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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. ROGELIO NAVA, Defendant and Appellant.	B289250 (Los Angeles County Super. Ct. Nos. BA462081, BA447788)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ray G. Jurado, Judge. Affirmed and remanded.

Anthony W. Tahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Rogelio Nava of arson of property of another. On appeal Nava primarily contends the court erred in failing to instruct the jury sua sponte on the lesser included offense of unlawfully causing a fire resulting in damage to property of another. We affirm Nava's conviction and remand to permit Nava to challenge his ability to pay the fines, fees and assessments the court imposed at sentencing.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of October 17, 2017 Nava was sleeping on a bench beneath a painted steel gazebo in a park maintained by the City of Los Angeles when another man who had also been sleeping in the park approached him. Nava rose from the bench, took a lighter from his pocket and ignited his blanket, which he had left on the bench. Nava told the second man, "Just like all this blanket is burning, that's the same way your life is gonna burn." Nava then picked up the man's possessions that were nearby, including the man's clothes and a small mattress; threw them into the blaze; and left the park. The fire eventually extended over an area approximately 15 square feet with flames six to eight feet high and damaged the gazebo. A city employee working at the park witnessed the events, stopped a patrol car and told the officer what had occurred.

Nava was charged in an information filed November 21, 2017 with one count of arson of property of another (Pen. Code, § 451, subd. (d))[1] for damage to the gazebo. At trial the prosecutor emphasized the arson charge related to damage to the

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[1] Statutory references are to this code unless otherwise stated.

gazebo and not to damage to the second man's possessions. The jury found Nava guilty of the charged offense.

At sentencing, based on the jury's verdict, the court found Nava had also violated his probation in Los Angeles Superior Court case No. BA447788 for aggravated assault and revoked his probation in that case. Citing Nava's lengthy criminal history and other aggravating factors, the court sentenced Nava to an aggregate state prison term of four years, the upper term of three years for arson plus a consecutive term of one year (one-third the middle term) for Nava's prior assault offense in case No. BA447788. The court also imposed a $300 restitution fine (§ 1202.4), a $30 court facilities assessment (Gov. Code, § 70373) and a $40 court operations assessment (§ 1465.8).[2]

DISCUSSION

1. *The Court Had No Sua Sponte Duty To Instruct the Jury on the Lesser Included Offense of Unlawfully Causing a Fire Under Section 452*

The trial court has a sua sponte duty to instruct a jury on all lesser included offenses of the charged crime "if substantial evidence supports the conclusion that the defendant committed

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[2] The minute order and abstract of judgment reflect imposition of a $300 restitution fine under section 1202.4, while the reporter's transcript reflects a $400 restitution fine. Conflicts between the reporter's transcript and the minute order are presumed clerical and generally resolved in favor of the court's oral pronouncements unless the record plainly reflects a contrary intent. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re P.A.* (2012) 211 Cal.App.4th 23, 30, fn. 4.) Here, the circumstances in the record suggest, and the People concede, the court intended to impose the minimum restitution fine of $300, as properly reflected in the minute order and abstract of judgment.

the lesser included offense and not the greater offense." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196; accord, *People v. Shockley* (2013) 58 Cal.4th 400, 403.) This requirement prevents ""either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other."" (*Gonzalez*, at pp. 196-197; accord, *People v. Smith* (2013) 57 Cal.4th 232, 239-240.)

We review the trial court's failure to instruct on a lesser included offense de novo (see *People v. Licas* (2007) 41 Cal.4th 362, 367; *People v. Manriquez* (2005) 37 Cal.4th 547, 581), considering the evidence in the light most favorable to the defendant (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137).

Section 451 provides, "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned . . . any structure, forest land, or property." Subdivision (d) of section 451 explains, "For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person's structure, forest land, or property."

Section 451's "'willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire; ""'in short, a fire of incendiary origin.'""" (*In re V.V.* (2011) 51 Cal.4th 1020, 1029.) Arson is a general intent crime. (*Ibid.; People v. Atkins* (2001) 25 Cal.4th 76, 85.) There is no requirement that a person commit the act with the specific intent to cause damage. Rather, it is sufficient if the defendant acts with "a general intent to willfully commit the act of setting

on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property." (*In re V.V.*, at p. 1029.)

Section 452 provides, "A person is guilty of unlawfully causing a fire when he [or she] recklessly sets fire to or burns or causes to be burned, any structure, forest land or property. [¶] . . . [¶] (d) Unlawfully causing a fire of property is a misdemeanor. For purposes of this paragraph, unlawfully causing a fire of property does not include one burning or causing to be burned his [or her] own personal property unless there is injury to another person or to another person's structure, forest land or property." The offense of unlawfully causing a fire is a lesser included offense of arson as defined by section 451. (See *In re V.V., supra,* 51 Cal.4th at p. 1025; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 (*Schwartz*).) It applies when the fire was not deliberately set, but was accidental or reckless. (*In re V.V.,* at p. 1031 ["'[t]he offense of unlawfully causing a fire covers reckless accidents or unintentional fires'"].)

