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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HENRY KENNEDY,

Defendant and Appellant.

H037069

(Santa Clara County
Super. Ct. No. CC954314)

Defendant David Henry Kennedy was convicted after jury trial of one count of making a criminal threat to Tasha Davis and one count of making a criminal threat to Sherilyn Massaro. (Pen. Code, § 422).¹ The jury was unable to reach a verdict as to a count of making criminal threats to Tina Brown and as to a misdemeanor count of resisting an officer (§ 148, subd. (a)(1)), and the trial court dismissed those charges upon motion of the prosecutor. The court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve one year in county jail. The court separately ordered defendant to pay a presentence investigation fee of \$300 pursuant to section 1203.1b.

¹ All further statutory references are to the Penal Code.

On appeal, defendant contends that (1) the trial court's refusal to require the prosecutor to elect which act the individual charges were based on violated his rights to due process and a fair trial, (2) the court erred by giving a misleading modified instruction regarding the section 422 charges, (3) the cumulative effect of the errors requires reversal, and (4) the court improperly imposed the \$300 presentence investigation fee. We will affirm the judgment.

BACKGROUND

Defendant was charged by information with three counts of making criminal threats (§ 422; counts 1 – 3), and one count of resisting an officer (§ 148, subd. (a)(1); count 4, a misdemeanor). The alleged victim of count 1 was Tina Brown, the alleged victim of count 2 was Sherilyn Massaro, and the alleged victim of count 3 was Tasha Davis.

The Trial Evidence

On August 27, 2009, Tina Brown was the community manager, Tasha Davis was the administrative assistant, and Sherilyn Massaro was the lot inspector for the Casa de Lago mobile home park in San Jose. Their office was in the main clubhouse of the park. Defendant was a resident of the park.

Around 3:00 p.m. that day, Brown and Massaro were in the office and Davis was on her lunch break when defendant came in and angrily complained about a broken water meter hose. Brown called the maintenance crew and told them to check out the situation. Defendant left the office and sped off on a motorcycle. After the maintenance crew assessed the situation, Brown called a plumber.

When Davis returned from her lunch break around 3:45 p.m., defendant was standing at the office counter. She asked defendant if there was something she could help him with, and defendant responded, "When is he going to get here." Because Davis did not know what defendant was talking about, she spoke with Brown and then told defendant that a plumber had been contacted and would be out to his space soon.

Defendant said he would turn it off himself, but Massaro told him not to do that and that the plumber would be there as soon as he could.

Davis asked defendant what had happened. Defendant said that somebody had tied a water hose to the bumper of his truck and that when he pulled out of the driveway that morning he ripped the water meter pipe out of the ground. He said that every time the lady with brown hair drives around on a cart something happens to his space, and that he should have shot that lady when she put her foot on his motorcycle. Massaro stood up and said that she was the one on the cart and that she did not touch his motorcycle.

Defendant said that he should have shot her a long time ago. This made Massaro fear for her life. Brown walked over, moved Massaro away from the counter, and returned to her desk. Massaro stood where she could no longer see defendant, but could still hear him.

Davis put her hand on defendant's and said something to him to try to redirect his attention back to her. Defendant responded by looking at Davis and saying, "Don't tempt me. I'll kill you, too. I'll shoot you." Davis was terrified, and she told Brown that defendant had just threatened to kill her.

Brown walked up to the counter, pushed Davis aside, and addressed defendant. She told him that he needed to go back to his space to wait for the plumber. Defendant said that he wasn't going anywhere, that he would wait for the plumber where he was. Brown said that she was going to call the police and she walked away from the counter. Davis stood by a filing cabinet keeping defendant in her line of sight. Defendant stayed where he was for a moment and said, "Fuck it, I will shoot and kill you all. I don't even care." He then left the building. Davis and Massaro both heard defendant's threat and they both took it seriously. Davis told Brown what defendant had said. Brown was afraid for herself and for everybody else. She called 911 and told the dispatcher that defendant had threatened two of her employees.²

² A recording of Brown's 911 call was played for the jury.

The three women were standing at the counter when two officers arrived in response to Brown's 911 call. The women told the officers who defendant was, what he had said, and where he lived. The officers went to defendant's park space. Later, one of the officers returned to the office and requested that each of the women separately give him a statement, which they did.

Defendant did not initially cooperate with the officers when they arrived at his park space. He was eventually taken into custody. He admitted to an officer that he had told the women at the office that he had killed before and would kill again, and he admitted that it was reasonable for the women to think that he was going to return to shoot them. Two loaded guns and additional ammunition were seized from on top of the bed in defendant's residence.

