Filed 10/8/19 P. v. Guzman CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARIO GUZMAN,<br><br>Defendant and Appellant. | B290089<br><br>Los Angeles County<br>Super. Ct. No. PA088293 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Conviction affirmed; remanded with directions.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Mario Guzman of assault with a firearm, possession of a firearm by a felon, criminal threats, and intimidation of two witnesses. The jury found Guzman used a firearm in the commission of the assault and the criminal threats. The court sentenced Guzman to 21 years and eight months in state prison. The court also issued two protective orders barring Guzman from any contact with two victims for 10 years.

We conclude the trial court must stay Guzman's criminal threats sentence under Penal Code section 654[1] and vacate one of the protective orders. In all other respects, we affirm the judgment.

## FACTS AND PROCEDURAL BACKGROUND

### 1. *Guzman and the Gutierrez family*

Guzman—who was 45 years old, unemployed, and a daily user of methamphetamine—was married to Elizabeth Gutierrez, known as Lisa.[2] She also was unemployed and used methamphetamine daily. Guzman and Lisa had known each other since childhood, and they had been in a relationship for 11 or 12 years. They lived in a Pacoima apartment that belonged to Lisa's parents, Jose and Martha Gutierrez. Jose lived with Lisa and Guzman, but in March 2017 he left to stay with his son in Panorama City.

### 2. *The assault, the criminal threats, and the firearm*

On May 11, 2016, Guzman and Lisa were at the Pacoima apartment. They were under the influence of drugs. Lisa's brother Jessie had told Guzman to leave, and the two men were fighting. Lisa called her parents to report the trouble.

---

[1] Statutory references are to the Penal Code unless otherwise noted.

[2] Because a number of members of the Gutierrez family were involved in these events, we refer to them by their first names for clarity. We mean no disrespect.

Jose, Martha, and their 13-year-old granddaughter Elizabeth—known as Valentina—traveled by bus from Panorama City to the Pacoima apartment. When they arrived about 4:30 p.m., Jose and Valentina went to the apartment, while Martha went to a nearby store.

Arriving at the apartment, Jose saw the windows were all broken, and he could hear Lisa and Guzman arguing. Before long, Guzman came out and slammed the door. Jose asked, " 'Mario, all the windows are broken. So that there's no more problems, why don't you go home?' "

Guzman responded by "banging on a table with his hand." He threatened Jose, "I'm going to kill you, too, son of a bitch." Guzman "lift[ed] up his shirt and he pulled out the gun." Guzman waved the gun and pointed it at Jose's chest and head. The barrel of the gun was six to 18 inches from Jose. Jose could see the butt and the barrel of the gun. Jose felt like fainting. Guzman told Jose, "I'm not playing. I'm not playing. I'm not playing."

Valentina was a witness to all of this. She told the police: "He was pointing it at my grandpa and he was, like, all scared that he would like . . . ." She told the police the gun looked flat, like a Glock 40 that a detective showed her. Jose "was telling, telling him don't shoot him." Valentina tried to pull her grandfather away.

Jose did something with his hand, and Guzman stepped back. Guzman pointed the gun at Jose's face from a distance of five or six feet. Jose told Guzman "throw your shit away in the trash." Jose thought Guzman was "high on drugs," and Jose later testified he was not afraid of Guzman. Eventually, Guzman put the gun back in his pants.

In the meantime, Valentina ran to Martha and "told her everything that was happening." Martha called 911. Martha was crying during the call. She told the 911 operator, "My son-

in-law has a gun and he wants to hit my husband." "[T]hey're outside arguing and he has a gun. A little while ago he wanted to hit my son [Jessie] with a piece of iron." "[H]e wanted to hit him with a piece of iron a little while ago and he left and brought a gun. And he wants to hit my old man with the gun." When the operator asked Martha if she had actually seen the gun, she responded, "Well, my granddaughter said she did see it."

During the 911 call, Valentina ran back to see if the two men were still arguing. Guzman still had the gun, but he had stopped pointing it at Jose. Lisa was pulling Guzman back "and telling him to run, that they're going to snitch on him." Guzman ran out the back gate into the alley, and Jose chased after him.

