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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO DE LA CERDA,

Defendant and Appellant.

D059358

(Super. Ct. No. JCF23853)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Affirmed as modified.

A jury found Alfonso De La Cerda guilty of possessing methamphetamine for sale. (Health & Saf. Code, § 11378.) The court placed De La Cerda on formal probation for three years on condition that he serve 270 days in county jail.

On appeal, De La Cerda contends the court erred in allowing expert testimony on the issue of whether he possessed the methamphetamine for sale, and his counsel provided constitutionally ineffective representation by failing to object to the evidence. We conclude De La Cerda waived the evidentiary issue, and his ineffective assistance

claim is without merit on the record before us. We also reject De La Cerda's contention the challenged expert testimony violated his constitutional due process rights.

De La Cerda also contends the court erred in ordering him to reimburse the county for \$200 in legal fees because there was no statutorily-required hearing on his ability to pay. (Pen. Code, § 987.8, subd. (b).) As conceded by the Attorney General, this contention has merit. We strike the \$200 reimbursement order from the judgment, and affirm the judgment as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

Background

In June 2009, Imperial County Deputy Sheriff Jason Hurley was investigating a theft of cantaloupes and approached De La Cerda, who was selling watermelons and cantaloupes from a semi-enclosed trailer attached to his vehicle (a truck). After speaking with De La Cerda, Deputy Hurley noticed De La Cerda appeared to be under the influence of a controlled substance. De La Cerda then agreed to a canine sniff. The canine alerted the officers to the front passenger compartment of the truck and to an area in the attached trailer.

Deputy Hurley first searched the passenger area of the truck and found marijuana and methamphetamine in a toolbox. The marijuana (weighing 25.9 grams) was contained inside a Ziploc bag, which also contained five smaller empty Ziploc bags. In the same toolbox, Deputy Hurley found: a jar with 2.29 grams of unpackaged methamphetamine, a brown bottle with methamphetamine residue, a pill bottle containing 29 Naproxen pills, and a sunglass case containing a methamphetamine smoking pipe.

Deputy Hurley then searched the attached trailer and found a different toolbox mounted in an area near where De La Cerda had been selling the fruit. In this toolbox, Deputy Hurley found a pill bottle containing 10 bindles of methamphetamine, in total weighing approximately 2.5 to 3.2 grams. Each methamphetamine bindle was wrapped in plastic packaging and weighed about .2, .3 or .4 grams. Four of the bindles were in white plastic and six were in black plastic. Deputy Hurley also found black and white plastic grocery bags inside De La Cerda's truck. These bags appeared to be the same material used to package the methamphetamine bindles. Deputy Hurley also found in De La Cerda's possession a cell phone and \$783 in cash (including many \$20 bills).

After Deputy Hurley arrested De La Cerda, De La Cerda waived his *Miranda* rights and spoke with the officer. De La Cerda first denied knowledge of the drugs, but eventually admitted all of the items found in the truck and trailer were his, including the methamphetamine and marijuana. He also admitted to packaging the 10 methamphetamine bindles found in the trailer, but said these drugs were for his personal use. When asked how much each bindle weighs, De La Cerda responded: "I don't weigh 'em" and "I just eyeball 'em."

De La Cerda was charged with possessing methamphetamine for sale and possessing a smoking device. During the first trial, the prosecution called three expert witnesses, each of whom specifically opined that De La Cerda possessed the methamphetamine bindles for sale. The jury was nonetheless unable to reach a unanimous verdict on the possession of methamphetamine for sale charge. The jury reached a guilty verdict only on the smoking device charge.

Second Trial

At the second trial solely on the methamphetamine sales charge, the prosecution called three witnesses — Deputy Hurley (who testified to the events summarized above) and two expert witnesses: Richard Sotelo, a special agent with the Bureau of Narcotic Enforcement of the California Department of Justice, and Gabriel Vela, an investigator with the Imperial County District Attorney's Office on special assignment with the Imperial Valley Street Interdiction team.¹ Both experts testified to substantial training and experience with respect to methamphetamine sales, and each opined (without objection) that based on this training and experience, De La Cerda held the 10 bindles of methamphetamine for sale.

