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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE MENDEZ SALGADO, Defendant and Appellant.	B296122 Los Angeles County Super. Ct. No. GA101299

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Conviction affirmed; sentence vacated; remanded.

Daniel Milchiker, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Chung L. Mar and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Enrique Mendez Salgado of possession of methamphetamine for sale, unlawful possession of ammunition, and unlawful access card activity. Salgado admitted four prison priors. The trial court sentenced Salgado to seven years and four months in the state prison. On appeal Salgado contends the court should have instructed the jury on simple possession of methamphetamine as a lesser included offense; the court violated his rights by permitting the jury to convict him on a theory of joint constructive possession with his two brothers; there was insufficient evidence to convict him on the access card activity count; he suffered only three prison priors, not four; and the court erred in imposing a restitution fine. In a supplemental brief Salgado asserts his prison priors must be stricken under Senate Bill No. 136. We accept the Attorney's General's (1) concession that the prison priors must be stricken and (2) suggestion that Salgado raise any ability-to-pay issue on remand. Accordingly, we order the prison priors stricken, vacate Salgado's sentence, remand for further proceedings, and otherwise affirm his conviction.

FACTS AND PROCEDURAL BACKGROUND

On April 25, 2017, Los Angeles County Sheriff's Department Sergeant Eddie Retamoza conducted a probation compliance search for Salgado's brother Jimmy Lopez at a residence in Duarte. Four surveillance cameras were mounted on the outside of the house. In Salgado's bedroom, Retamoza saw a box with two bags of methamphetamine in it on top of a set of plastic drawers. On the bed was a small digital scale and a bowl containing six rounds of live .357 caliber ammunition. A box under the bed contained 44 more rounds of live ammunition.

Retamoza also found a box with $2,230 in cash, a digital scale, an embosser and "a numerous amount of blank cards, as well as cards that were embossed with [Salgado's] name

on [them]." The embosser was under a desk. In the drawer of the desk, Retamoza found eight cards "of various banks," each with Salgado's name embossed on it. There also was one card embossed with the name "Daniel Salgado." Daniel is another of Salgado's brothers.

Earlier that evening, sheriff's deputies had stopped Salgado and his brother Jimmy in a car. Salgado was driving and Jimmy was in the passenger seat. Deputy April Nicholson found a .357 Colt revolver under the passenger seat and a purple plastic container of methamphetamine in the center console. The gun was loaded with six rounds.

The People charged Salgado with possession of methamphetamine for sale (count 1), unlawful possession of ammunition by a felon (count 2), and making or possessing access card making equipment or incomplete access cards (count 3). As to counts 1 and 2, the People alleged Salgado committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang.

The case went to trial in January 2019. Criminalist Michael Vanesian testified he weighed the two bags of a white substance found in Salgado's bedroom and tested the contents of one of them. The larger packet contained 11.4 net grams of powder containing methamphetamine. The smaller packet had a gross weight of 3.6 grams.

Retamoza testified that, in his opinion, the approximately 15 grams of methamphetamine found in Salgado's bedroom were not possessed for personal use. Retamoza said a typical user can use "anywhere from a quarter gram to one gram" a day. Retamoza added, "I've spoken to many addicts who use up to a gram a day, which is in my opinion a lot." Retamoza said 3.5 grams of methamphetamine is called "an eight-ball" (because

it's one-eighth of an ounce), and its street value is about $200. An addict might buy an eight-ball "to last them a couple days."

The prosecutor gave Retamoza a hypothetical tracking the facts of the case. Retamoza opined the methamphetamine in the hypothetical was "possessed for the purpose of sales." Retamoza listed the digital scale, the surveillance cameras, the "large sum of money" in denominations consistent with the quantities methamphetamine dealers typically sell, and the ammunition as factors supporting his opinion.

On cross-examination Retamoza conceded a user could have a digital scale "to make sure they're getting the amount that they paid for." Retamoza also admitted police found no pay/owe sheets in Salgado's bedroom.

Salgado chose not to testify.