When the police arrived, Lisa told Valentina " 'be careful what you say.' "

**3. *The second 911 call and Guzman's arrest***

Martha called 911 again the next day. She told the operator that Guzman had returned to the apartment and that he had a gun. Martha had not seen the gun, but Lisa had threatened she would tell Guzman "to pull the gun out . . . ." Martha told the operator that Guzman had followed her and threatened her, and she was afraid. Guzman had threatened her 73-year-old husband the day before. She and her husband had told Guzman to stay away, but he had come back.

The police came and arrested Guzman without incident. The police searched the apartment but did not find a gun or ammunition.

**4. *Attempted witness dissuasion***

While in custody, Guzman made several calls to Lisa before his first preliminary hearing, scheduled for May 24 and 26, 2016.[3] Guzman told Lisa, "Okay, look . . . you know that the

---

[3] The People originally filed the charges against Guzman as No. PA086326. The preliminary hearing took place in May 2016. That case was dismissed after the People announced unable to proceed. The prosecution refiled the case as No. PA088293. The

old man . . . that, the 2-4 . . . no one is there right . . . right . . . ." Guzman and Lisa frequently discussed whether Lisa's family would be going to the "fair." Guzman became very worried when he thought Lisa's family was going to the "fair": "No-no-no-no . . . . So, you're telling me you guys are going to the fair?" Guzman emphasized, "I need them to not go to the fair and that's it."

Valentina arrived for a court appearance on May 26, 2016 with her mother Maria and Jose. Lisa met them outside the courtroom. Lisa told them, "Oh, be careful what you say, we have a gun for all you guys."[4] Valentina's mother testified Lisa was "always saying a lot of things about guns and guns and I didn't pay attention." Lisa also tried to get her father to leave the courtroom, but he would not. Lisa tapped Jose on the shoulder and said to him, "Dad, it's better if you leave." He told her, "No. I'm not leaving."

Sandra Guzman, Mario Guzman's sister, approached Valentina and told her "you didn't see anything." Los Angeles Police Department Officer Shane Ampe saw an older woman approach Valentina outside the courtroom and tell her, "Tell the truth, tell them you didn't see anything. God's with you."

On some unspecified date before the second preliminary hearing in March 2017, Jose went to the Foothill police station after someone in a passing car told him he was going to be killed. Jose was waiting at the bus stop when "there was this vehicle in the center lane, a gray vehicle with tinted windows; and they lower the windows and they yell at me, you gonna get killed."

---

preliminary hearing in this case took place on March 14, 15, and 16, 2017.

[4] To avoid jail time, Lisa agreed to plead guilty to dissuading a witness. At Guzman's trial, however, she denied having made any threats.

Jose asked the officers who took his report not to tell Lisa that he had gone to the police station.

**5. *The charges, trial, and sentence***

The People charged Guzman with assault with a firearm on Jose (count 1), possession of a firearm by a felon (count 2), criminal threats against Jose (count 3), and attempting to dissuade Jose and Valentina as witnesses (counts 4 and 5). The People alleged that Guzman used a firearm in the assault and criminal threats against Jose and that he had suffered a strike prior for carjacking as well as prison priors under section 667.5, subdivision (b).

Guzman did not testify at trial, nor did the defense call any witnesses. The jury convicted Guzman on all counts and found the firearm allegations true. At the conclusion of a court trial on priors, the court determined Guzman had suffered a prior conviction for carjacking (a serious as well as violent felony) and had served three prior prison terms.

The court sentenced Guzman to 21 years and eight months in state prison. The court chose the upper term of four years on count 1, doubled because of the strike prior, plus the midterm of four years for the firearm under section 12022.5, subdivision (a), plus five years for the serious felony prior under section 667, subdivision (a)(1), plus two one-year terms for two prison priors. On count 2 the court chose the upper term of three years, doubled, and stayed that sentence under section 654. On count 3 the court imposed the midterm of two years, doubled, plus the midterm of four years for the firearm; the court ordered that eight-year sentence to be served concurrently with count 1. On each of counts 4 and 5, the court sentenced Guzman to eight months as one-third the midterm, doubled.

