdict forms (two for the charged offense and two for the lesser), the trial court instructed the jurors to complete the form finding appellant guilty of the charged offense only if they unanimously agreed the prosecution had proven appellant's guilt -- meaning, according to the same instruction, the prosecution had proven it beyond a reasonable doubt. The court did not separately instruct the jury with CALCRIM No. 220, the

standard pattern instruction on the prosecution's burden of proof and the definition of reasonable doubt. During closing arguments, counsel for both parties agreed the prosecution had the burden of proof beyond a reasonable doubt, and accurately defined it.

On the same day the jury convicted appellant, Penal Code section 1001.36 went into effect, giving the trial court discretion to postpone the prosecution of qualifying defendants to allow them to participate in a mental health diversion program. In the short time between conviction and sentencing, neither the court nor the parties demonstrated awareness of the newly enacted legislation. Appellant's counsel did, however, rely on appellant's asserted mental illness to argue that she should be granted probation. The court granted appellant probation and ordered her to pay assessments and a restitution fine.

On appeal, appellant contends: (1) the trial court prejudicially erred by failing to instruct the jury on (a) the prosecution's burden to prove each element of the charged offense beyond a reasonable doubt; and (b) the definition of reasonable doubt; (2) appellant's case should be remanded to give the court an opportunity to exercise its new discretion to order appellant to participate in the mental health diversion program; and (3) the court violated appellant's due process rights by imposing assessments and a restitution fine without finding her able to pay.

We find no prejudicial instructional error. We agree, however, that the trial court should have an opportunity to

determine whether appellant is eligible for diversion. To provide that opportunity, we conditionally reverse the judgment. Because the trial court may, on remand, inquire into appellant's ability to pay the assessments and restitution fine, we do not address her challenge to them.

STATEMENT OF THE CASE

The state charged appellant with elder abuse likely to cause great bodily harm, in violation of Penal Code section 368, subdivision (b)(1). A jury convicted appellant of the charged offense. The trial court sentenced appellant to three years probation and ordered her to serve the first six months of her sentence in county jail. The court further ordered appellant to pay a \$40 court operations assessment, a \$30 criminal conviction assessment, and a \$300 restitution fine. Appellant timely appealed.

PROCEEDINGS BELOW

A. Trial Evidence

Seventy-four-year-old Yolanda Lopez and her daughter Wendy were waiting for a bus in September 2017 when a woman approached, furiously insulting them. The woman struck Yolanda on the back of the head more than five times. An ambulance took Yolanda to a medical center for treatment. Yolanda sustained injuries that caused her to vomit and left her, at the time of trial (about nine months later), with pain in her head and difficulty sleeping.

Yolanda's poor eyesight prevented her from seeing her assailant. Wendy, on the other hand, saw the assailant's face during the attack. A few minutes after the attack, Wendy used her cell phone to take photographs of the assailant, who had continued insulting and spitting at the two women. Wendy gave her photographs to police officers and told them the assailant was between 40 and 45 years old (about 15 to 20 years younger than appellant).

About two months later, a detective showed Wendy a photographic "six-pack," in which appellant was not pictured. Wendy did not identify anyone as the assailant. The same day, the detective drove through the scene of the attack, hoping to find the assailant. He saw appellant and thought she looked like the woman in Wendy's photographs. He showed appellant Wendy's photographs after advising her of her *Miranda* rights.¹

Appellant told the detective she was the woman in Wendy's photographs. But she denied hitting anyone. When the detective tried to ask additional questions, appellant started yelling and refused to talk further. The detective did not ask Wendy to identify appellant as the assailant, either in person or in another six-pack.

Wendy identified appellant as the assailant at trial. She confirmed that several months earlier, at the preliminary hearing, she also had identified appellant as the assailant.

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Appellant did not testify. She called no witnesses and introduced no evidence other than the photographic six-pack.

