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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

YONIS ABDULKADER AFRAH,

Defendant and Appellant.

D059576

(Super. Ct. No. SCD231599)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed as modified.

A jury convicted Yonis Abdulkader Afrah of dissuading a witness or victim (Pen. Code,¹ § 136.1; count 2), dissuading a witness or victim from testifying (§ 136.1, subd. (a)(1); count 4) and violating a domestic violence protective order (§ 166 subd. (c)(1); counts 5 and 6). It found not true allegations that Afrah used force or the threat of force in committing the dissuasion offense of count 2. The jury acquitted Afrah of making or attempting to make a criminal threat under section 422 (count 1) and false

¹ All statutory references are to the Penal Code unless otherwise indicated.

imprisonment (count 3). The trial court sentenced Afrah to a total prison term of three years, consisting of an upper three-year term on count 4, a concurrent three-year term on count 2, and credit for time served on counts 4 and 5, both misdemeanors. It also imposed various fees and fines.

Afrah contends the trial court prejudicially erred and violated his due process right to meaningfully present a defense by denying his request to admit into evidence e-mail correspondence between him and the victim, requiring reversal of his counts 2 and 4 convictions. He further challenges the court's imposition of a \$400 restitution fine and \$154 booking fee on grounds the record does not show he had the financial ability to pay them. We modify the judgment to reflect that Afrah was convicted in count 2 of a violation of section 136.1, subdivision (b)(1), and, as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2010, Roberta Cocke called 911 after she heard a woman repeatedly call out for someone to call the police. The woman was screaming and crying, saying, "Call the police. Why did you hit me?" Cocke then heard a male voice respond, "Shut up, bitch. I'll kill you. Shut up. Shut up."

A responding police officer saw Afrah and Teresa Martinez arguing on a balcony. When Afrah saw the officer, he grabbed Martinez and pushed her inside the apartment. When police were finally allowed into the apartment by Afrah's roommate, they discovered Martinez hiding in a closet, fearful and crying hysterically. She told the officer

who found her, "Please don't take him to jail." The officer interviewed Martinez for 10 to 15 minutes, and then arrested Afrah for battery and making criminal threats.²

At trial, the court admitted into evidence two jail calls Afrah made to Martinez in November 2010. In the second call, Afrah speculated about his release date being on the 20th of the month. He then said, "But I'm not going to get released if they bust your ass—if they—if you get caught, then they going to keep your ass in jail to come, and have you come to court, to court against me. So you got to be careful." When Martinez responded, "They can't do that," Afrah said, "Hell, yeah, they could do that. Are you fucking lost your mind. They do that all the time. You would be, baby, you were serious in the court—they want you in court. So you got to hide, homey. You better fucking lie, look, fuck around and find a way not to show up or find a way to hide your ass and I, and I keep telling you—don't fuck up, homey. I don't give a fuck what's going on out there, and how you want to have fun or not. You come to Dago, stay your ass out the way. . . . [¶] . . . Do you hear me?" Afrah told Martinez she was acting childish, and urged her: "Use your head. Common sense. The whole case [is] about you. If you—if, if you not there, I'm cool. If they bust your ass, I'm fucked. So which one are you choosing, man?"

² Martinez ultimately could not be located and did not appear or testify at trial.

DISCUSSION

I. *Exclusion of E-Mail Correspondence*

A. *Background*

Before trial, Afrah's counsel sought to admit e-mail communications assertedly between Afrah and Martinez to show Martinez was not dissuaded for purposes of the section 136.1 offenses. Counsel argued the "rule of completeness" required admission of the e-mails; that the e-mails gave context to the jail calls so as to "give[] the jurors the full picture." She also argued the e-mails fell within the state-of-mind, statement-against-interest, and prior-inconsistent-statement exceptions to the hearsay rule. The prosecutor responded that the e-mails and jail calls were not analogous, and the victim's state of mind was irrelevant to the dissuasion crimes, rendering the e-mails irrelevant.

