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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. GENNELL LEWIS, Defendant and Appellant.	B293534 (Los Angeles County Super. Ct. No. TA145731)

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Lonergan, Jr., Judge. Affirmed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Michael R. Johnsen and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

After an evening of drinking, defendant Gennell Lewis and her best friend Laura McClelland got into a fight that ended in Lewis stabbing McClelland with a kitchen knife. A jury convicted Lewis of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1) with a finding she had personally inflicted great bodily injury within the meaning of section Penal Code section 122022.7, subdivision (a). The trial court sentenced Lewis to an aggregate prison term of five years. The court imposed a restitution fine and various assessments.[1]

On appeal, Lewis claims the trial court erred in excluding evidence of McClelland's prior crimes for impeachment purposes, and in instructing the jury using CALJIC No. 5.31 that a deadly weapon may not be used to defend against an attack with fists, unless the fists present a threat of great bodily injury. Lewis also contends the trial court erred in assessing statutory fines and assessments without first determining her ability to pay.

We conclude Lewis's claims of evidentiary and instructional error have no merit and affirm her conviction. We further reject Lewis's argument that she is entitled to an ability-to-pay hearing before the trial court can assess statutory fines and assessments.

FACTUAL BACKGROUND

Lewis and McClelland had been best friends for several years. They generally had a good time together, drinking alcohol

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[1] At sentencing, the trial court scheduled a hearing to determine victim restitution.

daily at Lewis's home. Lewis lived with her mother, Linda Lewis (Linda).[2]

A. Prosecution Evidence

1. *Events Leading Up to the Stabbing*

On the night of March 30, 2018, McClelland showed up at Lewis's home with a bottle of brandy, which they shared. McClelland testified she was not really drunk that night, because she drank alcohol every day. However, Linda testified that both women were intoxicated. Linda's health did not allow her to drink alcohol, so she was sober that night.

At 10:30 p.m., McClelland decided to go home. She could not leave, however, because a neighbor's car was blocking her car in the driveway. McClelland asked some people approaching the neighbor's front door to have the neighbor move his car. Lewis came out to open the front gate. She saw the neighbor's car and started banging on it. The neighbor came running, pushed Lewis away from the car, and Lewis fell. Lewis yelled threats at the neighbor.

Hearing the commotion, Linda looked out her bedroom window and saw Lewis arguing with the neighbor. Linda went to the front porch and heard McClelland telling Lewis to go back inside. Linda also told Lewis to return to the house. McClelland then bear-hugged Lewis and pulled her into the house to prevent the situation from escalating. McClelland was petite; standing

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[2] We refer to Lewis's mother by her first name to prevent confusion, and not out of any disrespect.

nearly five feet tall and weighing 100 pounds. Lewis was larger than McClelland.

Linda locked Lewis inside the house, while McClelland retrieved her keys and cellphone from her car. When McClelland returned, Lewis was hostile and "talking crazy." Lewis pushed Linda and told her to "stay out of it." McClelland testified she stood between them, fearing Lewis was going to fight her mother. Linda then retreated to her bedroom.

2. *McClelland's Account of the Stabbing*

McClelland told Lewis to hit her instead of Linda, but said she (McClelland) would fight back. Lewis pushed McClelland, punched her in the chest and pushed her again. McClelland backhanded Lewis, slapping her across the face. Lewis ran to the kitchen, grabbed a knife in each hand and lunged at McClelland. When she saw Lewis grab the knives, McClelland attempted to run out the back door to get a trash barrel lid to protect herself. Then, McClelland felt a knifepoint and could not breathe. Blood "started gushing like water," and McClelland grasped the kitchen counter before collapsing onto the floor. Linda then called the police.

While lying on the floor, McClelland attempted to call 911 and to reach her mother on her cellphone. When her mother called back, it was difficult for McClelland to speak. Lewis took the cellphone and told McClelland's mother that everything was fine. After trying to drag McClelland by her hair, Lewis lay on top of McClelland and told her not to tell the police that she had stabbed her.

