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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. ALFONZO PICKENS, Defendant and Appellant.	B290905 (Los Angeles County Super. Ct. No. BA465102)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Judgment of conviction affirmed; sentence vacated and matter remanded for further proceedings.

Elizabeth Richardson-Royer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Alfonzo Pickens of making criminal threats, with a deadly and dangerous weapon enhancement. He contends the trial court committed evidentiary errors, which were individually and cumulatively prejudicial; the matter must be remanded for resentencing in light of passage of Senate Bill No. 1393 (2017—2018 Reg. Sess.) (Senate Bill 1393); and the imposition of fines and assessments, without a determination of his ability to pay, violated his due process rights. We vacate Pickens's sentence and remand for resentencing in light of Senate Bill 1393. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

(i) *The threats against Sanders*

Kecia Sanders worked as a uniformed, unarmed security guard at a Los Angeles mall, "The Bloc." In approximately November 2017, she and a colleague encountered Pickens, asleep on the stairs at an entrance to the mall. The colleague told Pickens he was trespassing and had to leave. Pickens became "very hostile, cussing" Sanders and her colleague out and telling them to "leave [him] the fuck alone."

Sanders typically rode the Metro train to work, and had seen Pickens on the train five to 10 times. On one of those occasions, Sanders observed Pickens threatening a young woman, who appeared to be 16 or 17 years old, and who was wearing a uniform and a backpack. Sanders explained, Pickens "got into it with a young Latin[a] female." Sanders "cuss[ed]" the girl out and told her he would "beat her ass and everything else."

Sanders told Pickens to "chill out." He ignored Sanders and continued arguing with the girl.

On January 27, 2018, at approximately 3:00 a.m., while patrolling the shopping center, Sanders again saw Pickens sleeping on a mall stairway. She asked him three times to get up and leave. The third time, he jumped up, cussed her out, and "got in [her] face." Frightened, Sanders backed up. Pickens said, "bitch, I'll kill you." He pulled a black knife out of his pocket, briefly waved it in her face, and replaced it in his pocket. He said, "You better leave me alone. You better back off before I kill you, bitch." Sanders was "terrified." Hoping to de-escalate the situation, Sanders remained calm. She radioed for help and let Pickens "do all the talking." She informed the operator that Pickens had a knife. Sanders did not run because she was afraid Pickens would stab her if she "made a wrong move."

Pickens walked alongside Sanders, repeating his threats. Sanders walked with Pickens to the corner of 7th and Hope Streets to ensure he left the property. At the same time, Sanders's supervisor, Paul Voyt, and another security guard approached to assist her. Shortly thereafter, Pickens returned and screamed at Sanders, Voyt and the other guard. Pickens angrily screamed at Sanders, "Bitch, you better leave me alone before I kill you" and "Yeah, bitch, I'll catch you on the train," which she understood to be a threat. According to Voyt, Pickens threatened Sanders at least a dozen times.

Officers arrived on the scene and, after Sanders related what had happened, arrested Pickens. Sanders described the knife as a black knife with a long tip. Officers found a knife matching that description in Pickens's pants pocket.

A video depicting portions of the incident, taken from the mall's surveillance system, was played for the jury.

The prosecutor also introduced into evidence portions of Pickens's preliminary hearing testimony regarding the incident.

(ii) *The July 2016 uncharged misconduct*

At approximately 9:30 a.m. on July 13, 2016, Jose Rodriguez was working as a technician for the Metro Transit Authority at the 7th Street station. A woman approached him and stated she was afraid to go to the subway platform because Pickens was following her and "saying a lot of bad things to me and he scares me." Rodriguez offered to walk her to the station platform.

As Rodriguez and the woman walked, Pickens attempted to grab Rodriguez's arm. Rodriguez told Pickens to get away from him. Pickens responded that the woman was a racist. When Rodriguez told Pickens he should leave or he would call the authorities, Pickens said, "Motherfucker, I'm not afraid of you or the sheriffs." Pickens continued to curse at Rodriguez. Rodriguez radioed for assistance from the Los Angeles County Sheriff's Department, and again told Pickens to get away.