Defense counsel then asserted the e-mails were relevant to other counts and elements, including the count 1 criminal threat and count 3 false imprisonment alleged to have occurred on October 22, 2010. The trial court asked counsel to identify the dates of the relevant e-mails and sought to clarify her position:

"The Court: Okay. So your offer of proof is that as to Count 1 alone these e-mails are relevant?"

"[Defense counsel]: Yes.

"The Court: And what specific e-mails are you referring to?"

"[Defense counsel]: The bulk of the e-mails, Your Honor. I haven't—I haven't parsed out which ones I've—I was simply waiting for the Court to make a ruling as to

which, you know, if the e-mails would come in or not. I can tonight pull out the ones that I think are relevant to that specific charge, but because I have read the e-mails in its [*sic*] entirety and I have an overall understanding of what they are, that's why I'm saying it's [*sic*] relevant to Count 1. But they are—they are voluminous and so that's why I'm saying I'm not able to pull them out right now. There is a lot of them."

The trial court reserved on the issue, asking defense counsel to review it overnight and see if she could find something specific. However, it ruled the e-mails inadmissible on the counts 2 and 4 dissuading charges, noting that defense counsel was only seeking admission of the e-mails as to count 1.

The next day, defense counsel again addressed the issue, both as to its relevance to count 1 pertaining to the issue of Martinez's sustained fear and to the dissuasion counts. In response to the court's inquiries, counsel confirmed that no e-mail specifically addressed the October 22, 2010 incident, and that the closest e-mail to that date was sent four days later on October 26, 2010. The trial court found that to be "too long." It ruled defense counsel's proffer was insufficient in that there was no e-mail specifically addressing what amount of fear, if any, Martinez had on October 22 and whether or not it was sustained.

As for the dissuasion counts, defense counsel argued the e-mails provided a "general defense," telling the court that the "overall argument is how can someone's word dissuade a person who is already committed to not participating in the criminal procedures." The court asked for counsel to address the statement in CALCRIM

No. 2622: "It is not a defense that the defendant was not successful in preventing or discouraging the victim or witness. And it is not a defense that no one was actually physically injured or otherwise intimidated." Afrah's counsel responded: "I don't believe I have an argument to that, Your Honor." The trial court denied counsel's request to admit the e-mail evidence as to the dissuasion counts, confirming it had already ruled the e-mails inadmissible.

B. *Contentions*

Afrah contends the court erred by excluding Martinez's e-mail correspondence; that the correspondence was relevant, critical to his defense, and admissible under the "rule of completeness" of Evidence Code section 356. Relying on *People v. Harris* (2005) 37 Cal.4th 310, Afrah asserts the e-mail correspondence should have been admitted to provide the entire context to the jail calls because the e-mail correspondence "was specifically mentioned in the jail calls [and] . . . clearly had '*some bearing upon, or connection with*, the admission or declaration in evidence.'" He maintains the error deprived him of his due process right to a fair trial and meaningful opportunity to present a complete defense, and was not harmless under either the more stringent beyond-a-reasonable-doubt prejudice standard of *Chapman v. California* (1967) 386 U.S. 18, 24 or the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

The People respond that Afrah has not presented an adequate appellate record supporting his claims because defense counsel never made a specific offer of proof as to the content of the e-mails. They argue the claim fails on the merits as well. According to the People, the telephone calls are "self explanatory and clear on their own" and therefore

the rule of completeness does not apply because the rule only permits introduction of statements on the same subject or statements that are necessary to understand statements already introduced.

We review for abuse of discretion the trial court's decision to exclude Afrah's proffered evidence. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) The court's evidentiary ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Rodriguez*, at pp. 9-10; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193.)

C. Adequacy of Defense Counsel's Offer of Proof

To preserve for appeal a contention that evidence should have been admitted, the proponent of the evidence must make an offer of proof making clear the substance of the proffered testimony. (Evid. Code, § 354;³ *People v. Vines* (2011) 51 Cal.4th 830, 868-869; *People v. Allen* (2008) 44 Cal.4th 843, 872, fn. 19; *People v. Foss* (2007) 155 Cal.App.4th 113, 126; *People v. Brady* (2005) 129 Cal.App.4th 1314, 1332.)

