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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. LORENZO RAMON MONTGOMERY, Defendant and Appellant.	B292270 (Los Angeles County Super. Ct. No. BA447219)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Robert J. Perry, Judge. Affirmed.

Ralph H. Goldsen, 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, Senior Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Lorenzo Ramon Montgomery guilty of murder, assault with a deadly weapon, two counts of robbery, three counts of carjacking, and one count of attempted carjacking based on his day-long, violent crime spree. On appeal, defendant contends the trial court erred when it failed to instruct the jury sua sponte on the defense of accident and abused its discretion when it admitted evidence of his prior theft and narcotics convictions. Defendant also argues that the court erred when it imposed a fine, fee, and assessment without first determining his ability to pay them. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution's Case*

1. Carjacking of De La Rosa

On June 1, 2016, at approximately 11:45 a.m., Manuel De La Rosa arrived at a laundromat located at the intersection of Atlantic Avenue and Martin Luther King Boulevard. As De La Rosa was parking his Toyota Sequoia, defendant approached the Sequoia carrying a "chrome gun." Defendant advanced to the driver's open door, pointed the gun at De La Rosa, and told him to get out of the car or defendant would shoot him. De La Rosa complied. Defendant entered the Sequoia and drove away from the laundromat.

2. Robbery of Davis

Around noon that same day, defendant drove the Sequoia to Continental Currency, a check cashing business near Rosecrans Avenue and Wilmington Avenue. Around the same time, Robert Davis arrived at the business with $600 in cash to pay his mortgage. While Davis was at the cashier's window, defendant pointed a gun at Davis's side and told him to "'give me all the money.'" Defendant then took Davis's money and walked outside. Davis followed defendant and defendant pointed the gun at him again, prompting Davis to run "back inside."[1]

3. Carjacking of Dunsmore and Colmenares

Just before 1:00 p.m. that day, Michael Dunsmore[2] drove his black Mazda[3] to a liquor store at Normandie Avenue and 104th Street with his friend Eno Colmenares in the passenger seat. He parked to the side of the entrance to the liquor store. While Dunsmore was parked, defendant approached the passenger side of the Mazda and asked Dunsmore a question. As Dunsmore responded, he had his head toward the steering wheel. When he turned back, defendant pointed a gun at him through the passenger window. Defendant said, "Give me . . . the keys or

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1 Surveillance videos of the robbery were played for the jury.

2 Dunsmore's testimony from the preliminary hearing was read at trial due to his unavailability.

3 The Mazda's license plates were from Ontario, Canada.

I'll shoot you." Dunsmore complied, gave defendant the keys, and got out of the Mazda. Defendant drove away in the Mazda. Colmenares identified a video that depicted defendant's approach to the Mazda, Colmenares and Dunsmore walking away from the car, and defendant driving away in the Mazda.

4. Murder of Dermelle Davenport

On the day of the shooting, Debdulal Barva was working as a cashier at an ARCO gas station located at Florence Avenue. He was present when Dermelle Davenport was shot. After viewing various video clips from the ARCO's security cameras showing the events of that day, Barva identified himself as the man in the cashier's booth inside the mini-mart.

The security videos from the ARCO, which were shown to the jury, depicted the following events. A white Porsche Cayenne backed up to one of the pumps at the gas station and parked. Davenport got out of the Cayenne and walked toward the pump island. As he did so, defendant arrived in the Mazda and parked it across from the Cayenne. Defendant approached Davenport, who began to walk away, toward the entrance to the mini-mart.

Outside the entrance to the mini-mart, defendant produced a handgun, held it close to Davenport's side, and followed him into the store. Inside the store, defendant followed Davenport to the cashier's window, where Davenport pushed something under the cashier's window pass-through toward Barva. Defendant and Davenport then engaged in an exchange in front of the cashier's window, during which Davenport attempted to hand defendant some items. Following the exchange, Davenport ran from the store, and defendant followed.

Davenport ran past the driver's door of the Cayenne, went around the front of the vehicle toward the pump island, and turned toward the street. As defendant began to enter the driver's seat of the Cayenne, Davenport suddenly turned back toward the vehicle and dove head-first through the open front-passenger window. Davenport's legs remained dangling outside the window. A very brief struggle ensued between the men inside the front of the vehicle and then Davenport stopped moving. Defendant exited the front-driver's door of the Cayenne and attempted to pull Davenport's body toward the driver's side of the vehicle. Defendant then moved around the front of the vehicle to the passenger side, opened the front-passenger door, pulled Davenport's body out of that side of the vehicle, and left the body on the ground outside the car.

