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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANDRE MAURICE HOWARD,

Defendant and Appellant.

B294443

(Los Angeles County  
Super. Ct. No. MA069584)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Frank M. Tavelman, Judge. Affirmed.

Richard Lennon, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,  
Assistant Attorney General, Jason Tran and David W. Williams,  
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Deandre Maurice Howard (defendant) appeals from the judgment entered after he was convicted of robbery. Defendant contends that the trial court abused its discretion in denying his *Romero* motion<sup>1</sup> to dismiss a prior conviction which was alleged for purposes of sentencing under the Three Strikes law. Defendant also raises a *Duenas*<sup>2</sup> issue, asserting that the trial court's imposition of a restitution fine and the assessment of fees at the time of sentencing, without first determining his ability to pay, violated his right to due process. We find no abuse of discretion in the denial of defendant's motion to dismiss the prior conviction. We also conclude that defendant has forfeited his challenge to the restitution fine, and that any error in the imposition of fees was harmless. We affirm the judgment.

### **BACKGROUND**

Defendant was charged in count 1 of an amended information with second degree robbery in violation of Penal Code section 211,<sup>3</sup> and with the special allegation that he personally used a firearm in the commission of the robbery within the meaning of section 12022.53, subdivision (b). In count 2, defendant was charged with possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1). It was also

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<sup>1</sup> See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; *People v. Carmony* (2004) 33 Cal.4th 367, 377-378; Penal Code section 1385.

<sup>2</sup> See *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*).

<sup>3</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

alleged that defendant had suffered a prior conviction of a serious or violent felony that subjected him to sentencing pursuant to sections 667, subdivisions (b)-(j), and 1170.12 (the Three Strikes law), as well as section 667, subdivision (a)(1) (five-year recidivist enhancement).

On the day trial was to begin, defendant agreed to enter an open plea to the charges.<sup>4</sup> The trial court warned defendant that it could and might impose the maximum sentence of 26 years in prison, and that it made no representations regarding an intended sentence. In addition, the court advised defendant of his rights and the potential consequences of his plea, including a restitution fine from \$300 to \$10,000. Defendant represented that no promises had been made to him in exchange for his plea. Defendant then pled no contest to second degree robbery, and admitted having personally used a firearm during the robbery. He also admitted a prior conviction of violating section 245, subdivision (a), which qualified as a strike under the Three Strikes law. Counsel stipulated to a factual basis for the plea based upon the preliminary hearing transcript and discovery.

The trial court sentenced defendant on October 12, 2018, to a total term of 26 years 4 months in prison, composed of the high term of five years on count 1, doubled as a second strike, plus a five-year recidivist enhancement pursuant to 667, subdivision (a),

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<sup>4</sup> “An open plea is one under which the defendant is not offered any promises. [Citation.] In other words, the defendant ‘plead[s] unconditionally, admitting all charges and exposing himself [or herself] to the maximum possible sentence if the court later [chooses] to impose it.’ [Citation.]” (*People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4.)

a consecutive 10-year term due to the personal use of a firearm, under section 12022.53, subdivision (b), and a consecutive term of 16 months (one-third the midterm, doubled) as to count 2, felon in possession of a firearm. The court expressly elected not to strike the five-year enhancement. The court imposed a restitution fine of \$1,000, a parole revocation fine (stayed) in the same amount, criminal conviction and court security fees of \$30 and \$40 respectively, and a crime prevention fine of \$10 plus penalty assessment. Defendant received 801 days of presentence custody credit, comprised of 697 actual days and 104 days of conduct credit.

Defendant filed a timely notice of appeal from the judgment.

## **DISCUSSION**

### **I. *Romero* motion**

Defendant contends that the trial court abused its discretion in denying his *Romero* motion to dismiss the prior strike conviction.

