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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JIMMY LYNN HOGUE, JR., Defendant and Appellant.	H035635 (Santa Clara County Super. Ct. No. CC898966)

I. STATEMENT OF THE CASE

Defendant Jimmy Lynn Hogue, Jr., was charged with attempted first degree burglary (the Liccardo house) and two counts of first degree burglary (the DeSilva and the Chesney/Perez houses). It was further alleged that someone other than an accomplice was present during the Chesney/Perez burglary and that defendant had a prior serious felony conviction and had served three prior prison terms. (Pen. Code, §§ 459, 460, subd. (a), 664, 667, subds. (a)-(i), 667.5, subds. (b) & (c)(21).)[1] Defendant pleaded not guilty and not guilty by reason of insanity (NGI) to all charges.

At the guilt phase of the trial, the jury convicted defendant of all charges and found true the allegation that someone other than an accomplice was present during one burglary. At the sanity phase, the jury found that defendant was sane when he committed

[1] All unspecified statutory references are to the Penal Code.

these offenses. (§ 1026.) In a subsequent court trial, the court found true the allegation that defendant had a prior serious felony conviction and had served prior prison terms. The court imposed a total prison term of 19 years and, among other things, ordered defendant to pay a crime prevention fine plus penalty assessment and a criminal justice administration fee. (§ 1202.5; Gov. Code, § 29550.1.)

On appeal from the judgment, defendant claims the trial court erred in failing to dismiss the entire jury venire, or at least some of the jurors, after the court disclosed that he had pleaded not guilty and NGI. Defendant claims that references to his criminal record during trial violated his right to due process. He claims the court's instruction on adoptive admissions and the prosecutor's references during final arguments to defendant's post-*Miranda*[2] failure to clarify suspicious circumstances violated his Fifth Amendment guarantee against self-incrimination. Defendant further claims the court erred in failing to give complete instructions on circumstantial evidence. He claims the court erred in staying, instead of striking, one of the prison-term enhancements and in imposing the criminal justice administration fee and a crime prevention fee. Last, defendant claims the abstract of judgment must be corrected to eliminate the reference to count 1 as a "violent" crime.

We modify the judgment to strike the stayed prison-term enhancement and direct clerk of the superior court to correct the erroneous reference to count 1 as a violent crime. As modified, we affirm the judgment.

II. FACTS[3]

On the evening of March 11, 2008, defendant attempted to burglarize one home and burglarized two other homes in a residential area of San Jose.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] Defendant raises no issues concerning the sanity phase or the jury's sanity finding. Thus, we need only summarize the evidence introduced during the guilt phase of the trial.

A. Attempted Burglary on North 15th Street

Early that evening, Desiree Powers saw a gray-blue Saturn car park in the driveway of Sam Liccardo's house across the street. A man got out and disappeared into the back. Ms. Powers heard glass breaking. She saw a gardener working nearby ring Mr. Liccardo's door bell and then look into the back yard and shout something. The man she had seen then emerged from the back yard, threw a black bag into the car, and drove away. Bonnie Ross also saw the man drive away, and after speaking to Ms. Powers, she called Mr. Liccardo. Mr. Liccardo came home. He found nothing missing, but a side window was broken, the frame was damaged, and a screen was gone from another window. Ms. Powers and Ms. Ross later provided police with a description of the man and his car.

B. Burglary on North 13th Street

Later that evening, Laurie Chesney and her husband Daniel Perez returned to their house and heard a noise inside. When they tried to enter, the door was blocked. Mr. Perez forced it open, stepped inside, and saw defendant. Defendant tried to run, but Mr. Perez grabbed him, and they struggled. When Mr. Perez relaxed his hold, defendant fled into the street. The house had been ransacked, and there were bags piled near the door filled with various items. Mr. Perez and Ms. Chesney called the police and gave a description of the intruder.

C. Burglary on Jackson Avenue

That same evening, Carlos DeSilva was away from his house when he received a call from a home security company about a possible burglary. At the house, Mr. DeSilva and some police officers discovered that someone had disconnected the electricity, broken into the house through a side window, and left a sliding glass door open. A bedroom had been ransacked, drawers had been rifled, personal items were strewn about, and jewelry was missing. Police officers found a bloody envelope on a bed and a screwdriver next to the broken window.

Outside, a car was partially blocking the driveway. The engine was warm, the windows were down, and the door was unlocked. Inside the car, police found a wallet containing defendant's ID, tools, a camera, another wallet, some cash, some clothing, and some pieces of jewelry. They also found a blue baseball cap.

D. Investigation, Arrest, and Identification

Officer Raymond Vaughn and Sergeant Fredrick Kotto of the San Jose Police Department went to Mr. DeSilva's house and began to search for anyone who matched the descriptions of the burglar. Sometime between 8:45 and 9:00 p.m., they spotted defendant leaving the Freedom Church, which was just down the street from Mr. DeSilva's house. When defendant made eye contact with the officers, he looked agitated and retreated back inside. The officers followed and arrested him. In searching him, the officers found a key to the car parked outside and jewelry. He had a bloody scrape on one of his wrists. After being Mirandized, defendant told Sergeant Kotto that he was tired of running and lamented his circumstances and inability to find work.

During this exchange, the jewelry found on defendant was spread out on the hood of a patrol car. Sergeant Kotto asked defendant which house the items came from. Defendant said he "doesn't want to give [him] that." Sergeant Kotto then asked if he could have the victims come and identify their own stuff. Defendant said, "I am sure that is fine, but I can't tell you what came from what." Defendant then said that "his life was over" and, "I don't want to go back for some chicken-shit burglary[.]" Sergeant Kotto responded that "his days of running were over" and advised him to be as honest and candid when he spoke with other officers as he had been with him. Defendant said he would. Defendant thanked him for not "looking down on him."

Mr. and Mrs. DeSilva came to the scene and identified some of the jewelry as theirs. Ms. Chesney and Mr. Perez were brought for an in-field show-up, and both were "[a] hundred percent" and "absolutely" certain that defendant was the intruder they had encountered in the house. Ms. Powers and Ms. Ross also came to the scene. Ms. Powers

was "[o]ne hundred percent" certain that the car was the same car she saw pull into Mr. Liccardo's driveway; Ms. Ross was "very certain." Although neither was absolutely sure defendant was the person they had seen driving the car, Ms. Powers recognized a baseball cap found in the car as that worn by the driver. Police also took the screwdriver found at the DeSilva house to Mr. Liccardo's house and observed that its blade perfectly fit the pry marks on Mr. Liccardo's broken window.

Later, when Officer Vaughn booked defendant, defendant was angry and said he was "[p]issed off that [he was] going back for some shit like this." He said that if he had to "go[] back," then it should be for something more serious.

