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

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL ESCOBAR,

Defendant and Appellant.

H041060

(Santa Clara County

Super. Ct. No. E1007908)

**I. INTRODUCTION**

Defendant Miguel Angel Escobar was convicted after jury trial of aggravated sexual assault of a child under the age of 14 (former Pen. Code, § 269, subd. (a)(1)).<sup>1</sup> The trial court sentenced defendant to prison for 15 years to life. Defendant was ordered to pay various fines and fees, including a restitution fine of \$10,000, a corresponding suspended parole revocation restitution fine of \$10,000, a \$300 fine under section 290.3 plus penalty assessments, a presentence investigation fee of \$200, and a criminal justice administration fee of \$129.75.

On appeal, defendant contends that the restitution fines, the section 290.3 fine, and the penalty assessments must be reduced; that the penalty assessments must be specifically listed in the abstract of judgment; and that the presentence investigation fee

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

and the criminal justice administration fee should be stricken or remanded for an ability-to-pay determination.

We agree with defendant that the section 290.3 fine and associated penalty assessments must be reduced, and that the penalty assessments must be specifically listed in the abstract of judgment. We will affirm the judgment as so modified.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Defendant was charged by first amended information in 2013 with aggravated sexual assault of a child under 14 (former § 269, subd. (a)(1)). The offense allegedly took place on or about, and between, September 27, 1995, and September 26, 1998, when the child was three to four years old.

The jury trial was held in October 2013. The evidence included testimony from the victim, who was 20 years old at the time of trial. The victim testified that defendant, her grandfather, raped her when she was four years old. The victim testified that the rape lasted a “long time,” or approximately 20 to 30 minutes. She felt “something ripping inside” and a lot of pain. She later saw blood on her leg. Defendant had been her babysitter at the time. The victim had nightmares and “flashbacks” about the incident as a teenager. On October 24, 2013, the jury found defendant guilty of aggravated sexual assault of a child under 14 (former § 269, subd. (a)(1)).

The sentencing hearing was held in March 2014. The trial court sentenced defendant to prison for 15 years to life. The court also ordered defendant to pay various fines and fees, including a restitution fine of \$10,000, a corresponding suspended parole revocation restitution fine of \$10,000, a \$300 fine under section 290.3 plus penalty assessments, a presentence investigation fee of \$200, and a criminal justice administration fee of \$129.75. Defendant was also ordered to pay restitution as determined by the court, including \$1,530 to the Victim Compensation and Government Claims Board for the victim’s mental health costs.

### **III. DISCUSSION**

#### ***A. Restitution Fine and Parole Revocation Restitution Fine***

##### **1. The parties' contentions**

Defendant contends the \$10,000 restitution fine and the corresponding parole revocation restitution fine must each be reduced to \$200, or at least reduced to \$3,000. Regarding a reduction to \$200, defendant argues that the trial court abused its discretion in imposing the statutory maximum restitution fine (\$10,000) under the facts of this case, and that it should be reduced to \$200, the statutory minimum in effect at the time of his crime.

Regarding a reduction to \$3,000, defendant argues as follows: (1) the probation report referred to the formula set forth in section 1202.4, subdivision (b)(2) in calculating and initially recommending a restitution fine of \$3,000; (2) although the trial court imposed a \$10,000 fine, the court intended to impose a restitution fine in accordance with the formula because it expressly incorporated the statutory references from the probation report; and (3) using the statutory formula, defendant's restitution fine should only be \$3,000 based on his 15 year-to-life sentence. Defendant contends that the court accepted the "erroneous representations of the probation officer [at the sentencing hearing] that \$10,000.00 was the correct amount according to the formula because this was a 'life' case," and thus the court misunderstood the law in imposing a \$10,000 restitution fine.

Defendant further contends that, to the extent these claims were forfeited by the failure to object below, his trial counsel rendered ineffective assistance of counsel.

The Attorney General argues that defendant's claims are forfeited. The Attorney General further contends that the trial court did not err in imposing the \$10,000 restitution fine, and that defendant cannot establish ineffective assistance of counsel.

##### **2. Background**

In the probation report, the probation officer recommended that a restitution fine of \$3,000 "be imposed under the formula permitted by Penal Code Section 1202.4(b)(2)."

The sentencing hearing was continued to a new date, and a different probation officer appeared at the continued hearing and requested modifications to the probation report. Relevant here, the probation officer at the sentencing hearing recommended that the restitution fine be modified “to the maximum allowable because it is a life sentence, so it’s \$10,000.” The trial court acknowledged the modification by stating, “All right,” and the probation officer proceeded to request other modifications to the probation report.

