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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. VINCENT TODD ARMSTRONG, Defendant and Appellant.	B289701 Los Angeles County Super. Ct. No. NA102224

APPEAL from a judgment of the Superior Court of Los Angeles County, James Otto, Judge. Judgment of conviction affirmed; sentence vacated and matter remanded for further proceedings.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Vincent Todd Armstrong of second degree murder after hearing recordings of jailhouse conversations between Armstrong and undercover police officers. We affirm his conviction and remand for resentencing in light of Senate Bill No. 1393.

BACKGROUND

An amended information charged Armstrong with the murder of Taylor Parks on or about July 7, 2015 (Pen. Code,[1] § 187, subd. (a)); alleged Armstrong personally used a deadly weapon (a knife) (§ 12022, subd. (b)(1)); and alleged Armstrong had three prior serious or violent felony convictions, and had served four prior prison terms.

At trial, Christina Alvarado testified that on the night of July 7, 2015, she was sweeping outside the gas station where she worked on Long Beach Boulevard, across the street from the Windmill Creek apartment complex and a bridge over the Los Angeles River. Parks was a customer who lived with other homeless people, behind an access gate to a dirt area under the bridge.

Sometime between 11:00 p.m. and 11:15 p.m., Alvarado saw a light-skinned black man across the street, running away from the gate to the river area and toward a grey Camaro parked by the apartments. The man crouched as he ran. When he reached the car he opened the passenger door and moved the seat up, while looking back over his shoulder with his arm inside the car. A woman ran after him, saying: "I heard you were talking shit about my mama." The woman stood in front of the man on the sidewalk, he straightened up and punched her in the face,

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[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

and she fought back. The woman did not hit the man first or threaten him, and Alvarado saw no weapon.

Alvarado ran inside to call 911. She came back out and saw the man speed off in the Camaro, leaving the woman clinging to a tree. Alvarado ran across the street and recognized Parks, who was slumped down and barely breathing. Drops of blood were on the sidewalk.

Between 11:00 p.m. and 11:15 p.m., a woman in a third-floor apartment in the complex heard an argument. She looked outside and saw a black woman and man standing next to a car with its passenger door open. The man punched the woman, who fell to the sidewalk, and the man got into his car and left. Blood was on the sidewalk, and the woman could not get up. She did not hear the woman threaten the man physically or verbally, and saw no weapon.

A man in a second-floor apartment heard a female voice cursing outside, getting louder as it came closer. He looked outside and saw a man going in and out of the doors of a car as if looking for something. A woman stood by the trunk, swearing and telling the man to get out of the neighborhood. The woman did not hit or swing at the man. The witness heard no threats and saw no weapons. After he stopped watching he heard a loud smack, and when he looked out again the woman was on the ground and the man was driving away.

The jury heard the preliminary hearing testimony of Derrick Waddell, who was unavailable at trial. Waddell was near the gas station that night, hanging out with Parks and her boyfriend. Parks's boyfriend left to get cigarettes, and later Parks came back looking for him. Waddell and Parks went to the bridge. Parks asked Armstrong (whom Waddell later identified

in a six-pack) and another man: "[W]here is my dude?" When Parks asked Armstrong who he was and what he was doing there, he answered, "Fuck you, I'm not leaving." Parks argued with Armstrong, who swore at her and walked toward the gas station. Parks followed, angrily saying "this motherfucker . . . called my mama a bitch," while Armstrong cursed at her.

Waddell followed Armstrong and Parks at a distance. He saw Parks and Armstrong scuffling on the sidewalk by a grey Camaro, and one of them fell. When he went closer, he saw Parks on her side trying to get up, while the car drove away. Parks was hurt, and a woman helped her.

A Long Beach Police Department officer arrived at the scene and found Parks lying on her back on the sidewalk. Her eyes were rolled back, she was not breathing, he could not find a pulse, and a small amount of blood was on the sidewalk. He performed CPR and noticed a laceration on Parks's left chest. Parks did not have a weapon.