Defendant did not testify in his own behalf and did not present any other defense testimony.

Verdicts and Sentencing

On May 6, 2011, the jury found defendant guilty of count 2 (§ 422; making criminal threats to Massaro) and count 3 (making criminal threats to Davis). The jury was unable to reach verdicts on count 1 (making criminal threats to Brown) and count 4 (§ 148, subd. (a)(1); misdemeanor resisting an officer), and the court declared a mistrial as to those counts.

On June 17, 2011, the court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve one year in county jail. The court separately ordered defendant to pay a presentence investigation fee of \$300 pursuant to section 1203.1b. On motion of the prosecutor, the court dismissed counts 1 and 4.

DISCUSSION

Prosecutorial Election

Background

During the discussions regarding the proposed jury instructions, defense counsel requested the prosecutor elect which act he was relying on to constitute each of the criminal threats alleged in counts 1, 2, and 3. “[T]here were statements that were brought into evidence that Mr. Kennedy is alleged to have said to Miss Massaro, something along the lines of, I should have shot your ass a long time ago, or I should have shot you a long time ago. [¶] And it was in relation to an incident that allegedly occurred where Miss Massaro touched his motorcycle. That statement in and of itself cannot constitute a 422 because it does not meet the elements of a 422 [¶] And the concern that I have is that the jury may find that that statement was made and erroneously rely upon that statement in order to arrive at a conviction on the count that goes to Miss Massaro. [¶] And so that is the reason why I requested that the District Attorney make an election so that it was clear to the jury that he was not proposing that they find a conviction based upon that statement but, rather, a later statement that was allegedly made that, I should kill you all, or I will kill you all, or I will kill everybody.”

The court stated, “I don’t think the DA is required to make an election under these circumstances.” “For one thing, the statement by itself, I should have shot you a long time ago, clearly does not comply with all the elements required in [CALCRIM No.] 1300, for reasons which are pretty obvious. [¶] And so, you know, I can’t possibly instruct the jury about every possible path they might take that would be incorrect.”

Defense counsel then submitted the following proposed pinpoint instruction: “The statement to Sherilyn Massaro, I should have shot you a long time ago, if the jury finds it to have been uttered cannot be relied upon as an act which constitutes a criminal threat as

an element of counts one, two or three.”³ The court found that the instruction was not an accurate statement of the law “because I think it can be considered as part of the entire incident.” The court suggested the following language could be given at the end of CALCRIM No. 3500, the standard unanimity instruction: “If the jury finds that some version of the statement, I should have shot you a long time ago, was made to Sherilyn Massaro, that statement cannot be solely relied upon to constitute a criminal threat in counts one, two or three.” The prosecutor “was okay with that statement,” but defense counsel was not. Counsel explained: “My concern with the instruction that the court proposed was that there could be confusion. [¶] There is evidence that, or I anticipate that there will be evidence that Mr. Kennedy had weapons, and that he was angry and he stormed out, and that the concern is, is that they could misconstrue the additional words appended to [CALCRIM No.] 3500 that those words could constitute the threat and that they would have to look at additional surrounding circumstances in order to find a 422. [¶] So I feel that in the absence of the instruction as I’ve requested it that the safer course of action would be to not alter [CALCRIM No.] 3500 at all, and so that’s my decision.” The court responded, “All right. Thank you. And that’s what I’ll do then.”

The court later instructed the jury pursuant to CALCRIM No. 3500 as follows: “The defendant is charged with making criminal threats in Count One, Two, and Three. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed.”

³ Defense counsel also offered at one point to amend the proposed pinpoint instruction by deleting the words “as an element of” at the end of the instruction.

The Parties' Contentions

On appeal, defendant contends that the court's refusal to require the prosecutor to make an election deprived him of his rights to due process and a fair trial as it precluded him from raising several key defenses. Defendant first argues that there was "strong evidence that [he] never said 'don't tempt me. . . . don't tempt me. I will kill you too. I will shoot you,' which gives rise to an argument that any verdict based on that statement is unsupported by the evidence. Unfortunately, [defendant] could not make this argument at trial because the jury's guilty verdict on Count 3 could have been based on the 'I'll kill you all' statement that Ms. Massaro heard, on both statements, or even on the 'I should have shot you back then' statement, which all agreed did not constitute a criminal threat." Defendant also argues that he was precluded from arguing below that he cannot be convicted of, or separately punished for, two counts of violating section 422 based on one threat to two victims. He argues that the giving of the standard unanimity instruction did not cure the error and that any failure by defense counsel to preserve these claims by raising them below constitutes ineffective assistance.

