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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ZACHARY FRAZIER,

Defendant and Appellant.

B292711

(Los Angeles County
Super. Ct. No. NA105784)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard R. Romero, Judge. Affirmed with directions.

Elana Goldstein, 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, Scott A. Taryle, Supervising Deputy Attorney

General, Nancy Lii Ladner, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

Zachary Frazier (defendant) repeatedly punched a male co-worker and, when a female co-worker implored him to stop, grabbed her by the neck and slammed her against a wall while choking her. A jury convicted him of two counts of assault by means likely to cause great bodily injury and found that he inflicted great bodily injury against the male co-worker. On appeal, he argues that his convictions are defective due to two evidentiary errors and that his sentence is infirm due to three errors. Only one of his arguments has merit, and requires us to remand so the trial court can decide whether to exercise its newfound discretion to strike his “prior serious felony” enhancement. We otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In October 2016, defendant worked in a veterinarian hospital in Long Beach, California along with Jose Pineda (Pineda), Alyssa Contreras (Contreras) and others. Defendant and Pineda did not get along, so Pineda asked his supervisor not to schedule him to work with defendant. This upset defendant, who on October 27, 2016, called Pineda a “bitch” and told him he would be waiting for him after his shift.

In the mid-afternoon of October 28, 2016, while Pineda and defendant were working overlapping shifts, Pineda asked defendant if he had any clean towels. Defendant told Pineda to “get the fuck out of [his] face.” As Pineda turned to walk away, defendant punched him in the face. Defendant tried to land a second punch. Because Pineda saw it coming and ducked, this

second punch bounced off Pineda's head and sliced his scalp. Pineda tried to get away by moving into the kennel room, but tripped over metal cages on the floor and fell to the ground, landing on his back. Defendant continued to attack, bending over Pineda and throwing punches at his head as Pineda covered his face and head with his arms. A male co-worker pulled defendant away from Pineda, but defendant wriggled away and returned to Pineda. Contreras then put her hand on defendant to stop him, but he put both his hands around her neck, "slammed" her head against the wall, and choked her for seven or eight seconds. Additional employees ran in, and separated defendant from the others. Surveillance cameras caught bits and pieces of the melee, but none of the cameras had the proper angle to capture the punches or choking.

The second punch to Pineda's head resulted in a substantial loss of blood and required 10 staples to close.

II. Procedural Background

In the operative First Amended Information, the People charged defendant with assaulting Pineda and Contreras by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4))¹, and alleged that he inflicted great bodily injury upon Pineda. The People further alleged that defendant's first degree robbery conviction from Washington State constituted a "strike" within the meaning of our Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)) as well as a prior serious felony (§ 667, subd. (a)(1)). The People alleged that defendant had nine other prior prison terms for felonies (§ 667.5, subd. (b)).

¹ All further statutory references are to the Penal Code unless otherwise indicated.

A jury convicted defendant of both counts and found the great bodily injury allegation true. In exchange for defendant's admission of the Washington conviction, the People dismissed the prior prison term allegations.

The trial court sentenced defendant to 18 years in prison. For the assault on Pineda, the court imposed 16 years, comprised of a base term of eight years (the high-term of four years, doubled due to the prior "strike"), plus three years for inflicting great bodily injury, plus five years for the prior serious felony. For the assault on Contreras, the court imposed a consecutive two-year sentence, comprised of one-third the midterm of three years doubled due to the prior strike. This was the maximum sentence available, and the court imposed the maximum because defendant had an "extensive prior criminal record of increasing seriousness" and because the current crimes were "violent felon[ies] against two innocent individuals who did nothing to provoke the attacks."

The trial court also ordered defendant to pay a mandatory state restitution fine of \$390 (§ 1202.4), a court operations fee of \$40 for each of his two convictions (§ 1465.8), and a criminal conviction assessment fee of \$30 for each conviction (Gov. Code, § 70373, subd. (a)(1)) – a total of \$530 in fines and fees.

Defendant filed this timely appeal.