B. Jury Instructions

The court instructed the jury on the elements of elder abuse likely to cause great bodily harm, and on the elements of a lesser included offense requiring no likelihood of such harm.² The court informed the jury that it would receive two verdict forms (guilty and not guilty) for the charged offense and two for the lesser, and provided directions (per CALCRIM No. 3517) on how to complete the forms. The court directed the jurors to complete the form finding appellant guilty of the charged offense only if they unanimously agreed the People had proven appellant's guilt of that offense. In the same instruction, the court explained,

² Penal Code section 368, subdivision (b)(1), creates a felony, punishable by up to four years imprisonment, that is committed by any person "who knows or reasonably should know that a person is an elder . . . and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder . . . to suffer, or inflicts thereon unjustifiable physical pain or mental suffering" Any person who commits the same conduct in circumstances "other than those likely to produce great bodily harm or death" is guilty only of a misdemeanor. (*Id.*, § 368, subd. (c).) The statute defines "elder" as a person at least 65 years old. (*Id.*, § 368, subd. (g).)

“Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.”³

The court delivered several other instructions referencing the prosecution’s burden of proof beyond a reasonable doubt. First, it instructed the jury (per CALCRIM No. 315) on factors relevant to evaluating eyewitness identification testimony, concluding with the following admonition: “The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.” Second, it instructed the jury (per CALCRIM No. 355) that, in light of a defendant’s constitutional right not to testify, the defendant “may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt.” Finally, it instructed the jury on the corpus delicti

³ The court’s alternative directions under CALCRIM No. 3517 were differentiated by what, if anything, the jurors unanimously agreed the People had proven or failed to prove. If the jurors could not reach unanimous agreement on whether the People had proven appellant’s guilt of the charged offense, the court directed them to report an inability to reach an agreement, without completing any form. If the jurors unanimously agreed that the People had failed to prove appellant’s guilt of the charged offense, the court directed them to complete the not guilty form for that offense (and, depending on the jurors’ agreement or lack thereof concerning the lesser offense, either complete that offense’s guilty form, complete its not guilty form, or report an inability to reach agreement on it).

doctrine (per CALCRIM No. 359), explaining that: (1) the jury could not rely on appellant's out-of-court statement to convict her unless it first concluded that other evidence -- which could be slight -- showed that some perpetrator committed the charged crime or a lesser included offense; (2) if other evidence made that showing, appellant's out-of-court statement alone could prove her identity as the perpetrator; and (3) the jury could not convict appellant unless the People had proven her guilt beyond a reasonable doubt.

The court did not deliver the standard pattern instruction on the prosecution's burden of proof (CALCRIM No. 220), or any other instruction devoted solely to that burden. The court instructed the jury (per CALCRIM No. 200) to consider the court's instructions together.

C. Closing Arguments

The prosecutor argued the evidence established each element of the charged offense. She further argued Wendy's eyewitness identification testimony proved appellant was the assailant.

Appellant's counsel argued the evidence did not prove beyond a reasonable doubt that the attack could have produced great bodily harm. She did not challenge the prosecution's showing on any other element of the charged offense, instead framing the issue for the jury as whether the prosecution had proven appellant's identity as the assailant. She urged the jury to "really look at" the instruction on eyewitness identification testimony (CALCRIM No. 315)

when evaluating Wendy's testimony. Appellant's counsel reminded the jury that during voir dire, the trial court had contrasted lesser burdens of proof with the prosecution's burden to prove its case beyond a reasonable doubt. She further reminded the jurors that they had assured her they believed in the prosecution's burden of proof beyond a reasonable doubt, which she defined as requiring evidence leaving them with an abiding conviction of appellant's guilt. She repeatedly argued the prosecution had failed to meet its burden to prove appellant's guilt beyond a reasonable doubt, concluding by identifying five asserted weaknesses in the identification evidence and arguing that each individually established reasonable doubt.

In rebuttal, the prosecutor argued the jury had "two jobs": (1) to decide if the prosecution had proven appellant's identity as the assailant beyond a reasonable doubt; and (2) to decide if the prosecution had proven the elements of the charge beyond a reasonable doubt. She agreed the reasonable doubt standard required evidence leaving the jury with an abiding conviction of guilt. She argued the evidence -- including Wendy's eyewitness testimony and appellant's out-of-court statement -- proved appellant's identity as the assailant. She concluded by urging the jury to "spend time with" the jury instruction on how to complete the verdict forms (CALCRIM No. 3517), and by asking the jury to find that the prosecution had proven all elements of the charged offense beyond a reasonable doubt.

