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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

MANUEL ALEX TRUJILLO,

Defendant and Appellant.

H026000

(Santa Clara County

Super. Ct. No. CC125830)

Defendant Manuel Alex Trujillo was convicted at jury trial of assaulting David Smith by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1))¹ and acquitted of robbery. The court sentenced defendant to a seven-year prison term (midterm of three years and doubled it to six years because of one Three Strikes prior and one year for a prison prior) and ordered him to pay attorney fees. The court found that defendant's prior section 273.5 conviction of battery on a spouse or cohabitant was not a Three Strikes prior because the personal use allegation had been dismissed pursuant to a negotiated disposition. The People appeal. They contend the sentence was unlawful because the prosecution proved that defendant had suffered two prior strike convictions and the court had failed to sentence defendant pursuant to the three prior strikes provisions of the Three Strikes law.

¹ Further statutory references are to the Penal Code unless otherwise stated.

Defendant cross-appeals contending the exclusion of evidence that Smith had previously committed perjury about being the victim of a crime in order to obtain benefits was prejudicial error and that the order that he pay attorney fees was made without any basis for finding an ability to pay.

FACTS

About 8:30 p.m. on October 16, 2001, David Smith was unable to start the van he had left parked next to a San Jose CityTeam Ministries care facility for substance abusers and the homeless. He used his other car to go to buy jumper cables and a new battery and returned to the van to work on it. As Smith was removing the replacement battery from his car, defendant approached him with a group of people.

Defendant said something like, "You're a fool, you can't fix that car." Smith asked defendant what he was doing there, and without saying anything, defendant struck Smith on the jaw two or three times, knocking him to the ground. Defendant then kicked Smith repeatedly. Several kicks landed above Smith's ear. Defendant was wearing high top sneakers. The kicks were sufficiently hard that Smith blacked out for an unknown period of time. He described seeing flashes in his head, then having his vision reduced to tunnel vision, then going out. Next he could hear bystanders speaking but could not see. As his vision cleared, he could see defendant circling him "like a shark." Smith then got into a stand-up fetal position against the van with his forearms protecting his face. Defendant hit him again several times on the head, neck, shoulders, and arms as Smith turned and faced the van and covered his head with his arms. Smith did not try to hit defendant back and was screaming, "Why are you doing this? What's wrong with you?"

Suddenly defendant walked away. Smith tried to find the keys to the van and noticed his wallet was missing. He had several lumps on the side of the head plus some abrasions and contusions. He iced the side of his head with some ice he had previously purchased. Smith said he was too stunned and disabled to go to a nearby phone to call police, so he sat in the van and rested with the ice pack on his head until 6:00 a.m. the

next morning. About 45 minutes after defendant hit him, Al, another habitué of CityTeam Ministries and a member of the group of bystanders, came and said he had Smith's wallet and offered to return it for a reward. Smith found some change in the van which he gave Al to get his wallet back. The \$300 was no longer there.

Smith knew defendant as someone who frequented the CityTeam facility. Earlier that day, defendant talked to Smith about cashing a check he got from working at the *San Jose Mercury News*. Smith told defendant he had just cashed a \$300 check and the two discussed times, fee-charging check-cashing places and banks and savings and loans. Smith could not recall who had issued him the check he cashed earlier, but he did recall mentioning the amount of the check to defendant. Smith had some long overdue bills for his telephone and pager and some personal debts, and he planned to buy money orders at a convenience store and mail them that night. Defendant asked Smith to take him to a check-cashing place and he specified an intersection in downtown San Jose. Smith did not see a check-cashing place there, but defendant left the car and then returned.

Mark Meeuwissen, a resident at CityTeam Ministries for about three years who knew Smith and defendant, heard a fight outside his bedroom window around 10:30 p.m. on October 16, 2001. He and his roommates looked outside and saw Smith right below their window saying, "What did I do? What did I do?" Defendant was punching him. Meeuwissen told defendant to stop or he and his roommates would come down there. Defendant started arguing with someone else, and Meeuwissen told him to leave because he had caused too much trouble. Defendant walked away and a Mexican man who was standing by brought Smith an ice bag. Meeuwissen did not see Smith go down to the ground, lose consciousness or turn his back to defendant, nor did he see anybody reach into Smith's back pocket.