Specifically, Agent Sotelo testified that a person possessing about 2 or 3 grams of methamphetamine could either be holding it for sale or for personal use. But he said that if the person held this amount in 10 individual bindles, the individual would be possessing the drugs for sale. He explained that if a person purchased a "lump sum" of drugs and then packaged it into smaller bindles, this would be "very significant" to show the drugs were held for sale. Agent Sotelo further testified: "Also, there's a significance in the plastic coloring. There was some bindles that were black, others that were white, and that's so he can tell the difference in weight. Some bags he could sell for a certain amount of money, other bags he knew he had to sell for a little bit more money because

¹ In the first trial, Agent Sotelo also testified as an expert. Although Agent Vela did not testify in the first trial, another agent with similar experience on the Imperial Valley Street Interdiction Team testified as a narcotics expert.

they had a little bit more weight to it. [¶] . . . [¶] . . . We'll constantly come across that when we do warrants at residences that are suspected of selling methamphetamine. We'll find the plastic grocery bags. And they seem to cut out a circle out of it, out of the bag, and in that circle they will place the methamphetamine in, close it up, and then with either a cigarette, a lighter, a piece of metal that's hot they'll . . . touch the plastic, and that will seal the little baggie." In response to the prosecutor's question, Agent Sotelo opined that based on his training and experience and the information in the police report, he believed the 10 bindles found in De La Cerda's trailer were possessed for sale.

The second expert, Vela, similarly opined that, based on his training and experience and after reviewing the facts of the case, in his professional opinion the 10 bindles of methamphetamine found in De La Cerda's trailer were possessed for sale. He identified numerous factors supporting this conclusion, including: (1) the methamphetamine in the bindles weighed .2, .3, or .4 grams; (2) De La Cerda admitted to packaging the drugs himself; (3) the bindles were wrapped in plastic grocery bag type material, which is commonly used by methamphetamine sellers to package the drug; (4) the bindles were packaged in different colors, which is a common way of indicating two different weights/prices; (5) the bindles were kept separate from the methamphetamine pipe and the unpackaged methamphetamine found in the truck; (6) De La Cerda also possessed the marijuana with extra plastic baggies; and (7) De La Cerda had a significant amount of cash, including many \$20 bills.

During direct examination, the prosecutor also asked Agent Vela whether certain factors were "conclusive" of the issue whether the 10 bindles of methamphetamine were held for sale. This testimony was as follows:

"[Prosecutor]: Well, what about the fact that [De La Cerda] had the 10 [bindles]? Is that helpful, or, based on your training and experience, is that conclusive?"

[Vela]: That's conclusive.

[Prosecutor]: What about the fact that he packaged the methamphetamine himself?

[Vela]: That's conclusive of a drug dealer.

[Prosecutor]: Oh, right. [¶] And what about the fact that he had three grams of methamphetamine?

[Vela]: That is conclusive of a drug dealer."

A short time later, Vela reiterated that De La Cerda's possession of 10 bindles was "conclusive" on the sales issue.

Defense Case

Defense counsel aggressively cross-examined Deputy Hurley and the two expert witnesses. In so doing, defense counsel elicited testimony showing some contradictions between the experts' opinions. For example, Agent Sotelo testified that a person could possess as much as three grams of methamphetamine for personal use, but Agent Vela initially opined a person would never possess more than one gram of methamphetamine for personal use.

De La Cerda did not testify, but he presented two witnesses. One witness testified De La Cerda had a fruit stand from which he would sell cantaloupes and watermelons on

a daily basis. The second witness testified that he purchased a truck from De La Cerda for \$1,010 in cash several weeks before De La Cerda was arrested.

Closing Arguments

During his closing argument, the prosecutor urged the jury to find De La Cerda held the drugs for sale based on the factors identified by the two experts (Sotelo and Vela) as relevant to the issue. According to the prosecutor, these factors included: (1) the quantity of the drugs; (2) the drugs were contained in individual bindles; (3) the evidence that defendant admitted packaging the drugs into the bindles; (4) the bindles were different colors indicating different weights and these color plastic bags were found in De La Cerda's truck; (5) De La Cerda also possessed marijuana that appeared to be for sale; (6) De La Cerda's initial misrepresentations to the officers that the drugs were not his or he was unaware of the drugs; (7) the methamphetamine bindles were found close to where De La Cerda was selling the fruit and separate from the methamphetamine pipe and unpackaged methamphetamine which appeared to be for De La Cerda's personal use; and (8) De La Cerda had in his possession a significant amount of cash and a cell phone.