Defendant returned to the driver's seat of the Cayenne and attempted to start the vehicle. After a few moments, defendant exited the Cayenne, went to the passenger side of the vehicle, and shut the door. Defendant then returned to the driver's seat in another unsuccessful effort to start the Cayenne, but ultimately retreated to the Mazda and drove away from the scene.

The police eventually arrived at the ARCO, shut it down, and conducted an investigation. Officers observed that the interior front driver side of the Cayenne had "blood all over [the] seat." An officer recovered a .380 caliber shell casing that he booked into evidence. The ignition for the Cayenne was located

to the left of the steering wheel, which was not the normal location for most vehicles.[4]

An autopsy revealed that Davenport died from a single gunshot wound to the head; the bullet entered at the top-right side of his head inside the hairline, passed through his brain, and lodged in the soft tissue of his "lower chin/head region." The coroner recovered the bullet. A criminalist recovered another bullet from the front passenger door.

5. Assault with a Handgun of Torres

On the evening of the shooting, at around 7:30 p.m., Salvador Martinez Torres arrived for work at a company called A.S.I.G. located adjacent to the Los Angeles International Airport. Defendant approached him as Torres was putting on his work shoes and pressed a gun against his stomach. Defendant did not say anything. Torres stayed still for several moments; when he saw that defendant "wasn't doing anything to [him]," he slowly moved toward the office and went inside. Inside the office, Torres told his supervisor that defendant had a gun and asked the supervisor to call the police.

Torres, his supervisor, and another employee then went back outside where Torres saw defendant trying to scale the chain link fence that separated the parking lot from the airport property. As defendant struggled to scale the fence, he dropped his gun beneath one of the vehicles. One of Torres's coworkers

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[4] The location of the ignition suggested that defendant was unable to drive away in the Cayenne because he could not start it.

retrieved the gun and eventually gave it to the police. When the police arrived, defendant got into the Mazda and drove toward Century Boulevard.

6. Defendant's Arrest and Statements

Numerous police officers followed defendant in the Mazda. The officers attempted to stop the vehicle by activating their patrol car's red and blue overhead lights. Defendant did not stop and instead drove for an additional 12 minutes as he was pursued by the police. Defendant eventually stopped the Mazda and was ordered by the police to exit the vehicle and to put up his hands. As officers arrested defendant, they noticed that defendant had a large blood stain on his shirt. An officer asked defendant if he was injured. Defendant responded that he had "shot someone." Because officers at the scene believed defendant might be injured, they called paramedics to respond.

Two officers were assigned to the hospital to "watch over" defendant in his hospital room. They had been instructed not to speak with defendant and to "remain quiet and wait" until relieved. At some point, defendant asked the officers if "the guy that [he] shot" died. One officer responded that he did not know. Defendant repeated the question and received the same response. Defendant then said, "I hope he did, the guy with the braids, nasty-ass braids." Following that statement, defendant stated, "That's all I'm going to give you guys" and then "smiled and looked away."

7. Postarrest Investigation

Following defendant's arrest, an officer retrieved a shell casing from the driver's seat of the black Mazda. A criminalist for the City of Los Angeles later inspected the Mazda driven by defendant during the pursuit. During the inspection, she recovered various items and booked them into evidence: a burnt cigarette "with possible unknown narcotics;" a glass vial with yellow liquid and brown residue "with possible unknown narcotics;" and a discharged .380 cartridge case recovered from the rear floorboard of the Mazda.

A Los Angeles Police Department criminalist conducted an analysis on the firearms evidence recovered by investigators. The three recovered discharged cartridge cases and the bullet recovered from the victim's chin were all fired from the .380 handgun recovered by investigators.

B. *Defense Case*

Numerous defense witnesses testified as to defendant's character. They explained that defendant was someone who stayed out of trouble, was not violent, and would not steal. We discuss below certain of that character testimony in greater detail.