III. FAILURE TO DISMISS THE JURY VENIRE

Defendant contends the court erred in refusing to dismiss the jury venire. He claims the prospective jurors' knowledge of his NGI plea prevented them from being fair and impartial during the guilt phase of the trial and thus violated his constitutional right to due process, negated the presumption of innocence, and undermined the privilege against self-incrimination.

A. Background

At the beginning of jury selection, the court informed the venire of 48 persons that defendant had pleaded not guilty and NGI, and there would be a bifurcated trial at which the jury would first decide whether defendant was guilty, and then, if it found him guilty, whether he was sane when he committed the offenses. The court emphasized that during the guilt phase, jurors could not consider the NGI plea and would have to keep the two phases of the trial separate and focus on one at a time. The venire was divided into potential jurors and prospective jurors, and the court then questioned the prospective jurors in more detail.

One prospective juror found the bifurcation confusing. Another juror found it difficult to "fathom insanity." Juror No. 9 thought most people know right from wrong when they do something, and so it would be hard to find someone guilty but then not

guilty by reason of insanity. After the court explained legal insanity, Juror No. 9 acknowledged the possibility that because of a mental disease, a person might not know right from wrong. The court asked if Juror No. 9 could keep an open mind, hear the evidence, and not pre-judge the case. Juror No. 9 said he or she could.

The court explained that although some people might think an NGI plea allows defendants to escape responsibility on a "technicality," such a plea is a legitimate claim, and jurors would have to decide whether to accept it. One juror related that her brother had escaped death row and was sentenced to life without parole because he had asserted insanity based on a chemical imbalance. This bothered her, she did not believe him, but she was not called as a witness.

Voir dire continued for some time with the focus on the prospective jurors' answers to a questionnaire. The court asked about their experiences with the law. It asked whether they knew anyone associated with the case and whether they could listen to the evidence, be fair and impartial, stay open-minded during deliberations, and not prejudge the case. The court read various instructions and asked whether jurors could follow them, presume defendant's innocence, and apply the proper burden of proof beyond a reasonable doubt.

At one point, a prospective juror opined that there was something contradictory in pleading not guilty and NGI—i.e., denying committing an offense and also claiming not to be responsible for committing it. The court explained that the guilt and sanity phases were separate; there would be overlapping evidence; and only if there was a guilty verdict, would there be a sanity phase. The juror felt that the NGI plea undermined the credibility of the not guilty plea. The court explained that it would be unfair if jurors viewed the NGI plea as an admission of guilt. Rather, jurors had to presume innocence despite the NGI plea and separate that plea from the determination of guilt. The court understood that the juror might not be able to erase knowledge of the NGI plea but asked

if he could “compartmentalize” the guilt phase and simply look and the evidence, listen to the law, and make a decision. The juror said he possibly could.

A second prospective juror expressed the view that dual pleas were “contradicting” and raised a “credibility issue.” The court asked if he could nevertheless keep the issues of guilt and sanity separate, focus on the evidence, determine whether the defendant was guilty beyond a reasonable doubt. The juror said he could. However, that juror and a few others felt it would have been better not to know about the NGI plea. Two of them thought the NGI plea was an excuse for unlawful conduct and would give it some weight in determining guilt. However, another prospective juror found no contradiction in the pleas and said a defendant is simply “covering all bases” in case he is found guilty but is really innocent. Under such circumstances, the dual pleas reflect a good defensive strategy.

Juror No. 9, who knew people with mental disorders, wondered why the jurors needed to know about the NGI plea before the guilt phase and felt that since jurors are “all human,” their knowledge of the NGI put defendant at a disadvantage. Another, however, disagreed and reiterated that the dual pleas were merely a way for the defendant to cover all the bases in case the jury erroneously found him guilty. Some jurors, including Juror No. 10, agreed that sometimes innocent people are convicted. Juror No. 10 recognized the need to stay open-minded but admitted that “in the back of your mind there is that insanity deal.” At this point, defense counsel simply asked all of the perspective jurors “if you were sitting in [defendant’s] seat would you want someone with your frame of mind to sit as [your] juror.” Twelve of them said yes, including Jurors No. 9 and No. 10; 11 prospective jurors said no, including Juror No. 5.

When Juror Nine asked why the jury pool had know about the NGI plea from the beginning, the court explained that the same jury that determined the facts at the guilt phase would need to consider the same facts at the sanity phase. The court then gave an example to illustrate why dual pleas are not inconsistent. “I have an absolute belief that

God told me to break into your house and take your TV. Did I enter your house? Absolutely. Did I enter it with the intent commit theft? Absolutely. Guilty beyond all reasonable doubt. [¶] Next step, do I have a mental disease or defect? I suffer from delusions that God is telling me to do. Second, because of that disease or defect I didn't understand the act was morally or legally wrong. I thought I was doing what God told me to do. I'm not guilty by reason of insanity. The law is not holding a person that doesn't know the nature of what they do to the same consequences, and that is the process. They are not inconsistent pleas. They are not a technicality. They are a part of the criminal justice system that is used all the time."

The court further warned the jurors that their duty was to determine the facts and the validity of defendant's pleas, and in doing so they were not to speculate about the possible penalty or consequences of their determinations.

At this point, defense counsel moved to excuse the entire jury venire and argued that they had all been tainted by knowledge of the NGI plea. The court denied the motion.

Voir dire continued the next day. The prosecutor stressed that every defendant had a right to a fair trial, and the defendant must be presumed innocent. She noted that she had the burden to prove guilt beyond a reasonable doubt, and the defendant did not have to do anything. If she did not present enough evidence, the jury could not find him guilty, and that defendant also had pleaded NGI could not, and did not, alter those rules. Only if the jury found defendant guilty would there be a sanity phase. The prosecutor reiterated that the jurors had to keep those two determinations separate.

The court emphasized that defendant's NGI plea was not a comment on the evidence or evidence of anything itself, and the prosecutor had to prove guilt. The court advised jurors that they must approach the case with an open mind—i.e., be a "blank slate"—and not prejudge anything and not let the NGI plea inform their decision or undermine defendant's right to a fair trial.

Juror No. 5 again expressed some difficulty with the dual pleas, explaining that it seemed that defendant was saying he did not commit the offenses and also saying that if he did, then he was insane, which the juror thought was "acknowledging" the charges. The court said that was not the way to interpret the NGI plea. It then reiterated its example of person who thought God had directed him to commit a burglary. The court reiterated that the jurors had to focus first on whether the prosecution proved that the person committed the burglary; and only if it found the defendant guilty, would the jury then determine whether the defendant was sane at the time. Juror No. 5 then expressed the ability to keep the phases separate, even if the pleas were not logical. The court pressed and asked whether the juror could determine the guilt phase, hold the prosecution to its burden of proof, and not consider the sanity issue even if the process did not seem logical. Juror No. 5 said that he or she could.

