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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. BRANDON MARQUIS RUFFIN, Defendant and Appellant.	2d Crim. No. B289334 (Super. Ct. No. BA434009) (Los Angeles County)

Brandon Marquis Ruffin appeals his conviction, by jury, of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),[1] assault with a deadly weapon, an automobile (§ 245, subd. (a)(1)), possession of a firearm by a felon (§ 29800, subd. (a)(1)), and discharge of a firearm with gross negligence. (§ 246.3, subd. (a).) The jury further found appellant personally used a firearm in committing the assault. (§ 12022.5.) The trial court sentenced

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

appellant to a term of 16 years in state prison and assessed fines and fees totaling $580.

Appellant contends: his convictions are not supported by substantial evidence; the trial court erred when it failed to define the term "semiautomatic firearm" in its instructions to the jury and when it failed to instruct on a lesser included offense; the prosecutor committed misconduct in closing argument; his concurrent sentences for possession of a firearm by a felon and discharge of a firearm with gross negligence should have been stayed under section 654; the matter should be remanded so the trial court can determine whether to strike or dismiss the firearm use enhancement; and that the restitution fine and other assessments should be stayed pending a hearing on his ability to pay. We affirm.

Facts

Stephanie Brown is the mother of appellant's children. On a Sunday morning in February 2015, appellant saw Brown driving her new boyfriend, Maxwell Collins, to work and started chasing Brown's car with his SUV. Brown drove into a Home Depot parking lot. Appellant followed. There were other cars parked in the lot and pedestrians present. Appellant followed Brown, turn for turn, as she drove through the lot in an effort to evade him. While Brown's car was still in motion, appellant drove his SUV into the back of her car, damaging both vehicles.[2] Brown kept moving. Appellant drove next to Brown's car. Collins saw appellant holding a small firearm that was stainless steel and black.

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[2] The left taillight of Brown's car was broken and there was damage to the left rear bumper. Appellant's SUV had a damaged front right light.

Brown drove out of the parking lot and into a neighborhood of warehouses and factories. Appellant continued to chase her. As Brown drove through the surrounding neighborhood, appellant fired his gun. Collins called 911. While he was on the phone with the 911 dispatcher, appellant fired again. Collins could not see where appellant was aiming.

Brown and appellant both passed another motorist, Kayla De Leon, before driving through a red light on Pacific Boulevard. A few blocks later, Brown's car stalled in the intersection of Fruitland Avenue and Malabar Street. Appellant blocked Brown's car in by pulling in front of her.

De Leon saw the two cars stop in the intersection and watched appellant get out of his SUV. She saw appellant grab a handgun and put it in his waistband, "between his boxers and his pants." Both Brown and Collins got out of her car. Appellant was very agitated, shouting at Brown and Collins, demanding to know who Collins was.[3] Brown walked toward appellant's SUV. He grabbed her arms, causing bruises, and pushed her very hard. Appellant also grabbed Brown's phone and smashed it. Collins was talking to appellant, attempting to calm him. Appellant continued to push Brown but then suddenly turned around to strike Collins. Appellant swung at Collins multiple times before hitting him in the face. Collins did not fight back because appellant was armed.

By this time, the group could hear the sirens of approaching police cars. Collins told appellant that he needed to focus. A bystander, Jaime Carrasco, saw appellant take a black

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[3] The recorded 911 call captures appellant yelling, "Who the fuck is you homie?!? Who the fuck is you nigga?!? Who the fuck is this, bitch?"

object from his pants and toss it upward. Appellant moved back toward his SUV. As the patrol cars pulled up, a Huntington Park officer saw appellant throw a gun holster through the open window of his SUV. Appellant was taken into custody. His hands tested positive for gunshot residue.

Collins told the police about the chase route and where appellant had fired his gun. Two shell casings and a bullet fragment were recovered along the route described by Collins. A truck parked near the bullet fragment on Fruitland Avenue had a dent on the front left fender that was consistent with a bullet strike. Huntington Park Police Officer Juan Porras opined that the shooter stuck his hand out the driver's side window and shot at a moving vehicle at eye level. Small changes in a moving vehicle's direction would affect the shooter's aim.