Pickens, who appeared agitated, moved close to Rodriguez and opened his hand in an aggressive manner. Afraid, Rodriguez shoved Pickens hard several times, while Pickens cursed at and threatened him, stating, "I'm gonna kill you motherfucker. I'm gonna cut your head off." Pickens reached into his backpack and pulled out a knife-like weapon. Rodriguez backed up and again radioed for help. With an "evil smile," Pickens said, "Oh, now you're afraid, motherfucker?" and swung the knife at Rodriguez's side. Rodriguez jumped back, held up his radio, and told Pickens that if he came closer, Rodriguez would break his head open.

Pickens said, "You're a lucky motherfucker but I'm going to come back and kill you." He then walked across the street.

Officers arrived and detained Pickens. He had a knife-like saw in his pocket.

When cross-examined about the incident, Pickens stated that he never approached Rodriguez; however, Rodriguez pushed him three times. He admitted pulling a saw out of his backpack, but denied approaching Rodriguez with it, threatening to kill him, or trying to stab him with the saw.

b. *Defense evidence*

Pickens testified in his own defense. He was sleeping on the corner of 7th and Flower Streets, because medication he was taking sometimes "knock[ed him] out." When Sanders asked him to leave, he got up, put his backpack on, and walked down the sidewalk without saying anything. She followed and suggested that if he "can't make it where [he could] go," he should cross the street and sit at the Metro station. He denied threatening Sanders or pulling a knife. He was in "too much pain," due to a medical condition, to make such threats.

Sanders could not have seen him on the Metro after her graveyard shift because on six days of each week, he spent all morning, between 5:00 and 9:00 a.m., at the Slauson subway station, ensuring that no one bothered the female tamale vendors who worked there. Then, he usually distributed food to four or five persons at 7th and San Julian Streets. After that, each day he returned to the Slauson station to distribute hygiene items to homeless people. He explained, "That's my character."

Pickens insisted that he would never threaten or harm a woman. He testified: "I wouldn't do anything to a lady. I'm from the old school. I stick to the script, like, a woman you don't

disrespect. You don't cuss at. You don't cuss in front of. You don't touch. [¶] Now, I know this is not something to be proud of to be said, but I grew up in the streets . . . . And in the streets, that's something that you just don't do. You don't do nothing contrary or negative to a woman. Period. And I stick to that."

As discussed more fully where relevant *post*, the prosecutor cross-examined Pickens about two incidents in which he behaved aggressively toward female strangers.

Pickens admitted suffering prior felony convictions for first degree burglary, vehicle theft, attempted extortion by threat or force, and making criminal threats.

2. *Procedure*

Pickens represented himself at trial. A jury convicted him of making criminal threats against Sanders (Pen. Code, § 422),[1] and also found true the allegation that he personally used a deadly and dangerous weapon, a knife, in commission of the offense (§ 12022, subd. (b)(1)). The trial court denied Pickens's motion for a new trial.

Prior to sentencing, the court revoked Pickens's in propria persona status because of his disruptive behavior, and appointed standby counsel to represent him. In a bifurcated proceeding, the court found Pickens had suffered two prior serious felony, "strike" convictions (§§ 667, subds. (a), (b)—(i), 1170.12, subds. (a)—(d)) and had served nine prior prison terms within the meaning of section 667.5, subdivision (b). It struck each of the section 667.5, subdivision (b) enhancements (§ 1385), as well as one of the prior strike convictions (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), and stayed sentence on the deadly weapon

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[1] All further undesignated statutory references are to the Penal Code.

enhancement. It sentenced Pickens to 14 years in prison, comprised of the midterm of two years, doubled, plus two five-year serious felony enhancements. It imposed a $300 restitution fine, a suspended parole revocation restitution fine in the same amount, a $40 court operations assessment, and a $30 criminal conviction assessment. Pickens timely appealed.

