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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. DELBERT DEWAYNE TISDALE, Defendant and Appellant.	B292444 (Los Angeles County Super. Ct. No. YA095778)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Affirmed.

Miriam K. Billington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Pamela C.

Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Delbert Dewayne Tisdale guilty of attempted murder in count 1 (Pen. Code, §§ 187/664[1]), and domestic violence with a prior conviction for domestic violence in count 2 (§ 273.5, subd. (f)(1)). The jury found true the allegations that Tisdale personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and that he inflicted great bodily injury on the victim (§ 12022.7, subd. (e)), as to both counts.[2]

The trial court sentenced Tisdale to 15 years in prison, consisting of the upper term of 9 years in count 1, plus 5 years for the great bodily injury enhancement, plus 1 year for personal use of a deadly or dangerous weapon. The trial court stayed the sentence in count 2 pursuant to section 654.

On appeal, Tisdale contends that the trial court erred by (1) refusing to instruct on voluntary intoxication, (2) admitting evidence of a prior act of domestic violence, and (3) imposing certain fines and fees without conducting an ability to pay hearing. We affirm the judgment.

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

[2] The jury found not true the allegation that the attempted murder was willful, deliberate, and premeditated.

FACTS

Background

Tisdale and the victim, T.M., had been in a relationship for three years and had a child together at the time of the offenses. They had been living with Tisdale's sister, Ericka, but were in the process of moving out. T.M. planned to end the relationship.

The week before the offenses occurred, T.M. stayed at her cousin's home in Long Beach. Tisdale phoned and threatened to beat and kill her while she was staying with her cousin. He was angry that T.M. left. Tisdale had previously commented about T.M. seeing someone else.

The Charged Offenses

On February 22, 2017, T.M. went to Ericka's apartment to gather her belongings while Erika was out. Around 9:00 p.m., while T.M. was waiting for her cousin to pick her up, Tisdale, Ericka, and Ericka's children returned to the apartment.

Tisdale acted "lovey dovey" towards T.M., but she insisted that the relationship was over. They talked for a long time, and then Tisdale said he was going to smoke a "blunt" and drink outside. When he returned, they started arguing, because Tisdale did not want T.M. to end their relationship. During the argument, Tisdale showed T.M. a

small knife in his front pants pocket and threatened to kill her.

T.M. went to Ericka's bedroom to ask Ericka to escort her outside because Tisdale was threatening her. Tisdale came into the bedroom, and Ericka refused to do anything. Tisdale ran around the bed to get to T.M., but T.M. hopped over the bed and ran out of the bedroom. T.M. tried to open the two front door locks, but Tisdale hit her in the side with Ericka's child's scooter, knocking T.M. to the floor. He stood over T.M. and punched her in her left eye. Tisdale then went into the kitchen, got a larger knife, and stabbed T.M. in the back six times as she was attempting to get up. As he stabbed her, Tisdale said, "If I can't have you, nobody can have you," and "You played me, bitch, you played me."

Ericka came out of the bedroom screaming and crying. She opened the door to distract Tisdale. T.M. crawled into a space between the wall and couch. Ericka ran outside, and Ericka's young children came out of the bedroom. Tisdale stabbed himself in his neck and chest while his nephew watched. His nephew cried and pleaded, "Uncle, no." While Tisdale lay on the ground, T.M. took the child outside and went upstairs to the manager's apartment to get help.

Around 10:15 p.m., paramedics and the police arrived. Tisdale was lying on his back on the ground in front of Ericka's apartment. He was treated for stab wounds to his chest and abdomen. Tisdale told the paramedics that he had stabbed himself. A long knife with a bloodstained blade about 12 inches long was recovered nearby. Officers later

recovered a smaller knife, with a bent two-inch blade and blood on or near its handle, from the living room floor.

An officer saw T.M. sitting on the apartment stairs. She had stab wounds to her back, which were bleeding profusely. T.M. also received medical treatment. Both Tisdale and T.M. were transported to the hospital.