D. Verdict and Sentencing

Before the jury began its deliberations, the court admonished it as follows: “We’ve already described to you the way you are to approach your verdict with the -- both the greater crime and the lesser crime. Please follow those instructions.”

The jury returned a guilty verdict on the charged offense of elder abuse likely to cause great bodily harm. The same day (June 27, 2018), the Legislature granted trial courts new discretion, in specified circumstances, to order “the postponement of prosecution . . . to allow the defendant to undergo mental health treatment” (Pen. Code, § 1001.36, subd. (c); Stats. 2018, ch. 34, § 24.) A probation officer previously had suggested that appellant might have a significant mental health problem, noting, “The defendant randomly committed an act of violence toward a stranger on [a] bus bench, suggesting she may have some mental illness.” The probation officer also disclosed that appellant, who was 60 years old at the time of sentencing, had been unemployed and financially dependent on her parents for her entire life.

At a sentencing hearing five days after the verdict, appellant’s counsel asserted that appellant had untreated mental health issues. She asked the court to continue the hearing to a date when an employee of the Los Angeles County Department of Mental Health (“Ms. Lee”) would be available. The court did so.

The court sentenced appellant approximately six weeks after she was convicted (on August 7). At the sentencing hearing, appellant's counsel asked the court to grant probation.⁴ The court, noting appellant had no prior record of violence, agreed to grant probation. Appellant's counsel informed the court that Ms. Lee, after interviewing appellant, had identified a Department of Mental Health clinic "for [appellant] to contact to start receiving treatment." Appellant's counsel noted that the court could use this clinic information if it decided to impose a probation condition requiring mental health treatment. The court responded, "Well, if that's something she wants to do, I would do it; but otherwise, I wouldn't make it a condition of probation because I feel that's setting some of these people up just for failure. I don't think that's fair"

The court sentenced appellant to three years probation and ordered her to serve the first six months in county jail. It imposed a requirement to cooperate with the probation department in an anger management plan. It further ordered appellant to pay assessments and a restitution fine. At the conclusion of its oral pronouncement of sentence, the court asked appellant's counsel to identify the program she

⁴ In a sentencing memorandum, appellant's counsel asked the court to grant probation "and permit [appellant] to seek outpatient mental health services." In contrast, the prosecutor requested a four-year prison term (the statutory maximum), and the probation department recommended a "high-base" prison term.

wanted appellant to enter. Appellant's counsel responded, "If the court is not going to make [it] a condition and [appellant] indicates it is not necessary, so I think anger management --" The court replied, "That's fine, anger management."

DISCUSSION

Appellant contends: (1) the trial court prejudicially erred by failing to instruct the jury on (a) the prosecution's burden to prove each element of the charged offense beyond a reasonable doubt; and (b) the definition of reasonable doubt; (2) remand is warranted to give the court an opportunity to exercise its new discretion to order appellant to participate in the mental health diversion program; and (3) the court violated appellant's due process rights by imposing assessments and a restitution fine without finding her able to pay.

A. Instruction on the Prosecution's Burden of Proof

1. Burden to Prove Guilt Beyond a Reasonable Doubt

a. Governing Principles

In every criminal case, the trial court has a sua sponte duty to instruct the jury that the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt. (*People v. Aranda* (2012) 55 Cal.4th 342, 352-353 (*Aranda*).) The court may satisfy this duty by delivering the standard reasonable doubt instruction, CALCRIM No. 220.

(*Aranda, supra*, at p. 353.) Alternatively, the court may deliver other instructions explaining the prosecution's burden to prove each element of each charged offense beyond a reasonable doubt. (See *id.* at pp. 354, 358.)