DISCUSSION

1. *Admission of evidence of uncharged misconduct*

Pickens contends the trial court erred by admitting evidence of the July 2016 incident and by allowing Sanders to testify about his alleged behavior with the young woman on the train. He also argues that the prosecutor's cross-examination of him regarding his aggressive behavior toward other women was improper. We discern no reversible error.

a. *Applicable legal principles*

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is "broadly defined as that having a 'tendency in reason to prove or disprove any disputed fact that is of consequence' to resolving the case." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405 (*Bryant*); Evid. Code, § 210.) Evidence a defendant committed misconduct other than that currently charged is inadmissible to prove his or her propensity to commit the charged crime. (Evid. Code, § 1101, subd. (a); *Bryant*, at pp. 405–406; *People v. Rogers* (2013) 57 Cal.4th 296, 325.) However, such evidence is admissible if it is relevant to prove, among other things, intent. (Evid. Code, § 1101, subd. (b); *People v. Molano* (2019) 7 Cal.5th 620, 664; *People v. Jones* (2011) 51 Cal.4th 346, 371.) "To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for

which the evidence was presented." (*Jones*, at p. 371.) "The least degree of similarity between the uncharged act and the charged offense is required to support a rational inference of intent; a greater degree of similarity is required for common design or plan; the greatest degree of similarity is required for identity." (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 859; *People v. Jones* (2013) 57 Cal.4th 899, 930.)

Even if other crimes evidence is admissible under Evidence Code section 1101, subdivision (b), it should be excluded under Evidence Code section 352 if its probative value is substantially outweighed by undue prejudice. (*Bryant*, *supra*, 60 Cal.4th at pp. 406–407; *People v. Thomas* (2011) 52 Cal.4th 336, 354.) Because other crimes evidence may be highly inflammatory, it should be admitted only if it has substantial probative value. (*People v. Jones*, *supra*, 57 Cal.4th at p. 930; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) We review a trial court's rulings on relevance and the admission of evidence under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114; *People v. Rogers*, *supra*, 57 Cal.4th at p. 326.)

b. *The July 2016 incident*

Prior to trial, and over Pickens's relevance objection, the trial court ruled that evidence of the July 2016 incident was admissible to prove intent, pursuant to Evidence Code section 1101, subdivision (b). It concluded the prior incident was sufficiently similar to the charged offense, and the evidence was more probative than prejudicial. The court instructed the jury that evidence of the July 2016 incident was admissible only for the limited purpose of deciding whether Pickens "acted with the intent that his statement be understood as a threat in this case."

Pickens argues the trial court erred because (1) the July 2016 incident was dissimilar to the charged conduct; (2) the evidence did not show his intent in the charged crime; (3) his intent was not at issue because, if he committed the alleged conduct, there could be no genuine dispute he possessed the requisite intent; and (4) even if relevant, the evidence was unduly prejudicial under Evidence Code section 352.

The July 2016 incident was sufficiently similar to the charged offense. In both incidents, when an employee asked Pickens to leave the premises, Pickens reacted by getting angry, pulling a weapon, and threatening the employees. He told both victims he would harm them when he saw them on a subsequent occasion. And, both incidents occurred in a public place, in the same area of downtown Los Angeles. Pickens points out that the two incidents occurred at different times of day; one involved a male victim, the other a female; the 2016 incident originated with Pickens's harassment of a Metro patron, whereas in the charged offense he was woken up by the victim; and, in the July 2016 incident, but not the charged crime, the victim responded with physical force. But we do not view these differences as significant. The salient point was that in both instances, Pickens reacted to a simple request to leave by pulling a weapon and threatening the victim. As noted, the least degree of similarity is required to prove intent or mental state; the offenses need only be sufficiently similar to support an inference that the defendant probably harbored the same intent in each. That standard was met here. (See *People v. Rogers*, *supra*, 57 Cal.4th at p. 326; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 859; *People v. Merchant* (2019) 40 Cal.App.5th 1179, 1193, fn. 4 ["exact overlap" between the charged and prior crimes is not required]; *People v.*

Jones, *supra*, 51 Cal.4th at p. 371 [charged and prior robberies were "not particularly similar, but they contained one crucial point of similarity—the intent to steal from victims whom defendant selected"].)