After the probation officer’s oral modifications to the probation report, the trial court gave the parties the opportunity to make corrections or modifications to the probation report and to make further statements regarding defendant’s sentence. The parties submitted the matter based on arguments they had made prior to the probation officer’s modification of the probation report. Defendant had primarily argued that probation should be granted, and he raised no objection to any particular fine or fee.

In sentencing defendant, the trial court stated at the outset: “So for the record, I am incorporating by reference into my judgment the statutory references in the probation report recommendations.” The court proceeded to set forth its reasons for denying probation. The court acknowledged defendant’s age (68 years old) and serious health conditions, but concluded that “given the nature, the seriousness and the circumstances of this crime as found by the jury, and in particular the age of the victim and the relationship between [defendant] and the victim,” probation was not “appropriate in this case.” The court proceeded to sentence defendant to prison, grant custody credits, and order the payment of various fines and fees, including a restitution fine of \$10,000 and a suspended parole revocation restitution fine of \$10,000.

### **3. Analysis**

Section 1202.4 generally requires the imposition of a restitution fine in every case where a person is convicted of a crime. During the timeframe that defendant committed his crime, former section 1202.4, subdivision (b) provided that the restitution fine “shall be set at the discretion of the court and commensurate with the seriousness of the offense,

but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000)” if the person is convicted of a felony. (Stats. 1995, ch. 313, § 5; Stats. 1997, ch. 527, § 4; see *People v. Souza* (2012) 54 Cal.4th 90, 143 [restitution fine must be based on the law at the time the offense was committed].) Further, former subdivision (b), and subsequently former subdivision (b)(2), provided that “the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (Stats. 1995, ch. 313, § 5 [§ 1202.4, former subd. (b)]; Stats. 1997, ch. 527, § 4 [§ 1202.4, former subd. (b)(2)].)

Section 1202.45 requires the court to also impose a parole revocation restitution fine in the same amount as the restitution fine under section 1202.4, with the additional fine suspended unless and until parole is revoked. (§ 1202.45, subd. (a); see also Stats. 1995, ch. 313, § 6, eff. Aug. 3, 1995 [former § 1202.45].)

We review the ordered restitution fine under section 1202.4 for abuse of discretion. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 (*Nelson*).) A court abuses its discretion “when its determination is arbitrary or capricious or ‘ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ’ [Citations.]” (*People v. Welch* (1993) 5 Cal.4th 228, 234.) Moreover, “[a] discretionary order based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal . . . .” (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26, italics omitted; accord *In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *People v. Knoller* (2007) 41 Cal.4th 139, 156.)

In this case, defendant did not object to the restitution fine in the trial court. “[A]ll ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ raised for the first time on appeal are not subject to review. [Citations.]” (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*); see also *People v. Scott* (1994) 9 Cal.4th 331, 351-354, 356; *Nelson, supra*, 51 Cal.4th at p. 227.)

A “narrow exception” exists for “ “unauthorized sentences” or sentences entered in “excess of jurisdiction.” ’ [Citation.] Because these sentences ‘could not lawfully be imposed under any circumstance in the particular case’ [citation], they are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court.’ [Citation.]” (*Smith, supra*, 24 Cal.4th at p. 852.) Appellate intervention is “appropriate” in such cases because the errors present “ ‘pure questions of law’ [citation]” and are “ “clear and correctable” independent of any factual issues presented by the record at sentencing.’ [Citation.]” (*Ibid.*)

In this case, it cannot be said that a \$10,000 restitution fine could not have been lawfully imposed, as section 1202.4 has at all relevant times expressly authorized a maximum fine amount of \$10,000. (Stats. 1995, ch. 313, § 5 [§ 1202.4 former subd. (b)]; Stats. 1997, ch. 527, § 4 [§ 1202.4 former subd. (b)(1)].) It thus appears that defendant’s claims of error regarding the ordered restitution fine are forfeited by failing to object below.

However, even assuming defendant’s claims are not forfeited, we determine that he fails to establish a basis for reducing the restitution fine.

First, defendant fails to establish that the trial court abused its discretion in imposing the statutory maximum restitution fine of \$10,000 rather than the statutory minimum at the time of his offense of \$200.