Where a court's instructions fail to specifically link the reasonable doubt standard to the elements of a charged offense, the court commits federal constitutional error. (*Aranda, supra*, 55 Cal.4th at p. 363.) Under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, the error requires reversal of a conviction if there is a reasonable possibility that the jury failed to apply the reasonable doubt standard when it convicted the defendant. (*Aranda, supra*, at pp. 365-368.)⁵ In assessing the reasonableness of this possibility, the reviewing court may not consider the strength of the prosecution evidence. (*Id.* at pp. 367-368.) Otherwise, however, the reviewing court should evaluate the record as a whole, including other jury instructions and the content of closing arguments. (*Id.* at pp. 365, 368.)

⁵ There is one exception to this harmless error rule, inapplicable here -- the reviewing court must automatically reverse, without a harmless error analysis, where the trial court not only failed to link the reasonable doubt standard to the elements of a charged offense, but also erroneously defined reasonable doubt in a manner lowering the prosecution's burden of proof. (*Aranda, supra*, 55 Cal.4th at p. 363.) Appellant concedes that because the trial court did not define reasonable doubt erroneously (or at all), we are bound by *Aranda* to reject her assertion of structural error.

b. Analysis

The trial court satisfied its duty to instruct on the prosecution's burden of proof beyond a reasonable doubt by delivering instructions specifically linking that burden to the elements of the charged offense. In instructing the jury how to complete the verdict forms for the charged and lesser offenses (CALCRIM No. 3517), the court directed the jurors to find appellant guilty of the charged offense only if they unanimously agreed the prosecution had proven appellant's guilt beyond a reasonable doubt.⁶ (See *Aranda, supra*, 55 Cal.4th at pp. 359-361 [omission of standard reasonable doubt instruction was not federal constitutional error with regard to manslaughter conviction, where prosecution's burden of proof beyond reasonable doubt was stated in instructions differentiating manslaughter from other

⁶ Although CALCRIM No. 3517 did not list the elements of the charged offense, due process does not require juxtaposition of the elements and the reasonable doubt standard in a single instruction. (Cf. *Aranda, supra*, 55 Cal.4th at p. 361 [trial court erred with respect to gang-participation charge "because neither the instruction on the elements of that offense *nor any other instruction* given by the court connected the reasonable doubt standard of proof to that charge"], italics added; *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498 [defendant posited "a distinction without a difference" by arguing instruction should have referred to evidence on each element of crime, rather than evidence crime was committed].) Here, the court directed the jury to consider the instructions together and gave an instruction defining the charged offense by listing each element the prosecution was required to prove.

homicide offenses].) This instruction -- which both the trial court and the prosecutor reminded the jury to follow -- directly linked the reasonable doubt standard to the prosecution's burden to prove the charge.

This link was reinforced by instructions on key evidence at trial, viz., Wendy's in-court eyewitness identification and appellant's out-of-court statement. The eyewitness identification instruction (CALCRIM No. 315) -- which appellant's counsel urged the jury to "really" examine -- directed the jury to acquit appellant if the prosecution failed to prove her identity as the perpetrator beyond a reasonable doubt. Similarly, the corpus delicti instruction (CALCRIM No. 359) prohibited the jury from convicting appellant unless the prosecution had proven her guilt beyond a reasonable doubt.

Appellant has forfeited her contention that CALCRIM No. 359 might have misled the jury into believing her conviction required only "slight" evidence. Her counsel did not ask the trial court to clarify the instruction. (See *People v. Grimes* (2016) 1 Cal.5th 698, 723-724 [defendant's failure to request clarification of circumstantial evidence instruction forfeited her contention that instruction misled jury to believe reasonable doubt standard did not apply to proof by direct evidence].) In any event, CALCRIM No. 359 was unlikely to mislead the jury into disregarding the prosecution's burden of proof beyond a reasonable doubt -- a burden CALCRIM No. 359 itself stated. The instruction referred to "slight" evidence only in connection with the

showing necessary to permit the jury to rely on appellant's out-of-court statement. Nothing suggests the jurors were incapable of understanding the distinction between that showing and the showing necessary for conviction. (See *People v. Rosales* (2014) 222 Cal.App.4th 1254, 1258-1261 [CALCRIM No. 359 correctly stated law and had no reasonable likelihood of confusing jury].)

