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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.

CHRISTOPHER HIGA,

Defendant and Appellant.

B291859

(Los Angeles County
Super. Ct. No. SA096375)

APPEAL from a judgment of the Superior Court of Los Angeles County, George F. Bird, Judge. Affirmed and remanded with directions.

Jason Szydlik, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Michael J. Wise, Deputy Attorney General for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Christopher Higa of first degree burglary and grand theft. Higa argues the trial court erred in ordering him to pay \$243 in restitution to Charles Musoke because Musoke was not a “victim” under Penal Code section 1202.4.¹ Higa also contends the trial court violated his rights to due process and equal protection by imposing certain fines, fees, and assessments without evidence of his ability to pay. Finally, Higa asserts the trial court failed to specify the statutory bases for the penalty assessment and surcharge.

We affirm the trial court’s restitution order and remand for the trial court to give Higa the opportunity to request a hearing and to present evidence of his inability to pay the fines, fees, and assessments. We also remand for the trial court to separately list, with the relevant statutory bases, any fines, fees, and penalties the court imposes.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crime*

In November 2016 Musoke, a locksmith, received a phone call for service at an apartment in Hawthorne. When he arrived, Musoke met Higa, who identified himself as Richard Goldsmith or Richard Goldstein and said he had locked himself out of the apartment.

Musoke proceeded to drill out the apartment locks, giving Higa access to the apartment. As Musoke was changing the

¹ Undesignated statutory references are to the Penal Code.

locks, Higa walked out of the apartment carrying a white leather box. Musoke requested \$243 for his services, and Higa asked Musoke to follow him to a nearby bank. While Musoke was loading his truck, Higa got inside a taxi and rode away. Musoke tried to follow the taxi but gave up when he realized Higa was fleeing.

The same day, Keiko Murakami and her fiancé, David Goldsmith, returned from work to find they could not get into their apartment—the same apartment Higa had arranged for Musoke to unlock. Goldsmith and Higa were friends, but recently had an argument. When Murakami and Goldsmith finally entered the apartment, they discovered Murakami's jewelry box was missing. Murakami also recognized Higa's jacket, which Higa had left behind.

B. *The Trial*

The People filed an information charging Higa with first degree burglary (§ 459) and grand theft (§ 487, subd. (a)). A jury convicted Higa on both counts. The trial court imposed a prison term of four years on the burglary conviction and imposed but stayed under section 654 a sentence of one year four months on the grand theft conviction. The court ordered Higa to pay restitution in the stipulated amounts of \$4,000 to Murakami and \$243 to Musoke. The court also ordered Higa to pay an \$80 court operations assessment, a \$60 criminal conviction assessment, a \$300 restitution fine, a \$10 crime prevention fee, a \$29 penalty assessment, and a \$2 criminal surcharge. Higa filed a timely notice of appeal.

DISCUSSION

A. *The Trial Court Did Not Err in Ordering Higa To Pay Restitution to Musoke*

1. *Relevant Proceedings*

During the trial, the court denied the prosecutor's motion to amend the information to add a petty theft count for the theft of Musoke's locksmith services. At sentencing the prosecutor asked the court to order Higa to pay \$243 in restitution to Musoke. The court asked, "Do I have jurisdiction over that since it's not a charge?" The prosecutor responded, "I believe it's part of the burglary, your Honor. I believe that's stipulated." Higa voiced his agreement to the proposed restitution order, and the court ordered him to pay Musoke \$243.

Higa argues the trial court imposed an unauthorized sentence and abused its discretion by ordering him to pay restitution to Musoke. Higa contends Musoke was not a "victim" within the meaning of section 1202.4 because the information identified Murakami as the only victim of the burglary and because the object of the burglary was not to obtain Musoke's services without payment.

