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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR VILLATORO RIOS,

Defendant and Appellant.

B293392

Los Angeles County

Super. Ct. No. BA460505

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

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

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Edgar Villatoro Rios of two counts of second degree robbery and found he personally used a firearm during the commission of each offense. On appeal, defendant contends the prosecutor committed misconduct when she told the jury she intended to give a rebuttal argument that would be longer and more detailed than her initial closing argument. Defendant also argues the court violated his due process rights when it imposed a \$300 restitution fine, a \$30 criminal conviction assessment fee as to each robbery count, and a \$40 court security fee as to each robbery count without first determining defendant's ability to pay the fine and fees. We affirm the judgment.

PROCEDURAL BACKGROUND

The People charged defendant with two counts of second degree robbery (Pen. Code,¹ § 211) and one count of identity theft (§ 530.5, subd. (a)). The People alleged defendant personally used a firearm during the commission of the robberies (§ 12022.53, subd. (b)). At trial, the court granted defendant's motion to dismiss the identity theft count.

A jury convicted defendant of the two robbery counts and found true the firearm allegation as to each count. The court sentenced defendant to 12 years in prison. For count 1, the court sentenced defendant to the low term of 2 years for the robbery, plus 10 years for the firearm enhancement under section 12022.53, subdivision (b). As to count 2, the court sentenced

¹ All undesignated statutory references are to the Penal Code.

defendant to the same 12-year term, to run concurrently to the term for count 1.

The court ordered defendant to pay a \$300 restitution fine, plus a \$30 criminal conviction assessment fee and a \$40 court security fee for each robbery count. Defendant did not ask the court to determine whether he had the ability to pay the restitution fine, the criminal conviction assessment fee, or the court security fee, nor did he otherwise object to the court's imposition of the fine and fees.

Defendant appeals.

FACTUAL BACKGROUND

1. The First Robbery

In the early morning of August 13, 2017, Marlon Clemente was taking a break from his job as a Lyft driver. As Clemente stood next to his parked car, an SUV drove past him and stopped in the middle of the street. Defendant got out of the SUV, approached Clemente, and asked him for a cigarette. Clemente responded that he didn't have a cigarette, but he offered defendant his lighter.

After Clemente reached into his car to grab a lighter, defendant told him to hand over his wallet. Defendant then pulled what looked a handgun out of his waistband. Clemente described the gun as black metal with a cartridge or magazine protruding from the bottom of the grip. Defendant pulled back the slide on the top of the gun, as if to load it, and pointed it at Clemente. Clemente heard what sounded like metal parts sliding against each other as defendant cocked the gun. Clemente had experience handling real and fake guns, and he believed the gun defendant pointed at him was real.

Clemente went back to his car and grabbed his wallet. Defendant followed Clemente and put the gun back in his pants. After Clemente handed over his wallet, defendant demanded that Clemente give defendant his phone. When Clemente handed over his phone, defendant pulled the gun out of his pants again, pointed it at Clemente, and told Clemente to turn around. Clemente refused to turn around. Instead, Clemente backed away from defendant, ducked behind his car, and then ran behind a wall and waited until he heard the SUV drive away. After he was sure defendant had left, Clemente drove around until he spotted two police officers and reported the robbery.

2. The Second Robbery

About an hour after robbing Clemente, defendant approached Jay Ju, who was walking home. Defendant asked Ju for a cigarette, to which Ju replied, “No.” Defendant then pulled up his shirt, showed Ju a handgun in his waistband, racked the slide on the gun, and asked Ju to give him everything Ju had. Ju believed the gun was real based on how it looked and sounded when defendant racked the slide. After giving defendant his phone and wallet, Ju ran home and called the police.

3. Defense Evidence

David Kim, a firearms expert and former deputy sheriff, testified for the defense. Kim explained that many replica handguns, such as B.B., airsoft, or pellet guns, look like real handguns, even though they are made out of different types of metal and have different firing mechanisms. Kim showed the jury two replica handguns that resembled real firearms.

The police did not recover any handgun, real or fake, during its investigation of the robberies.

DISCUSSION

1. The Prosecutor's Argument

Defendant argues the prosecutor committed prejudicial misconduct when she told the jury, before her initial closing argument, that she intended to give a longer rebuttal argument than her initial closing argument. According to defendant, the prosecutor intended to “sandbag defense counsel” by depriving defendant of the opportunity to respond to the People’s arguments addressing the firearm allegations. As we explain, the prosecutor did not commit misconduct.

1.1. Relevant Background

Before beginning her initial closing argument, the prosecutor explained to the jury that she would argue twice, once before defense counsel argued and a second time to respond to defense counsel’s argument. The prosecutor then told the jury, “I’m going to keep my first argument very short and bare bones to the point. And after lunch you’ll get all the juicy details.”

