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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. QUINTON MARCEL CARR, Defendant and Appellant.	B295680 (Los Angeles County Super. Ct. No. MA073131)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed as modified.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Quinton Marcel Carr appeals from the judgment following his conviction for two counts of burglary and related offenses. Carr contends the trial court denied him his right to be present at trial by removing him from the courtroom following an outburst, and violated his due process rights by imposing a restitution fine and various assessments without determining his ability to pay them. We reject both arguments.

In response to our request for supplemental briefing, the Attorney General concedes that under Senate Bill No. 136, effective January 1, 2020, we must strike the one-year enhancement of Carr's sentence under section 667.5, subdivision (b). We modify the judgment accordingly, but otherwise affirm.

PROCEDURAL BACKGROUND

The facts of the underlying offenses are not at issue in this appeal so we limit our summary to the relevant procedural history. We provide additional background in our Discussion section.

An information charged Carr and Terry Donnell Galloway with one count of first degree residential burglary (Pen. Code,[1] § 459), and two counts of grand theft of a firearm (§ 487, subd. (d)(2)). The information charged Carr individually with one count each of first degree residential burglary with a person present (§ 459), possession of a firearm by a felon with two priors (§ 29800, subd. (a)(1)), and unlawful possession of ammunition (§ 30305, subd. (a)(1)). The information alleged enhancements on all of Carr's counts based on Carr's prior convictions and prison

[1] Undesignated statutory citations are to the Penal Code.

terms (§§ 667, subd. (a)(1) and (b)–(j), 667.5, subd. (b), 1170.12), and alleged a firearm enhancement on the count for residential burglary with a person present (§ 12022, subd. (a)(1)).[2]

The jury found Carr guilty on all counts, and found the firearm allegation to be true. The trial court found that Carr had suffered a prior strike conviction (§§ 667, subd. (b)–(j), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)). The trial court further found that Carr had served a prior prison term for carrying a concealed weapon in violation of former section 12025, subdivision (a)(2), thus subjecting him to a one-year enhancement under section 667.5, subd. (b).

In imposing sentence, the trial court selected the count of first degree residential burglary with a person present as the principal term. For that offense, the trial court sentenced Carr to 19 years, calculated as the high term of six years, doubled because of the prior strike, with a five-year enhancement for the prior serious felony conviction, a one-year enhancement for the firearm, and a one-year enhancement for the prior prison term pursuant to section 667.5, subdivision (b). The trial court added two years eight months for the other burglary count and one year four months for the firearm possession count, both calculated as one-third the midterm doubled for the prior strike. The trial court imposed the high term of three years each for the two counts of grand theft of a firearm and one count of unlawful possession of ammunition, but stayed those sentences pursuant to section 654. Carr's total sentence therefore was 23 years.

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[2] We omit discussion of the individual counts and enhancements alleged against Galloway, which are not at issue in this appeal.

The trial court imposed a restitution fine of $5,000 under section 1202.4, subdivision (b), $240 in court operations assessments under section 1465.8, subdivision (a)(1) ($40 per count), and $180 in criminal conviction assessments under Government Code section 70373 ($30 per count), as well as other fees not at issue in this appeal. The trial court also awarded credits.

Carr timely appealed.

DISCUSSION

A. The Trial Court Did Not Abuse its Discretion by Removing Carr from the Courtroom

Following an outburst from Carr during the testimony of the prosecution's final witness, the trial court ordered Carr removed from the courtroom, and denied defense counsel's subsequent request to allow Carr to return. Carr therefore was absent during closing arguments and the reading of the verdict. Carr contends the trial court violated his constitutional and statutory rights to be present at his trial. We disagree.

1. Relevant proceedings

During a pretrial hearing on August 20, 2018, the trial court informed Carr that if he proceeded to trial "there is a good chance you will get 24 years and change in prison," whereas the prosecution had offered a plea deal for 12 years. Carr stated he wished to proceed with the trial. The trial court said that was fine but wanted to be sure Carr understood the decision he was making. Carr then said, "Get me out of here. I don't want—Westside Neighborhood 40's, bitch." Carr was removed from the courtroom.

After Carr left the courtroom, the trial court stated, "The record should reflect that before the court was done, the defendant got up not at the instruction of the court or bailiff. As he was going into the breach, the . . . bailiff had to assist the defendant in getting in. It looked like he was being resistant. The defendant then became belligerent and yelled out something that finished by the word 'bitch.' "

The trial court stated it had reviewed the defendant's criminal history, which included crimes of violence, and determined there was a need to shackle the defendant at trial, with the shackles not visible to the jury. Defense counsel objected.