Pickens contends that in the July 2016 incident, victim Rodriguez "behaved in a way that signified" he did not take the threats seriously. Therefore, Pickens argues, the July 2016 incident did not show he knew or intended that his subsequent statements to Sanders would be understood as threats. But Rodriguez testified that he *was* afraid when Pickens threatened him and pulled the knife from his backpack, and he called for help in response. Moreover, neither the trial court nor the jury was required to accept Pickens's assertion that persons who are afraid "do not ordinarily engage in physical confrontations with those they fear," but instead try to escape.

Pickens further asserts that the evidence was irrelevant and lacked probative value because his intent was not at issue. He maintains that if he committed the conduct alleged, i.e., brandished a knife and threatened to kill Sanders, his intent in doing so could not reasonably be questioned. In *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406, for example, our Supreme Court explained: "If defendant engaged in this conduct [sexual molestation of his young stepdaughter], his intent in doing so could not reasonably be disputed"; therefore, "the prejudicial effect of admitting evidence of similar uncharged acts . . . would outweigh the probative value of such evidence *to prove intent*."

In *People v. Lopez* (2011) 198 Cal.App.4th 698, the prosecution presented evidence of a defendant's prior offenses to prove intent and knowledge in the charged burglary. (*Id.* at p. 713.) The appellate court found this was error, reasoning:

"Evidence regarding the Mendicino burglary showed that someone entered the kitchen of the Mendicino residence and took two purses. Assuming appellant committed the alleged conduct, his intent in so doing could not reasonably be disputed—there could be no innocent explanation for that act. Thus, the prejudicial effect of admitting evidence of [the prior theft-related crimes] outweighed the probative value of the evidence to prove intent as to the Mendicino burglary charge." (*Id.* at p. 715.) "[E]vidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute; the prejudicial effect of the evidence of the uncharged acts outweighs its probative value to prove intent as it is cumulative regarding that issue. [Citations.]" (*Ibid.*)

Similarly, in *People v. Willoughby* (1985) 164 Cal.App.3d 1054, the trial court admitted evidence that the defendant, charged with child molestation, had molested another child three years earlier. *Willoughby* concluded this was reversible error, reasoning: "The problem with the intent theory is that appellant never placed his intent in issue; he categorically denied any sexual involvement with [the victim of the charged offense]. Evidence of sex offenses with persons other than the victim of the charged crime is admissible only when proof of the defendant's intent is *ambiguous*, as when he admits the act and denies the necessary intent because of accident or mistake." (*Id.* at p. 1063.) Because "intent was not in issue" and the court failed to give a limiting instruction, the evidence could have been considered by the jury only to prove appellant's disposition to sexually molest children. (*Id.* at p. 1064; see also *People v. Von Villas* (1992) 10 Cal.App.4th 201, 263 [defendant "denied any participation in

the robbery and related charges, therefore the issue of his intent was not relevant"].)

The People, on the other hand, point out that Pickens's not guilty plea "put all elements" of the offense "at issue." (*People v. Booker* (2011) 51 Cal.4th 141, 171; *People v. Burney* (2009) 47 Cal.4th 203, 245; *People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1395.) To prove a violation of section 422, the prosecution had to establish that Pickens had the specific intent that his statements be understood as threats. (§ 422, subd. (a); *People v. Toledo* (2001) 26 Cal.4th 221, 227—228; *People v. Orloff* (2016) 2 Cal.App.5th 947, 953; CALCRIM No. 1300.) Generally, the People are entitled to prove their case even in the face of a defendant's failure to contest an element. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243 ["Defendant argues that he conceded at trial the issue of intent to kill. Even if this is so, the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent"].)

In *People v. Jones*, *supra*, 51 Cal.4th 346, for example, the prosecution presented evidence of defendant's prior robbery to show intent. (*Id.* at p. 370.) Our Supreme Court found no abuse of discretion in admitting the evidence, explaining: "Defendant argues that only identity was actually disputed at trial, and he did not dispute the perpetrator's intent to rob at the Florville residence. Even if this is so, it is not dispositive. '[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' [Citation.] 'The prosecution, of course, must prove each element of its case. Defendant's assertion that his defense to the two charges was bound to focus

upon identity, and not intent, would not eliminate the prosecution's burden to establish both intent and identity beyond a reasonable doubt.' [Citation.]" (*Id.* at p. 372.)