An ambulance took Parks to the hospital, where she was declared dead. The coroner testified the cause of death was a stab wound, seven and three-quarters inches deep and five-eighths inch wide, which penetrated both chambers of her heart. Parks had no offensive or defensive wounds on her hands, arms, or legs, and nothing indicated she was moving or turning when she was stabbed. Parks was heavily tattooed and weighed 215 pounds.

Police surveillance of Armstrong showed he drove a silver Camaro registered to him, with a license plate of 7JOE252. Officers arrested Armstrong at 4:00 a.m. on July 16, as he slept in the Camaro in a parking lot. The officers retrieved a cell phone from the car, but no weapon. The cell phone records

showed that before 9:00 p.m. on the night of July 7, three calls hit a cell tower less than a half-mile from where Parks was stabbed. The next two calls, at 11:45 p.m. and at 12:06 a.m., hit a cell tower about 5.1 miles to the south. On July 6, a police department mobile license plate reader installed on a patrol car had picked up the Camaro's license plate at .7 miles from the crime scene at 8:52 a.m., and at about 125 feet from the crime scene at 11:25 p.m.

The jail cell recording

The day after Armstrong's arrest, police placed him in a cell with two undercover informants. The jury heard a redacted three-hour recording of their six-hour conversation.

An officer told Armstrong (who believed he had been brought in for sleeping in his car) that he had been positively identified, and was charged with Parks's murder. The officer left, promising to come back when his partner returned from the field. Armstrong told the informants he had been in Victorville, and denied killing or hurting anyone. He was nervous, but the officers had no "slam-dunk case on me." He knew where he had been and what he had done, and he did not have to tell the police anything. Armstrong wondered if he and his 2000 Camaro fit a description. He wanted to see the police report to "[s]ee what the fuck's going on here. Get the lawyer . . . the lawyer see what the hell's going on."

A detective entered to photograph Armstrong's hands. Like his body, they showed no cuts. The detective said he had seen video footage of the crime scene. After the detective left, Armstrong wondered what was on camera. He would not talk to the police: "I'm not gonna discriminate [*sic*] myself." He thought someone from the gas station or the apartment complex had

identified him, but he didn't leave town, because "wh[y] would I take off running some place . . . if I ain't done nothing?"

The informants suggested he argue self-defense. Armstrong agreed, if the video showed somebody coming after him, "[e]specially . . . a female's that's all tat down and shit." The woman was black and she teamed up with a black man to steal from people in the park by the river. Armstrong's bag had been stolen. If the police had evidence or witnesses, it was "not me attacking nobody. Maybe somebody coming at me and attacking me . . . self-defense." He was trying to get into his car and get away, and "they pulled something out."

An officer entered the cell to take a DNA sample from Armstrong, telling him they found "a lot of blood." After the officer left, Armstrong said he did not cut himself when it happened, and the officers were just "fishing." He had told the officers "no, I'm gonna (Inaudible) my lawyer (Unintelligible). I'm not stupid." One informant asked Armstrong if whatever he used to defend himself was "gone." Amstrong said, "It doesn't exist. . . ." "[I]t ain't gonna be found. . . . My nephew made sure of that. . . ." "Let's just say he made sure that things were taken care of. . . ." "Fuck, it ain't nowhere in that area. Ain't nowhere in no area. . . ." "[I]f anything, it might be on somebody's, uh, dinner table somewhere."

Asked if he had "ever poked anybody before" when he was "in the system," Armstrong answered: "I got a sticking in '95 at—on somebody. A Crip from Hoover," and "I learned how to from a Mexican. From the Mexicans" in county jail.

Armstrong said the woman yelled curses and insults, and "chased after me. . . . [T]hey was calling backup to do something; to take me out and shit. And I—and I tried to run and make it

to my car and she was behind me." She was big and fat, and he thought "she was either gonna shank me, or she was gonna —I don't know," and he "[k]nocked her ass off" and drove away. He had just found out she was dead.