2. *Higa Did Not Forfeit His Argument the Trial Court Erred in Ordering Him To Pay Musoke Restitution*

A defendant may forfeit an argument the trial court erred, including in calculating the amount of restitution, if the defendant fails to object in the trial court. (*People v. Anderson* (2010) 50 Cal.4th 19, 26 & fn. 6; *People v. Pinon* (2016) 6

Cal.App.5th 956, 968; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) An order requiring the defendant to pay restitution to someone who is not entitled to it, however, is an unauthorized sentence (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1094-1096; *People v. Woods* (2008) 161 Cal.App.4th 1045, 1050), and an unauthorized sentence “constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.” (*Anderson*, at p. 26; see *People v. Rivera* (2019) 7 Cal.5th 306, 348-349 [an unauthorized sentence is one that ““could not lawfully be imposed under any circumstance in the particular case”” and “is reviewable on appeal regardless of whether it was objected to at trial”].) Thus, if Musoke was not entitled to restitution because he was not a victim of Higa’s crimes, the order requiring Higa to pay Musoke \$243 was unauthorized, and Higa did not forfeit his argument by failing to object. (See *People v. Williams* (2017) 7 Cal.App.5th 644, 696 [stipulating to restitution did not forfeit “the purely legal issue whether the court imposed the restitution order in excess of its statutory authority”]; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179 [imposition of unauthorized restitution order was “in excess of [the court’s] statutory authority,” and the defendant did not forfeit the issue by failing to object].) Therefore, we will decide the merits of Higa’s argument the trial court erred in ordering restitution to Musoke.

3. *The Trial Court Did Not Err in Ordering Higa To Make Restitution to Musoke*

a. *Criminal Restitution*

The California Constitution, as amended in 1982 by Proposition 8, provides that “all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer” and that “[r]estitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” (Cal. Const., art. I, § 28, subd. (b)(13)(A)-(B); see *People v. Martinez* (2017) 2 Cal.5th 1093, 1100 (*Martinez*) “[u]nder the California Constitution . . . every crime victim has a right to be compensated by the defendant for losses incurred as a result of the defendant’s crime”]; *People v. Nichols* (2017) 8 Cal.App.5th 330, 341 “[v]ictim restitution is mandatory under the California Constitution”). “In passing Proposition 8, the electorate expanded victims’ access to compensation . . . and instruct[ed] the Legislature to adopt legislation to implement this directive.” (*Martinez*, at p. 1100.) “The Legislature’s response [is] currently codified in section 1202.4.” (*Ibid.*)

Section 1202.4, subdivision (a)(1), states that “a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” Section 1202.4, subdivision (f), further provides that, “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order.”

Although “[a] victim’s restitution right is to be broadly and liberally construed” (*People v. Nichols, supra*, 8 Cal.App.5th at p. 342), there are limits to the court’s power to order restitution. “When judgment is imposed and the defendant sentenced to a period of incarceration (in prison or jail), the court may order restitution only for losses arising out of the ‘criminal conduct for which the defendant has been convicted.’ [Citations.] This result is dictated by the language of section 1202.4, which looks to ‘the defendant’s *conduct*’ [citation] and by the unfairness that would result if a defendant were held responsible for losses caused by conduct underlying charges that were dismissed or of which he was acquitted.” (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1274; see *People v. Williams, supra*, 7 Cal.App.5th at pp. 696-697 [“[t]he term ‘criminal conduct’ as used in [section 1202.4,] subdivision (f) means the criminal conduct for which the defendant has been convicted”].) In other words, “[a]pplication of these provisions depends on the relationship between the victim’s loss and the defendant’s crime.” (*Martinez, supra*, 2 Cal.5th at p. 1098.)

“[W]e apply the abuse-of-discretion standard to the trial court’s determination of predominantly factual matters regarding restitution” (*People v. Brunette* (2011) 194 Cal.App.4th 268, 277; see *People v. Williams* (2010) 184 Cal.App.4th 142, 146 [“[o]rdinarily, the standard of review of a restitution order is abuse of discretion”].) But “when the legal basis for a restitution award is under challenge,” we independently review “the legality of the restitution award in light of the applicable statutes and any relevant decisional law.” (*Brunette*, at p. 277; see *People v. Sy* (2014) 223 Cal.App.4th 44, 63 [“a restitution order ‘resting upon a ‘demonstrable error of law’ constitutes an abuse of the

court's discretion""]; *People v. Williams, supra*, 184 Cal.App.4th at p. 146 ["when the propriety of a restitution order turns on the interpretation of a statute, a question of law is raised, which is subject to de novo review on appeal"].)