Officer Porras also found a loaded semiautomatic pistol on the roof of a building at the southeast corner of Fruitland Avenue and Malabar Street. A criminalist from the Los Angeles County Sheriff's Department opined that the shell casings and bullet fragment matched the pistol recovered from the roof. No fingerprints or DNA material were found on the pistol.

Discussion

Substantial Evidence

1. Standard of Review. In assessing the sufficiency of the evidence, we are required to review "'the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The question is "'"whether, after reviewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.]' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 142-143 (*Farnam*).)

We "presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We may not reweigh the evidence or second-guess credibility determinations made by the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Simply put, if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citations.]" (*Farnam*, *supra*, 28 Cal.4th at p. 143.)

2. Assault with a Semiautomatic Weapon. Appellant contends the evidence is not sufficient to support his conviction of assault with a semiautomatic weapon (§ 245, subd. (b)) because there was no evidence he had actual knowledge that intentionally firing his gun from a moving car on a public street would probably and directly result in the application of physical force against another. Appellant notes that he did not point his gun at Brown or Collins in the Home Depot parking lot. Although Collins testified he could hear gunshots during the chase, he could not say that he saw appellant pointing the gun at him or firing it in his direction. There was no bullet-related damage to Brown's vehicle. In addition, the incident occurred on a Sunday morning in an industrial neighborhood where there were few pedestrians.

"Section 245, subdivision (b), makes it a crime to commit an assault with a semiautomatic firearm. 'An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' [Citation.]" (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1350-1351.) Assault is a general intent crime that "does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

The record contains substantial evidence supporting appellant's conviction of assault with a semiautomatic weapon. Appellant chased Brown and Collins through a parking lot and down public streets with other motorists and pedestrians present. Collins, De Leon, and Carrasco saw appellant with the weapon in his hand. He tested positive for gunshot residue. A truck parked along the chase route was hit with a bullet. Officer Porras opined that, given the locations of the bullet strike and the bullet fragment found nearby, appellant was shooting at eye level.

As the court noted in *People v. Riva* (2003) 112 Cal.App.4th 981, a reasonable person would understand that, if he fired a gun in an urban neighborhood "the bullet could strike a pedestrian and a battery would directly, naturally, and probably result from his conduct." (*Id.* at p. 998, fn. omitted.) Here, a reasonable jury could infer that appellant actually knew the bullets he fired from the window of his moving car while driving at high speed could hit Brown, Collins, nearby motorists, pedestrians or other

bystanders. Substantial evidence thus supports his conviction of assault with a semiautomatic weapon.

3. Assault with a Deadly Weapon, an Automobile.

Appellant contends his conviction of assault with a deadly weapon is not supported by substantial evidence because there is no evidence he deliberately used his SUV in a manner to produce death or great bodily injury. We are not persuaded.

The prosecution was not required to prove that appellant deliberately rammed his SUV into Brown's car. As we held in *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1189, "[T]he test is whether an objectively reasonable person with knowledge of [the facts surrounding a collision] would appreciate that an injurious collision, i.e., a battery, would directly and probably result from [the driver's] actions."

Here, the facts are that appellant was closely following Brown as she drove through a parking lot in an attempt to evade him. Appellant was not chasing Brown out of curiosity or on a whim. He was furious with her, as demonstrated by his behavior when he eventually caught up to Brown's stalled car. When Brown made a sharp turn in the parking lot, the front end of appellant's SUV collided with the rear end of her car, which was still in motion. An objective person knowing these facts would realize that a collision would directly and probably result from the chase through the parking lot. Substantial evidence thus supports appellant's conviction.

4. Possession of a Firearm by a Felon. Appellant contends there is no substantial evidence he possessed a firearm. The claim is without merit. Collins testified he saw appellant holding a gun. De Leon also testified she saw appellant with a gun in his hand. Jamie Carrasco saw appellant throw something upward as

police approached. Officer Porras recovered a semiautomatic pistol from a nearby rooftop. Appellant had gunshot residue on his hands. This constitutes substantial evidence that appellant had actual possession of the pistol. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410.)

5. Discharge of a Firearm with Gross Negligence.

To prove a violation of section 246.3, the prosecution must prove "'(1) [appellant] unlawfully discharged a firearm; (2) [appellant] did so intentionally; (3) [appellant] did so in a grossly negligent manner which could result in the injury or death of a person.'" (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1361, quoting *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 (*Alonzo*).) Gross negligence in this context, "requires a showing that the defendant's act was '"such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences."' [Citations.] It is beyond dispute that shooting a gun in a commercial area where people are present constitutes gross negligence under this definition." (*Alonzo, supra*, at pp. 539–540.)