The police pulled Armstrong out of the cell. When he returned, Armstrong told the informants his parked car had shown up on a camera during the day " 'where it happened,' " but he wasn't worried because the camera would not show anything in the middle of the night. If a video showed him running out of the riverbed and the woman chasing after him, he had feared for his life, and "[t]hen that's manslaughter, yeah." The woman had come up from behind, yelling, " 'Motherfucker, you talking my momma's a fucken faggot motherfucker? I'll show you something.' " She had a "duct taped fucken shank; metal shank, like, a knife" with a homemade blade, like a "bone crusher." He was not reaching for anything, just trying to get into his car. After the woman jumped him, Armstrong "hit her to the curb" in self-defense, and "took it away from her. And then, you know, bam, got her off me. Boom, hit her with that."

An officer testified a "bone crusher" was a very sturdy shank that could puncture deep into the body and penetrate bone, muscle, tissue, organs, arteries, or veins.

DISCUSSION

1. *Recorded conversation with undercover agents*

Defense counsel moved before trial to exclude the entire recording of Armstrong's jail conversation with the undercover informants. Acknowledging that current case law held such evidence did not violate due process, the right to counsel, or the right against self-incrimination, counsel argued the case law was

"bad policy." After carefully redacting the transcript, the trial court overruled the objection.

Despite California case law, Armstrong argues that under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the jail conversation violated the rule that officers may not engage in custodial interrogation after a suspect has invoked his right to counsel. He argues he invoked his right to counsel when he told the informants he wanted to get his lawyer before he spoke to the officers.

In *Illinois v. Perkins* (1990) 496 U.S. 292, 294-297 (*Perkins*), the Supreme Court held a conversation between an incarcerated suspect (who had not been given *Miranda* warnings) and an undercover agent posing as a fellow inmate was not custodial interrogation, and therefore did not require *Miranda* warnings. "It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners." (*Perkins*, at p. 297.) Custodial questioning by a suspect's captors who appear to control the suspect's fate may create "mutually reinforcing pressures" weakening the suspect's will, but "where a suspect does not know that he is conversing with a government agent, these pressures do not exist." (*Ibid*.) "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. . . . [¶] *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." (*Id.* at pp. 297-298.)

Armstrong argues that unlike the defendant in *Perkins*, during the conversation with the informants he repeatedly stated he wanted counsel present. Relying on *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*), and its prohibition of further custodial interrogation of a suspect who has invoked his *Miranda* rights (absent waiver), he argues his conversation with the informants was inadmissible because he had asserted his *Miranda* rights.

People v. Guilmette (1991) 1 Cal.App.4th 1534, rejected a similar argument. The defendant invoked his right to remain silent and his right to counsel. Police then recorded a phone call he made to his rape victim, who was acting as a police agent and asking questions suggested by the police. (*Id.* at pp. 1537-1538.) The court held the recording was admissible, even though the defendant had invoked his *Miranda* rights: "It is true, as appellant contends, that in *Perkins* there was no *Miranda* warning, no invocation of *Miranda* rights, and that the issue presented to the court was whether the undercover agent was required to give Perkins a *Miranda* warning. These distinguishing facts, however, do not change or alter the basic nature of the respective conversations by Perkins and appellant herein. . . . Statements made under these circumstances simply do not implicate *Miranda*, and a noncoercive atmosphere is not transformed into a coercive one because one suspect is warned and the other is not." (*Guilmette*, at p. 1541.)

In *People v. Orozco* (2019) 32 Cal.App.5th 802 (*Orozco*), the defendant's baby died of blunt trauma. After police advised him of his *Miranda* rights, he said he understood them, gave an account absolving himself, and asked five times for a lawyer. The officers arrested him, and again he asked for a lawyer.

The officers jailed him. (*Orozco*, at pp. 806-808.) The officers told the baby's mother she had a right to know the truth and suggested she could get a full explanation. They placed her in an interview room with the defendant, and recorded him as he confessed he killed the baby. (*Id.* at pp. 808-809.)