DISCUSSION

I. Evidentiary Challenges

Defendant argues that the trial court erred in (1) allowing the jury to consider two of defendant's prior convictions for impeachment purposes after defendant asked Contreras whether defendant said he was "sorry," and (2) allowing the prosecutor to ask Contreras whether she was "nerve-wrack[ed]" while

testifying in part because defendant's family had "made [her] feel uncomfortable" at a prior hearing, which the prosecutor asked after defendant had asked Contreras if she was a "pretty tough little gal" and if defendant had threatened her after assaulting Pineda. We review evidentiary rulings for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 597.)

A. Admission of sanitized prior convictions for impeachment

1. Pertinent facts

During his cross-examination of Contreras, defendant asked her a series of questions regarding what defendant had said to her after the incident and to Pineda during the incident as well as whether defendant had given Contreras a letter to pass onto the hospital's management. In response to defendant's leading questions, Contreras denied that defendant had said, "I thought you were grabbing me so I pushed you away," "You were pulling me from [my] shirt, and I pushed you away. I didn't know you were behind me"; denied that defendant had "threaten[ed her]"; and denied that defendant told Pineda, "I'm not gonna take this' or whatever." In response to an open-ended question, Contreras said defendant had said he was "sorry." The court subsequently ruled that defendant's elicitation of his own apology rendered defendant a hearsay declarant who could be impeached with his prior convictions involving moral turpitude. Balancing the probative value of defendant's prior convictions for robbery and burglary for impeachment against the danger of "undue prejudice," the court nevertheless sanitized the convictions by deleting the specific crimes involved and instructed the jury—during trial and at the end of trial—that the convictions could be used "only in evaluating the credibility of" defendant's apology and for "[no] other purpose whatsoever."

2. *Analysis*

A witness's prior felony convictions may be used to attack his credibility because they constitute evidence of his "character for honesty or veracity or their opposites." (Evid. Code, §§ 780, subd. (e), 788.) Because "evidence offered to attack . . . the credibility of [a hearsay] declarant is admissible if it would have been admissible had the declarant been a witness at [a] hearing" (*id.*, § 1202), the credibility of a hearsay declarant may be attacked by admitting the declarant's prior felony convictions as impeachment evidence. (*People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1449-1451 (*Jacobs*); *People v. Little* (2012) 206 Cal.App.4th 1364, 1367, 1373-1376 (*Little*); accord, *People v. Brooks* (2017) 3 Cal.5th 1, 51-52 [assuming, without deciding, that *Jacobs* and *Little* are good law].) "Hearsay" is an out-of-court statement "offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a)), and the hearsay "declarant" is merely the "person who makes [the] statement" (*id.*, § 135). Because defendant's apology to Contreras constitutes an out-of-court "statement" admitted to prove that defendant was, in truth, remorseful, defendant was a hearsay "declarant" and the trial court did not abuse its discretion in admitting his prior convictions to impeach him. *Little* put it succinctly: "Once [defendant] took it upon himself to put his hearsay declaration at issue, the prosecution was entitled to test his credibility as the hearsay declarant." (*Little*, at p. 1376.)

Defendant resists this conclusion with several arguments, none of which has merit.

First and chiefly, he argues that *Jacobs* and *Little* only authorized impeachment of a hearsay declarant with his prior convictions if his declaration was "exculpatory." He is wrong.

The plain language of the statutes cited above refutes any such limitation, and the fact that *Jacobs* and *Little* happened to involve exculpatory (or, as in *Jacobs*, “potentially exculpatory” statements (*Jacobs, supra*, 78 Cal.App.4th at p. 1451)) does not over-write the statutes themselves. Defendant’s argument for an “exculpatory” requirement seems to rest on the notion that there was no *reason* to impeach his apology because it inculpated him, but this is a relevance argument (rather than an argument about the proper methods of impeachment). This relevance argument also lacks merit because a defendant’s apology is often introduced to “impress[] the trier of fact with the [defendant’s] candor, remorse, and willingness to cooperate.” (*People v. Reeves* (1966) 64 Cal.2d 766, 774.) Because expressions of remorse are notoriously “untrustworthy” (*People v. Smith* (2003) 30 Cal.4th 581, 629), evidence relevant to impeach such an expression is all the more relevant.

Second, defendant asserts that he was not a *hearsay* declarant because his apology was not admitted for its truth. Defendant urges that there was “no reason” to admit it for its truth. He has it backwards: There is “no reason” to admit it *except* for its truth.