"The substance of evidence to be set forth in a valid offer of proof means the testimony of specific witnesses, writings, material objects, or other things presented to the

³ Evidence Code section 354 provides in part: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"

senses, to be introduced to prove the existence or nonexistence of a fact in issue.' " (*In re Mark C.* (1992) 7 Cal.App.4th 433, 444.) Thus, "a specific offer of proof is necessary in order to preserve an evidentiary ruling for appeal. . . . 'It must set forth the *actual evidence to be produced* and not merely the facts or issues to be addressed and argued.' " (*People v. Brady, supra*, 129 Cal.App.4th at p. 1332, italics added; see *People v. Foss, supra*, 155 Cal.App.4th at p. 128; *United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282, 294 ["An offer of proof that sets forth the substance of *facts* to be proved does not comply with Evidence Code section 354, subdivision (a), since *facts* do not constitute *evidence*"].) Absent an adequate offer of proof, the record is inadequate for a reviewing court to determine error and assess prejudice. (See *People v. Whitt* (1990) 51 Cal.3d 620, 648; *Brady*, at p. 1314; *Foss*, at p. 127 [function of an offer of proof is to lay an adequate record for appellate review].)

Where a proponent seeks to introduce certain statements of witnesses, for example, he or she must provide the court with an understanding of the "precise testimony" the witnesses would provide if called. (*Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 168.) Where a proponent seeks to introduce evidence from standardized tests, a sufficient offer of proof should include "meaningful information about the nature, content or import" of the tests. (*In re Mark C., supra*, 7 Cal.App.4th at p. 445.) In *United Sav. & Loan Assn. v. Reeder Dev. Corp., supra*, 57 Cal.App.3d 282, the defendant gave an offer of proof that the plaintiff had entered into written purchase and sales contracts with other buyers, that the contracts were substantially the same as a sales agreement between the defendant and plaintiff, that plaintiff "followed a practice that

if the buyer was doing engineering, going forward and attempting to put the package together, [plaintiff] would extend the deadline when the contract was to become absolute as long as the buyer was working in good faith to complete the transaction, and that at the end of the condition-subsequent time period, [plaintiff] voluntarily returned the deposited funds to the buyer and claimed no right to retain these funds." (*Id.* at p. 293.) This was held to be a defective offer of proof as it did not set forth the substance of the evidence that was being offered; the information pertaining to the plaintiff's practices fell into the category of an offer of facts, not an offer of evidence to be introduced in the form of the writing. (*Id.* at p. 294.)

Here, Afrah's offer of proof as to the e-mail correspondence lacked the requisite specificity to preserve his claim of evidentiary error. The closest defense counsel came to presenting an offer of proof was in discussing the count 1 charge and her assertion that they evidenced no sustained fear. She said: "But we have e-mails to show that [Martinez] is calling him, she's making apologies. I mean, the question is: What do these apologies mean? Apologies for what? And so to exclude these e-mails, I think, precludes us from putting on an appropriate defense, especially when we don't have the victim to confront and cross-examine as to this whole matter." As to the dissuading charge, defense counsel told the court: "The e-mails show that she doesn't want him in jail. The e-mails shows [*sic*] that she lives in a different city, and that may be a reason why she's not coming to court. The e-mails show that she's not in sustained fear by virtue of contacting him." While these offers set out the nature of the e-mails and the facts or issues to be addressed and argued, they do not constitute meaningful information about the e-mails' substance

and content—that is, the *actual evidence* proposed to be produced, as they must. (*People v. Brady, supra*, 129 Cal.App.4th at p. 1332.)

We observe Afrah purports to characterize the content of the e-mails on appeal in connection with his prejudice arguments. He argues exclusion of the evidence was prejudicial as to count 2 because the e-mail purportedly shows Martinez made apologies to Afrah and "made it clear to [Afrah] that she had no intention of testifying or reporting anything to the police" and thus was not a victim or witness to a crime. He argues as to count 4, the e-mail "showed that Martinez had expressed to him her independent commitment not to participate in the trial." He maintains the trial court's ruling prejudiced him because the e-mails established Martinez had already made it clear that, independent of Afrah's statements in the calls, she had no intention of reporting any crime or testifying prior to the jail calls. According to Afrah, his knowledge of Martinez's prior decision not to report him or testify negates any malice or specific intent on his part to dissuade her from doing so. But while the proffered e-mail correspondence may establish these facts, nothing imparts to us the actual substance of the e-mails, and we will not speculate as to their content.

