A P P E N D I X A

Opinion, California Court of Appeal, Second Appellate District,
Division Three, filed October 24, 2019

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDY NGUYEN, Defendant and Appellant.	B290564 Los Angeles County Super. Ct. No. KA112263

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Conviction affirmed; remanded with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Andy Nguyen of assault to commit a felony (forcible oral copulation) during the commission of a first degree burglary, two counts of forcible oral copulation, and first degree residential burglary. On appeal, Nguyen contends (1) the trial court should have stayed his sentence on the first degree residential burglary count; (2) he had a right to have the jury determine whether his two acts of forced oral copulation took place "on separate occasions"; and (3) he was entitled to good time/work time credits. The Attorney General agrees with Nguyen's first and third contentions but disagrees with his second. We reject Nguyen's second contention.

In a supplemental brief, Nguyen asserts the trial court erred in ordering him to pay a restitution fine and court fees without determining his ability to pay. The Attorney General disagrees, as do we.

We remand the case for the trial court to stay Nguyen's sentence on the burglary count and to award him presentence good conduct credits. We otherwise affirm Nguyen's conviction.

FACTS AND PROCEDURAL BACKGROUND

As Nguyen does not challenge the sufficiency of the evidence, we summarize it only briefly.

In June 2014, Angel Doe[1] was working as a bartender. On June 5, Angel finished her shift around 3:00 a.m. and drove home, stopping on the way to pick up some fast food. She was sitting on her couch, eating the food and looking at her tablet, when the light in her bedroom flicked on. Then the television flicked on. When Angel walked to the doorway of her bedroom, an arm reached around from behind the bedroom door and

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[1] The court and counsel referred to the victim by her first name and a fictitious last name at trial. (See Pen. Code, § 293.5, subd. (a).)

grabbed her. A hand "went over [her] mouth"; she saw a metal knife.

Angel tried to fight off the intruder; she tried to scream "help." He told her to be quiet. The intruder pushed Angel into the living room. He shoved a cloth into her mouth. Angel couldn't see because the intruder put a sleep mask over her eyes. He began to strangle her with his hands. Angel recognized the intruder's voice as that of Andy Nguyen, a neighbor she had met outside the apartment building several days earlier.

Nguyen pulled the straps of Angel's dress down and her dress up. He fondled her breasts, rubbed her vagina, and told her "to perform oral sex on him." Angel urinated on herself and began to gag when Nguyen put her mouth on his penis. At some point Nguyen bound Angel's hands. Nguyen shoved Angel into the kitchen area and gave her some water to drink. Nguyen forced Angel back to the sofa in the living room. He again told Angel she had to perform oral sex; he said if she "didn't do it right," they would "have to take it into the bedroom." Angel thought if they went into the bedroom "he [was] for sure gonna rape [her], and [she was] not gonna walk out of this apartment," so she complied with Nguyen's demand. Nguyen forced Angel to perform oral sex a third time; she bit his hand, which tasted like rubber. Nevertheless, Nguyen forced Angel's head down onto his penis.

Nguyen asked Angel if he could use her bathroom to wash up. She said yes and she could hear him running water in the bathroom. Nguyen told Angel he would come back and kill her if she called the police.

After Nguyen left, Angel threw her belongings back into her purse, grabbed a kitchen knife, and ran down the stairs and out the door to her car. She drove straight to the police station. Police took Angel to the hospital where a nurse collected swabs.

A comparison of DNA from swabs taken of Angel's left fingernails and right hand with a reference sample taken from Nguyen showed Nguyen was a potential contributor.[2]

The People charged Nguyen with assault to commit a felony during the commission of a first degree burglary in violation of Penal Code section 220, subdivision (b) (count 1)[3]; two counts of forcible oral copulation in violation of section 288a, subdivision (c)(2)(A) (counts 2 and 3); and first degree residential burglary in violation of section 459 (count 4). The People alleged Nguyen used a deadly and dangerous weapon—a knife—in the commission of the assault. On counts 2 and 3, the People alleged Nguyen used a deadly weapon, tied or bound the victim, or committed the crimes during a burglary within the meaning of section 667.61, subdivisions (a), (b), (c)(7), (d)(4), and (e)(3), (5).