By the time of trial, Smith claimed to still suffer intense and debilitating headaches, disorientation, dizziness, nausea and vomiting. He stated that immediately after the assault, he was unable to sit up in bed without suffering dizziness, disorientation

and nausea. He was unable to drive, shop, or cook or clean for himself. Smith said his senses became hypersensitive. He was extremely sensitive to light and had to keep dark sunglasses on to deal with inside light. He had a sensitivity to noise that was “so acute and so brutal that it would prevent you from even listening to the television or a normal sound.” He was extremely sensitive to smell; any odor would make him vomit. These symptoms lasted about four months, and still persisted, though less severely, to the time of trial, some 15 months after the assault.

Smith did not seek medical attention the night of the assault because he had an upcoming appointment with a doctor. He had been suffering from the same types of symptoms as a result of an April 1998 trauma. Smith had been a manager at an electronics assembly facility when two of the employees got into an altercation. Smith intervened and was pushed backwards. He hit his head on a concrete floor and a large electric motor and suffered a severe concussion. He was forced to quit his job because the headaches were so bad. Smith suffered repeated seizures during which all of his muscles tensed and he would quiver, shake and sweat. Smith had broken teeth during the seizures, dislocated fingers, and suffered injuries to his feet and ankles. The headaches and other symptoms continued from April 1998 to October 2001, although the severity lessened and the seizures became less frequent.

The defense contended that although the assault occurred, it was not felonious and did not result in great bodily injury. According to defendant, Smith exaggerated his injuries in order to appear disabled and feed a preexisting addiction to prescription drugs that began when he was injured in 1998.

The defense was allowed to call Gordon Complin, the manager of a Texaco gas station about two blocks from CityTeam Ministries, where Smith worked from November 2000 to June 2001. Complin testified that when Smith applied for the job, he told Complin he had had a head injury two years before. Complin requested and received a note from Smith’s physician saying that Smith was cleared to go back to work fulltime.

Complin did not see any signs that Smith had memory loss, inability to concentrate, nausea, or sensitivity to light or noise. On several occasions, however, Smith had called Complin at home when Smith was working the 11:00 p.m. to 7:00 a.m. graveyard shift to say that he was about to have a seizure and needed relief. It would take Complin about 45 minutes to dress and drive to the gas station. Smith would be there when he arrived and would say that he was going to the hospital.

After Smith quit, he continued to visit other employees at the gas station. Complin last saw him in February 2002. He saw no signs that Smith was unable to function, nor did Smith mention any injury other than the one he had had two years before being employed at the station.

However, the court refused to allow Complin to give evidence that the defense contended would show that Smith had previously lied under oath and used a common plan of exaggerating a minor situation to gain benefits. This evidence was that one morning about 4:45 a.m., Smith called the Texaco personnel office and left a message saying he had been threatened by another employee over the phone and wanted to leave the job, but he also wanted to make sure he got unemployment benefits. Both Complin, and the Texaco human resources department asked Smith to make a police report, offered to investigate the incident, and asked how the matter could be resolved to Smith's satisfaction. Smith would not cooperate. At 7:00 p.m. that night, Smith called Complin and said he would not be in to work anymore and that he wanted his unemployment benefits.