Appellant contends his conviction of violating section 246.3 is not supported by substantial evidence because the prosecution did not prove beyond a reasonable doubt that his conduct was incompatible with a proper regard for human life. He relies on the fact that he fired the gun in an industrial neighborhood on a Sunday morning when pedestrian and motor vehicle traffic was light. The contention is without merit.

The court in *Alonzo*, *supra,* 13 Cal.App.4th 535, held that firing a gun into the air at 2:00 a.m. in an urban neighborhood

was grossly negligent as a matter of law. (*Id.* at p. 540.) Here, appellant fired a gun at eye level from a moving vehicle on a public street. The neighborhood was more sparsely populated than the one at issue in *Alonzo*, and the shooting occurred at about 10:00 on Sunday morning. Overwhelming evidence demonstrates that other people were present in the area at the time. Brown and Collins were in a car just ahead of appellant. De Leon and Carrasco were both nearby and Collins saw people sitting on the curb at the intersection where the chase ended. Like the court in *Alonzo*, we conclude it is "beyond dispute" that shooting a gun under these circumstances constitutes gross negligence within the meaning of section 246.3. (*Alonzo*, *supra*, at p. 540.)

Instructional Error

Appellant contends the trial court prejudicially erred when it failed to define the term "semiautomatic" in its instructions to the jury, and when it failed to instruct the jury on the lesser included offense of assault with a firearm. We disagree.

1. Definition of Semiautomatic Firearm.

Here, Officer Porras testified that the firearm he recovered was a semiautomatic firearm. Firearms expert Anny Wu confirmed that Officer Porras had recovered a semiautomatic firearm. Collins identified photographs of the same firearm as the one he saw appellant holding. Appellant did not dispute Porras' and Wu's characterization of the firearm as a semiautomatic. The trial court instructed the jury, in the words of the statute, that to prove a violation of section 245, subdivision (b), "each of the following elements must be proved: 1. A person was assaulted; and 2. The assault was committed with a

semiautomatic firearm." Appellant did not request any amplification or clarification of this pattern instruction.

"[A] jury instruction should typically track the language of a statute when feasible under the circumstances . . . ." (*People v. Santana* (2013) 56 Cal.4th 999, 1007.) The trial court has no sua sponte duty to define terms that are commonly understood and not used in a technical sense. (*People v. Lucas* (2014) 60 Cal.4th 153, 296, disapproved on other grounds, *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) Similarly, the trial court "has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal . . . ." (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

Appellant contends the trial court's failure to define "semiautomatic" removed an element of the offense from the jury's consideration. We are not persuaded. First, appellant forfeited review of this issue because the instruction correctly quoted section 245 and appellant did not request any modification or clarification of the statutory language. Second, the trial court had no sua sponte duty to further define "semiautomatic" because the statutory definition of the term is consistent with its commonly understood meaning. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022-1023.)

Finally, any error in failing to define the term was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 502-504.) Both Officer Porras and firearms expert Anny Wu described appellant's firearm was a semiautomatic pistol. Collins identified photographs of the firearm as the one he saw in appellant's possession. There was no evidence to the

contrary and the defense never disputed the gun was a semiautomatic. The trial court did not prejudicially err.

2. Lesser Included Offense. Appellant contends the trial court prejudicially erred because it failed to instruct the jury on the lesser included offense of assault with a firearm. (§ 245, subd. (a)(2).) A trial court has a duty to instruct sua sponte on a lesser included offense "whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present." (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) Here, the trial court had no obligation to instruct on assault with a firearm because there was no substantial evidence appellant possessed something other than a semiautomatic firearm. As we have explained, both the investigating officer and the firearms expert identified appellant's firearm as a semiautomatic. There was no evidence to the contrary. As a consequence, there was no basis for an instruction on the lesser included offense.