At the conclusion of the People's case, the court granted a defense motion under Penal Code section 1118.1[1] to dismiss the gang allegation because there was no testimony about the gang's primary activities.

The court gave counsel proposed jury instructions. Defense counsel said he had no comments, questions, or issues about the jury instructions. Counsel did not ask the court to instruct on simple possession of methamphetamine as a lesser to possession for sale. On count 1, the court instructed the jury with CALJIC No. 12.01, illegal possession for sale of a controlled substance.

In closing argument, Salgado's counsel did not argue the methamphetamine in the bedroom was for Salgado's personal use. Instead, counsel argued the room in which the sheriffs found methamphetamine and other items was not Salgado's room. Counsel noted there was no DNA evidence or fingerprints "either

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[1] References to statutes are to the Penal Code.

on the dope or the scales," and the officers didn't "do their job correctly." Counsel told the jury Salgado had neither actual nor constructive possession of "the dope and the bullets"; "[t]here is no exercise [of] control over anything." Counsel said, "Daniel's name further lends itself to the acknowledgement that other people in that household had the right to control and/or enter that room." Counsel argued Jimmy and Daniel's "stuff" was "everywhere in that room."

The jury convicted Salgado on all three counts. Salgado admitted he had suffered four prison priors within the meaning of section 667.5, subdivision (b). The court sentenced Salgado to seven years and four months in the state prison. The court selected the midterm of two years on count 1. The court imposed one-third the midterm—eight months each—for counts 2 and 3, to be served consecutively. The court added four years for the four one-year prison priors.

The court imposed a $2,000 restitution fine, and imposed and stayed a $2,000 parole revocation restitution fine. The court then stated, "I find the defendant is indigent, so the $30 facilities assessment and $40, what used to be the security fee, those are waived." The court imposed a $50 crime lab drug analysis fee.

DISCUSSION

1. *The trial court was not required to instruct the jury sua sponte on simple possession of methamphetamine as a lesser crime of possession of methamphetamine for sale*

Salgado contends there was substantial evidence that he possessed the methamphetamine for personal use, not for sale, and accordingly the trial court committed reversible error by not instructing on simple possession as a lesser. We disagree.

Even in the absence of a request, a trial court must instruct the jury on all general principles of law relevant to the issues

raised by the evidence, including lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Whalen* (2013) 56 Cal.4th 1, 68-69.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense but not of the greater. (*Whalen*, at pp. 68-69.) However, the court is required to give a particular instruction sua sponte only if there is substantial evidence from which a jury composed of reasonable people could find true the facts underlying the instruction. (*Breverman*, at p. 162.) The existence of any evidence—no matter how weak—will not justify instruction on a lesser included offense. (*Ibid.*; *Whalen*, at p. 68.)

The determination whether sufficient evidence supports an instruction must be made without reference to the credibility of that evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) Doubt as to the sufficiency of the evidence to warrant a particular instruction should be resolved in the defendant's favor. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) However, the court need not give instructions based solely on conjecture and speculation. (*People v. Day* (1981) 117 Cal.App.3d 932, 936.)

We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Error in failing to give a lesser included instruction is reviewed for prejudice under the *People v. Watson* (1956) 46 Cal.2d 818 standard. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.)

Simple possession of a controlled substance is a lesser included offense of possession of the same substance for sale. (See *People v. Oldham* (2000) 81 Cal.App.4th 1, 16; *People v. Magana* (1990) 218 Cal.App.3d 951, 954.) Accordingly, if there was substantial evidence to show Salgado was guilty of possession of methamphetamine, but not possession for sale,

the trial court should have instructed sua sponte on the lesser offense.

Salgado does not cite any evidence that he possessed the methamphetamine for personal use but not for sale, much less substantial evidence. He argues only that Retamoza didn't "observe any sales taking place" and that he didn't make any "statements or admissions" to police that he "was involved in drug sales." Salgado also says "[t]he quantity of methamphetamine involved in this case was not so substantial that it negated personal use."