T.M. had six stab wounds to her back and side. Both of her lungs were lacerated, causing life-threatening injuries, and requiring surgical intervention. T.M. also sustained facial injuries caused by blunt force trauma, including bruising, swelling around her left eye, a broken nose and bone fracture around her eye, a blood clot behind her eye, and a corneal abrasion to her eye, which caused lasting visual impairment. T.M. was hospitalized for over a week.

Tisdale also sustained multiple stab wounds. He had surgery and was hospitalized for over a week.

The Investigation

In a telephone interview on February 28, 2017, T.M. told an Inglewood police detective that Tisdale had a knife in his front pants pocket that he kept showing her. While she was trying to unlock the apartment doors, Tisdale went into the kitchen and grabbed another knife. He hit her in the back with a scooter and punched her left eye, knocking her to the floor. Tisdale stabbed T.M. three times before she crawled between the couch and wall.

Jail Call

On September 23, 2017, Tisdale spoke with his mother on the phone while he was in jail. Tisdale said an unnamed person was going to get his mental health record and a doctor's statement "to see if these are self-inflicted wounds which, which they're not." Tisdale's mother asked, "[D]idn't you stab yourself?" Tisdale said that he did not and added, "[I]f I did mom, this is a recorded phone call. Why would I tell you I did that?"

Prior Acts of Domestic Violence

At trial, evidence was presented that Tisdale had committed two acts of domestic violence against T.M. in 2016, and had been convicted of misdemeanor domestic violence against a former girlfriend in 2014.

DISCUSSION

Voluntary Intoxication Instruction

Tisdale first contends that the trial court erred by refusing to instruct the jury that his voluntary intoxication could negate the specific intent for attempted murder. We reject the contention, because even if we were to assume that substantial evidence supports the finding that Tisdale was intoxicated at the time of the offenses, there is no evidence

regarding how intoxication may have affected his ability to formulate the requisite intent; the mere fact of intoxication does not negate the ability to form the intent to kill.

Proceedings

During cross-examination, defense counsel questioned T.M. as follows:

"[Defense counsel]: Mr. Tisdale comes in and you're talking but not arguing, correct?

"[T.M.]: Yes.

"[Defense counsel]: And this is for a period of time?

"[T.M.]: Yes, he's acting lovey dovey towards me and he went outside to smoke a blunt and drink and came in and, you know, was talking to me."

"[Defense counsel]: And you stated that he had been drinking alcohol?

"[T.M.]: Yes."

"[Defense counsel]: Did you see him drink alcohol at the residence?

"[T.M.]: No.

"[Defense counsel]: Did you smell alcohol on his breath?

"[T.M.]: Yes.

"[Defense counsel]: Do you know what alcohol smells like?

"[T.M.]: Yes.

"[Defense counsel]: Did he seem intoxicated to you?

"[T.M.]: Yes."

"[Defense counsel]: And you've seen him intoxicated before?

"[T.M.]: Of course, yeah."

Defense counsel inquired as to T.M.'s knowledge of Tisdale's marijuana ingestion:

"[Defense counsel]: When you say 'he went outside to smoke a blunt' are you referring to marijuana?

"[T.M.]: Yes.

"[Defense counsel]: And you knew he did that because he told you he was doing it?

"[T.M.]: No. He's just a smoker.[3]

"[Defense counsel]: Okay. You saw him doing it?

"[T.M.]: No, I didn't see him smoke a blunt."

T.M. could not recall how long Tisdale was outside, but she testified that the argument that preceded the attack happened afterward.

Based on T.M.'s testimony, defense counsel requested that the jury be instructed regarding voluntary intoxication under CALCRIM No. 625.[4] The trial court refused the

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[3] T.M. later testified that Tisdale told her he was going to smoke a blunt.

[4] CALCRIM No. 625 provides, in relevant part: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill . . . . [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any

proffered instruction based on its conclusion that the record was not sufficiently developed to establish Tisdale was intoxicated. It ruled:

"I'm still of the belief that there isn't enough there to warrant that instruction. You have to have more. It could lead to confusing the jurors, undue consumption [of time]. I'm just trying to figure out how is it this instruction applies. We heard someone say he was intoxicated but we didn't hear anything more, and that's why I think it's not warranted, the giving of that instruction."

