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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DESIRAE PERRY, Defendant and Appellant.	F073235 (Super. Ct. No. BF159525A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Desirae Perry was charged with five counts of perjury (Pen. Code, § 118 [counts 1-5]) and one count of welfare fraud (Welf. & Inst. Code, § 10980, subd. (c)(2) [count 6]). Following a trial, the jury acquitted her on count 1 and convicted her on the remaining counts. The trial court suspended imposition of sentence, placed defendant on formal probation for three years, and permanently disqualified her from receiving cash aid and food stamps pursuant to Welfare and Institutions Code section 11486, subdivision (b)(3).[1] In addition, the court ordered defendant to report to the Revenue Recovery Division for an evaluation of her ability to pay the cost of legal assistance.

On appeal, defendant makes several contentions. First, the trial court should have admitted evidence she returned the welfare benefit overpayments. Second, in contravention of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), her permanent disqualification from receiving cash aid and food stamps was based on a finding made by the court rather than the jury. Finally, the court's financial evaluation order must be stricken.

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[1] Welfare and Institutions Code section 11486, subdivision (b)(3), reads in pertinent part:

> "The needs of any individual who is a member of a family applying for, or receiving, aid under [Welfare and Institutions Code section 11200 et seq.] shall not be taken into account in making the determination under [Welfare and Institutions Code s]ection 11450 with respect to his or her family for the following periods beginning on the date or any time thereafter the individual is convicted of a felony in state or federal court . . . for committing fraud in the receipt or attempted receipt of aid: [¶] . . . [¶] . . . Permanently, if the amount of aid is five thousand dollars ($5,000) or more."

We conclude: the exclusion of evidence defendant returned the welfare benefit overpayments was not prejudicial error; *Apprendi* is inapplicable; and there is no basis to strike the financial evaluation order. Accordingly, we affirm the judgment.

STATEMENT OF FACTS

Defendant was employed by the Rosedale Union School District as a bus driver since 2007. In October 2010, she injured her back on the job and filed a claim for workers' compensation. Her physician also ordered her off work due to her high-risk pregnancy. On January 28, 2011, defendant gave birth. She returned to work on March 14, 2011. Between October 2010 and March 14, 2011, defendant worked one day. Nonetheless, she received wages during this period.

The record shows defendant—via direct deposit—received paychecks in net amounts of $1,730.07 on October 29, 2010; $833.95 on November 30, 2010; $933.52 on December 29, 2010; $2,126.12 on January 31, 2011; $542.06 on February 28, 2011; $715.98 on March 31, 2011; $1,366.33 on April 29, 2011; $1,705.04 on May 31, 2011; $76.24 on June 15, 2011; $1,294.89 on June 30, 2011; $685.56 on August 31, 2011; $1,718.62 on September 30, 2011; $264.20 on October 14, 2011; $1,718.62 on October 31, 2011; and $420.20 on November 15, 2011.[2] The record also shows defendant made miscellaneous deposits into her bank accounts. Into one account, she deposited $500 on November 5, 2010; $450 on November 24, 2010; $730 on December 6, 2010; $400 on January 18, 2011; $7,189 on February 11, 2011;[3] $350 on March 18, 2011; $400 on April 15, 2011; and $331 on July 18, 2011. Into a second account, she deposited $3,000 on May 31, 2011, and $1,100 on July 5, 2011. Into a third

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[2] Shannon Goldsberry, the school district's payroll clerk, testified "mid-month supplemental paycheck[s]" were issued on June 15, 2011, and October 14, 2011. Defendant did not receive a paycheck in July 2011 because she was a "10-month employee" and "doesn't work in July."

[3] This deposit was determined to be defendant's tax refund.

account, she deposited $343 on June 24, 2011; $1,660 on September 6, 2011; and $1,200 on September 14, 2011.

On November 16, 2010, defendant applied for cash aid, food stamps, and medical assistance. She subsequently received welfare benefits for the period of November 2010 to November 2011.