The People first contend that defendant's election-related arguments are forfeited by the failure to raise them below and that defense counsel was not ineffective for failing to do so. The People also contend that no prosecutorial election was required because of the court's decision to give a unanimity instruction. Lastly, the People contend that the lack of an election did not foreclose defendant from raising the defenses below that he raises here.

Analysis

Under the constitutional right to due process, a defendant "is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged." (*People v. Jones* (1990) 51 Cal.3d 294, 305.) "The general rule is that the jury must unanimously 'agree upon the commission of the same act in order to convict a defendant of a charged offense.' [Citations.] Essentially, an 'either/or' rule has evolved: '[W]hen

the accusatory pleading charges a single criminal act and the evidence shows more than one such lawful act, *either* the prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed . . . that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.’ [Citation.]” (*People v. Gear* (1993) 19 Cal.App.4th 86, 90 (*Gear*)). “This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ [Citation.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*)).

“A violation of section 422 requires: (1) the defendant willfully threatens to kill or seriously injure another person; (2) the defendant has the specific intent that the listener understands the statement to be a threat; (3) the threat and the circumstances under which it was made lead the listener to believe the defendant would immediately carry through on the threat; and (4) the threat causes the listener to suffer sustained fear based upon a reasonable belief the threat would be carried out.” (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1023-1024 (*Solis*)). A conviction under section 422 requires proof “that the defendant made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out’ ” (*People v. Toledo* (2001) 26 Cal.4th 221, 228; § 422; see CALCRIM No. 1300.) “[T]he determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone.” (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) Where the defendant does not personally make the statement to the target victim, a conviction under section 422 requires proof that the defendant specifically intended the threat to be conveyed to the target. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861-862; *People v. Felix* (2001) 92 Cal.App.4th 905, 913-914 (*Felix*)).

“ ‘Since its origin in 1872, the Penal Code has prohibited multiple punishment for a single “act or omission.” (§ 654.) . . . Since 1962 we have interpreted section 654 to allow multiple convictions arising out of a single act or omission, but to bar multiple punishment for those convictions. [Citations.] . . . [E]xecution of the sentence for one of the offenses must be stayed.’ [Citations.] [¶] Whether multiple convictions are based upon a single act is determined by examining the facts of the case.” (*People v. Mesa* (2012) 54 Cal.4th 191, 195-196.) However, section 654 does not apply to crimes of violence against multiple victims. (*Ibid.*; *People v. Oates* (2004) 32 Cal.4th 1048, 1063.)

Under the multiple victim exception to section 654, “ ‘even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim.’ ” (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.) Section 422 requires that a victim suffer harm, namely a sustained fear of death or injury (see *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140-1141), and it “constitutes a crime of psychic violence which, if directed at separate listeners (victims) who each sustain fear, can be punished separately.” (*Solis, supra*, 90 Cal.App.4th at p. 1024.) Making a criminal threat is like assaulting someone, and it is settled that a person can be convicted of and punished for multiple counts of assault based on a single assaultive act where there is more than one victim. (See *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 352; *People v. Prater* (1977) 71 Cal.App.3d 695, 699.)

Here, the prosecution charged defendant with only one count (count 3) of making a criminal threat to Davis but introduced evidence and argued to the jury that defendant made two separate but similar threats to her: (1) “Don’t tempt me. I’ll kill you, too. I’ll shoot you”; and (2) “I will shoot and kill you all. I don’t even care.” The record shows that the first threat was made solely to Davis when they were both at the counter. The second threat was made later, after everyone had left the counter and just before defendant walked out the door. The record also shows that the prosecutor argued to the

jury that defendant's second threat was the only basis for the charge involving Massaro (count 2) and the charge involving Brown (count 1), because Massaro also heard the threat and Davis communicated the threat to Brown. The prosecutor also argued to the jury that defendant's statement to Massaro that he should have shot her back when she put her foot on his motorcycle was "not a charged offense in this case [because] it doesn't [meet] all six of the[] elements. [¶] But it's something you can and should consider . . . in determining what the defendant's intention was" The court gave the standard unanimity instruction after defendant rejected the court's offer to modify it. Nothing more was required of the court or the prosecutor in this case. The prosecutor informed the jury which act or acts the People were relying on as a basis for each count, and the unanimity instruction eliminated the danger that defendant would be convicted of each count if there was no single offense which all the jurors agreed defendant committed. (*Gear, supra*, 19 Cal.App.4th at p. 90; *Russo, supra*, 25 Cal.4th at p. 1132.)