Defendant made two *Romero* motions. The first was filed prior to trial. In that motion, defendant declared that he had a “job offer/interview” scheduled for the day after his arrest in September 2016, and that he was married with four children, one of them a newborn. Defendant added that he had been convicted of murder in 2003, but a petition for habeas corpus was later granted by the Ninth Circuit Court of Appeals, which ordered a new trial. He was then acquitted and released from prison in December 2013. It was in 2005, while incarcerated on the murder charge that defendant was convicted of the strike offense, a violation of section 245, subdivision (a)(1), which was his only conviction during the 11-year period that he was in custody on

the murder conviction. The trial court denied the pretrial motion after noting defendant's lengthy criminal history beginning as a juvenile: two sustained juvenile petitions based upon findings of assault in 1995; a felony drug offense as an adult in 2002 while on probation; and the strike offense committed in 2004 while incarcerated. Defendant's motion to strike the prior conviction was revisited at the time of sentencing. The court again denied the motion.

"[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). The failure to strike would constitute an abuse of discretion only in limited circumstances such as where the court was unaware of its discretion or applied impermissible factors, or in the extraordinary case where the appropriate factors "manifestly support the striking of a prior conviction and no reasonable minds could differ." (*Id.* at p. 378.) Our review of the trial court's discretion is deferential, and its discretion will not be disturbed unless the ruling "falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*); *Romero, supra*, at p. 530.) It is the defendant's burden to show that the trial court's decision was irrational or arbitrary. (*Carmony*, at pp. 377-378.)

Defendant does not contend that the trial court was unaware of its discretion, that it applied impermissible factors, or even that the trial court's findings were unsupported by substantial evidence. Indeed, defendant does not summarize the evidence relied upon by the trial court. He refers to just one exhibit in the record, and he has not filed a reply brief or

otherwise challenged respondent's extensive summary of the record relating to the *Romero* motions.<sup>5</sup> Nevertheless, defendant contends that the denial of his *Romero* motion was an abuse of discretion because his criminal history did not demonstrate a serious or continuous record of offenses. Defendant argues as follows: "First, his prior 'strike' conviction was more than ten years old at the time that he committed the instant offense. Second, that 2004 offense was an assault that occurred while [defendant] was in state prison and involved a fight between three prisoners . . . not a crime committed against an uninvolved victim in the community. Third, defendant had no arrests or convictions following his release from prison on the assault offense." Defendant concludes from his characterization of his record that he "did not have the kind of recidivist history that would normally justify denying a *Romero* motion."

To determine whether the defendant may be deemed outside the spirit of the Three Strikes law, in whole or in part, the trial court must consider such factors as the nature and circumstances of the defendant's present felony and prior serious or violent felony convictions, as well as his background, character, and prospects. (*Williams, supra*, 17 Cal.4th at p. 161.) Here, the trial court thoroughly reviewed all such factors. The

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<sup>5</sup> Defendant cites a paragraph from the Department of Justice's opposition to defendant's 2016 request for a declaration of factual innocence, in which the Attorney General describes the prior strike offense -- defendant's assault on another inmate. The opposition was one of 10 exhibits covering approximately 100 pages attached to the prosecutor's sentencing memorandum. The exhibits included documents relating to defendant's criminal history, probation reports, incident reports, prison records, and photographic evidence relevant to the current offense.

court noted for the record that it had considered the probation report, the prosecution's sentencing memorandum and exhibits, defendant's response, and the letters and emails the court had received on defendant's behalf. The court heard the argument of counsel, read and considered the probation report, and heard testimony from a family member who asked the court for leniency on defendant's behalf. The court made findings based upon this review, which the court summarized in both *Romero* hearings.