Orozco concluded this did not violate *Edwards*, which prohibits only further *interrogation* by the authorities once the suspect invokes his *Miranda* rights. (*Orozco*, *supra*, 32 Cal.App.5th at p. 813.) "Interrogation" for *Miranda* purposes means " 'express questioning' " or " 'words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response,' " requiring " 'a measure of compulsion above and beyond that inherent in custody itself.' " (*Orozco*, at p. 813.) Whether a conversation is interrogation "is judged by what the suspect perceives, not what the police intend." (*Ibid.*) As a result, "there is no 'interrogation' when a suspect speaks with someone he does not know is an agent of the police," and "there is also no basis to apply *Edward*'s restrictions on further 'interrogation.' " (*Id.* at p. 814.) Lacking a police-dominated atmosphere and compulsion, when " 'an incarcerated person speaks freely to someone' that he thinks is a lover, a family member, a friend or *even a fellow criminal*," the purpose of *Miranda* and *Edwards* "is simply not implicated." (*Ibid.*, italics added.)

Armstrong cites Justice Brennan's concurrence in *Perkins*, *supra*, 496 U.S. at pp. 301-302, to argue that his due process rights were violated. But Justice Brennan's concurrence is dicta, and the seven-justice majority opinion controls. (*Orozco*, *supra*, 32 Cal.App.5th at p. 815.)

Armstrong spoke freely to men he believed were fellow inmates. Even if his references to a lawyer were invocations of his right to counsel, the trial court correctly denied Armstrong's motion to exclude his statements under *Miranda*.[2]

2. *Admission of individual statements*

Armstrong moved to exclude his references to his right to a lawyer or to his right to remain silent. The trial court excluded most of those statements, but admitted two: "I don't talk to no detective on no shit like that," and (following a suggestion by one of the agents that his family had money for an attorney), "I don't know. See if my family, uh—see what my family say about this shit right here."[3] He now argues the court was wrong to admit the statements, which allowed the prosecution to use against him both his post-*Miranda*-advisement silence (*Doyle v. Ohio* (1976) 426 U.S. 610), and his failure to testify at trial. (*Griffin v. California* (1965) 380 U.S. 609.)

It was not an abuse of discretion to admit the two challenged statements. Neither directly referred to Armstrong's

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[2] Armstrong did not argue in the trial court that his statements were involuntary, and so he has forfeited the issue on appeal. (*People v. Tully* (2012) 54 Cal.4th 952, 992.)

[3] Armstrong identifies three additional statements: "See what the fuck's going on here. Get the lawyer. The lawyer—the lawyer see what the hell's going on."; "I'm gonna (Inaudible) my lawyer (Unintelligible). I'm not stupid."; and his statement that he told the officers: " 'I don't speak to you guys unless my attorney's here.' " Armstrong has forfeited appellate review of these statements because he did not challenge them in the trial court in briefing or at the hearing. (*People v. Valdez* (2012) 55 Cal.4th 82, 142-143.)

right to counsel or his right not to testify. The statement "I don't talk to no detective on no shit like that" immediately preceded "Where my lawyer at?", which the trial court excluded. The statement as admitted does not invoke Armstrong's right to counsel. We agree with the trial court that the remaining statement about his family was general banter with the informants, and was not "anywhere close to him asserting his right to counsel."

We see no violation of due process. "To establish a violation of due process under *Doyle*, the defendant must show that the prosecution inappropriately used his postarrest silence for impeachment purposes and the trial court permitted the prosecution to engage in such inquiry or argument." (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.) *Griffin* and *Doyle* prohibit the prosecution from taking unfair advantage of the defendant's silence, providing a shield, not a sword. (*Champion*, at p. 1449.) Armstrong does not point to any conduct by the prosecution using his references to his right to counsel as substantive evidence of guilt, or for impeachment. He did not testify. No shield was necessary absent an improper attempt. And any error would have been harmless beyond a reasonable doubt given the overwhelming evidence of guilt, including eyewitness testimony and the physical evidence negating Armstrong's argument he acted in self-defense. (*People v. Delgado* (2010) 181 Cal.App.4th 839, 854.)