Nor can we find that defendant has shown that defense counsel rendered ineffective assistance by failing to raise below the issues he has raised on appeal, that the failure by the prosecutor to make an election precluded him from raising several key defenses. " "[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his [or her] 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' (*Strickland v. Washington* [(1984)] 466 U.S. 668, 687-688 . . .) Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 925.)

In this case, defense counsel cannot be faulted for failing to raise an argument in the trial court that any verdict based on defendant's first threat to Davis—"Don't tempt me. I'll kill you, too. I'll shoot you"—was unsupported by the evidence. Assuming that the jury's verdict on count 3 was based on that reported threat, Davis's testimony regarding the threat is sufficient evidence to support the verdict even though Massaro and Brown did not hear defendant make such a threat. " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) Davis's testimony did not describe facts or events that were physically impossible or inherently improbable.

Additionally, counsel cannot be faulted for failing to argue below that defendant cannot be convicted of or sentenced for making more than one criminal threat. A single criminal threat directed at multiple victims, such as defendant's reported threat that he would kill or shoot "you all," can support multiple convictions. (*Solis, supra*, 90 Cal.App.4th at p. 1024.) At sentencing, the court suspended imposition of sentence and placed defendant on probation. Although the clerk's minutes state that the court imposed a one-year jail term on count 2 with a concurrent one-year term on count 3, the court's oral pronouncement of judgment was simply that one of the conditions of defendant's probation was that "[a] county jail sentence of one year is imposed and the defendant will receive no credits because he is waiving his credits" Defendant has not shown that he has suffered multiple punishment and counsel is not foreclosed from raising a section 654 argument if and when defendant violates the terms of his probation and the court

decides to impose sentence. In sum, defendant has not shown that he was prejudiced by any alleged omissions of trial counsel.

CALCRIM No. 1300

When the court instructed the jury after the close of evidence, it gave CALCRIM No. 1300, the standard instruction on section 422, three times, one for each of counts 1, 2, and 3. Each time it was given, the alleged individual victim of the specified count was clearly stated. The court also gave CALCRIM No. 3500, the standard unanimity instruction, and CALCRIM No. 3515, which states: “Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.” In addition, the court provided the jury members individual copies of all its instructions.

However, in its pre-instructions to the jury before the presentation of the evidence, and again during deliberations in response to a jury question, the court gave a single revised version of CALCRIM No. 1300 which included all three alleged victims’ names.⁴

⁴ The jury’s question was: “Does a threat to an individual have to be a direct statement to that person or can a threat to a person be recounted by a third party?” The court’s answer was as follows: “A revised version of 1300 is below. For convenience, all the alleged victims’ names have been included in one instruction. Please see if the change to ‘3’ answers your question. [¶] 1300. [¶] The defendant is charged with having made a criminal threat in Count One. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Tina Brown and/or Sherilyn Massaro and/or Tasha Davis; [¶] 2. The defendant made the threat orally; [¶] 3. The defendant intended that his statement be understood as a threat *and intended that it be communicated to Tina Brown and/or Sherilyn Massaro and/or Tasha [Davis]*; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to *Tina Brown and/or Sherilyn Massaro and/or Tasha Davis* a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused *Tina Brown and/or Sherilyn Massaro and/or Tasha Davis* to be in sustained fear for her own safety; [¶] And [¶] 6. The fear of *Tina Brown and/or Sherilyn Massaro and/or Tasha Davis* was reasonable under the circumstances. [¶] Someone commits an act willfully when he does it willingly or on purpose. In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves,

Defendant objected to the italicized language in paragraph 3 of the revised instruction given during deliberations on “due process grounds . . . because that language was not included in the instructions prior to argument.” The court explained that the italicized language was “specifically from the approved language for 1300” and that it put the alleged victims’ names all in one instruction “for convenience sake” and “[s]o I didn’t single out any person. . . .”

On appeal, defendant contends that the court erred when it modified CALCRIM No. 1300 by including all three alleged victims’ names in one instruction because it was misleading and “permitted the case to go to the jury on a legally and factually incorrect theory of guilt, namely, that [defendant] could have violated Penal Code section 422 three times by directing any or all of the statements he made towards any or all of the three alleged victims. This theory was factually incorrect in that not all statements had been heard by all victims. It was legally incorrect in that a single threat uttered to two victims does not constitute multiple violations of the statute.” Defendant further contends that “under the circumstances, the trial court had a duty to instruct the jury, even in the absence of a request by counsel, that it had to agree on a separate and distinct factual basis for each verdict.”

The People contend that defendant has forfeited these claims on appeal by failing to raise them below. The People further contend that “the modified instruction neither offered a factually impermissible nor a legally infirm theory,” and that the court’s unanimity instruction ensured unanimous verdicts.

as well as the surrounding circumstances. [¶] Someone who intends that the statement be understood as a threat does not have to actually intend to carry out the threatened act. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Sustained fear means fear for [a] period of time that is more than momentary, fleeting, or transitory. [¶] An immediate ability to carry out the threat is not required.”