The court issued 10-year protective orders barring Guzman from any contact with Jose and Valentina. The court imposed a $300 restitution fine under section 1202.4, subdivision (b), a $200 court operations assessment ($40 per count) under section

1465.8, and a $150 conviction assessment ($30 per count) under Government Code section 70373. The court imposed and stayed a parole revocation fine.

## DISCUSSION

### 1. *Sufficiency of the evidence of a firearm*

Guzman contends his convictions for assault with a firearm and possession of a firearm by a felon, along with the firearm enhancements, must be reversed because there was insufficient evidence the gun he used to threaten Jose qualified as a "firearm" under the relevant statutes. We disagree.

a. *Governing legal principles*

In considering the sufficiency of the evidence, this court's task "is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*).) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " [Citations.]' " (*Rodriguez*, at p. 11.)

b. *Substantial evidence supports the jury's conclusion that Guzman threatened Jose with a firearm*

The Penal Code defines a "firearm" as "a device, designed to be used as a weapon, from which is expelled through a barrel,

a projectile by the force of an explosion or other form of combustion." (§ 16520, subd. (a).) The fact that an object was a "firearm" can be established by circumstantial evidence of both "the object's appearance and the defendant's conduct and words in using it." (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435-1438 (*Monjaras*).) The prosecution's reliance on circumstantial evidence is permissible "because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Id*. at p. 1436.)

Guzman argues jurors cannot rely solely on lay witness testimony about a gun's appearance because imitation guns—which do not satisfy the statutory requirements—now "duplicate precisely the outward appearance of genuine weaponry . . . ." (See *U.S. v. Martinez-Jimenez* (9th Cir. 1989) 864 F.2d 664, 667, fn. 1.) Guzman contends even trained professionals cannot reliably distinguish imitations from real firearms based on their outward appearance, citing a statute requiring imitation firearms to provide "a conspicuous advisory . . . that the product may be mistaken for a firearm by law enforcement officers or others . . . ." (§ 20160, subd. (a).)[5] Guzman cites a long list of decisions—published and unpublished—in which defendants committed crimes with imitation guns.

Here, however, the evidence went beyond the gun's outward appearance. The jury also had Guzman's words and

---

[5] Guzman cites to section 12554, but that section was repealed in 2010 and replaced with section 20160. "Section 20160 continues former Section 12254 without substantive change." (Cal. Law Revision Com. com., West's Ann. Penal Code (2019) foll. § 20160.)

conduct. Taken together, these provided substantial evidence from which the jury could infer the gun was a firearm.

According to Jose, Guzman called him a "son-of-a-bitch" and said he was going to kill him. According to Valentina, Guzman insisted—several times—he was not playing. In *Monjaras* the defendant and his accomplice robbed a female victim. (*Monjaras, supra*, 164 Cal.App.4th at p. 1434.) The defendant told the victim, "Bitch, give me your purse," and then "pulled up his shirt and displayed the handle of a black pistol tucked in his waistband." (*Id*. at p. 1436.) Although the victim "conceded that she could not say for certain whether [the gun] was 'a toy or real or not ' " (*ibid*.), the court found "the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm and that he was prepared to shoot the victim with it if she did not comply with his demand." (*Id*. at p. 1437.)

Guzman's words were even more explicit. The defendant in *Monjaras* suggested he had a firearm capable of doing grievous harm. Here, Guzman said he would kill Jose and warned repeatedly he was not playing. The jury was entitled to take Guzman at his word. (*Monjaras*, *supra*, 164 Cal.App.4th at p. 1437.) A "defendant's statements and behavior while making an armed threat against a victim may warrant a jury's finding the weapon was loaded." (*Rodriguez*, *supra*, 20 Cal.4th at p. 12 [defendant's threat that he could do to the victim what he had done to another person the previous day—he shot and killed that person—was tantamount to an admission that defendant's gun was operable and loaded].)