3. *Evidence of a prior stabbing*

During the recorded conversation, one of the informants asked Armstrong: "When you was in the system, had you ever poked anybody before?" Armstrong explained: "I got a sticking in '95 at—on somebody. A Crip from Hoover. . . . A little homie."

The informant replied: "[T]hat's shit that we learn in—in prison. You feel me? That ain't shit motherfuckers just do. . . . We know what to do." Armstrong answered: "Yeah. Oh, I learned how to from a Mexican. From the Mexicans" when he was locked up in county jail.

Defense counsel moved to exclude "several statements that he previously stabbed someone while in prison" as inadmissible under Evidence Code section 1101 (section 1101), subdivision (a). The trial court ruled the statements were admissible under section 1101, subdivision (b) as relevant to Armstrong's intent, and their relevance outweighed any possible prejudice. Armstrong argues this was error. "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369 (*Kipp*).)

Evidence that a defendant has committed crimes other than the crimes currently charged is not admissible under section 1101, subdivision (b) to prove bad character or criminal disposition, but may be admitted to prove "the intent with which the perpetrator acted in the commission of the charged crimes." (*Kipp*, *supra*, 18 Cal.4th at p. 369.) To be admissible as evidence of intent, the uncharged crime "need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' " ' " (*Id.* at p. 371.) "Against this substantial probative value on material and contested issues, we must weigh the danger of undue prejudice to defendant, of confusing the issues, or of misleading the jury." (*Id.* at p. 372.) The trial court's balancing of probative value and prejudice under Evidence

Code section 352 is an abuse of discretion when its ruling " 'falls outside the bounds of reason.' " (*Kipp*, at p. 371.)

Whether Armstrong intended to kill Parks was a central issue at trial. The prosecution argued he intentionally stabbed and killed Parks after he took the knife out of his car. The defense argued Parks carried the knife as she ran after Armstrong, and he grabbed it from her and used it in self-defense, believing she was going to stab him. But to be relevant to prove Armstrong's intent, the 1995 stabbing must be similar enough to the charged offense to allow the jury to infer that Armstrong harbored the same intent then as in 2015. We do not see a connection. The only evidence about the 1995 stabbing is that Armstrong used a knife to stab a Crip while in jail, and he learned how "from the Mexicans." That bare description is not enough to show the 1995 stabbing was similar, let alone substantially similar, to the 2015 stabbing, or whether in 1995 Armstrong intended to attack the victim or acted in self-defense. It shows only that Armstrong had stabbed someone before, and therefore "the probative value of the prior offense to support an inference [the defendant] harbored the same intent in each case is, at best, minimal." (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 862.) That Armstrong had learned from others how to use a knife says nothing about his intent 20 years later. And, like any other crimes evidence, the 1995 stabbing posed a danger of prejudice, as a jury might view it as evidence of his propensity for violence. (*Kipp*, *supra*, 18 Cal.4th at p. 372.)

But we need not determine whether the court abused its discretion when it admitted Armstrong's statements about the 1995 stabbing. Any error in failing to exclude the evidence does not require us to reverse unless it is reasonably probable

Armstrong would have obtained a more favorable verdict if the evidence had not been admitted. (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 862; *People v. Carter* (2005) 36 Cal.4th 1114, 1152.) All the evidence showed Armstrong ran to his car, groped inside, and then punched Parks just before she fell to the sidewalk, where she died from a stab wound to the heart. None of the four eyewitnesses testified Parks had a weapon, or hit or threatened Armstrong before he punched her. Parks's body had no offensive wounds, Armstrong had no injuries, and nothing showed Parks was moving or turning when she was stabbed. Given this strong evidence that Armstrong did not act in self-defense, it is not reasonably probable Armstrong's statements were the critical factor in the jury's conclusion that he intentionally stabbed Parks, so that the jury would have reached a verdict more favorable to Armstrong had the court excluded the 1995 stabbing. And the trial court properly instructed the jury it could use the statements only to decide whether Armstrong acted with the intent to kill, and not to conclude that Armstrong had a bad character or was disposed to commit crimes. We presume the jury followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

4. *Detective Goodman's testimony*

Armstrong argues the trial court abused its discretion when it admitted a detective's hearsay testimony about witnesses' descriptions of the suspect and his vehicle.