The trial court acknowledged that the prior strike conviction was for a crime defendant committed while he was incarcerated for murder, and that he was later acquitted of the murder in a second trial. However, the court found this to be the only fact mitigating the prior strike. The court noted that although defendant was ultimately acquitted of murder, his motion for a finding of factual innocence was denied. The court also acknowledged that prison is a hostile environment, however, after a review of the prison reports and witness statements, the court found that defendant did not act in self-defense. Rather, defendant and an accomplice brutally assaulted another inmate into unconsciousness, striking him in the face, knocking him to the ground, kicking his head and stomping on his face. Finally, in order to save the inmate's life, one guard was about to shoot defendant, who had refused two orders to go to the ground and cease hostile activity. Another correctional officer then shot defendant with a nonlethal round, causing both defendant and his partner to stop. Defendant was charged with attempted murder, but pled to the lesser crime. The trial court observed that this was not a situation of survival or defense, but a cold, calculated, callous attack on another inmate. A letter from a

prison physician stated that the other inmate's injuries were life threatening.

As it had when it denied defendant's pretrial motion, the trial court again reviewed defendant's extensive criminal history at sentencing. However, defendant has omitted any mention of most of his criminal history and other evidence reviewed by the trial court, instead relying on his attempt to trivialize his record. In essence, defendant's argument merely offers an alternative to the trial court's opinion, which is insufficient to demonstrate that the court exceeded the bounds of reason. (See *People v. Clair* (1992) 2 Cal.4th 629, 655.)

Contrary to defendant's argument, and as the trial court found, defendant's lengthy criminal history began as a juvenile in 1995 with a misdemeanor battery and a felony assault with a deadly weapon (§ 245, subd. (a)(1)). The trial court noted that as an adult, defendant was convicted in 2001 of forgery and failure to appear, and was sentenced to 16 months in prison. He was on probation or parole in 2002 when he committed felony possession or purchase of a controlled substance for sale (Health & Saf. Code, § 11351), and he was convicted of that offense in 2002. Defendant committed the strike offense in 2004 while incarcerated, just two years after his drug conviction. Defendant was released from prison in December 2013 and committed the current offense on April 29, 2016, just 28 months later.

We thus reject defendant's argument that such a record is "minimal," as well as his suggestion that there was a long period of lawful behavior after his release from prison. Furthermore, we reject any suggestion in defendant's argument that a life-threatening assault is not serious if committed upon a prison inmate.



Defendant also argues that the current offense did not justify a finding that he came within the spirit of the Three Strikes law by characterizing the current offense as “*solely* an armed robbery” in which no violence or physical harm was inflicted on the victim, despite the use of a gun. (Italics added.) It cannot be said that defendant did not use violence. Any robbery and any felony in which it is pled and proved that the defendant used a firearm is a violent felony. (§ 667.5, subd. (c)(8) & (9).) Nor can defendant claim that he did not harm the victim simply because he did not inflict a physical injury. The record reflects that the victim reported to the probation department that he was psychologically traumatized by the robbery and now lived in fear for his life.

Although the trial court did not recite the circumstances of the current offense on the record until after ruling on the motion, there being no record to the contrary, we presume that the court considered all of the relevant factors before making its decision. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The court’s view of the circumstances was made clear during sentencing. The trial court observed that defendant had the love and support of his family, whom he let down by going into a store, pointing a gun at a person who was trying to earn a living for himself and his family, and who pleaded with defendant not to take his cell phone because he had personal things on it. The court found the following factors in aggravation: defendant used violence or threats of great bodily injury; the victim was particularly vulnerable; defendant and his accomplice waited in the store until the victim was alone and had exited the bulletproof cage; defendant was the primary participant in the crime; defendant’s casing the store from the outside and inside demonstrated

sophistication and premeditation; there was great monetary loss (\$10,000); and defendant showed callousness toward the proceedings by absconding and failing to appear on the date first set for jury trial. The only factors in mitigation the court found were the representations by defense counsel that defendant suffered from depression and anxiety. That was insufficient, however, to offset the factors in aggravation or to support a term lower than the high term.

We conclude that the trial court considered the appropriate factors and adequately balanced the relevant facts, and that defendant has failed to demonstrate that this is “such an extraordinary case [that] the relevant factors . . . manifestly support the striking of a prior conviction and no reasonable minds could differ.” (*Carmony, supra*, 33 Cal.4th at p. 378.) Accordingly, we hold that the trial court did not abuse its discretion in refusing to strike defendant’s prior strike conviction.