Given the foregoing circumstances, we have no ability to assess error or potential prejudice, and Afrah has not shown entitlement to relief. This includes with respect to his constitutional claims. "The ordinary application of state evidentiary law does not, as a general matter, implicate the United States Constitution." (*People v. Vines, supra*, 51 Cal.4th at p. 869.) Thus, in this case, the trial court's ruling excluding the e-mail evidence "did not foreclose defendant from presenting a defense, but 'merely rejected certain

evidence concerning the defense.' " Accordingly, the trial court's rulings in this case did not infringe defendant's constitutional rights. (*Ibid.*)

D. The Trial Court Did Not Abuse its Discretion in Implicitly Ruling Evidence Code Section 356 is Inapplicable to Afrah's Statements in the Jail Calls

Even if we were to conclude counsel provided a sufficient offer of proof to admit the e-mail communication between Afrah and Martinez, we would nevertheless reject Afrah's assertion that they were admissible under Evidence Code section 356.

Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

" 'The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' " (*People v. Vines, supra*, 51 Cal.4th at p. 861.)

"Application of Evidence Code section 356 hinges on the requirement that the two portions of a statement be 'on the same subject.' " (*Ibid.*) While " 'courts do not draw narrow lines around the exact subject of inquiry' " in applying Evidence Code section 356 (*People v. Zapien* (1993) 4 Cal.4th 929, 959), the proponent must show some connection between the matters: " ' "In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all

that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . ." (Ibid., quoting *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.)

As stated above, Afrah maintains that the requisite connection for purposes of Evidence Code section 356 is met by the fact Martinez referenced her e-mails in the jail calls. The contention is unavailing. Toward the beginning of the first call placed on November 19, 2010, Martinez asked Afrah, ". . . Did you get my—you didn't get my emails?" Afrah responded that he had gotten her e-mail, and after counseling Martinez about problems she had apparently referenced in it with "fighting with bitches," told Martinez she should not pay his cell phone bill.⁴ It appears that after Martinez asked Afrah if he had received her e-mails, they proceeded to discuss matters and events having no apparent relation or connection to the offenses, or Afrah's dissuading statements in the second call placed two days later. This, combined with the absence of any showing of the content of Martinez's e-mails so as to assess similarity of general or specific subject matter, compels us to conclude Afrah did not meet the requirements of Evidence Code

⁴ More fully, their conversation at this point was as follows: Martinez asked whether Afrah had received her e-mails, and he said, "Yeah, but if you do get the—I got your email. You said 25 bitches and you're fighting all that bullshit, but cut that shit, man, get a—think about your money. Don't worry about fighting with bitches and shit. Look. What I'm saying is this, baby. Do—don't pay my cell phone bill, alright?" Martinez asked why, and Afrah told her, "Because, I—it's no reason to have two cell phones, man. I, I might just do that when I get—when I—when I get released the 30th." Martinez said okay, Afrah told her he loved her, and then asked, "How's everything?" The conversation continued, with Afrah telling Martinez he had learned she had gone to a club with another individual, and suggesting Martinez had lied to him about it.

356. The trial court did not abuse its discretion in excluding the proffered e-mail correspondence.

II. *Imposition of Fines and Fees*

Prior to his sentencing hearing, Afrah submitted a statement in mitigation in which he asserted, among other things, he was able to comply with reasonable terms of probation because he was an "able-bodied young man" in "good health" and "will be seeking employment and schooling upon his release." He pointed out he had been employed and had attended school in the past.