Thereafter, the court itself excused a number of the prospective jurors who had disagreed with the dual pleas and separate phases and had indicated that they could not consider them separately. Defense counsel exercised peremptory challenges to remove a number of other prospective jurors who had expressed difficulty with defendant's NGI plea. Those vacancies were filled with those from the group of potential jurors. The parties continued to exercise their challenges, and ultimately the court empanelled the jury, which included Jurors No. 5, No, 9, and No. 10.

B. Discussion

When a defendant pleads not guilty and not guilty by reason of insanity, he or she is entitled to separate determinations of guilt and sanity before the same or different juries. (§ 1026, subd. (a).) The trial court has discretion to decide whether the same jury will decide guilt and sanity. (*People v. Rupp* (1953) 41 Cal.2d 371, 383, implicitly disapproved on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13.) Where the court elects to proceed with a single jury, there is no inherent harm in informing prospective jurors about the NGI plea and conducting voir dire on both the

guilt and sanity issues at the same time. (See *People v. Panah* (2005) 35 Cal.4th 395, 434-435; *People v. Hernandez* (2000) 22 Cal.4th 512, 520; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 542-544; *People v. Phillips* (1979) 90 Cal.App.3d 356, 362-364.)

Defendant acknowledges that those prospective jurors who had said the NGI plea would affect their ability to be fair and impartial were excused. However, he argues that the extensive discussion during voir dire necessarily tainted, albeit subconsciously, the remaining jurors, especially Jurors No. 5, No. 9, and No. 10, who had spoken up during voir dire about the NGI plea and were seated on the jury. Defendant further argues that the court's hypothetical example aggravated the problem jurors were having with the dual pleas. Accordingly, defendant argues that realistically, it was impossible for the seated jurors to block the NGI plea from their minds, and he claims it affected their evaluation of the evidence during the guilt phase and undermined their ability to be fair and impartial.

A defendant has a right to a fair trial by a panel of impartial and indifferent jurors. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) The court enjoys "broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889; see *People v. Weaver* (2001) 26 Cal.4th 876, 910; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146-1147.) Discharging the entire venire "is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*People v. Medina, supra,* 51 Cal.3d at p. 889.)

In *People v. Panah, supra,* 35 Cal.4th 395, the defendant claimed that informing prospective jurors about his NGI plea violated his constitutional rights, in that the jury would have been so prejudiced by having learned of his NGI plea it would have been unable to impartially determine his guilt. The court rejected the notion that once a jury learns of a dual plea, it cannot be impartial when it initially determines the issue of guilt.

The court found the claim of prejudice wholly speculative. (*Id*. at p. 435.) " ' "We must assume that a fair and impartial jury of intelligent men and women would obey . . . instructions and would therefore hold in reserve their ultimate finding upon the issue of the defendant's sanity until that separate issue and the evidence supporting it had, in the prescribed order of the trial, been committed to it for determination. We are not to assume that such a jury will cease to be fair and impartial as the cause progresses upon its successive issues, but, on the contrary, we must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality under the changed procedure as before until the whole cause . . . has been determined." ' [Citation.]" (*Ibid*, quoting *People v. Leong Fook* (1928) 206 Cal. 64, 78.)

We do not find that the court abused its discretion in refusing to dismiss the entire venire or some of the seated jurors. Only a very few of the 48 prospective jurors expressed any concern about defendant's dual pleas or their ability keep the NGI plea from affecting the determination of guilt, and those who were unable or unwilling to keep the NGI plea from doing so were excused. Although Jurors No. 5, No. 9, and No. 10 participated in the discussion about the dual pleas, Jurors No. 9 and No. 10 said that they could keep an open mind during the guilt phase, and both offered that if they were defendants, they would want them to be on the jury. Juror No. 5, who seemed to have the most difficulty, ultimately understood the bifurcated process and expressed the ability to make the prosecution prove guilt and keep the NGI plea separate even if the process did not seem logical. The court did not dismiss these jurors for cause on its own motion, as it had done to other jurors, and defense counsel did not request that they be removed for cause.[4]

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[4] Defense counsel challenged three other prospective jurors for cause, but the court denied the challenges. None of those prospective jurors was ultimately seated on the jury.

Several potential jurors were brought into the pool of prospective jurors to replace those excused by the court. Only two mentioned the NGI plea. One questioned the logic of the process but said it would not affect consideration of the case or ability to follow instructions. The other could not erase knowledge of the fact that there might be two phases but had not prejudged the case and would consider the evidence. Defense counsel did not request that either be removed for cause. Moreover, none of the other new prospective jurors expressed any concern about the dual pleas, suggested they would have a problem keeping the NGI plea separate from the consideration of guilt, or said they would have difficulty being fair and impartial.

We further note that throughout the voir dire, the court repeatedly explained the two-phase process and reminded the prospective jurors of their duty to remain impartial, separate the two phases of the trial, and not let the NGI plea inform their determination of guilt. At the close of the prosecution's case, the court reiterated that it would be unfair for jurors to consider the NGI plea during their deliberations.

Under these circumstances, we do not find that the discussion of the dual-plea process and defendant's NGI plea during voir dire was so irresistibly provocative that no juror reasonably could be expected to separate the guilt and sanity phases of the trial and follow the court's instruction to determine defendant's guilt based solely on the evidence and without considering his NGI plea. Furthermore, the record does not establish, and defendant fails to convince us, that either the entire venire or, at a minimum, one or more of the jurors actually seated were so affected by the NGI discussion that they could not have avoided, or did not avoid, considering the NGI plea in determining defendant's guilt. In our view, defendant's claim of subliminal taint rests on psychological speculation.

IV. REFERENCES TO DEFENDANT'S CRIMINAL HISTORY

Defendant contends that the jury heard prejudicial and non-probative evidence concerning his prior criminal history, and this violated his right to due process. The evidence comprised three references to his criminal record and previous incarceration.[5]

A. The Evidence

Prior to trial, defendant sought to exclude statements he made to Officer Vaughn and to Sergeant Kotto shortly after his arrest. At an Evidence Code section 402 hearing, Officer Vaughn testified that defendant was agitated when arrested and said he was "[p]issed off that I'm going back for some shit like this." He also said, "[I]t should have been something more serious. I should have hurt somebody." Sergeant Kotto testified that defendant said, "I'm going to do life for this" and referred to himself as a "third-striker." Defendant also said, "I didn't want to go back for some chicken-shit burglary. If I'm going to do life, I should have hurt somebody." The court excluded defendant's references to the statements about hurting somebody, doing a life sentence, and being a third striker.

1. The "CDC" I.D.

At trial, Officer Vaughn testified that he searched the car in front the DeSilva house and found a wallet containing I.D. When asked whose I.D., he said "[i]t was a CDC." Defense counsel objected, and the court advised the jury that the answer was not responsive and struck it. Officer Vaughn then said that it was defendant's I.D.