The trial court offered to give the defense the opportunity to present additional evidence on Tisdale's intoxication: "[I]f the defense relied on the court's ruling not to strike [T.M.'s testimony with respect to Tisdale's intoxication], not to sustain the objection as a basis for asking for [CALCRIM No.] 625, then I think it's only fair that the defense have the opportunity to reopen and elicit any additional information it deems would be admissible and relevant in regard to whether Mr. Tisdale was intoxicated on the date in question." Tisdale did not present additional evidence.

Legal Principles

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intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect."

Under the current state of the law, evidence of voluntary intoxication is admissible solely for the purpose of determining whether the defendant *actually* formed a required specific intent. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117 (*Saille*).) Voluntary intoxication "is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt." (*Id.* at p. 1120.) Where, as here, the defendant is charged with attempted murder, evidence of voluntary intoxication may be presented to raise a doubt as to whether the defendant actually formed the intent to kill. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Instructions on voluntary intoxication are "in the nature of pinpoint instructions required to be given only on request where the evidence supports the defense theory." (*People v. Ervin* (2000) 22 Cal.4th 48, 91.) "Pinpoint instructions '"relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case."' [Citation.] 'Upon proper request, a defendant has a right to an instruction pinpointing the theory of defense . . . if the theory proffered by the defendant is supported by substantial evidence' [citation], the instruction is a correct statement of law [citation], and the proposed instruction does not simply highlight specific evidence the defendant wishes the jury to consider [citation]. [¶] The trial court may properly refuse an instruction highlighting a defense theory if it is 'duplicative or potentially confusing.' [Citation.] '[W]here standard instructions fully and adequately advise the jury

upon a particular issue, a pinpoint instruction on that point is properly refused.' [Citations.] Put another way, '[t]here is no error in a trial court's failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial.' [Citation.]" (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1173–1174.)

"[A] defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent."' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 715 disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Williams* (1997) 16 Cal.4th 635, 677–678 [not error to refuse instruction where "[even if] scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"]; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661 (*Ivans*) [no intoxication instruction required absent evidence defendant "became intoxicated to the point he failed to form the requisite intent"].)

Analysis

Here, the evidence of Tisdale's intoxication was T.M.'s brief testimony that Tisdale had gone outside to drink and smoke, T.M. could smell alcohol on his breath, and Tisdale

seemed intoxicated, something she had seen before. T.M. did not see Tisdale ingest the alcohol or marijuana, and there is no evidence of how much he drank or smoked. Even crediting this evidence as sufficient to establish that Tisdale was intoxicated, there is no evidence of the extent of his intoxication, and more significantly, no evidence regarding the effect of Tisdale's intoxication on his actual mental state at the time of the attack. Voluntary intoxication is not admissible to prove that a defendant is *incapable* of forming a specific intent. (*People v. Young* (1987) 189 Cal.App.3d 891, 905, fn. 1.) It is only admissible to demonstrate that a defendant's *actual* intent was affected. (*Saille*, *supra*, 54 Cal.3d at p. 1117.) Because there was no evidence presented that was relevant to the effect of intoxication on Tisdale's mental state, or that he was intoxicated "to the point he failed to form the requisite intent," the trial court was not obligated to instruct on voluntary intoxication, and did not err in refusing the instruction. (*Ivans*, *supra*, 2 Cal.App.4th at p. 1661.)[5]

Evidence of Prior Acts of Domestic Violence

At trial, evidence of Tisdale's prior acts of domestic violence against T.M. and another former girlfriend, were

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[5] The lack of evidence about the extent or effect of Tisdale's intoxication is particularly significant here, where the trial court afforded defendant an opportunity to reopen its case to offer evidence that would support the requested jury instruction, and defendant declined to do so.

admitted under Evidence Code section 1109, over his objection. On appeal, Tisdale contends that in admitting the evidence pursuant to section 1109, the trial court failed to conduct a thorough analysis of whether the prior acts evidence was more prejudicial than probative under Evidence Code section 352, and abused its discretion by allowing the prosecution to elicit that T.M. was pregnant during one of the incidents. Tisdale further argues that although the jury was told that he pled guilty to the 2014 incident of domestic violence against the other former girlfriend, it was not told whether he was punished, and may have felt that it should convict to punish him for that offense.

