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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUCAS JULIAN NOUVET, Defendant and Appellant.	H046198 (Santa Clara County Super. Ct. No. C1774599)

Defendant Lucas Julian Nouvet pleaded no contest to assault with a deadly weapon and admitted an associated firearm enhancement in exchange for the dismissal of other charges and enhancement allegations and an eight-year prison sentence. In accordance with defendant's negotiated plea agreement, the trial court sentenced him to eight years in prison. On appeal, defendant's counsel filed an opening brief in which no issues are raised and asked this court to independently review the record under *People v. Wende* (1979) 25 Cal.3d 436. We sent a letter to defendant notifying him of his right to submit a written argument on his own behalf on appeal. He has not done so.

We requested supplemental briefing regarding the propriety of defendant's conviction for assault with a deadly weapon *other than a firearm* and whether, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court erred in imposing any fines or fees without ascertaining defendant's ability to pay. We shall affirm. We conclude that the court properly accepted defendant's plea. With respect to *Dueñas*, we conclude that defendant has not forfeited the argument despite his failure to raise it in the

trial court, but conclude that any error in failing to hold an inability-to-pay hearing was harmless here.

I. BACKGROUND

A. Factual Summary[1]

In the early evening on October 2, 2017, defendant shot the victim twice following a confrontation. Defendant, who was 20 years old at the time, fled on foot but was apprehended quickly. He told officers he was the shooter and that he shot the victim because the victim hit him. Witnesses also identified defendant as the shooter during in-field show ups. Police officers found a six-inch square plastic bag full of marijuana, a digital scale, and $316 in cash on defendant's person and more marijuana, two cell phones, and a loaded handgun in his backpack. The victim suffered injuries to his small bowel, pancreas, kidney, and a major artery.

B. Procedural History

The Santa Clara County District Attorney filed a felony complaint on October 5, 2017, charging defendant with attempted murder (Pen. Code, §§ 664, subd. (a), 187)[2] and possession for sale of marijuana (Health & Saf. Code, § 11359, subd. (b)), a misdemeanor. The complaint also alleged that, in the commission of the attempted murder, defendant had personally and intentionally discharged a firearm and caused great bodily injury to a non-accomplice (§§ 12022.7, 12022.53, subds. (b)-(d)).

On March 9, 2018, the court granted the prosecutor's motion to amend the complaint to add a third count—a violation of section 245, subdivision (a)(1)—and an enhancement allegation that defendant personally used a firearm in the commission of that offense (§ 12022.5, subd. (a)). Immediately thereafter, defendant pleaded no contest to the newly added charge of assault with a deadly weapon and admitted the associated firearm enhancement. In exchange, the prosecutor agreed to dismissal of the other

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[1] The facts are taken from the probation report.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

charges and enhancement allegations and an eight-year prison sentence. After defendant entered his plea, the prosecutor put the following factual basis for the plea on the record: "On or [about] October 2nd, 2017 in Santa Clara County, the defendant and the victim engaged in a verbal and then physical altercation. And during that altercation the defendant was in possession of a firearm and shot the victim twice."

The plea form—signed by defendant, his counsel, the prosecutor, and the court—includes a section entitled "fines and fees." In that section of the plea form, defendant initialed the form next to three items, thereby indicating that he understood and agreed with each. The first item states, "I understand: I will be ordered to pay fines, fees, and costs, which may include: . . . a mandatory restitution fine of not less than $300 and not more than $10,000 (plus a 10% county assessment); a probation or parole revocation fine equal to the imposed restitution fine; a court operation assessment of $40 per count; [and] a criminal conviction assessment of $30 per count . . . . Depending upon my ability to pay, I may also be required to pay a crime prevention fund fine of $10 (plus over 310% in penalty assessment); a $4 emergency medical air transportation penalty for each vehicle code violation; an AIDS education fund fine of $70 (plus over 310% in penalty assessment); a drug program fee not to exceed $150 for each separate drug offense (plus over 310% in penalty assessment); a criminal justice administration fee of up to $259.50; a probation supervision fee (up to $110 a month); and court appointed attorney's fees; and I do not contest my ability to pay these fines and fees." The second item states, "I understand if I am sentenced to state prison, the Court will impose a parole revocation fine, which I have to pay if my parole is later revoked. I also understand that if I am granted probation, the Court will impose a probation revocation fine, which I have to pay if my probation is later revoked." The third item states, "I understand the amount of the restitution fine . . . to be imposed in my case is not part of any plea agreement and the sentencing judge may impose any amount within the minimum and maximum range." At the time defendant entered his plea, he assured the court that the signature and initials

on the form were his, that he had had sufficient time to review the form, and that he did not have any questions about the form.