One of the factors Retamoza listed as a basis for his opinion that Salgado possessed the methamphetamine for sale was the quantity: approximately 15 grams. Salgado asserts, "Retamoza admitted that users build up a tolerance, will have a ready supply at hand and will use every day. This was evidence available to the jury to find that the methamphetamine was possessed for personal use."

But Retamoza never testified that a user could have 15 grams for personal use, or anything close to that. Retamoza testified an addict typically would have "a quarter gram to one gram," and the use of one gram a day was "in [his] opinion a lot." He said "someone who is an addict and maybe is buying some to last them a couple [of] days, might have up to . . . an eight-ball, which is three-and-a-half grams approximately." Salgado had more than four times that amount. Retamoza testified he had never encountered a situation in which a user had that much cash and that quantity of methamphetamine.

Nor was there any evidence Salgado was a methamphetamine user, much less an addict. He never told the police he was, or that the methamphetamine in his bedroom was for his personal use. There was no evidence of a methamphetamine pipe, syringe, or other paraphernalia for

ingesting the drug.[2] Retamoza also cited, as bases for his opinion, (1) the digital scale, (2) the large quantity of cash in bills consistent with the street prices for different amounts of methamphetamine, (3) the four surveillance cameras outside Salgado's home, and (4) the ammunition in his room, which was of the same caliber as the Colt revolver found in Salgado's car shortly before the search of his home. There was no evidence of any legitimate source for the $2,230.

Retamoza had been a peace officer for nearly 20 years. He had "made hundreds of arrests for possession of methamphetamine and other drugs," as well as "easily more than thirty arrests for possession of methamphetamine for sales." The defense did not call an expert. The court properly instructed the jury on how to judge expert testimony. On this record, the trial court had no obligation to instruct on simple possession as a lesser offense to possession for sale.

Salgado cites *People v. Saldana* (1984) 157 Cal.App.3d 443 and *People v. Walker* (2015) 237 Cal.App.4th 111. Those authorities do not assist him. In *Saldana*, police arrived at the home where David Saldana lived with his brothers Edmundo and Manuel, his mother, his sister, and her husband. Police had a warrant for Manuel. An officer saw David lying on his mother's bed in a bedroom he shared with her. The officer said David put his hand into the headboard. Shortly thereafter, police found 18 balloons of heroin in the headboard. (*Saldana*, at p. 450.)

Police found Edmundo and Manuel in the basement. Manuel was " 'loaded' " on heroin. The basement contained

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[2] Retamoza testified methamphetamine is "most common[ly]" smoked in "a cylindrical tube with a bulbous end." He said a user also could "melt it" and "shoot it up into their veins" with a syringe or "chop it up real fine like cocaine and snort it."

items consistent with sales of heroin, as well as its use (syringes). (*People v. Saldana*, *supra*, 157 Cal.App.3d at p. 451.) David testified at trial that he knew nothing about the 18 balloons. The testimony of other family members also contradicted the officer's claim he had seen David in the bedroom reaching into the headboard. (*Id*. at pp. 452, 455.) Some of the balloons had been cut open, possibly for Manuel's use. (*Id*. at p. 457.) The appellate court noted "conflicting testimony was given by the witnesses." (*Id*. at p. 455.)

Here, by contrast, Salgado chose not to testify, nor did the defense elicit testimony from any witness that anyone in the household was a methamphetamine user or that paraphernalia were found in the home. David Saldana did not have a large amount of cash, a scale, ammunition, or surveillance cameras outside his home. Salgado did.

Walker involved marijuana. A sheriff found Walker sitting in a car in an area known for drug sales. The deputy smelled marijuana. He found 11 baggies of marijuana in a thermos in Walker's center console. The total weight of all the marijuana was 23.14 grams, or less than an ounce. Walker had a medical marijuana card, and told the deputy he'd bought the marijuana about a week earlier at a dispensary. (*People v. Walker*, *supra*, 237 Cal.App.4th at p. 114.)