2. "Going Back"

In accordance with the trial court's ruling, Officer Vaughn related that defendant was agitated when arrested and said (1) he was "[p]issed off that I'm going back for some

[5] Prior to trial, the court granted defendant's motion to bifurcate the trial on the charges and on the prior conviction allegation so that jurors would not learn of his prior conviction unless he elected to testify. The court also prohibited reference to defendant status as a parolee and a registered sex offender.

shit like this. I should have—it should have been something more serious"; and (2) "I don't want to go back for some chicken-shit burglary."

3. The "402" Testimony

After the guilt phase of the trial, and during deliberations in the sanity phase, the jury requested a readback of Sergeant Kotto's trial testimony. However, instead of reading that testimony, the reporter read back the "402" testimony in which Sergeant Kottto related defendant's statement that he was "going to do life for this" and his self-reference as a "third-striker." The court denied defense counsel's motion for a mistrial and advised the jury that the reporter had mistakenly read a portion of testimony taken outside their presence. The court then instructed the jurors to disregard the testimony they had just heard, warned them not to consider the evidence in any way, and directed them to consider only the testimony that they had actually heard Sergeant Kotto give. The court further directed jurors not to consider the penalty, punishment, or consequences during their deliberations. The court then asked whether any juror felt that he or she could not follow these instruction and could not ignore the mistakenly read testimony. None responded, and the court sent them back to continue deliberating.

B. Discussion

"[T]he admission of evidence, even if error under state law, violates due process *only* if it makes the trial *fundamentally unfair*" (*People v. Partida* (2005) 37 Cal.4th 428, 439, first italics added), that is, only if it offends "fundamental conceptions of justice." (*Dowling v. United States* (1990) 493 U.S. 342, 352; e.g., *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008 [erroneous admission of evidence of uncharged crimes did not violate due process].) For this reason, the category of infractions that implicate due process is narrowly confined to those that directly violate " 'those "fundamental conceptions of justice which lie at the base of our civil and political institutions," [citation], and which define "the community's sense of fair play and decency," [citation].' " (*Dowling v. United States*, *supra*, 493 U.S. at p. 353; e.g., *People v.*

Albarran (2007) 149 Cal.App.4th 214, 229 [admission of highly inflammatory gang evidence, some completely unrelated to the charged offenses, to prove motive and intent violated due process because the evidence was irrelevant for that purpose].)

Accordingly, to prove a deprivation of federal due process rights, a defendant "must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial." (*People v. Albarran, supra,* 149 Cal.App.4th at p. 229.) " 'Only if there are *no permissible inferences* the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citations.]' [Citation.]" (*Id*. at pp. 229-230, italics added.)

With these principles in mind, we analyze the three references and their potential impact on the fundamental fairness of the trial.

Officer Vaughn's reference to a "CDC" I.D. does not reveal any particular prior criminal conduct, and the acronym was never explained. Thus, it is not clear that any juror knew what "CDC" meant.

Defendant suggests that jurors would know what "CDC" meant "given the media coverage of prison events and policies in the past few years." This is a speculation at best. Defendant further suggests that even if jurors did not know what "CDC" meant, the objection and admonition to disregard it "must have alerted them." This suggestion is even more speculative because nothing in the objection or the admonition explained what "CDC" meant.

Even if the jurors caught the brief reference and knew what it meant, the court immediately struck the testimony. Moreover, the jury was generally instructed not to consider for any purpose evidence that the court may strike. We presume that jurors obey

such an instruction; and given the innocuous and unexplained reference to "CDC," we have little difficulty presuming that they disregarded it during their deliberations. (*People v. Gonzalez* (2011) 52 Cal.4th 254, 292; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) Furthermore, whatever "CDC" might have meant to jurors was surely overshadowed by the far more understandable and probative revelation that the I.D. found in the car belonged to defendant.

Defendant's statements to Officer Vaughn that he might be "going back" for a "chicken-shit burglary" and not "something more serious" did imply that he had a record and had been in prison. However, the statement was relevant, probative, and admissible because it showed a consciousness of guilt and supported an inference that defendant was admitting that he had committed the burglary, albeit a "chicken-shit" burglary, for which he had just been arrested.

Defendant argues that the statement was not an implied admission of guilt to the immediate burglary. Rather, he was simply making a general reference to break-ins in the abstract. This interpretation of his statement is strained. Given the context of the arrest and his reference to *burglary*, as opposed to some other unspecified "chicken-shit" crime, defendant's statement strongly reflects a consciousness and implied admission of guilt.

Concerning the accidental reading of Sergeant Kotto's "402" testimony, we note that it could not have undermined the fairness of the guilt phase or the reliability of the guilty verdicts because the testimony was read later, during the jury's deliberations on the *sanity* phase. We further note that during that phase and before the sanity deliberations began, the jury learned from a defense witness—i.e., defendant's parole officer, Arthur Valdez—that he had served time in prison and was on parole in 2005 and 2006. Thus, insofar as defendant's reference to himself as a "third striker" implied a prior criminal history, the reference was redundant. Indeed, the jury had already found him guilty of two burglaries and one attempted burglary.

Next, we note that although an inadmissible reference to prior criminal conduct may be potentially prejudicial during guilt phase, the potential prejudice at the sanity phase is far less apparent. In *People v. Houser* (1965) 238 Cal.App.2d 930, the defendant's prior criminal record was alluded to during the sanity phase of his trial when a psychiatrist called by the prosecution was asked to explain the basis for his opinion that defendant was sane. The court rejected a claim that the testimony was inadmissible. The court found no compelling reason why it should be excluded in a trial where the defendant's sanity rather than his guilt is the sole issue. "Prejudice, the obvious reason for the rule in a trial for the determination of guilt has no comparable application in a probe of mental status. It seems only reasonable that a history of conduct, past as well as present, would be an important consideration in an appraisal of mental status. There occurs to us no cogent reason to expect that prejudice in a sanity hearing would be incited to the point of unfairness by knowledge of defendant's criminal record." (*Id*. at p. 933; accord, *People v. Martinez* (1973) 31 Cal.App.3d 355, 358; cf. also *People v. Medina*, *supra*, 51 Cal.3d 870, 898 [risk of prejudice from seeing defendant shackled during sanity phase diminished after jury had determine his guilt].)

Finally, we note that the court admonished jurors to disregard the "402" testimony, and none of the jurors said he or she would be unable to do so. Again, in the absence of evidence to the contrary, we presume the jurors obeyed the court's direction.

In sum, defendant fails to convince us that the obscure reference to "CDC" and the general references to defendant's prior criminal history rendered his trial fundamentally unfair and thereby violated his right to due process.

V. INSTRUCTION ON ADOPTIVE ADMISSION AND PROSECUTORIAL MISCONDUCT

Defendant contends that the court erred in instructing the jury on adoptive admissions. (CALCRIM No. 357.) He further contends that the prosecutor was guilty of misconduct in arguing that issue. He claims the instruction and argument violated his privilege against self-incrimination and his right to due process.

