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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS ZAVALA,

Defendant and Appellant.

F061038

(Super. Ct. No. MCR037120)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Virna L. DePaul, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Juan Carlos Zavala broke into a parked car and stole the stereo. He now challenges his conviction for petty theft with a prior (Pen. Code, § 666),<sup>1</sup> and also raises

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

claims of error as to the pronouncement of judgment, his sentence, the prison term, and the fines and fees imposed. Respondent concedes certain of the claims and we find merit in certain others. For the reasons discussed below, we remand the matter to the trial court for proceedings in accordance with this opinion.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Since the appeal raises no factual controversies, a detailed recitation of the facts is unnecessary. On the evening of January 13, 2010, appellant broke the window of a locked car parked in an alley and took the stereo from the dash. In the course of appellant attempting to leave the scene on his bike, the owner of the car returned. A confrontation ensued, and appellant was detained by the car owner, and later arrested.

Appellant was charged with two counts: 1) second degree burglary (§ 459), and 2) petty theft (§ 484, subd. (a)) with a prior theft conviction (§ 666). In addition, it was initially alleged that appellant had three prior convictions: a) vehicle theft (Veh. Code, § 10851, subd. (a)); b) second degree burglary (§ 459); and c) receiving stolen property (§ 496, subd. (a)) and had served a prior prison term with respect to each offense. During trial, the prosecution amended the information to reflect that one of appellant's prior convictions was for attempted burglary, not the completed crime. A jury returned a verdict of guilty on both counts, and found the allegations true.

At sentencing, the trial court summarized the matter and made several statements as to the circumstances of the offense and the nature and character of appellant. The court then stated its intended sentence, following the recommendations of the probation officer's report, of five years total in prison, plus anticipated fines and fees. The trial court specifically noted it intended to impose an \$880 fine, "pursuant to Penal Code Section 672, made up of the fines and assessments as set forth in the probation report, and a \$38 fine pursuant to [section] 1202.5, which consists of the fines and assessments as set forth in the probation report. [¶] There should be a \$750 presentence report fee, and \$102.59 booking fee, payable to the City of Madera." Counsel for both parties argued

their positions briefly, and then the trial court imposed its sentence in accordance with its intended sentence, noting that it was following the recommendations of the probation report. Appellant made no objection to the sentence or fees imposed, nor the manner in which the trial court announced its judgment at sentencing.

## DISCUSSION

### I.

#### RECENT AMENDMENTS TO SECTION 666 RENDER APPELLANT'S CONVICTION IMPROPER

The jury found appellant guilty on August 19, 2010, of violating section 666 (petty theft with prior theft-related conviction). He was sentenced on September 17, 2010. As this court has recently recognized, section 666 was amended as applicable here, effective September 9, 2010, to require *three* qualifying prior theft-related convictions, rather than just one. (*People v. Vinson* (2011) 193 Cal.App.4th 1190, 1194 (*Vinson*).) Appellant asserts his conviction should thus be stricken because section 666 no longer applies to him, given that attempted burglary does not qualify. He therefore has only two qualifying prior theft-related convictions. Respondent concedes the amendment applies here and appellant does not have three prior qualifying convictions. Respondent, however, requests we reduce the conviction to the lesser-included offense of petty theft. (§ 484.) We accept respondent's concession and grant the request.

At the time appellant committed the present offense, a violation of section 666 required only one prior qualifying conviction and related incarceration coupled with a current petty theft. Prior qualifying convictions were: "petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 ...." (*Vinson, supra*, 193 Cal.App.4th at pp. 1193-1194.)

"Effective September 9, 2010, Assembly Bill No. 1844 (2009-2010 Reg. Sess.), the Chelsea King Child Predator Prevention Act of 2010 ... amended section 666 to provide, in pertinent part: '(a) Notwithstanding Section 490 [(specifying the punishment

for petty theft)], every person who, having been convicted *three or more times* of [a qualifying conviction] and having served a term therefore in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable ....” (*Vinson, supra*, 193 Cal.App.4th at p. 1194, original italics.)