3. *Linda's Account of the Stabbing*

Linda heard arguing and fighting and went into the kitchen. She saw Lewis pulling McClelland's hair and McClelland punching Lewis. They stopped fighting, and Lewis backed away to the kitchen counter. McClelland advanced and wrapped Lewis in a bear hug. The women were face to face, and Lewis's back was pressed against the counter. Lewis repeatedly yelled at McClelland to release her. Lewis turned slightly, grabbed a knife from the knife block on the counter, and stabbed McClelland in the upper left shoulder. McClelland released Lewis and fell to the floor. Linda did not see McClelland run for the back door or try to grab a trash barrel lid. Linda went to get her cellphone and called the police. Linda told the responding officer that the women were arguing, McClelland turned around, and Lewis then stabbed her twice in the back.

4. *McClelland's Injuries*

McClelland had stab wounds in the back of her lower neck and in her lung. She underwent surgery for her collapsed lung, and her neck wound was stitched. McClelland testified she was in the hospital for a week and a half and suffered from severe pain while in the hospital. McClelland had to wear a filter to ensure her lung healed properly. Hospital records admitted by stipulation showed that McClelland was released after five days with ibuprofen, that she had acute alcohol intoxication when admitted, and that she had no pain after three days.

B. Defense Evidence

Lewis did not testify. Her defense was self-defense, presented through cross-examination. Two of Lewis's friends

offered character evidence, testifying that Lewis was kind, generous, and never aggressive or violent.

DISCUSSION

A. Exclusion of McClelland's Prior Crimes For Impeachment

Lewis contends the trial court abused its discretion in refusing to allow her to impeach McClelland with her prior crimes. McClelland's criminal history consisted of a 2006 juvenile adjudication for loitering to commit prostitution (Pen. Code, § 653.22), a 2008 juvenile adjudication for unlawfully driving or taking a motor vehicle (Veh. Code § 10851), and a 2009 misdemeanor conviction for loitering to commit prostitution.

1. *Applicable Law and Standard of Review*

"Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach" a witness. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) Moral turpitude offenses "include crimes in which dishonesty is an element (i.e., fraud, perjury, etc.)." (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) " '[T]he latitude [Evidence Code[3]] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) A trial

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[3] All further statutory references are to the Evidence Code, unless otherwise indicated.

court's decision to admit or exclude impeachment evidence is not reversed " 'unless it is shown " 'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice' " ' " (*People v. Jones* (2017) 3 Cal.5th 583, 609.)

2. *Trial Court Acted within Its Discretion in Excluding the Impeachment Evidence*

Misdemeanor convictions and juvenile adjudications themselves are not admissible for impeachment. (*People v. Chatman* (2006) 38 Cal.4th 344, 373 [misdemeanor convictions]); *People v. Sanchez* (1985) 170 Cal.App.3d 216, 218—219 [juvenile adjudications].) Evidence of the underlying conduct however may be admissible, subject to the trial court's exercise of discretion under section 352. Pursuant to section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In deciding whether to admit evidence of conduct underlying a prior misdemeanor conviction or juvenile adjudication to impeach a witness, courts are to assess (1) "whether [the conduct] reflects on the witness's honesty or veracity," (2) "whether [the conduct] is near or remote in time," (3) "whether [the conduct] is for the same or similar conduct as the charged offense" and (4) that "a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony." (*People v. Clark* (2011) 52 Cal.4th 856, 931; *People v. Wheeler* (1992) 4

Cal.4th 284, 296.)[4] These factors are not to be construed as rigid limitations, but "legitimate considerations in the exercise of the trial court's discretion under Evidence Code section 352." (*People v. Williams* (1985) 169 Cal.App.3d 951, 956.)

Here, in deciding what impeachment evidence to admit and what to exclude, the trial court assumed, for purposes of its ruling, that all three of McClelland's prior offenses involved moral turpitude. Without deciding the issue, we make a similar assumption.[5] The trial court then considered the age of the offenses. Whether the offenses are remote or near in time is a primary factor for the court to assess in deciding whether to admit a prior misdemeanor conviction or juvenile adjudication to impeach a witness. (*People v. Clair* (1992) 2 Cal.4th 629, 654 ["[w]hen the witness subject to impeachment is not the

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[4] There is a fifth factor, which is "what effect . . . admission [of that conduct] would have on the defendant's decision to testify." (*People v. Clark, supra,* 52 Cal.4th at p. 931.) That factor was not pertinent here because McClelland was not the defendant.