At trial Walker testified the marijuana was for his personal use. The court refused to instruct on simple possession, noting that possession of less than 28.5 grams was an infraction and "it wouldn't be proper" for the jury to decide an infraction case. (*People v. Walker*, *supra*, 237 Cal.App.4th at p. 114.) The appellate court noted there were "innocent explanations for [Walker's] possession of small amounts" of marijuana. (*Id*. at p. 117.) The trial court's refusal to instruct on possession also deprived Walker of his ability to argue as a defense that he

lawfully possessed the marijuana with his medical card. (*Ibid.*) Suffice it to say the facts in *Walker* bear no resemblance to the facts of this case.

Finally, even assuming for argument's sake there was substantial evidence requiring the court to instruct on simple possession sua sponte, we see no prejudicial error. "The failure to instruct on a lesser included offense in a noncapital case does not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.' " (*People v. Wyatt* (2012) 55 Cal.4th 694, 698; *People v. Beltran* (2013) 56 Cal.4th 935, 955.) No such reasonable probability exists here. There was no evidence whatsoever suggesting Salgado was a methamphetamine user. His defense was not based on the theory that the drugs were possessed only for personal use; his counsel did not make that argument to the jury. The quantity found provided many more doses than that necessary for personal use. In short, even if the court should have given the instruction, its omission was harmless error.

2. *The trial court did not violate Salgado's due process rights by instructing the jury with CALJIC Nos. 1.24 and 12.01*

The court instructed the jury on actual and constructive possession, using CALJIC No. 1.24. That instruction also told the jury, "One person may have possession alone, or two or more persons together may share actual or constructive possession." In addition, on count 1—possession of methamphetamine for sale—the court gave CALJIC No. 12.01, which included the same language. Salgado contends "[t]he only evidence of joint possession was the highly inflammatory gang evidence that was excluded" after the court granted the section 1118.1 motion, and the court's instructions on joint possession thus erroneously

"required the jury to use [that] gang evidence" to find him guilty. The record does not support Salgado's contention.

The prosecution's theory was the northwest bedroom of the residence—where the bullets, methamphetamine, scale, cash, embosser, and cards were found—was Salgado's. The prosecutor never argued Salgado possessed any of those items jointly with his brothers. It was the *defense* theme—throughout the trial, from opening statements through closing arguments—that Jimmy and Daniel possessed the items at issue.

In his opening statement, defense counsel told the jury the evidence would reveal the "wrongdoings of one brother" and "another brother"—not Salgado—was the guilty one. Counsel elicited testimony from Retamoza that Jimmy, Daniel, and a sister all lived in the residence with Salgado; that the northwest bedroom was next to Jimmy's, separated only by a bathroom; and that probationers lie during compliance searches about which room is theirs. In closing, defense counsel argued the gun was on Jimmy's side of the car—suggesting the bullets in the northwest bedroom were Jimmy's; the northwest bedroom—where Retamoza found only one piece of mail addressed to Salgado—was not Salgado's room; Jimmy and Daniel were "easily able to hide their stuff . . . in another family's member's room"; and Daniel's name was on one of the access cards, "further lend[ing] itself to the acknowledgement that other people in that household had the right to control and/or enter that room." Counsel told the jury, "We have two different people, two brothers liv[ing] under the same roof."

Defense counsel noted there was no DNA evidence or fingerprints on the bullets, the bullet box under the bed, or the bags of methamphetamine. Counsel discussed the jury instruction on circumstantial evidence and the jury's obligation to choose the interpretation that points to innocence if there are

two reasonable interpretations. Counsel told the jury, "You have the brother's stuff everywhere in that room. You've got the brother's bullets. You've got the brother's dope in that room. You've got the other brother's embosser in that room." Counsel concluded that the prosecution's case was "speculation and conjecture," "a smoke and mirrors routine."

In light of the defense contention that the items belonged not to Salgado but to his brothers, the prosecutor was entitled to discuss joint constructive possession with the jury. The prosecutor's rebuttal argument was brief. She told the jury, "[P]ossession can be something that belongs to more than one person." She said, "Maybe all three of them were using the credit card making machine, but that doesn't mean that the defendant doesn't still possess it."

