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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

COREY MCCLELLAND et al.,

Defendants and Appellants.

B228643

(Los Angeles County  
Super. Ct. Nos. BA364703  
and BA364926)

APPEALS from judgments of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed as modified.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant Corey McClelland.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant Brandin M. Wilson.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

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Corey McClelland and Brandin M. Wilson appeal from the judgments entered after their convictions by a jury of second degree robbery with true findings on related firearm-use enhancements. We modify the judgments to strike certain fines imposed by the trial court and to correct McClelland's custody credits but otherwise affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On the afternoon of November 7, 2009 Eduardo Ramirez was playing blackjack at the Hollywood Park Casino. As his winnings increased, Ramirez noticed several people watching him, including two African-American men, one wearing a white shirt and a heavier one wearing a black shirt and a heavy gold chain. Ramirez switched tables and noticed the men continued to watch him. Around 4:15 p.m., he cashed out his chips and left with more than \$3,000 in winnings. While waiting for his car, Ramirez noticed the heavier of the two men had followed him to the valet parking area.

After retrieving his car, Ramirez drove from the casino to join his wife, who had been shopping for a birthday gift at a nearby store. They completed their shopping and drove to a party in a residential area near 52nd Street and Budlong Avenue in south Los Angeles, parking several blocks from the home hosting the party. As they walked toward the party, an African-American man (wearing what Ramirez testified was a black shirt) passed Ramirez, jumped onto the ledge of the neighboring yard and pointed a chrome, semiautomatic handgun at Ramirez's head. The man, whom Ramirez later identified as Wilson, demanded Ramirez's money. Ramirez denied having any money. At this point, another African-American man grabbed Ramirez from behind and began searching his pockets. When Ramirez saw the second man's face, he recognized him as the heavier man from the casino.

Ramirez had his wife give McClelland about \$300 from her purse, but Wilson and McClelland were not satisfied and demanded Ramirez's "stash." McClelland told Ramirez he would "blow [his] head off" if he did not produce the money by the count of five. Ramirez pulled his winnings from his pocket at the count of four. McClelland thumbed through the bills and then ran down the street with Wilson. Ramirez and his wife ran to the party and called the police.

Surveillance video from the casino showed Wilson and McClelland watching Ramirez play blackjack. They followed him to the second table and then loitered near the cashier while Ramirez cashed in his chips. McClelland, wearing a black shirt and a gold chain, followed Ramirez to the valet; Wilson, wearing a white shirt, headed to the parking lot. The video recording then showed a light colored sedan following Ramirez's car out of the Century Boulevard exit.

Police were able to trace the license plate of the sedan to Wilson. Officers showed Ramirez a six-pack photographic array that included Wilson's photograph. Ramirez identified Wilson as the person holding the gun during the robbery. Wilson was arrested the following day as he attempted to leave the parking lot under his apartment building. The car was searched, and police found a loaded, chrome P-380 semiautomatic handgun in the console between the front seats, as well as four cell phones, one of which belonged to Ramirez. According to police, Wilson consented to the search of his apartment where police found a blue steel nine-millimeter handgun, another cell phone and more than \$5,000 in cash.

A few days later, viewing a second six-pack, Ramirez identified McClelland as the heavier robber. McClelland was arrested the following day wearing the same black shirt and gold chain shown in the casino surveillance video, although no money, guns or personal property of Ramirez's was found on McClelland's person or in his residence.

Wilson and McClelland were charged in an information with one count of second degree robbery (Pen. Code, § 211).<sup>1</sup> The information further alleged a principal had been armed with a handgun during the commission of the offense (§ 12022, subd. (a)(1)). As to Wilson alone, it was alleged he had personally used a handgun during the commission of the offense (§ 12022.53, subd. (b)).