Defendant contends that the statutory minimum fine was warranted based on the following circumstances. At the time of sentencing, defendant was 68 years old and ill with diabetes and, according to defendant, other ailments “including a possible cancer diagnosis.” Defendant further argues that the probation report contains no information about his past employment and earnings, and that there was evidence he worked at home sewing clothes during the time of the offense. According to defendant, “he will most likely die while incarcerated” in view of his 15-year-to-life sentence. Defendant contends that the crime was a “one-time occurrence involving one victim,” and that he

was also ordered to pay victim restitution in the amount of \$1,530 for the victim's mental health treatment costs.

Section 1202.4 requires the amount of the restitution fine to be "commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1); see also Stats. 1995, ch. 313, § 5; Stats. 1997, ch. 527, § 4.) In setting the restitution fine in excess of the statutory minimum, former subdivision (d) of section 1202.4 stated: "[T]he court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. *A defendant shall bear the burden of demonstrating lack of his or her ability to pay.* Express findings by the court as to the factors bearing on the amount of the fine shall not be required." (Stats. 1995, ch. 313, § 5, italics added; see Stats. 1997, ch. 527, § 4.)

Although the trial court was not required to make express findings regarding the factors bearing on the amount of the fine, the court did discuss several of those factors in denying probation. In particular, the court acknowledged defendant's age and his serious health conditions, but concluded that "given the nature, the seriousness and the circumstances of this crime as found by the jury, and in particular the age of the victim and the relationship between [defendant] and the victim," probation was not "appropriate in this case."

Regarding the circumstances of the offense, the record reflects that defendant was in his early fifties when he committed the offense against his granddaughter. During a time when defendant was supposed to be taking care of the victim, he raped her. The

victim suffered physically and mentally, and she continued to have nightmares as a teenager. According to the probation report, the victim as a teenager told the police that she had been “dramatically” affected by the incident. She had concentration problems, her grades suffered, and she had to seek therapy. The probation officer observed that the “emotional” and/or “psychological impact this offense has had on the victim is momentous.”

At the sentencing hearing, defendant never established that his health conditions prevented him from earning income in the past or in the future, or that his financial situation was such that he could not pay a restitution fine in excess of \$200. The trial court also had the opportunity to observe defendant’s physical condition at the sentencing hearing.

Based on the relevant factors, including the seriousness of the offense, the circumstances of its commission, the continuing psychological harm suffered by the victim, and the paucity of evidence concerning defendant’s inability to pay, we cannot say that the trial court abused its discretion in ordering a restitution fine of \$10,000.

Second, regarding defendant’s contention that the restitution fine should be reduced to \$3,000, we are not persuaded that the record reflects the trial court’s “misunderstanding of the law” regarding the statutory formula and the ordered \$10,000 restitution fine. Error must be affirmatively shown (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564) and, “[a]s a general rule, we presume that the trial court has properly followed established law” (*People v. Diaz* (1992) 3 Cal.4th 495, 567 (*Diaz*)).

Although the initial recommendation in the probation report was for a restitution fine of \$3,000 “under the formula permitted by Penal Code Section 1202.4(b)(2),” we do not believe the court’s general statement at the outset of the imposition of sentence – that it was “incorporating by reference into [the] judgment the statutory references in the probation report recommendations” – literally meant that the ordered \$10,000 restitution fine was the product of the statutory formula. The probation report contained numerous

statutory citations bearing on different aspects of defendant's sentence, including regarding fines, fees, restitution, and parole. Neither the trial court, nor the probation officer who requested the modified \$10,000 restitution fine at the sentencing hearing, invoked the word "formula," and neither the trial court nor the probation officer made any years-based calculation of the type offered in the statutory formula.

Moreover, the amount of the restitution fine is discretionary, and use of the statutory formula is discretionary. As we have explained, the court acted well within its discretion in imposing the maximum statutory fine given the circumstances of this case, where defendant raped his four-year-old granddaughter.

In sum, we are not persuaded that the trial court's general incorporation of the probation report's "statutory references" meant that the ordered restitution fine was the product of the statutory formula, particularly where use of the formula is itself discretionary. Rather, the court's comment may reasonably be interpreted as referring generally to the statutory basis for the restitution fine under section 1202.4.

Accordingly, defendant fails to demonstrate error in the imposition of the \$10,000 restitution fine and corresponding parole revocation restitution fine. In the absence of a showing of error, we need not address defendant's contention that trial counsel rendered ineffective assistance by failing to object to the fines.