The trial court sentenced defendant to eight years in prison, as called for by his negotiated plea agreement, on June 27, 2018. The court imposed the upper term of four years for assault with a deadly weapon (§ 245, subd. (a)(1)) and the middle term of four years on the firearm enhancement (§ 12022.5, subd. (a)). The court awarded defendant a total of 309 days of presentence credits, consisting of 269 days of actual custody and 40 days of worktime credits under section 2933.1.

The court imposed the following fines and fees: a $300 restitution fine (§ 1202.4, subd. (b)(2)); a $300 parole revocation restitution fine, which was suspended pending successful completion of parole (§ 1202.45); a $40 court operation assessment (also known as a court security fee) (§ 1465.8); a $30 court facilities assessment (also known as a criminal conviction assessment) (Gov. Code, § 70373); and a $129.75 criminal justice administration fee payable to the City of San Jose (Gov. Code, §§ 29550, 29550.1, 29550.2). Defendant did not object.

There is no evidence in the record regarding defendant's personal financial status, education level, or employment history. He was represented by the Public Defender's Office below.

Defendant timely appealed. He also requested a certificate of probable cause, stating: "My attorney did not inform me on which charge to take the plea on, he did not give me the information needed to take the correct charge. Example *245(a)1 or 245(a)2* Including the <u>enhancement</u> to take along with my charge. [¶] This is regarding my enhancement I took along with my charge. And allowing my enhancement to fall off." The trial court granted that request.

II. DISCUSSION

A. The Court Properly Accepted Defendant's Plea

Section 245, subdivision (a)(1) states that "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument ***other than a firearm*** shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (Emphasis added.) Section 245, subdivision (a)(2) provides that "[a]ny person who commits an assault upon the person of another ***with a firearm*** shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment." (Emphasis added.)

The record indicates that the assault at issue involved a firearm. Yet defendant pleaded no contest to violating section 245, subdivision (a)(1) as opposed to section 245, subdivision (a)(2). Therefore, we requested supplemental briefing as to whether defendant's plea to and conviction of assault with a deadly weapon other than a firearm in violation of section 245, rather than assault with a firearm in violation of section 245, subdivision (a)(2), was error. The Attorney General says it was and purports to "stipulate[] to appellant's preferred remedy of a remand to allow appellant to withdraw his plea, and allow the parties to renegotiate a disposition or proceed to trial on the original charges." But defendant does not seek that remedy. Instead, defendant maintains there was no error because he properly pleaded to an offense that was reasonably related to his conduct. We agree with defendant.

Our Supreme Court has long held that a trial court may accept a bargained plea of guilty or nolo contendere to any lesser offense reasonably related to the offense charged in the accusatory pleading. (*People v. West* (1970) 3 Cal.3d 595, 611 (*West*).) The court has noted that, in that circumstance, "it is desirable that . . . the lesser offense to which a

defendant pleads be one 'reasonably related to defendant's conduct,' " such that " 'the defendant's record . . . , while not a completely accurate portrayal of his criminal history, will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion.' [Citation.]" (*Id*. at p. 613.) "[A] reasonable relationship between the charged offense and the plea obtains when (1) the defendant pleads to the same type of offense as that charged . . . , or (2) when he pleads to an offense which he may have committed during the course of conduct which led to the charge." (*Ibid*.)

Here, defendant did not plead to an uncharged offense. Rather, the plea agreement called for the complaint to be amended to add the lesser related charge to which defendant would plead—assault with a deadly weapon other than a firearm. (*People v. Nelson* (2011) 51 Cal.4th 198, 215 [assault with a deadly weapon is a lesser related offense of attempted murder].) In our view, the offense to which defendant pleaded, " 'while not a completely accurate portrayal of his [conduct], will not [result in a criminal history that is] grossly misleading . . . .' [Citation.]" (*West*, *supra*, 3 Cal.3d. at p. 613.) Accordingly, the trial court properly could have accepted a no contest plea to assault with a deadly weapon other than a firearm even absent an amendment to the complaint under *West*. It follows that the court likewise was free to accept the parties' agreement to amend the complaint to add that offense and to accept defendant's no contest plea to the newly added charge.[3]

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[3] We note that imposition of the section 12022.5, subdivision (a) firearm enhancement was proper. As a general rule, that enhancement does not apply where "use of a firearm is an element of [the underlying] offense." (§ 12022.5, subd. (a).) However, an exception to that general rule exists for violations of section 245. Specifically, section 12022.5, subdivision (d) provides that, "[n]otwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used . . . ." Accordingly, the section 12022.5, subdivision (a) firearm enhancement likewise could have been properly imposed had defendant been convicted of assault with a firearm in violation of section 245, subdivision (a)(2).