Smith applied for unemployment, but was denied when Complin said Smith had left the job without notice and that Texaco wanted him to work and was willing to protect him from threats or any bodily harm. Smith appealed the denial of benefits, and both Smith and Complin testified under oath at the resulting hearing. Complin believed Smith's testimony differed from the story he originally told Complin. Complin stated that originally, Smith said he did not know the identity of the person who threatened him,

that the voice was male, and that there was only one call. At the hearing, Smith identified the caller by name and said that he had been threatened over a period of two or three weeks before he reported it to Complin. He said he had been willing to make a police report. Although he had told Complin that the caller was a man, the employee he named at the hearing was female. The only men who worked at the Texaco station were Complin and Smith. Complin said they knew each other's voices and that he had certainly not threatened Smith. Smith also told the judge that he had a head injury and his doctor had told him that even a slight blow to the head would kill him. Smith won the appeal and was granted benefits. Later Complin learned from a "highway patrol beat officer" that a week before Smith left the message and quit, he told the officer he intended to leave to get unemployment benefits.

In late summer 2001, Smith applied for general assistance. He was seeking to be medically excused from performing jobs as a condition of receiving assistance. Also in 2001 Smith had a pending claim for spousal support because of his disability. Smith received disability payments from the state and saw numerous doctors for treatment and certification that he was disabled. He did not inform any of the doctors that he was seeking treatment and narcotics from the others. He took numerous medications including Vicodin, a narcotic, up to four to six times a day. Some of his doctors wondered whether Smith had "rebound" headaches caused by the amount of narcotics taken to prevent the headaches. They took him off narcotics for a three month period during which the headaches got a lot worse. Smith claimed he needed the drugs to function and without them could not help his daughter with her homework or carry her, did not leave the house or exercise as much, and had memory loss, bad headaches, seizures, nausea, and vomiting. He denied being addicted to narcotics, however he was referred to a drug treatment center and to Kaiser Hospital's chemical dependency unit for evaluation.

ISSUES ON APPEAL

The prosecution contends the trial court erred in determining that defendant's prior conviction of battery on a spouse or cohabitant with the personal use of a deadly or dangerous weapon was not a strike. Defendant asserts that exclusion of evidence that Smith had previously committed perjury was prejudicial error and violated his due process right to present a complete defense. He also complains that the trial court's order that he pay attorney fees was made without any basis for the finding that he had an ability to pay.

STRIKE

The People contend that they may appeal the order finding the strike "not true" as an order setting aside any portion of the information (§ 1238, subd. (a)(1)), as an order dismissing or otherwise terminating any portion of the action (*id.*, subd. (a)(8)), and as the imposition of an unlawful sentence (*id.*, subd. (a)(10)). Defendant responds that the People's appeal is unauthorized because the court's finding was not an order doing any of the above, but was a verdict of "not true" as to the strike prior conviction allegation.

After the jury verdict was recorded and the jury was discharged, the court held a trial on the prior conviction allegations. The People introduced eight exhibits to prove the allegations. Exhibit 13 contained 20 pages of court documents relating to Santa Clara County Superior Court case No. 149886, battery on a spouse/cohabitant. The exhibit contained an abstract of judgment, minutes of the plea, the probation report, and a transcript of the plea. To prove that the case was a serious felony because defendant personally used a knife, a deadly or dangerous weapon (§§ 667, subd. (a), 1192.7, subd. (c)(23)), the prosecution relied on defendant's statement to the probation officer that he stabbed the victim.

However, when defendant had pled guilty in that case, a section 12022, subdivision (b) allegation, that he personally used a deadly or dangerous weapon had been stricken pursuant to a negotiated disposition. Later, in the trial of the prior

conviction in this case, defense counsel argued that there was no ambiguity on the face of the abstract of judgment and therefore the court could not consider defendant's statement to the probation officer. The court commented "that a prior, to be a strike, has to be a prior conviction, and there was no conviction of the [section] 12022 [subdivision] (b) allegation. And the charging language of Count 1, the [section] 273.5, mentions nothing about a weapon." The prosecutor responded that "[t]here does not have to be a conviction for something which is alleged on its face to involve personal use of a weapon." The court responded, "[b]ut that was stricken, so it's no longer alleged on its face." The prosecutor stated that he was relying on cases that say "where you look is to the entire record of the conviction." The court reiterated that it was "going on the fact that [the previous prosecutor], in all his wisdom, settled the case with the understanding the knife allegation would not be used. It went away. The defendant relied on that. [¶] . . . [¶] And I think this goes to the benefit of his bargain." The trial court then found the strike prior allegation "not a strike."