Thus, section 666, as amended, requires three prior qualifying theft-related convictions, and applies retroactively to judgments not yet final as of September 9, 2010, including the present case.<sup>2</sup> (*Vinson, supra*, 193 Cal.App.4th at pp. 1194 & 1199.)

Appellant and respondent agree that appellant had two prior theft-related qualifying convictions, but his third prior conviction was for attempted burglary, which is not included under the purview of section 666.

We thus modify appellant’s conviction under section 666 to a conviction of the lesser included offense under section 484 (petty theft) and remand to the trial court for resentencing accordingly.<sup>3</sup> (§§ 1181, subd. (6) & 1260; *People v. Navarro* (2007) 40 Cal.4th 668, 679 [§§ 1181, subd. (6) and 1260 provide a statutory scheme for courts’ correction function to bring a jury verdict in line with the evidence presented at trial].)

## II.

### THE ONE-YEAR SENTENCE ENHANCEMENT FOR THE THIRD PRIOR PRISON TERM UNDER SECTION 667.5 SHOULD BE STRICKEN

The trial court, following the recommendation of the probation officer’s report, sentenced appellant to the aggravated prison term of three years for count I and three years for count II, which it stayed pursuant to section 654. It also imposed three

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<sup>2</sup> Subsequently, the statute has been further amended twice in ways that do not impact the analysis here. (Stats. 2011, ch. 15, § 440; Stats. 2011, ch. 39, § 21.)

<sup>3</sup> We note also that the jury was instructed on petty theft and reached a verdict of guilty as to a violation of section 484 in the course of determining guilty with respect to section 666.

consecutive one-year enhancements for each of appellant's prior prison terms served for felony convictions, in accordance with section 667.5, subdivision (b), but stayed the enhancement for one of the prior prison terms because it was previously served concurrently with another prior prison term, relying on section 667.5, subdivision (g) in doing so.

Appellant contends the trial court erred in imposing, but staying, the enhancement for the previous concurrent prior prison term. Respondent concedes, and we accept the concession.

“Courts have consistently recognized that [the statutory language of section 667.5, subdivisions (b), (e) and (g)] means that only one enhancement is proper where concurrent sentences have been imposed in two or more prior felony cases. [Citations.]” (*People v. Jones* (1998) 63 Cal.App.4th 744, 747; see also *People v. English* (1981) 116 Cal.App.3d 361, 372-373.)

Appellant's sentence should thus be enhanced under section 667.5, subdivision (b) by only one year for the two prior prison terms served concurrently, which still leaves a total prison commitment of five years. We therefore modify the sentence in this matter to strike one of the enhancements imposed.

### III.

#### THE TRIAL COURT'S PRONOUNCEMENT OF JUDGMENT WAS ADEQUATE; ANY ERROR WAS HARMLESS

Appellant challenges two aspects of the trial court's oral pronouncement of judgment. First, that the trial court failed to adequately state its reasons for imposing the aggravated terms, and second that the trial court improperly stated only the total fine imposed under section 672 and failed to set forth on the record the itemized fines and fees assessed. Respondent asserts the trial court made adequate oral pronouncement of the judgment and its reasons for its sentencing choices and, in the alternative, claims harmless error. We conclude that, even assuming the trial court erred in its oral

pronouncement of its sentencing choices, any such error was harmless. We address imposition of the section 672 fee in section V of the Discussion, *post*.

