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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANGEL HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B235289
(Super. Ct. No. 2008044775)
(Ventura County)

Jose Angel Hernandez appeals his conviction by plea for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹, making terrorist treats (§ 422), three counts of resisting an executive officer (§ 69), obstructing an officer (§ 148, subd. (a)), and vandalism (§ 594, subd. (b)(2)(A)) with two prior strikes (§§ 667, subds. (c) - (e); 1170.12, subds. (a) – (c)) and a prior serious felony conviction enhancement (§ 667, subd. (a)(1)). The trial court sentenced appellant to 18 years 4 months state prison and ordered him to pay victim restitution, \$1,200 restitution fines, \$1,391.64 to the Victim Compensation & Government Claims Board (§ 1202.4), and a \$1,524 presentence investigation fee.

We strike the \$1,524 presentence investigation fee because there is no evidence to support the finding that appellant has the financial ability to pay the fee. (§ 1203.1b, subds. (b) & (e).) The judgment, as modified, is affirmed.

The preliminary hearing transcript and probation report reflect that appellant got into a fight with a roommate, Martin Delgado, after work. Appellant beat Delgado on the head with a toaster, kicked the bedroom door down, and threatened to kill Delgado and

¹ All statutory references are to the Penal Code.

his brother. Appellant threatened to kill the officer responding to the 911 call and resisted three officers assisting in the arrest.

At the sentencing hearing, the trial court read and considered the presentence investigation report and statement-in-mitigation letters, and imposed a state prison sentence with restitution fines, victim restitution, and the recommended \$1,524 presentence investigation fee. Defense counsel was asked, "[I]s there anything else you want to put on the record?" Counsel replied, "No. Thank you very much"

Ability to Pay

Section 1203.1b, subdivision (b) provides : "The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." Appellant contends that the trial court failed to find that he had the financial ability to pay the presentence investigation fee and there is no evidence to support such a finding. The Attorney General argues that appellant did not object, forfeiting the alleged error. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072.) But no objection is required in order to preserve a claim of insufficient evidence for appeal. (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536–1537.)

Section 1203.1b, subdivision (e) provides in pertinent part: "The term 'ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation. . . and shall include, but shall not be limited to, the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonable discernible future financial position." Furthermore, "[i]n making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution." (§ 1203.1b, subd. (b)(3).)

In view of the restitution order and victim restitution fines, the 18 year 4 month prison sentence, coupled with appellant's lack of assets and on-going child support obligations, appellant does not have, and has no prospects of having, the financial ability to pay the \$1,524 presentence investigation fee. Unless the trial court finds unusual circumstances, a defendant sentenced to state prison is presumed not to have the future financial ability to reimburse the costs of his or her defense or a presentence investigation fee. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1068.) Nothing in the record shows that appellant will be able to pay the presentence investigation fee. (See e.g., *People v. Lopez, supra*, 129 Cal.App.4th at p. 1537 [express finding of unusual circumstances necessary to order defendant to reimburse cost of his or her defense per §987.8, subd. (g)(2)(B)].)

The \$1,524 presentence investigation fee is stricken. The superior court clerk is directed to amend the August 16, 2011 sentencing minute order and abstract of judgment and to forward certified copies to the California Department of Corrections and Rehabilitation.

The judgment, as modified, is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David M. Hirsch, Judge
Superior Court County of Ventura

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