The gang evidence doesn't change this analysis. The prosecutor never argued Salgado and Jimmy were working together as fellow members of the Eastside Duarte gang. After defense counsel asked Retamoza a number of questions about gangs, including whether Jimmy was a gang member, the prosecutor finally on re-redirect asked if it was "common" "for gang members to share ammunition and guns amongst themselves." Defense counsel opened the door on this question by suggesting that, as the gun in the car was found under Jimmy's seat, the bullets of the same caliber found in the northwest bedroom likely were Jimmy's as well.

The court instructed the jury that, because the gang allegation was no longer a part of the case, jurors were "to disregard the gang evidence that was presented at trial." The court said, "You must not consider this evidence for any purpose. This evidence must not, in any way, affect your verdict." We presume the jury understood and followed that instruction.

(*People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.)

In short, contrary to Salgado's assertion, the evidence of a relationship between Salgado, and Jimmy and Daniel, was not based on gang membership[3] but on the fact that they were three brothers who, in defense counsel's words, "live under the same roof."

3. *Substantial evidence supports Salgado's conviction for unlawful access card activity*

Salgado contends there was insufficient evidence of specific intent to sustain his conviction for violating section 484i, subdivision (c). That statute prohibits designing, making, possessing, or trafficking "in card making equipment or incomplete access cards with the intent that the equipment or cards be used to make counterfeit access cards." (§ 484i, subd. (c).)

As the trial court noted, there is no form jury instruction for this crime, either in CALCRIM or CALJIC. The record reflects no submission to the trial court by Salgado's counsel or the prosecutor of a proposed jury instruction. The court noted no published case has interpreted or construed the statute.

Accordingly, the court drafted a jury instruction tracking the language of the statute. The instruction told the jury the People must prove two elements: "1. A person designed, made, or possessed access card making equipment or incomplete access cards; and 2. At the time, the person had the specific intent that the equipment or cards be used to make counterfeit access cards." The court also gave the jury CALJIC No. 3.31 on the joint operation of act or conduct and specific intent.

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[3] There was no testimony that Daniel was a gang member.

At the time, the trial court was unaware that section 484d contains definitions of " '[a]ccess card' " and " '[c]ard making equipment,' " and explains what it means for an access card to be " 'incomplete.' " Nor did either attorney point out those statutory definitions to the court. During deliberations, the jurors sent out a question: whether "knowingly receiving fraudulent credit/debit access cards implicate[d]" a person in element 1 of the special instruction. The court responded that element 1 required that the defendant "A) designed; B) made; or C) possessed either access card making equipment or incomplete access cards." The court also said the possession under alternative C must have been done knowingly.[4]

Later, the court discovered the definitions in section 484d. The court drafted a supplemental special jury instruction containing the definitions in that statute for " '[a]ccess card,' " " 'incomplete' " access card, " '[c]ounterfeit access card,' " and " '[c]ard making equipment.' " Counsel approved that supplemental instruction and stipulated the court could give it to the jury.[5] The jurors did not ask any more questions about count 3 before returning their guilty verdict.

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[4] The court already had instructed the jury with CALJIC No. 1.21, defining "knowingly."

[5] In his appeal brief, Salgado states the court "failed to instruct the jury with the definitions found at Penal Code § 484d, which includes definitions of many of the terms included in 484i, subsection (c)" and "failed to provide the jury with any guidance as to how to define the terms found within Penal Code § 484i, subsection (c)." Salgado omits the fact that the court provided the jurors with a supplemental instruction containing those definitions, to which both counsel stipulated.

In reviewing a conviction challenged for insufficient evidence, we review the whole record to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) On appeal, we must view the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) The test is not whether the evidence establishes guilt beyond a reasonable doubt but whether the evidence could persuade a reasonable jury to find guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) It is the exclusive province of the jury to determine the credibility of the witnesses and the truth or falsity of the facts on which that determination depends, and if substantial evidence supports the verdict, we accord due deference to the trier of fact. (*Smith*, at p. 739.)

Salgado argues there was no evidence presented "as to the authenticity of the cards found in the desk drawer" or "that the access cards in [Salgado's] name were made using the embossing machine." But jurors can use their common sense and everyday experience. That's what we expect them to do when judging the evidence.