Because Afrah declined to be interviewed, the probation officer in his report recounted information gathered in 2005, when Afrah was being sentenced in a prior case. At that time, Afrah reported he had worked for Sony as a warehouse assistant for seven months before being taken into custody and had worked for Kyocera in the same capacity for four months until he was laid off. He had worked as a translator for seven months at a community clinic and had worked various jobs in Holland, where he lived for several years before coming to the United States. He had completed only two years of high school, but had a year of electronics training and had attended the Mid City Adult School "off and on" for two and a half years. Afrah described his financial situation then as "broke and poor" with no assets or debts, and no source of income. Afrah told the probation officer he had possible job offers in the construction field and was interested in furthering his education and career training.

The probation officer in the present case recommended that Afrah be denied probation and that, in addition to his sentence, he pay various fines and fees including a \$400 restitution fine under section 1202.4, subdivision (b), and a \$154 criminal justice administrative fee under Government Code section 29550.1. At his sentencing hearing, Afrah's counsel asked that the fines and fees be waived or stayed, claiming Afrah had no financial ability to make the payments. The trial court imposed the fines and fees, making them "payable forthwith or as provided in [section] 2085.5, which is in the regular prison system. They can garnish up to a certain percentage if they deem fit. But that's the normal practice."

A. *Section 1202.4, Subdivision (b) Restitution Fine*

"In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) The "Legislature intended restitution fines as punishment." (*People v. Hanson* (2000) 23 Cal.4th 355, 361.) "As with other types of fines, the money is deposited into the state treasury; it is earmarked for the Restitution Fund, which enables the state to compensate victims of crimes." (*Id.* at p. 362; § 1202.4, subd. (e).) Section 1202.4 was amended in 2011 to increase the minimum restitution fee from \$200 to \$240. Prior to its amendment in 2011, and at the time of Afrah's sentencing, the court had discretion to impose a restitution fine of between \$200 and \$10,000 for a felony, under section 1202.4, subdivision (b)(1). (§ 1202.4, former subd. (b)(1) as amended (Stats. 2011, ch. 358, § 1, pp. 4008-4009).) The court could set the fine by multiplying \$200 by the number of years

of imprisonment ordered and multiplying that number by the number of felony convictions. (§ 1202.4, former subd. (b)(2).)

In setting a restitution fine in excess of \$200, as was the case here, the court "shall consider any relevant factors, including . . . the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, . . . and the number of victims involved in the crime." (§ 1202.4, former subd. (d).) Consideration of a defendant's inability to pay may include his or her future earning capacity," and a "defendant shall bear the burden of demonstrating his or her inability to pay." (*Ibid.*) A defendant's ability to pay or earn does not necessarily require existing employment or cash on hand. (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.)

Afrah contends the court abused its discretion by imposing a restitution fine beyond the \$200 statutory minimum. Pointing out the court was required to consider various factors including his financial ability to pay, he maintains the fine is not supported by the record because the sole evidence on that point is the probation officer's report, which states he has no income or assets. Afrah argues the probation officer's report rebutted the presumption he was able to pay, and met his burden to demonstrate inability to pay under section 1202.4, subdivision (d).

The People respond that the court was well within its discretion in setting the restitution fine at \$400, as the fine could have been set as high as \$1200 based on the section 1202.4, former subdivision (b)(2) statutory formula for calculating the fine. They argue Afrah's self-serving statement in 2005 that he was broke and poor was insufficient

to overcome the trial court's conclusion that he had the ability to pay the minimal \$400 fine.

We perceive no abuse of discretion in the trial court's imposition of the \$400 restitution fine. It was Afrah's burden at his sentencing hearing to demonstrate his inability to pay, but his counsel presented no evidence or meaningful argument on the issue, merely stating Afrah had "no financial ability to make the payments on fines and fees. . . ." Nor does Afrah "identify anything in the record indicating the trial court breached its duty to consider his ability to pay; as the trial court was not obligated to make express findings concerning his ability to pay, the absence of any findings does not demonstrate it failed to consider this factor." (*People v. Nelson* (2011) 51 Cal.4th 198, 227.)