In his closing argument, defense counsel did not dispute that the methamphetamine bindles and the unpackaged methamphetamine were in De La Cerda's possession, but argued the drugs were for his personal use rather than for sale. In urging the jury to find the prosecution did not meet its burden on the sales element, defense counsel highlighted inconsistencies between the experts' testimony and flaws in the experts' reasoning. Defense counsel also argued the experts were biased and not credible because they were law enforcement officers "who want Mr. De La Cerda to be convicted

of sales even though the evidence doesn't exactly show that." He additionally argued that the cell phone and cash found in De La Cerda's possession were irrelevant to the methamphetamine charge and that Deputy Hurley conducted an incomplete investigation because he did not follow through with confirming De La Cerda's statements regarding the persons from whom he received the cash.

After a brief deliberation, the jury found De La Cerda guilty of possessing methamphetamine for sale.

DISCUSSION

I. *Challenged Expert Testimony*

De La Cerda contends the court prejudicially erred by permitting Agent Sotelo and Agent Vela to testify to their opinions that he possessed the 10 bindles of methamphetamine for sale. He contends the testimony was tantamount to an improper legal conclusion on an ultimate issue on his guilt or innocence disguised as opinion testimony. The Attorney General counters that De La Cerda waived this objection by failing to object to the opinion testimony.

We agree with the Attorney General that De La Cerda forfeited his evidentiary challenge by failing to object to the testimony. (See *People v. Doolin* (2009) 45 Cal.4th 390, 448; *People v. Ramos* (1997) 15 Cal.4th 1133, 1171; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.)

De La Cerda alternatively argues that his counsel's failure to object to the disputed testimony constituted ineffective assistance of counsel. For the reasons explained below, we reject this contention.

A. *Applicable Legal Principles*

"To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.) Since the failure of either prong of an ineffective assistance of counsel claim (defective representation or prejudice) is fatal to establishing the claim, we need not address both prongs if we conclude the appellant cannot prevail on one of them. (See *People v. Sapp* (2003) 31 Cal.4th 240, 263.)

Under Evidence Code section 801, expert testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Vang* (2011) 52 Cal.4th 1038, 1044.) If an expert's opinion is admissible because it is helpful to the jury under this test, the testimony is "not objectionable because it embraces the ultimate issue to be decided by the [jury]." (Evid. Code, § 805; *People v. Vang, supra*, 52 Cal.4th at p. 1049; *People v. Wilson* (1944) 25 Cal.2d 341, 349; *People v. Roberts, supra*, 184 Cal.App.4th at p. 1193; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) However, an expert's opinion is *not* admissible when that testimony amounts to no more than an expression of the expert's general belief as to how the case should be decided. (*Summers v. A. L. Gilbert*

Co. (1999) 69 Cal.App.4th 1155, 1182-1183.) If a trier of fact is just as competent to weigh the evidence and reach a conclusion on a particular issue, the expert opinion is inadmissible. (See *People v. Vang, supra*, 52 Cal.4th at p. 1048.)

Under these principles, the California Supreme Court long ago recognized that in cases in which a defendant is charged with possessing a controlled substance for sale, "experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as quantity, packaging and normal use of an individual" (*People v. Newman* (1971) 5 Cal.3d 48, 53, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) Following *Newman*, numerous Courts of Appeal have similarly upheld expert testimony on the ultimate issue of whether a particular defendant possessed drugs for sale as opposed to personal use. (See *People v. Parra* (1999) 70 Cal.App.4th 222, 227 ["Both Officer Hoffman and Detective Corbin, experienced narcotics interdiction officers, testified that, based on the quantity of the controlled substance seized and lack of drug paraphernalia in the car, defendants possessed cocaine with the specific intent to sell. It is well settled that ' . . . experienced officers may give their opinion that the narcotic are held for purposes of sale"]; *People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378 [holding trial court properly denied the defendant's evidentiary objection to experienced police officer's testimony "render[ing] an expert opinion that defendant possessed rock cocaine for purposes of sale, based on the quantity of the drug possessed"]; *People v. Martin* (1971) 17 Cal.App.3d 661, 668; see also *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1228-1229.)