### Background

At sentencing, the trial court initially noted, prior to argument by either counsel, that it had read and considered the probation officer's report, and proceeded to relate certain procedural facts, as well as recite a number of excerpts from the probation officer's report regarding the circumstances of the offense and the nature and character of appellant.<sup>4</sup> Following these comments, the court stated: "by way of circumstances and [*sic*] aggravation the prior convictions are numerous. He was on parole when the crime was committed, and his prior performance on probation and parole was unsatisfactory. By way of circumstances in mitigation there are no mitigated factors cited. [¶] The probation report goes through analysis with regard to the Penal Code, as to its application to the counts herein. The Court generally agrees with that analysis, as set forth in the report .... The Court will therefore state its intended judgment...[and then] hear any comment by the People and defense."

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<sup>4</sup> The Court stated: "This matter was concluded on the basis of a conviction by a jury .... The defendant is presumptively ineligible for probation, unless the Court deems this to be an unusual case. There are no apparent factors fully applicable showing this to be an unusual case. [¶] This arose out of an occurrence on January 13, 2010, at which time the defendant broke into a parked vehicle and stole a stereo." The court continued, following the analysis of the probation officer's report without specifically referencing the report: "The degree of monetary loss to the victim has not been determined and the defendant was an active participant in the offense. He hasn't [*sic*] established a prior record of theft. His prior performance on probation and parole was unsatisfactory. [¶] He was on parole when he committed the instant offense, and he expressed neither a willingness, nor unwillingness, to comply with probation. His ability to comply may be indicated by his family ties to the community. His inability to comply may be indicated by his lack of a high school diploma or GED, established prior record of criminality, or prior performance on probation and parole, unemployment, and the commission of the instant offense while on parole. [¶] Imprisonment poses no special jeopardy, and the additional felony convictions pose no perceivable advert [*sic*] collateral consequences. The defendant did not express remorse ...."

The trial court then stated its intended judgment, including the aggravated term for both counts, with the term for count 2 stayed pursuant to section 654, and the one-year consecutive enhancements for prior prison terms served in connection with prior felony convictions, discussed in section II of the Discussion, *ante*. The trial court thus concluded, “[t]he aggregate time is five years State prison,” and went on to describe the intended fines and fees to be imposed.

After hearing arguments from counsel on both sides, the trial court concluded, “The Court, as mentioned, has read and considered the report, and I am considering the comments by both prosecution and the defense. I am not inclined to suspend sentencing and to send [appellant] to any sort of program .... [¶] Unfortunately, this is one of those cases where the factors in aggravation do clearly preponderate. I think the recommendation of probation is thoughtful and well crafted here, and I am following that recommendation. So, it will be the 5-year aggregate term in State prison.”

#### Analysis

Appellant asserts the oral pronouncement here is deficient because the trial court incorporated the probation report by reference and implies the trial court failed to give an adequate statement of reasons for its sentencing choice. We agree generally that sentencing by merely incorporating the probation officer’s report by reference is improper. “[T]he purpose for requiring the court to orally announce its reasons at sentencing is clear. The requirement encourages the careful exercise of discretion and decreases the risk of error. In the event ambiguities, errors, or omissions appear in the court’s reasoning, the parties can seek an immediate clarification or change. The statement of reasons also supplies the reviewing court with information needed to assess the merits of any sentencing claim and the prejudicial effect of any error. [Citations.]” (*People v. Scott* (1994) 9 Cal.4th 331, 351 (*Scott*).)

This court has, in the past, rejected the assertion that incorporation by reference of a probation officer’s report is a sufficient statement of facts and reasons: “This argument

totally ignores the obvious meaning of Penal Code section 1170, subdivision (b), which requires that the *court* set forth *on the record* the facts and reasons for imposing other than the middle term. An incorporation by reference is not a statement of facts and/or reasons by the court and is obviously not on the record.” (*People v. Turner* (1978) 87 Cal.App.3d 244, 247.) Although it is not clear from that opinion, we assume the trial court simply incorporated by reference the probation report, without mentioning any of the specific factors or reasons contained in that report, which the trial court in this case did, as outlined in footnote 4, above.