"The People's right to appeal is statutory, and appeals that do not fall within the exact statutory language are prohibited. [Citation.]" (*People v. Salgado* (2001) 88 Cal.App.4th 5, 11.) "The restriction on the People's right to appeal is not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs but is a substantive limitation on review of trial court determinations in criminal trials." (*People v. Superior Court* (1968) 69 Cal.2d 491, 498.)

Section 1238 sets out the situations which the People may appeal. In this case, the People argue that they may appeal the trial court's "not true" finding on defendant's prior section 273.5 conviction under three subdivisions of section 1238. Because we find that the trial court imposed a sentence not authorized by law (§ 1238, subd. (a)(10)), we need not discuss the other two subdivisions.

The procedure for determining if a prior conviction allegation is true in the absence of an admission by defendant involves a determination by the jury or by a judge

if the jury is waived “whether or not [defendant] has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: ‘We (or I) find the charge of previous conviction true,’ or, ‘We (or I) find the charge of previous conviction not true,’ according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each.” (§ 1158.) Thereafter, “[d]etermining whether a prior conviction qualifies as a strike under the Three Strikes law is . . . the type of inquiry that judges traditionally perform as part of the sentencing function.” (*People v. Kelii* (1999) 21 Cal.4th 452, 456.)

“[I]n determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction” but “*no further.*” (*People v. Guerrero* (1988) 44 Cal.3d 343, 355, original italics.) Defendant’s statements in a probation report may be considered. (*People v. Goodner* (1990) 226 Cal.App.3d 609, 614.)

In the instant case, the trial court refused to consider the admission of personal use of a knife defendant made to the probation officer in the prior case because of the dismissal of the section 12022, subdivision (b) enhancement. “Generally, however, when a plea bargain calls for striking an enhancement, that merely means the enhancement cannot be used to enhance the current conviction. The plea bargain does not bar the use of the facts underlying the stricken enhancement in sentencing on a subsequent conviction. [Citations.]” (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1527.) Details of prior conduct that resulted in dismissal pursuant to a plea bargain can be presented in a later proceeding on the separate issue of appropriate penalty for a subsequent offense. (*People v. Melton* (1988) 44 Cal.3d 713, 756.) The plea bargain does not bar the use of the facts underlying the stricken enhancement in sentencing on a subsequent conviction. (*People v. Visciotti* (1992) 2 Cal.4th 1, 68, fn. 36.) Consequently, the trial court’s refusal to consider defendant’s statement constituted

judicial error and deprived the prosecution of a full and fair opportunity to prove that the prior offense was a “serious” felony.

A “not true” finding on a prior-conviction allegation is not an acquittal on defendant’s prior conviction status. “ ‘A defendant cannot be “acquitted” of that status any more than he can be “acquitted” of being a certain age or sex or any other inherent fact.’ [Citation.]” (*People v. Monge* (1997) 16 Cal.4th 826, 839.) Consequently, there is no double jeopardy bar to retrial of the prior conviction in the instant case. (*Ibid.*) The matter must be remanded to the trial court for a retrial on the prior-conviction allegation.

EXCLUSION OF EVIDENCE

Defendant complains that the trial court’s exclusion of Complin’s testimony about Smith’s quitting his job at Texaco and getting unemployment benefits as “vaguely relevant, barely relevant,” and probative on “a completely collateral matter,” was erroneous and an abuse of discretion. He states that the evidence “was highly probative on the issue of Smith’s general credibility, and was highly probative on the issue of whether Smith was ‘working the system’ in the present case by exaggerating an event that might serve as a basis for obtaining benefits.” Defendant states, “[t]hese issues were not collateral in this case, but went to the heart of the defense. The theory of the defense was that Smith was lying about the degree of force used by [defendant] and exaggerating his injuries in order to obtain a disability waiver so he would not have to work while receiving general assistance, spousal support from his wife due to his alleged disability, and additional narcotics medications, at a time when doctors were becoming reluctant to prescribe him any more.” Defendant states that “[w]hile the defense could point out that Smith was more likely to get the benefits he was seeking by exaggerating the seriousness of the assault, there was little hard evidence of actual dishonesty in his statements to various doctors, despite some inconsistencies and his failure to tell multiple doctors treating him about the others. However, the evidence from Complin that was excluded

showed that Smith would go to the extent of lying under oath in order to get the benefits he sought.”