B. Challenges to Fines and Fees

In response to our request for supplemental briefing on the issue, defendant asserts that the trial court erred in imposing the court operations assessment (§ 1465.8), the court facilities assessment (Gov. Code, § 70373), and the criminal justice administration fee (Gov. Code §§ 29550, 29550.1, 29550.2) without determining whether he had an ability to pay them, citing *Dueñas*. Defendant further contends that the trial court should have stayed enforcement of the restitution fine (§ 1202.4, subd. (b)(2)) and the parole revocation restitution fine (§ 1202.45) pending an ability to pay finding, again invoking *Dueñas*. The Attorney General argues that defendant waived any challenge to the fines and fees in the plea form. Alternatively, the Attorney General contends defendant forfeited any challenge by failing to object at the sentencing hearing. We conclude defendant expressly waived any challenge to his ability to pay the criminal justice administration fee only in the plea form. As to the other fines and fees, we decline to find forfeiture. But we conclude that any error in failing to determine defendant's ability to pay was harmless.

1. The Dueñas *Decision*

In *Dueñas*, Division 7 of the Second Appellate District, held that due process requires (1) the trial court to conduct a hearing to ascertain a defendant's ability to pay before it imposes a court operations assessment or a court facilities assessment and (2) the trial court to stay execution of any restitution fine (§ 1202.4) unless and until it holds an ability-to-pay hearing and concludes that the defendant has the ability to pay the restitution fine.

Court facilities assessments (Gov. Code, § 70373) and court operations assessments (§ 1465.8, subd. (a)(1)) are statutorily required to be imposed on every criminal conviction (except for parking offenses) without reference to the defendant's ability to pay. (*Duenas*, *supra*, 30 Cal.App.5th at p. 1164.) The purpose of each assessment is to generate court funding. (Gov. Code, § 70373, subd. (a)(1) ["To ensure

and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . .”]; § 1465.8, subd. (a)(1) [“To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense . . .”].) The assessments are enforceable as civil judgments.

The *Dueñas* court noted that “ ‘[c]riminal justice debt and associated collection practices can damage credit, interfere with a defendant’s commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation.’ ” (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.) In view of “[t]hese additional, potentially devastating consequences suffered only by indigent persons,” *Dueñas* concluded that Government Code section 70373 and section 1465.8, subdivision (a)(1) effectively impose “additional punishment for a criminal conviction for those unable to pay.” (*Dueñas*, *supra*, at p. 1168.) Based on that conclusion, the court reasoned that imposing these assessments without a determination that the defendant has the ability to pay is “fundamentally unfair” and “violates due process under both the United States Constitution and the California Constitution. (U.S. Const. 14th Amend.; Cal. Const., art. I, § 7.)” (*Ibid*., fn. omitted.)

Also at issue in *Dueñas* was a restitution fine imposed under section 1202.4, subdivision (b). That provision requires the imposition of a restitution fine “[i]n every case where a person is convicted of a crime, . . . unless [the court] finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” (§ 1202.4, subd. (b).) “A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b).” (§ 1202.4, subd. (c).) “When imposed on a probationer, restitution fines are conditions of probation. (Pen. Code, § 1202.4, subd. (m).) Any unpaid restitution fines remaining at the end of the probationary term

are enforceable as a civil judgment. (Pen. Code, § 1202.43; *People v. Willie* (2005) 133 Cal.App.4th 43, 47-48.) A restitution fine is a debt of the defendant to the state that may be enforced by litigation or by offset against nearly any amount owed to the defendant by a state agency, including tax refunds. (Pen. Code, § 1202.43, subd. (b); Gov. Code, §§ 12418, 12419.5.)" (*Dueñas, supra*, 30 Cal.App.5th at pp. 1169-1170.)

