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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.

JOSE JESUS AVALOS,

Defendant and Appellant.

B295971

(Los Angeles County  
Super. Ct. No. BA468793)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed as modified.

Christine Dubois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, David E. Madeo and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

Following Jose Jesus Avalos’s conviction for assault with a deadly weapon and resisting a peace officer, the trial court sentenced him to an aggregate state prison term of two years; imposed a \$30 court facilities assessment, a \$40 court operations assessment and a \$300 restitution fine; and imposed and stayed a \$300 parole revocation fine. On appeal Avalos contends only that the assessments and fines imposed should be reversed because there was insufficient evidence to support the trial court’s finding he had the ability to pay those assessments and fines. We modify the judgment to correct a clerical error and affirm the judgment as modified.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Information, Jury Trial and Verdict*

Avalos was charged in a three-count information with attempted second degree robbery (Pen. Code, §§ 211, 664)<sup>1</sup> (count 1), assault with a deadly weapon (§ 245, subd. (a)(1)) (count 2) and resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)) (count 4).

According to the People’s evidence at trial, as Simon Francisco was walking through a park with a container of fruit for his family picnic, Avalos demanded, “Give me the food. I’m hungry.” Francisco ignored him. Avalos demanded the food a second time while calling Francisco a “motherfucker” or a “son of a bitch.” When Francisco declined, Avalos approached him from behind. Francisco felt a kick to his back, and he dropped the fruit. Turning around to face Avalos, Francisco saw Avalos was two feet away with a hatchet in his hand. Holding the hatchet

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<sup>1</sup> Statutory references are to this code unless otherwise stated.

above his head, Avalos pointed it at Francisco and, with a “very aggressive” look on his face, stated, “I’m going to cut your head now.” Although frightened, Francisco observed a police car in the vicinity; and he lifted his hands and formed fists to protect himself from Avalos. Avalos left without attempting to grab the fruit.

Testifying in his defense, Avalos explained he had gone to the park looking for work, perhaps “to help for the day,” and for something to eat. While looking for recyclables, he found a small hatchet and a pair of shoes. Intending to sell the items, he put the hatchet in his pocket (with the handle protruding out).

Avalos saw Francisco with a container of watermelon and approached him to ask for a piece of fruit. Avalos believed Francisco to be “distributing to the homeless,” either independently or through a church or other charitable organization. Homeless at the time, Avalos had experience as a recipient of such distributions. Francisco, however, angrily declined. When asked a second time, Francisco yelled his refusal very loudly using an obscenity and charged at Avalos. As Avalos turned to escape from Francisco, the hatchet fell out of his pocket. Francisco grabbed the ax and swung it at Avalos from behind. When a police officer arrived at the scene, Avalos, at first relieved, later ran from him and other officers and jumped into a lake because the police seemed to think he, rather than Francisco, was the aggressor, and he wanted to give the police time to “clarify the situation.”

The jury found Avalos not guilty of attempted second degree robbery, but convicted him of assault with a deadly weapon, a felony, and resisting a peace officer, a misdemeanor.

## *2. The Sentencing Memorandum and Sentencing Hearing*

On February 19, 2019 Avalos's attorney filed a sentencing memorandum, which requested the trial court sentence Avalos to formal probation and a mental health and substance abuse program. The memorandum, which was unsupported by any declarations, stated, "Avalos was employed prior to finding himself homeless"; "homelessness, mental health issues, hunger, and desperation befell him"; "[w]hile homeless, he sought to recycle, find items to sell, and sustain himself as best as possible"; and "[h]e wishes to seek treatment, and then return to gainful employment."

On February 20, 2019 the trial court denied probation; sentenced Avalos to the lower term of two years in state prison for assault with a deadly weapon and a concurrent term of six months for resisting a peace officer; and awarded 509 days of presentence credit (255 days of actual custody and 254 days of good time/work time credit). The court imposed a \$30 court facilities assessment (Gov. Code, § 70373); a \$40 court operations assessment (Pen. Code, § 1465.8); and a \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)). It imposed and suspended a corresponding \$300 parole revocation fine (Pen. Code, § 1202.45).

At the sentencing hearing, immediately after the trial court stated the fines and assessments it was imposing, Avalos's attorney responded, "We're requesting that the court waive any waivable fees as he was homeless at the time of this incident and has no income, and now under the new rules, the Court can consider waiving them." The trial court replied, "I think he'll have the ability to pay once he's in prison. He's able-bodied."