In *People v. Pierce* (1995) 40 Cal.App.4th 1317, the appellate court reprimanded the trial court for failing to state reasons for its decision to impose an aggravated term. The trial court there orally pronounced solely, ““The circumstances in aggravation and mitigation as set forth on page four of the presentence report are adopted as the circumstances in aggravation and mitigation. Court finds that circumstances in aggravation outweigh the circumstances in mitigation.’ [Fn. omitted.]” (*Id.* at p. 1319.)

In *People v. Fernandez* (1990) 226 Cal.App.3d 669 (*Fernandez*), the court found the trial court’s incorporation of the probation report by reference insufficient. It reasoned that the probation report merely checked off aggravating factors using the language of former California Rules of Court rule 421 (now renumbered as rule 4.421) without, essentially, making underlying specific factual determinations supporting each aggravating factor. (*Id.* at pp. 680-681.) As relevant here, the *Fernandez* court noted, “[t]he probation report also notes as aggravating the ‘defendant’s prior convictions ... are numerous or of increasing seriousness.’ [Citation.] [¶] Incorporation of this factor is problematic because the court used defendant’s prior rape conviction to enhance his sentence..... However, the court’s blanket incorporation resulted in the improper use of the prior conviction both to enhance *and* impose an aggravated term. [Citations.] To avoid such dual use, the court had to explicitly exclude defendant’s prior rape conviction from consideration as an aggravating factor. [Citations.] Incorporation by reference,

however, suggests the trial court was not aware of the dual-use danger inherent in using this factor.” (*Ibid.*)

The *Fernandez* court continued, “[m]oreover, had the court excluded consideration of the prior rape conviction, only two prior convictions would have been left .... Two prior convictions, however, are not ‘numerous.’ [Citation.] Nor do these prior convictions reflect ‘increasing seriousness.’ Thus, the applicability of this factor is questionable.” (*Fernandez, supra*, 226 Cal.App.3d at p. 681.)

Our Supreme Court has also addressed the dual use danger. In *People v. Coleman* (1989) 48 Cal.3d 112 at pages 163 to 164 (*Coleman*), the court noted, “[b]ecause defendant had served a prior prison term ... he was sentenced to an additional three years under section 667.5. [¶] The trial court relied on that same prior prison term, including the fact that defendant was still on parole under that term at the time of the present crimes, in selecting the upper terms on counts two through eight. Defendant contends, and we agree, that the court thus violated [former] rule 441(c), which provides: ‘A fact used to enhance the defendant’s prison sentence may not be used to impose the upper term.’ ... [A]n additional sentence under section 667.5 is an enhancement under sentencing rules. The mandatory nature of such an enhancement ... does not preclude applicability of the rest of the sentencing rules. [Citation.]” Current California Rules of Court rule 4.420 provides the same essential restriction, as applicable here.<sup>5</sup>

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<sup>5</sup> Rule 4.420(c) states in pertinent part, “[t]o comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so.”

We note that the probation officer’s report, and thus the trial court, declined to find as an aggravating factor that appellant had served a prior prison term. (See Cal. Rules of Court, rule 4.421(b)(3).)

Here, the trial court imposed the mandatory one-year enhancements for two of appellant's prior prison terms served pursuant to section 667.5, subdivision (b), as discussed in section II of the Discussion, *ante*. The trial court also noted that a circumstance in aggravation was appellant's numerous prior convictions. However, because two prior prison terms arising from prior felony convictions were used to enhance appellant's sentence under section 667.5, those two felony convictions cannot be used as a circumstance in aggravation. If we remove from consideration appellant's two prior felony convictions used to enhance his sentence, we find that appellant's record for circumstances in aggravation consist of: 1) one prior felony conviction; 2) three violations of probation or parole associated with the three prior felony offenses (in 2006, 2007, and 2009); 3) juvenile charges in 2005 and 2006 consisting of four counts resulting apparently from one incident (petty theft, burglary tools, vandalism), and a violation of probation while a ward of the juvenile court; and 4) two independent violations of parole in 2008. He was on parole for the third prior felony conviction at the time he committed the instant offense in early 2010.<sup>6</sup> We conclude this history, some of which was "incorporated" from the probation report, supports the trial court's findings that appellant's "prior record of criminality," ... "[unsatisfactory] performance on probation and parole," the fact that "[h]e was on parole when he committed the instant offense, and [that] he expressed neither a willingness, nor unwillingness, to comply with probation," justifies the imposition of the aggravated term.