And, in *People v. Rogers*, the defendant offered to stipulate that the charged murder was " 'a first degree or nothing type of a case,' " thereby obviating the prosecution's need to prove intent, premeditation, and deliberation. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 329.) *Rogers* explained that a prosecutor cannot be compelled to accept a stipulation that would "deprive the state's case of its evidentiary persuasiveness or forcefulness." (*Ibid.*) Although the circumstantial evidence of premeditation and express malice was strong, "the prosecution had the right to present all available evidence to meet its burden of proving the requisite mens rea for first degree murder beyond a reasonable doubt." (*Id.* at p. 330.)

We need not resolve the apparent tension between these principles because, even if evidence of the July 2016 incident was admitted in error, it is not reasonably probable that Pickens would have obtained a more favorable result had it been excluded. (See *People v. Jones*, *supra*, 51 Cal.4th at p. 372; *People v. Carter* (2005) 36 Cal.4th 1114, 1152; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 862.)

The video evidence shows Pickens interact with Sanders in a hostile manner. After she approaches him, Pickens almost immediately pulls his hand from his pocket, momentarily points his hand close to Sanders's face, and then replaces it in his pocket. It is difficult to see whether Pickens is holding a knife; one clip is filmed from a significant distance away, and in another, Sanders's form blocks a clear view of Pickens's hand.

Nonetheless, Sanders testified that this portion of the video showed Pickens pulling the knife, and the film is not inconsistent with this testimony. Moreover, Sanders described the knife to officers. When they subsequently searched Pickens, they found a black knife matching that description in his pocket. No reasonable jury would conclude that Sanders lied about Pickens's use of the knife, but Pickens coincidentally happened to have just such a weapon in his pocket. This evidence strongly supported a finding that Pickens threatened Sanders with a knife.

The video also amply supported Sanders's testimony that Pickens verbally threatened her. Although there is no audio, it is readily apparent that Pickens yells at or speaks aggressively to Sanders, sometimes gesturing, moving close to her, or circling her, as they walk down the block. When Sanders stops and radios for assistance, Pickens walks on, but keeps looking back to where Sanders is, apparently still yelling. When another security guard walks around the corner, Pickens appears to yell at her. When Voyt, Sanders, and the third security guard walk to the corner to ensure Pickens has left the premises, Pickens approaches them, gesturing and apparently yelling, as all three of them back cautiously away. And, Sanders's testimony that Pickens repeatedly threatened to kill her was corroborated by Voyt, who testified that Pickens threatened to kill Sanders "[a]t least a dozen times."

The events shown on the video stand in sharp contrast to Pickens's trial and preliminary hearing testimony that he did not get angry at Sanders, and said nothing to her until she continued to follow him down the street. The video also undercut Pickens's account that he was "in too much pain" to threaten her. To the contrary, the video shows him to be ambulatory and apparently

in no significant physical distress. In short, all the evidence supported Sanders's account of the incident, and contradicted Pickens's.

Moreover, several factors limited any potential for prejudice. Contrary to Pickens's arguments, we do not view the July 2016 incident as significantly more inflammatory than the charged crime. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [potential for prejudice is decreased when uncharged acts are no more inflammatory than the charged offenses].) Significantly, the court gave a limiting instruction advising that evidence of the prior incident could be considered only on the issue of intent, and for no other purpose. The instruction specifically required that the jury "not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." We presume the jury followed this instruction, which mitigated the potential for prejudice. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 332; *People v. Homick* (2012) 55 Cal.4th 816, 866—867; *People v. Jones*, *supra*, 51 Cal.4th at p. 371; *People v. Foster* (2010) 50 Cal.4th 1301, 1332.) Contrary to Pickens's assertion, the fact the jury knew Pickens had been convicted in the prior incident further reduced any potential for prejudice, as jurors would not be tempted to convict to punish him for the prior offense. (*People v. Molano*, *supra*, 7 Cal.5th at p. 666; *People v. Jones*, at pp. 371—372 ["The fact that defendant was convicted of the [prior] robbery reduced any prejudicial effect, as the jury would not be tempted to convict defendant of the charged offenses in order to punish him for the previous crime"]; *People v. Steele*, *supra*, 27 Cal.4th at p. 1245.)