b. Musoke Is Entitled to Restitution

The trial court did not err in ordering Higa to make restitution to Musoke. Contrary to Higa's argument, the information's failure to name Musoke as a victim did not preclude the court from ordering Higa to pay restitution to Musoke. (See *People v. Walker, supra*, 231 Cal.App.4th at pp. 1273-1274 [trial court properly ordered the defendant to pay restitution to victims of the defendant's criminal conduct who were not named in the charging document].) As the court in *Walker* explained, restitution is appropriate for "losses arising out of 'the criminal conduct for which the defendant has been convicted.' [Citation.] Whether these potential victims were specifically named in the charging document is irrelevant. Section 1202.4 imposes no such duty to name, and judicially imposing such a duty would make a victim's entitlement to restitution turn on the happenstance of whether the prosecutor located or named that victim before the defendant pled or was convicted. Such absurd results are to be avoided." (*Id.* at pp. 1275-1276.) Thus, Musoke's right to restitution did not depend on which victims the People named in the information or whether the People successfully sought to amend the information to bring additional charges or name additional victims.

Regarding Higa's argument Musoke was not the direct object of Higa's crime, we look to the criminal conduct of the burglary and grand theft offenses, not whether Musoke was an

intended victim. (See *Walker, supra*, 231 Cal.App.4th at pp. 1274-1275 [the trial court “may order restitution only for losses arising out of the ‘criminal conduct for which the defendant has been convicted,’” “which turns on what conduct is encompassed by the crime”].) In *Martinez, supra*, 2 Cal.5th 1093 the California Supreme Court held “direct victim restitution is available when the victim’s losses are caused by conduct that does, in fact, constitute a crime.” (*Id.* at p. 1105.) The Supreme Court explained, by way of example, that if a thief steals a car and a third party reckless driver damages it, the owner is entitled to restitution from the thief under section 1202.4, subdivision (f), “because the owner has incurred losses resulting from the thief’s criminal conduct (namely, the unlawful deprivation of his or her property)” (*Martinez*, at p. 1105; see *People v. Pierce* (2015) 234 Cal.App.4th 1334, 1336-1337 [owner of a stolen car, utility companies, and a property owner were all “entitled to full restitution for the economic loss they suffered as a result of defendant’s conduct” under § 1202.4, subd. (f), where the defendant’s accomplice drove the stolen car into a telephone pole while attempting to evade the police, causing damage to the pole and a house]; see also *People v. Foalima* (2015) 239 Cal.App.4th 1376, 1396-1397 [murder victim’s daughter was “entitled to compensation” for clothes and household items destroyed by a fire the defendant set to destroy evidence of the murder because the defendant’s conduct in killing the victim “was a substantial factor and the proximate cause” of the damages].) Like the owner of the stolen car in the Supreme Court’s example in *Martinez*, Musoke suffered a loss “resulting from” Higa’s criminal conduct in burglarizing Murakami’s home and stealing the jewelry box: Musoke did not receive payment for his services because Hill fled

the scene of the crime to complete the theft. Hill's conduct in committing the burglary and theft directly caused economic loss to several victims, including Musoke.

The Supreme Court also held in *Martinez* that a court may “order restitution for losses incurred as a result of the means by which the defendant committed the offense.” (*Martinez, supra*, 2 Cal.5th at pp. 1105-1106.) The Supreme Court explained, again by way of example, that “if a burglar breaks a window to enter a home, he or she may be ordered to pay for the broken window in victim restitution, even though the burglary statute requires the prosecution to prove only that the defendant entered the house with the intent to commit a felony. [Citation.] If the burglar happens to have committed the prohibited entry by some means that causes damage to the home, a trial court certainly can—and must—take the damage into account in ordering restitution.” (*Ibid.*) Here, Higa used Musoke's locksmith services as the means to enter the apartment, and the trial court properly ordered Hill to pay for those services.

B. *Remand Is Necessary To Give Higa the Opportunity To Request a Hearing Concerning His Ability To Pay the Fines, Fees, and Assessments the Court Imposed*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 this court held that a trial court cannot impose a court operations assessment under section 1465.8 or a court facilities assessment under Government Code section 70373 without first determining the defendant's ability to pay and that the court must stay execution of a restitution fine until the court determines the defendant has the ability to pay. Higa challenges the trial court's

imposition of the \$300 restitution fine, the \$80 court operations assessment, and the \$60 criminal conviction assessment. The People argue Higa forfeited his challenge to these fines, fees, and assessments because he did not object to them in the trial court. Higa concedes he did not object in the trial court but argues that, because *Dueñas* was an unforeseen change in the law, his failure to object is excusable.