Proceedings

Prior to trial, the prosecution moved for admission of evidence of three prior acts of domestic violence by Tisdale. In the first incident, against the other former girlfriend, Tisdale was convicted of corporeal injury to a girlfriend under section 273.5, causing abrasions to her left forehead, left eyebrow, right knee, and right foot, a swollen and bloody lower lip, and a swollen lump on the back of her head. After injuring the former girlfriend, Tisdale slashed his wrist with a razor. Tisdale pleaded no contest to violating section 273.5 and was convicted on July 21, 2014.

The second and third incidents were against T.M. The first incident occurred before or around June of 2016, when

T.M. was pregnant. Tisdale and T.M. got into an argument at Tisdale's brother's house. T.M. tried to leave, but Tisdale locked the door. He then punched her, giving her a black eye, and choked her. Tisdale threatened to kill T.M. if she called the police.

On June 14, 2016, after their daughter was born, Tisdale and T.M. argued at his mother's house. Tisdale hit T.M. and tried to drag her off of a bed, which resulted in bruising to her hand and arm. Tisdale apologized afterwards, and T.M. pretended to accept his apology so that she could get away to call the police. She reported the incident to police as a "domestic violence" crime.

Prior to trial, the trial court discussed admission of the Evidence Code section 1109 evidence with the parties. The prosecutor argued that, with respect to the Evidence Code section 352 analysis, the charged incident was much more violent than the prior incidents. With respect to the 2016 incidents, the prosecutor asserted that presentation would not require further time because they involved the same victim who would already be testifying, and it was "part of the pattern and practice of this relationship and the dynamics that's [*sic*] at issue." Defense counsel conceded that all three incidents were admissible under Evidence Code section 1109. The court tentatively ruled that the evidence was admissible under Evidence Code sections 1109 and 352, and that, as to Evidence Code section 352, the evidence's probative value was not substantially outweighed

by any potential prejudice, and its presentation would not involve undue consumption of time.

Following a recess later that day, the court found the incidents admissible under Evidence Code sections 1109 and 352. In evaluating the incidents under section 352, the court found that there was nothing about the incidents that made them overly inflammatory, stating "[c]learly the incident involved in the underlying case is far more egregious." The court saw no probability of confusion, but invited defense counsel to argue the point. The trial court found that the incidents were not remote, and stated that it did not believe presentation of the evidence would involve an undue consumption of time. The court found the incidents to be highly probative.

On direct examination, the prosecutor asked T.M. about the second incident that led her to call the police, and T.M. instead described the earlier incident. The prosecutor attempted to clarify the order in which the incidents occurred by using T.M.'s pregnancy as a benchmark:

"[Prosecutor]: Was this incident that you're telling us about now before or after you had your child?

"[T.M.]: Before.

"[Prosecutor]: Were you pregnant with your child?

"[T.M.]: Yes."

Defense counsel objected on relevance grounds, and the court sustained the objection. The prosecutor explained, "It goes to timing." The trial court held a sidebar:

"[Prosecutor]: I'm trying to set up the timeline of events, when the first incident was, when the next incident was, et cetera, and I think the witness is able to do that by using a life marker like the birth.

"[Defense counsel]: She can ask her what the date was or the year or the month as opposed to her pregnancy."

The trial court reversed its ruling, but noted "I'm hoping that we don't spend a lot of time on that." The court then clarified that the pregnancy could only be used to establish a time frame.

Trial resumed and the prosecutor questioned T.M. as follows:

"[Prosecutor]: So in terms of when this incident that you're talking about happened, where you were unable to call the police, do you recall the month or year or anything like that?

"[T.M.]: No.

"[Prosecutor]: Okay. In terms of when your child was born was it before or after?

"[T.M.]: Before.

"[Prosecutor]: And were you pregnant or not pregnant?