Relying on *Schwartz, supra,* 2 Cal.App.4th 1322, Nava contends the court had a sua sponte duty to instruct the jury on the lesser included offense of unlawfully (that is, recklessly) causing a fire of property under section 452, subdivision (d). In *Schwartz* the defendant had poured gasoline on car frames and parts stored in a garage, lit a piece of paper on fire, and threw it to the ground in the garage. The garage and several cars were damaged from the blaze. The jury convicted the defendant of arson of a structure under section 451, subdivision (c). On appeal the defendant argued the trial court had a sua sponte duty to instruct the jury with the lesser included offense of unlawfully (recklessly) causing a fire to a structure (§ 452, subd. (c)), citing

evidence, if believed, that would have supported a finding that the defendant intended to set fire to the cars, not the structure. (*Schwartz,* at p. 1325.) The court of appeal agreed, concluding the trial court had erred in failing to instruct the jury sua sponte on the lesser included offense of unlawfully causing a fire to a structure. (*Ibid.*)

Nava contends he intended to burn his own blanket and perhaps other items belonging to the other man, not the gazebo, and the court erred in failing to instruct the jury sua sponte with unlawfully causing a fire resulting in damage to property, a misdemeanor. (§ 452, subd. (d).) His argument fails. Even if there were substantial evidence to support a finding Nava did not intend to burn city property, the absence of specific intent is immaterial. As the Supreme Court explained nearly two decades after *Schwartz* was decided, a defendant need only intend to ignite the fire "'under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property'"; a defendant need not intend to damage the property at issue. (*In re V.V., supra,* 51 Cal.4th at p. 1029.) Nava identifies no evidence the fire was accidentally or recklessly ignited, which would support a lesser included offense instruction. The court did not err in failing to give one.

2. *Remand Is Necessary To Permit Nava To Challenge His Ability To Pay the Imposed Fines, Fees and Assessments*

Nava contends remand is required in accordance with our decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) to allow him the opportunity to present evidence as to his inability to pay the fines, fees and assessments imposed at sentencing. In *Dueñas* this court concluded "the assessment provisions of Government Code section 70373 and Penal Code

section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." As this court noted, the court assessments, which must be imposed on every criminal conviction, were enacted as part of legislation to raise funds for California courts, not to impose punishment on the defendant. (*Dueñas*, at pp. 1164-1165.)

In contrast to the assessments, a restitution fine under section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas, supra*, 30 Cal.App.5th at pp. 1165, 1169.) Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a "compelling and extraordinary reason" not to impose the restitution fine; rather, inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question raised by imposition of the restitution fines on an indigent defendant, we held that, "although the trial court is required by . . . section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas,* at p. 1172.) Otherwise, unpaid restitution fines would later be enforceable as a civil judgment, which could be collected by the State as an offset against any amount a state agency owes a defendant, including tax refunds. (*Id*. at pp. 1169-1170.) Further, a defendant granted probation who does not have the ability to pay the restitution fine would be

unable to fulfill the conditions of probation, and as a result, "through no fault of his or her own he or she [would be] categorically barred from earning the right to have his or her charges dropped and to relief from the penalties and disabilities of the offense for which he or she has been on probation, no matter how completely he or she complies with every other condition of his or her probation." (*Id*. at pp. 1170-1171, citing § 1203.4, subd. (a)(1).)

The People argue Nava, who was sentenced prior to our decision in *Dueñas*, has forfeited this issue because he failed to raise it in the trial court. We have rejected the application of forfeiture in these circumstances. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) ["[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture."].)[3]

Alternatively, relying on decisions by our sister courts of appeal that have disagreed with our substantive analysis in

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[3] The intermediate appellate courts are currently divided as to whether such a claim is forfeited by the defendant's failure to raise it in the trial court prior to issuance of our decision in *Dueñas*. (Compare, e.g., *Castellano*, *supra,* 33 Cal.App.5th at pp. 488-489 [issue not forfeited]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [same] with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 [forfeited]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeited].)

Dueñas,[4] the People argue the issue of the restitution fine is properly addressed under the excessive fines clause of the Eighth Amendment to the United States Constitution, and neither that constitutional provision nor due process requires remand to permit a defendant to contest his or her ability to pay a restitution fine that is not grossly disproportional to the gravity of the offense.[5] In *People v. Belloso* (Nov. 26, 2019, B290968) __ Cal.App.5th ___ [2019 Cal.App. Lexis 1181]), we addressed these arguments and reaffirmed our holdings in *Dueñas* and *Castellano*. Accordingly, as the judgment in Nava's case is not yet final, we remand the matter to the trial court so that Nava may request a hearing and present evidence demonstrating his inability to pay the fines, fees and assessments imposed by the trial court.

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[4] Several intermediate appellate courts have taken issue with our substantive holding in *Dueñas*. (See, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, 327, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1068; *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-928.) The Supreme Court recently granted review of the decision in *People v. Kopp* (2019) 38 Cal.App.5th 47, 96-99, review granted November 13, 2019, S257844, to decide the following issues: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?"

[5] Conceding the court facilities assessment (Gov. Code, § 70373) and court operations assessment (Pen. Code, § 1465.8) are not punishment, the People expressly limit their substantive challenge to the imposition of the restitution fine, stating they "do[] not seek to uphold the imposition of these [court] assessments on those who have no ability to pay."

DISPOSITION

The judgment is affirmed, and the matter remanded to permit Nava to request a hearing and present evidence demonstrating his inability to pay the court facilities and court operations assessments and the restitution fine. If Nava demonstrates his inability to pay the assessments, the court must strike them. If the trial court determines Nava does not have the ability to pay the restitution fine, it must stay execution of that fine. If Nava fails to demonstrate his inability to pay these amounts, the fines, fees and assessments imposed may be enforced.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.