Although we are concerned that the trial court's use of "incorporation by reference"<sup>7</sup> as a sentencing technique could have permitted it to avoid careful

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<sup>6</sup> Factors 2-4 come from the probation report.

<sup>7</sup> The Court "ha[s] read and considered the probation officer's report...[which] goes through analysis with regard to the Penal Code, as to its application to the counts herein... The Court generally agrees with that analysis, as set forth in the report ...."

consideration of the probation report and the sentencing rules, as outlined in *Fernandez*, based on the record in this case, we conclude that the trial court here did not reach the level of disregard exhibited by the trial courts in the cases discussed above. The trial court did not simply refer to and incorporate the probation report; it also cited to specifics of the offense and the personal traits of appellant. In any case, assuming *arguendo* that the trial court provided an inadequate statement of reasons, we conclude that any such error was harmless.

“Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if ‘[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.’ [Citation.]” (*Coleman, supra*, 48 Cal.3d at p. 166.)

As respondent points out, in *People v. Green* (1988) 200 Cal.App.3d 538, the appellate court found harmless error where the trial court made the following statement when imposing the upper term: “‘There are aggravating factors listed at page 12 of the probation report which I specifically find to be true as to each count, thus justifying the high term as to each count.’” (*Id.* at p. 543, fn. 1.) There, the probation report recommended the aggravated term and listed four circumstances in aggravation. The appellate court concluded, “[i]n view of the record, it would be idle to remand for a statement of reasons.” (*Id.* at p. 543.)

Here, the trial court stated aggravating factors on the record, albeit essentially reciting those listed in the probation officer’s report (see footnote 4, *ante*). The probation report recommended the aggravated term. Also, the trial court’s initial recitation of certain characteristics of the defendant and his background, that the probation report listed, could reasonably be construed to support imposition of the aggravated sentence. It is not reasonably probable that a more favorable sentence would have been imposed had the trial court expended more thought and effort on its sentencing determination. (*Coleman, supra*, 48 Cal.3d at p. 166.)

IV.  
APPELLANT FORFEITED HIS APPEAL RIGHTS TO THE FINES AND FEES  
IMPOSED

Appellant challenges the trial court's imposition of fines and fees in a disorganized and confusing manner. In the heading for briefing on this issue, appellant states the trial court erred in imposing the "theft fine" pursuant to section 1202.5, subdivision (a) and a presentence report fee because it failed to make a finding of appellant's ability to pay. The heading further alleges insufficient evidence supports a finding of ability to pay. Finally, the heading alleges the "presentence booking fee" is unauthorized.

Moving to the body of the argument, although it is somewhat unclear, it appears appellant asserts in his introductory paragraph that the trial court imposed the theft fine (pursuant to § 1202.5, subd. (a)), presentence report fee, and booking fee, without determining appellant's ability to pay "these fines and fees." He thus contends, "the fines and fees are unauthorized."

Then under subheading "A," which sets forth claims regarding both the theft fine and the presentence report fee, the body of the argument focuses entirely on the theft fine, to the exclusion of any mention of the presentence report fee outside of the subheading. Appellant therein asserts the theft fine should be stricken for failure by the trial court to make a finding of ability to pay, that the sentence is unauthorized, that appellant had no meaningful opportunity to object to imposition of the fine, and that insufficient evidence supports a finding of ability to pay.

