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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO RODRIGUEZ,

Defendant and Appellant.

E056642

(Super.Ct.No. RIF1104611)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed with directions.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal by Roberto Rodriguez from the judgment entered after a jury found him guilty of first degree murder in connection with the death of Ronnette Sigala, and further found true the allegation that defendant personally used a knife in the commission of the crime. After defendant admitted the truth of the allegations that he had three prior serious felony convictions within the meaning of the three strikes law (Pen. Code, 667, subs. (c), (e)), the trial court sentenced defendant to serve 25 years to life, tripled under the three strikes law, preceded by a determinate term of one year on the knife use enhancement.

Defendant contends the trial court's jury instruction on provocation was incorrect as a result of which we must reverse his first degree murder conviction. Defendant also challenges various fines the trial court imposed at defendant's sentencing hearing. We agree with his challenge to two of the three fines in question. Therefore we will affirm the judgment but with directions to strike the \$150 Government Code section 70373 fine and to reduce the Penal Code sections 1202.4 and 1202.45 fines to \$200.

FACTS

Our resolution of the issues defendant raises in this appeal requires only an abbreviated statement of facts. According to the undisputed evidence defendant killed Ronnette Sigala after she said she wanted him to move out of the mobilehome they had shared for five years. When the police arrived, defendant refused to come out or to let them in. After about five hours, defendant gave himself up and walked out with his hands in the air. In his statement to the police, defendant said Sigala had gone to sleep after telling him she was tired of him raising his voice to her and she wanted him to move

out. Defendant sat in a rocking chair and thought about what he was going to do. Then he took a knife from the kitchen and put it in his dresser drawer in the bedroom where Sigala was sleeping. Defendant woke up Sigala, and after she confirmed she wanted defendant to move out, he got the knife and stabbed Sigala in the abdomen. Defendant stabbed Sigala at least two more times, on each side of her neck. The wound on the right side severed her jugular vein and caused her death.

DISCUSSION

1.

JURY INSTRUCTIONS ON PROVOCATION

Defendant contends, by giving CALCRIM No. 570, the trial court effectively instructed the jury that all provocation must be objectively reasonable, and therefore the trial court incorrectly instructed that only objectively reasonable provocation may be considered for its effect on premeditation and deliberation. We disagree.

The pertinent details are that the trial court instructed the jury on premeditation and deliberation according to CALCRIM No. 521.¹ The trial court also instructed the

¹ “The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. [¶] On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.” (Italics added.)

jury according to CALCRIM No. 522, “Provocation may reduce a murder from first degree to second degree. It may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first- or second-degree murder. Also consider the provocation in deciding whether the defendant committed murder or manslaughter.”

Finally, the trial court gave CALCRIM No. 570, which instructed the jury, “A killing that would otherwise be murder is reduced to voluntary manslaughter if: [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion, the defendant killed someone because of a sudden quarrel or in the heat of passion if the defendant was provoked; [¶] Secondly, as a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] And third, *the provocation could have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.* [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. [¶] While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. *It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In*

deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.” (Italics added.)

Defendant contends the jury might have construed the CALCRIM No. 570 definition of provocation, emphasized above, to apply not only in the context of reducing murder to voluntary manslaughter but also for purposes of negating premeditation and deliberation. We disagree, but conclude defendant has not preserved the issue for review on appeal.

In *People v. Lee* (1994) 28 Cal.App.4th 1724 [Fourth Dist., Div. Two], we held a trial court is not required to instruct sua sponte on the effect provocation had on the defendant’s ability to premeditate and deliberate. Because premeditation and deliberation are an element of the crime of first degree murder, the effect of provocation on that element is a pinpoint instruction, i.e., one that relates certain evidence to an element of the offense in an effort to create reasonable doubt about that element, that need not be given sua sponte. (*Id.* at p. 1734; see also *People v. Rogers* (2006) 39 Cal.4th 826, 887-879.) Because the trial court was not required to give CALCRIM No. 522 sua sponte,

defendant was required to request modification of the instruction in order to preserve his claim of error for review on appeal. Defendant did not ask the trial court to modify CALCRIM No. 522 to clarify that provocation in this context need not be objectively reasonable. (See *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295 [Fourth Dist., Div. Two] [“whether the provocation precluded the defendant from deliberating . . . requires a determination of the defendant’s subjective state”].) Because defendant did not request the clarification, he has waived any purported error.