On February 1, 2011, defendant completed and signed a "QUARTERLY ELIGIBILITY/STATUS REPORT FOR CASH AID AND FOOD STAMPS" (QR-7). She marked the "NO" checkbox in response to the following question: "Did you or anyone get any income or money from any source [in January 2011]?" Defendant also marked the "NO" checkbox in response to the following question: "Did anyone get . . . any . . . land, home, cars, bank accounts, money payments (such as: lottery or casino winnings, retroactive social security, tax refunds), other[since your last report]?"[4]

On May 3, 2011, defendant completed and signed a second QR-7. She marked the "NO" checkbox in response to the following question: "Did you or anyone get any income or money from any source [in April 2011]?" Defendant also marked the "NO" checkbox in response to the following question: "Did anyone get . . . any . . . land, home, cars, bank accounts, money payments (such as: lottery or casino winnings, retroactive social security, tax refunds), other[since your last report]?"[5]

On June 22, 2011, defendant completed and signed a document known as a SAWS[6]-2-A to renew her welfare application. She answered the following questions in the negative: "Has any parent living in the home worked or been in training in the past 24 months? [¶] . . . [¶] . . . Is anyone, including children, working or in training now?"[7]

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4 Defendant's responses formed the basis for count 2.

5 Defendant's responses formed the basis for count 3.

6 SAWS stands for "Statewide Automated Welfare System."

7 Defendant's responses formed the basis for count 4.

On August 2, 2011, defendant completed and signed a third QR-7. She marked the "NO" checkbox in response to the following question: "Did you or anyone get any income or money from any source [in July 2011]?" Defendant also marked the "NO" checkbox in response to the following question: "Did anyone get . . . any . . . land, home, cars, bank accounts, money payments (such as: lottery or casino winnings, retroactive social security, tax refunds), other[since your last report]?"[8]

Each QR-7 signed by defendant contained the following language under the heading "**CERTIFICATION – FRAUD WARNING**":

> "**I UNDERSTAND THAT:** If on purpose I do not report all facts or give wrong facts about my income, property, or family status to get or keep getting aid or benefits, I can be legally prosecuted. I may also be charged with committing a felony if more than $400 in Cash Aid, and/or Food Stamps is wrongly paid out as a result of such an action. I have received a copy of the Instructions and Penalties for the Eligibility/Status Report for Cash Aid and Food Stamps.
>
> ". . . I declare under penalty of perjury under the laws of the United States and the State of California that the facts contained in this report are true and correct and complete."

The SAWS-2-A signed by defendant contained similar language:

> "**I understand that:** [¶] . . . [¶]
>
> > "All facts, including benefit and income facts, I gave may be reviewed and checked out by county, state, and federal personnel, and that if I gave wrong facts, my cash aid, [food stamps], and Medi-Cal may be denied or stopped. [¶] . . . [¶]
> >
> > "I or other family members will be required to repay any cash aid I should not have received.
> >
> > "The [Food Stamp] household . . . may be required to repay any benefits the household should not have received. [¶] . . . [¶]
>
> "**I also understand that:**

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8 Defendant's responses formed the basis for count 5.

> "I will get disqualification and/or welfare fraud penalties if on purpose I give wrong facts or fail to report all facts or situations that affect my eligibility or benefits for cash aid, [food stamps], and Medi-Cal.

"**For cash aid**:

> "If I on purpose do not follow cash aid rules, I may be fined up to $10,000 and/or sent to jail/prison for 3 years. And my cash aid can be stopped: [¶] . . . [¶] For conviction of felony thefts to get aid: . . . forever for amounts of $5000 or more. [¶] . . . [¶]

"**For** [**food stamps**]:

> "If on purpose I do not follow [food stamp] rules, my [food stamps] will be stopped for 12 months for the first violation, 24 months for the second, and forever for the third. And I may be fined up to $250,000 and/or sent to jail/prison for 20 years. [¶] . . . [¶]

"**I declare under penalty of perjury under the laws of the United States of America and the State of California that the information in this statement of facts is true, correct, and complete.** [¶] . . . [¶]

