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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY LIGHTNING, JR.,

Defendant and Appellant.

D059170

(Super. Ct. Nos. SCD227182,
SCD217600)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed as modified.

Larry Lightning, Jr., appeals a judgment of the superior court entered following his guilty plea to corporal injury resulting in a traumatic condition, assault with a firearm and dissuading a witness from testifying. He contends the trial court abused its discretion by imposing a \$5,000 restitution fine without exercising its judgment considering the relevant factors, including his ability to pay the fine, and by imposing a \$154 criminal justice administration fee unsupported by any evidence that he could afford to pay it or

that it accurately reflected the administrative costs of booking him. We reject these challenges and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2008, Lightning was arrested and charged with three counts of assault with a firearm and one count of kidnapping arising out of two incidents in which he attacked his girlfriend, B.W. After being promptly released, Lightning physically abused B.W. on two more occasions in January and February 2009; at the time, there was an active domestic violence restraining order against Lightning for B.W.'s protection.

Lightning posted bail in early July 2009 and left California sometime thereafter. However, he was arrested in Florida and extradited to California in May 2010. After his return to San Diego, Lightning was incarcerated. Because he had, while in Florida, attempted to have family members contact B.W. to persuade her not to testify against him if he returned to California, he was placed in administrative segregation and denied phone access other than to contact his attorney.

In October 2010, the People filed an amended criminal complaint charging Lightning with one count each of inflicting corporal injury, kidnapping and battery, three counts each of assault with a firearm and dissuading a witness from testifying, and four counts of disobeying a domestic violence restraining order arising out of the foregoing incidents. In a separate criminal proceeding, he was also charged with a May 2007 armed robbery of an Edward's Cinema.

In connection with both cases, Lightning agreed to (1) plead guilty to two counts each of corporal injury resulting in a traumatic condition and assault with a firearm, and

one count each of dissuading a witness from testifying and grand theft from a person (as a lesser included offense of robbery); and (2) admit certain firearm enhancement allegations in exchange for a dismissal of the remaining charges and allegations. Shortly after the plea hearing, Lightning stated he wanted to withdraw his plea, which he contended was not knowing, intelligent and voluntary, primarily because at the time he entered the plea he was taking narcotic medications for injuries sustained in an altercation with Sheriff's deputies in the jail.

Recalling the change of plea hearing, over which it had presided, the court denied the motion to withdraw the plea, describing Lightning's testimony in support of the motion as "completely and deliberately false." The court sentenced Lightning to 10 years 8 months in prison for these offenses, as stipulated by the parties in the plea agreement. It also imposed various fines and fees, including a restitution fine of \$5,000 and a \$154 criminal justice administration fee. Lightning filed a notice of appeal and obtained a certificate of probable cause to challenge the plea.

DISCUSSION

1. *Restitution Fine*

Lightning challenges the court's imposition of the \$5,000 restitution fine, arguing that the court did not consider the factors set forth in Penal Code section 1202.4,

subdivision (d), or his ability to pay the fine.¹ The People respond that his failure to object to the fine in the trial court forfeits the issue for purposes of appeal.

No appellate claim that a trial court failed to properly make or articulate its discretionary sentencing choices may be considered on appeal unless the claims were raised in the trial court proceedings. (*People v. Smith* (2001) 24 Cal.4th 849, 852, citing *People v. Scott* (1994) 9 Cal.4th 331, 353.) The purpose of this rule is to reduce the number of errors committed in the trial court, and the number of costly appeals that would otherwise result, by requiring that a defendant bring the error to the trial court's attention so the error may be corrected. (*Scott*, at p. 353; *Smith*, at p. 852.)

