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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FRANCISCO BUELNA,

Defendant and Appellant.

B290944

(Los Angeles County  
Super. Ct. No. TA143824)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa P. Magno, Judge. Affirmed.

James R. Bostwick, Jr., 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, Assistant Attorney General, Colleen M. Tiedemann and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a fight with his friend's tenant over rent owed to the friend, a jury convicted defendant Jose Francisco Buelna of assault with a semiautomatic weapon (Pen. Code, § 245, subd. (b))<sup>1</sup> and found true the allegation he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)). On appeal, Buelna contends the trial court erred in denying his requests for a mistrial and a new trial based on a flawed translation of a Spanish language recording of the fight. He also requests that we reverse the restitution fine and court assessments imposed against him pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Finding no merit in these contentions, we affirm.

## **BACKGROUND**

### **A. Prosecution Evidence**

Juan Limas lived with his two sons, 19-year-old Carlos and 10-year-old Brian, in half of a divided house.<sup>2</sup> His landlord, Jose Alviso, lived in the other half of the house. Buelna, a friend of Alviso's, lived across the street.

On July 21, 2017, Juan and Brian arrived home about 8:00 p.m. Landlord Alviso and a friend were sitting near the front door, drinking beer. Alviso, who appeared to be drunk, angrily told Juan the rent was past due and demanded payment. Juan sent Brian into the house. Juan told Alviso he did not have the money but would pay him in a few days. After demanding the

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> We hereafter refer to the Limas family members by their first names for clarity and ease of reference, and not out of any disrespect.

money several times, Alviso told Juan that if he did not pay, he would see what would happen to him.

Alviso sent his friend across the street to get Buelna. Buelna came to the house and told Juan to pay Alviso. Juan responded that he did not have the money, and would make arrangements with Alviso for payment. Juan said it was not Buelna's problem, and Buelna should leave. Buelna got upset and told Juan that if he was not going to pay, he was going to see what would happen to him.

Buelna went back across the street and returned a few minutes later with a gun in his waistband. Buelna drew the gun, cocked it, pointed it at Juan, and asked "if he had the balls." At some point after Buelna came back with the gun, Juan began recording the incident with his cell phone out of concern something was going to happen. Buelna then struck Juan on the head and face with the gun. Juan dropped his cell phone, which continued to record the incident. Juan grabbed Buelna's hand to keep Buelna from hitting him. The two struggled over the gun; they fell to the ground. Buelna tried to point the gun at Juan, but Juan pushed his hand away. The gun discharged, but as it was pointed in the direction of the street, no one was hit.

Brian, who had been observing the incident through the window, told his brother Carlos that someone was hitting their father. The two went outside and heard the gunshot. Carlos went over to his father and Buelna. Carlos grabbed the gun out of Buelna's hand and put it out of reach. Carlos then broke up the fight. Juan and Buelna separated and got to their feet. Buelna told Juan they should "leave it at that." Buelna asked Carlos to give him back his gun; Carlos refused. At his father's request, Carlos called 911.

Los Angeles County Sheriff's Deputy Danielle Leos arrived at the scene between 8:30 and 9:00 p.m. Juan, Carlos, and Brian all appeared to be frightened and in shock. Juan had bruises and abrasions on his face, and his head was bleeding. Deputy Leos retrieved the gun. While Deputy Leos was talking to Juan, Carlos, and Brian, Buelna came out of his home. Juan identified Buelna as the man who fired the gun. Other deputies then detained Buelna. At the time he was arrested, Buelna had no visible injuries.

#### **B. Defense Evidence**

Buelna testified in his own behalf. He stated he lived in an apartment across the street. Alviso had complained about Juan not paying his rent on time.

On the evening of July 21, Buelna was returning home from the store. Alviso was having an argument with Juan, and he yelled at Buelna to come help him. Alviso said that Juan was late with his rent, and asked Buelna to tell Juan to pay the rent. Juan told Buelna not to get involved, as it was none of Buelna's business. Juan said he could only afford \$100 a week. Buelna asked how Juan could support his children if he could not pay \$700 a month for rent. Juan got angry and hit Buelna in the face. Buelna and Juan then began fighting. Juan grabbed Buelna by the neck and knocked him to the ground.

After several minutes, Buelna and Juan stopped fighting and stood up. Carlos handed a gun to his father Juan. Buelna knocked the gun out of Juan's hand, and it discharged upon hitting the ground. Juan tried to pick up the gun, but Buelna knocked Juan down to prevent this from happening. Instead, Carlos picked up the gun. Buelna told Carlos to give him the gun, fearing that Carlos would shoot him. Carlos refused.