Defendant's older brother, James Johnson, believed that defendant did not "have a violent bone in his body . . . ." On Memorial Day 2016, at about 6:00 a.m., Johnson picked defendant up from Harbor U.C.L.A. Medical Center. According to Johnson, there was "something clearly wrong" with defendant who was not behaving like "[Johnson's] brother." Defendant did

not know who he was or where he was. Johnson believed defendant was under the influence of PCP and that was confirmed by "the doctors" when Johnson picked him up.

Johnson had seen defendant smoke PCP more than once. When defendant was under the influence of that drug, he would "repeat himself" and not remember things he had done.

Defendant's mother, Mary Brown, also testified about picking defendant up from the hospital on Memorial Day 2016. According to Brown, defendant was disoriented and could not tell her why he had been in the hospital. A nurse told Brown "it was P.C.P." According to Brown, defendant was "talking crazy" and was not "really making much sense."

Defendant testified on his own behalf as follows: He started working as a barber when he was 18 and had previously operated his own barber shop. In his late thirties, defendant began using PCP and became addicted, but then went through a rehabilitation program in 2005 or 2006. Following his time in rehabilitation, defendant moved to Chicago for a new start. He was "clean and sober" for the entire eight years he lived in Chicago. But he developed depression and anxiety for which he sought treatment and was prescribed medication.

After he lost his job in Chicago, defendant moved back to California to help his mother, who had been diagnosed with cancer. Two or three months after defendant returned, his grandmother died, and two or three weeks after that, his father had a stroke. Caring for his father became so stressful that defendant resumed using PCP after a few months. When his youngest son was diagnosed with H.I.V., defendant decided that he could no longer handle the pressure.

About a week before the shooting, defendant overdosed on PCP and was admitted to the hospital. Defendant explained that he was involved in a car accident that resulted in his hospitalization and his car being impounded. After he was discharged from the hospital, defendant was unable to retrieve his car and personal belongings, which caused him to "overload." He decided to take his father's gun and "go find some money."

Defendant recalled that he "went and got a car from the Hispanic [man] at the Laundromat." He "asked [the man] for [the] keys to his car and then . . . went to the check cashing place" because he needed money. Defendant confirmed that he committed the robbery of Davis at the check cashing business. According to defendant, he had "never done [any]thing like [that] before in [his] life."

Following the robbery, defendant "just wanted to [overdose]. [He] just wanted to kill [him]self." He went to a location in Compton he frequented in the past and "bought a whole bunch [of] P.C.P. . . . ." After he smoked about four or five PCP cigarettes, he "really [did not] remember too much of anything. It [was] a blur." But defendant remembered being in a car and putting the gun on the console. Davenport "dove through the window and tried to grab the gun and [they] had a tug of war for the gun and the gun went off. [Defendant did not] know how [it discharged] because it wasn't supposed to have any bullets in [it]."

Defendant did not remember anything that happened after the gun discharged until he was at the airport "jumping on top of vehicles trying to get to [an] airplane." He also remembered "getting chased by" and "running from the police." He was "just . . . trippin' . . . . [He] was really high."

Defendant did not remember being in the hospital, conversing with officers, or being interviewed by a detective. Even after defendant watched a video showing him speaking with detectives in custody, he did not remember speaking to anyone while in custody until he telephoned his mother. On that call, defendant explained to his mother that an officer told him he had "murdered somebody."[5]

C. *Prosecution's Rebuttal*

Los Angeles Police Department Sergeant David Steussie testified about the symptoms of PCP intoxication. Sergeant Steussie reviewed the evidence in this case, including video footage from the ARCO and opined that defendant's movements were not consistent with those of a person under the influence of PCP. Sergeant Steussie explained that video footage depicted defendant engaging in divided attention tasks in a manner that was inconsistent with someone who was intoxicated from PCP use. For instance, video footage showed defendant holding a gun in one hand, bending down to scoop an item off the ground with another, and stepping over a curb. It also showed defendant taking money, walking out the door while holstering a gun or putting a gun to his side, and walking backwards. Defendant performed these tasks without stumbling, staggering, or bracing himself against anything. In addition, video footage showed defendant enter the Cayenne, struggle with Davenport, walk back to the passenger side, remove the body, close the passenger

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[5] The prosecutor cross-examined, portions of which we discuss further below.

door, and return to the driver side of the car, the sum of which movements demonstrated a thought process and dexterity that was inconsistent with being under the influence of PCP. Finally, the video footage demonstrated that defendant had put on additional clothing—a long-sleeved shirt—sometime between his presence at the cash-checking business and the ARCO. Sergeant Steussie concluded that putting on additional clothing was inconsistent with being under the influence of PCP because PCP use causes a rise in core temperature, which would cause a person to remove, not put on, clothing.