Wilson and McClelland were tried together. Neither man testified at trial. Wilson presented two alibi witnesses, one of whom was his girlfriend: Those witnesses testified

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

they were with Wilson at various times between 4:30 p.m. and 8 p.m. on the evening of the robbery.<sup>2</sup>

The jury convicted both Wilson and McClelland of second degree robbery and found the related firearm-use allegations true. McClelland was sentenced to three years in state prison—the low term of two years for robbery, plus one year for the handgun enhancement under section 120221, subdivision (a)(1). Wilson was sentenced to 15 years in state prison—the upper term of five years for robbery, plus 10 years for the handgun enhancement pursuant to section 12022.53, subdivision (b). Both were ordered to pay a total of \$1,660 in restitution to Ramirez, plus various court fines.

### **CONTENTIONS**

Wilson’s appellate counsel was unable to identify any meritorious issues. On his own behalf Wilson filed a supplemental brief accusing both his trial and appellate counsel of ineffective assistance in violation of his Sixth Amendment right to counsel. McClelland claims the court erred by one day in calculating his custody credits, which the People concede, and failed to make any findings as to whether he was able to pay a \$10 crime prevention fee under section 1202.5 and other, related fines and assessments. He further contends there was insufficient evidence to support his robbery conviction.

### **DISCUSSION**

#### *1. Wilson’s Claims of Ineffective Assistance of Counsel Lack Merit or Are Premature*

To establish ineffective assistance of counsel, Wilson must demonstrate that “(1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the

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<sup>2</sup> Wilson’s girlfriend testified he picked her up from the restaurant where she worked around 5 p.m. on the day of the robbery. The other alibi witness, a friend of Wilson’s from high school, was in the car with Wilson. Wilson dropped his girlfriend at their apartment around 6 p.m. and then left with his friend. The friend testified he was with Wilson until approximately 8 p.m.

petitioner.” (*In re Neely* (1993) 6 Cal.4th 901, 908; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].) None of Wilson’s contentions regarding his counsel’s inadequate representation has merit.

Wilson first claims his counsel was ineffective because he failed to impeach a police officer who had responded to the robbery with the officer’s statements in a report filed on the incident. However, the court conducted a hearing under Evidence Code section 402 on the admissibility of those statements and ruled the statements were irrelevant.<sup>3</sup> Wilson’s counsel, therefore, was barred from raising the issue at trial.

Wilson also contends his counsel was ineffective because he failed to move to exclude the items found in Wilson’s apartment as the fruit of an illegal search. The police lacked a warrant, and Wilson claims his consent to the search of his apartment was forced. The record, however, indicates Wilson’s counsel knew of the contention and made a tactical decision to withdraw the motion to exclude the evidence. “In order to prevail on [an ineffectiveness] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.” (*People v. Ray* (1996) 13 Cal.4th 313, 349.) Thus, to the extent there is any merit to Wilson’s argument, it must be raised in a petition for habeas corpus. (*People v. Jones* (2003) 29 Cal.4th 1229, 1263 [“[a]s the record on appeal does not reveal why defense counsel chose not to object to this line of questioning, this ineffective assistance of counsel claim would be more appropriately raised on a habeas corpus petition”]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to ““why

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<sup>3</sup> At the evidentiary hearing, the officer testified he was responding to the Ramirez robbery when he saw two African-American males, one wearing a white shirt and one wearing a black shirt, running along Budlong Avenue between 51st and 52nd Streets. When he gave chase, one of the men threw what the officer believed to be a chrome gun over a fence. The officer lost sight of the men and was unable to find the gun when he searched the area. Six days later, a neighborhood resident discovered a blue steel handgun two blocks away from the area described by the officer. Wilson’s counsel sought to introduce the evidence as exculpatory. The court excluded the evidence as irrelevant and misleading.

counsel acted or failed to act in the manner challenged” is more appropriately decided in a habeas corpus proceeding”].)

Wilson also cites his counsel’s failure to elicit testimony relating to the differing descriptions of the suspects.<sup>4</sup> Ramirez, for instance, insisted he was “100 percent sure” the heavier man (McClelland) was wearing a white shirt and the gunman (Wilson) was wearing a black shirt. Ramirez’s testimony was flatly contradicted by the casino surveillance video, in which Wilson and McClelland were readily identifiable notwithstanding Ramirez’s mistaken assertion as to the color of their clothing. Wilson’s counsel attempted to highlight these contradictions, but his efforts were unlikely to convince the jury in light of the highly incriminating video. There was no ineffective assistance on this point.