Higa did not forfeit his argument. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), at the time the trial court sentenced the defendant, “*Dueñas* had not yet been decided; and no 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. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court’s consideration of a 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.” (*Castellano*, at p. 489; see *People v. Jones* (2019) 36 Cal.App.5th 1028, 1031-1034; see *People v. Santos* (Aug. 15, 2019, H045518) __ Cal.App.5th __, __ [2019 WL 3821793, p. 5]; see generally *People v. Brooks* (2017) 3 Cal.5th 1, 92 [“[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence”]; but see *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.)

The People also argue remand is not appropriate because the record does not establish Higa lacks the financial ability or future earning capacity, including his ability to earn wages in prison, to pay the fines and assessments. The People are correct Higa must request a hearing and present evidence on his ability to pay the fines and assessments. “Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court.” (*Castellano*, at p. 490.) As discussed in the context of forfeiture, however, because Higa was not aware of his right to challenge the fees, fines, and assessments based on his inability to pay, he should have the opportunity on remand to request a hearing and present evidence.

We similarly disagree with the People’s additional argument that remand is not appropriate because Higa has not identified any adverse consequences resulting from imposition of the fines and assessments. A “defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.” (*Castellano*, at p. 490.)

Because Higa’s conviction and sentence are not yet final, we remand the matter to the trial court so that Higa may request a hearing and present evidence demonstrating his inability to pay the fines, fees, and assessments imposed by the trial court. If he demonstrates he does not have the ability to pay these amounts, the trial court must strike the assessments and fees and stay the execution of the restitution fine. If Higa fails to

demonstrate his inability to pay these amounts, the fines, fees, and assessments imposed may be enforced.

C. *The Trial Court Erred in Failing To Specify the Statutory Bases for the Penalty Assessment and Surcharge on Higa's Crime Prevention Fine*

“[P]enalty assessments must be (1) specified in the court’s oral pronouncement of judgment, and (2) specifically listed in the abstract of judgment.” (*People v. Hamed* (2013) 221 Cal.App.4th 928, 937.) “[A]lthough . . . a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts’ Moreover, ‘[a] detailed description of the amount of and statutory basis for the fines and penalty assessments imposed would help the parties and the court avoid errors in this area.’” (*People v. Hartley* (2016) 248 Cal.App.4th 620, 636.) A trial court may satisfy these requirements in several ways: “A trial court could recite the amount and statutory basis for any base fine and the amounts and statutory bases for any penalty assessments on the record, as [the court in *People v. High* (2004) 119 Cal.App.4th 1192] suggests should be done. [Citation.] Or, in cases where the amounts and statutory bases for the penalty assessments have been set forth in a probation report, a sentencing memorandum, or some other writing, the court could state the amount and statutory basis for the base fine and make a shorthand reference in its oral pronouncement to ‘penalty assessments as set forth in the’ probation report, memorandum, or writing” (*Hamed*, at pp. 939-940.) “[F]ailure to specify the amount and statutory basis for each fine, fee, and penalty assessment is a ‘legal error[] at

sentencing’ that can be reviewed on appeal “regardless of whether an objection or argument was raised” [Citation.] On remand for resentencing, the trial court shall specify the appropriate statutory bases for any fine, fee, and penalty assessments that it imposes.” (*Hartley, supra*, 248 Cal.App.4th at p. 637.)

Higa asserts the trial court failed to specify the statutory bases for the penalty assessment and criminal surcharge. Higa argues the court erred because it only specified section 1202.5, which provides the basis for the crime prevention fine, but not the remaining two fees—the penalty assessment and criminal surcharge fees. Higa is correct. The trial court did not orally pronounce the statutory basis for each of the three fines. In addition, the abstract of judgment does not specifically list the statutory basis for the criminal surcharge or the penalty assessment, and the court did not refer to the probation report or other document identifying the applicable statutory bases. Therefore, we also remand for the trial court to separately list, with the statutory bases, any fines, fees, and penalties imposed and to prepare an amended abstract of judgment.

DISPOSITION

The judgment is affirmed. The case is remanded with directions to give Higa the opportunity to request a hearing and to present evidence demonstrating his inability to pay the applicable fines, fees, and assessments. The trial court is also directed to separately list, with the statutory bases, any fines, fees, and penalties imposed and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.