[5] Violation of Vehicle Code section 10851 is a crime of moral turpitude (*People v. Rodriguez* (1986) 177 Cal.App.3d 174, 177—179), as is prostitution (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708—709). It is unclear, however, whether loitering for the purpose of prostitution is a crime of moral turpitude. Determining if that offense is a crime of moral turpitude turns not on the underlying facts of the offense but on the statutory elements test. "[A] witness' prior conviction should only be admissible for impeachment if the least adjudicated elements of the conviction necessarily involve moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 317.)

defendant," the primary factors to consider are "whether the conviction (1) reflects on honesty and (2) is near in time"].) The court concluded the prior offenses were too remote to be of significant probative value for impeachment purposes. Finally, the court considered whether the prior offenses involved the same or substantially similar conduct at issue in the present case, and determined they were dissimilar.

Lewis contends the trial court abused its discretion by relying on the wrong legal standard, specifically section 1101, in determining whether to exclude the impeachment evidence. That statute provides that evidence a person committed a crime is admissible "when relevant to prove some fact (such as motive, opportunity, [or] intent . . . ." (§ 1101, subd. (b).) In support of her claim, Lewis points to the court's comments that there was "no relevance" between McClelland's prior offenses and the current charge, and that it may have considered admitting the evidence "if there [had been] any remote relationship" between the prior offenses and current charge.

The trial court's ruling was not based on the wrong standard. The court never cited section 1101, or suggested it applied. We read the court's comments as assessing whether there were similarities between the prior crimes and current offense, one factor in balancing the probative value against the potential prejudice of admitting potential impeachment evidence. (*People v. Clark, supra,* 52 Cal.4th at p. 931.) Given that McClelland's offenses were nine, 10 and 12 years old, her most recent offense was a 2009 misdemeanor and she had no convictions in the intervening nine years prior to trial, and the lack of similarity between the prior conduct (vehicle theft and prostitution-related loitering) and the conduct in the present case

(aggravated assault), the court's ruling was well within its discretion.

Furthermore, because impeachment would involve introducing evidence of the underlying conduct and not the fact of conviction, "impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler, supra,* 4 Cal.4th at pp. 296—297.) The trial court properly did so here. The court did not err in weighing the minimal probative value of such evidence against the time and problems of proof that would be involved in placing the underlying conduct in proper context for the jury as pertaining solely to McClelland's credibility.

3. *The Trial Court Did Not Violate Lewis's Constitutional Rights in Excluding the Impeachment Evidence*

Lewis also argues that the trial court's exclusion of the impeachment evidence violated due process and her Sixth Amendment right to confront and cross-examine witnesses. We reject this claim. A trial court's ruling that complies with the rules of evidence, as this ruling did, ordinarily does not violate a criminal defendant's constitutional rights. (*People v. Boyette* (2002) 29 Cal.4th 381, 427—428.) More specifically, our Supreme Court has " 'repeatedly held that "not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation

clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance." ' " (*People v. Harris* (2008) 43 Cal.4th 1269, 1292.)

Contrary to Lewis's assertion, the omission of the prior offenses did not "cloak[ ][McClelland] in a false aura of credibility." (*People v. Chavez, supra,* 84 Cal.App.4th at p. 28 [exclusion of impeachment evidence should not be allowed to clothe the witness "in a false aura of veracity."].) As discussed, the offenses were only minimally relevant in impeaching her credibility. (*People v. Brown* (2003) 31 Cal.4th 518, 545.)

Furthermore, Lewis was not otherwise precluded from impeaching McClelland with evidence that directly related to the stabbing and demonstrating that McClelland was not a truthful or reliable witness. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 362—363, fn. 16.) The jury heard evidence that hospital records showed McClelland had acute alcohol intoxication and that Linda testified she was drunk, whereas McClelland testified that she was not buzzed or drunk that night. Defense counsel cross-examined McClelland at length on her rather elaborate version of the stabbing, which conflicted with Linda's account. McClelland acknowledged to defense counsel that she had only recently told the prosecutor about attempting to grab the trash can lid and Lewis attempting to drag her by her hair. The jury heard evidence that McClelland was wrong about the length of her hospital stay, and McClelland insisted on cross-examination that the hospital records contradicting her testimony were incorrect. McClelland also insisted she was still in pain when she was discharged and was prescribed more pain medication than ibuprofen, contrary to hospital records.