Subheading "B" then purports to assert a claim against the "presentence booking fee" but focuses exclusively on the presentence *report* fee imposed pursuant to section 1203.1b. Moreover, appellant's sole argument as to the presentence report fee is that it is inapplicable given appellant's sentence to state prison, rather than probation. Appellant relies on our holding in *People v. Montano* (1992) 6 Cal.App.4th 118, 123, but as respondent points out, our analysis on that case was based on statutory language that has

since been amended to permit imposition of the fee even where probation is not imposed. (*People v. Robinson* (2002) 104 Cal.App.4th 902, 905.) Appellant’s statement that “[w]hile the statu[t]e has been amended since the 1992 holding, the amendments did not change the fundamental fact that the fees for a presentence investigation or report can be ordered only for defendants placed on probation,” is made without authority, and in fact is directly contradicted by *Robinson*.<sup>8</sup>

Respondent makes a valiant effort to inject some level of organization to appellant’s briefing, extricating argument on imposition of the theft fine, the booking fee, and the presentence report fee. Respondent’s primary argument is that appellant forfeited his claims due to failure to object at trial. We agree.

Appellant asserts that failure to object did not forfeit the claim because imposition of the theft fine was unauthorized. We disagree with appellant’s characterization. “As pertinent here, the ‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]” (*Scott, supra*, 9 Cal.4th at p. 354.) “Although the cases are varied, a sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*) Furthermore, “claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Ibid.*) As applicable here, even assuming the trial court erred in failing to find appellant’s ability to pay the theft fine was authorized to be imposed by section 1202.5, but imposed in a procedurally flawed manner. (See *id.* at pp. 354-355; see also *People v. Avila* (2009) 46 Cal.4th 680, 729.) Assuming appellant also challenges the presentence report fee imposed pursuant to

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<sup>8</sup> We also note this court has recently recognized the effect of the amendment, in accordance with *Robinson*, subsequent to briefs being filed in this matter. (*People v. Orozco* (2011) 199 Cal.App.4th 189, 191-192.)

section 1203.1b on the same basis as the theft fine, the same analysis applies. As appellant makes no actual argument as to the booking fee, we need not address it here. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

Appellant next asserts that even if we deem the imposition of the fine authorized, that there was no waiver because appellant had no meaningful opportunity to object. “[T]here must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today’s decision [that the waiver doctrine applies to a trial court’s pronouncement of sentencing reasons]. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices.” (*Scott, supra*, 9 Cal.4th at p. 356.) Here, the trial court stated its intent about what fines and fees it was going to impose, prior to argument by either counsel, and invited argument from each party. Moreover, as the *Scott* court acknowledged, “[a]s a practical matter, both sides often know before the hearing what sentence is likely to be imposed and the reasons therefor. Such information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing. [Citations.]” (*Scott, supra*, 9 Cal.4th at pp. 350-351.) Appellant had a meaningful opportunity to object, but failed to do so.

As respondent acknowledges, there is a current split in the courts as to whether the failure to object to an imposed fee based on the trial court’s failure to make a determination of an ability to pay forfeits the issue on appeal.<sup>9</sup> (Compare, e.g., *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*) and *People v. Valtakis* (2003) 105

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<sup>9</sup> We note a similar issue is under review by our 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].)

Cal.App.4th 1066.) Appellant, however, makes no express assertion based on *Pacheco* that his claim remains cognizable. To the extent appellant relies on the reasoning of *Pacheco* to assert his claim was not waived, we conclude that we cannot agree with the reasoning of *Pacheco* and the cases it relied upon.

In *Pacheco*, the Sixth District concluded defendant's claims that the court improperly imposed certain fees and fines were cognizable as claims based on the insufficiency of the evidence to support the order, notwithstanding the defendant's failure to object at sentencing to the fees. In doing so, the court relied on two cases: *People v. Viray* (2005) 134 Cal.App.4th 1186, and *People v. Lopez* (2005) 129 Cal.App.4th 1508. The *Pacheco* court's explanation as to the applicability of the logic and reasoning of *Viray* and *Lopez* -- two cases involving imposition of attorney's fees and raising due process concerns -- to the imposition of administrative fees shed little light on the analysis it undertook: "[T]hese claims are based on the insufficiency of the evidence to support the order or judgment. We have already held that such claims do not require assertion in the court below to be preserved on appeal. [Citations to *Viray* and *Lopez*.]" (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.)