"**PENALTY WARNINGS**

"**If on purpose you don't report all facts or give wrong facts to get or keep getting benefits, you can be legally prosecuted, and can be charged with committing a felony if more than $400 is wrongly paid out for cash aid, food stamps, or Medi-Cal because you did not report all of your facts or changes in income, property, or family status. And you can be disqualified from getting cash aid or food stamps.** [¶] . . . [¶]

"**Cash Aid Penalties**

"**If you do not follow cash aid rules, you may be fined up to $10,000 and/or sent to jail/prison for 5 years.**

"**And if you are found guilty by court of law or an administrative hearing of committing certain types of fraud, your cash aid can be stopped . . . forever.** [¶] . . . [¶]

"**Food Stamps Penalties**

"**If you do not follow food stamp rules, your benefits can be stopped for 12 months for the first violation, 24 months for the second, and forever**

for the third. And you may be fined up to $250,000 and/or sent to jail/prison for 20 years. . . . [¶] . . . [¶]

"**APPLICANT/RECIPIENT CERTIFICATION** [¶] . . . [¶]

"● I understand my rights and responsibilities and agree to comply with my responsibilities.

"● I also understand the penalties for giving incomplete or wrong facts, and for failing to report facts or situations that may affect my eligibility or benefit level for cash aid or food stamps . . . ."

According to the Kern County Department of Human Services, as a result of her nondisclosure, defendant received welfare benefit overpayments in excess of $6,000. Hector Avila, a member of the Kern County District Attorney's Special Investigations Unit, examined defendant's welfare application history and learned she signed at least 20 SAWS-2-A's between 2000 and November 2010.

At trial, defendant admitted she had signed at least 20 SAWS-2-A forms prior to November 2010 and knew how to report her earnings. She also admitted she lied at an August 1, 2013, administrative hearing, when she testified she was not paid between January and May 2011. Defendant affirmed she was "more or less" "continually employed" by the school district for five years.

DISCUSSION

I. The trial court's exclusion of evidence defendant returned welfare benefit overpayments.

a. *Background*.

Before trial, the prosecutor moved to exclude evidence defendant returned the welfare benefit overpayments in mid-2015. The court tentatively granted the motion. Later, defense counsel asked the court to revisit its tentative ruling and argued the evidence was probative as to defendant's state of mind. The court rejected the argument and finalized the ruling.

b. *Analysis*.

"[E]very person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury." (Pen. Code, § 118, subd. (a).) "A conviction for perjury requires that the accused have the specific intent to make a false statement under penalty of perjury." (*People v. Story* (1985) 168 Cal.App.3d 849, 853.)

"Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact, or by impersonation or other fraudulent device, obtained or retained aid under [Welfare and Institutions Code section 10000 et seq.] for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished . . . ." (Welf. & Inst. Code, § 10980, subd. (c).) "An intent to defraud is a shorthand expression for the intent to induce the victim, by a false representation, to part with money or property knowing that he would not do so but for the false representation." (*People v. Faubus* (1975) 48 Cal.App.3d 1, 5.)

On appeal, defendant reiterates the excluded evidence "is admissible on the issue of specific intent to declare falsely (counts 2-5) and to defraud (count 6)." Assuming, arguendo, the court should have admitted this evidence, its decision not to did not constitute prejudicial error. By constitutional mandate, "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to

the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); accord, *People v. Callahan* (1999) 74 Cal.App.4th 356, 363.)[9]

In the absence of the purported error, it is not reasonably probable defendant would have obtained a more favorable verdict as to the perjury charges on counts 2 through 5 and the welfare fraud charge on count 6. Defendant was clearly familiar with the welfare application process, having applied as early as 2000 and signed at least 20 SAWS-2-A's prior to November 2010. At trial, she conceded she knew how to report her earnings. The record demonstrates defendant received wages and/or other payments every month between October 2010 and November 2011. (See *ante*, at p. 3.) Yet, in three separate QR-7's, she declared under penalty of perjury she did not "get any income or money from any source" in January, April, and July 2011 and did not receive any payments since her November 16, 2010, application. Later, she admitted she lied when she testified at an earlier administrative hearing that she was not paid between January and May 2011. The record also demonstrates defendant only worked a single day between October 2010 and March 14, 2011, but she was otherwise "more or less" "continually employed" by the school district between 2007 and 2012. However, in a SAWS-2-A completed and signed on June 22, 2011, over three months after she returned to work, she declared under penalty of perjury she was not working and had not worked in the past 24 months. Because of these false representations, defendant was overpaid more than $6,000 in welfare benefits for an entire year. "The evidence admits of no interpretation other than that defendant intended to deceive . . . and that the purpose of