## **II. *Duenas***

The trial court ordered defendant to pay a \$40 court operations assessment pursuant to section 1465.8, a \$30 court facilities assessment pursuant to Government Code section 70373, and a \$1,000 restitution fine pursuant to section 1202.4. Defendant contends that the trial court’s imposition of the fine and assessments without first determining his ability to pay them violated his right to due process.

Defendant concedes that he did not object to the assessments and fine in the trial court. It has long been the rule that failure to object to the imposition of fines and fees at sentencing forfeits the right to challenge them on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [probation costs and appointed counsel fees]; *People v. Trujillo* (2015) 60 Cal.4th

850, 853-854 [probation fees]; *People v. McCullough* (2013) 56 Cal.4th 589, 596-597 [jail booking fee]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [restitution fine in excess of the minimum]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [same].)

Defendant argues that he has not forfeited his claim because it presents an issue of law decided in *Duenas, supra*, 30 Cal.App.5th 1157. Defendant claims that a request for a hearing on his ability to pay would have been futile and that his failure to object should be excused, because the law at the time he was sentenced was not in his favor, and *Duenas*, which was not decided until after he was sentenced, represented a dramatic and unforeseen change in the law governing assessments and restitution fines. He cites *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), in which Division 7 explained that because its holding in *Duenas* represented a newly announced constitutional principle, the rule of forfeiture would not be applied to a defendant who had not objected to assessments or the imposition of the minimum restitution fine of \$300. (*Castellano, supra*, at p. 489; § 1202.4, subd. (b)(1).)

*Castellano* is inapplicable to the restitution fine imposed here, as it was \$1,000, above the minimum. Section 1202.4, subdivision (d) confers on the defendant the right to contest his ability to pay a restitution fine greater than the minimum required by that statute, and that right existed prior to the publication of *Duenas*. (See Stats. 2017, ch. 101, § 1.) Subdivision (d) provides in relevant part: “In setting the amount of the fine pursuant to subdivision (b) *in excess of the minimum fine* pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant’s inability to pay . . . . Consideration of a defendant’s

inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay.” (§ 1204.4, subd. (d), italics added.) As defendant did not make such a claim, request a hearing, or submit evidence, he failed to preserve his appellate challenge to the restitution fine, and we may presume that he has the ability to pay it. (See *People v. Avila*, *supra*, 46 Cal.4th at p. 729; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154.)

Because defendant has forfeited his objection to the restitution fine, any remand for a hearing on defendant’s ability to pay would involve only the question of the assessments totaling \$70. As defendant did not contest his ability to pay a fine of \$1,000, we assume he can pay it, and it is unlikely that he would be unable to pay an additional \$70. Moreover, we infer that defendant has an ability to pay the \$70 from *probable* future prison wages.<sup>6</sup> (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) Thus, even if we assumed a due process violation, the fact that defendant will serve a lengthy prison term with ample time to pay such a modest amount renders any error harmless beyond a reasonable doubt under the test of *Chapman v. California*

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<sup>6</sup> In California prisons, every able-bodied prisoner must work. (§ 2700.) As defendant represented to the court that he had a job offer/interview to work for Amazon Distribution, we assume that he is able to work. The minimum wage in prison is \$12 per month, and up to 50 percent of that may be withheld for payment of fines. (See § 2085.5; Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1).) Thus, defendant’s restitution fine should be paid in 14 years or less, and the fees in one additional year or less.

(1967) 386 U.S. 18, 24.<sup>7</sup> (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140.)

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
HOFFSTADT

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<sup>7</sup> As we find harmlessness beyond a reasonable doubt, we need not decide whether *Duenas* was correctly decided. We have addressed that issue in the recently published *People v. Hicks* (2019) 40 Cal.App.5th 320.