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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOEL RAVIN Defendant and Appellant.	B293381 (Los Angeles County Super. Ct. No. LA088100)

APPEAL from the judgment of the Superior Court of Los Angeles County. Michael V. Jesic, Judge. Affirmed.

Carlos Ramirez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant makes two arguments on appeal.

First, he contends the trial court erred in instructing the jury pursuant to CALCRIM No. 315 that in evaluating the reliability of eyewitness testimony, the jury can consider the eyewitness's level of certainty about his or her testimony. Second, appellant argues we should vacate the court assessments and fees and stay his restitution fine because they were imposed without an ability-to-pay hearing in violation of his due process rights.

As to appellant's first argument, although the California Supreme Court recently granted review in a case to consider the propriety of the certainty factor, the court's prior decisions upholding the use of this factor are currently valid and we are bound by them. As to appellant's second argument, we find he has forfeited his challenge on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In an Amended Information filed October 4, 2018, appellant Joel Ravin was charged with the crime of vandalism, in violation of Penal Code,[1] section 594, subdivision (a)—a felony—for causing "over $400 damage" to personal property. Appellant entered a plea of not guilty.

The details surrounding the crime follow.

On January 31, 2018, Lucine Trim (Trim) posted an advertisement on the phone app "LetGo" for two printers she was selling for $40. She received a message from an individual with

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[1] All further statutory references are to the Penal Code, unless otherwise stated.

the username "JR" who expressed interest in buying the printers. Trim and JR exchanged messages on LetGo regarding the printers. JR said, "I'll buy it right now if you can bring it to me. If not I'll have to get a Lyft." JR provided his address and an (818) area code phone number to Trim, who called and scheduled the meeting with JR at the address he provided.

Upon arrival, Trim "texted or called" the (818) number, and appellant "came out to the car." He paid Trim $40 for the two printers. The entire transaction took "5 minutes or even less."

The next morning, Trim received the following text message from the (818) number: "Hey, Lucy. Well, not too happy about last night. If you needed to borrow 40 bucks you should of [*sic*] just asked . . . . [T]he big 1 has no ink but turns on. And the other 1 doesn't even turn on. So I really hope you make this right [be]cause it's not cool and very unprofessional. Please just get back to me and make this right. Thanks." Trim offered to give a refund "just [to] calm him down," though she later admitted she never intended on refunding appellant's money. She blocked the (818) number because she "didn't want to be bothered anymore" and deleted both the number and messages from her phone.

Trim subsequently posted an advertisement on LetGo for sunglasses she was selling. On February 5, 2018, she received a message from the username "Katia Danielian" who expressed interest in the sunglasses. They exchanged numerous messages throughout the next few days and thereafter agreed to meet at a McDonald's to effectuate the sale; Trim said she would be in a blue Civic.

At approximately 8:40 a.m. on February 8, 2018, Trim arrived at the McDonald's, stopped her car in front, texted "come out please," and waited in her car. All of a sudden, Trim felt

someone kicking her car on the driver's side. Trim looked outside her car windows and saw it was appellant doing the kicking; he kicked her car "a dozen times" and the car "was moving back and forth." Trim remained in her car with the windows up and doors locked. Appellant "started cussing" at Trim and called her a "fucking bitch." Trim started to drive away from appellant in an effort to exit the McDonald's parking lot, but "he kept on kicking and screaming foul language" and then "went onto the passenger side and kicked the passenger side." Trim saw appellant's face as she turned the car in the parking lot and exited onto the street.

A few minutes later, at 8:47 a.m., Trim received messages on LetGo from the username "Katia Danielian," cursing her and calling her a "dumb bitch." Trim replied, saying she filed a police report, to which she received the response: "I don't give a fuck." Trim then blocked the username on LetGo.

Later that same day, Trim received a message on LetGo from someone named Keith; the message read: "Ain't no one arresting anyone fat bitch. But let's see your insurance cover that shit. LOL if you even got any[,] cheap trick you fucked with the wrong 1."

After she reported the incident to the police, Trim filed a claim with her insurance company for the damage to her vehicle; she paid a $1,000 deductible. The insurance company's field appraiser calculated the total repair cost for Trim's car to be $3,804.55.

The investigating officer assigned to Trim's case called the (818) number and left a voicemail; after a couple of days, the officer received a phone call from appellant who verified the (818) number is his phone number.

On February 26, 2018, the investigating officer showed Trim a "six-pack" photographic lineup, with a photo of the appellant placed in the number five position. Trim identified appellant as the perpetrator and wrote on page 2 of the six-pack: "I recognize that's him because he was white, thin, and attractive. I'm 100 percent sure this is the guy."