Because the issue whether a controlled substance is possessed for personal use or for sale (e.g., based on quantity and packaging of the drug) is generally beyond the common experience of most jurors, direct expert testimony on this issue is usually viewed as helpful and is not prohibited merely because it relates to an ultimate issue to be decided by the jury. (See *People v. Newman*, *supra*, 5 Cal.3d at p. 53; *People v. Carter*, *supra*, 55 Cal.App.4th at pp. 1377-1378.) The jury continues to play a critical role by deciding whether to credit the expert's opinion and whether the facts stated as the basis for the expert's conclusion are true and valid. (See *People v. Vang*, *supra*, 52 Cal.4th at p. 1050.)

In challenging these principles, De La Cerda relies on a Court of Appeal decision filed more than 40 years ago, in which the court questioned the admissibility of a police officer's opinion testimony regarding the defendant's intent to sell heroin. (*People v. Arguello* (1966) 244 Cal.App.2d 413, 420-421.) However, the *Arguello* court recognized an expert may give an opinion that "coincides with the ultimate issue" and declined to set forth any absolute rule prohibiting this form of opinion testimony in drug sales cases. (*Id.* at pp. 417-418.) Moreover, as have other courts, we question *Arguello's* continuing validity in light of *Newman*. (See *People v. Carter*, *supra*, 55 Cal.App.4th at pp. 1377-1378 [holding *Newman* overruled *Arguello* on this point sub silentio].)

We also reject De La Cerda's argument that the rule permitting expert testimony on the possession-for-sales issue is no longer valid after the California Supreme Court's decision in *People v. Vang*, *supra*, 52 Cal.4th 1038. In *Vang*, the high court evaluated the scope of permissible expert testimony on a gang enhancement allegation that the

defendant committed an assault for gang-related reasons. In holding that the trial court properly allowed hypothetical questions based on the specific facts of the case, the *Vang* court repeatedly emphasized that "expert testimony is permitted even if it embraces the ultimate issue to be decided." (*Id.* at pp. 1048, 1049-1050; see Evid. Code, § 805.)

Although the court left open the question whether an expert can testify directly (without using a hypothetical) on whether the specific defendant committed a crime for a gang-related purpose, the court reaffirmed the general rule that expert testimony "regarding the specific defendant" may be proper if the testimony is of assistance to the trier of fact. (*Vang, supra*, at p. 1048, fn. 4.) This general rule has been long applied in the drug possession for sale context, and we decline to accept De La Cerda's invitation that we reevaluate the reasoning underlying the rule.

B. *Analysis*

In applying these legal principles to De La Cerda's contention that his counsel was ineffective for failing to object to counsel's questions to the two expert witnesses, we divide the challenged questions into three categories: (1) questions regarding the experts' ultimate opinions whether De La Cerda possessed the drugs for sale; (2) questions regarding the grounds for the experts' opinions as they specifically relate to De La Cerda's case (e.g., the significance of the 10 packaged bindles found in De La Cerda's trailer and the location of the bindles in relation to the unpackaged methamphetamine found in De La Cerda's vehicle); and (3) questions regarding whether expert Vela's opinions were "conclusive" on the issue of De La Cerda's possession for sale.

With respect to the first two categories, the questions were permissible because they sought information that was generally beyond the jurors' common experience. The expert testimony explaining that a person who was not selling drugs would not repackage drugs into individual bindle packets and would not engage in the process of sealing those packets and placing them in different color plastic was information helpful to the jury. Likewise, a jury would not necessarily be expected to understand the relevance of the location of the bindles in relation to De La Cerda's other methamphetamine supply and his possession of a substantial amount of cash. Both experts testified to numerous specific factors supporting a conclusion that De La Cerda was holding the drugs for sale and that based on the expert's extensive training and experience, these factors showed that De La Cerda in fact possessed the drugs for sale. Under settled law, the fact the prosecution sought the expert opinions directly (rather than asking the questions in the form of hypotheticals) did not show the expert testimony was objectionable.