The prosecutor’s initial closing argument spans about nine pages of the reporter’s transcript. The prosecutor first described the crimes and enhancements with which defendant was charged. The prosecutor then explained the elements of robbery and applied the facts of this case to those elements, separately discussing each count. The prosecutor also addressed the firearm allegations. With respect to count 1, the prosecutor spent about a page and a half arguing why the gun defendant used to rob Clemente was real, primarily focusing on Clemente’s description of the gun and how he came to believe defendant was using a real gun. As to count 2, the prosecutor spent about half a page of the reporter’s transcript arguing why the gun defendant used to rob

Ju was real. After discussing the individual charges and enhancements, the prosecutor used the remainder of her argument—about a page and a half of the reporter’s transcript—to address how the jury may consider circumstantial evidence and explained the beyond a reasonable doubt burden of proof.

After the prosecutor finished her initial closing argument, defendant objected, contending the prosecutor committed misconduct when she told the jury she would give a perfunctory initial argument followed by a more in-depth rebuttal argument. Defendant argued the prosecutor intended to preclude him from giving an effective closing argument by reserving most of her argument concerning the firearm allegations for rebuttal.

The court admonished the prosecutor that her comment that she intended to save the “juicy details” for her rebuttal argument “sounded like [she] planned to save [the] arguments [concerning the firearm allegations] for [her] rebuttal.” But after acknowledging the prosecutor did in fact address the firearm allegations in her initial closing argument, the court declined to limit the prosecutor’s rebuttal argument.

Near the beginning of defendant’s closing argument, defense counsel conceded that defendant committed the two charged robberies. Defense counsel then spent the remainder of his closing argument—about nine and a half pages of the reporter’s transcript—arguing why the jury could not find beyond a reasonable doubt that defendant used a real firearm during the commission of the robberies.

The prosecutor’s rebuttal argument spans about 10 pages of the reporter’s transcript. The prosecutor spent the majority of her rebuttal responding to defendant’s argument that the gun he used during the two robberies was fake. The prosecutor focused

on Clemente’s and Ju’s testimony addressing why they believed the gun defendant used during the robberies was real, and she tried to discredit defendant’s reliance on Kim’s testimony that fake or replica handguns often look like real guns. The prosecutor also played portions of defendant’s police interview, in which defendant denied participating in the robbery, to attack the credibility of defendant’s claim that the gun he used during the robbery was fake.

1.2. The prosecutor did not commit misconduct during her closing argument.

A prosecutor commits prejudicial misconduct under the federal constitution when she uses deceptive or reprehensible methods to infect the trial with such “ “ “ “unfairness as to make the resulting conviction a denial of due process.” ’ [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.” ’ [Citation.]” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1238 (*Hajek and Vo*), abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214–1215.) When a defendant asserts prosecutorial misconduct, a court must ultimately decide whether it is reasonably probable that a result more favorable to the defendant would have occurred absent the disputed conduct. (*People v. Strickland* (1974) 11 Cal.3d 946, 955.)

Section 1093, subdivision (e), permits the prosecutor to open the argument and to close the argument. While a prosecutor “ “ “ ‘is given wide latitude during argument,’ ” ’ ” (*People v. Stanley* (2006) 39 Cal.4th 913, 951–952), a prosecutor may not “give a perfunctory ... opening argument designed to preclude

effective defense reply, and then give a ‘rebuttal’ argument—immune from defense reply—10 times longer ... than his opening argument.” (*People v. Robinson* (1995) 31 Cal.App.4th 494, 505 (*Robinson*).)

Here, the prosecutor’s comments before her initial closing argument suggested she intended to reserve the bulk of her argument for rebuttal, which would have been improper had she in fact done that. (See *People v. Hill* (1967) 66 Cal.2d 536, 564–565 [a prosecutor may not “present [her] entire argument in rebuttal” to “accord the People an undue advantage”]; see also *Robinson, supra*, 31 Cal.App.4th at p. 505 [a prosecutor may not give a perfunctory initial closing argument followed by a much longer rebuttal argument designed to deprive the defendant of an opportunity to respond to the People’s argument].) But the prosecutor did not, in the end, structure her argument in a way that deprived defendant of an opportunity to respond to the People’s arguments.

As noted above, the prosecutor’s initial closing argument was only one page shorter than her rebuttal argument. That is in stark contrast to the prosecutor’s argument in *Robinson*, a case on which defendant relies. There, the reviewing court concluded the prosecutor’s closing argument was improper because the rebuttal was 10 times longer than the initial argument (the initial argument spanned 3.5 pages of the reporter’s transcript while the rebuttal spanned 35 pages). Moreover, unlike the prosecutor’s initial argument in *Robinson*, the prosecutor’s initial argument in this case was not perfunctory. While the prosecutor spent most of that argument addressing the robbery charges, she also addressed the firearm allegations, arguing to the jury that Clemente’s and Ju’s testimony supported a finding that defendant used a real firearm during the robberies.

That the prosecutor spent most of her rebuttal argument addressing the firearm allegations does not mean she “sandbagged” defense counsel with respect to those issues. Rather, the prosecutor’s rebuttal argument was a fair response to the theory raised by defense counsel during his closing argument. Before defense counsel argued, defendant had contested both the robbery charges and the firearm allegations. During defendant’s closing argument, however, defense counsel conceded defendant’s guilt on the robbery charges and used virtually his entire argument to address the firearm enhancements. Thus, by the time it was the prosecutor’s turn to present a rebuttal argument, the only contested issues remaining were the firearm allegations. The prosecutor’s rebuttal argument did not raise any issues that were not addressed in the prosecutor’s initial argument or defense counsel’s closing argument. On this record, we cannot conclude the prosecutor employed “ ‘deceptive or reprehensible” ’ ” techniques during closing argument or that she engaged in conduct so egregious it rendered the trial fundamentally unfair. (See *Hajek and Vo*, *supra*, 58 Cal.4th at p. 1238.) Accordingly, defendant’s claim of prosecutorial misconduct lacks merit.