***B. Section 290.3 Fine***

Defendant was ordered to pay a \$300 fine pursuant to section 290.3, plus penalty assessments. The trial court did not expressly state the amount of the penalty assessments or the statutory basis for the penalty assessments. The minutes of the sentencing hearing and the abstract of judgment reflect a total penalty assessment of \$510.

Defendant contends that, at the time of his offense, the amount of the fine under section 290.3 was only \$200, and that imposition of a greater amount violates the ex post facto provisions of the federal and state Constitutions. He further contends that the

penalty assessments on a reduced fine must accordingly be reduced, and that the amounts and statutory bases for the penalty assessments must be listed in the abstract of judgment.

The Attorney General contends that defendant has waived his challenge to the section 290.3 fine by failing to raise it below. The Attorney General also contends that further specificity regarding the penalty assessments is not required.

As we explained above, an exception exists to the forfeiture rule for unauthorized sentences, which “ ‘could not lawfully be imposed under any circumstance in the particular case.’ ” (*Smith, supra*, 24 Cal.4th at p. 852.) Such sentences “are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court.’ [Citation.]” (*Ibid.*) We therefore turn to the issue of whether the trial court could lawfully impose a \$300 fine under section 290.3.

Section 290.3 provides that every person convicted of an offense specified in section 290 “shall . . . be punished by a fine.” (§ 290, subd. (a).) Defendant’s offense, a violation of section 269, is among the offenses listed in section 290. (§ 290, subd. (c).) Beginning in 1995, the fine required under section 290.3 was \$200 for the first conviction. (Stats. 1994, ch. 866, § 1; Stats. 1994, ch. 867, § 3.5.) In 2006, the fine was increased to \$300 for the first conviction. (Stats. 2006, ch. 337, §§ 18, 62, eff. Sept. 20, 2006; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248 (*Valenzuela*).) Because the fine in section 290.3 is punitive on its face, to avoid the prohibition against ex post facto laws the amount of the fine must be determined as of the date of the offense. (See *People v. Alford* (2007) 42 Cal.4th 749, 755.)

Defendant committed his offense in the late 1990’s. At that time, the only amount that could have been lawfully imposed on defendant under section 290.3 was \$200. The ordered \$300 fine was therefore unauthorized and must be reduced. (See *Valenzuela, supra*, 172 Cal.App.4th at pp. 1248-1249.)

The parties agree that defendant’s fine is subject to two penalty assessments that were in effect at the time he committed his offense: (1) a 100 percent state penalty

assessment under section 1464, and (2) a 70 percent additional penalty under Government Code section 76000. Thus, defendant's section 290.3 fine is subject to a penalty assessment of \$200 under section 1464, and a penalty assessment of \$140 under Government Code section 76000.

The trial court clerk must list the amount and statutory basis for each penalty assessment in the abstract of judgment. (*People v. Hamed* (2013) 221 Cal.App.4th 928, 940.) This assists the Department of Corrections and Rehabilitation in "fulfill[ing] its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency" and assists state and local agencies "in their collection efforts." (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

Accordingly, we will order the judgment modified to reflect the imposition of a \$200 fine under section 290.3, a penalty assessment of \$200 under section 1464, and a penalty assessment of \$140 under Government Code section 76000. We will also order the amounts and statutory basis for the penalty assessments be included in the abstract of judgment.

### ***C. Presentence Investigation Fee***

The probation officer's preparation of the probation report included interviewing defendant. In the probation report, the probation officer recommended that defendant be ordered to pay a presentence investigation fee not to exceed \$450 pursuant to section 1203.1b. The trial court ultimately ordered defendant to pay a presentence investigation fee of \$200.

On appeal, defendant contends that he lacked the ability to pay the fee. He argues that the fee should be stricken or the matter should be remanded for a determination of his ability to pay. Although he failed to raise the ability-to-pay issue below, defendant argues that his claim on appeal is not forfeited. To the extent the claim is forfeited, defendant contends that his trial counsel rendered ineffective assistance of counsel.

The Attorney General contends that defendant's claim is forfeited by his failure to raise it below. The Attorney General further contends that the record supports an implied finding by the trial court of defendant's ability to pay, and that defendant fails to establish that his counsel rendered ineffective assistance of counsel.

Section 1203.1b, subdivision (b) provides that "[t]he court shall order the defendant to pay the reasonable costs [of any presentence investigation and report] if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." These costs may be imposed where the defendant is granted probation or sentenced to prison. (§ 1203.1b, subd. (a); *People v. Robinson* (2002) 104 Cal.App.4th 902, 903-905; *People v. Orozco* (2011) 199 Cal.App.4th 189, 191-193.)