"[T.M.]: Pregnant.

"[Prosecutor]: So at that point in time when you were pregnant -- I want to focus on that incident, okay? What exactly happened?"

In closing argument, the prosecutor again used the pregnancy to establish where the incident occurred in the timeline of events:

"So, again, prior domestic violence is the June 2016 incident with [T.M.], where she got those scratches. There was also the incident she remembered she got a black eye while she was pregnant, and then, of course, there's the . . . incident [involving the other former girlfriend] that you heard the 911 call for . . . ."

Legal Principles

Evidence of uncharged misconduct is not admissible to prove a defendant's predisposition to commit such conduct, except as allowed by statutory exceptions. (§ 1101, subd. (a).) Evidence Code section 1109, subdivision (a)(1) provides for one such exception: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 352 provides that "[t]he 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."

"'[W]hen ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrate the trial court

understood and fulfilled its responsibilities under . . . section 352.' [Citations.]" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315 (*Jennings*).) "We review a challenge to a trial court's choice to admit or exclude evidence under section 352 for abuse of discretion." (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Analysis

Tisdale specifically challenges the trial court's admission of the fact that T.M. was pregnant in the first incident against her, the court's admission of Tisdale's guilty plea with respect to the incident against the other former girlfriend, and the court's alleged failure to carefully weigh certain factors under Evidence Code 352.

Pregnancy

With respect to the trial court's admission of the fact that T.M. was pregnant the first time he attacked her, we agree that the fact of T.M.'s pregnancy may have increased the potential for prejudice against Tisdale. It is evident that the trial court considered the effect of the evidence, as well, however. The court initially sustained the defense's objection. When the court changed its ruling, it limited the use of evidence to establishing a time frame.

The timing of the prior acts of domestic violence was relevant in this case. An act's probative value increases if it

is more recent. T.M. was not able to recall the month or year of the first incident. Confirming that the incident took place during her pregnancy confined the date to a time period of less than one year. It also established which of the incidents occurred first, and aided in identifying and differentiating the two incidents.

While the fact of T.M.'s pregnancy may well have increased the prejudicial impact of that incident, we cannot conclude that the trial court abused its discretion in finding that the probative value of the incident still outweighed its potential prejudicial impact.

With respect to the charged crimes, evidence was presented that Tisdale hit T.M. in her side with a scooter with enough force to knock her to the ground. He then stood over her and punched her in the eye. When T.M. tried to get up, Tisdale went to the kitchen to obtain a knife and proceeded to stab her in the back six times. He then stabbed himself in front of his sister's young children, despite the fact that his nephew was crying and pleading with him to stop. As a result of Tisdale's attack on her, T.M. suffered six stab wounds, and both of her lungs were lacerated. T.M.'s nose was broken, she had a bone fracture near her eye, a corneal abrasion, and a blood clot behind her eye. She spent over a week in the hospital, and her vision was still impaired at the time of the trial as a result of the attack.

In contrast, in the prior incident, T.M. suffered a black eye after Tisdale punched her in the eye and attempted to choke her. While a black eye is not a negligible injury, it is a

substantially less serious injury than lacerated lungs, stab wounds, broken facial bones, and lasting visual impairment. Although Tisdale argues "the prior acts evidence portrayed [him] as an attempted murderer of both [T.M.] and their unborn child," the evidence does not suggest that Tisdale harmed the fetus, intended to harm the fetus, touched T.M.'s body anywhere below her neck, or caused injuries to her neck or throat that would have endangered their unborn child. Tisdale's actions were reckless and dangerous, but they fell short of suggesting to the jury an intent to kill, or even injure, the fetus. On this record, we cannot say that the trial court's admission of the evidence was an abuse of discretion.[6]

[6] Tisdale does not contend that the prosecutor committed misconduct or expressly used the fact of T.M.'s pregnancy other than to establish a timeline. The prosecutor referred to the pregnancy once in closing argument, to indicate when the incident occurred relative to the other prior acts of domestic violence.