During direct examination of Detective Donald Goodman, the prosecutor asked him about eyewitnesses' and others' descriptions of the suspect and the vehicle. The trial court overruled defense counsel's hearsay objection, telling the jury not to use the testimony for the truth of the descriptions, but to

explain the detective's next step in the investigation. Detective Goodman then testified that the general description of the suspect was a thin black male in his mid to late 40's with a medium skin tone, five feet six or seven, clean shaven and bald, with a gap between his teeth. The car was described as an older Camaro, gray or silver or platinum, with stripes on the hood. Based on these descriptions, he and his partner used departmental resources to identify potential suspects, including using the department's license plate reader system, among many other tools. The license plate reader detection records for the area where Parks was stabbed identified a vehicle with the license plate 7JOE252, which DMV records showed was registered to Armstrong.

The description of the Camaro was not hearsay. It was offered to show what the detectives did next in their investigation (using the description to identify Armstrong's car with the help of a license plate reader system), not to show the description of the car was accurate. Instead, the prosecution used the testimony to explain "subsequent action by a law enforcement officer during his investigation into a murder." (*People v. Samuels* (2005) 36 Cal.4th 96, 122.) Here, the officers used the information to identify the car with department resources, including the license plate reader.

Detective Goodman did not describe how the officers used the description of Armstrong in the investigation. Nevertheless, the identity of the perpetrator was not seriously contested at trial, and so admitting the evidence did not prejudice Armstrong. Waddell identified Armstrong in a photographic lineup, and testified a grey Camaro drove away from the scene. Once the Camaro was identified, Armstrong was identified as its owner

by the DMV records. In his conversation in jail, Armstrong described his interaction with Parks. The issue was Armstrong's intent when he stabbed Parks, not whether Armstrong fit the general description in Detective Goodman's testimony.

Finally, Armstrong argues that cumulative error requires reversal. As we find little error and none that is prejudicial, we reject this claim, as we do his assertions he was prejudiced by the ineffective assistance of trial counsel.

5. Senate Bill No. 1393

The trial court imposed three five-year prior serious felony enhancements, adding 15 years to Armstrong's sentence under section 667, subdivision (a)(1), which was mandatory when Armstrong was sentenced. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Effective January 1, 2019, Senate Bill No. 1393 (S.B. 1393) amended sections 667 and 1385 to allow a court to exercise its discretion to strike or dismiss prior serious felony convictions for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; *Garcia*, at p. 971.) S.B. 1393 applies retroactively to cases not final when it took effect. (*Garcia*, at p. 973.) Armstrong argues we must vacate his sentence and remand to allow the trial court to exercise its discretion whether to strike or dismiss the enhancements under the amended law. The People agree, and so do we. We therefore vacate Armstrong's sentence and remand for a new sentencing hearing, without expressing an opinion about how the trial court should exercise its discretion.

6. *Imposition of fines and fees*

Armstrong also argues that the trial court violated his federal and state rights to due process by imposing a $40 court operations assessment, a $30 criminal conviction assessment,

and a $300 restitution fine without determining his ability to pay, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157. Our colleagues in Division Two recently held that *Dueñas* was wrongly decided. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 327-329, review granted Nov. 26, 2019, S258946; see also *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060, 1067-1069; cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-927 [concluding "the due process analysis in *Dueñas* does not justify extending its holding beyond" the " 'extreme facts' " presented there].) The California Supreme Court is currently considering whether a court must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.) Because we remand for resentencing, we need not reach whether Armstrong is entitled to remand for an ability to pay hearing. Armstrong should raise any challenge to the fees or fines at the sentencing hearing.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing under Senate Bill No. 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.