Section 1203.1b sets forth the procedure the trial court must follow before ordering the payment of presentence investigation costs. The court shall first order the defendant to appear before the probation officer so that the officer may ascertain the defendant's ability to pay any part of these costs, and to propose a payment schedule. (§ 1203.1b, subd. (a).) The probation officer must inform the defendant of the right to a court hearing on the ability to pay issue. (*Ibid.*) Unless the defendant waives the right "by a knowing and intelligent waiver" (*ibid.*), the defendant is entitled to a court hearing on his or her ability to pay the costs (*id.*, subd. (b)).

In *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*), the California Supreme Court concluded that the forfeiture rule applies to claims under section 1203.1b "[n]otwithstanding the statute's procedural requirements." (*Trujillo, supra*, at p. 858.) In *Trujillo*, the defendant refused to be interviewed by the probation officer while the presentence investigation report was being prepared. (*Id.* at p. 855.) The report was thus "completed without the benefit of defendant's input regarding either the facts of the offense or her personal financial status, and evidently without obtaining the knowing and intelligent waiver contemplated by section 1203.1b, subdivision (a). At sentencing,

defense counsel acknowledged having received the presentence investigation report and raised no objection to it. The court generally followed the report's recommendations respecting fees and fines." (*Ibid.*) The court placed the defendant on probation and ordered her to pay a presentence investigation fee and a monthly probation supervision fee. (*Id.* at p. 854.) The defendant did not object to the fees in the trial court and did not assert an inability to pay them. (*Ibid.*)

On appeal, the defendant contended that the court had failed to determine her ability to pay the fees as required by section 1203.1b. (*Trujillo, supra*, 60 Cal.4th at p. 854.) The Court of Appeal determined that the matter should be remanded because the record did not reflect that the trial court or the probation officer had complied with section 1203.1b's procedural safeguards. (*Id.* at pp. 854-855.)

The California Supreme Court concluded that it was "appropriate" to "place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal." (*Trujillo, supra*, 60 Cal.4th at p. 858.) The court stated that the defendant's counsel "presumably was aware of the knowing and intelligent waiver requirement and was in a position to advise" the defendant about her rights under section 1203.1b. (*Ibid.*) The court also observed that the defendant had "never claimed a lack of notice of the amounts of the fees the court might impose." (*Ibid.*) Further, "[r]epresented by counsel, defendant made no objection at sentencing to the amount of probation-related fees imposed or the process, or lack thereof, by which she was ordered to pay them . . . ." (*Id.* at pp. 858-859.) The defendant had thus "tacitly assented below" to imposition of the fees. (*Id.* at p. 859.)

The California Supreme Court explained that, "[i]n the context of section 1203.1b, a defendant's making or failing to make a knowing and intelligent waiver occurs before the probation officer, off the record and outside the sentencing court's presence. Although the statute contemplates that when the defendant fails to waive a court hearing, the probation officer will refer the question of the defendant's ability to pay probation

costs to the court, the defendant—or his or her counsel—is in a better position than the trial court to know whether the defendant is in fact invoking the right to a court hearing.” (*Trujillo, supra*, 60 Cal.4th at p. 858.) The *Trujillo* court reasoned that, “unlike cases in which either statute or case law requires an affirmative showing on the record of the knowing and intelligent nature of a waiver, in this context defendant’s counsel is in the best position to determine whether defendant has knowingly and intelligently waived the right to a court hearing. It follows that an appellate court is not well positioned to review this question in the first instance.” (*Id.* at p. 860.)

Defendant contends that *Trujillo* is distinguishable and the forfeiture rule does not apply because he was sentenced to prison whereas the defendant in *Trujillo* was placed on probation.

We do not believe this distinction is material to the issue of whether defendant’s claim is forfeited. In *Trujillo*, the California Supreme Court provided a detailed explanation of why the forfeiture rule applied to the defendant’s claim. After concluding that the defendant’s claim was forfeited, the California Supreme Court stated in the last paragraph of the opinion that “[a] defendant who by forfeiture of a hearing is precluded from raising on appeal the issue of ability to pay probation-related fees is not wholly without recourse.” (*Trujillo, supra*, 60 Cal.4th at p. 860.) The California Supreme Court thereafter explained that the sentencing court and the probation officer “retain[] jurisdiction to address ability to pay issues throughout the probationary period.” (*Id.* at p. 861.)