Nguyen testified on his own behalf at trial. Nguyen said he never had been in Angel's apartment.[4] He stated he was

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[2] The DNA testing showed a third contributor, in addition to Nguyen and Angel, at one of 15 locations.

[3] Statutory references are to the Penal Code.

[4] When asked on direct examination whether he ever had gone into Angel's apartment, Nguyen answered, "I don't recall. But I believe not." Nguyen's counsel asked him if he had told an investigator he was outside drinking and Nguyen responded, "That sounds correct." On cross-examination, Nguyen admitted he had answered "not that I know of" when a detective asked him if he ever had gone into the apartment. When the prosecutor asked Nguyen whether he would know if he had gone into the apartment or not, he responded, "Well, I mean, it's a pretty straightforward answer. 'Not that I know of' is very similar to 'not that—not that I remember' or 'I'm not sure.' " Nguyen then stated that "not that I know of" means "no."

asleep when Angel was assaulted. The defense also called Nguyen's younger brother Vinny. Vinny testified he and Nguyen played a video game that night sometime before 1:00 a.m. and Nguyen then went outside to smoke. Nguyen came back in, "took a long time in the restroom, like he always does," then lay down on his bed and went to sleep before 2:00 a.m. Vinny had talked with his parents "a lot" about his brother's case.

A defense DNA expert, Blaine Kern, testified DNA can be transferred by touch. In his closing argument, defense counsel suggested Angel—while running downstairs after the attack—could have touched something Nguyen had touched.

The jury convicted Nguyen on all counts and found all of the special allegations true. The trial court sentenced Nguyen to an indeterminate term of life in prison as well as a determinate term of six years. The court imposed consecutive 25 to life sentences on counts 2 and 3. The court found the two acts of forcible oral copulation took place on "separate occasions" within the meaning of sections 667.6, subdivision (d), and 667.61, subdivision (i). On count 1, the court sentenced Nguyen to seven years to life plus one year for the knife use, consecutive to counts 2 and 3, but stayed that sentence under section 654. On count 4, the court imposed the upper term of six years, consecutive to counts 2 and 3.

The court gave Nguyen presentence custody credits of 775 actual days but no good conduct credits. The court ordered Nguyen to pay restitution to the Victim Compensation and Government Claims Board in the amount of $2,000 plus interest under section 1202.4, subdivision (f). The Board had provided Angel with funds to relocate. The court also imposed a restitution fine of $300 under section 1202.4, subdivision (b), a court operations assessment of $160 ($40 per count), and

a criminal conviction assessment of $120 ($30 per count). The court imposed and stayed a $300 parole revocation fine.[5]

DISCUSSION

1. *The trial court must stay Nguyen's sentence on Count 4*

Nguyen contends the trial court should have stayed his sentence on Count 1 as well as Count 4. The Attorney General agrees, noting Nguyen's "intent and objective in committing the burglary was to force Angel to orally copulate him." We agree as well. On remand, the trial court is to stay Nguyen's sentence on Count 4 under section 654.

2. *The trial court determined Nguyen's two acts of forcible oral copulation took place "on separate occasions" under governing law*

Nguyen contends he was entitled to have the jury decide whether his two acts of forcible oral copulation took place "on separate occasions" within the meaning of section 667.61, subdivision (i). Nguyen acknowledges the United States Supreme Court has held "the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses." (See *Oregon v. Ice* (2009) 555 U.S. 160, 168-172; see also *People v. Nguyen* (2009) 46 Cal.4th 1007, 1018, fn. 9 ["It is also now clear that *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] does not require a jury determination of facts bearing on whether to impose concurrent

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[5] In addition, the court imposed a sex offender fine of $300 "plus penalty assessment and 20 percent state surcharge." The minute order states the total sex offender fine with penalty assessments and the surcharge was $1,810. Nguyen does not mention this fine in his appellate briefing.

or consecutive sentences for separate offenses."].) Nguyen argues the dissenting opinion in *Oregon v. Ice* "is better reasoned," however, and he "invites" us "to record [our] disagreement with [the majority] opinion." We decline Nguyen's invitation.

Nguyen also notes he must raise his objection to the rule announced in *Oregon v. Ice* "to preserve his claims for subsequent review."