On August 22, 2018, the trial court stated that it had reviewed Carr's inmate disciplinary record indicating several incidents of creating disturbances or fighting with other inmates, and in light of those incidents and Carr's courtroom behavior on August 20, the trial court again concluded, over defense counsel's objection, that Carr should be shackled during trial. The trial court interpreted Carr's reference to the "Westside Neighborhood 40's" as indicating Carr's membership in the "Rollin' 40's Crips" gang. The trial court viewed Carr's reference to his gang membership "as a threat to the court and courtroom personnel."

Later that day, after jury selection, the trial court told Carr that it had been advised that he was refusing to attend trial. The trial court informed Carr that if he refused to come to the courtroom, the trial would continue in his absence.

After further proceedings, the trial court stated that it had heard Carr ask the deputy sheriff to take him out of the courtroom. The trial court informed Carr he had a right to be

present but would be excused if he wished. Carr said he wanted to go, then interrupted the trial court to say, "Might as well find me guilty already. Don't need to act like it is going to be a real fair trial. Might as well find me guilty. You understand?" The record indicates Carr then exited the courtroom. The trial court stated, "The defendant has voluntarily absented himself from these portions of these proceedings after getting agitated and instructing me to find him guilty."

On August 23, 2018, after trial had begun, the trial court repeated its warning that if Carr refused to come to the courtroom on the next day of trial, the trial would proceed in his absence.

On the afternoon of August 28, 2018, the trial court stated that proceedings were scheduled to begin that morning, but Carr had refused to come to court, claiming to be sick. Carr was now present in the courthouse, but the bailiff reported Carr was refusing to come to the courtroom, telling the bailiff, " 'I don't give a fuck about the judge or this process. I'm reading my book. Leave me the fuck alone.' " The trial court instructed the bailiff to inform Carr that trial would proceed in his absence. Carr then came to the courtroom.

The trial proceeded with witness testimony from a parole agent. Shortly after direct examination had begun, Carr complained audibly that something was too tight. The trial court immediately sent the jury out of the courtroom. The trial court then asked Carr if there was a problem. Carr said, "The restraint is too tight. [¶] Didn't you just hear me tell them? [¶] Shit hurt my leg." The trial court told Carr not to use "foul language." Carr responded, "I don't give a fuck. [¶] You said you would do a trial without me. You could have left me where I was at." Then,

"Get me out of here. Fuck this courtroom." The trial court asked if Carr was excusing himself, and Carr responded, "Yeah, I'm excusing myself. I don't want to be here. Give me life already or whatever time. I don't care."

The trial court reminded Carr that he had a right to be present, but if he caused problems or refused to come to court, the trial would proceed in his absence. Carr complained, using obscenities, that he felt sick and did not want to be in court that day. The court again admonished him not to use foul language, and Carr replied, "You're acting like you're up here giving a fair trial. This shit is fucking rigged." The trial court began speaking, but Carr interrupted, stating, "I don't want to hear nothing you have to say." The trial court declared the trial in recess and cleared the audience from the courtroom.

After the audience left, the trial court continued to try to speak with Carr, who repeatedly interrupted, stating he did not want to listen to the trial court, that the trial court was not being fair to him, and that he was "giving up my right to be present during the trial."

Carr was removed from the courtroom. The trial court stated, "It did require a sergeant and, I believe, four deputy personnel to make sure that [Carr] was safely removed from the courtroom." The trial court questioned the deputy who placed the restraints on Carr originally. The deputy reported that the restraints were not too tight, that he was able to put two fingers through it, and that he observed Carr freely moving the restraint up and down his leg.

After discussion with counsel, the trial court called the jury back in, informed the jurors that Carr had voluntarily absented himself, and proceeded with witness testimony.

The next day, August 29, 2018, Carr returned to the courtroom. The trial court reminded Carr that he could attend trial but could not act in a disruptive manner. Carr did not respond, and the trial court noted that Carr appeared to be ignoring the court and singing to himself.