On October 3, 2018, trial by jury commenced.

At trial, Trim testified she got a "good look at his face" when she first met appellant during the printer transaction on January 31, 2018. She testified that when she next saw appellant at the McDonald's parking lot, nothing obstructed her view of him. She further testified she has no eyesight problems and wears glasses for reading only.

Ekaterina Danielian, nickname Katia, testified she was in a relationship with appellant for five years and he is the father of her children. Although they are no longer in a relationship, they were dating in February 2018. Katia recalled creating an account on LetGo, but "never really used it." Katia testified she never sent a message about trying to buy sunglasses to any seller on LetGo.

The trial court instructed the jury with CALCRIM No. 315, which tells jurors to consider a series of questions when evaluating an eyewitness's identification, including: "How certain was the witness when he or she made an identification?" Before giving the instruction, the court discussed CALCRIM No. 315 with appellant's counsel, who did not object to it.

The jury found appellant guilty of vandalism and found true that the amount of damage caused "was $400 or more." As part of his sentence, appellant was ordered to pay $3,804 in restitution to Trim. The trial court also imposed a $40 court

operations assessment per section 1465.8, subdivision (a)(1); a $30 criminal conviction assessment per Government Code section 70373; and a $300 restitution fine per sections 1202.45 and 1202.4, subdivision (b).

Appellant timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err in Instructing the Jury That it Could Consider the Eyewitness's Level of Certainty About Her Identification of Appellant.*

Appellant argues the trial court erred in instructing the jury with CALCRIM No. 315.

Appellant contends the inclusion of the certainty factor in CALCRIM No. 315 violates his Fourteenth Amendment right to due process; "[t]elling a jury that a witness's certainty in his identification correlates with the reliability of that identification infects a trial when eyewitness testimony is at the heart of the prosecutor's case and particularly where, as here, the defendant's only defense is that he was not the perpetrator of the vandalism." In support of his claim, Appellant relies upon the possibility that the California Supreme Court "may overrule [*People v. Sanchez* (2016) 63 Cal.4th 411] and its predecessor[s]," and "reconsider its holding" on the issue.

The California Supreme Court is currently considering whether the certainty factor as articulated in CALCRIM No. 315 remains valid or is a violation of a defendant's due process rights. (See *People v. Lemcke*, review granted Oct. 10, 2018, S250108.) Unless and until the Supreme Court overrules its prior precedent, however, the trial court was bound by it—and so are we. (See *Auto Equity Sales, Inc. v. Superior Court* (1962)

57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."].) We therefore reject appellant's argument.

B. *Appellant Forfeited His Challenge to the Trial Court's Imposition of Assessments/Fines*

Appellant argues the trial court violated his federal and state right to due process by imposing a $40 court operations assessment, a $30 criminal conviction assessment, and a $300 restitution fine without determining whether he had the present ability to pay. Appellant requests we vacate the assessments and stay the imposition of the restitution fine in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

Respondent contends appellant forfeited the issue because he did not object to the imposition of the fines and assessments or request a hearing to determine whether he had the ability to pay them. Appellant concedes he did not object to or raise any due process argument regarding the assessments or the restitution fine during sentencing. He argues, however, that his counsel's failure to object at the trial level is excusable because it would have been futile, as *Dueñas* was not yet decided and "represents a dramatic and unforeseen change in the law."

We are unpersuaded. "[N]othing in the record of the sentencing hearing indicates that [appellant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments." (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.) Appellant plainly could have made a record had his ability to pay the assessments and fine actually been an issue. (*Ibid.* [see also discussion at pp. 1153-1155.]) As a result, we find appellant has forfeited this

challenge. (*Id.* at p. 1155; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.)

Further, we note the following with respect to the imposition of the $300 restitution fine per section 1202.4, subdivision (b). A reading of the language in subdivision (c) of that statute indicates that a defendant's inability to pay "*may* be considered only in increasing the amount of the restitution fine in excess of the minimum fine [of $300]." (§ 1202.4, subd. (c), italics added.) Here, the trial court imposed the minimum amount allowed—$300. (§ 1202.4, subd. (b)(1) [if convicted of a felony, the fine shall not be less than $300 and shall not be more than $10,000].)

DISPOSITION

The judgment is affirmed.

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STRATTON, J.

I concur:

GRIMES, J.

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BIGELOW, P.J., Concurring:

I concur. I write separately to add that I believe the imposition of the assessments and restitution fine did not violate appellant's Due Process rights, as articulated in *People v. Hicks* (2019) 40 Cal.App.5th 320.

BIGELOW, P. J.