Dueñas concluded that section 1202.4 "punishes indigent defendants in a way that it does not punish wealthy defendants" because "a defendant who has successfully fulfilled the conditions of probation for the entire period of probation [generally] has an absolute statutory right to have the charges against him or her dismissed. (Pen. Code, § 1203.4, subd. (a)(1).)" (*Dueñas, supra*, 30 Cal.App.5th at p. 1170.) An indigent probationer who cannot afford to pay the restitution fine, and thus cannot fulfill the conditions of probation, will be denied that benefit solely by his or her poverty. According to *Dueñas*, "[t]he statutory scheme thus results in a limitation of rights to those who are unable to pay," which is fundamentally unfair and a due process violation. (*Id*. at p. 1171.) To avoid that constitutional question, the court interpreted section 1202.4 as requiring the imposition of a restitution fine, but permitting courts to stay the execution of such fines "until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas, supra*, at p. 1172.)

2. Defendant Waived Any Challenge to the Criminal Justice Administration Fee

Defendant's plea form stated, "[d]epending upon my ability to pay, I may also be required to pay . . . a criminal justice administration fee of up to $259.50 . . . and I do not contest my ability to pay these fines and fees." Defendant initialed the form next to that statement to indicate his understanding and agreement. He thereby waived any contention that he lacks the ability to pay the $129.75 criminal justice administration fee ultimately imposed by the trial court.

The Attorney General argues that defendant likewise waived his challenges to *all* other fines and fees in the plea form. A close reading of the form shows that defendant indicated that he did not contest his ability to pay only certain, specified fines and fees, namely "a crime prevention fund fine of $10 (plus over 310% in penalty assessment); a $4 emergency medical air transportation penalty for each vehicle code violation; an AIDS education fund fine of $70 (plus over 310% in penalty assessment); a drug program fee not to exceed $150 for each separate drug offense (plus over 310% in penalty assessment); a criminal justice administration fee of up to $259.50; a probation supervision fee (up to $110 a month); and court appointed attorney's fees . . . ." As to the other fines and fees, defendant indicated only an understating that he would be ordered to pay them. We decline to find waiver as to such other fines and fees.

3. Forfeiture

The Attorney General argues that defendant's failure to object to the imposition of the fines and assessments below forfeited the argument on appeal. The defendant disagrees, arguing *Dueñas* changed the law in a manner that was not reasonably foreseeable. The Courts of Appeal currently are divided on the issue. (Compare *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) [finding no forfeiture, reasoning *Dueñas* announced a new "constitutional principle that could not reasonably have been anticipated at the time of trial"] and *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 (*Johnson*) [where minimum restitution fine was imposed below, declining to find forfeiture, reasoning that *Dueñas*, while "grounded in long-standing due process principles and precedent," was not "predictable [such that it] should have been anticipated"] with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [finding forfeiture, reasoning that "*Dueñas* was foreseeable" and "applied law that was old, not new"] and *People v. Bipialaka* (2019) 34 Cal.App.5th 455 [same].)

"Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Put differently, an exception to the forfeiture rule applies " 'when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.' " (*People v. Black* (2007) 41 Cal.4th 799, 810.) "In determining whether the significance of a change in the law excuses counsel's failure to object at trial, we consider the 'state of the law as it would have appeared to competent and knowledgeable counsel at the time of the trial.' " (*Id.* at p. 811.)

At the time of defendant's sentencing, "*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. Indeed, . . . in the case of the restitution fine, Penal Code section 1202.4, subdivision (c), expressly precluded consideration of the defendant's inability to pay." (*Castellano, supra,* 33 Cal.App.5th at p. 489.)

We acknowledge that "*Dueñas* is grounded in long-standing due process principles and precedent . . . ."[4] (*Johnson, supra,* 35 Cal.App.5th at p. 138.) But "the

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[4] The *Dueñas* court relied on *Griffin v. Illinois* (1956) 351 U.S. 12 (*Griffin*) and its progeny. *Griffin* establishes that principles of due process and equal protection bar states from conditioning access to the courts on ability to pay, thereby effectively denying such access to the indigent. (*Id*. at p. 19 [striking down a state law requiring all criminal defendants not sentenced to death to pay for a trial transcript in order to appeal]; *Ross v. Moffitt* (1974) 417 U.S. 600, 607 [describing *Griffin* and other cases invalidating "state-imposed financial barriers to the adjudication of a criminal defendant's appeal" as "stand[ing] for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons"].) *Dueñas* also relied on a line of cases applying *Griffin* to strike down as unconstitutional state laws allowing the incarceration of indigent convicted defendants solely because of their

statutes at issue here stood and were routinely applied for so many years without successful challenge [citation], that we are hard pressed to say its holding was predictable and should have been anticipated." (*Ibid*.) We will excuse the failure to object.