By referring to a probationary defendant’s “recourse” after “forfeiture,” it is apparent that the existence of such recourse was not a basis for the California Supreme Court’s determination that the forfeiture rule applied. (*Trujillo, supra*, 60 Cal.4th at p. 860.) Accordingly, we determine that, based on *Trujillo*, defendant forfeited his ability-to-pay claim regarding the presentence investigation fee by failing to raise it below, notwithstanding the imposition of a prison sentence in his case. We therefore turn

to defendant's contention that his trial counsel rendered ineffective assistance by failing to object to the presentence investigation fee.

In order to establish a claim of ineffective assistance of counsel, the defendant has the burden of demonstrating, among other matters, “ ‘that counsel’s performance was deficient because it “fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.” [Citations.] Unless a defendant establishes the contrary, we shall presume 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.” [Citation.] If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel must be rejected “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” [Citations.]’ ” (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).

Under section 1203.1b, “[t]he term ‘ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation . . . , and shall include, but shall not be limited to, the defendant’s: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant’s financial capability to reimburse the county for the costs.” (§ 1203.1b, subd. (e).)

In this case, the record is silent as to why trial counsel did not object to the \$200 presentence investigation fee. Trial counsel may have been aware of facts, such as defendant’s overall financial condition, that would have supported an ability-to-pay finding, even after taking into consideration the other amounts defendant was ordered to

pay and his age, health, and length of sentence. Because defendant fails to demonstrate that “there simply could be no satisfactory explanation” for trial counsel’s lack of objection to the presentence investigation fee, we reject defendant’s claim of ineffective assistance of counsel. (*Lopez, supra*, 42 Cal.4th at p. 966.)

**D. Criminal Justice Administration Fee**

The probation officer recommended in the probation report that defendant pay a criminal justice administration fee of \$129.75 to the City of Sunnyvale “pursuant to Government Code [sections] 29550, 29550.1 and 29550.2.” At sentencing, the trial court imposed a criminal justice administration fee of \$129.75 payable to the City of Sunnyvale.

Defendant contends that he “had the right to a determination of his ability pay this . . . fee before the court ordered payment.” He acknowledges that his ability-to-pay claim is forfeited by the failure to object below, but he contends that trial counsel rendered ineffective assistance by not objecting to the fee. The Attorney General contends that defendant’s ineffective assistance of counsel claim is without merit.

Government Code sections 29550, 29550.1, and 29550.2 authorize the imposition of a criminal justice administration fee on an arrestee who is ultimately convicted in order to cover the expenses involved in booking or otherwise processing the arrestee in a county jail. In determining which statute applies and whether to order the fee payment, a trial court must consider which governmental entity arrested the defendant and whether the defendant was sentenced to prison. (*People v. McCullough* (2013) 56 Cal.4th 589, 592 (*McCullough*)). In this case, defendant “believes” the fee was imposed under Government Code section 29550.1. Government Code section 29550.1 does not, however, contain a provision requiring a finding that the defendant has the ability to pay the fee, whereas Government Code sections 29550 and 29550.2 expressly include such a requirement. (*Id.*, §§ 29550, subd. (d)(2), 29550.2, subd. (a)).

In the absence of a requirement that the trial court make an ability-to-pay determination, trial counsel did not provide ineffective assistance by failing to object to the fee on this ground. (See *Diaz, supra*, 3 Cal.4th at p. 562 [counsel does not render ineffective assistance by failing to make a futile objection].) Moreover, even assuming the trial court was required to make an ability-to-pay determination, defendant forfeited the claim by failing to object below (*McCullough, supra*, 56 Cal.4th at p. 597) and, as we have explained with respect to the presentence investigation fee, defendant fails to demonstrate that “ ‘there simply could be no satisfactory explanation’ ” for trial counsel’s lack of objection to the criminal justice administration fee. (*Lopez, supra*, 42 Cal.4th at p. 966.) We therefore reject defendant’s claim of ineffective assistance of counsel.

#### **IV. DISPOSITION**

The judgment is ordered modified by (1) reducing the fine imposed on defendant under Penal Code section 290.3 to \$200, (2) reducing the Penal Code section 1464 penalty assessment on the fine to \$200, and (3) reducing the Government Code section 76000 penalty assessment on the fine to \$140. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment that includes the amount of and statutory basis for each of the two penalty assessments on the Penal Code section 290.3 fine, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.

*People v. Escobar*  
**H041060**