A. Background

As noted, Sergeant Kotto testified that he asked defendant where the items of jewelry had come from. Defendant said he did not want to provide "that" information. Sergeant Kotto asked if the victims could come and claim their items. Defendant agreed but reiterated that he could not say where each piece came from. Sergeant Kotto further testified that during their conversation after the arrest, defendant never offered an innocent explanation for being in the houses and did not accuse anyone else of committing the burglaries.

During opening argument, the prosecutor argued, "You have his statement which valuable came—the officer telling him which valuable or asking him which valuables came from which house. Obviously that means that there is [*sic*] more than one house being burglarized. And he doesn't—you know, he says he can't give him that information as far as helping the officers out, but it definitely shows his agreement or his—he doesn't say, 'I didn't burglarize any houses. I only burglarized one house.' He just says, 'Yeah, you can have the burglary victims all come over and come and take their property back or come and look at the property.' " During closing argument, the prosecutor again argued that in response to being accused, defendant did not explain why he was in other people's houses or accuse someone else of stealing the property or claim that he had just bought the jewelry or even deny committing the burglaries. Rather, he gets mad that he is going back to jail and says the victims can come and claim their property.

After final argument, the court gave the standard instruction on adoptive admissions. (CALCRIM No. 357; see Evid. Code, § 1221.) That instruction permits the jury to assess a defendant's failure to deny an accusation or a defendant's false, evasive, or contradictory statements in the face of an accusation as an admission of the truth of the

accusation under circumstances where the defendant reasonably had an opportunity to reply and heard and understood the nature of the accusation.[6]

B. The Instruction

The Attorney General argues that defendant forfeited his constitutional claim concerning the instruction because he failed to object to it on that ground. We disagree. A defendant may assert instructional error for the first time on appeal if the alleged error implicated the defendant's substantial rights. (§ 1259; *People v. Coffman* (2004) 34 Cal.4th 1, 103, fn. 34.) Moreover, defendant objected to the instruction, and the court denied the objection because there was substantial evidence to support it. Whether the instruction violated defendant's constitutional rights would initially depend on whether there was evidence to support giving it. Because it appears defendant objected on that ground, a further objection on constitutional grounds would have been futile, and the failure to raise that objection did not forfeit his appellate claim. (*People v. Arias* (1992) 13 Cal.4th 96, 159 [claim not forfeited if objection would have been futile]; see also *People v. Jennings* (2010) 50 Cal.4th 616, 661 [unless circumstances support inference that defendant was invoking right to remain silent, evidence of evasive or equivocal response to accusation may be offered as implied or adoptive admission and does not violate constitutional rights].)

Turning to merits, we note that under Evidence Code section 1221, "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the

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[6] The court instructed the jury as follows. "If you conclude that someone made a statement outside of court that accused the defendant of the crime and defendant did not deny it, you must decide whether each of the following is true: [¶] One, the statement was made to the defendant; [¶] Two, the defendant heard and understood the statement; [¶] Three, the defendant would under all circumstances naturally have denied the statement if he thought it were not true; and [¶] Four, the defendant could have denied it, but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement as true. [¶] If you decide that any of those requirements have not been met, you must not consider either the statement or the defendant's response for any purpose."

statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Thus, if a person is accused of a crime under circumstances that fairly afford the person an opportunity to hear the accusation and reply, and the person fails to speak or makes an evasive or equivocal reply, both the accusation and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) The circumstances, however, must not suggest that the person was invoking his or her constitutional right to remain silent. (*Ibid*.) On the other hand, a direct accusation in so many words is not essential for the adoptive admission exception to apply. (*Ibid*.) Further, to warrant admissibility, " 'it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.' " (*Id*. at pp. 1189-1190.)

Here, the exchange between Sergeant Kotto and defendant concerning the jewelry found in his possession justified giving the instruction. "A suspect's express willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights." (*People v. Cruz* (2008) 44 Cal.4th 636, 667-668.)

As noted, Sergeant Kotto testified that after being arrested, defendant was upset and immediately started talking to Sergeant Kotto. He said he was tired of running because he did not know what it was like. He said he felt as if his whole world had collapsed. Sergeant Kotto offered him a cigarette, and defendant accepted it. He then said he could not find a job and was "a little like shit." Sergeant Kotto mentioned the jewelry found on him and wanted to know which house each item came from. The inquiry implied that defendant knew where the jewelry had come from because he had stolen it. Defendant, who had just been Mirandized and was being cooperative, said he

did not want to provide *that* information. His response supports an inference he actually knew where the items had come from. When Sergeant Kotto asked if the victims could come and identify their property, defendant said that was fine but again he could not tell Sergeant Kotto where each item had came from. He then said that his life was over, and he did not "want to go back for some chicken-shit burglary." Defendant's subsequent responses reasonably implied that he was guilty of burglary and either could not remember exactly where he had taken each item from or again did not want to provide that information.

Under the circumstances, defendant's voluntary responses to Sergeant Kotto's implied accusation, knowing he had the right to remain silent, were sufficient to warrant giving the instruction and letting the jury decide whether his response constituted an adoptive admission. (Cf. *People v. Fauber* (1992) 2 Cal.4th 792, 852 [given the inferences "that the defendant heard and understood [an unavailable witness's] statements and had the opportunity to deny them, and that he chose to remain silent except for an evasive and equivocal statement," the statements were "properly allowed as adoptive admissions"].)

C. Prosecutorial Misconduct

Defendant claims that the prosecutor's argument, quoted above, constituted improper comment on his failure to testify in violation of his constitutional privilege against self-incrimination. (See *Griffin v. California* (1965) 380 U.S. 609, 614 (*Griffin*) [comment on failure to testify]; *United States v. Hale* (1975) 422 U.S. 171, 176 [comment on silence during interrogation]; *Doyle v. Ohio* (1976) 426 U.S. 610, 617, 620; *People v. Cockrell* (1965) 63 Cal.2d 659, 669-670 [comment on silence when confronted by accusatory statement].)

The Attorney General again argues that defendant forfeited his claim of prosecutorial misconduct by failing to object below. We agree.

Generally, the failure to object at trial waives a claim of prosecutorial misconduct on appeal because the trial court should be given the opportunity to cure any harm by giving an appropriate instruction. (*People* v. *Green* (1980) 27 Cal.3d 1, 27; e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 127 [failure to object to prosecutor's comment on defendant's failure to testify forfeited claim of *Griffin* error on appeal].) Moreover, we do not find the potential prejudice so great that it could not have been cured by an appropriate admonition. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1060 [harm from comments on failure to testify cured by admonition]; *People v. Memro* (1995) 11 Cal.4th 786, 873-874, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2 [alleged *Griffin* error waived by failure to object, and no reason to believe alleged harm could not have been cured by admonition].)