Trial resumed with direct examination of a deputy sheriff, who testified regarding her search of the home of Galloway, Carr's alleged accomplice. Shortly after the testimony began, Carr interrupted, stating that he was not Galloway. The trial court admonished him not to make outbursts, but Carr proceeded to speak over the trial court, stating, "You want me . . . [to] sit here and get 25 years . . . for some shit that . . . don't have nothing to do with me?"[3]

The trial court sent the jury away. The court said, "Mr. Carr, your outburst is unacceptable. It is clear to the court that this was 100 percent orchestrated on your part. You came in here knowing darn well you were going to attempt to influence the jury by throwing out a false number that you're facing as to time." Carr interrupted; the trial court directed him not to interrupt further, and Carr said, "I don't give a fuck." The trial court ordered that Carr be removed from the proceedings "[a]s a result of your inappropriate conduct." The trial court declared that Carr was "voluntarily absenting yourself from the proceedings." Carr was removed from the courtroom.

The trial court repeated its conclusion that Carr had engaged in "an orchestrated effort . . . to influence the jury with

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[3] In the reporter's transcript, Mr. Carr's quoted statement was broken up by the trial court repeatedly stating his name. For clarity we have omitted the trial court's statements and replaced them with ellipses.

inappropriate comments, and he had every intention of disrupting these proceedings" by coming to court that day, despite having voluntarily absented himself the day before. The trial court also concluded that Carr "was attempting to distance himself from Mr. Galloway in front of the jury . . . without having to subject himself to cross-examination. Again, I believe it was an attempt to orchestrate and manipulate these proceedings. The defendant was repeatedly warned." The trial court stated it was open to reconsidering its decision to remove Carr from the courtroom if defense counsel could "provide information that causes the court to believe Mr. Carr is no longer an obstruction."

The trial court called the jury back in and the deputy concluded her testimony with Carr absent.

Following lunch, defense counsel requested that the trial court allow Carr to return to the courtroom, stating that Carr had assured defense counsel that he would behave appropriately. The trial court denied the request, finding no "change in circumstances or explanation to justify [Carr's] conduct." The trial court noted Carr's repeated disruptions and "disregard for proper courtroom decorum," despite multiple admonishments. The trial court also found that Carr's "attempts to improperly influence the jury before lunch are certainly an indication that he has some sort of greater plan, of which the court is not going to allow."

When the jury returned, the prosecution read several stipulations and the parties rested. Carr was not present for the remainder of the trial, including closing arguments, discussion of inquiries from the jury, and the verdict.

2. Applicable law and standard of review

A criminal defendant has the right under both the federal and state constitutions, as well as state statutory law, to be personally present at trial. (*People v. Waidla* (2000) 22 Cal.4th 690, 741; see §§ 977, subd. (b)(1), 1043, subd. (a).) However, " 'a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.' " (*People v. Bell* (2019) 7 Cal.5th 70, 117 (*Bell*); § 1043, subd. (b)(1).) "[W]e review a trial court's actions in controlling a disruptive defendant for an abuse of discretion." (*People v. Huggins* (2006) 38 Cal.4th 175, 202.) In doing so, "[w]e generally defer to the trial court's determination as to when a disruption has occurred or is likely to occur." (*Bell*, at p. 116.) "A trial court need not wait until actual violence or physical disruption occurs within the four walls of the courtroom in order to find a disruption within the meaning of section 1043." (*People v. Price* (1991) 1 Cal.4th 324, 406.)

Carr argues we must "review[ ] de novo the trial court's order excluding a criminal defendant to determine whether the disruption amounted to a waiver of the defendant's right to be present at trial." This position cannot stand in light of the authorities we cite above, which apply a deferential abuse-of-discretion standard. Carr's cited authority, *People v. Bradford* (1997) 15 Cal.4th 1229 (*Bradford*), is unavailing. That case involved a defendant who voluntarily absented himself from certain in-chambers and in-court hearings during the trial and penalty phases of the case, not one whom the court ordered

removed following a disruption.[4] (See *id.* at pp. 1355–1358.) Moreover, the Supreme Court in that case did not discuss the standard of review.[5]

We recognize the trial court in the instant case, when ordering Carr removed from the courtroom, stated that Carr was "voluntarily absenting [him]self from the proceedings." The trial court's stated reasons for ordering Carr removed, however, pertain to Carr's disruptive or inappropriate conduct. The proper framework for our analysis, therefore, is the law concerning removal of a disruptive defendant, not the law concerning a defendant's voluntary waiver of his presence at trial.