D. *Verdict and Sentence*

The jury returned a verdict of guilty on all counts in the information, which charged defendant in count 1 with the murder of Davenport in violation of Penal Code section 187, subdivision (a)[6] and further alleged that the murder was committed while defendant was engaged in the commission of a robbery within the meaning of section 190.2, subdivision (a)(17); in count 2 with the second degree robbery of Davenport in violation of section 211; in count 3 with the attempted carjacking of Davenport in violation of sections 664 and 215, subdivision (a) and further alleged that in the commission of the offenses charged in counts 1, 2, and 3, defendant personally used a firearm, discharged a firearm, and discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivisions (b), (c), and (d); in counts 4 and 5 with the carjacking

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[6] All further statutory references are to the Penal Code unless otherwise indicated.

of Dunsmore and Colmenares in violation of section 215, subdivision (a) and further alleged that in the commission of those offenses defendant personally used a firearm within the meaning of section 12022.53, subdivision (b); in count 6 with the assault with a handgun of Torres in violation of section 245, subdivision (a)(2) and further alleged that in the commission of that offense defendant personally used a firearm within the meaning of section 12022.5; in count 7 with the second degree robbery of Davis in violation of section 211 and further alleged that in the commission of that offense defendant personally used a firearm within the meaning of section 12022.53, subdivision (b); and in count 8 with the carjacking of De La Rosa in violation of section 215, subdivision (a) and further alleged that in the commission of that offense defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). The jury found the special circumstance and firearm enhancement allegations to be true.

The trial court sentenced defendant to an aggregate term of life without the possibility of parole, plus 25 years to life, plus 34 years and four months. It also imposed a fine, a fee, and an assessment discussed below.

III. DISCUSSION

A. *Jury Instruction on Accident*

1. No Sua Sponte Duty

Defendant contends that the trial court erred by failing to instruct sua sponte on the defense of accident. He concedes that

under *People v. Anderson* (2011) 51 Cal.4th 989 (*Anderson*) and *People v. Saille* (1991) 54 Cal.3d 1103 (*Saille*), when a defendant presents evidence to negate the prosecution's proof on an element of an offense, such as intent to kill, there is ordinarily no duty to instruct sua sponte concerning such evidence; instead, the defendant must request a pinpoint instruction relating such evidence to the specific element of the offense. Nevertheless, defendant cites *People v. Townsel* (2016) 63 Cal.4th 25 (*Townsel*) in support of his argument that "there is a duty to instruct even on pinpoint defenses when the defense is placed at issue by the evidence and forms an important part of the jury's inquiry."

We are not persuaded that the circumstances of this case require us to deviate from the well-established rule announced in *Saille, supra*, 54 Cal.3d 1103 and recently affirmed in *Anderson, supra*, 51 Cal.4th 989. The factual defense to the first degree premeditated murder charge suggested by defendant's testimony was that, while he was extremely intoxicated by the PCP he had ingested, defendant found himself embroiled in a struggle for the gun inside the Cayenne during which the gun accidentally discharged killing Davenport. That accidental discharge testimony was presumably intended to negate an essential element of the first degree premediated murder charge by showing that defendant did not act with the requisite mental state, i.e., express malice or the intent to kill. It therefore brought this case directly under the rule in *Saille* and *Anderson* which holds that a trial court has no sua sponte duty to instruct upon such pinpoint defenses, so long as the court instructs the jury on the requisite mental element of the offense. Instead, it was incumbent upon defendant to request a pinpoint instruction relating the defense to the necessary mental element.