Prosecutorial Misconduct

Appellant contends the prosecutor committed misconduct in her closing and rebuttal arguments. First, appellant contends the prosecutor referred to facts not in evidence when she stated, "There's a stipulation to the felonies," even though appellant stipulated to only one prior felony conviction. Second, appellant contends the prosecutor improperly vouched for the strength of the prosecution's case when she stated in her rebuttal argument, "I've been doing this for about eight years, and I've never seen evidence this – this strong, ever." Finally, appellant contends the prosecutor improperly appealed to the passions of the jury when she stated, "Can you imagine being in that car, being chased by your psycho ex-boyfriend following you, chasing you through the

streets making you run red lights in broad daylight going in opposing traffic to get around cars, and then your car stalling after he's been shooting at you? Can you imagine that terror." We conclude there was no prejudicial misconduct.

To preserve a claim of prosecutorial misconduct "the defense must make a timely objection at trial and request an admonition . . . ." (*People v. Price* (1991) 1 Cal.4th 324, 447 (*Price*).) In the absence of a timely objection, a claim of prosecutorial misconduct is reviewable only if an admonition would not have cured the harm or if an objection would have been futile. (*Ibid.*; *People v. Arias* (1996) 13 Cal.4th 92, 159.)

"'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." . . . [Citation.]' [Citation.]" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

It is misconduct for a prosecutor to refer in closing arguments to facts not in evidence "because such statements 'tend[] to make the prosecutor [her] own witness – offering unsworn testimony not subject to cross-examination. . . . [Citations.]' [Citations.]" (*Hill*, *supra*, 17 Cal.4th at p. 828.) However, the prosecutor has wide latitude to make vigorous arguments, as long as those arguments amount to fair comment on the evidence, including reasonable inferences or deductions to

be drawn from the evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) "When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion." (*People v. Booker* (2011) 51 Cal.4th 141, 184-185.)

1. Facts Not in Evidence. Count three of the information alleged that appellant was a felon in possession of a firearm, in violation of section 29800, because he was convicted of felonies in 2011 and 2006. At trial, appellant stipulated that he "has previously been convicted of a felony within the meaning of Penal Code section 29800 as charged in count three of the information." In her closing argument, while discussing count three, the prosecutor stated, "There's a stipulation to the felonies."

Appellant contends the prosecutor referred to facts not in evidence because her statement implies that he had more than one prior felony conviction and the stipulation referred to a single prior conviction. Appellant is incorrect. He stipulated that he "'has previously been convicted of a felony . . . as charged in count three of the information.'" Count three referred to two prior convictions. The prosecutor's statement was accurate; there was no misconduct.

2. Improper Vouching. In her rebuttal argument, the prosecutor discussed what constituted reasonable doubt: "Reasonable doubt is not reason to doubt. It's not any doubt. It's not imaginary or speculative doubt. . . . Reasonable doubt must be reasonable. Your job is to figure out if you have an abiding conviction in the truth of the charges. There is no way you don't. [¶] I've been doing this for about eight years, and I've never seen evidence this – this strong, ever. The 911 call . . . ." Defense

counsel interjected, "Your Honor," but did not state an objection. Instead, the prosecutor continued to list facts that she argued removed reasonable doubt. Appellant contends the prosecutor's statement about the strength of the evidence was improper vouching. We are not persuaded.

First, appellant forfeited this contention by failing to object. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1355 (*Seumanu*).) Had it not been forfeited, we would reject the contention because the prosecutor's comments were not improper vouching.

"'Impermissible vouching occurs when "prosecutors [seek] to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.]"' [Citation.]" (*People v. Mendoza* (2016) 62 Cal.4th 856, 906.) When a claim of misconduct is based on a prosecutor's statements to the jury, """"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' . . ." [Citation.]" (*Id.* at p. 905.)

Throughout her closing and rebuttal arguments, the prosecutor urged the jury to rely on the evidence and follow the trial court's instructions in determining appellant's guilt or innocence. The remark at issue expresses the prosecutor's confidence that the jury would, after considering the evidence, have an abiding conviction in the truth of the charges. This is a fair comment on the evidence, not improper vouching. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other grounds, *Stansbury v. California* (1994) 511 U.S. 318, 325-326.)

3. Appealing to the Passions of the Jury. In her closing argument, the prosecutor described Collins' testimony, "He told you what happened. And you saw every bit of evidence that

followed behind him corroborate what he said. You heard [the] 911 call of that happening. Can you imagine being in that car . . . ? Can you imagine [the] terror?" Appellant's trial counsel did not object to the statement, "Can you imagine [the] terror?" He now contends the comment was misconduct because it improperly appealed to the passions of the jury. We disagree.