3. Analysis

The record amply supports the trial court's conclusion that Carr was sufficiently disruptive that the trial could not proceed with him present. Throughout the proceedings Carr used foul

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[4] We note that in *Bradford*, some of defendant's absences were at the request of defense counsel, who wanted to discuss with the court defendant's wishes to represent himself, for no witness to testify on his behalf, and to be executed. At that time, defense counsel also raised concerns about defendant's competency. (*Bradford*, *supra*, 15 Cal.4th at p. 1356.)

[5] Defendant appears to cite *People v. Welch* (1999) 20 Cal.4th 701 as supporting a de novo standard of review. That case, however, supports an abuse of discretion standard of review. "[A]ppellate courts accord trial courts considerable discretion in determining when disruption has occurred. Our review of the record reveals quite plainly a defendant who was persistently disruptive. We find the trial court did not abuse its discretion by either ordering defendant's removal or consenting to his absence for the sake of maintaining order in the courtroom." (*Id.* at p. 774.)

language, invoked his gang membership to the trial court, interrupted the trial court, and refused to listen to its instructions. He twice had outbursts in front of the jury. After the first, in which he complained his restraints were too tight, the trial court warned him that trial would proceed in his absence if he caused problems or refused to come to court. The next day, the trial court again warned Carr not to conduct himself in a disruptive manner. Despite these warnings, Carr interrupted a witness's testimony and claimed that he was being punished for something he did not do, thus effectively testifying without subjecting himself to cross-examination, as the trial court noted. Under these circumstances, we have no reason not to defer to the trial court's determination that Carr, following warnings, had disrupted the proceedings, and presented a risk of disrupting them further. (See *Bell*, *supra*, 7 Cal.5th at p. 116.)

Carr claims his "outbursts were not so disruptive that the trial could not be carried out with him in the courtroom," noting that he only had two outbursts. Whether his outbursts were sufficiently disruptive to require his removal is a subjective determination by the trial court to which we defer. (*Bell*, *supra*, 7 Cal.5th at p. 116.) Carr cites no authority suggesting that on these or similar facts a trial court abuses its discretion by removing a defendant.

Carr challenges the trial court's accusation that Carr was attempting to mislead the jury by declaring he faced 25 years if convicted. Carr notes that the trial court itself had told him he faced 24 years, so his statement to the jury was largely accurate. Carr concedes, however, that "it may have been inappropriate for [Carr] to alert the jury as to his potential punishment."

Whether or not Carr's particular statement was accurate, the trial court reasonably concluded that he was attempting to influence the jury without subjecting himself to cross-examination. The court also reasonably concluded that Carr was improperly attempting to place the issue of punishment before the jury. (See, e.g., CALCRIM No. 101 [jury must reach verdict "without any consideration of punishment"].) That inappropriate conduct, in concert with Carr's other disruptive and extreme disrespectful behavior, justified his removal.

Carr further argues that even if the trial court properly removed him at the time of his outburst, it erred by refusing to allow him to return for the rest of the trial, despite defense counsel making that request and assuring the court Carr would conduct himself properly. Other than noting that removed defendants can reclaim their right to be present at trial if they are willing to conduct themselves properly, Carr cites no authority in support of his argument. Again, we defer to the trial court's assessment that, despite defense counsel's representations, Carr continued to pose a risk of disruption.

Carr argues that denying him the right to attend trial was prejudicial. We need not address this argument. Even if his exclusion was prejudicial, the trial court was within its authority to exclude him given Carr's multiple disruptions and inappropriate behavior.

B. No Hearing Is Necessary to Determine Carr's Ability to Pay Fines and Fees

Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Carr argues that the trial court erred by imposing the $5,000 restitution fine and $420 in court operations and criminal

conviction assessments without first determining Carr's ability to pay those costs. We reject this argument.

In *Dueñas*, an unemployed, homeless mother with cerebral palsy lost her driver's license when she was unable to pay over $1,000 for three juvenile citations. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160–1161.) Thereafter she received multiple convictions related to driving with a suspended license, each accompanied by jail time and additional fees she could not afford to pay. (*Id.* at p. 1161.) The trial court rejected Dueñas's request to hold an ability to pay hearing despite undisputed evidence that she was indigent. (*Id.* at p. 1163.)

The appellate court reversed, holding that due process prohibited imposing the same assessments imposed in the current case and required the trial court to stay execution of the restitution fine until the trial court held an ability to pay hearing. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.)