3. *Nguyen is entitled to presentence good conduct credits of 15 percent*

Nguyen asserts he is entitled to presentence good time/work time credits of 15 percent under section 2933.1. The Attorney General agrees, citing *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1311. We accept the concession.[6]

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[6] A leading treatise states, "Section[ ] . . . 667.61 (One Strike law) . . . [was] amended in 2006 to eliminate the provision that allowed such crimes to accrue 15% conduct credits, whether before or after sentencing. Now there are no conduct credits allowed against the minimum term." (Couzens & Bigelow, Sex Crimes: Cal. Law and Procedure (The Rutter Group 2018) ¶ 13:16(2), p. 13-92; see also *id*. at ¶ 13:10(4), p. 13-56 ["After an amendment effective September 20, 2006, the defendant is not entitled to any conduct credits against the minimum terms [in a One Strike case], either before or after sentencing to state prison. The amendment eliminated the statutory authorization for credits under section 2930 and 4019 previously contained in section 667.61, subdivision (j)."].) We have not located any statute that so provides. (The treatise's reference to section 2930 may be a typographical error. That statute concerns the government's obligation to inform prisoners of prison rules.) As the parties in this case note, section 2933.1 limits worktime credits for violent felonies to 15 percent of actual credits. The only violent felony exempted from this provision is murder; for that crime the defendant receives no conduct credits at all. (§ 2933.2.)

4. *Nguyen is not entitled to an ability to pay hearing*

In a supplemental brief Nguyen contends he is entitled to a remand to the trial court for a hearing on his ability to pay the restitution fine and court assessments under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Nguyen states he "does not here contest the direct victim restitution order of $2,000."

Some courts—including our colleagues in Division Two—have held *Dueñas* was wrongly decided. (*People v. Hicks* (Sept. 24, 2019, B291307) ___ Cal.App.5th ___ [2019 WL 4635156]; see also *People v. Aviles* (2019) 39 Cal.App.5th 1055; cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 923, 927 ["urg[ing] caution in following [*Dueñas*]"; concluding in any event "the due process analysis in *Dueñas*" does not justify extending its holding beyond the "extreme facts" that case presented].)

In any event, unlike the defendant in *Dueñas*, Nguyen did not object to the imposition of the restitution fine or assessments or assert any inability to pay. Generally, where a defendant has failed to object to a restitution fine based on an inability to pay, he has forfeited the issue on appeal. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our colleagues in Division Eight that this general rule applies here as well to the assessments imposed under section 1465.8 and Government Code section 70373. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155; but see *People v. Jones* (2019) 36 Cal.App.5th 1028; *People v. Castellano* (2019) 33 Cal.App.5th 485.)

Our constitution provides, "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes for the losses they suffer." (Cal. Const., art. I, § 28, subd. (b),

par. (13)(A).) Our Legislature enacted section 1202.4 to promote and further this intent. The California Victim Compensation and Government Claims Board provides restitution to crime victims from the restitution fund. (See Gov. Code, §§ 13950-13966.)

This case well illustrates the importance of the Board's work. The Board provided the victim here, Angel Doe, with $2,000 for relocation expenses. Not only had Angel been repeatedly violated in her apartment, but Nguyen's family continued to live downstairs. In her victim impact statement, Angel told the court she "will never feel safe again" "[n]o matter how many therapist's sessions attended, pills popped, knowledge of self-defense, weapons, security systems, tears shed, or promises of a loved one." Angel stated the "relief" she once had when coming home—"[t]he one sanctuary we all have"—"was taken [away] from [her] by Andy" and "is lost forever."

Even if forfeiture did not apply to the restitution fine and assessments, *Dueñas* does not apply here. *Dueñas* is based on the due process implications of imposing a fine and assessments on an impoverished defendant. The situation in which Nguyen has put himself—life in prison for at least 50 years—does not implicate the same due process concerns. Nguyen, unlike Dueñas, does not face incarceration because of an inability to pay a restitution fine and assessments. Nguyen is in prison because he hid in the victim's apartment, attacked her, and repeatedly forced her orally to copulate him. Even if Nguyen does not pay the fine and assessments, he will suffer none of the cascading and potentially devastating consequences Dueñas suffered. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) Nguyen has not faced and never will face additional punishment because he cannot pay the restitution fine or assessments.