No Contest Plea

We reject Tisdale's argument that the jury would be tempted to punish him for the injuries he inflicted upon the other former girlfriend, because no evidence was presented that he suffered punishment after pleading no contest to domestic violence. Our Supreme Court has held that where a defendant has not suffered a criminal conviction there may be "increased . . . danger that the jury might have been inclined to punish defendant for the uncharged offenses . . . ." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) However, we know of no precedent suggesting that such danger is increased where evidence of a conviction is presented. Here, the jury was presented with evidence that Tisdale "entered a plea of no contest . . . and was thereby convicted." It is highly improbable that jurors would conclude Tisdale had been convicted of a crime but was not punished.

Trial Court's Analysis

Tisdale cites to *People v. Falsetta* (1999) 21 Cal.4th 903, at page 917, to support his argument that the trial court was required to expressly consider a prior act's "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors . . . its similarity to the charged offense, its likely prejudicial impact on the jurors, the

burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as . . . excluding irrelevant though inflammatory details surrounding the offense." In *Falsetta*, the Supreme Court did not overrule longstanding and repeatedly reaffirmed precedent holding that "'when ruling on a section 352 motion, . . . [a]ll that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352.' (*People v. Williams* (1997) 16 Cal.4th 153, 213, citing *People v. Lucas* (1995) 12 Cal.4th 415, 448–449.)" (*Jennings*, *supra*, 81 Cal.App.4th at p. 1315.) Here, it is clear that the trial court understood and fulfilled its responsibilities under Evidence Code section 352.

Ability to Pay

At sentencing, the trial court imposed $60 in court facilities assessments (Gov. Code, § 70373), $80 in court operations assessments (§ 1465.8, subd. (a)(1)), a $300 restitution fine (§ 1202.4, subd. (b)), and a stayed $300 parole revocation fine (§ 1202.45, subd. (a)). Tisdale did not request a hearing to determine whether he had the ability to pay these fines, fees, and assessments.

Tisdale asserts that he is indigent, as evidenced by the fact that he was represented by a court-appointed attorney at trial and on appeal, and was in custody and not employed at the time of sentencing. He argues that the trial court's

failure to determine whether he had the ability to pay the assessments and fines prior to their imposition violated his constitutional rights to due process and equal protection under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which applies to his case retroactively. Tisdale asserts that counsel's failure to object did not forfeit his claims, and requests that we strike the court operations and court facilities assessments, and stay execution of the restitution fine unless and until the People prove that he has the present ability to pay the fine, as the Court of Appeal in *Dueñas* did.

We reject Tisdale's contention.[7] In *Dueñas*, the record established that the defendant was a homeless, jobless mother of two children, whose husband was also frequently unemployed. Dueñas was caught in a longstanding cycle of poverty that had been exacerbated by fines she accrued by driving with a suspended license. Dueñas had repeatedly served time in jail in lieu of paying fines because of her inability to pay, and had suffered other severe adverse consequences due to nothing more than her own impoverishment. In the matter before the Court of Appeal, Dueñas had requested, and the trial court had granted, a hearing to determine her ability to pay a $30 court facilities assessment (Gov. Code, § 70373), a $40 court operations

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[7] Because we resolve Tisdale's claim on the merits, we need not address the issues of whether Tisdale forfeited his claim or whether *Dueñas* applies retroactively to cases that are not yet final.

assessment (§ 1465.8, subd. (a)(1)), and a $150 restitution fine (§ 1202.4, subd. (b)), as well as previously imposed attorney fees.[8] (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1161–1162.) Dueñas presented undisputed evidence of her inability to pay, and the trial court waived the attorney fees. However, the court was statutorily required to impose the court facilities assessment and court operations assessment, and prohibited from considering her inability to pay as a "'compelling and extraordinary reason[ ]'" that would permit waiver of the minimum restitution fine. (*Id*. at p. 1163.) It therefore imposed the assessments and fine despite its finding that Dueñas was unable to pay them. (*Ibid*.)

The Court of Appeal held that the consequences Dueñas faced amounted to punishment on the basis of poverty, which the state and federal constitutional rights to due process and equal protection forbid. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1166–1172.) The court's decision was rooted in the well-established constitutional principles that "'allow no invidious discriminations between persons and different groups of persons'" and prohibit "inflict[ing] punishment on indigent convicted criminal defendants solely on the basis of their poverty." (*Id*. at p. 1166.) Specifically, the Court of Appeal stated: "'As legislative and other policymakers are becoming increasingly aware, the growing use of . . . fees and similar forms of criminal justice debt creates a significant barrier for individuals seeking to

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[8] A $150 restitution fine is the minimum that may be imposed upon a misdemeanant. (§ 1202.4, subd. (b).)

rebuild their lives after a criminal conviction. Criminal justice debt and associated collection practices can damage credit, interfere with a defendant's commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation. "What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large. . . . [¶] . . . Debt-related mandatory court appearances and probation and parole conditions leave debtors vulnerable for violations that result in a new form of debtor's prison. . . . Aggressive collection tactics can disrupt employment, make it difficult to meet other obligations such as child support, and lead to financial insecurity—all of which can lead to recidivism." [Citations.]' (*People v. Neal* (2018) 29 Cal.App.5th 820, 827.) [¶] These additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay." (*Duenas*, *supra*, 30 Cal.App.5th at p. 1168.) The appellate court reversed the trial court's order imposing the court facilities assessment and court operations assessment, and directed it to stay the execution of the restitution fine unless and until the People proved that Dueñas had the present ability to pay it. (*Id*. at pp. 1172–1173.)

The *Dueñas* court concluded that due process requires trial courts to determine a defendant's ability to pay before it

may impose the assessments mandated by section 1465.8 and Government Code section 70373, and requires trial courts to stay execution of any restitution fine imposed under section 1202.4, subdivision (b) until it has been determined that the defendant has the ability to pay the fine. These conclusions were not necessary to the resolution of the case, as the trial court had granted Dueñas's request for a hearing to determine her ability to pay the fine and assessments, and held the hearing before they were imposed. (See *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 443, quoting *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["'[a]n appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided"'"].) In the wake of *Dueñas*, these conclusions have spurred numerous defendants to challenge imposition of fines, fees, and assessments in the absence of an ability to pay hearing, even where the defendant did not request a hearing and the record bears no indication that waiver of these fines, fees, and assessments would be appropriate.

The harm that caused Dueñas's situation to rise to the level of a constitutional violation was the application of the statutes imposing fines, fees, and assessments, in the face of undisputed evidence that she was unable to pay and would undoubtedly suffer penalties based solely on her indigence. There is no similar harm suffered by the many defendants who are able to bear these costs without enduring additional penalties, and we cannot conclude that the constitution

requires extending the concepts expressed in *Dueñas* to afford all defendants an ability to pay hearing regardless of whether there is evidence that waiver of fines, fees, and assessments may be warranted.

The factual differences between the instant case and *Dueñas* are considerable. In contrast to Dueñas, Tisdale did not contest the assessments and fines imposed upon him. The record contains no evidence of his indigence. That he was represented in the trial court and on appeal by appointed counsel does not demonstrate an inability to pay the assessments or the restitution fine. (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 ["a defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have the 'ability to pay' a restitution fine"].) That Tisdale was unemployed and incarcerated at the time of sentencing is no indication of his ability to pay the fines and fees. There is no evidence that Tisdale lacked sufficient funds prior to his incarceration and would not have the means to earn sufficient funds to pay the fines and fees following incarceration. Nor is there evidence indicating that Tisdale will be subject to additional penalties based upon his inability to pay the assessments and fee. To the contrary, Tisdale's extensive term in prison will afford him the opportunity to earn prison wages over a significant number of years. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's ability to obtain prison wages].) The additional punishment that Dueñas faced on the basis of her poverty formed the entire

basis for the court's opinion in that case, whereas Tisdale has not been penalized as a result of poverty or even demonstrated a potential of future penalization due to impoverishment. Because Tisdale's case lacks the hallmarks that defined *Dueñas*, we decline to apply its reasoning to the facts before us.

DISPOSITION

The trial court's judgment is affirmed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.