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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VALENTINE ALFREDO GUTIERREZ, JR.,

Defendant and Appellant.

F062320

(Super. Ct. No. MCR038681)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

John F. Schuck, 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, Catherine Chatman, Deputy Attorney General, for Plaintiff and Respondent.

-ooOoo-

Appellant Valentine Alfredo Gutierrez was convicted of one felony count for sexually molesting his 12-year-old cousin Jane Doe in 2010 and sentenced to 16 years in prison. On appeal, he contends the trial court prejudicially erred when it permitted the

prosecution to introduce evidence that he sexually molested Jane Doe when she was between the ages of five and eight. Appellant also contends the trial court erroneously imposed booking and probation report fees without first determining his ability to pay the fees. We affirm.

PROCEDURAL BACKGROUND

On August 25, 2010, an information was filed in the Superior Court of Madera County charging appellant with rape (Pen. Code, § 261, subd. (a)(2); count 1), lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a); count 2), and forcible lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (b)(1); count 3). As to all three counts, the information alleged that appellant had suffered a prior “strike” conviction/juvenile adjudication (Pen. Code, §§ 667, subd. (b)-(i)).

On October 25, 2010, the trial court granted, over defense objection, the prosecution’s motion to introduce evidence of appellant’s prior sex offenses against Jane Doe pursuant to Evidence Code section 1108.

On October 26, 2010, appellant’s jury trial began. On November 10, 2010, the jury found appellant guilty of count 2. The jury was unable to reach a verdict on counts 1 and 3, and a mistrial was declared as to those counts, which were later dismissed at the prosecution’s request. Appellant waived a jury trial on the prior strike allegation, and the trial court found the allegation to be true.

On March 7, 2011, the trial court imposed the upper term of eight years for count 2, doubling it to 16 years pursuant to Penal Code, section 667, subdivision (e)(1).

FACTS

In February 2010, Jane Doe lived with her sister in Lemoore but would stay with her mother in Firebaugh on the weekends. Maxine, Jane Doe’s 15-year-old cousin, would stay with her mother (Jane Doe’s aunt) in Firebaugh every other weekend. Jane

Doe and Maxine would spend time together when they were both in Firebaugh. Appellant was one of Maxine's brothers and was 22 years old in February 2010.

On the Saturday before Valentine's Day, Jane Doe spent the night with Maxine at Maxine's mother's one-bedroom apartment in Firebaugh. Appellant was also there that night, along with Maxine's little brother and Jane Doe's little sister. Jane Doe and Maxine fell asleep late that night while watching television in the bedroom.

In the early morning hours, appellant came into the bedroom and told Maxine to wake up and go to the living room to sleep. Maxine went to the couch in the living room and appellant turned on the television in the living room and turned up the volume. Appellant then went back into the bedroom and closed the door. Maxine heard the bathroom fan come on. She then heard the bed in the bedroom start squeaking and hitting against the nightstand. The squeaking lasted five to 10 minutes.

After appellant left Maxine in the living room, he got under the covers and lay down on the bed next to Jane Doe. Appellant put Jane Doe's hand on his penis and asked her to move it. When Jane Doe did not respond, appellant moved her hand up and down on his penis for a few minutes.

Appellant got on top of Jane Doe and held her wrists down with his hands. Appellant tried to open Jane Doe's crossed legs. Jane Doe testified that, "we were arguing because he wanted me to open my legs and I didn't want to." After a couple of minutes, Jane Doe stopped resisting because appellant was stronger than she was. Appellant pulled down Jane Doe's sweats and underwear, put his penis into her vagina, and moved back and forth on top of her.

Afterwards, appellant walked into the restroom. Jane Doe opened the door to the living room and Maxine came back into the bedroom. At that time, Jane Doe did not tell Maxine what happened because Jane Doe was scared and did not want to upset her family. However, Jane Doe told Maxine what happened later the next day and Maxine reported it to Maxine's mother.

In the subsequent police investigation, Jane Doe made several pretext calls to appellant with the assistance of Detective Zachary Zamudio of the Madera County Sheriff's Department. Among other things, appellant said that Jane Doe had "wanted it" after Jane Doe told appellant that he had raped and hurt her, and taken away her virginity. Appellant also apologized and expressed regret for what happened, and said "I promise that nothing like will ever happen again nothing like that." Appellant told Jane Doe, "[j]ust act like it didn't happen, you know."

Appellant stated a few times that he and Jane Doe were both drunk and she was "the one that started it" and told her not to "play innocent." He also suggested that Jane Doe took her own bottoms off. Jane Doe disputed appellant's characterization of their encounter, stating, at one point: "I didn't do anything and if you were drunk that's no reason." To this, appellant replied: "It's not you're right. I was stupid, I'm fucking pathetic." Appellant also asked Jane Doe if she wanted him to buy something for her.

Appellant adamantly denied statements by Jane Doe that he touched her when she was younger. Among other things, he told her: "Calm down. I never done that shit to you when you were smaller. What the fuck are you talking about?"

Detective Zamudio and other law enforcement agents went to appellant's apartment to arrest appellant. During the drive to the sheriff's department, appellant consented to being interviewed and acted shocked when told he was arrested for rape. Detective Zamudio testified that appellant "cussed me out saying I was sick and how could I say that he had raped his 12-year-old cousin." When Detective Zamudio finally told appellant he knew about the pretext calls and that they were recorded, appellant became very upset. He started swearing, calling Jane Doe different names, and hitting his head on the dash of the detective's truck.

Detective Zamudio conducted a further interview of appellant at the sheriff's department. Appellant admitted he had a sexual encounter with Jane Doe on the night in question but claimed she was the instigator, stating: "She was drinking and she's the one

that did everything. Me I'm a fool because I'm older I should have known better but and I was already intoxicated" According to appellant, he sent his sister to the living room and was going to send Jane Doe there too because he wanted to sleep in the bedroom. However, after his sister went to the living room, Jane Doe grabbed his penis and started playing with it. Appellant also claimed that Jane Doe also "took off her bottoms."

Appellant denied having sexual intercourse several times during the interview. However, when confronted with allegations that he pinned Jane Doe down and forced her to have sex, appellant stated: "No nothing like that. She, she did it she enticed me ... she got me already aroused and everything when I was already aroused she, she grabbed everything and stuff like that and put it in inside her." When they were having sex, Jane Doe never screamed or told appellant to stop.

Appellant's Prior Sex Offenses Against Jane Doe

Jane Doe testified that appellant sexually molested her when she was five to eight years old. At the time, she was living in Firebaugh with her mother, siblings, and appellant. Jane Doe testified: "Every night [appellant] would put his hand under my bottom clothing and touch my vagina or not, [and] ... he would put his hand on top o[f] my hand on his penis and he would move it." Jane Doe clarified that appellant would touch her "every night" she did not sleep with her sister.

Sometimes appellant would get on top of Jane Doe and "hump" her by rubbing his body against hers. This happened several times and in different locations. Once it happened in Jane Doe's brother's room, and when her brother walked in, appellant jumped off her.

Jane Doe never told anyone about the molestation except a friend who was around Jane Doe's age. Jane Doe explained she did not tell anyone else because, "I was scared that the police would get involved and just take me away from my mom because my mom had [appellant] living there."

The Defense

Maxine testified about her conversation with Jane Doe the day after the incident. Jane Doe told Maxine that appellant “stuck it in her and he covered her mouth.” While appellant was covering Jane Doe’s mouth, he said, ‘Shut up. You know you like it.’ Jane Doe never mentioned to Maxine that appellant held down her wrists or took her hand and touched his penis with it.

Appellant testified he only “vaguely” remembered the incident because he “drank a lot that night.” Earlier in the night he drank “a good size portion of tequila and at the end ... started drinking Bud Ice.”

When asked whether he knew what Jane Doe was talking about in the pretext calls, appellant testified: “She told me something happened —the day afterwards she said something happened, but, you know, honestly, I didn’t know what to think of it, you know, but I know I was—I was embarrassed and I was shameful. I didn’t want to talk about it.”

Appellant denied that he raped Jane Doe. When asked if something happened that night, he testified: “I don’t know. I honestly don’t know.”

DISCUSSION

I. Evidence Code section 1108

Appellant contends the trial court committed reversible error by admitting evidence of prior uncharged sex offenses against Jane Doe. (Evid. Code, § 1108.) We disagree.

Evidence that a person has a propensity or disposition to commit criminal acts is generally inadmissible, and is excluded because of its highly prejudicial nature. (Evid. Code, § 1101; *People v. Karis* (1988) 46 Cal.3d 612, 636 (*Karis*)). The admissibility of character evidence was previously limited to establish some fact other than a person’s

character or disposition, such as motive, intent, identity, or common scheme and plan. (Evid. Code, § 1101, subd. (b); *Karis, supra*, at p. 636; *People v. Soto* (1998) 64 Cal.App.4th 966, 983.)

Evidence Code section 1108 provides an exception to Evidence Code section 1101 and permits the jury in sex offense cases to consider evidence of prior charged or uncharged sex offenses for any relevant purpose. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912 (*Falsetta*); *People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. 7.) Evidence Code section 1108, subdivision (a) states: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense . . . is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.”

Evidence Code section 1108 therefore permits the trier of fact to consider a defendant’s prior uncharged sex offenses as propensity evidence. (*Falsetta, supra*, 21 Cal.4th at p. 911; *People v. Pierce* (2002) 104 Cal.App.4th 893, 897.) That is because our Legislature has determined that in sexual offense cases, the policy considerations favoring the exclusion of evidence of other sexual offenses are outweighed by the policy considerations favoring its admission, and that “the need for this evidence is ‘critical’ given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.” (*People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182.)

Admission of evidence under Evidence Code section 1108 remains subject to a section 352 analysis, which permits “[t]he trial court in its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” (*Karis, supra*, 46 Cal.3d at p. 638; *People v. Yu*

(1983) 143 Cal.App.3d 358, 377.) “Rather, the statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors. [Citation.]” (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

Appellant contends:

“As a matter of law, the trial court abused its discretion by allowing the prosecutor to present the extremely inflammatory, prejudicial uncharged sex evidence. Under [Evidence Code] section 352, the evidence should have been excluded.... Admission of the evidence violated the ‘common-law tradition’ of excluding propensity evidence ..., and thus resulted in the denial of appellant’s right to due process, a fair trial, and fundamental fairness under the Fifth, Sixth, and Fourteenth Amendments....”

In *Falsetta, supra*, 21 Cal.4th at p. 911, the California Supreme Court held Evidence Code section 1108 is constitutional on its face. This court is bound by that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The California Supreme Court recently declined a defendant’s invitation to (a) reconsider its decision in *Falsetta* and (b) hold that admission of evidence under Evidence Code section 1108 to establish a defendant’s propensity to commit a sexual offense violates his or her due process rights. The Supreme Court noted that Evidence Code section 352 is an adequate safeguard against the admission of unduly prejudicial evidence. The Supreme Court further affirmed that the routine application of state evidentiary law does not implicate a criminal defendant’s constitutional rights. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1285-1299.) Accordingly, we reject appellant’s constitutional challenge to Evidence Code section 1108 on the ground it violates the common law tradition of excluding propensity evidence.

We next turn to appellant’s claim that the evidence of his prior sex offenses against Jane Doe should have been excluded under Evidence Code section 352. In making an Evidence Code section 352 determination of whether the probative value of evidence of an uncharged offense is substantially outweighed by the probability of undue

prejudice, the court must consider the nature, relevance, and possible remoteness of the uncharged offense, the degree of certainty that it was committed, the likelihood of confusing or misleading the jurors, its similarity to the charged offense, its likely prejudicial impact on the jurors, and other factors. (*Falsetta, supra*, 21 Cal.4th at pp. 916–917; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-740 (*Harris*).) We review a trial court’s decision under the abuse of discretion standard, and will uphold the ruling unless the court acted in an arbitrary, capricious, or patently absurd manner. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Thus, on one side of the balance is the probative value of the evidence, which is increased by the relative similarity between the prior offenses and the charged offenses. (*Falsetta, supra*, 21 Cal.4th at p. 917.) In this case, the victim of the prior offenses was the same victim as the charged offenses, and the conduct involved was similar to the conduct alleged in the instant case. The prior offenses were thus highly probative of appellant’s propensity to commit sexual offenses under similar circumstances.

On the other side of the balance are the inflammatory nature of the evidence, the probability of confusion, the remoteness of the offenses, and the consumption of time. (*Harris, supra*, 60 Cal.App.4th at pp. 737-741.) Here, the prior offenses were not too remote and the presentation of the evidence did not consume an undue amount of time. Appellant contends the evidence was “exceedingly prejudicial” because it “painted [him] as an incorrigible repeat sex offender/child molester.” However, the prior offenses were no more inflammatory than the conduct alleged in the instant case. That the evidence tended to show appellant was a repeat perpetrator of similar sex offenses against his young cousin was precisely what made the evidence so probative and, thus, weighed in favor of its admission as propensity evidence under Evidence Code sections 1108 and 352.

Appellant also suggests that because he was not convicted of the prior offenses against Jane Doe, the jurors were tempted to convict him of the current offenses to punish

him for the prior offenses. Where “uncharged acts [do] not result in criminal convictions,” a jury “might [be] inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses,” thus “increas[ing] the likelihood of ‘confusing the issues’ (Evid. Code, § 352)” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405; *Falsetta, supra*, 21 Cal.4th at p. 917.) But the record provides no reason to conclude the jury did so here. The court properly instructed with CALCRIM No. 1191 on the limited purpose for which the jury could consider the evidence, and we presume the jurors followed the instructions (*People v. Pinholster* (1992) 1 Cal.4th 865, 919, overruled on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Finally, appellant suggests that, but for the evidence of his prior offenses, it is likely the jury would not have convicted him on count 2. Appellant attacks the victim’s credibility and asserts the jury’s lengthy deliberations and ultimate verdict demonstrate “the jury rejected much of Jane Doe’s testimony.” Appellant concludes:

“But for the inflammatory testimony regarding the prior sexual conduct, the jury likely would have rejected all of her testimony. The prior offense evidence very well could have been the deciding factor in convincing the jury to find appellant guilty—and not necessarily because it believed appellant was guilty beyond a reasonable doubt.”

We could not disagree more. After a careful review of the entire record, we conclude the evidence against appellant on count 2 was compelling. We are convinced that any reasonable jury would have convicted appellant on the charge of committing a lewd and lascivious act upon Jane Doe, a child under the age of 14 (Pen. Code, § 288, subd. (a)), even without evidence of the prior offenses.¹ Here, evidence of appellant’s

¹ It also bears repeating that the jury did not acquit appellant of count 1 (rape) and count 3 (forcible lewd and lascivious act) but was unable to reach a verdict as to those counts. The inability to reach a verdict does not necessarily demonstrate that “the jury did not believe that appellant had raped Jane Doe or that he committed any forcible offense” as appellant asserts.

prior offenses, in addition to evidence of any inconsistencies in Jane Doe's stories, was properly before the jurors for their credibility assessment.

We conclude the trial court did not abuse its discretion under Evidence Code section 352 when it admitted evidence of appellant's prior offenses.

II. Probation Report Fee

The probation report recommended, and the trial court imposed, a probation report fee of \$750 pursuant to Penal Code section 1203.1b. Appellant contends the trial court erred because it did not make an assessment of his ability to pay as required by the statute and the fee must be stricken because there was no substantial evidence to support a finding of his ability to pay it. Appellant acknowledges that he did not object to the imposition of the probation report fee in the trial court but argues that no objection below is required to preserve a claim of insufficient evidence for appeal. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*).

Citing *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*), respondent asserts that appellant has forfeited his claim by failing to object to imposition of the fee at sentencing. For the following reasons, we agree.

A condition precedent to imposition of a probation report fee is the determination that the defendant has the ability to pay it. As provided in pertinent part by Penal Code section 1203.1b, subdivision (b): "The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative."

The statute also sets out elaborate procedures for determining a particular defendant's ability to pay. Here, as in *Valtakis, supra*, 105 Cal.App.4th 1066, none of these procedures were followed. The probation report made no determination of appellant's ability to pay, and did not advise appellant of his right to a separate hearing on that issue, although it did recommend that he pay a probation report fee of \$750.

“The forfeiture rule for sentencing error is a judicially created doctrine invoked as a matter of policy to ensure the fair and orderly administration of justice.” (*People v. Butler* (2003) 31 Cal.4th 1119, 1130 (conc. opn. of Baxter, J.)) “In general, the forfeiture rule applies in the context of sentencing as in other areas of criminal law. As a general rule neither party may initiate on appeal a claim that the trial court failed to make or articulate a “discretionary sentencing choice[.]” [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 881.)

In a series of cases involving appellate challenges to sentencing decisions,² our Supreme Court has consistently “distinguished between unauthorized sentences—those that ‘could not lawfully be imposed under any circumstances in the particular case’ [citation]—and discretionary sentencing choices—those ‘which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.’ [Citation.] As to the former, lack of objection does not foreclose review: ‘We deemed appellate intervention appropriate in these cases because the errors presented “pure questions of law” [citation] and were “clear and correctable’ independent of any factual issues presented by the record at sentencing.” [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.’ [Citation.] With respect to the latter, however, the general forfeiture doctrine applies and failure to timely object forfeits review. Such ‘[r]outine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.’ [Citations.]” (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

² See, e.g., *People v. Walker* (1991) 54 Cal.3d 1013, 1023 (*Walker*); *People v. Welch* (1993) 5 Cal.4th 228, 234-235; *People v. Scott* (1994) 9 Cal.4th 331, 351-354 (*Scott*); *People v. Tillman* (2000) 22 Cal.4th 300, 302; *People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*).

Valtakis, supra, 105 Cal.App.4th 1066, teaches that the policy considerations that inform the forfeiture rule in criminal cases are applicable to the situation before us. In *Valtakis*, the appellate court concluded “that failure to object in the trial court to statutory error in the imposition of a probation fee under [Penal Code] section 1203.1b waives the matter for purposes of appeal.” (*Id.* at p. 1072.) While the probation officer in *Valtakis* recommended imposition of a \$250 probation fee in the presentencing report, neither the officer nor the trial court made a finding of ability to pay or gave notice to the defendant of the right to a separate hearing by the court, as required by section 1203.1b. Nor did the trial court hold a separate hearing or make its own determinations. (*Valtakis, supra*, at pp. 1070-1071.) Nevertheless, the *Valtakis* court concluded that imposition of a probation fee without a hearing or evidence of ability to pay did not result in an unauthorized sentence, “for a probation fee *could* (italics original) have been lawfully imposed had an ability to pay appeared, a clearly fact-bound determination. ‘In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner’ [citation], which is exactly the claim here: the probation fees, otherwise permitted, were procedurally flawed (for absence of notice, a hearing or a finding) and *factually flawed (for absence of evidence that the defendant had the ability to pay)*. The unauthorized-sentence exception does not apply. [Citation.]” (*Id.* at p. 1072, italics added; see also *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 (*Gibson*)). The *Valtakis* court further observed that the case law has “uniformly held that defendants likewise cannot complain for the first time on appeal of restitution fines imposed without findings or evidence of ability to pay [citations], even when characterized as unauthorized due to legal error [citations].” (*Valtakis, supra*, at p. 1072.) Finally, the court pointed out that to “allow a defendant and his counsel to stand silently by” as the court imposes a probation fee, (*id.* at p. 1076) and then contest it for the first time on an appeal not only contravenes the objective of section 1203.1b and other recoupment statutes that “reflect a strong legislative policy in favor of

shifting the costs stemming from criminal acts back to the convicted defendant” and “““replenishing a county treasury from the pockets of those who have directly benefited from county expenditures,””” (Valtakis, supra, at p. 1073) but “would also be completely unnecessary, for the Legislature has provided mechanisms in section 1203.1b for adjusting fees and reevaluating ability to pay *without an appeal* anytime during the probationary period [citation] or the pendency of any judgment [citations].” (Valtakis, supra, at p. 1076.)

We agree with the court’s reasoning in *Valtakis*, and follow it here. Appellant was informed through the probation report that imposition of a probation report fee of \$750 pursuant to section 1203.1b was recommended. Thus, he had notice and the opportunity to object at the sentencing hearing about the amount or his ability to pay, yet failed to do so. The imposition of probation costs was not an unauthorized sentence. Instead, it was imposed in a procedurally and factually flawed manner. The asserted errors in the imposition of probation costs could have been readily corrected or avoided and more appropriately reviewed on appeal had appellant interposed a timely objection in the trial court. Thus, in the interest of ensuring the fair and orderly administration of justice, like the *Valtakis* court, we also conclude that appellant forfeited his challenge to the imposition of probation costs. (*Valtakis, supra*, 105 Cal.App.4th at p. 1076; *Gibson, supra*, 27 Cal.App.4th at p. 1469.)

III. Booking Fee

The probation report recommended, and the trial court imposed, a booking fee of \$102.59, “payable to the City of Madera.” Neither the probation report nor the court specified the statutory authority under which the booking fee was imposed. Further, the court did not inquire about appellant’s ability to pay the fee or make a specific finding about his ability to pay.

We begin by observing that, while the parties on appeal assume the applicable code section is Government Code section 29550.2,³ which requires a determination of a defendant's ability to pay, it is not clear from the record whether this was the statute under which the trial court imposed the booking fee in this case. Government Code sections 29550, 29550.1, and 29550.2 govern fees for processing or "booking" arrested people into a county jail. To a certain extent, the fees vary depending on the identity of the arresting agency and the eventual disposition of the person arrested.

The record does not definitively establish the identity of the arresting officer.⁴ There are strong indications that a county sheriff's detective arrested appellant, in which case the governing code provisions would appear to be Government Code section 29550, subdivisions (c) and (d)(1),⁵ which provide for a discretionary booking fee, which is not

³ "Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs ... incurred in booking or otherwise processing arrested persons. *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.*" (Gov. Code, § 29550.2, subd. (a), italics added.)

⁴ Detective Zamudio's trial testimony and the transcript of his conversation with appellant as they were driving back to the sheriff's department would seem to suggest that he was the arresting officer. However, Detective Zamudio never specifically testified that he was the person who arrested appellant, and the record reflects that other law enforcement agents were present at the time of appellant's arrest. Thus, the probation report states: "Parole Agent Hunter and Detectives Clark, Kerber and Weaver made contact with [appellant] at his residence. [Appellant] was arrested without incident." While Detective Zamudio testified that "others" were present at the time of appellant's arrest, the only other law enforcement agent he specifically identified was Detective Clark, a colleague of his from the Madera County Sheriff's Department. It is unclear with what agency the other officers present were affiliated, or what specific role they played in appellant's arrest.

⁵ Government Code section 29550 provides, in relevant part: "(c) Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice

specifically conditioned on the defendant's ability to pay. On the other hand, the court made the booking fee payable to the city, rather than the county, suggesting the fee was imposed pursuant to Government Code section 29550.1, which provides for a mandatory booking fee but likewise makes no mention of the fee being conditioned on the defendant's ability to pay.

However, assuming the booking fee was imposed under Government Code section 29550.2 and required an ability-to-pay determination, we find that the policy reasons that support application of the forfeiture doctrine to appellant's challenge to the probation report fee, discussed *supra*, also apply to his challenge to the jail booking fee.

Currently, there is a split of authority on the issue of whether the forfeiture doctrine applies in the context of challenges to the imposition of jail booking fees. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 (*Hodges*) [holding forfeiture doctrine applicable]; *Gibson, supra*, 27 Cal.App.4th at pp. 1467-1468 [holding forfeiture doctrine applicable]; *Pacheco, supra*, 187 Cal.App.4th at p. 1397 [holding the doctrine inapplicable].) The issue is currently pending review in the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [whether failure to object to imposition of a jail booking fee forfeited a sufficiency of the evidence of ability to pay claim on appeal].)

administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the offense for which the person was originally booked. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons. [¶] (d) 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.*" (Italics added; contrast with Gov. Code, section 29550, subd. (d)(2) [making fee mandatory and requiring ability-to-pay determination if the defendant is granted probation].)

Without the Supreme Court’s definitive decision on the matter, we follow the precedents holding that challenges to sentencing decisions must be made in the trial court and the underlying rationale that fairness and efficiency require defendants to make such challenges initially in trial courts. (*Hodges, supra*, 70 Cal.App.4th at p. 1357; *Gibson, supra*, 27 Cal.App.4th at pp. 1467-1468.) “The purpose of the [forfeiture] doctrine is to bring errors to the attention of the trial court so they may be corrected or avoided” (*Gibson*, at p. 1468; *Walker, supra*, 54 Cal.3d at p. 1023), and it is especially important in situations involving fact-specific inquiries because the People should be afforded the opportunity at trial to provide more evidence. (*Gibson*, at p. 1468.) However, we also agree with courts that have followed a “narrow exception” to the doctrine by allowing claims regarding sentences that are unauthorized, void, excessive, or in excess of jurisdiction to be made for the first time on appeal. (*Scott, supra*, 9 Cal.4th at p. 354; *Smith, supra*, 24 Cal.4th at p. 852.)

Here, appellant did not object to the imposition of the fees at trial, and the \$102.59 booking fee does not fall into the “narrow exception” to the forfeiture doctrine. (*Scott, supra*, 9 Cal.4th at p. 354.) Therefore, we decline to consider his claim regarding the booking fee.

DISPOSITION

The judgment is affirmed.

Hill, P.J.

WE CONCUR:

Levy, J.

Poochigian, J.