## DISCUSSION

### 1. *Governing Law and Standard of Review*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held a trial court cannot impose a court operations assessment as required by Penal Code section 1465.8 or the court facilities assessment mandated by Government Code section 70373 without first determining the defendant's ability to pay. (*Dueñas*, at p. 1168.) We also held, although the trial court is required to impose a restitution fine under Penal Code section 1202.4, subdivision (b), the court must stay execution of that fine until it determines the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)<sup>2</sup>

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<sup>2</sup> Not all courts of appeal agree with our decision in *Dueñas*. (Compare, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, 322 [*“Dueñas was wrongly decided”*] and *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060 [*“a constitutional challenge to the imposition of fines, fees, and assessments should be based on the excessive fines clause of the Eighth Amendment instead of the due process rationale utilized in Dueñas”*] with *People v. Santos* (2019) 38 Cal.App.5th 923, 934-935 [applying *Dueñas* rationale and remanding cases for the limited purpose of affording appellant the opportunity to request a hearing on his ability to pay assessments imposed by the trial court].) The Supreme Court recently granted review of the decision in *People v. Kopp* (2019) 38 Cal.App.5th 47, 96-99, limited to 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?” (*People v. Kopp* (review granted Nov. 13, 2019, S257844) 2019 Cal.Lexis 8371.)

We have since clarified it is the defendant’s burden to prove his or her inability to pay. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 490, “*Dueñas* does not support that conclusion [reversal of the court facilities and operations assessments and the criminal laboratory analysis fee and staying execution of the restitution fine] in the absence of evidence in the record of a defendant’s inability to pay. . . . [¶] 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.” (Accord, *People v. Santos* (2019) 38 Cal.App.5th 923, 934 [“it is the defendant’s burden to demonstrate an inability to pay, not the prosecution’s burden to show the defendant *can* pay”].)

Although an appellate court ordinarily reviews for substantial evidence a trial court’s resolution of disputed factual questions (*People v. Trinh* (2014) 59 Cal.4th 216, 236; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136), “[i]n the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528). “Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’” (*Ibid.*; accord, *Glovis America, Inc. v. County of Ventura* (2018)

28 Cal.App.5th 62, 71; *Atkins v. City of Los Angeles* (2017)  
8 Cal.App.5th 696, 734.)

2. *Section 1237.2 Does Not Require Dismissal of Avalos's Appeal*

The People contend this court lacks jurisdiction to consider Avalos's claim and urge us to dismiss his appeal pursuant to section 1237.2. That section provides, "An appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing."<sup>3</sup> The People assert section 1237.2 precludes Avalos's appeal because he did not raise in the trial court the specific argument he now advances on appeal—that, applying his presentence custody credits, he had only 111 days remaining on his prison term, an inadequate time to earn through prison wages the amount of fines and assessments imposed.

Section 1237.2 does not require such precision. At the sentencing hearing, held six weeks after our decision in *Dueñas*, Avalos's counsel asked the court "under the new rules" to waive all fines and assessments because of Avalos's indigency. Although the trial court should have provided Avalos the opportunity to present additional evidence concerning his ability

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<sup>3</sup> By its terms, section 1237.2 only applies where, as here, "the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal."

to pay<sup>4</sup>—an error Avalos does not raise on appeal—the fundamental issue of Avalos’s ability to pay any fines and assessments was unquestionably presented to, and considered by, that court.

The cases relied upon by the People are inapposite. In those cases the defendants did not dispute they had failed to first raise their claims of error in the trial court. In *People v. Alexander* (2016) 6 Cal.App.5th 798, the defendant argued on appeal the trial court had erred in imposing a \$6,000 restitution fine because an implied term of his plea agreement was that the fine would be the statutory minimum of \$300. The court of appeal, pursuant to section 1237.2, dismissed the appeal because the defendant had failed to make in the trial court any claim of error regarding the fine. The defendant’s only argument against dismissal of his appeal was that section 1237.2 did not apply where the error entailed a violation of a plea bargain rather than a mere miscalculation (that is, a mathematical mistake). (*Alexander*, at pp. 800-801.)

Similarly, in *People v. Hall* (2019) 39 Cal.App.5th 502, the defendant had made no claim of error in the trial court, but argued section 1237.2 did not apply because the issue on

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<sup>4</sup> See *People v. Castellano*, *supra*, 33 Cal.App.5th at page 490 (“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”; the “trial court then must consider all relevant factors in determining whether the defendant is able to pay the fines, fees and assessments to be imposed”); *Dueñas*, *supra*, 30 Cal.App.5th at page 1164 (“due process of law requires the trial court to conduct an ability to pay hearing”).



appeal—whether the trial court’s imposition of fees and assessments must be reversed and the \$300 restitution fine stayed pending a hearing on her ability to pay—implicated a violation of her constitutional rights rather than a miscalculation of the fees. The court of appeal rejected the defendant’s argument and dismissed her appeal pursuant to section 1237.2 on the grounds (1) section 1237.2 applies broadly to any error in the imposition or calculation of fees, not merely to mathematical error; and (2) the appeal did not involve constitutional rights, as the trial court had already stayed all of the fines and fees imposed. (*Hall*, at pp. 504-505.)