Eventually, the three men worked together to shut off a water valve to a sprinkler that broke during the fight. Then Buelna went home. When he later came outside to speak to the sheriff's deputies, they arrested him.

### **C. Trial and Jury Deliberations**

During Juan's testimony, the recording of the incident from his cell phone was played for the jury. The audio of the recording contained a mixture of Spanish and English. The prosecution provided a transcript of the recording to the jury. The transcript included both the words spoken in Spanish and English, and an English translation of the Spanish words. Before the recording was played, the court told the jury: "The actual evidence is the recording, not the transcript. The transcript is . . . to assist you in understanding what, if anything, was being said. If there's a discrepancy or dispute between the recording and the transcript, you're ordered to go with the recording."<sup>3</sup>

At the close of trial, the court instructed the jury pursuant to CALCRIM No. 121: "You heard a recording in a foreign language. You received a transcript with an English language translation of that recording. [¶] You must rely on the

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<sup>3</sup> Because the recording was not entirely in English, the instruction to rely on the recording rather than the transcript was incorrect. (See *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303-304.) The trial court rectified this error by instructing the jury before deliberations using CALCRIM No. 121, which correctly stated jurors were required to rely on the transcript, and not the recording, for any statements in a language other than English. Buelna does not claim prejudice from the erroneous instruction at the time the recording was initially published to the jury.

transcript, even if you understand the language in the recording. Do not retranslate the recording for other jurors. If you believe the transcript is incorrect, let me know immediately by writing a note and giving it to the bailiff. [¶] If the recording is partially in English, the English parts of the recording are the evidence.”

The defense theory was that Carlos and Juan possessed the gun, Juan was the aggressor, and Buelna acted in self-defense. During closing argument, defense counsel noted that the recording was “turned on just around the time when, allegedly, [Juan] was pistol-whipped.” Defense counsel argued Brian’s voice can be heard seconds into the recording calling out for his dad, and shortly before the recording ends telling his dad to leave Buelna alone. The defense argued that if in fact Buelna had pistol-whipped Juan, Brian would not “be saying, Dad, leave the other guy alone. He’d be yelling Dad, watch out for the gun. . . . [Brian] would be screaming—pardon me—for Carlos, his older brother.”

During deliberations, and in accord with the jury instructions, the jury sent the court a note stating that the transcript was “incorrect/incomplete.” In a discussion regarding the jury note, the prosecutor stated that she believed the problem was the transcription of a statement in English as “Go inside, Grace.” She believed defense counsel was also aware of this problem before the jury was instructed. The court suggested that counsel agree to a proper transcription and translation as the “least problematic” way to remedy the error. After further discussion, the court ordered the preparation of a new transcript, including correcting any errors that might exist in the translation. At defense counsel’s request, the court appointed a

second interpreter to listen to the recording and confirm the revised transcript was correct.

The following day, the prosecutor had a new transcript, which a certified translator verified was true and accurate. In the new transcript, the line spoken in English now read “Go inside, Brian.” The court asked if there were any problems. Defense counsel responded that he had not yet had an interpreter go through the revised transcript. The court indicated that “I brought this up to you yesterday . . . . If you want me to appoint someone, I’m more than happy to.” Defense counsel then moved for a mistrial. He claimed that prior to trial, he was not told that the prosecution intended to introduce the recording into evidence, and only learned of that intent later.

The court noted that defense counsel did not object at the time the transcripts were distributed to the jury and the recording played. The court asked if it was “missing something.” Defense counsel did not explain his failure to object, and instead reiterated that he was not aware before trial the People intended to introduce the recording, the original transcript was “false,” and a mistrial should be granted. When asked to identify the prejudice justifying a mistrial, defense counsel said the change from “Go inside, Grace” to “Go inside, Brian” “completely changes everything about this case . . . because the testimony and what we all assumed was that Brian was at the window when this was going on, inside of the house rather than outside the house.”<sup>4</sup> In

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<sup>4</sup> Defense counsel further identified a passage previously translated as “[unintelligible] look. Look [unintelligible] with the man” that was now translated as “Look, look you. I—I’m trying to smooth things over with the man to do you a favor.” Counsel

defense counsel's view, a mistrial was appropriate because there were issues raised during trial about whether Brian was inside or outside, and there was "no way to clean this up" with a corrected transcript.

The prosecutor rebutted defense counsel's lack of notice claim by pointing out there was a pretrial request to play the recording and have a transcript made, and defense counsel did not object. The prosecutor also rejected any claim of prejudice. The prosecutor pointed out that a child's voice was clearly audible on the recording yelling, " 'Papa, papa, papa,' " before the statement "Go inside, Brian," and that "I don't think it's prejudicial [the change from "Grace" to "Brian"] given the fact that [defense counsel] was aware of these statements and asked the witness about it." The prosecutor saw no way in which defense counsel "is now prejudiced in his questioning."