4. Any Error Was Harmless

We conclude that without deciding that *Dueñas* was correctly decided, any error in imposing the fines and assessments without conducting an ability-to-pay hearing was harmless in this case.[5]

We review federal constitutional errors under the harmless-beyond-a-reasonable-doubt test for prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *Johnson*, *supra*, 35 Cal.App.5th 134 [finding *Dueñas* error harmless under *Chapman*]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1030-1031 (*Jones*) [same].) Any error was harmless if the record demonstrates that defendant could not have established an inability to pay.

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inability to pay a fine. (See *Tate v. Short* (1971) 401 U.S. 395, 399 [Equal Protection Clause precludes a state from converting a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full]; *Bearden v. Georgia* (1983) 461 U.S. 660, 665, 673 [revocation of defendant's probation for failure to pay a fine or restitution, "absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate," "would be contrary to the fundamental fairness required by the Fourteenth Amendment."]; *In re Antazo* (1970) 3 Cal.3d 100, 104 (*Antazo*) [holding that the practice of imprisoning indigent convicted defendants for nonpayment of fines constituted "an invidious discrimination on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment"].) Unlike the cases on which it relied, *Dueñas* did not involve fines or fees required to be paid in order to access judicial processes or avoid imprisonment. Thus, it represents an extension of *Griffin* and its progeny, which further supports our conclusion that trial counsel cannot be faulted for not anticipating *Dueñas*.

[5] The *Dueñas* court's conclusion that the restitution fine imposed under section 1202.4 "punishes indigent defendants in a way that it does not punish wealthy defendants" is limited to cases in which probation is granted. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1170.) Defendant was not granted probation. We nevertheless shall assume, without deciding, that *Dueñas* applies to the restitution fine imposed in this case.

Defendant was sentenced to an eight-year term with a total of 309 days of presentence credits. Section 2933.1, subdivision (a) provides that those convicted of a violent felony within the meaning of section 667.5, subdivision (c) "Shall accrue no more than 15 percent of worktime credit." "Any felony in which the defendant . . . uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55" is a violent felony within the meaning of section 667.5, subdivision (c)(8). Defendant admitted a section 12022.5 firearm enhancement; therefore, he was convicted of a violent felony and will be required to serve at least 85 percent of his sentence. (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1337.) Accordingly, he will serve at least six years in prison.[6]

"Wages in California prisons currently range from $12 to $56 a month. [Citations.] And half of any wages earned (along with half of any deposits made into [a defendant's] trust account) are deducted to pay any outstanding restitution fine. [Citations.]" (*Jones*, *supra*, 36 Cal.App.5th at p. 1035.) Assuming defendant earns the minimum monthly wages of $12, he can earn $864 in six years. Of that, $300 will be deducted to pay the restitution fine. That leaves $564 to pay the $70 in court facilities and court operations assessments. Defendant also purports to challenge the imposition of the parole revocation restitution fine under *Dueñas*, although that fine already has been stayed and will not be imposed unless and until defendant violates parole. Regardless, he can earn more than enough in prison to pay that $300 fine as well.

On this record, we conclude that any error was harmless. (*Johnson*, *supra*, 35 Cal.App.5th at p. 139 ["The idea that [defendant] cannot afford to pay $370 while serving an eight-year prison sentence is unsustainable."]; *Jones*, *supra*, 36 Cal.App.5th at p. 1035 [finding *Dueñas* error harmless because defendant sentenced to six-year term would have

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[6] An eight-year prison sentence is approximately 2,920 days. Less the 309 days in credits, this leaves 2,611 days. Defendant will be required to serve 85 percent (or 2,219) of those days, which works out to be a little more than six years.

ability to pay $300 restitution fine and $70 in assessments from prison wages]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 ["defendant's ability to obtain prison wages and to earn money after his release from custody" are properly considered when determining whether a defendant has the ability to pay].)

III. DISPOSITION

The judgment is affirmed.

ELIA, J.

WE CONCUR:

GREENWOOD, P. J.

PREMO, J.

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