Third, defendant contends that the court erred in introducing his prior felony convictions to impeach him because the People, by not objecting to defendant’s elicitation of his own hearsay statement, somehow waived its right to impeach that statement through introduction of his prior felony convictions. *Little* rejected this precise argument (*Little, supra*, 206 Cal.App.4th at pp. 1376-1377), and with good reason: The People’s tactical decision about how to respond to defendant’s elicitation of his own hearsay statement does not exempt him

from the consequences of that elicitation under the rules of evidence.

Lastly, defendant suggests that his counsel was constitutionally ineffective for eliciting his apology. Although we are limited to the trial court record in evaluating this claim, the record shows that counsel made the tactical decision to attempt to elicit several of defendant's out-of-court statements, many of which, if Contreras had acknowledged them, would have exculpated him. Reasonable tactical choices cannot be the basis for an ineffectiveness challenge simply because they do not work out. (*People v. Ochoa* (1998) 19 Cal.4th 353, 445 ["It is not deficient performance for a criminal defendant's counsel to make a reasonable tactical choice."].)

B. Admission of questions regarding victim's discomfort

1. *Pertinent facts*

Contreras testified that defendant repeatedly returned to the veterinarian hospital to talk to her after the incident and that she had tried, unsuccessfully, to get a restraining order against him. On cross-examination, defendant asked whether he had "threaten[ed]" her (she said "no"), asked whether she had been "afraid to run into th[e kennel] room where the incident was" (she said "no"), and asked, "You're a pretty tough little gal, right?" During redirect, the prosecutor asked her if she was "nerve-wrack[ed]" having to answer questions, and if it was "tough" for her to testify with defendant and defendant's family in the courtroom. During this questioning, the prosecutor asked if defendant's family had "sa[id] anything to [her] that made [her] feel uncomfortable the last time [she] w[as] [in court]," and she said "yes." On further cross-examination, defendant asked what his mother and sister had said; Contreras responded, "I don't

know, but they were being rude and kind of just cussing at me, making me feel uncomfortable.”

2. *Analysis*

A witness’s “demeanor is always relevant to credibility.” (*People v. Scott* (2011) 52 Cal.4th 452, 493.) “An explanation of the basis” for that demeanor “is likewise relevant to . . . credibility . . .” (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084.) Consequently, Contreras’s testimony that she was “uncomfortable” and that it was “tough” for her to testify—and the reasons *why* she felt it was “tough”—are relevant. What is more, the prosecutor’s questions about why being near to defendant and his family was “tough” was directly responsive to defendant’s prior questions, on cross-examination, on the topics of whether defendant “threatened her” and whether she was “a pretty tough little gal.” As our Supreme Court has noted, where a defendant “himself [has] ‘opened the door for the admission of such evidence, . . . he is . . . in no position to complain of its reception . . . [as] relevant. . . .” (*People v. Westek* (1948) 31 Cal.2d 469, 481.)

Defendant marshals a number of arguments against this conclusion, none of which has merit. He argues that a witness may be questioned about intimidation and threats only if the witness changes her story, but this argument inserts a restriction found nowhere in the cases and ignores that Contreras testified solely to be “uncomfortable” and *denied* being threatened. Defendant argues that the People’s actions in not moving to exclude defendant’s family members and in not previewing what questions it would ask about intimidation during redirect rendered it inappropriate to allow this questioning, but this argument would require the People to seek an exclusion order

that would put the convictions in jeopardy by violating defendant's Sixth Amendment right to a public trial and ignores that the People could not have previewed their trial strategy on this issue because that strategy was shaped by defendant's questions on cross-examination. Defendant argues that the court abused its discretion in concluding that the questioning was appropriate under Evidence Code section 352, but we conclude there was no abuse of discretion in the court's conclusion that the probative value of those questions was not substantially outweighed by the danger of undue prejudice. And defendant argues that the prosecutor committed misconduct, but a prosecutor does not commit misconduct by asking questions that are lawful under the rules of evidence. (Cf. *People v. Adams* (2014) 60 Cal.4th 541, 568 [defining "prosecutorial misconduct"].)