In sum, even taking into account the principle that prior crimes evidence may be inflammatory, we are confident that

Pickens would have achieved no better result had the July 2016 evidence been excluded.

c. *Sanders's testimony regarding Pickens's threats to the teenager on the Metro*

Pickens argues that the trial court also abused its discretion by allowing Sanders to testify about her observations of his conduct with the teenage girl on the train. He contends that the evidence was minimally probative, yet "enormously prejudicial," and therefore should have been excluded under Evidence Code section 352.

The People are correct that Pickens has forfeited this argument because he failed to object to the evidence at trial. "Evidence Code section 353, subdivision (a) allows a judgment to be reversed because of erroneous admission of evidence only if an objection to the evidence or a motion to strike it was 'timely made and so stated as to make clear the specific ground of the objection.' " (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20—21; see *People v. Rivera* (2019) 7 Cal.5th 306, 341 [failure to object to evidence of uncharged misconduct forfeited contention on appeal]; *People v. Jones*, *supra*, 57 Cal.4th at p. 977; *People v. Hinton* (2006) 37 Cal.4th 839, 893, fn. 19 [failure to object to evidence under Evidence Code section 352 forfeits claim on appeal].)

Pickens asserts there was no forfeiture because he "complained about the content of Sanders's testimony during trial." But in the cited portions of the record, Pickens did not object to the evidence. He complained: "not only is [Sanders] lying on me, now she's try[ing] to paint a picture, I'm cussing out some little kid. Are you serious?" and "It's just going a bit overboard to tell me that I was cussing out some kid on the train." These statements did not amount to legal objections and

were not made contemporaneously with Sanders's testimony. " 'Evidence Code section 353, subdivision (a) requires that an objection to evidence be "timely made and so stated as to make clear the specific ground of the objection or motion . . . ." . . . " 'Specificity is required both to enable the court to make an informed ruling on the . . . objection and to enable the party proffering the evidence to cure the defect in the evidence.' " ' [Citation.]" (*People v. Jones*, *supra*, 57 Cal.4th at p. 977.) To the extent Pickens suggests his failure to object should be excused because he was representing himself, he is incorrect. (Cf. *People v. Harrison* (2013) 215 Cal.App.4th 647, 656—657 [defendant who exercises his right to self-representation cannot later complain about the quality of his defense]; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.)

In any event, the claim fails on the merits. To prove a violation of section 422, the prosecution had to establish, inter alia, that the threat, on its face and under the circumstances made, was so unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution; it actually caused the victim to be in sustained fear for her own safety, or for that of her immediate family; and the victim's fear was reasonable under the circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 630.) The totality of the circumstances, including the parties' prior contacts, are relevant to prove these elements. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 324; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 860; *People v. Butler* (2000) 85 Cal.App.4th 745, 753—754.) Here, Sanders's observations of Pickens's harassment of and threats to the teen on the train were relevant to prove these elements. Pickens's actions on the train showed he was volatile

and prone to react with anger to innocuous circumstances. It also showed that he routinely made threats in an apparent effort to intimidate others. From this, reasonable jurors could conclude that Sanders's fear of him was genuine and reasonable. The jury could also infer that Pickens intended his statements to Sanders be construed as threats. The evidence was therefore relevant and probative.

d. *Cross-examination of Pickens*

After Pickens's direct testimony, the prosecutor cross-examined him about two incidents in which he behaved aggressively toward additional women. The prosecutor asked about a January 10, 2016 incident in which he became angry at a female Starbucks employee and called her a "white bitch." Pickens denied the conduct. He explained, "The officer that wrote that report got mad because they was in a hurry. I was on my way. He pushed me and bumped my nose to the door, and I pull out my knife. That's why. That's what happened."