Though Afrah points to his 2005 statement to the probation officer that he was "broke" and "poor" as the sole evidence in the record on his financial condition, we cannot agree. First, Afrah's statement in 2005 does not by itself provide support for the proposition that he was unable in April of 2011 to pay fines and fees. And, in determining whether a defendant has the ability to pay a restitution fine, the trial court may consider the defendant's future ability to pay, including his ability to earn wages while in prison. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) Where the defendant is capable of supporting himself with legitimate employment, the trial court may also consider his ability "to find and maintain productive employment once his sentence is complete." (*People v. Staley, supra*, 10 Cal.App.4th at p. 786.) Accordingly, the bare fact of impending incarceration does not necessarily establish a defendant's inability to pay.

(*People v. Nelson, supra*, 51 Cal.4th at p. 227; *People v. Gamache* (2010) 48 Cal.4th 347, 409.)

Afrah disregards other indications in the record—in his statement in mitigation and the probation officer's report—from which the trial court could have reasonably concluded he had future capacity or ability to earn a wage. At the time of his sentencing, Afrah was only 31 years old, was in good health, had some adult-level schooling including training in electronics, and had worked jobs at reputable companies in the past. " [T]he trial court is entitled to consider the probation report when determining the amount of restitution.' " (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048.) Afrah does not point to evidence that he is physically or mentally incapable of finding legitimate employment upon completion of his sentence.

Here, the trial court indicated it had read Afrah's statement in mitigation, as well as the probation report, in reaching its decision to impose the fines and fees. On this record, we conclude Afrah did not demonstrate his inability to pay the \$400 fine, and the trial court did not abuse its discretion by imposing it.

B. Government Code section 29550.1 Criminal Justice Administration Fee

Government Code section 29550 et seq. provides for imposition of a criminal justice administration fee to reimburse arresting agencies for the cost of booking and processing arrested persons. Government Code section 29550.1 provides for imposition of the fee on convicted persons arrested by officers of a city, special district, school district, community college district, college, university, or other local arresting agency.

As stated above, the trial court imposed a \$154 fee under Government Code section 29550.1 over counsel's objection that Afrah had no financial ability to pay fees or fines.

Afrah asks this court to vacate this fee. He maintains the trial court was required to make a finding of his ability to pay the fee in order to impose it, but the court's finding, whether express or implied, is not supported by evidence of his financial ability to pay, nor is it supported by evidence in the record of the actual administrative costs of his booking. The People argue the trial court's implied finding is supported by evidence that Afrah was 31 years old at the time of his sentencing; he told the probation officer he had "possible job offers in the construction field" and was "interested in furthering his education and career training"; Afrah denied physical health problems; and he stated any mental health issues were adequately addressed by medication, permitting the trial court to discern he was not physically or mentally impeded from paying his debts.

Recently the Fourth District, Division Two held that a trial court need not make a finding of the defendant's ability to pay a Government Code section 29550.1 fee. (*People v. Almanza* (2012) 207 Cal.App.4th 269.) After explaining the fee in that case was imposed under Government Code section 29550.1, not Government Code section 29550.2, as the defendant had asserted, the appellate court reasoned: "Government Code section 29550.2, subdivision (a), on which defendant relies, provides, '*If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted

person to reimburse the county for the criminal justice administration fee.' (Italics added.) In contrast, Government Code section 29550.1 provides for payment of the criminal justice administration fee by a convicted person but omits the above italicized language. Thus, Government Code section 29550.1 does not require a finding of ability to pay." (*People v. Almanza*, at pp. 272-273.) In this respect, the court disagreed with the Sixth District's holding *People v. Pacheco* (2010) 187 Cal.App.4th 1392 to the extent *Pacheco* could be interpreted otherwise. (*People v. Almanza*, at p. 274.)

The *Almanza* court additionally rejected the defendant's argument that an ability to pay finding was required under Government Code section 29550, subdivision (d)(2), pointing out the subparagraph was inapplicable because the defendant was not granted probation but sentenced to state prison. (*People v. Almanza, supra*, 207 Cal.App.4th at p. 273.) This is Afrah's situation in the present case.