Finally, Nguyen has presented no evidence of any inability to pay. When he committed his crimes, Nguyen was employed

as a chef at a Sheraton hotel. He had an iPhone 5. He had been "first in line to get it" the year before. "Not only does the record show [Nguyen] had some past income-earning capacity, but going forward we know he will have the ability to earn prison wages over a sustained period." (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139.) "The idea that he cannot afford to pay [$580] while serving a [50]-year prison sentence is unsustainable." (*Ibid*.) "Thus, even if we were to assume [Nguyen] is correct that he suffered a due process violation when the court imposed this rather modest financial burden on him without taking his ability to pay into account, we conclude that, on this record, because he has ample time to pay it from a readily available source of income while incarcerated, the error is harmless beyond a reasonable doubt." (*Id.* at pp. 139-140, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

We affirm Andy Nguyen's conviction. We remand the matter to the trial court with directions to stay Nguyen's six-year sentence on Count 4 under Penal Code section 654 and to award him 116 days of presentence conduct credits. The court is to prepare an amended abstract of judgment and forward it to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

I concur:

DHANIDINA, J.

LAVIN, Acting P.J., Concurring:

I agree with the majority's conclusion that defendant was not entitled to a jury determination of whether his crimes took place on separate occasions. I also agree that count 4 must be stayed and that defendant is entitled to 15 percent custody credit.

I respectfully disagree with the majority's conclusion that defendant forfeited any challenge to the imposition of the court facilities fee (Gov. Code, § 70373), the court security fee (Pen. Code,[1] § 1465.8), and the restitution fine (§ 1202.4, subd. (b)) by failing to object in the trial court. *People v. Dueñas*, which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1169–1172.) No one saw it coming—and defendant was not required to anticipate it. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 137–138; see *People v. Brooks* (2017) 3 Cal.5th 1, 92 [" '[r]eviewing 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' "].) On the merits, however, I conclude no error occurred because the court impliedly found defendant had the ability to pay the disputed fine and fees. I therefore concur.

When a defendant is convicted of a sex crime listed in section 290, subdivision (c), the court must impose a fine under section 290.3 unless it "determines that the defendant does not

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

have the ability to pay" it. (§ 290.3, subd. (a).)[2] The fine is $300 for the first offense and $500 for each subsequent offense (*ibid.*) plus penalty assessments and the state surcharge (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249). The fine applies per count rather than per case. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 822.) Thus, as defendant was convicted of two eligible sex offenses, the court was required to impose one $300 fine and one $500 fine plus penalty assessments and the surcharge.

Instead, the court imposed a single $300 sex offender fine under section 290.3 plus $870 in penalty assessments and a $60 state surcharge. On a silent record, the failure to impose all required sex offender fines implies a finding that the defendant lacks the ability to pay the fines the court did not impose. (*People v. Stewart* (2004) 117 Cal.App.4th 907, 911.) That is, by ordering defendant to pay $300 rather than $800, the court impliedly found that defendant *could* pay $300 in fines but *could not* pay more than that.

A defendant's ability to pay fines and fees is evaluated in light of his total financial obligations. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) Total financial obligations include the conviction assessment (Gov. Code, § 70373), the operations assessment (§ 1465.8), the restitution fine (§ 1202.4),

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[2] Although the parties did not address section 290.3 in their briefing, the statute's application is fairly included within defendant's contention that he lacked the ability to pay the disputed fine and fees. (See *People v. Alice* (2007) 41 Cal.4th 668, 679 ["The parties need only have been given an opportunity to brief the issue decided by the court, and the fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of [Government Code] section 68081."].)

and victim restitution. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531–1532.) I presume the court accounted for these obligations when it concluded defendant could pay the $300 sex offender fine and $930 in penalty assessments and the state surcharge but could not pay the other required sex offender fine. (*Ibid*.) And, because the court concluded defendant had the ability to pay $1,230 more than the fine and fees he now challenges, it follows that the court found he had the ability to pay the challenged fine and fees as well.

As the court below has already made an ability to pay determination, there is no need to remand for the hearing defendant requests.

LAVIN, Acting P.J.

A P P E N D I X B

Order of the California Supreme Court Denying Review,
filed January 2, 2020

Court of Appeal, Second Appellate District, Division Three - No. B290564

S258923

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANDY NGUYEN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice