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

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT LANE PENLEY,

Defendant and Appellant.

F069329

(Super. Ct. No. F12908540)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Kent W. Hamlin, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J. and Franson, J.

Appellant Scott Lane Penley pled no contest to two counts of attempted, deliberate, premeditated murder (counts 2 & 3/Pen. Code, §§ 664/187, subd. (a))¹ and admitted a great bodily injury enhancement involving domestic violence (§ 12022.7, subd. (e)) in count 2.

On appeal, Penley contends the court used an “improper” standard minimum restitution fine amount in calculating his restitution and parole revocation fines. Alternatively, Penley contends he was denied the effective assistance of counsel if he forfeited this issue on appeal by defense counsel’s failure to object. Respondent contends Penley forfeited this issue but concedes that Penley was denied the effective assistance of counsel. Respondent also contends that the great bodily injury enhancement the court imposed on count 3 constitutes an unauthorized sentence. We will find that the great bodily injury enhancement imposed on count 3 was unauthorized and strike the enhancement. In all other respects, we affirm.

FACTS

On October 20, 2012, during a conversation with his estranged wife Alena Martianova, Penley threatened to “blow [her] head off and bury [her] six feet under.” Later that day, he went to the restaurant where Martianova’s friend, Christina Shaw, worked and threatened to kill her also.

On October 22, 2012, Martianova was at Shaw’s apartment when Penley broke down the door and brutally assaulted them. During the attack, Penley hit Martianova with a bat on her mouth chipping a tooth, and choked her until she was unconscious. Penley struck Shaw on the arm with a bat, breaking two bones in one arm, and twice on the back of her head, fracturing her skull. Penley also forcibly took Martianova’s phone from her and broke it.

¹ All further statutory references are to the Penal Code.

On February 26, 2014, the district attorney filed a first amended information that charged Penley with two counts each of corporal injury to a spouse (counts 1 & 6/ § 273.5, subd. (a)), attempted, deliberate and premeditated murder (counts 2 & 3), assault with a deadly weapon (counts 7 & 8/§ 245, subd. (a)(1)), and criminal threats (counts 9 & 10/§ 422), and one count each of first degree burglary (count 4/§§ 459/460, subd. (a)), first degree robbery (count 5/§ 211), and misdemeanor disobeying a domestic relations court order (count 11/§ 273.6, subd. (a)). Counts 2 through 8 alleged a great bodily injury enhancement involving domestic violence. Count 4 also alleged that another person who was not an accomplice was present in the home during the burglary, thus making the offense a violent felony (§ 667.5, subd. (c)(21)). Penley then pled no contest to the two counts of attempted murder, admitted the allegation in each count that the attempted murder was deliberate and premeditated, and admitted the great bodily injury enhancement in count 2, only.

On April 18, 2014, the court sentenced Penley to an indeterminate term of life with the possibility of parole in each count and a three-year great bodily injury enhancement with the aggregate term in each count running concurrent to each other. The court, without objection, also imposed a restitution fine of \$3,000 (§ 1202.4) and a parole revocation fine in the same amount (§ 1202.45). In imposing these fines, the court stated:

“[Penley shall] [p]ay a restitution fine of \$3,000, that’s based on \$300 per year for the ten year sentence,[²] that is a recommended number. Actually there’s a way to read the [c]ode to say that the [c]ourt should multiply it by the number of counts for which he was convicted, however my view is

² Penley was required to serve seven years on each of his life terms before he was eligible for parole. (§ 3046.) With the three-year great bodily injury enhancement in each count, Penley would have to serve 10 years, less any goodtime/worktime credit that would be deducted from the enhancement terms, before he was eligible for parole. (But see, *infra*, regarding validity of enhancement imposed on count 2.) The court was referring to this 10-year term in its comments.

since he's being sentenced on the murders concurrently, it's appropriate to simply impose *the standard minimum \$300 per year* for the ten years. \$3,000 fine will be imposed and collected from his books while he's housed at the Department of Corrections[.]” (Italics added.)