2. Fine and Fees²

Defendant next contends the court violated his due process rights under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), when it imposed, without first determining his ability to pay, a \$300 restitution fine (§ 1202.4, subd. (b)), a \$40 court operations assessment for each robbery conviction (§ 1465.8), and

² This portion of the opinion reflects the views of Justice Edmon and Justice Dhanidina.

a \$30 court facility assessment for each robbery conviction (Gov. Code, § 70373, subd. (a)(1)).

Our colleagues in other divisions have held that *Dueñas* was wrongly decided. (See, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, 327–329; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060, 1067–1069; cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 926–927.) Our California Supreme Court is currently considering whether a court must consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.) Pending further guidance from our Supreme Court, however, we agree with *Hicks*. That is, *Dueñas* improperly wove together two distinct strands of due process precedent. The first strand secures a due-process-based right of access to courts. The second strand erects a due-process-based bar to incarceration based on failure to pay criminal penalties when that failure is due to indigence. However, imposing fines, fees, and assessments does not deny a criminal defendant access to the courts. And, mere imposition of those penalties does not result in incarceration for failure to pay due to indigence. Hence, neither strand prohibits imposing assessments and fines.

Moreover, unlike the defendant in *Dueñas*, defendant here did not object below on the ground of his inability to pay. Generally, where a defendant has failed to object to a restitution fine or assessment based on an inability to pay, the issue is forfeited on appeal. (*People v. Avila* (2009) 46 Cal.4th 680, 729; *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 206.) We agree with our colleagues in Division Eight that this general rule applies to the restitution

fine and assessments imposed here under the Penal and Government codes. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155; but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.)

Further, even if defendant had not forfeited his argument, *Dueñas* is inapplicable. Not all defendants are similarly situated to the *Dueñas* defendant, whose cerebral palsy rendered her unable to work and whose inability to pay fines and fees was directly related to her poverty. (See *People v. Johnson* (2019) 35 Cal.App.5th 134.) *Dueñas* thus is based on the due process implications of imposing assessments and fines on an impoverished defendant. The situation in which defendant here has put himself does not implicate the same due process concerns at issue in factually unique *Dueñas*. Defendant, unlike *Dueñas*, does not face incarceration because of an inability to pay assessments and fines. Defendant is incarcerated because he committed robbery while using a gun. And, even if defendant does not pay the fines and assessments, there is no indication he will suffer the cascading consequences *Dueñas* faced.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.

LAVIN, J., Concurring and Dissenting:

To secure a majority for the decision and provide timely resolution of the appeal, I have omitted from the majority opinion my view that defendant did not forfeit his challenge to the imposition of the court facilities fees (Gov. Code, § 70373), the court security fees (Pen. Code, § 1465.8), and the restitution fine (Pen. Code, § 1202.4, subd. (b)) by failing to object in the trial court. (See *Lyons v. Wickhorst* (1986) 42 Cal.3d 911; *People v. Howard* (1984) 36 Cal.3d 852; see also *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 595 [“it is not unprecedented for a justice to write a separate concurrence to an opinion of which he was the author for the court”].)

People v. Dueñas (2019) 30 Cal.App.5th 1157 (*Dueñas*), which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*Id.* at pp. 1169–1172.) No one saw it coming—and defendant should not have been required to anticipate it. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 137–138; *People v. Brooks* (2017) 3 Cal.5th 1, 92 [“ [r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence’ ”].) Indeed, the California Supreme Court recently granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47 to determine whether a court must “consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments” (see *People v. Kopp* (Nov. 13, 2019, S257844) __ Cal.5th __ [2019 WL 5997020]), further supporting the notion that a defendant could not be expected to anticipate the holding in *Dueñas* before that case was decided.

Addressing the merits of defendant's claims, the People contend the imposition of the restitution fine was constitutional but concede they do "not seek to uphold the imposition of [the court security and criminal conviction] assessments on those who have no ability to pay." The People acknowledge the "proper remedy is to remand to give [defendant] the opportunity to request a hearing on his ability to pay" those assessments. In light of the People's concession that remand is appropriate to assess defendant's ability to pay the court security and criminal conviction fees—and given the unsettled state of the law in this area—I see no reason why defendant should not also be allowed to ask the lower court to assess his ability to pay the restitution fine at the same hearing. I would therefore remand the matter for the limited purpose of affording defendant a hearing to determine his ability to pay the fines and assessments that the trial court imposed in this case. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 490 [where there is no record of the defendant's indigence, the appropriate remedy is to remand for the limited purpose of affording the defendant a hearing to assess his ability to pay the various fines and fees imposed by the trial court].)

LAVIN, J.