Even had we found error, we would find it harmless beyond a reasonable doubt. Counsel for both parties discussed the prosecution's burden of proof in a manner leaving no reasonable possibility that the jury failed to apply the reasonable doubt standard when it convicted appellant. The prosecutor herself informed the jury that the People had the burden of proving, beyond a reasonable doubt, the elements of the charged offense and appellant's identity as the perpetrator. Appellant's counsel reminded the jurors they had assured her, during voir dire, that they believed in the prosecution's burden to prove its case beyond a reasonable doubt. Further, she repeatedly argued the prosecution had failed to meet its burden to prove appellant's guilt beyond a reasonable doubt, concluding by identifying five asserted weaknesses in the identification evidence and arguing each individually established reasonable doubt. Although the attorneys' words held less weight than the court's, the court did not contradict the attorneys' agreement on the reasonable doubt standard. Indeed, appellant's counsel reminded the jury that during voir dire, the court had contrasted lesser burdens with the

prosecution's burden of proof beyond a reasonable doubt. (See *Aranda, supra*, 55 Cal.4th at pp. 371-372 [failure to link reasonable doubt standard to gang offense was harmless beyond a reasonable doubt, in part because trial court, during voir dire, "contrasted the prosecution's burden of proof beyond a reasonable doubt with the lesser standards of proof that applied in other settings"].) In short, there is no reasonable possibility that the jury, upon entering the jury room, forgot or disregarded these reminders of the standard of proof. (Cf. *id.* at p. 370 ["we find it unreasonable to say that the jury would have divined a different standard of proof or ignored one entirely with respect to the gang offense"].)

2. Definition of Reasonable Doubt

The Legislature has defined reasonable doubt as "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Pen. Code, § 1096.) A trial court errs under state law if it fails to define reasonable doubt for the jury. (*Aranda, supra*, 55 Cal.4th at pp. 374-375.) Here, the trial court erred by failing to define reasonable doubt. Respondent does not argue otherwise.

But the error was not prejudicial. Under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, the error requires reversal only if there is a reasonable probability that an instruction defining reasonable doubt would have

yielded an outcome more favorable to appellant. (*Aranda, supra*, 55 Cal.4th at pp. 354, 375.) Appellant identifies no support for that probability in the record, and we find none. Counsel for both parties conveyed the Legislature’s “abiding conviction” definition to the jury, which made no request for clarification. (See *Aranda, supra*, at pp. 375-376 [trial court’s failure to define reasonable doubt was not prejudicial, in part because jury did not request clarification and closing arguments did not invite application of lesser standard]; cf. *People v. Mayo* (2006) 140 Cal.App.4th 535, 551-552 [omission of Legislature’s “arcane” definition of reasonable doubt was not prejudicial; courts have recognized that definitions of reasonable doubt lack “practical utility”].)

B. Remand to Consider Appellant’s Eligibility for Diversion

Appellant asks us to remand to the trial court for an exercise of the court’s discretion under Penal Code section 1001.36, the mental health diversion statute that became effective on the day she was convicted. We need not decide whether appellant forfeited this request, as respondent argues, by failing to raise it in the short time between her conviction and sentencing. Even if traditional forfeiture rules apply, we exercise our discretion to consider the merits. (See, e.g., 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2019) Criminal Appeal, § 163.)

Respondent does not challenge appellant’s position that Penal Code section 1001.36 applies retroactively to all cases

in which the judgment is not yet final. Our Supreme Court is reviewing the issue, on which the Courts of Appeal have reached different conclusions. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 [statute applies retroactively], review granted Dec. 27, 2018, S252220; *People v. Burns* (2019) 38 Cal.App.5th 776, 785-788 [same], review granted Oct. 30, 2019, S257738, with *People v. Torres* (2019) 39 Cal.App.5th 849, 855-856 (*Torres*) [statute does not apply retroactively]; *People v. Craine* (2019) 35 Cal.App.5th 744, 754-760 [same], review granted Sept. 11, 2019, S256671.) We agree with the courts that have held that the statute applies retroactively. We need not further discuss the issue, given its impending resolution by our Supreme Court and respondent's failure to present any argument on it.