Defendant argues that his objection to the instruction preserved his claim of prosecutorial misconduct amounting to *Griffin* error. He argues that "the only evidence upon which the instruction could have been based was [his] failure to deny the burglaries in the face of [Sergeant] Kotto's questioning. Given the court's ruling that the instruction was appropriate, it would have been futile for defense counsel to make further objections or requests for admonitions during the prosecutor's argument."

Evidence of defendant's responses to Sergeant Kotto's implicit accusation supported the court's instruction. The prosecutor's argument, however, focused on defendant's failure to offer an exculpatory story. For this reason, we do not find that counsel's objection to the instruction somehow preserved a *Griffin* claim based on the prosecutor's comments about what defendant did not say.

D. Ineffective Assistance of Counsel

Defendant claims that if counsel forfeited his claim of prosecutorial misconduct, then counsel provided ineffective assistance of counsel.

To obtain reversal due to ineffective assistance, a defendant must first show "that defense counsel's performance fell below an objective standard of reasonableness, i.e.,

that counsel's performance did not meet the standard to be expected of a reasonably competent attorney[.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*); *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) Second, the defendant must show that there is "a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*Cunningham, supra,* 25 Cal.4th at p. 1003.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

Because the defendant bears this burden, "[a] reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Moreover, where the record on direct appeal "does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Here, we cannot say that counsel's failure to object was unreasonable as a matter of law. Had defendant remained silent when Sergeant Kotto implicitly accused him of burglary, the prosecutor's comments about what defendant did not say—i.e., that defendant did not deny or otherwise provide an innocent reason for having the jewelry in his possession—would have represented comment on his silence and implicated defendant's constitutional privilege against self-incrimination. However, defendant did not remain silent. His response supported a reasonable inference that he knew where the jewelry had come from but would not tell Sergeant Kotto.

Under the circumstances, counsel reasonably could have concluded that the prosecutor was not so much commenting on an invocation of the right to remain silent in the face of an implicit accusation as comparing the inculpatory implication of his response against exculpatory things he could have said. Accordingly, counsel could have

reasoned that an objection would not only call more attention to the prosecutor's statement but also be overruled.

Even if we assume that counsel's omission fell below an objective standard of reasonable competence, defendant cannot establish prejudice.

The three burglaries occurred within hours and a few blocks of each other. A car containing defendant's I.D. was found parked at Mr. DeSilva's recently burgled house. Police found a bloody envelope inside the house. When he saw police at the DeSilva house, defendant retreated back into a nearby church. When arrested, he had property taken from the DeSilva house on his person, and his wrist was bloody. Ms. Chesney and Mr. Perez were absolutely certain defendant was the burglar they tried to detain inside their house. Ms. Powers and Ms. Ross were equally certain that the car parked at the DeSilva house was the same car they had seen leaving the Liccardo house, and Ms. Powers recognized the baseball cap found in the car. The blade of a screwdriver found at the DeSilva house matched the pry marks on the broken window at the Liccardo house. And after being arrested and Mirandized, defendant was upset that he would be going back to prison for a "chicken-shit" burglary.

Given this evidence, we do not find a reasonable probability that defendant would have obtained a more favorable verdict on any of charges had counsel objected to statements by the prosecutor during his final arguments. (See *Strickland*, *supra*, 466 U.S. at p. 694; *Cunningham*, *supra*, 25 Cal.4th at p. 1003.)

VI. INCOMPETE INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE

Defendant contends, and the Attorney General concedes, that the court erred in failing to instruct the jury on how to consider circumstantial evidence introduced to prove an issue other than mens rea. (CALCRIM No. 224.)[7] We agree that the court erred.

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[7] CALCRIM No. 224 provides: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a

In *People v. Rogers* (2006) 39 Cal.4th 826 (*Rogers*), there was no direct evidence linking the defendant to a murder, and so the prosecutor relied on circumstantial evidence to prove identity. (*Id*. at p. 885.) The trial court instructed on the use of circumstantial evidence to prove only mental state and failed to instruct more generally on the use of such evidence to prove other elements. (*Ibid*.) The Supreme Court held that it was error not to give the more generally applicable instruction. However, the court found the error harmless because the evidence of identity was "strong," and the evidence pointing to innocence was "weak." (*Id*. at p. 886.) Under the circumstances, the court found no reasonable probability the jury would have found that the defendant did not kill the victim had the general instruction been given. (*Ibid*.; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We reach the same conclusion in this case. Defendant correctly notes that the prosecution relied on circumstantial evidence to prove the DeSilva burglary and elements of the Liccardo attempted burglary. However, as outlined above, the evidence that defendant burglarized Mr. DeSilva's house was overwhelming: a car with his I.D. was parked outside; he was arrested close by after trying to avoid the police; he had a key to the car and jewelry taken from the DeSilva house; and after being Mirandized, defendant

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reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

The trial court did give CALCRIM No. 223, which defines circumstantial evidence and CALCRIM No. 225, which mirrors CALCRIM No. 224 but is focused exclusively on circumstantial evidence pertaining to intent.

We note that during voir dire, the court gave CALJIC No. 224. However, for some reason, the court did not reiterate the instruction at trial.

implicitly admitted the burglary by complaining that he was headed back to prison for a "chicken-shit" burglary.

Defendant argues that "a reasonable jury could have decided that someone else might have done the burglary and given the jewelry to [him] for hiding . . . ." However, we fail to see how a reasonable juror could do so in the absence of any evidence remotely suggesting the existence of a mysterious burglar and in the face of strong evidence directly linking defendant to the crime. Rather, such a finding would be rank speculation.

The evidence supporting the Liccardo attempted burglary was also strong. Ms. Powers saw defendant's car pull into the Liccardo driveway and a man get and go into the back. She heard glass breaking. A gardener spooked the stranger who threw a bag inside and drove away. Ms. Powers also saw defendant's car drive away, and she recognized the baseball cap found inside defendant's car as that worn by the driver. Finally, pry marks on a window at the Liccardo house matched the blade of the screwdriver found at the DeSilva house. Again, there was no evidence to suggest someone other than defendant was driving his car, especially since he had the keys when he was arrested.

Defendant suggests that a reasonable juror could have concluded that the pry marks were made "by some other tool." However, this suggestion is speculation and not a reasonable inference from the circumstantial evidence.

We further note that the court instructed the jury that defendant was to be presumed innocent, the prosecution had the burden to prove every element beyond a reasonable doubt, and they must acquit if the evidence does not so prove. (CALCRIM No. 220

Under the circumstances, we do not find it reasonably probable defendant would have obtained a more favorable verdict on any charge had the court generally instructed the use of circumstantial evidence. (*Watson, supra,* 46 Cal.2d at p. 836.)