The prosecutor also inquired about an April 27, 2013 incident in which Pickens threatened and cussed at a female sheriff's deputy who was working undercover. The prosecutor asked Pickens whether, when the deputy told Pickens she did not need assistance purchasing a Metro ticket, he became hostile, stating, "Who do you think you are, you stupid bitch? Why do you think you can question a man? I will beat your fucking ass." Pickens testified that he had tried to assist the deputy's friend, and the deputy called him a racial epithet and told him to get out of the way. He said he did not make the alleged statements or threat.[2]

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[2] While the record is not entirely clear, it appears that the 2013 incident did not result in a conviction, and the 2016 incident

Pickens contends the prosecutor's cross-examination was improper because, while the People may offer rebuttal character evidence through reputation or opinion testimony, evidence of specific instances of misconduct is prohibited by Evidence Code section 1102. This contention lacks merit.

Pickens has forfeited any challenge to the prosecutor's cross-examination because he failed to object to it. (*People v. Powell* (2018) 6 Cal.5th 136, 182 ["a claim of prosecutorial misconduct is forfeited when there was neither a timely and specific objection nor a request for admonition"]; *People v. Rivera*, *supra*, 7 Cal.5th at p. 341 [failure to object to evidence of uncharged misconduct forfeits contention on appeal]; *People v. Doolin* (2009) 45 Cal.4th 390, 437 [Evid. Code, §§ 1101 and 1102 challenge forfeited where no objection on these grounds was made at trial]; Evid. Code, § 353, subd. (a).) Contrary to Pickens's assertion, there is no indication an objection would have been futile or ineffective.

Even if he had preserved his challenge it would lack merit. "In general, evidence of a defendant's character or a trait of his character—that is, his propensity or disposition to engage in a certain type of conduct—is not admissible to prove his conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) However, when a defendant offers evidence of his good character 'to prove his conduct in conformity with such character or trait of character,' the prosecution may offer evidence to rebut it. (Evid. Code, § 1102, subd. (a); see *id*., subd. (b).)" (*People v. Hall* (2018) 23 Cal.App.5th 576, 591.) Under Evidence Code section 1102, subdivision (b), such rebuttal evidence may be "in the form of

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resulted in a misdemeanor conviction for conduct during the incident other than that described at trial.

opinion or reputation evidence only, not specific acts of misconduct such as prior convictions or the facts underlying them." (*People v. Hall*, at p. 592; *People v. Doolin*, *supra*, 45 Cal.4th at p. 437, fn. 31.)

But here, the People did not question Pickens about the two prior incidents to demonstrate his bad character or his propensity to violate section 422; they offered the evidence to directly impeach his credibility, i.e., his testimony that he always treated women respectfully and never "cussed" at them. When evidence is offered to impeach testimony, rather than as character evidence, different principles come into play. When determining the credibility of a witness, the jury may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) When offered for impeachment, subject to Evidence Code section 352, there is no prohibition on admission of the circumstances of a prior offense or misconduct. (See, e.g., *People v. Dalton* (2019) 7 Cal.5th 166, 214 ["Evidence of circumstances underlying a conviction is admissible to impeach credibility if the proponent demonstrates that the evidence has 'any tendency in reason' to disprove credibility"]; see generally *People v. Clark* (2011) 52 Cal.4th 856, 931; *People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7 [witness may be impeached with conduct involving moral turpitude even though the witness was not convicted, or even if the conduct did not constitute a criminal offense]; *People v. Chatman* (2006) 38 Cal.4th 344, 373; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522; *People v. Hall*, *supra*, 23 Cal.App.5th at p. 589 ["Threatening to kill or seriously injure someone . . . is . . . conduct involving moral turpitude"].)

For example, in *People v. Doolin*, the defendant testified, inter alia, that he did not hate women or prostitutes, had not made derogatory comments about prostitutes, did not treat women differently when away from his family, did not call a woman a "bitch" because she turned him down for a date, did not carry guns, did not drink excessively or use drugs, and was not indifferent to his sexual partner's pain during intercourse. (*People v. Doolin*, *supra*, 45 Cal.4th p. 435.) In rebuttal, the prosecution elicited the testimony of several witnesses who variously stated that they had observed him when he was intoxicated, had heard him describe his cocaine use and make derogatory comments about prostitutes, and had seen him carry guns; and a former girlfriend testified he ignored her protests that his actions caused her pain during intercourse. (*Id.* at pp. 436—437.) Defendant argued on appeal that the rebuttal evidence was inadmissible under Evidence Code sections 1101 and 1102. (*Doolin*, at p. 437.) Our Supreme Court gave short shrift to these contentions, stating: "The testimony of the rebuttal witnesses was . . . properly admitted as direct impeachment of defendant's own testimony. Here, '[b]y taking the stand, defendant put his own credibility in issue and was subject to impeachment in the same manner as any other witness.' [Citations.]" (*Id.* at p. 438.)