There also was testimony the object Guzman wielded looked like a firearm. After the incident, a detective showed Valentina his Glock 40, a real firearm, and asked her whether the gun Guzman had used was flat like the Glock or different, like a revolver. Valentina said the gun she had seen looked

like the detective's Glock 40.[6] That Valentina did not respond with more detail does not render the evidence insufficient. (Cf. *Monjaras, supra*, 164 Cal.App.4th at p. 1437 ["the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm"].)[7]

Indeed, Guzman's argument—carried to its logical extreme—would mean a gun enhancement never could be proved unless police found the gun and determined it was a real firearm, not a replica. That is not the law, for obvious reasons. Viewing the evidence as a whole, and indulging every reasonable inference in favor of the verdict as we must (*Rodriguez, supra*, 20 Cal.4th at p. 12), we conclude there was sufficient evidence from which the jury could infer Guzman's gun was a firearm. (*People v. Mora* (2018) 5 Cal.5th 442, 490-491 ["Even if the evidence supported [defendant's] theory, we are not free to reform the verdict simply because another theory is plausible."]; *People v. Jackson* (2016)

---

[6] Jose saw the gun from just six to 18 inches away, and from a few feet away he could see the butt and barrel of the gun. Although Jose testified at the preliminary hearing that the gun had not worked, he testified at trial that the gun was not broken and that Guzman "knows that the gun was working well."

[7] Guzman's reliance on *People v. Vaiza* (1966) 244 Cal.App.2d 121, is misplaced. In *Vaiza*, the defendant argued the court should have instructed the jury on a lesser assault offense based on his assertion he used a toy gun. (*Id.* at pp. 124-125.) The court concluded that, if defendant had used a toy gun, he would have been absolved of the lesser charge as well, thereby requiring no instruction on a lesser. (*Ibid.*) The court went on to conclude that the admission of prejudicial evidence—including a real weapon used for demonstration purposes—rendered defendant's trial unfair, and that without the prejudicial material "there [was] no substantial evidence to show that the pistol, even if real, was loaded." (*Id.* at p. 129.) The court did not determine what evidence would suffice to establish the gun was real.

1 Cal.5th 269, 345 [" 'If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' "].)

**2. *There was substantial evidence Guzman's threat caused Jose to fear for his safety***

Section 422 provides that a criminal threat must be conveyed in such a manner as to cause the victim to "be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." (§ 422, subd. (a).) Section 422 does not define "sustained fear," but courts have interpreted the phrase to mean "a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 (*Allen*).)

Guzman contends we must reverse his conviction for making a criminal threat because the prosecution did not prove his threat caused Jose to be afraid. Guzman does not challenge the period of time Jose was afraid, but he argues the jury could not conclude Jose was afraid "as he unequivocally testified he was not afraid."

As with the firearm evidence, our task is to determine whether credible evidence supported the jury's conclusion that Guzman's threat caused Jose to suffer the requisite fear. (*Rodriguez*, *supra*, 20 Cal.4th at p. 11.)

Although Jose testified he was not afraid, the jury was free to reject his direct testimony and to infer from other evidence that in fact he was afraid. (See *People v. Wader* (1993) 5 Cal.4th 610, 641 ["The jury was free to believe some of the [witness's] statements and to disbelieve other statements."]; *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 34 ["a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary"].) During his trial testimony, Jose cried and said, "[W]e really love [Guzman]." Jose said he didn't want to come to court and he "want[ed] this to finish." Jose had

written letters to the judge asking him to let Guzman go free "[s]o that we wouldn't have no more problems in our family." In his testimony, Jose admitted he had told officers at the Foothill station he "covered things up at the preliminary hearing so there wouldn't be any more problems." He also admitted under oath he still had concerns for his family's safety.

At the time of the altercation, Jose told two officers he felt like he was going to faint when Guzman was brandishing the gun and threatening to kill him. This alone would have been sufficient circumstantial evidence to overcome Jose's direct denial, but the jury had more. According to Valentina, Jose kept asking Guzman not to shoot him and "was, like, all scared . . . ." Based on these statements by Valentina and Jose, a reasonable juror could have decided that Jose—despite his brave words and behavior—was afraid, and that this fear was more than momentary or fleeting. (*Allen*, *supra*, 33 Cal.App.4th at p. 1156.) When Valentina left Guzman to tell her grandmother to call the police, Guzman was wielding the gun, and when she returned he was still wielding it. The jurors were in the best position to judge which of Jose's statements were true—those he made to authorities at the time, or those he made at trial some 18 months later.

