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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM EDWARD DYE,

Defendant and Appellant.

G048050

(Super. Ct. No. 12HF1532)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Deputy Attorney General, for Plaintiff and Respondent.

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William Edward Dye was convicted of burglary. His only argument on appeal is that the trial court imposed \$240 restitution and parole revocation fines instead of \$200 fines. Because the minimum fines were raised between the time the offense was committed and the time of sentencing, defendant claims the trial court must have been confused and applied the higher fine, which was unauthorized by law and violated ex post facto principles. Yet because the amounts authorized by the relevant statutes were suggested, not mandatory, and because defendant has failed to offer any evidence of the court's purported confusion, he has failed to establish error. The \$240 fines were well within a reasonable range and permitted by statute. We therefore affirm.

## I

### FACTS

Defendant was charged with one count of first degree burglary, which allegedly occurred in 2009. (Pen. Code, §§ 459, 460, subd. (a)).<sup>1</sup> A number of strike priors and serious felony priors were also alleged. In due course, a jury found defendant guilty and found all strike and serious felony priors true. The trial court imposed a prison sentence of 19 years. Pursuant to sections 1202.4, subdivision (b) and 1202.45, and without objection, the court also imposed a mandatory state restitution fine of \$240 and a parole revocation fine of \$240, with the latter suspended unless parole was revoked.

## II

### DISCUSSION

As in effect between January 8, 2008 and December 31, 2009, the period during which defendant's crime was committed, section 1202.4, subdivision (b)(1) stated: "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 dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, and shall

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<sup>1</sup> Subsequent statutory references are to the Penal Code.

not be less than one hundred dollars (\$100), and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor.” (Former § 1202.4, subd. (b)(1); Stats. 2008, ch. 468, § 1 (the 2009 version).)

The version in effect when defendant was sentenced in February 2012 changed the amount of the fine, increasing the minimum to \$240: “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, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, and shall not be less than one hundred twenty dollars (\$120) starting on January 1, 2012, one hundred forty dollars (\$140) starting on January 1, 2013, and one hundred fifty dollars (\$150) starting on January 1, 2014, and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor.” (Former § 1202.4, subd. (b)(1); Stats. 2011, ch. 358, § 1) (the 2012 version).)

The same version of § 1202.45 was in effect at all times relevant. It stated that “the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.” (Former § 1202.45; Stats. 2007, ch. 302, § 15.)

Both versions of section 1202.4, subdivision (b)(2), stated that the court “may determine the amount of the fine” by multiplying the minimum fine by the number of years of imprisonment, multiplied again by the number of felony counts of which the defendant is convicted. As indicated by the use of the word “may,” however, this formula is permissive rather than mandatory.

Defendant argues that the imposition of the \$240 fines were unauthorized by law, and violated ex post facto and due process principles. Both of these arguments are built on the same faulty foundation — specifically, that the trial court intended to impose the statutory minimum, but mistakenly used \$240 instead of \$200 for that amount.

Unfortunately for defendant, this argument is unsupported by any evidence whatsoever. The court, in imposing the fines, did not say anything about the minimum fines, merely that it was imposing fines of \$240 each. (Nor is the court required to set forth its reasons for imposing a particular restitution fine.) “The very settled rule of appellate review is a trial court’s order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record. [Citations.]” (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.) Furthermore, we presume the trial court was aware of and followed the law. (*In re Julian R.* (2009) 47 Cal.4th 487, 498-499.) Defendant has no evidence to the contrary; he has nothing more than speculation.

Therefore, because \$240 fines were authorized by the 2009 version of the statute, those fines were neither unauthorized by law nor in violation of ex post facto principles. The language of the 2009 version (as well as the 2012 version) expressly authorizes a fine “set at the discretion of the court and commensurate with the seriousness of the offense . . . .” Fines merely \$40 over the minimum cannot be said to abuse that discretion. (See *People v. DeJesus* (1995) 38 Cal.App.4th 1, 32 [The trial court’s “discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered.”].)

Moreover, ex post facto principles are only violated when a punishment fails to give fair warning or imposes unforeseeable punishment. (See *People v. Snook* (1997) 16 Cal.4th 1210, 1221; *In re Ramirez* (1985) 39 Cal.3d 931, 938.) Because the

2009 version permitted a fine greater than \$200 at the court's discretion, defendant had more than reasonable notice, and ex post facto principles were not violated.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.