Where a defendant meets Penal Code section 1001.36's eligibility requirements, the court may (but need not) postpone the defendant's prosecution to allow the defendant to undergo mental health treatment.⁷ (Pen. Code, § 1001.36,

⁷ The eligibility requirements are (1) evidence to the court's satisfaction that the defendant has a mental disorder identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders; (2) evidence to the court's satisfaction that the disorder was a significant factor in the commission of the charged offense; (3) a qualified mental health expert's opinion that the symptoms "motivating the criminal behavior" would respond to treatment; (4) the defendant's consent to diversion and waiver of speedy trial rights; (5) the defendant's agreement to comply with treatment; and (6) evidence to the court's satisfaction that the defendant will not (Fn. is continued on the next page.)

subds. (a), (c).) Remand for an exercise of this discretion is appropriate if there is an affirmative indication in the record that the trial court may find a qualifying disorder, unless the record otherwise affirmatively indicates that remand would be futile. (See *Torres, supra*, 39 Cal.App.5th at p. 856; *People v. Jefferson* (2019) 38 Cal.App.5th 399, 409.)

Remand is appropriate here. By granting appellant probation, the trial court implicitly indicated its belief that appellant's treatment in the community would not pose an unreasonable risk of danger to public safety. (Pen. Code, § 1001.36, subd. (b)(1)(F).) Moreover, appellant's counsel informed the court that a mental health professional (Ms. Lee) had identified a clinic appellant could contact to receive treatment. This representation indicates that appellant may provide satisfactory evidence of a qualifying disorder and of its responsiveness to treatment. (*Id.*, § 1001.36, subds. (b)(1)(A), (C).) The same evidence, along with the nature of the offense (from which the probation officer inferred a mental disorder), may satisfy the court that the disorder was a significant factor in the offense's commission. (*Id.*,

pose an "unreasonable risk of danger to public safety" if treated in the community. (Pen. Code, § 1001.36, subd. (b)(1).) The definition of "unreasonable risk of danger to public safety" incorporated into Penal Code section 1001.36 requires an unreasonable risk that the defendant will commit a specified violent felony, including any serious or violent felony punishable by life imprisonment or death. (*Id.*, §§ 1001.36, subd. (b)(1)(F), 1170.18, subd. (c), 667, subd. (e)(2)(C)(iv).)

§ 1001.36 subd. (b)(1)(B).) Finally, appellant’s pursuit on appeal of an opportunity to participate in diversion (knowing it would require compliance with treatment) indicates she may be able to satisfy the remaining eligibility requirements, which concern appellant’s willingness to participate in diversion and to comply with treatment. (*Id.*, § 1001.36, subds. (b)(1)(D), (E).)

To allow the trial court to determine whether appellant is eligible for diversion, we conditionally reverse the judgment. If the court does not grant diversion, or if the court grants diversion but later determines “the criminal proceedings should be reinstated” (Pen. Code, § 1001.36, subd. (d)), the court shall reinstate appellant’s conviction and, as it deems appropriate, either reinstate her sentence or conduct further sentencing proceedings. Such further sentencing proceedings may include an inquiry into appellant’s ability to pay the assessments and restitution fine. We therefore do not address appellant’s challenge to the assessments and restitution fine under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

DISPOSITION

The judgment is conditionally reversed. The case is remanded to the trial court with instructions to determine whether appellant is eligible for diversion under Penal Code section 1001.36 and, if so, to exercise its discretion within the procedures set forth in the statute. If the court does not grant diversion, or if the court grants diversion but later determines, pursuant to the statute's procedures, that the criminal proceedings should be reinstated, the court shall reinstate appellant's conviction and, as it deems appropriate, either reinstate her sentence or conduct further sentencing proceedings.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.