Defense counsel further argued to the jury the physical evidence did not support McClelland's testimony. Counsel pointed to evidence that only one knife was involved in the stabbing, not two knives as McClelland testified. Counsel maintained that Linda's testimony and the nature and placement of McClelland's two stab wounds showed McClelland was stabbed twice in "one motion," rather than the three times she recounted. Counsel further argued that McClelland could not have removed the trash barrel lid for protection because photographs showed it was clamped onto the barrel.[6]

Thus, any assertion that the court's ruling resulted in an unfair characterization of McClelland as an entirely trustworthy witness and, in the process, denied Lewis her right to confrontation and cross-examination, fails. (See *People v. Pearson* (2013) 56 Cal.4th 393, 455—456.)

B. CALJIC No. 5.31 Instruction (Self Defense – Assault with Fists)

Lewis claims the trial court erred when instructing the jury, pursuant to the People's request and over her objection, on self-defense using CALJIC No. 5.31. The court gave several self-defense instructions, including a modified version of CALCRIM No. 3470 defining the right to self-defense, CALCRIM No. 3471 specifying when the defense is available to the initial aggressor or in cases of mutual combat, CALCRIM No. 3474 limiting the

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[6] Police photographs of McClelland's injuries, the kitchen, and the outside trash barrels were introduced into evidence and are part of the record on appeal.

right to use force when the danger no longer exists, and CALJIC No. 5.31.

1. *Applicable Law and Standard of Review*

"A trial court must instruct on the *law* applicable to the facts of the case." (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) "[L]egally correct and factually warranted pinpoint instructions designed to elaborate and clarify other instructions should be delivered upon request . . . ." (*People v. Hughes* (2002) 27 Cal.4th 287, 362, italics omitted.) However, a court must refrain from giving an argumentative instruction, that is "an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " (*People v. Mincey, supra,* at p. 437.) Claims of instructional error are reviewed de novo. (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

2. *The Trial Court's Decision To Instruct With CALJIC No. 5.31 Was Not Error*

Lewis contends the trial court erred in giving CALJIC No. 5.31 because the instruction is argumentative. As read to the jury, CALJIC No. 5.31 provides: "An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon her."

CALJIC No. 5.31 is not argumentative. It correctly states the law. (*People v. Rush* (1960) 180 Cal.App.2d 885, 889—890 [" 'probable danger of less degree than great bodily injury' " is insufficient to justify the exercise of self-defense].) It does not invite inferences favorable to either party and did not integrate

facts of Lewis's case as an opinion of the court or suggest a particular verdict. Instead, CALJIC No. 5.31 is balanced and focuses the jury in an unbiased manner on how to evaluate the elements of perfect self-defense in the context of an escalating fight. It instructs the jury to allow a conviction—if a deadly weapon is used in response to an assault with fists—or an acquittal—if the defendant actually and reasonably believes the assault is likely to inflict great bodily injury.

Lewis asserts CALJIC No. 5.31 is argumentative because, in giving the instruction, the trial court conveyed its view to the jury that the stabbing occurred "*during* the fight" and "rejected and discredited" Linda's testimony that "the stabbing occurred *after* McClelland and [Lewis] had stopped fighting." Lewis also claims CALJIC No. 5.31 is argumentative because the prosecutor urged during rebuttal argument that the instruction was dispositive on the issue of self-defense.

Neither of these arguments is persuasive. Lewis fails to explain how the wording of CALJIC No. 5.31 itself unfairly highlighted facts favorable to the prosecution. (See e.g., *People v. Mincey, supra,* 2 Cal.4h at p.437 [charged with torture murder, a defendant's proposed instruction that his beatings of a child victim were a " 'misguided, irrational and totally unjustified attempt at discipline rather than torture,' " were properly rejected as argumentative].) The instruction as given did not incorporate the facts of the case and did not suggest anything regarding the timing of when the stabbing occurred.