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9 To the extent defendant suggests the more stringent "harmless beyond a reasonable doubt" standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24, is the proper test of reversible error, we disagree. The application of ordinary rules of evidence does not implicate the federal Constitution; therefore, we review allegations of evidentiary error under *Watson*'s "reasonable probability" standard. (*People v. Harris* (2005) 37 Cal.4th 310, 336; *People v. Marks* (2003) 31 Cal.4th 197, 226-227.)

this deception was to wrongfully obtain welfare assistance." (*People v. Faubus*, *supra*, 48 Cal.App.3d at p. 6; see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [" 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' "].) Her return of the overpayments four years after the fact does not alter this conclusion.

II. *Apprendi* and the trial court's finding resulting in permanent disqualification.

In *Apprendi*, the United States Supreme Court held the Sixth Amendment generally requires a jury to find any fact that increases the penalty for a crime beyond the prescribed statutory maximum. (*Apprendi*, *supra*, 530 U.S. at p. 490; accord, *People v. Mosley* (2015) 60 Cal.4th 1044, 1048, 1054 (*Mosley*).) Defendant contends her permanent disqualification from receiving cash aid and food stamps violated *Apprendi* because it was based on the court's finding she committed fraud in the receipt of over $5,000 of aid. Even assuming, arguendo, the disqualification was not based on the jury's finding, we reject defendant's contention because *Apprendi* does not apply to the instant case.[10]

In *Oregon v. Ice* (2009) 555 U.S. 160 (*Ice*), the United States Supreme Court "refined and circumscribed the scope of the rule of *Apprendi* . . . ." (*Mosley*, *supra*, 60 Cal.4th at p. 1057.) It observed:

> "Our application of *Apprendi*'s rule must honor the 'long-standing common-law practice' in which the rule is rooted. [Citation.] The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. [Citation.] Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain. [Citation.] We accordingly considered whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.' [Citation.]"

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10 Because we address the merits of defendant's claim, we need not consider her alternative contention that defense counsel rendered ineffective assistance by failing to object to the finding.

(*Ice*, *supra*, 555 U.S. at pp. 167-168; accord, *Mosley*, *supra*, 60 Cal.4th at p. 1057.)

In other words, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." (*Ice*, *supra*, 555 U.S. at p. 170; accord, *Southern Union Co. v. United States* (2012) 567 U.S. 343, 353; *Mosley*, *supra*, 60 Cal.4th at p. 1059.)

Disqualification from receiving welfare benefits on account of a welfare fraud conviction is a "modern regulatory sentencing imperative[] unknown at common law." (See *Mosley*, *supra*, 60 Cal.4th at p. 1060 [discussing sex offender registration and residency requirements].) It is "not [a] sentencing matter[] in which, historically, the jury has played any traditional role at common law" and therefore "do[es] not implicate *Apprendi*'s Sixth Amendment jury trial right." (*Id.* at pp. 1059-1060.)

III. The trial court's financial evaluation order.

a. *Background*.