The jury heard Retamoza's testimony that he found the embosser, eight cards "of various banks," each embossed with Salgado's name, and "numerous blank cards" in a black plastic card holder. Retamoza testified the embosser has no use other than to emboss "information"—"card numbers and letters"—onto a card. Photographs of the embosser and of one of the cards embossed with Salgado's name were introduced into evidence. Jurors—using their common sense—readily could conclude that

the combination of eight cards for different banks, all with Salgado's name on them, plus "numerous" blank cards, plus the embosser, constituted compelling evidence that Salgado was using the embosser to make counterfeit access cards.

4. *Salgado's prison priors must be stricken under Senate Bill No. 136*

As noted, Salgado admitted he had served four prior prison terms within the meaning of section 667.5, subdivision (b). The trial court imposed one year for each of those four prison commitments. On October 8, 2019, the Governor signed Senate Bill No. 136 into law. Under the bill's amendment to section 667.5, subdivision (b), a one-year prior prison term enhancement applies only if the defendant served the prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (See Stats. 2019, ch. 590, § 1.) (*People v. Lopez* (2019) 42 Cal.App.5th 337, 340-341.) The amended statute applies to defendants whose cases are not yet final. (*Lopez*, at pp. 341-342; *People v. Gastelum* (2020) 45 Cal.App.5th 757, 772-773.)

None of Salgado's prison priors was for a sexually violent offense. The Attorney General concedes they must be stricken. Accordingly, we order the four one-year enhancements stricken, vacate Salgado's sentence, and remand the matter for resentencing. (See *People v. Hill* (1986) 185 Cal.App.3d 831, 834; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258; *People v. Buycks* (2018) 5 Cal.5th 857, 896, fn. 15.)[6]

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[6] Because we are striking all of Salgado's prison priors, we need not address his argument that his trial counsel was constitutionally ineffective for failing to realize he had only three qualifying prior prison commitments, not four.

5. *Salgado may raise any ability-to-pay contentions on remand*

Finally, Salgado contends the trial court violated his due process rights by imposing the restitution fine without determining his ability to pay. The Attorney General proposes that, as we are remanding for resentencing, Salgado can raise any ability-to-pay issue in the trial court.

People v. Dueñas (2019) 30 Cal.App.5th 1157 held due process requires a trial court to conduct an ability-to-pay hearing and ascertain a defendant's ability to pay before imposing assessments and executing a restitution fine. (*Id*. at p. 1164.) We agree with other courts that have concluded *Dueñas* was wrongly decided. (See *People v. Hicks* (2019) 40 Cal.App.5th 320, 327-329, review granted Nov. 26, 2019, S258946; *People v. Cota* (2020) 45 Cal.App.5th 786, 794-795; *People v. Petri* (2020) 45 Cal.App.5th 82, 90-92; *People v. Adams* (2020) 44 Cal.App.5th 828, 831; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-280; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060, 1067-1069.) Our Supreme Court is currently reviewing whether a trial court must consider a defendant's ability to pay before imposing or executing fines, fees, or assessments, and, if so, which party bears the burden of proof. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

However, we accept the Attorney General's suggestion that Salgado raise any such issue in the trial court on remand. There appears to be an error—as well as some uncertainty—in the trial court record in any event. First, the court ordered Salgado to pay a restitution fine of $2,000 but the minute order and abstract of judgment state that amount as $300. Where there is a conflict between the reporter's transcript and the minute order, the court's oral pronouncement controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

Second, the court waived the court operations ($40 per count) and criminal conviction ($30 per count) assessments, stating Salgado is indigent. The court then imposed a $50 crime lab drug analysis fee. The minute order, however, states, "The court waives all fees in this case." On remand the trial court should clarify which fees it is waiving, and the minute order and abstract should be corrected to reflect the amount of the restitution fine the court imposes.

DISPOSITION

We vacate Enrique Mendez Salgado's sentence, order his one-year prior prison term enhancements stricken, remand for further proceedings, and otherwise affirm his conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.