Lightning argues these principles do not apply here because he is challenging the sufficiency of the evidence to support the imposition of the fine, rather than the court's exercise of a discretionary sentencing choice. (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399.) We are not persuaded by this argument. First, for the reasons stated in section 2 of the Discussion, *post*, we conclude the forfeiture doctrine does apply to a challenge to the sufficiency of the evidence to support the court's imposition of the fine. Second, even if Lightning could properly challenge the sufficiency of the evidence

¹ Penal Code section 1202.4, subdivision (d), provides in relevant part: "In setting the amount of the fine . . . in excess of the [two hundred-dollar (\$200)] minimum, the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. . . . Express findings by the court as to the factors bearing on the amount of the fine shall not be required. . . ."

in support of the imposition of the restitution fine, the challenge would fail on its merits. Notably, Lightning's briefs do not argue or attempt to establish that the record is devoid of evidence to establish the existence of factors, such as the seriousness and gravity of the charged offenses, the circumstances of their commission and the number of victims and extent of their losses resulting from his crimes, on which the court could have properly relied in determining the amount of the fine to impose. (Pen. Code, § 1202.4, subd. (d).) The absence of such an argument is understandable, because the record contains sufficient evidence to establish that the offenses were serious and repetitive and caused substantial injuries to his victims.

Instead, Lightning focuses his challenge on the absence of any evidence in the record to establish that he had the ability to pay the restitution fine. However, the language of Penal Code section 1202.4, subdivision (d), refers to a defendant's "inability," rather than his ability, to pay the restitution fine and expressly provides that a defendant bears the burden of demonstrating such inability. (*Ibid.*) Under the statute, the absence of evidence that Lightning was able to pay the restitution fine does not invalidate the sentencing court's decision to impose a fine of \$5,000.

2. *Criminal Justice Administration Fees*

Lightning also challenges the trial court's imposition of a \$154 criminal justice administration fee, arguing that (a) the trial court did not affirmatively determine he had the ability to pay the fee before imposing it and (b) there was no evidence in the record to establish the \$154 amount accurately reflects the actual administrative costs of his

booking.² Because Lightning did not object to the imposition of these fees in the trial court, the People assert he has forfeited this contention on appeal.

We recognize there is a split of authority on the issue of whether the forfeiture doctrine applies in the context of a challenge to the imposition of jail booking fees. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [holding forfeiture doctrine applicable]; *People v. Pacheco, supra*, 187 Cal.App.4th at p. 1397 [holding the doctrine inapplicable where the defendant challenges the sufficiency of the evidence to support a determination the defendant had the ability to pay the fee].) Further, the issue is currently pending review in the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [whether failure to object to imposition of a jail booking fee forfeited a sufficiency of the evidence of ability to pay claim on appeal].)

Pending the Supreme Court's definitive resolution of the matter, we interpret its existing precedents holding that challenges to sentencing errors must be raised in the trial court to be cognizable on appeal, and the underlying rationale that fairness and efficiency require a defendant to raise such challenges in the trial court in the first instance are

² The probation reports recommended the court impose a \$154 fee "pursuant to GC29550.1" and, at the sentencing hearing, the trial court imposed "the mandatory . . . criminal justice administration fees as required by law." As the record shows that Lightning was arrested by officers of the San Diego Police Department, the imposition of this fee is governed by Government Code section 29550.1, which authorizes the fine for arrests made by a city agency. Although the clerk's abstract of judgment recites that the \$154 fee was imposed "per GC29550," the entry was the result of clerical error. We modify the judgment to provide that the criminal justice administration fee was imposed under Government Code section 29550.1.

equally applicable here. (*People v. Smith, supra*, 24 Cal.4th at p. 852 [recognizing the general forfeiture rule is broad, subject only to "a narrow exception" for "'unauthorized sentences' or sentences entered in 'excess of jurisdiction,' " i.e., sentences that could not lawfully have been imposed "under any circumstance in the particular case"]; see *People v. Butler* (2003) 31 Cal.4th 1119, 1130-1131 (conc. opn. of Baxter, J.) [stating sentencing determinations falling outside the narrow exception "may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the evidence."].) Because Lightning does not contend his sentence was either unauthorized or imposed in excess of the trial court's jurisdiction, his failure to bring the errors he now raises to the trial court's attention prevents their consideration on appeal. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 750; see generally *People v. Stowell* (2003) 31 Cal.4th 1107, 1113 [noting challenges to a sentence otherwise permitted by law, but imposed in a procedurally *or factually flawed* manner, are subject to the general forfeiture rule].)]

DISPOSITION

The judgment is affirmed as modified. The superior court is directed to prepare an amended abstract of judgment as specified herein.

McDONALD, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.