Defendant claims the error violated his federal constitutional rights in that it lessened the prosecution's burden to prove guilt beyond a reasonable doubt. Therefore the error must pass muster under the stricter, harmless-beyond-a-reasonable-doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

In *Rogers*, the defendant also claimed the instructional omission violated his federal constitutional rights. (*Rogers, supra*, 39 Cal.4th at p. 886.) In rejecting that claim, the court observed that "[i]nsofar as the federal Constitution itself does not require courts to instruct on the evaluation of circumstantial evidence where, as here, the jury properly was instructed on reasonable doubt [citations], defendant's claim necessarily rests on the asserted arbitrary denial of a state-created liberty interest. [Citation.] We doubt the common law right to a circumstantial evidence instruction rises to the level of a liberty interest protected by the due process clause. [Citation.]" (*Id*. at pp. 886-887.) That said, the court concluded that any federal constitutional error would be harmless beyond a reasonable doubt for the same reasons it was harmless under *Watson*.

Where, as here, the court instructs the jury that the prosecutor must prove the elements of each offense beyond a reasonable doubt and the jury must acquit unless it so finds, we doubt that the omission of a general circumstantial evidence instruction lessens the prosecutor's burden of proof in violation of a defendant's constitutional rights, especially when the court gives a circumstantial evidence instruction concerning one essential element of the offenses.

In any event, we would find any constitutional error harmless under the stricter standard. The evidence of guilt was overwhelming; and although the proof of certain offenses or elements rested in part on circumstantial evidence, that evidence did not reasonably support any exculpatory inferences. Accordingly, we are satisfied that the instructional omission was harmless beyond a reasonable doubt.[8]

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[8] Defendant claims the instructional omission was compounded by (1) the instruction permitting jurors base a conviction for burglary on evidence that he

VII. CUMULATIVE PREJUDICE

Defendant contends that if individually none of the alleged errors would compel reversal, the cumulative effect of *all* the errors does. We disagree because we have rejected defendant's claim or error concerning the failure to dismiss the jury venire, his claim or prejudice from the references to his criminal background, his claims of error concerning the instruction on adoptive admissions, and his claim of ineffective assistance of counsel.

VIII. THE PRIOR-PRISON-TERM ENHANCEMENT

The trial court found true three prior-prison-term allegations, and under section 667.5, subdivision (b), imposed three one-year sentence enhancements.[9] However, because the court imposed a five-year, serious-felony enhancement based on the conviction underlying one of the prison-term enhancements, it could not also use that prison-term finding to enhance defendant's sentence. Recognizing this, the court imposed but stayed that enhancement.

Defendant contends that the trial court erred in staying, rather than striking, the enhancement.[10]

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knowingly possessed recently stolen property plus "slight" supporting evidence (CALCRIM No. 376); and (2) the instruction permitting a conviction based on defendant's out-of-court statements plus "slight" corroborating evidence (CALCRIM No. 359). However, as defendant concedes, these instructions have been upheld against claims that they lessen or undermine the prosecution's burden of proof. Accordingly, that the court gave these instructions does not alter our view that the instructional omission was harmless.

[9] Section 667.5, subdivision (b) generally requires the court to impose a consecutive one-year prior-prison-term enhancement when a defendant is convicted of a felony that is not a "violent felony."

[10] The Attorney General argues that defendant forfeited his claim by failing to object below when the court stayed the enhancement. However, insofar as the stay represents an unauthorized sentence, the failure to object does not forfeit the sentencing claim. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354.)

Striking the enhancement was the procedure prescribed by the Supreme Court in *People v. Jones* (1993) 5 Cal.4th 1142 at page 1153 (*Jones*). (*People v. Perez* (2011) 195 Cal.App.4th 801, 805 [following *Jones*]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021 [same]; *People v. Gonzalez* (1993) 20 Cal.App.4th 1607, 1610 [same]; see *People v. Murphy* (2001) 25 Cal.4th 136, 156 [voters did not intend that a defendant's sentence would be enhanced for both a prior conviction and the resulting prison term]; but see *People v. Lopez* (2004) 119 Cal.App.4th 355, 362-366 [suggesting that *Jones* is not binding authority and that staying, not striking, is the proper procedure].)

In light of *Jones*, we shall modify the judgment accordingly.

IX. THE ABSTRACT OF JUDGMENT

Defendant contends, and the Attorney General concedes, that the abstract of judgment incorrectly states that count 1 (the attempted burglary) was a violent offense in that it lists the punishment for it as "consecutive 1/3 violent" term. Thus, the parties agree that the attempted burglary does not qualify as a violent offense (see § 667.5, subd. (c) [listing violent felonies]), and therefore, this court should correct the abstract to show that count 1 was a consecutive one-third *non-violent* term. We shall do so.

X. FINES, ASSESSMENTS, AND FEES

At sentencing, the court ordered defendant to pay (1) a $10 crime prevention fine plus an accompanying $26.50 penalty assessment under section 1202.5 and (2) a $129.75 criminal justice administration fee under Government Code sections 29550 and 29550.1.[11]

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[11] Under Government Code section 229550, subdivision (a)(1), a county may impose fees to recover one-half of the costs incurred in booking or otherwise processing arrested persons; and when a person is arrested by city police and booked into a county facility, the county may recover one-half the booking/processing costs from the city. If the person is convicted of a crime related to his or her arrest, then under Government Code section 29550.1, the city may impose a fee upon the defendant in the amount the city owes the county.

In imposing the fee, the trial court misspoke when it referred to section "129550."

A. Crime Prevention Fine and Assessment under Section 1202.5

Defendant challenges the crime prevention fine and accompanying assessment on the ground that there is insufficient evidence to support a finding that he has the ability to pay the total of $36.50. The Attorney General argues that defendant forfeited his claim by failing to object below. We agree.

Section 1202.5, subdivision (a) mandates the imposition of $10 fine.[12] As a general rule, when a statute mandates a fine but requires the court to consider the defendant's ability to pay, the defendant must object below or demand a hearing to determine his ability to pay in order to preserve the issue for appeal, especially when, as here, the probation report recommends imposition of such a fine. If the defendant fails to do so, he or she forfeits the issue on appeal. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.) Thus, in *People v. Crittle* (2007) 154 Cal.App.4th 368 (*Crittle*), the court applied the foregoing principle to the imposition of the same type of fine imposed here. The *Crittle* court held that "[s]ince defendant did not raise the issue in the trial court, we reject his contention that the fines must be reversed because the court did not make a finding of defendant's ability to pay them, and nothing in the record shows he had the ability to pay." (*Id*. at p. 371.)

We follow *Crittle* and conclude that defendant forfeited his claim.

Relying on this court's opinion in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), defendant argues that the failure to object does not forfeit a challenge based on the ground that there is insufficient evidence to support a finding of ability to pay. Defendant's reliance on *Pacheco* is misplaced.

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[12] Section 1202.5, subdivision (a) provides, in relevant part, "(a) In any case in which a defendant is convicted of any of the offenses enumerated in Section . . . 459 . . . , the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed. If the court determines that the defendant has the ability to pay all or part of the fine, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability."