Here, because the trial court instructed the jury using CALCRIM Nos. 520 and 521 on the requisite mental state required for express malice and first degree premeditated murder, it had no further duty to instruct sua sponte on the accident defense. Thus, under the controlling Supreme Court authority discussed above, the trial court did not err as contended.[7]

Defendant's argument based on *Townsel, supra*, 63 Cal.4th 25—that the "categorical" rule stated in *Saille, supra*, 54 Cal.3d 1103 has been "implicitly" modified to require sua sponte pinpoint instructions on defenses supported by the evidence—is unpersuasive. The defendant in *Townsel* "[a]cknowledg[ed] that instructions relating to mental state evidence to charged offenses are no longer required to be given sua sponte," and thus "relie[d] on the principle that once a trial court undertakes to instruct on a legal point, it must do so correctly." (*Townsel, supra*, 63 Cal.4th at p. 58.) In that case, the court had instructed the jury with a modified version of CALJIC No. 3.32—which advised the jury to consider the defendant's intellectual disability defense *only* on the issue of whether he acted with the requisite express malice for the murder charges—and thus implicitly precluded the jury

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[7] The jury was instructed on two theories of first degree murder—premediated murder and felony murder based on the killing during the course of a robbery—and accident is not a defense to felony murder. Thus, according to the Attorney General, there could be no sua sponte duty to instruct on accident as to that alternative theory of murder. Because we conclude that the trial court had no sua sponte duty to instruct on accident as to premeditated murder, we do not need to reach the merits of the Attorney General's argument.

from also considering that disability as to other charges or special allegations, such as deliberation and premeditation. (*Townsel, supra*, 63 Cal.4th at pp. 57, 59.) The court in *Townsel* agreed that the instruction limiting the disability defense to the issue of express malice precluded the jury from considering that defense on other issues to which it potentially applied, such as premeditation. The court therefore exercised its discretion to review the issue, despite the defendant's failure to object to the instruction, because it affected the defendant's substantial rights. (*Id*. at pp. 59–60.)

Here, there is no claim that a specific instruction given by the trial court precluded the jury from considering the defendant's testimony that the gun accidentally discharged on any claims or issues, such as express malice or premeditation. The jury was instructed on all the elements necessary, not only for express malice murder, but also for a finding on the deliberation and premeditation necessary for first degree murder; and, unlike in *Townsel, supra*, 63 Cal.4th 25 the jury was not expressly instructed to refrain from considering certain evidence in connection with those issues. Thus, the jury was free to consider defendant's accidental discharge testimony in conjunction with his intoxication testimony, as it related to each of those issues. The holding in *Townsel* thus has no application to the sua sponte duty question at issue here, which duty, as discussed, is controlled by *Saille, supra*, 54 Cal.3d 1103 and *Anderson, supra*, 51 Cal.4th 989.

2. No Ineffective Assistance of Counsel

Defendant next contends that if the trial court had no sua sponte duty to instruct on accident then he received ineffective assistance of counsel. According to defendant, given his testimony concerning the accidental discharge of the gun, no reasonable attorney would have failed to request a pinpoint instruction on accident or failed to argue accident as a defense to the murder charge.

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective

assistance are more appropriately resolved in a habeas corpus proceeding. (E.g., *People v. Vines* (2011) 51 Cal.4th 830, 875–876 . . . ; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267 . . . .)" (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

The primary defense theory at trial was that defendant was so intoxicated that he lacked the ability to form the intent to kill or to premediate and deliberate. In support of this defense, defendant, his brother, and his mother each testified about his prior use of PCP, which caused defendant not to remember things and caused him to speak and act in a manner that did not "mak[e] much sense." According to defendant's testimony, after robbing Davis, he ingested PCP and did not remember "too much of anything" afterwards; "[it] was a blur." Yet defendant claimed to remember the details of putting the gun on the console; Davenport diving through the window; and a purported "tug of war" over the gun, all of which occurred in a matter of seconds. Defense counsel could have reasonably concluded that defendant's testimony about a struggle for control over the gun and a resulting accidental discharge would highlight the inconsistencies between defendant's claim that he did not recall what happened after he ingested PCP and his detailed recall of the struggle with Davenport, inconsistencies that would serve to discredit defendant's primary defense of PCP intoxication.