Moreover, defendant’s argument fails on the merits. “In reviewing a claim that the court’s instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. [Citation.]” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

The trial court’s instructions clearly informed the jury that objectively reasonable provocation is required in reducing murder to manslaughter. As set out above, the trial court instructed the jury, “*In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. [¶] While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the*

same situation and knowing the same facts would have reacted from passion rather than from judgment.” (Italics added.)

Although the instructions could be clearer, we simply cannot say jurors, when viewing the instructions as a whole and in context, would believe the objective provocation requirement applied not only in deciding whether the defendant acted in the heat of passion but also in deciding whether the defendant acted with premeditation and deliberation.

Finally, even if we were to agree with defendant and conclude the instructions on provocation are confusing, we nevertheless would conclude the error was harmless in this case. Defendant argues we must apply the federal constitutional standard of harmless beyond a reasonable doubt in assessing prejudice because the purportedly confusing instruction on provocation affected an element of the crime of murder. We disagree. As previously noted, provocation is not an element of the crime of murder. It is a fact that relates to and affects the element of premeditation and deliberation. The trial court correctly instructed the jury on that and all other elements of the crimes. If error occurred it consisted of failing to clarify that any provocation, even if not objectively reasonable, could be considered in deciding whether the evidence proved premeditation and deliberation. Failure to give such a clarifying instruction is error under state law and thus subject to the harmless error standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Flood* (1998) 18 Cal.4th 470, 487 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed under the harmless error standard articulated in

People v. Watson].) The error is prejudicial and requires reversal only if we can say it is reasonably probable the jury would have reached a result more favorable to defendant if the trial court had clarified that provocation that is not objectively reasonable may nevertheless affect a defendant's ability to premeditate and deliberate.

The evidence in this case is undisputed. As set out above, defendant killed Ronnette Sigala after she said she wanted him to move out of the home they had shared for five years. In his statement to the police, defendant said Sigala had gone to sleep after telling him she was tired of him raising his voice to her and wanted him to move out. Defendant sat in a rocking chair and thought about what he was going to do. Then he took a knife from the kitchen and put it in his dresser drawer in the bedroom where Sigala was sleeping. Defendant woke up Sigala, and after she confirmed she wanted defendant to move out, he got the knife and stabbed Sigala in the abdomen. Defendant stabbed Sigala at least two more times, on each side of her neck.

Better evidence of premeditation and deliberation is difficult to imagine. Accordingly, we must conclude, assuming without actually deciding the jury instructions on provocation were ambiguous if not actually incorrect, it is not reasonably probable any jurors would have reached a result more favorable to defendant if the instructions had been clarified and the jury had been told they could consider any evidence of provocation for whatever effect it might have had on defendant's ability to premeditate and deliberate.

2.

FINES AND FEES

Defendant raises three claims directed at fines and fees the trial court either imposed at sentencing or that are reflected on the abstract of the judgment but were not imposed by the trial court.

A. Criminal Conviction Fee

The abstract of judgment includes a \$150 criminal conviction fee under Government Code section 70373. However, at sentencing the trial court expressly declined to impose that fee. Therefore, inclusion of that fee in the abstract of judgment is a mistake, and we will direct the fee be stricken.

B. Restitution Fine

The trial court imposed the minimum restitution fine of \$240 under Penal Code section 1202.4, subdivision (b). In accordance with the provision in Penal Code section 1202.45, subdivision (a), that requires the trial court to assess a parole revocation restitution fine in the same amount if the trial court assesses a restitution fine, the trial court also required defendant to pay a parole revocation restitution fine in the amount of \$240. Defendant contends the trial court should have imposed fines of \$200 because that was the minimum fine under the pertinent statutes in effect when defendant committed his offense.

The Attorney General concedes, “A restitution fine qualifies as punishment for purposes of the prohibition against ex post facto laws. [Citations.]” (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.) Just as the 1992 increase in the minimum fine from

\$100 to \$200 made more burdensome the punishment for a crime, the increase from \$200 to \$240 had the same effect. (*Ibid.*) The Attorney General also does not dispute the trial court intended to impose the minimum restitution fine permitted by law.² The Attorney General argues, however, that defendant forfeited the claim because he did not raise it in the trial court.

“Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) “[T]he forfeiture rule applies in the context of sentencing as in other areas of criminal law.” (*Id.* at p. 881.) “The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]’ [Citations.]” (*Ibid.*) The forfeiture rule is subject to recognized exceptions, one of which is that forfeiture will not be applied to pure questions of law because resolution of a legal issue does not depend on facts contained in the record. (*Id.* at pp. 881-882.)

We view defendant’s claim in this appeal as purely a question of law, i.e., what was the minimum statutory restitution fine in August 2011 when defendant committed his crime. That minimum fine was \$200. (See Stats. 2011, ch. 45, § 1 [Sen. Bill No. 208], eff. July 1, 2011.) The trial court clearly intended to assess the statutory minimum. Therefore, we will direct that the \$240 restitution fine assessed under Penal Code section

² In sentencing defendant the trial court imposed “[t]he restitution fund minimum of \$240 . . . because defendant does not have the ability to pay more.”

1202.4, subdivision (b), and the \$240 parole revocation restitution fine assessed under Penal Code section 1202.45, subdivision (a), each be reduced to \$200.

C. Booking Fee

The trial court ordered defendant to pay a \$409.43 criminal justice administration fee, commonly referred to as a booking fee. Defendant contends Government Code section 29550, the statute defendant claims the trial court relied on to impose the fee, violates the equal protection clauses of the state and federal Constitutions. The Attorney General contends defendant has forfeited this issue because he did not assert his equal protection claim at sentencing in the trial court or otherwise object at sentencing to the booking fee. We are inclined to agree the issue is forfeited.

“Three statutes address defendants’ payment of jail booking fees, Government Code sections 29550, 29550.1, and 29550.2. Which section applies to a given defendant depends on which governmental entity has arrested a defendant before transporting him or her to a county jail. The factors a court considers in determining whether to order the fee payment also vary depending on whether or not the court sentences the defendant to probation or prison. (See Gov. Code, §§ 29550, subd. (d)(1) & (2), 29550.1, 29550.2, subd. (a).)” (*People v. McCullough* (2013) 56 Cal.4th 589, 592 (*McCullough*)).

In *McCullough*, the Supreme Court held the defendant forfeited his sufficiency of the evidence challenge to a booking fee because he failed to object to the fee in the trial court. In this case, as in *McCullough*, the trial court imposed the booking fee without citing the pertinent statutory authority. Defendant would have us assume the trial court relied on Government Code section 29550, subdivision (d)(1), as the statutory authority

for the booking fee.³ Based on that assumption, defendant would have us conclude the statute is unconstitutional because, unlike Government Code section 29550.2,⁴ the trial court does not need to find the defendant has the ability to pay before imposing the booking fee under Government Code section 29550.

If defendant had objected to the booking fee in the trial court, the record would reflect the specific statute the trial court relied on to impose the booking fee. On this record we cannot tell for certain. It is possible Government Code section 29550.2 is the pertinent statute, and the trial court in turn imposed the fine pursuant to that statute. That fact would eliminate defendant's equal protection claim.

Moreover, even if we were to agree with defendant's equal protection challenge, the remedy he proposes would require the trial court to make a finding defendant has the ability to pay before imposing the booking fee. *McCullough* holds unless it is raised in the trial court, a defendant cannot raise an objection on appeal based on inability to pay a booking fee. (*McCullough, supra*, 56 Cal.4th at p. 597.) Defendant did not object to the

³ Government Code section 29550, subdivision (d), states, "When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: [¶] (1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt."

⁴ Government Code section 29550.2 applies to persons booked into a county jail by a governmental entity other than those specified in sections 29550 and 29550.1, and states, in pertinent part, "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." (Govt. Code, § 29550.2, subd. (a).)

booking fee on any ground in the trial court and therefore has forfeited his right to challenge the booking fee on appeal.

DISPOSITION

The judgment is modified by striking the \$150 Government Code section 70373 criminal conviction assessment, and by reducing the Penal Code sections 1202.4 and 1202.45 fines from \$240 to \$200. Except as expressly modified, the judgment is affirmed. The trial court is directed to prepare and send to the appropriate agencies an amended abstract of judgment that reflects the modified sentence.

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McKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.