We have in the past addressed a similar situation where we found the defendant forfeited his claim on appeal of imposition of a fine arguably requiring the trial court to first determine defendant's ability to pay prior to imposition. In *People v. McMahan* (1992) 3 Cal.App.4th 740, the trial court imposed a fine under section 290.3 (at the time, a \$100 fee for defendants convicted of specific sex offenses), which mandates imposition of a fine, "unless the court determines that the defendant does not have the ability to pay the fine." (§ 290.3, subd. (a).) We concluded, "even if the court were required to initially determine the defendant's ability to pay, his failure to object or present contrary evidence waived the right to complain on appeal. [Citation.]" (*McMahan, supra*, 3 Cal.App.4th at p. 750.) In reaching our conclusion, we noted, "the most knowledgeable person regarding the defendant's ability to pay would be the defendant himself. It should

be incumbent upon the defendant to affirmatively argue against application of the fine and demonstrate why it should not be imposed.” (*Id.* at pp. 749-750.) Appellant has provided no reason why we should not follow our reasoning of *McMahan*. We thus conclude appellant’s claims as to the imposition of the presentence report fee, booking fee, and theft fine, are deemed forfeited.

## V.

### THE FINE IMPOSED PURSUANT TO SECTION 672 SHOULD BE STRICKEN

Appellant asserts the trial court erred in imposing a “catch-all” fine pursuant to section 672 because a separate fine for the burglary offense was authorized pursuant to section 1202.5, and section 672 is available to impose a fine only where no other fine has been prescribed for the offense. Respondent, relying on *People v. Clark* (1992) 7 Cal.App.4th 1041, asserts that because the Legislature enacted section 1202.5 using language to the effect of “in addition to any other fine imposed,” (*id.* at p. 1046) and as a means of expressly funding crime prevention programs, that the Legislature did not intend for it to act as a substitute fine, but rather, as an additional fine. This court has, however, in the past found that section 672 precludes imposition of a fine thereunder if another fine is imposed for the offense pursuant to a separate statute.

Section 672 states in pertinent part, “Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender ... in addition to the imprisonment prescribed.”

“The operative language of section 672 is the second phrase of the first sentence, ‘in relation to which no fine is herein prescribed.’” (*People v. Breazell* (2002) 104 Cal.App.4th 298, 302 (*Breazell*)). “The language used in section 672 demonstrates that it was meant to provide a fine for offenses for which another statute did not impose a fine. In other words, this is a catchall provision allowing a fine to be imposed for every crime, even if the statute criminalizing the conduct did not specifically authorize a fine. The

limiting provision was meant to ensure that a fine pursuant to section 672 would not be imposed if another statute authorized a fine for the offense.” (*Id.* at p. 304.)

We thus conclude imposition of the fine pursuant to section 672 was unauthorized and must be stricken.<sup>10</sup> (*Breazell, supra*, 104 Cal.App.4th at p. 304.)

**DISPOSITION**

The Penal Code section 666 conviction is modified and reduced to a conviction for violation of Penal Code section 484. The matter is remanded for resentencing accordingly. The third one-year sentence enhancement imposed but stayed for the concurrent prior prison term served is stricken. The fine imposed pursuant to section 672 is stricken. After resentencing, the trial court is directed to prepare an amended abstract of judgment reflecting these modifications and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Franson, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Cornell, J.

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<sup>10</sup> As discussed, *ante*, because the fine was an unauthorized sentence, the claim is cognizable on appeal notwithstanding appellant’s failure to object to it at sentencing.