DISCUSSION

The Restitution Fines

Penley contends that the trial court's use of the standard minimum fine of \$300 to calculate his restitution and parole revocation fines violated constitutional ex post facto proscriptions because when he committed his offenses, the standard minimum fine was only \$240. Penley acknowledges that his defense counsel did not object to the use of this amount to calculate his restitution fine. However, he contends this issue has not been forfeited and is properly before this court for decision on the merits “under the rubric of ineffective assistance of counsel.” Respondent agrees that imposition of a \$3,000 restitution fine and parole revocation fine violated ex post facto principles, but contends that Penley forfeited this issue by his failure to object. Respondent, however, “does not oppose” Penley's claim that he was denied effective assistance of counsel by defense counsel's failure to object to this amount.

The issue is forfeited and Penley has failed to demonstrate defense counsel was ineffective for not objecting to the \$3,000 fines.

The version of section 1202.4, subdivision (b), in effect when Penley committed his offenses provided, in relevant part: “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. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012 ... and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine

pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (Former § 1202.4, subd. (b), italics added.) Beginning January 1, 2014, the minimum restitution fine was increased to \$300. (§ 1202.4, subd. (b).) (Stats. 2011, ch. 358, § 1, p. 3759.)

“The Constitution forbids the passage of ex post facto laws, a category that includes ‘[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.’” (*Peugh v. United States* (2013) 569 U.S. ____, ____, [133 S.Ct. 2072, 2077-2078]; see *Collins v. Youngblood* (1990) 497 U.S. 37, 41-42.) “[T]he imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions.” (*People v. Souza* (2012) 54 Cal.4th 90, 143; accord. *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

The issue has been forfeited because Penley did not object to these fines on this ground. “[C]laims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices” are forfeited when they are raised for the first time on appeal (*People v. Scott* (1994) 9 Cal.4th 331, 353), particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing. While this forfeiture rule does not apply to unauthorized sentences (*People v. Smith* (2001) 24 Cal.4th 849, 852), Penley’s fines were within the range authorized by the controlling sections of the Penal Code. As such, the fines were authorized by law.

“An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice.” (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147.)

“Generally, in assessing performance, there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.]

Courts are ‘highly deferential’ to the tactical decisions made by counsel.” (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1190.) A claim of ineffective assistance of counsel fails if the “record does not demonstrate there could be no rational tactical reason for [an] omission.” (*People v. Lucas* (1995) 12 Cal.4th 415, 437, 442.) Further, an attorney is not required to make frivolous or futile objections. (*People v. Memro* (1996) 11 Cal.4th 786, 834.)

Penley has failed to demonstrate defense counsel was ineffective for not objecting to the fines. The trial court did not expressly state it intended to use the *statutory* minimum fine in its calculation. It referenced “the standard minimum \$300 per year.” The court could have been referring to the statutory minimum fine as Penley contends, or to the standard minimum amount it imposes or uses when calculating restitution fines pursuant to a statutory formula. In light of this possibility, we cannot assume the court intended to use the statutory minimum fine, but was unaware the applicable amount was \$240. We will not presume the court applied the wrong statutory law (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [“It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties.”])

Thus, we reject Penley’s challenge to the imposition of the fines.

The Great Bodily Injury Enhancement in Count 3

Respondent contends the court imposed an unauthorized sentence when it imposed a concurrent great bodily injury enhancement term of three years in count 3 because Penley did not admit a great bodily injury enhancement in that count. We agree.

Penley’s plea bargain did not require him to admit the great bodily injury enhancement in count 3. Nor did the court take his admission of that enhancement when it took his plea. Therefore, the court did not have jurisdiction to impose a three-year great bodily injury enhancement in count 3 and we will strike it.

DISPOSITION

The three-year great bodily injury enhancement term imposed in count 3 is stricken. The trial court is directed to prepare an amended abstract of judgment that deletes any reference to this enhancement and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.