However, with respect to the third category of challenged testimony (that certain factors were "conclusive" on the issue of De La Cerda's possession of the drugs for sale), we agree the testimony went beyond the scope of permissible opinion and a court would have properly sustained an objection to this testimony. By asking whether certain factors were "conclusive" on the issue, the prosecutor sought information that was within the jury's exclusive province. Although an expert witness may identify relevant factors and opine whether those factors support a conclusion that the defendant was holding the drugs for sale, an expert is not permitted to interfere with the jury function in deciding whether those opinions are "conclusive" or "believable."

However, defense counsel's failure to object to this testimony does not support De La Cerda's ineffective representation claim on the record before us. First, the record does not show there could be no rational tactical purpose for counsel's failure to object. By allowing the expert to assert such an absolute and definitive opinion, defense counsel may have reasonably believed the testimony would support De La Cerda's bias claim and/or create additional doubt about the validity of the expert opinion. For example, although Agent Vela testified "the fact that [De La Cerda] had three grams of methamphetamine" was "*conclusive* of a drug dealer," the jury also heard the other expert, Agent Sotelo, testify that the amount held by De La Cerda was not necessarily indicative of whether he was possessing the drugs for sale or personal use. (Italics added.) By allowing the jury to hear that Vela believed the evidence was "conclusive," and yet presenting the jury with other evidence showing the basis for his opinion was subject to some doubt, defense counsel could have made a tactical choice that the jury would reject the expert's opinion in its entirety. "Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) This record does not demonstrate there could be no rational tactical purpose for counsel's failure to object.

Moreover, to establish an ineffective assistance of counsel claim, a defendant must also show prejudice, i.e., " 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

[Citations.] 'A reasonable probability is a probability sufficient to undermine confidence

in the outcome.' [Citation.] In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147.)

Viewing the entire record, it is not reasonably probable that De La Cerda would have obtained a more favorable result. Even assuming all of the challenged testimony was erroneously admitted, the remaining evidence established De La Cerda acknowledged packaging the methamphetamine in plastic bindles, which required a deliberate procedure of placing the drugs in a small plastic material and then burning the ends of the plastic to keep the drugs in place. De La Cerda also admitted to "eyeball[ing]" the amount for each bindle and the evidence shows he used different color plastic bags to identify the drugs. Further, the undisputed evidence shows the bindles were placed in the trailer in an area near where he was sitting and selling the fruit, whereas his personal stash (located near his methamphetamine pipe) was contained further away in the passenger side of the vehicle.

During trial, both experts explained (in unchallenged testimony) that a typical methamphetamine user would have no more than two bindles of the drug for personal use and that a person who packages 10 methamphetamine bindles would be holding the methamphetamine for sale rather than personal use. This evidence, without consideration of Agent Sotelo's and Agent Vela's challenged testimony, clearly established that a person (not De La Cerda directly) would not package 10 methamphetamine bindles for personal use and thus would have been holding the drugs for sale. Further, although the

experts did not entirely agree as to the amount of methamphetamine that would be typically held for personal use, both experts focused primarily on the packaged bindles as evidence of an intent to sell. De La Cerda's defense evidence and argument did not undermine this opinion testimony.

In evaluating prejudice, it is further significant that during closing arguments, the prosecutor did not rely on the expert's ultimate opinions as to De La Cerda's intent to sell the drugs, nor did he repeat the testimony about the "conclusive" nature of the evidence. Instead, he focused on the various factors upon which the expert opinions were based and urged the jury to find those factors supported a finding that the drugs were held for sale. Additionally, the court specifically instructed the jury that it was "not required to accept" expert opinions "as true or correct," and that the "meaning and importance of any [expert] opinion are for you to decide." The court further told the jury that: "In evaluating the believability of an expert witness, . . . [¶] . . . [¶] . . . consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether information on which the expert relied was true and accurate. [¶] You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

Viewing the entire record, we are satisfied the outcome would have been the same without the challenged testimony.