**3. *Prosecutorial misconduct***

Guzman contends the prosecutor committed misconduct in closing argument when she "made unfair comment" on the evidence and argued facts not in evidence. He also argues his trial counsel was ineffective for failing to object and the court had a duty to intervene.

a. *Additional facts*

During closing, the prosecutor made the following arguments:

- On the criminal threat count, the prosecutor argued "[Mr. Gutierrez] had a gun pointed in his face, just within inches from his face, and he said the gun was

working, and he was freaked out and he thought he was going to faint."

- The prosecutor urged the jury to infer that, in their jail calls, Guzman and Lisa were discussing attempts to prevent witnesses from appearing at Guzman's upcoming preliminary hearing. For example, during the May 19 call, Guzman asked Lisa, "Okay, look, you know that old man, the two-four, no one is there, right?"

b. *Governing legal principles*

Prosecutorial misconduct violates the 14th Amendment when it so infects the trial with unfairness that the conviction denies the defendant due process and the right to a fair trial. (*People v. Tully* (2012) 54 Cal.4th 952, 1009-1010.) Even if the prosecutor's misconduct does not make the trial unfair, " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' " violates California law. (*Ibid.*) Absent a showing that an objection or request for admonition would have been futile or that the harm could not have been cured, an appellant may not complain of prosecutorial misconduct unless he timely objected to the alleged misconduct at trial and asked the court to admonish the jury to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

c. *Guzman forfeited his prosecutorial misconduct claims; they are without merit in any event*

The defense did not object to the prosecutor's comments that Guzman now raises on appeal. " 'When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely objection. Otherwise no claim is preserved for appeal.' " (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1019-1020, quoting *People v. Morales* (2001) 25 Cal.4th 34, 43-44.) Guzman does not argue any exception to forfeiture applies here.

In any event, we find no prosecutorial misconduct. A "prosecutor has a wide-ranging right to discuss the case in closing argument. [She] has the right to fully state [her] views as to what the evidence shows and to urge whatever conclusions [she] deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

The prosecutor's argument that Jose was "freaked out" was a fair inference from the evidence. Jose thought he was going to faint when Guzman pointed the gun at him; Jose asked Guzman not to shoot him; and Valentina told police Jose was afraid. The same is true of the prosecutor's argument that "the circumstances were [that] the defendant said these words to [Jose] as the gun was pointed at him." Jose testified Guzman said "I'm going to kill you" as he pulled out the gun and pointed it at Jose's chest.

When the prosecutor discussed the telephone calls, she again was arguing valid inferences; there was a preliminary hearing scheduled for May 24th, just five days after the phone call in which Guzman asked Lisa to reassure him that the "old man" would not be there on the "two-four."

All of the prosecutor's comments were well within the range of permissible argument, and we see no error. (See *People v. Thomas* (1992) 2 Cal.4th 489, 526 [misconduct claim failed because prosecutor's comments were fair inferences from the evidence].) Because we conclude the prosecutor did not commit misconduct, we need not address Guzman's arguments that his counsel was ineffective for failing to object or that the court should have corrected the prosecutor's comments on its own initiative.

**4. *Effectiveness of counsel***

Guzman asserts any reasonably competent counsel would have: 1) argued in closing that the People failed to prove Guzman had a firearm; 2) argued in closing "that the victim

himself Jose Gutierrez unequivocally testified that he was not in fear when appellant was threatening him"; 3) objected to testimony that his sister Sandra Guzman tried to dissuade Valentina from testifying; and 4) asked for a curative admonition after the court sustained an objection to a comment by the prosecutor in closing, suggesting the jurors put themselves in the shoes of the victim.

a. *Governing legal principles*

"When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of the representation provided by counsel." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1057-1058 (*Mitcham*).) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

b. *Guzman has not demonstrated constitutionally inadequate representation*

Guzman has failed to meet his burden because there are plausible explanations for each of the failures he alleges.