In making a tactical decision not to seek a pinpoint instruction on accident, counsel could also have reasonably concluded that the evidence relating to that defense was too weak to support it. The autopsy evidence showed the fatal bullet entered the top of Davenport's head and passed straight through his skull, which reflected a level of precision that was inconsistent with an accidental discharge during a struggle. And

defendant had fired at least two shots while inside the Cayenne: one bullet was found lodged in Davenport's chin and another was found lodged in the door of the car. There was also evidence that defendant fired at least two additional shots while in the Mazda, as two cartridges were found inside that car, although there was no evidence about when he fired such shots. Evidence that defendant fired multiple shots in the Cayenne and in the Mazda was plainly inconsistent with defendant's claim that he did not know the gun was loaded and had shot Davenport accidentally. Finally, defendant's statement following the shooting that he hoped "the guy with the braids, nasty-ass braids" was dead, strongly rebutted defendant's claim of accident. We therefore find no merit on appeal to defendant's ineffective assistance contention.

B. *Admission of Theft and Narcotics Convictions*

Defendant contends that the trial court abused its discretion when it allowed the prosecutor to cross-examine Mary Brown and defendant about defendant's past theft and narcotics convictions. According to defendant, the theft and narcotics convictions were not relevant to Brown's character testimony or to defendant's credibility; and, in any event, those convictions were more prejudicial than probative.

1. Background

Defendant's mother, Mary Brown, described defendant as an "average kid" whom she "kept . . . busy in sports" and church

to "keep [him] out of trouble." She maintained that he was not a violent person or a person who would steal from others.

During a break in Brown's testimony, the prosecutor asked for a sidebar conference concerning certain evidence the prosecution intended to introduce. Specifically, the prosecutor informed the trial court that, based on the testimony of Brown, she intended to cross-examine Brown about (1) defendant's "misdemeanor conviction for petty theft;" (2) his "felony conviction for narcotics [possession] in 2016;" and (3) a taped jailhouse telephone conversation between defendant and Brown during which he informed her that "he had to beat somebody up because he didn't want to share his cell." The trial court responded by asking defendant's trial counsel whether he had seen the transcript of the taped conversation, to which defense counsel responded, "No, but I'm fine with that. I'm fine with that. [¶] . . . [¶] [But w]hat about the [narcotics] possession? I mean, it's possession. It's not a crime of moral turpitude. It doesn't come in." The trial court disagreed, ruling that, given Brown's character testimony, questions about the prior convictions and the taped conversation were appropriate, assuming they were in the proper form. "The Court: I think given [Brown's] statement, you can certainly ask—the way you should properly ask, have you heard [defendant] has a conviction on such and such a date."

Following the sidebar conference, the prosecutor asked Brown if she recalled her prior testimony that defendant was "a very honest person and would never steal or take something from another," to which Brown replied, "I've never known him to take something from anybody else." The prosecutor then asked Brown if she had heard that defendant "was arrested in October . . .

1991 for theft," to which Brown responded, "No." Although the prosecutor then proceeded to question Brown in some detail about her taped telephone conversation with defendant in jail, she did not question Brown further about the theft or ask any questions about defendant's narcotics conviction.[8]

During cross-examination of defendant, the prosecutor asked him, without objection, whether he had sustained a felony conviction in 2006 for possession of a controlled substance. Defendant responded that he was not the person who had possessed a controlled substance, someone else had used his name, and the case had been thrown out. Then, the prosecutor asked defendant, again without objection, whether he had been convicted of theft of personal property in 1991. Defendant said that he did not recall, although he had stolen some alcohol as "a young kid," that is, when he was 20 years old.

2. Forfeiture

The only specific objection made by defense counsel to either of defendant's two convictions was his objection to the narcotics conviction during Brown's testimony on the grounds

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[8] Later in the trial, defendant recalled the investigative detective to the stand and cross-examined her about a reference to a robbery in defendant's "rap sheet" for which there was no information about a conviction. On redirect examination, the detective confirmed that defendant's rap sheet showed convictions for theft of personal property and possession of a controlled narcotic substance. Defense counsel did not object to those questions and defendant does not challenge the admissibility of the detective's responses on appeal.

that it was not a crime of moral turpitude. But the prosecutor did not cross-examine Brown about the narcotics conviction and thus there could be no error on that score.

In addition, defendant did not object to the prosecutor asking Brown about defendant's theft conviction. Nor did defendant object to the prosecutor's cross-examination of defendant about his two prior convictions. A defendant forfeits appellate review of the admissibility of evidence by failing to object to the evidence in the trial court. (*People v. Wilson* (2008) 44 Cal.4th 758, 792–793.) Thus, defendant has forfeited any challenge to the trial court's ruling allowing questions about the theft conviction to rebut Brown's character testimony, as well as any challenge to the cross-examination of defendant about his two prior convictions.