First, the contention has been forfeited because appellant did not object to it. (*Seumanu*, *supra*, 61 Cal.4th at p. 1355.) Second, the comment did not improperly invite the jury to "'view the crime through the eyes of the victim . . . .'" (*Id.* at p. 1344.) Instead, it was a reasonable description of how dramatic the car chase and subsequent confrontation were. Even if the comment was improper, there was no prejudice. Evidence of appellant's guilt was overwhelming and the trial court properly instructed the jury that it "must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" but must instead "[consciously] consider and weigh the evidence . . . ."

Section 654

Appellant contends he acted with a single criminal intent and objective when he committed the three firearm-related offenses of which he was convicted. The sentences imposed on counts 3 and 4 (§ 29800, possession of a firearm by a felon and § 246.3, discharge of a firearm with gross negligence) should, he contends, be stayed under section 654. Appellant is incorrect.

Section 654 bars "multiple punishments for conduct that violates more than one criminal statute but which constitutes an indivisible course of conduct." (*People v. Vang* (2010) 184 Cal.App.4th 912, 915.) Whether multiple offenses were part of an indivisible course of conduct "'depends on the *intent and objective*

of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses, but not for more than one.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The question whether a defendant had a single criminal intent is one of fact. We review the trial court's factual determination for substantial evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

First, section 654 did not prohibit separate punishment for appellant's possession of a firearm. He had to have completed that offense by possessing the firearm before he began chasing Brown and Collins, and before he fired shots at Brown's car. Section 654 "is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1145.)

Similarly, section 654 permitted separate punishment for appellant's grossly negligent discharge of the firearm. "Section 654 does not preclude separate punishment for crimes of violence committed against separate victims." (*Price*, *supra*, 1 Cal.4th at p. 492.) Here, Collins was the only named victim of appellant's assault with a semiautomatic firearm. When appellant chose to fire his weapon in a grossly negligent manner, he committed a violent crime that placed at risk the lives of Brown and every nearby motorist and pedestrian. (*People v. Clem* (2000) 78 Cal.App.4th 346, 351.) Section 654 permits separate punishment of that offense against persons other than Collins.

Firearm Use Enhancement

Appellant's sentence includes a 10-year enhancement term for his personal use of a firearm. (§ 12022.5.) At the time of appellant's trial, the trial court lacked discretion to strike the

enhancement. However, appellant fled before the verdict was received and remained at large for over two years. He was arrested in August 2017, following a traffic stop in Georgia and finally appeared for sentencing in February 2018. In the interim, Senate Bill No. 620 (2017-2018 Reg. Sess.) amended section 12022.5 to give the trial court discretion to strike a firearm use enhancement in the interest of justice. Respondent concedes the amendment applies to appellant because the judgment against him was not final when the amendment took effect. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712 (*Chavez*).)

Appellant contends the matter should be remanded for resentencing, to permit the trial court to exercise its discretion to strike the enhancement. We conclude a remand is unnecessary because the trial court has already clearly indicated it would not strike the enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *Chavez*, *supra*, 22 Cal.App.5th at p. 713.)

At the sentencing hearing, the trial court explained to appellant, "You know, there was a lot that I could do with your case, and you pretty much forfeited any right to have me exercise discretion for you." After asserting that he fled before sentencing because he was "simply thinking about my children's wellbeing. I support them fully," appellant stated he did not believe the evidence justified his conviction because there were no fingerprints on the gun. He later denied that he was guilty of any of the offenses, although he admitted that he and Collins "had a physical confrontation." The trial court noted the issue had been resolved. By denying guilt, appellant was "telling me he hasn't learned from this, that nothing's changed."

With regard to the firearm enhancement, the trial court noted, "interestingly enough, at the time this was alleged, the

court was without authority to strike a gun allegation. I can now. I'm not even sure that change in the law applies to this case. But is that what you're suggesting?" Defense counsel replied, "Yes."