To show prejudice, De La Cerda relies primarily on the fact that the jury in the first trial could not reach a unanimous verdict on the methamphetamine possession for

sales charge. This reliance is unhelpful. Although a prior deadlocked jury may be a relevant factor in the prejudice analysis (e.g., showing a close case or that certain evidence omitted in the first trial and admitted in the second trial may have affected the outcome), it has little weight in this case because in *both trials* the experts were permitted to, and did, specifically and directly opine that De La Cerda possessed the drugs for sale. For example, in the first trial, the prosecutor asked Agent Sotelo, "Now, based on the totality of the evidence and the circumstances in this case, have you come to a conclusion whether the methamphetamine in the bindles was possessed for personal use or sales?" Agent Sotelo responded: Yes. [¶] . . . [¶] I believe that the methamphetamine in the bindles was for sales." Later, in the first trial, Agent Sotelo repeated: "In my training and experience, based on the facts, based on the [police] report I read, based on the interview with Mr. De La Cerda that I listened to, I . . . formed the opinion that [De La Cerda] was involved in the sales of methamphetamine."

Despite the three experts in the first trial who each directly opined that *De La Cerda held the methamphetamine bindles for sale*, the jury was *deadlocked* as to whether the prosecution met its burden on this charge. Contrary to De La Cerda's current appellate contentions, this disposition does not show the expert testimony must have been prejudicial in the second case. In fact, it supports the opposite conclusion — that properly instructed jurors are capable of making up their own minds and weighing the various factors, even when an expert (or three) opines directly on whether a particular defendant possessed illegal drugs with the intent to sell. In his reply brief, De La Cerda asks: "Can anyone realistically expect that a jury faced with two veteran narcotics

officers convinced of appellant's guilt would reach a different conclusion?" Based on the first jury trial, the answer is "Yes." At least some jurors in the first case apparently refused to credit the opinions of three law enforcement officers that this defendant — De La Cerda — held the methamphetamine bindles for sale.

We also reject De La Cerda's contention that the expert testimony in this case violated his due process rights. Viewing the entire record, De La Cerda had a full and fair trial, during which his defense counsel forcefully challenged all of the evidence, including the expert opinions. This is the same counsel who appears to have convinced at least some jurors in the first trial that the prosecution had not met its burden. The fact that a similar defense was successful in the first trial, but unsuccessful in the second trial, does not show a due process violation.

II. *Ability to Pay*

The trial court ordered that De La Cerda pay \$200 as reimbursement to the county for the legal services received in the case. (See Pen. Code, § 987.8.) De La Cerda argues, and the Attorney General agrees, the order must be vacated because the trial court did not hold a statutorily-required noticed hearing to determine De La Cerda's ability to pay. Generally, where, as here, the trial attorney failed to challenge an order concerning reimbursement of his or her own fees, the failure to object in the trial court proceedings does not waive this claim. (See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215.)

A court may order defendant to pay the cost of court-appointed counsel only after a hearing to determine if defendant has the ability to pay. (Pen. Code, § 987.8, subd. (b).)

"At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the

following rights: [¶] (1) The right to be heard in person. [¶] (2) The right to present witnesses and other documentary evidence. [¶] (3) The right to confront and cross-examine adverse witnesses. [¶] (4) The right to have the evidence against him or her disclosed to him or her. [¶] (5) The right to a written statement of the findings of the court." (Pen. Code, § 987.8, subd. (e).)

The trial court did not hold a hearing on De La Cerda's ability to pay and there was no evidence in the record supporting a finding he had the ability to pay. The question remains as to the appropriate remedy. De La Cerda argues that we should strike the reimbursement order. The People counter that the matter should be remanded to the trial court for an opportunity to conduct a noticed hearing on the issue. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1061, 1068.) We conclude it would not be a proper use of judicial resources to remand for further proceedings on the \$200 attorney fees reimbursement. The cost of the judicial proceedings to determine De La Cerda's ability to pay would be substantially greater than the amount to be recovered by the county. In the interests of judicial economy and efficiency, we strike the order assessing attorney fees. We remind the trial court of the necessity to conduct the required hearing in future cases.

DISPOSITION

The judgment is modified by striking the order that defendant pay \$200 for the services of court-appointed counsel. As so modified, the judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.