The court noted that it was the prosecution's responsibility to provide an accurate transcript, but that defense counsel had access to the recording and could have had an interpreter go through it. Having read the new transcript, the court did not "see any substantive charges that would have changed how the case would have been or should have been argued." With respect to Brian's location, the court found it "very clear that Brian at some point was observing things through the window and then at some point he came out to the porch area and witnessed certain things." The new transcript reflected no change in the facts, and the court saw nothing to change the defense's theory of the case. Finding no prejudice, the court denied the motion for a mistrial.

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did not, however, articulate why he believed this change was problematic.



The court then brought the jury into open court, and thanked them for abiding by the instruction to notify the court if they believed the transcript was inaccurate. It ordered the jury to disregard the old transcript, and handed out the new and corrected one.

The jury thereafter convicted Buelna of assault with a semiautomatic firearm but deadlocked on the charge of assault by means of force likely to produce great bodily injury. The court declared a mistrial as to that count, and it was eventually dismissed in the interest of justice.

#### **D. New Trial Motion and Sentencing**

After the jury returned its verdict, Buelna moved for a new trial. As pertinent to this appeal, the new trial motion asserted the trial court erred in denying the defense's mistrial motion, and in providing the new transcript to the jury. At the hearing on the motion, the trial court noted that when the original transcript was introduced the defense did not object, and raised concerns only after the jury's note. The court further noted the lack of material differences between the two transcripts, and that the key statement on which the defense relied—Brian's statement to Juan to leave Buelna alone, which the defense argued showed Juan was the aggressor—was unchanged. Finding no prejudice, the trial court denied the motion for a new trial.

The trial court sentenced Buelna to an aggregate prison term of 13 years, consisting of the low term of three years for the assault, plus 10 years for the firearm use enhancement. The court also imposed a restitution fine of \$300 (§ 1202.4, subd. (b)), a \$40 court operations assessment (§ 1465.8, subd. (a)(1), and a \$30 criminal conviction assessment (Gov. Code, § 70373). Buelna timely appealed.

## DISCUSSION

### A. Standard of Review

“ ‘A trial court should declare a mistrial only “ ‘if the court is apprised of prejudice that it judges incurable by admonition or instruction.’ ” ’ ” (*People v. Bell* (2019) 7 Cal.5th 70, 121.) That is, the court should grant a mistrial “ ‘when “ ‘a party’s chances of receiving a fair trial have been irreparably damaged.’ ” ’ ” [Citation.]” (*Ibid.*) The trial court has considerable discretion in determining whether there has been incurable prejudice. (*Ibid.*)

We review the trial court’s determination on a mistrial motion, as well as a motion for new trial, for abuse of discretion. (*People v. Bell, supra*, 7 Cal.5th at p. 121; *People v. Watts* (2018) 22 Cal.App.5th 102, 115.) “ ‘[A] trial court’s ruling [on a mistrial motion] will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094.) “ ‘ “A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” ’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

### B. The Trial Court Did Not Abuse its Discretion in Denying the Motions for a Mistrial and for a New Trial

Buelna argues that “questioning the truth and accuracy of prosecution testimony was key to [his] defense. An accurate translation of the recording and the availability of the translation to counsel when cross-examination was being

conducted was crucial.” The lack of an accurate translation “rendered his cross examination less effective than it should have been.” Thus, he claims, “a significant constitutional error affecting [his] right to a fair trial occurred.”

These broad generic claims in Buelna’s appellate brief, however, are not buttressed by any specific examples of how the questioning would have in fact differed, or any purported prejudice. Before the trial court, Buelna provided three such examples. One related to a change in identification of the speaker from an unknown voice to a child’s voice. The second was the change in transcription from “Go inside, Grace” to “Go inside, Brian.” Defendant claimed this was prejudicial because where Brian was located during the altercation, and thus what he was able to observe, was a key issue.

These two changes to the transcript did not necessitate a mistrial. First, defense counsel had pretrial access to the recording, and did not object when the original transcript was handed to the jury. Second, whether or not the speaker was a child was a fact the jury could decide from hearing the recording, and did not require any translation. Third, shortly before the “go inside” comment, Brian’s voice can be heard saying “Dad, Dad, Dad, Dad, Dad” and that statement was transcribed on both transcripts. Wherever Brian was located at other points in the altercation, he was close enough to Juan’s cell phone to have his voice recorded shortly before Juan’s “go inside” comment—a fact that defense counsel argued to the jury. Indeed, the comment to “go inside” is entirely consistent with the defense contention that Brian was leaning out of the front window when the altercation began. Fourth, there was no evidence anyone named Grace was present, so the transcription

error was self-evident and did not mislead anyone. Finally, the “go inside” comment was made in English, not Spanish. The jury was instructed when the recording was played, and again before deliberation, that for statements in English the evidence was the recording, not the transcript.