There the defendant failed to object to a $259.50 criminal justice administration fee (Gov.Code, § 29550, subd. (c) [if the arresting agency was the county] or Gov.Code, § 29550.2 [if the arresting agency was other specified arresting agencies]), a $64 per month probation fee (§ 1203.1b, subd. (a)), and a $100 attorney fee (§ 987.8). "His challenge to all three fines or fees [was] based on the court having failed to determine his ability to pay them." (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1396.) Citing *People v. Viray* (2005) 134 Cal.App.4th 1186 and *People v. Lopez* (2005) 129 Cal.App.4th 1508, we held that "claims . . . based on the insufficiency of the evidence . . . . do not require assertion in the court below to be preserved on appeal." (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.)

Nevertheless, we pointed out that the criminal justice administration fee was to cover "actual administrative costs" (*Pacheco, supra*, 187 Cal.App.4th at p. 1400); the probation fee was to cover "reasonable cost" of services and supervision after referral of the defendant to the probation officer for inquiry into ability to pay and notice of right to counsel and court hearing on ability to pay (defendant must waive right to a court determination) (*id*. at pp. 1400-1401); and the attorney fees were to cover " 'all or a portion of the cost' " (*id*. at p. 1398) after notice and hearing. We held that as to the criminal justice administration fee, no evidence supported what were the "actual administrative costs" (*id*. at p. 1400); as to the probation fee no evidence supported that the "statutory procedure" for determining or waiving ability to pay was followed and the costs "cannot be made a condition of probation" (*id*. at p. 1401); and as to the attorney fees, no evidence supported that the "statutory directive" (*id*. at p. 1398) was met and "an order directing payment of attorney fees" may not be made a condition of probation. (*Id*. at p. 1399).

Pacheco is distinguishable because section 1202.5 requires the imposition of a *definitive* fee of $10 rather than an open-ended fee in an amount to be determined. Accordingly, the probation report put defendant on notice that fine of $10 was at issue.

Under the circumstances, he was required to challenge the fee and assessment below. Furthermore, the fees in *Pacheco* were independently erroneous regardless of whether substantial evidence supported an ability to pay. No evidence supported the amount of the administrative fee, and the statutory procedures for imposing the probation and attorney fees were not followed. Moreover, the probation and attorney fees were erroneously imposed as conditions of probation.

In short, concerning the $10 fine and accompanying assessment totaling $36.50, we find *Crittle* more persuasive and appropriate to follow than *Pacheco.*

2. Criminal Justice Administration Fee under Government Code section 29550.1[13]

Defendant also challenges the $129.75 criminal justice fee again on the ground that there is insufficient evidence of his ability to pay it. Defendant acknowledges that section 29550.1 does not expressly require the court to consider his ability to pay. However, defendant opines that without such a requirement, the statute would violate his constitutional right to equal protection. Thus he argues that to save the statute from constitutional infirmity, this court must interpret it to include an ability-to-pay requirement.

The Attorney General argues that defendant forfeited both his sufficiency of the evidence and equal protection claims by failing to object below and raise the constitutional claim. The Attorney General acknowledges that in *Pacheco, supra,* 187 Cal.App.4th 1392, we rejected the forfeiture argument as applied to a criminal justice administration fee. Nevertheless, she urges us to disavow *Pacheco* and find forfeiture in this case. We decline to do so.[14] On the merits, we reject defendant's equal protection

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[13] In this section only, all unspecified statutory references are to the Government Code.

[14] The Supreme Court has granted review in a case declining to follow *Pacheco* and distinguishing *Viray.* (*People v. McCullough* (2011) 193 Cal.App.4th 864 [123 Cal.Rptr.3d 341], review granted Jun. 29, 2011, S192513.)

claim. The statutory scheme (§§ 29550-29550.2) was designed to reimburse counties for at least part of their booking costs and created three classes of arrestees. Section 29550.1, at issue in this case, applies to persons, like defendant, who were arrested by a city peace officer; we called these persons local arrestees. Section 29550, subdivision (d) applies to persons arrested by county officers, and we called them county arrestees. Section 29550.2 applies to persons arrested by non-city and non-county officers, presumably, for example, California Highway Patrol officers, and we called them state arrestees. Defendant's equal-protection claim rests on the fact that on the face of the statutes, a local arrestee may be required to pay a booking fee without any showing that he is able to pay it, whereas state and county arrestees, or at least some of them, may only be subjected to such a fee if shown to possess such ability.

For defendant to succeed on his claim, the three classes of arrestees must be "sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) However, local arrestees, such as the defendant, are not "similarly situated" to state and county arrestees. All these statutes rest on the general premise that an arrestee, if convicted or placed on probation, should generally be obligated to absorb these costs. To that extent all arrestees are similarly situated. But beyond that point, a local arrestee's situation differs from that of a state or county arrestee in two respects. First, part of his "debt" to the county has been already been defrayed by someone else—the arresting agency—which, in relation to him, stands in something like the position of a guarantor or subrogee. Second, and far more critically, the debt has been cut in half. For these reasons, when a local arrestee stands before the court at sentencing, he is not situated similarly to state and county arrestees " 'for purposes of the law challenged.' " (Cooley v. Superior Court (2002) 29 Cal.4th 228, 253.)

Furthermore, even if local arrestees were similarly situated, their differential treatment passed constitutional muster because the foregoing considerations would establish a rational basis for the differential treatment of which he complains. Section 29550.1 denies him a benefit granted to other arrestees, i.e., the possibility of avoiding an assessment because he lacks the ability to pay it. But in conjunction with section 29550(a)(1), it also grants him a benefit denied to other arrestees: in effect, automatic forgiveness of half of his debt. This arrangement grants advantages as well as disadvantages to two of the three principals: The county receives a sure source of reimbursement in exchange for writing off half its expenses; the defendant receives the benefit of the write-off but give up the opportunity to avoid all liability on grounds of inability to pay. Even the local agency receives the benefit of an evident compromise, i.e., it does not assume the county's whole burden but only half of it, and it is granted the right to reimbursement without having to prove the defendant's ability to pay. The Legislature could rationally conclude that this arrangement justifies withholding an ability-to-pay condition as to this class of arrestees because other arrestees are exposed to a potential debt of twice the size.

In sum, the statutory scheme does not violate the defendant's constitutional right to equal protection.[15] Accordingly, no finding of ability to pay was required, and the alleged insufficiency of the evidence to sustain such a finding is immaterial.

Given *Mason*, we reject defendant's equal protection claim.

XI. DISPOSITION

The judgment is modified to strike the prior-prison-term enhancement imposed under section 667.5, subdivision (b). The clerk of the superior court is ordered to correct the abstract of judgment to reflect this change and also list count 1 as a consecutive one-

[15] This equal protection claim is pending before the Supreme Court in *People v. Mason* (2012 206 Cal.App.4th 1026, review granted August 29, 2012, S203747.

third non-violent term and then transmit a copy of the corrected abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

WALSH, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.