We have previously stated that a single threat, if directed at separate listeners (victims) who each sustain fear, can support multiple convictions and punishments under section 422. (*Solis, supra*, 90 Cal.App.4th at pp. 1023-1024.) It was for the jury to determine whether defendant made a criminal threat that he intended the victims to either hear or have communicated to them. (*Felix, supra*, 92 Cal.App.4th 913-914.) Accordingly, the modified instruction was not legally incorrect, nor did it permit a guilty verdict on a factually impermissible theory. Additionally, the court's instructions to the jury pursuant to CALCRIM Nos. 3500 and 3515 ensured that the jury had to separately agree on a factual basis for each count and to arrive at unanimous verdicts. No error has been shown.

Cumulative Error

Defendant contends that “the injurious effect of the combination of judicial errors and ineffective assistance of counsel” constitutes “cumulative prejudice in violation of his due process rights” (See *Chambers v. Mississippi* (1973) 410 U.S. 284.) As we have found neither judicial error nor ineffective assistance of counsel, we need not further address defendant's claim.

Presentence Investigation Fee

The testimony at trial showed that defendant possesses a truck and a motorcycle, and the summary of defendant's offense in the probation report also mentions the truck and motorcycle. The probation report also states that defendant has a GED, that he worked as a shop foreman from 1999 to 2007, that he has worked as a construction foreman since 2008 at \$14 per hour, and that he has no prior criminal history. In the report, the probation officer recommended that defendant be ordered to pay a presentence investigation fee not to exceed \$450. At sentencing, the court ordered as one of the conditions of defendant's probation that he “seek and maintain gainful employment.” When the court was considering whether to order defendant to pay a presentence investigation fee, the probation officer stated: “I believe the court can set it not to exceed

\$450. And if there is an issue with his ability to pay I do believe the Department of Revenue can set them out.” Defense counsel then stated: “Your Honor, I believe [defendant] is going to have difficulty paying and I would request the court waive that fee or set it at a lower amount.” The court responded: “I am not going to waive it. I will set it at \$300. [¶] It is imposed pursuant to section 1203.1[b] of the Penal Code.”

On appeal, defendant contends that there is insufficient evidence to support the court’s imposition of a \$300 presentence investigation fee over his objection. “The trial court refused to consider his ability to pay. There is no evidence that the probation officer made any determination of ability to pay, nor is there any evidence in the record that [he] was advised of his right to have the court make this determination or that he waived this right. Accordingly, the case should be remanded . . . with instructions to determine [defendant’s] ability to pay before imposing this fee.”

The People contend that, “[e]ven assuming the trial court’s statement was not an explicit finding of [defendant’s] ability to pay the fee, ‘substantial evidence’ supports an implied finding.”

Section 1203.1b, subdivision (a), provides in pertinent part: “In any case . . . in which a defendant is granted probation . . . , the probation officer . . . shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of . . . conducting any presentence investigation and preparing any presentence report The reasonable cost of these services . . . shall not exceed the amount determined to be the actual average cost thereof. . . . The court shall order the defendant to appear before the probation officer . . . to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer . . . shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the

payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”

Section 1203.1b, subdivision (b), provides that when “the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer” While the court’s finding that the defendant has the ability to pay the ordered presentence investigation fee may be implied, the finding must be supported by substantial evidence. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398.)

In this case, prior to sentencing, defendant appeared before the probation officer who ascertained defendant’s educational background, employment history, and possession of a truck and a motorcycle. The probation officer then recommended to the court that defendant be ordered to pay a \$450 presentence investigation fee. At the sentencing hearing, defendant contested his ability to pay that amount and he asked that the court waive the fee or lower the amount. The court then lowered the amount to \$300. On this record, we cannot say that the trial court refused to consider defendant’s ability to pay the ordered \$300 presentence investigation fee. Rather, that the court found that defendant has the ability to pay the ordered fee is implied. Further, the finding is amply supported by evidence in the record, given defendant’s possession of a truck and a motorcycle, his employment history, and the probation condition that he seek and maintain employment during the probationary period. (See e.g., *People v. Hoover* (2011) 199 Cal.App.4th 1470, 1472-1473 [ability to pay was based on the defendant’s possession of a cell phone and car, and the area in which he lived].) No remand for a determination of defendant’s ability to pay is required.

DISPOSITION

The judgment (order of probation) is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

GROVER, J.*

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