3. *The Record Does Not Compel a Finding That Avalos Is Unable To Pay the Fines and Assessments Imposed*

Relying on an incorrect standard of review, Avalos contends the trial court abused its discretion in imposing fines and assessments because its finding he had the ability to pay was not supported by substantial evidence. Avalos concedes a court may consider the “realistic ability to earn prison wages” as a factor in determining ability to pay (*People v. Santos, supra*, 38 Cal.App.5th at p. 934), but argues there was no evidence the prison wages he could realistically earn would be enough to pay the imposed amounts. To the contrary, Avalos asserts, he could not possibly earn enough prison wages to pay the \$370 in fines and assessments imposed (an amount that does not include the imposed but suspended \$300 parole revocation fine), as shown by the following facts: (1) The trial court sentenced Avalos to two years, or 730 days, in state prison and awarded him 509 days of presentence credit, so that only 221 days of his prison term remained; (2) he would have to serve only half of that term (Pen. Code, § 2933) and thus have only 111 days, or about three and a

half months, in prison in which to earn wages; and (3) “[w]ages in California prisons currently range from \$12 to \$56 a month” (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035; see, e.g., Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1)).<sup>5</sup>

However, as discussed, it was Avalos’s burden to establish his inability to pay any fines or assessments. Although the trial court knew Avalos was represented by the public defender’s office, was told Avalos had mental health and substance abuse issues and from the evidence at trial had information indicating Avalos at the time of his assault on Francisco was hungry and homeless, Avalos failed to submit any declarations or offer live testimony, and did not request a hearing concerning any of the matters he now asserts demonstrated his inability to pay. There was trial evidence Avalos was able-bodied and was capable of earning money, and his sentencing memorandum acknowledged he had previously been employed. Moreover, Avalos’s probation report stated there was no indication or claim of any significant

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<sup>5</sup> Avalos explains if, as is possible, he were paid only \$12 per month during his three-and-a-half month term in prison, he would earn total prison wages of about \$42, half of which would have to be applied to the \$300 restitution fine; thus, it is possible his prison wages would be inadequate to pay even the \$30 court facilities assessment. (*People v. Jones, supra*, 36 Cal.App.5th at p. 1035 [“half of any wages earned . . . are deducted to pay any outstanding restitution fine”], citing Pen. Code, § 2085.5, subd. (a); Cal. Code Regs., tit. 15, § 3097, subd. (f).) He also argues it is doubtful he even had two and a half months to earn prison wages, as prisoners must first spend time being classified in a reception center prior to being assigned a work group.

physical, mental or emotional health problem;<sup>6</sup> and he had, in the past, maintained a mailing address with the Department of Motor Vehicles and completed a drug diversion program. On this record, as limited as it may be, we cannot say the uncontradicted and unimpeached evidence compelled a finding Avalos was unable to pay the \$370 in fines and assessments imposed through a combination of prison wages and post-prison earnings. (Cf. *Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486 [“[w]here, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor”].)

4. *The Minute Order of the Sentencing Hearing and Abstract of Judgment Must Be Corrected To Accurately Reflect the Oral Pronouncement of Judgment*

At the sentencing hearing on February 20, 2019 the court imposed a term of two years in state prison for aggravated assault and a concurrent six-month term for the misdemeanor offense of resisting a peace officer and awarded 509 days of presentence credit, including 255 days of actual custody credit. Neither the minute order prepared after the sentencing hearing nor the abstract of judgment, however, reflects the concurrent nature of the terms imposed; and the abstract of judgment indicates an award of 225 days of actual custody credit, rather than 255 days. The abstract of judgment also indicates Avalos was convicted by plea agreement, rather than following a jury trial. The February 20, 2019 minute order must be corrected to accurately reflect the terms of the court’s oral pronouncement of

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<sup>6</sup> In his opening appellate brief Avalos characterizes any psychological issues as “marginal.”

judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [trial court's oral pronouncements are best indicator of intent and prevail over clerk's minute order]; *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order abstract of judgment corrected to accurately reflect the oral judgment of sentencing court; a court "may correct clerical errors at any time" and "on its own motion"].)

### **DISPOSITION**

The judgment is affirmed as modified. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a corrected abstract of judgment that reflects the concurrent nature of the sentencing terms, the awarding of 255 days of actual custody credit and conviction by jury trial rather than by plea agreement.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.