II. Sentencing Challenges

A. *Fines and fees*

Defendant argues that *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) requires us to vacate all of his fines and fees. He is wrong.

Citing the constitutional guarantees of due process and excessive fines, *Dueñas* held that trial courts may not impose three of the standard criminal assessments and fines—namely, the \$40 court operations assessment (§ 1465.8), the \$30 criminal convictions assessment (Gov. Code, § 70373), and the \$390 minimum restitution fine (§ 1202.4)—without first ascertaining the “defendant’s present ability to pay.” (*Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) So, defendant argues, *Dueñas* applies to the \$530 in fines and fees imposed in this case. Even though we have elsewhere held that *Dueñas* was “wrongly decided” (*People v. Darrick Demond Hicks* (2019) 2019 Cal.App.

Lexis 914, *1), we need not rely on *Dueñas*'s invalidity because even if *Dueñas* were correct, the record in this case, unlike the record in *Dueñas*, indicates that defendant has the ability to pay the \$530 in assessments. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].) A defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) Prisoners earn wages of at least \$12 per month. (Dept. of Corrections, Operations Manual, §§ 51120.6, 51121.10 (2019).) At even this minimum rate, defendant will have enough to pay the \$530 in assessments and fines in 45 months, which is long before his 18 year sentence would end (or, if the trial court elects to strike the five-year prior "serious" felony enhancement, before his lesser sentence would end). Even if defendant does not voluntarily use his wages to pay the amounts due, the state may garnish between 20 and 50 percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1093.) In light of these statutes, we reject defendant's argument that his ability to earn prison wages is "speculative." The record also contains evidence that defendant, at the time of his crime, was employed. Because defendant "points to no evidence in the record supporting his inability to pay" (*People v. Gamache* (2010) 48 Cal.4th 347, 409), and hence no evidence that he would suffer any consequence for non-payment, a remand on this issue would serve no purpose.

B. *Calculation of custody credits*

Defendant argues that the trial court erred in calculating the actual custody credits to which he was entitled in this case. We review this issue independently (*People v. Arevalo* (2018) 20 Cal.App.5th 821, 827), and conclude that the trial court did not err.

A defendant is entitled to credit against his sentence for all the time he is actually in custody, but “only where the custody to be credited is attributable to proceedings related to the same conduct for which defendant has been convicted.” (§ 2900.5, subd. (b); *In re Joyner* (1989) 48 Cal.3d 487, 489.) In this case, defendant was charged by criminal complaint with the crimes underlying this case on February 1, 2017, and sentenced on September 17, 2018. This entitles him to 594 days of actual custody, along with 89 days of conduct credit (calculated as 15 percent of the actual custody because his crimes are “violent” felonies (§ 2933.1, subd. (a))). The trial court awarded defendant precisely those credits.

Defendant asserts that the trial court should have started counting his custody on November 27, 2016, which is the date defendant was arrested on a different and unrelated crime. This assertion ignores that limitation, noted above, that a defendant is entitled to actual custody only if that custody is “related to the same conduct for which the defendant has been convicted.” (§ 2900.5, subd. (b).)

C. *“Prior serious felony” enhancement*

On September 30, 2018, the Governor signed Senate Bill 1393, which amends section 1385 to eliminate the prohibition on dismissing prior “serious” felony conviction allegations under section 667, subd. (a). (§ 1385, subd. (b) (2018 ed.); Sen. Bill No.

1393 (2017-2018 Reg. Sess.) § 2.) Because this new law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless the Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature has expressed no such intent in Senate Bill 1393. Because defendant's convictions were not final when Senate Bill 1393 took effect on January 1, 2019, he is entitled to have the trial court exercise its newfound discretion whether to strike the two prior “serious” felony allegations unless the court, during the original sentencing, “clearly indicated . . . that it would not . . . have stricken” those allegations if it had been aware of having the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, there is no such indication, although the trial court’s decision to impose the maximum possible sentence certainly suggests a disinclination to do so. However, the court made no express statements to that effect. To ensure that the trial court is given the full opportunity to consider defendant’s sentence in light of its newfound discretion, a remand is appropriate.

DISPOSITION

The judgment is affirmed, but the matter is remanded for the trial court to consider whether to exercise its discretion under Senate Bill 1393.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