Errors in transcripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man. (*People v. Polk* (1996) 47 Cal.App.4th 944, 955.) Any error in the original transcription was not of that dimension. In light of the cautionary instructions read to the jury about relying on the recording and not the transcript for statements in English, the jury’s ability to make its own determination if an adult or 10-year-old was speaking, Brian’s voice on the recording before the “go inside” comment, the lack of any evidence that a “Grace” was present during the altercation (meaning it was self-evident the transcription saying “Go inside, Grace” was in error), the lack of any conflict with the defense theory, and the jury’s note recognizing the transcript was inaccurate, Buelna has not shown this portion of the original transcript was so inaccurate as to mislead the jury. (*Ibid.*)

With regard to the statements translated from Spanish, Buelna fails to explain how any specific inaccuracies in the original transcript hampered his ability to cross-examine the witnesses. As the trial court noted, the differences in the translated portions did not meaningfully alter the timing or tenor of the exchange between Buelna and Juan. The portion of the transcript on which Buelna relied—Brian’s statements to his father to leave Buelna alone—were the same on both transcripts.

The only example identified by defense counsel to the trial court was a passage previously translated as “[unintelligible] look. Look [unintelligible] with the man” that was then translated as “Look, look you. I—I’m trying to smooth things over with the man to do you a favor.” Defense counsel failed to explain, and we fail to see, a meaningful difference between these two statements, or how any difference was relevant to any defense argument that was or could have been advanced. Buelna’s failure to identify any meaningful disparities, or how he would have used those disparities if he had a more accurate transcript at the time he cross-examined Juan, Carlos, and Brian or testified in his own defense, defeats his claim that the trial court abused its discretion in denying his motions for a mistrial and new trial. (See *People v. Welch* (1999) 20 Cal.4th 701, 749-750.)

**C. The Trial Court Did Not Err in Imposing a Restitution Fine and Assessments**

The trial court imposed a \$300 restitution fine, a \$40 court operations assessment, and a \$30 conviction assessment. Buelna requests that we reverse these amounts because the trial court did not first ascertain his ability to pay them, relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157. We decline to do so.

The People argue that Buelna’s failure to object below to the fine and assessments, or to raise the issue of inability to pay, caused him to forfeit any such argument on appeal. The Courts of Appeal are divided on the issue of forfeiture in these circumstances. (Compare *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [no forfeiture] and *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same], with *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeiture] and *People v.*

*Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [same].) We find it unnecessary to weigh in on this debate because in our view *Dueñas* was wrongly decided. (*People v. Kingston* (2019) \_\_\_\_ Cal.App.5th \_\_\_\_ [2019 Cal.App. LEXIS 1038] (*Kingston*); see also *People v. Caceres* (2019) 39 Cal.App.5th 917.)<sup>5</sup>

In *Kingston*, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks*, *supra*, 40 Cal.App.5th 320 that, contrary to the analysis in *Dueñas*, “due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant’s incarceration.” (*Kingston*, *supra*, \_\_\_\_ Cal.App.5th at p. \_\_\_\_ [2019 Cal.App. LEXIS 1038 at p. \*9], citing *Hicks*, *supra*, at pp. 325-326.) Here, the “imposition of the [restitution fine] and fees in no way interfered with [Buelna]’s right to present a defense at trial or to challenge the trial court’s rulings on appeal . . . . And their imposition did not result in [Buelna]’s incarceration.” (*Kingston*, *supra*, at p. \_\_\_\_ [2019 Cal.App. LEXIS 1038 at pp. \*13-\*14].)

At this point in time, due process does not deny Buelna the opportunity to try to satisfy these obligations. (*People v. Hicks*, *supra*, 40 Cal.App.5th at p. 327.) The trial court accordingly did not violate Buelna’s due process rights by imposing the restitution fine and assessments without first ascertaining his ability to pay them.

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<sup>5</sup> Other courts have also disagreed with *Dueñas*. (See *People v. Allen* (2019) \_\_\_\_ Cal.App.5th \_\_\_\_ [2019 Cal.App. LEXIS 1040]; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068; *People v. Kopp* (2019) 38 Cal.App.5th 47, 93-98.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.\*

We concur:

JOHNSON, Acting P.J.

BENDIX, 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.