Nor do we agree that the instruction was argumentative because it was given by the court and argued by the prosecutor. That is clearly not the test for whether an instruction is

argumentative, as it would apply to nearly every jury instruction. Both prosecutors and the defense counsel typically argue the import of jury instructions in their summations, and that does not make the instructions that each side highlights argumentative. Instead, whether an instruction is potentially argumentative turns on whether it "invite[s] the jury to draw inferences favorable to [one of the parties] from specified items of evidence on a disputed question of fact, and therefore properly belongs . . . in the arguments of counsel to the jury." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135, see also *People v. Panah* (2005) 35 Cal.4th 395, 486.) That did not occur here.

Lewis additionally observes that trial courts are discouraged from mixing CALCRIM and CALJIC instructions. She cites the latest edition of the CALCRIM usage guide, which provides: "The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy." (CALCRIM (2019) Guide for Using, etc., p. xxii.) Lewis points to the jury's deliberations as evidencing the kind of confusion that led to the Judicial Council's warning.

While we endorse the Judicial Counsel's sound, cautionary advice about mixing and matching differing pattern instructions, a trial court's decision not to follow that advice does not relieve us of our obligation to determine whether there was instructional error requiring reversal. Here, after approximately four-and-a-half hours of deliberations, the jury notified the trial court that it could not reach a verdict. Upon questioning, the foreperson

stated the split among jurors was 10 to 2. The foreperson informed the court there appeared to be an honest difference of opinion and jurors were "kind of stuck" specifically "on the law that discussed how much force was necessary and being able to use a weapon or not." The court suggested the jury focus on the elements of the crime of assault with a deadly weapon in CALCRIM No. 875 and the foreperson agreed. The court directed the jury to continue deliberating and advised the foreperson to have the jury try to formulate a question for clarification. That afternoon, the jury requested clarification on the definition of "wrongful intent" in CALCRIM No. 250 (Union of Act and Intent: General Intent). The court provided clarification, as stipulated by the parties, and, shortly thereafter, the jury returned a verdict.

Lewis interprets the foreperson's remark as signaling there was a conflict among the jurors over whether to follow CALCRIM No. 3470 on self-defense or CALJIC No. 5.31. The People hypothesize there may have been a difference of opinion over whether the evidence supported the charged offense. Both parties are speculating beyond the actual record, and we decline to join in their conjecture. What the record does show is that the trial court gave the jury ample opportunity to present any questions about the instructions. The jury subsequently asked about "wrongful intent" but did not seek any other clarification—including any clarification on self-defense—before reaching a verdict. In short, nothing in the jury's questions suggested CALJIC No. 5.31 created confusion warranting reversal.

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

At the October 22, 2018 sentencing hearing, the trial court imposed, without objection, the statutory minimum restitution fine of $300 (Pen. Code, § 1202.4, subd. (b)(1)), a court operations assessment of $40 (Pen. Code, § 1465.8, subd. (a)(1)), and a criminal conviction assessment of $30 (Gov. Code, § 70373). Lewis requests that we reverse these amounts because the trial court did not first ascertain her ability to pay them, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We decline to do so.

Lewis's argument is premised on the notion that *Dueñas* properly decided that the imposition of such fines and fees without an ability-to-pay hearing violated due process. However, in our view, *Dueñas* was wrongly decided. In *People v. Kingston* (2019) 41 Cal.App.5th 272, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks* (2019) 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*, 41 Cal.App.5th at p. 279, citing *Hicks, supra*, at pp. 325—326.) Here, the "imposition of the [restitution fine] and fees in no way interfered with [Lewis]'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 [Lewis's] incarceration." (*Kingston, supra*, at p. 281.)

Lewis was sentenced to a prison term of five years. She has sufficient time remaining on her sentence to make bona fide

efforts to repay the restitution fine and assessments. At this point in time, due process does not deny Lewis the opportunity to try to satisfy these obligations. (*People v. Hicks, supra*, 40 Cal.App.5th at p. 328.) The trial court accordingly did not violate Lewis's due process rights by imposing the restitution fine and assessments without first ascertaining her ability to pay them.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, 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.