Finally, *Almanza* rejected the defendant's argument, similar to Afrah's here, that the booking fee was invalid because there was no record, hearing, or substantial evidence establishing the actual administrative costs of his booking. (*People v. Almanza, supra*, 207 Cal.App.4th at p. 273.) The court explained, "Government Code section 29550 does not contemplate an evidentiary showing in the trial court to determine the amount of the fee; rather, determination of the amount of the fee is directed toward the county imposing the fee: 'The fee imposed by a county pursuant to this section shall not exceed the actual administrative costs, including applicable overhead costs as permitted by federal Circular A-87 standards, as defined in subdivision (d), incurred in booking or otherwise processing arrested persons. For the 2005-2006 fiscal year and each fiscal year thereafter, the fee

imposed by a county pursuant to this subdivision shall not exceed one-half of the actual administrative costs, including applicable overhead costs as permitted by federal Circular A-87 standards, as defined in subdivision (d), incurred in booking or otherwise processing arrested persons. . . .' (Gov. Code, § 29550, subd. (a)(1).) 'Any increase in a fee charged pursuant to this section shall be adopted by a county prior to the beginning of its fiscal year and may be adopted only after the county has provided each city, special district, school district, community college district, college, or university 45 days written notice of a public meeting held pursuant to Section 54952.2 on the fee increase and the county has conducted the public meeting.' (Gov. Code, § 29550, subd. (a)(2).) In addition, Government Code section 29550, subdivision (d) provides, '*When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency,*' the court may or shall impose the fee as specified in other subdivisions of that section." (*People v. Almanza*, 207 Cal.App.4th at pp. 273-274.)

We agree with the *Almanza* court's conclusions and likewise decline to follow *People v. Pacheco*, *supra*, 187 Cal.App.4th 1392.⁵ The Sixth District Court of Appeal recognized that its own holding in *Pacheco* is limited to the booking fee imposed under either Government Code section 29550.2 or 29550(c). (*People v. Mason* (2012) 206 Cal.App.4th 1026, 1034-1035.) Additionally, the Sixth District in *Mason* recognized, in line with *Almanza*, that nothing in Government Code section 29550.1 "requires that this

⁵ Even if we did not agree with *People v. Almanza*, *supra*, 207 Cal.App.4th 269, for the reasons discussed above in connection with Afrah's restitution fine, the record supports the trial court's implied finding that Afrah had the financial ability to pay the Government Code section 29550.1 fee.

calculation [the one-half the actual cost of appellant's booking] be made, or supported, at sentencing." (*People v. Mason*, 206 Cal.App.4th at p. 1034.) It thus rejected the defendant's argument that his Government Code section 29550.1 booking fee was "unsound because '[t]here is no evidence in this record of the actual cost of appellant's booking.' " (*People v. Mason*, at p. 1034.)

We hold, as for Afrah's latter claim, that to successfully challenge imposition of the Government Code section 29550.1 fee, it is Afrah's appellate burden to establish that the fee in his case somehow exceeded the required amounts as set forth in the statute. Because he has not done so, we reject his challenge.

III. *Amendment of Abstract of Judgment*

In a footnote, Afrah asserts his conviction in count 2, though alleged under section 136.1, subdivision (c)(1), should be adjudicated a violation of section 136.1, subdivision (b)(1) given the jury's not true finding on the allegation of force or threat of force. He asks that we order the abstract of judgment as to count 2 corrected accordingly. The People do not address the request. The reporter's transcript of sentencing does not reflect that the trial court specified the underlying statutory basis for Afrah's count 2 conviction. We agree in view of the jury's not true finding on the force or threat of force allegation, the abstract of judgment should reflect that Afrah was convicted in count 2 of a violation of section 136.1, subdivision (b)(1). (*People v. Smith* (2001) 24 Cal.4th 849, 854 [appellate court may correct obvious and easily fixable errors even in absence of objection at sentencing].) We so modify the judgment and direct the trial court to amend the abstract of judgment accordingly.

DISPOSITION

The judgment is modified to reflect that Afrah was convicted in count 2 of a violation of section 136.1, subdivision (b)(1), and the matter is remanded with directions that the trial court amend the abstract of judgment accordingly. The trial court shall forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.