Finally, Wilson contends his appellate attorney was ineffective for failing to identify any meritorious issues on appeal. With the exception of the issue raised by McClelland concerning the court’s failure to determine his ability to pay the fines imposed, which appears to apply equally to Wilson, we have examined the entire record and are satisfied Wilson’s appellate attorney has fully complied with the responsibilities of counsel. (See *Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

2. *Remand Is Not Warranted To Consider Defendants’ Ability To Pay the Required Crime Prevention Fine*

McClelland claims the matter should be remanded as to the section 1202.5, subdivision (a), crime prevention fine for a determination of his ability to pay. The People agree the matter should be remanded to allow the court to determine McClelland’s ability to pay the crime prevention fine and contend the trial court must also impose \$26 in related fines that were inadvertently omitted.

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<sup>4</sup> Wilson also attacks his counsel’s failure to obtain testimony from Ramirez’s wife about the robbery; but, as Ramirez testified, his wife had returned to her native Brazil some months before trial and was unavailable.

There is no doubt it was error for the trial court to fail to inquire into the defendants' ability to pay the crime prevention fine or to impose the additional fines associated with a finding of ability to pay. In *People v. Castellanos* (2009) 175 Cal.App.4th 1524 (*Castellanos*), our colleagues in Division Five of this court pointed out that the \$10 fine under section 1202.5 is subject to seven different penalties and surcharges totaling \$30.<sup>5</sup> Although *Castellanos* observed that the mandatory nature of the various penalties allows their omission to be corrected for the first time on appeal, it did not do so because, in imposing a section 1202.5 fine, trial courts must consider the defendant's ability to pay these additional sums. (*Castellanos*, at pp. 1530-1532.)

The amount at issue here, however, including the crime prevention fine and associated surcharges, for both defendants total \$72. This negligible amount does not warrant the inevitable expenditure of public funds required by remand to the trial court. In the interests of judicial economy, and in light of the statutory presumption a defendant sentenced to state prison lacks the ability to contribute to the expense of appointed counsel (§ 987.8, subd. (g)(2)(B)), we strike the orders directing defendants to pay the \$10 crime prevention fines under section 1202.5, subdivision (a).

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<sup>5</sup> The additional fees include \$10 for a state penalty assessment (§ 1464, subd. (a)(1)), \$2 for a 20 percent state surcharge (§ 1465.7), \$5 for a state courthouse construction penalty (Gov. Code, § 70372, although that sum has been reduced to \$2 by Los Angeles County), \$7 for an additional penalty (Gov. Code, § 76000, subd. (a)(1)), \$2 for an additional penalty if authorized by the county board of supervisors for emergency medical services (Gov. Code, § 76000.5, subd. (a)(1)), \$1 for an additional penalty “[f]or the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act” (Gov. Code, § 76104.6, subd. (a)(1)), and \$3 for an additional state-only penalty to finance Department of Justice forensic laboratories (Gov. Code, § 76104.7). (See *Castellanos*, *supra*, 175 Cal.App.4th at pp. 1528-1530.)

### 3. *Substantial Evidence Supports McClelland's Conviction*

To assess a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

McClelland contends the lack of physical evidence tying him to the robbery undermines the jury’s verdict of guilty. Notwithstanding the absence of physical evidence, the evidence of guilt in this case was overwhelming. The casino surveillance video clearly depicts both McClelland and Wilson following Ramirez from the gaming tables to the cashier to the parking lot and out to the street. Even if Ramirez wrongly recalled which defendant was wearing the white or black shirt, his identification of McClelland was compelling; and the jury had no difficulty reconciling Ramirez’s testimony with the video.



### **DISPOSITION**

The judgments are modified to strike the crime prevention fines of \$10 imposed pursuant to Penal Code section 1202.5, subdivision (a). In addition, the presentence custody credit awarded to McClelland is modified to add one day to reflect the correct credit of 329 actual days and 49 conduct days, for a total of 378 days. As modified, the judgments are affirmed. The abstracts of judgment are ordered corrected to reflect these modifications. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.