The trial court acknowledged that appellant had "grown a lot since all of this happened," but also noted that his conduct was "very serious and very dangerous," and could have resulted in a murder "but for the fortuity of the bullet hitting a car . . . instead of a person." It found the seriousness of appellant's crimes was compounded by his extensive criminal record and his having fled before sentencing. The trial court concluded that it would impose the mid-term on appellant's assault with a semiautomatic weapon conviction, plus the upper term of 10 years for the firearm enhancement. The resulting sentence was eight years shorter than the possible maximum sentence.

The trial court's comments at sentencing demonstrate that it was aware of the amendment to section 12022.5. Although the trial court expressed uncertainty about whether the amended statute applied to appellant, it declined to exercise the discretion it unquestionably had to impose the lowest possible sentence. Instead, relying on the fact that appellant fled the jurisdiction and his lengthy criminal record, the trial court imposed the middle term on appellant's substantive offenses, and the upper term on the firearm use offense. Given this deliberate choice to impose the highest possible enhancement term, "there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*People v. McVey* (2018) 24 Cal.App.5th 405, 419.)

Ability to Pay Fines and Fees

Appellant contends the restitution fine and other fees assessed against him should be stayed until he is afforded a

hearing at which the trial court determines that he has the ability to pay those amounts. He asserts the failure to hold such a hearing violates his right to due process of law.

Appellant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157. In *Dueñas*, the court held that imposing assessments for court operations and court facilities funding (§ 1465.8, subd. (a); Gov. Code, § 70373) without a hearing on the defendant's ability to pay violates due process of law under both the federal and state constitutions. (*Dueñas*, *supra*, at p. 1168.) Neither statute expressly prohibits the trial court from considering the defendant's ability to pay. By contrast, section 1202.4, subdivisions (b)(1) and (c) expressly prohibit the trial court from considering a defendant's ability to pay a restitution fine unless the fine imposed exceeds $300. *Dueñas* held the court must stay execution of the restitution fine unless or until the prosecutor demonstrates the defendant's ability to pay. (*Dueñas*, *supra,* at p. 1172.)

Here, the trial court imposed total fines and fees of $580, including a $300 restitution fine under section 1202.4 and, on each count, a $30 criminal conviction assessment (Gov. Code, § 70373) and a $40 court operations assessment. (§ 1465.8.) Appellant did not object to these financial penalties in the trial court. His failure to do so forfeits the issue on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 [probation-related costs and fees paid to trial counsel].)

As the court noted in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, *Dueñas* was not such a "a dramatic and unforeseen change in the law" that an objection made at sentencing based on inability to pay would have been futile. Section 1202.4 itself contemplates an objection on that basis.

(*Frandsen*, *supra*, at p. 1153.) "Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and demonstrate why it should not be imposed." (*Id.* at p. 1154.) Like the *Frandsen* court, we "stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they would like appellate review of that issue." (*Id.* at p. 1155.) Appellant did not raise this issue in the trial court and therefore has forfeited appellate review of it.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

I concur:

PERREN, J.

TANGEMAN, J., Concurring and Dissenting:

I join with my colleagues as regards all but their conclusion that Ruffin forfeited his claim that he is entitled to a hearing on his ability to pay the amounts imposed pursuant to Penal Code section 1202.4, subdivisions (b)(1) and (c) [minimum restitution fine], Penal Code section 1465.8 [court facilities assessment], and Government Code section 70373 [court operations assessment], because he did not object to those fees in the trial court. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126.)

At the time Ruffin was sentenced, the cited statutes expressly or implicitly precluded any objections to the imposition of the amounts they mandated; thus, a due process objection would have been either futile or wholly unsupported by substantive law. I disagree that the result in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 was somehow foreseeable.

As succinctly stated in *People v. Black* (2007) 41 Cal.4th 799, 812: "The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated" the change in law. In *Black*, our Supreme Court held that there was no forfeiture where a defendant failed to object in the trial court that he was entitled to a jury trial on sentencing issues based on an argument later accepted by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296. This was so, held the court, even though the *Blakely* opinion relied on "longstanding precedent" (*id.* at p. 305).

Based on law in existence when Ruffin was sentenced, *Dueñas* was surely as unforeseeable as was the holding in *Blakely*. Accordingly, I agree with and would follow *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.

NOT TO BE PUBLISHED.

TANGEMAN, J.

Craig E. Veals, Judge

Superior Court County of Los Angeles

Janet Uson, under appointment by the Court of Appeal for Defendant and Appellant.

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