Based on the record before us, we cannot second-guess counsel's choice to emphasize what appear to have been Guzman's strongest arguments, while omitting the weak. First, as for the firearm, counsel focused on the testimony of Martha and Lisa that they saw no gun and that the Gutierrez family wanted Guzman removed from the apartment. Second, as for counsel's failure to focus on Jose's purported fear, counsel instead argued Jose had been the aggressor based on testimony by several witnesses that Jose threatened Guzman with an iron bar or metal rod. Third, regarding counsel's failure to object on

relevance grounds to Guzman's sister's attempt to dissuade Valentina, evidence that a friend or relative or anyone has discouraged a witness from testifying is relevant to the witness's credibility. (*People v. Warren* (1988) 45 Cal.3d 471, 484-486.) Fourth, counsel's failure to request further action—an admonition or a motion to strike—after the court sustained his objection to the prosecutor's comment was plausibly justified by a desire to avoid emphasizing objectionable material. (*People v. Homick* (2012) 55 Cal.4th 816, 875.) " '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) All of these decisions by Guzman's trial lawyer are tactical ones "not subject to second-guessing by this court." (*Mitcham*, *supra*, 1 Cal.4th at p. 1080.)

**5. *Guzman's sentence for making a criminal threat must be stayed under Penal Code section 654***

Guzman contends the trial court erred in running his sentence for making a criminal threat (count 3) concurrent with his sentence for assault with a firearm (count 1). He asserts the court should have stayed the criminal threat sentence under section 654. The Attorney General concedes the error and we accept the concession.

**6. *No hearing is necessary to determine Guzman's ability to pay fines and fees***

Without objection from Guzman, the trial court imposed a $300 restitution fine and $350 in assessments. In a supplemental brief, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Guzman contends we should "vacate" the assessments and stay the restitution fine "unless and until the People can show that he has the present ability to pay." We disagree.

In an opinion issued September 24, 2019, our colleagues in Division Two held that *Dueñas* was wrongly decided. (*People v. Hicks* (Sept. 24, 2019, B291307) __ Cal.App.5th __ [2019 WL

4635156].) We agree. (See also *People v. Aviles* (Sept. 13, 2019, F073846) __ Cal.App.5th __ [2019 WL 4408495]. Cf. *People v. Caceres* (Sept. 12, 2019, B292031) __ Cal.App.5th __ [2019 WL 4316477, at *6] ["urg[ing] caution in following" *Dueñas*; concluding in any event "the due process analysis in *Dueñas* does not justify extending its holding beyond" the "extreme facts" that case presented].)

Moreover, unlike the defendant in *Dueñas*, Guzman 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 court fees 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.) We agree with our colleagues in Division Eight that this general rule applies here to the restitution fine and the assessments imposed 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; but see *People v. Castellano* (2019) 33 Cal.App.5th 485.)

Finally, even if Guzman had not forfeited his argument, *Dueñas* does not apply here. Dueñas was the disabled, unemployed, often homeless mother of two young children. She was convicted of vehicle offenses. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160-1161.) The *Dueñas* decision is based on the due process implications of imposing assessments and fines on an impoverished defendant. The situation in which Guzman has put himself—a lengthy sentence in state prison—does not implicate the same due process concerns at issue in the factually unique *Dueñas* case. Guzman, unlike Dueñas, does not face incarceration because of an inability to pay assessments and fines. Guzman is in prison because he threatened his father-in-law with a gun—a gun he was prohibited from possessing because of several felony convictions. Even if Guzman does not pay the assessments and fines, he will suffer none of the

cascading and potentially devastating consequences Dueñas faced. (*Dueñas*, at p. 1163.)

**7. *The protective order as to Jose was authorized by law but the protective order as to Valentina was not***

Guzman contends the protective orders requiring him to have no contact with Jose and Valentina for 10 years were unauthorized by law and must be stricken. In his brief, the Attorney General conceded the issue. We accept the concession as to Valentina but, as it appeared to us the parties might be mistaken as to Jose, we requested letter briefs from counsel on the issue under Government Code section 68081. Having read the letter briefs, we conclude the no-contact order as to Jose was authorized.

a. *In this case, the minute order governs over the court's oral pronouncement*

At sentencing, without objection,[8] the trial court ordered Guzman to "have no contact with [Jose and Valentina] for a period of 10 years commencing today." The court stated it was imposing the orders "under 136.1, sub[d]. i." The court's minute order, however, referred to section 136.*2*, subdivision (i).