Near the conclusion of the February 5, 2016, sentencing hearing, defense counsel requested $800 in attorney's fees. On the same day, the court issued an "ORDER TO REPORT FOR FINANCIAL EVALUATION," which read:

> "THE COURT FINDS that the amount of $800.00 is owed for the costs of the court appointed attorney/Public Defender in this case. This finding shall become an ORDER FOR PAYMENT in the amount and manner determined by the Financial Evaluation Officer.
>
> "THE COURT ORDERS that you are to report to the Revenue Recovery Division of the Superior Court . . . IMMEDIATELY OR WITHIN 72 HOURS OF YOUR RELEASE FROM CUSTODY, for instructions regarding paying the county for the services of your Court appointed attorney / Public Defender pursuant to Penal Code [section] 987.8 and Government Code [section] 27750.[11]

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11 Government Code section 27750 reads:

> "The board of supervisors of any county may designate a county officer to make financial evaluations of defendants and other persons liable for

"FAILURE TO REPORT to Revenue Recovery Division within 20 working days of this notice, or within 20 working days after your release from custody, will result in an order to pay the full cost of legal assistance provided to you. An order by the Court to pay all or a portion of the costs of your court appointed attorney / Public Defender has the same force and effect as a judgement in a civil action and shall be subject to enforcement in the same manner as any other money judgement. . . .

"If you do not agree with the determination of the Financial Evaluation Officer, you have the right to a hearing before the Court to re-examine your present ability to pay legal costs. At that hearing you shall be entitled to, but shall not be limited to, all of the following rights.

"1) The right to be heard in person.

"2) The right to present witnesses and other documentary evidence.

"3) The right to confront and cross-examine adverse witnesses.

"4) The right to have the evidence against you disclosed to you.

"5) The right to a written statement of the findings of the court.

"6) The right to a statement of the legal costs as soon as available.

"7) The right to be represented by counsel."

Defendant signed the order and acknowledged:

"I have read and understand the above, and I understand my right to request a hearing before the Court if I disagree with the determination of the Financial Evaluation Officer."

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reimbursable costs under the law. A county officer so designated shall be known as the county financial evaluation officer, whose duties shall be to determine, according to the standards set by the board of supervisors and at the direction of the court, the financial ability of parties who have incurred, or will incur, attorney's fees or other court-related or court-ordered costs, which costs by law must be waived of the services provided free of charge if the party is indigent."

b. *Analysis.*[12]

Penal Code section 987.8, subdivision (b), reads in pertinent part:

> "If a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. . . . The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

As a threshold matter, we reject the claim defense counsel rendered ineffective assistance by requesting attorney's fees in the first place. " 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*In re Valdez* (2010) 49 Cal.4th 715, 729, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Defendant does not cite any authority showing a request for attorneys' fees by defense counsel *after* the trial " ' " 'renders the result of the trial unreliable or the proceeding fundamentally unfair.' [Citation.]" [Citation.]' [Citation.]" (*In re Valdez*, *supra*, at p. 729.)

Defendant asserts the "fee order" and "order to report for financial evaluation" should be stricken for one of three reasons: (1) "denial of the right to notice"; (2) "failure of the trial court to hold a hearing and determine [her] ability to pay the fee"; and (3) "[a] record . . . insufficient to support the implied finding of ability to pay." We reject these arguments. The record demonstrates the court found attorney's fees in the amount of $800 and, as permitted by Penal Code section 987.8, subdivision (b), ordered defendant to appear before the Revenue Recovery Division for an evaluation of her ability to pay.

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[12] Because we address the merits of defendant's claim, we need not consider her argument against forfeiture.

She was notified of—and acknowledged—her right to a court hearing in the event she disputed the division's assessment. Furthermore, while defendant claims "[no] hearing was held," "no ability to pay was determined," the court "summarily imposed the $800 fee," and "[t]here is no evidence in the record to support the implied finding of [an] ability to pay," the record does not establish she reported to the Revenue Recovery Division as instructed; assuming, arguendo, she did appear, the record does not establish she contested a financial evaluation officer's determination of her ability to pay and invoked her right to a hearing. (See *id.*, subd. (e)(2) ["Failure of a defendant who is not in custody to appear [at a hearing] after due notice is a sufficient basis for an order directing the defendant to pay the full cost of the legal assistance determined by the court."].) "On appeal, we presume that a judgment or order of the trial court is correct, ' "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." ' " (*People v. Giordano* (2007) 42 Cal.4th 644, 666, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In view of this principle, we uphold the financial evaluation order.

DISPOSITION

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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PEÑA, J.