Carr has forfeited his challenge to the fine and fees by not raising it in the trial court. Courts have disagreed whether the constitutional principles announced in *Dueñas* are new and reasonably unforeseeable such that appellants sentenced prior to *Dueñas* can invoke those principles despite not having raised them in the trial court. (Compare, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [finding no forfeiture, reasoning *Dueñas* announced a new "constitutional principle that could not reasonably have been anticipated at the time of trial"] with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154–1155 [finding forfeiture, reasoning that "*Dueñas* was foreseeable" and "applied law that was old, not new"].)

We need not resolve this disagreement. Even before *Dueñas*, defendants had a statutory right to challenge imposition

of a restitution fine above the statutory minimum of $300. (§ 1202.4, subd. (c); *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 (*Gutierrez*).) Carr received a restitution fine well above the statutory minimum but did not challenge it. Thus, he has forfeited that challenge on appeal. (*Gutierrez*, at p. 1033.) Carr also has forfeited his challenge to the court assessments: "As a practical matter, if [Carr] chose not to object to a [$5,000] restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional [$420] in fees." (*Ibid.*)

Had Carr not forfeited his challenge, we nonetheless would reject it. Following *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted November 26, 2019, S258946, this court has held that *Dueñas* was wrongly decided because it misapplied due process precedents. (*People v. Kingston* (2019) 41 Cal.App.5th 272; see also *People v. Caceres* (2019) 39 Cal.App.5th 917, 928 [declining to apply *Dueñas*'s "broad holding" beyond its "unique facts"].) Although Carr contends the imposition of the fines and fees without determining his ability to pay them also violated his equal protection rights and constitutional prohibitions on excessive fines, he provides no authority for those challenges apart from *Dueñas*. Our rejection of *Dueñas* thus disposes of his entire argument.

Even if *Dueñas* were correctly decided, imposition of the $420 in assessments was harmless given Carr's ability to earn wages during his two-decade prison sentence. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139–140 [any error under *Dueñas* harmless when defendant "will have the ability to earn prison wages over a sustained period"].)

C. The One-Year Enhancement Under Section 667.5, Subdivision (b) Must Be Stricken Pursuant to Senate Bill No. 136

We requested supplemental briefing regarding the impact on Carr's sentence of Senate Bill No. 136, which amends section 667.5, subdivision (b). We conclude, and the Attorney General concedes, that Carr's one-year enhancement under that statute must be stricken.

Under current law which applied at the time of Carr's sentencing, section 667.5, subdivision (b) imposes a one-year sentence enhancement for each prior prison or county jail term served by the defendant. Senate Bill No. 136 amends section 667.5, subdivision (b) to impose the enhancement only if the prior prison or jail term was served "for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (Stats. 2019, ch. 590, § 1.)[6] The

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[6] Welfare and Institutions Code section 6600, subdivision (b) provides, " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 287, 288, 288.5, or 289 of, or former Section 288a of, the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 287, 288, or 289 of, or former Section 288a of, the Penal Code."

amendments will be effective on January 1, 2020. (See Cal. Const., art. IV, § 8, subd. (c)(2).)

Absent evidence to the contrary, we presume the Legislature intended amendments to statutes that reduce punishment "to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, citing *In re Estrada* (1965) 63 Cal.2d 740, 742–748.)

Our decision in this appeal will not be final for at least 30 days from issuance of this opinion, which will be after January 1, 2020, when the amendments to section 667.5 take effect. (Cal. Rules of Court, rule 8.366(b)(1).) Thus, Senate Bill No. 136 will apply retroactively to Carr. (See *People v. Lopez* (2019) 42 Cal.App.5th 337, 341–342 (*Lopez*) [applying Senate Bill No. 136 retroactively when appeal not final by January 1, 2020].)

Carr served a prior prison term for carrying a concealed firearm (former § 12025, subd. (a)), which is not a sexually violent offense under Welfare and Institutions Code section 6600, subdivision (b). We therefore strike Carr's one-year enhancement under section 667.5, subdivision (b). The parties do not request remand for resentencing, nor is remand warranted: "Because the trial court imposed the maximum possible sentence, there is no need for the court to again exercise its sentencing discretion." (*Lopez*, *supra*, 42 Cal.App.5th at p. 342.)

DISPOSITION

The judgment is modified to strike the one-year enhancement under section 667.5, subdivision (b). The judgment is otherwise affirmed. The trial court shall forward the modified abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.