3. No Ineffective Assistance of Counsel

Defendant alternatively argues that if defense counsel did not preserve his evidentiary objections for appeal, he rendered ineffective assistance, as there could have been no strategic reason for the failure to make such objections to the prior convictions.

The general legal principles applicable to this claim of ineffective assistance are the same as those discussed above. When examining an ineffective assistance claim, we defer to counsel's reasonable tactical decisions, including the decision whether to object, which is inherently tactical and rarely the basis for an ineffective assistance claim. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) Nor can we uphold a claim of ineffective assistance based on counsel's decision not to make

meritless objections. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.) Finally, even if a defendant can demonstrate that counsel's performance was deficient, he must additionally show "resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai, supra*, 57 Cal.4th at p. 1009.)

An objection to the prosecutor's cross-examination of Brown about defendant's prior theft conviction would have been meritless. Brown testified that defendant was not the type of person who would steal. "'It is well established that, "[w]hen a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony." [Citation.] So long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire. [Citation.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173.)

As to the prosecutor's cross-examination of defendant about his prior convictions for theft and narcotics possession, even if we were to assume for the sake of argument that counsel was objectively unreasonable in failing to object to this line of cross-examination, we would affirm because defendant cannot demonstrate that, but for counsel's deficient performance, there was a reasonable probability of a more favorable outcome.

The evidence against defendant was overwhelming. There was clear video footage depicting defendant's crimes against Davis, Dunsmore and Colmenares, and Davenport. Moreover, defendant admitted to taking his father's gun, taking the car from De La Rosa, and robbing Davis. Further, he admitted to

being the person who shot Davenport, but claimed that due to his intoxication from PCP, he lacked the intent to kill and had shot Davenport by accident. Defendant concedes, however, that his defense of intoxication was "not very persuasive" because it was not corroborated by any forensic evidence showing what, if any, amount of PCP was in defendant's blood. Nor did defendant present any expert testimony about whether defendant's level of intoxication would affect his ability to form the intent to kill. By contrast, the People introduced expert testimony that defendant's conduct during the murder was inconsistent with someone acting under the influence of PCP.

In light of the strength of the evidence against defendant and the serious nature of the charges pending against him, there is no reasonable probability that excluding the brief references to defendant's prior theft and narcotics convictions would have changed the outcome of this trial.

C. *Ability to Pay Fine, Fee, and Assessment*

At the sentencing hearing, the trial court imposed a $300 victim restitution fine (§ 1202.4, subd. (b)); a $320 court security fee (§ 1465.8, subd. (a)(1)); and a $240 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)). At the time, defendant did not request a hearing to determine whether he was able to pay the fine, the fee, and the assessment.

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant contends the trial court erred in ordering him to pay the restitution fine, the court operations fee, and the criminal conviction assessment without conducting a hearing on his ability to pay those amounts. According to defendant, we

should stay the restitution fine, vacate the fee and assessment, and remand for an ability to pay hearing. The Attorney General argues, among other things, that defendant has forfeited this issue by failing to object to the imposition of the fine, fee, and assessment without an ability to pay hearing.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) This forfeiture doctrine applies where a defendant fails to object to the imposition of fines and fees at sentencing. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Avila* (2009) 46 Cal.4th 680, 729.)

According to the probation report, at the sentencing hearing, defendant's employment and financial status were unknown. We do know, however, that defendant was 46 years old at the hearing and the trial court sentenced him to, among other terms, life in prison without the possibility of parole, a term that should enable him to earn sufficient wages during his incarceration to satisfy his fine, fee, and assessment obligations. Therefore, based on the specific facts of this case—and assuming *Dueñas, supra*, 30 Cal.App.5th 1157 was correctly decided—any error in failing to hold an ability to pay hearing was harmless beyond a reasonable doubt. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139–140 ["even if we were to assume [the defendant] is correct that he suffered a due process violation when the court imposed this rather modest financial burden on him without taking his ability to pay into account, we conclude that, on this record, because he has ample time to pay it from a readily available source of income while incarcerated, the error is harmless beyond a reasonable doubt"].)

IV. DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.