The same is true here. Pickens testified that he was always respectful and protective toward women, "wouldn't do anything to a lady," and would not cuss at a woman—testimony that directly contradicted the evidence that he threatened Sanders. Thus, evidence that he was lying and in fact repeatedly cussed at or threatened women directly impeached his credibility. The issue was not collateral or insignificant, but went to the

heart of the case. "[A] defendant who elects to testify in his own behalf is not entitled to a false aura of veracity." (*People v. Beardslee* (1991) 53 Cal.3d 68, 95.) The questions comprised a relatively brief portion of the trial, and the prosecutor did not elicit unnecessarily inflammatory details about the incidents. Because the evidence was highly probative on the jury's evaluation of Pickens's credibility, the trial court did not abuse its discretion under Evidence Code section 352.

2. *Cumulative error*

Pickens next asserts that even if the purported errors were individually harmless, when viewed in combination they were prejudicial, requiring reversal of his conviction. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235—1236; *People v. Henriquez* (2017) 4 Cal.5th 1, 48.)

3. *Senate Bill 1393*

The trial court imposed two five-year serious felony enhancements pursuant to section 667, subdivision (a)(1). When Pickens was sentenced in 2018, imposition of section 667, subdivision (a) serious felony enhancements was mandatory. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Effective January 1, 2019, Senate Bill 1393 amended sections 667 and 1385 to allow a court to exercise its discretion to strike or dismiss prior serious felony convictions for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1—2; *People v. Garcia*, at p. 971.) Senate Bill 1393 applies retroactively to all cases that were not final when it took effect. (E.g., *People v. Garcia*, at p. 973; *People v. Gonzalez* (2019) 39 Cal.App.5th 115, 123; *People v. Dearborne* (2019) 34

Cal.App.5th 250, 268.) Pickens contends his sentence must be vacated and the matter remanded to allow the trial court to exercise its discretion to strike or dismiss the enhancements in light of the amended law. The People agree, and so do we. Accordingly, we vacate Pickens's sentence and remand for resentencing. We offer no opinion about how the trial court's discretion should be exercised.

4. *Imposition of fines and fees*

Without objection from Pickens, the trial court imposed a $300 restitution fine, a suspended parole revocation restitution fine in the same amount, a $40 court operations assessment, and a $30 criminal conviction assessment. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Pickens avers that he is indigent, and imposition of the fines and fees, without a determination of his ability to pay, violated his due process rights. Pickens asserts that we should reverse the assessments and stay the restitution fine unless and until the People can show he has the ability to pay, or alternatively the matter should be remanded for an ability-to-pay hearing. We disagree.

Our colleagues in Division Two recently held that *Dueñas* was wrongly decided. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 327—329, rev. granted Nov. 26, 2019, S258946; see also *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060, 1067—1069; cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 926—927 [concluding that "the due process analysis in *Dueñas* does not justify extending its holding beyond" the "extreme facts" presented therein].) We observe that the 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, rev. granted Nov. 13,

2019, S257844.) Pending further guidance from our Supreme Court, however, we agree with *Hicks*.

Moreover, unlike the defendant in *Dueñas*, Pickens 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; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 206.) 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—1155; but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.)

Finally, even if Pickens had not forfeited his argument, *Dueñas* does not apply here. The situation in which Pickens has put himself does not implicate the same due process concerns that were at issue in the factually unique *Dueñas* case. Pickens, unlike Dueñas, does not face incarceration because of an inability to pay assessments and fines. Pickens is in prison because he violated section 422, not because he was unable to pay the fine and assessments imposed. Even if he does not pay them, there is no indication he will suffer the cascading and potentially devastating consequences Dueñas faced. (See *Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.)

DISPOSITION

Pickens's sentence is vacated and the matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 667, subdivision (a)(1) serious felony enhancements. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.