Section 136.1 describes the crime of witness intimidation and its penalties, but it does not have a subdivision (i). (§ 136.1.) Although the court's oral pronouncement of judgment ordinarily will control when there is a discrepancy between the minute order and the oral pronouncement (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2), this is not an inflexible "mechanical rule." (*People v. Smith* (1983) 33 Cal.3d 596, 599 [giving preference to the part of the record "entitled to greater credence" under "the circumstances of [that] particular case"].) Here, the court's

---

[8] An appellant may challenge an "unauthorized sentence" on appeal without first raising the issue in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382.)

minute order is entitled to greater credence because it cites an actual statute and one that authorizes protective orders. Accordingly, we analyze whether the protective orders were authorized under subdivision (i) of section 136.2.

b. *The protective order as to Jose stands*

Subdivision (i) of section 136.2 requires the court, at the time of sentencing, to consider a restraining order of up to 10 years in all cases where "a criminal defendant has been convicted of a crime involving domestic violence as defined in . . . Section 6211 of the Family Code . . . ." (§ 136.2, subd. (i)(1).) Family Code section 6211 defines "domestic violence" as "abuse perpetrated against . . . [a] cohabitant or former cohabitant, as defined in Section 6209." Family Code section 6209 defines "cohabitant" as "a person who regularly resides in the household," and "[f]ormer cohabitant" as "a person who formerly regularly resided in the household." The Family Code does not require cohabitants and former cohabitants to have a romantic, sexual, or dating relationship with the defendant. (*People v. Dallas* (2008) 165 Cal.App.4th 940, 953 [child unrelated to defendant but regularly residing in his home].) Family Code section 6203, subdivision (a) defines "abuse" as "any of the following: . . . (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another." Subdivision (b) states, "Abuse is not limited to the actual infliction of physical injury or assault." (Fam. Code, § 6203, subds. (a)(3), (b).)

These statutes authorize the court's protective order here, preventing Guzman from contacting Jose for 10 years. Jose lived with Guzman and Lisa in the Pacoima apartment for about 15 years. Because Jose was allergic to the dogs Guzman and Lisa had, by the time of trial he had gone to stay with his son in Panorama City. Accordingly, Jose was either a cohabitant or

a former cohabitant.[9] The jury convicted Guzman of criminal threats against Jose. Thus, the jury found beyond a reasonable doubt that Guzman "place[d] [Jose] in reasonable apprehension of imminent serious bodily injury" within the meaning of Family Code section 6203, subdivision (a)(3). Accordingly, that offense constitutes "a crime involving domestic violence" under Family Code section 6211. (§ 136.2, subdivision (i)(1).) The trial court did not err in ordering Guzman to stay away from Jose for 10 years.[10]

c. *The protective order as to Valentina must be vacated*

The Attorney General concedes the trial court must vacate the protective order as to Valentina. We accept the concession. Valentina was neither a cohabitant (or former cohabitant) of Guzman nor was she related to him by affinity within the requisite second degree. (§ 136.2; Fam. Code, § 6211.)

---

[9] It appears the protective order also was authorized through "affinity" by virtue of Guzman's marriage to Lisa, Jose's daughter. (Fam. Code, §§ 6205, 6211, subd. (f).) We need not reach this issue.

[10] In his letter brief, Guzman contends he was entitled to "meaningful notice" of the court's "intent to impose the protective order." Guzman cites *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948. Guzman concedes notice is not required in a domestic violence case. As we have explained, the criminal threats crime against Jose is domestic violence. Moreover, *Babalola* noted criminal protective orders may be properly issued under section 136.2 in "cases involving witness and victim intimidation." (*Babalola*, at p. 960.) Here, the jury convicted Guzman of witness intimidation against Jose. And, as we have said, the statute requires the court to consider issuing a protective order. That statutory requirement is sufficient "notice" to Guzman.

## DISPOSITION

The case is remanded for the trial court to stay the sentence for criminal threats and to vacate the protective order as to Valentina. We otherwise affirm the judgment.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

EDMON, P.J.

DHANIDINA, J.