Evidence may be excluded “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352 (section 352).) Exclusion of evidence pursuant to section 352 is reviewed under an abuse of discretion standard. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) A trial court’s consideration of section 352 factors is entitled to deference on appeal. (*People v. Ayala* (2000) 24 Cal.4th 243, 283.) Exclusion of evidence that is highly probative, when none of the discretionary reasons for exclusion exists, constitutes an abuse of discretion. (*People v. Minifie, supra*, 13 Cal.4th at pp. 1070-1071.)

In determining the credibility of a witness, a trier of fact may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony, including the witness’s character for honesty or veracity or their opposites. (Evid. Code, § 780, subd. (e).) Specific instances of misconduct involving dishonesty or moral turpitude are relevant and admissible unless properly excluded by statutory rules relating to privilege, hearsay, or Evidence Code sections 352, 782 (rape shield law), or 1101-1103 (character evidence). (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082 [“Truth in Evidence” law (Cal. Const. art. I, § 28, subd. (d)) repealed Evidence Code sections 786-790 pro tanto in criminal cases].) However, “impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297.)

Contrary to defendant’s characterization of the evidence as “evidence that Smith had previously committed perjury . . . ,” the excluded evidence did not establish that

Smith was ever investigated, arrested, or convicted of perjury. Perjury is committed by a person who, having taken an oath that he or she will testify truly, willfully states as true any material matter which he or she knows to be false. (§ 118, subd. (a).) Smith could not have been convicted of perjury on the basis of Complin's testimony alone. "No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant." (*Id.*, subd. (b).) Complin's proposed testimony established at most that Complin and Smith had differing recollections about the content of Smith's original complaint. Jurors are routinely warned that "[d]iscrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, . . . do not necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial." (CALJIC No. 2.21.1.)

In addition, defendant's proposed impeachment violated the hearsay rule "[E]vidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a)) is inadmissible unless it falls under one of the exceptions to the hearsay rule. Defendant had to show the testimony fell under one of the exceptions.

The trial court recognized that the testimony would have been a prior inconsistent statement if Smith could have been recalled to the witness stand to first testify whether a male or female made the threat. "[E]xtrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." (Evid. Code, § 770.) Since Smith had been excused from further testimony in the action, the court correctly stated that before Complin could

testify that Smith complained to him, Smith would have to be recalled to the stand to be asked about that subject. (See Evid. Code, § 1235.)

The trial court properly declined to allow defendant to attempt to prove that Smith's first complaints on the personnel department answering machine and to Complin were true and that Smith's testimony at the hearing was false. Smith had been excused and was, therefore, no longer under subpoena. As the prosecutor pointed out, "it [wa]s difficult to get ahold [*sic*] of Mr. Smith and arrange transportation." The trial court could reasonably decide not to delay the trial and risk confusing the jury by allowing defendant to accuse Smith of a prior act of perjury based on nothing more than a disfavored oath contest. Although defendant was not technically trying to convict Smith of perjury, he was nonetheless trying to prove falsity of a collateral matter "solely upon contradiction by testimony of a single person other than [Smith]." (§ 118, subd. (b); *People v. Davis* (1882) 61 Cal. 536, 537.) The trial court wisely avoided this thicket. Threats to Smith by unknown and irrelevant third parties and complaints of threats by him were decidedly collateral to the instant matter which was concerned with the issue whether defendant robbed and assaulted Smith with the intent to inflict great bodily injury. The trial court's ruling allowed the defense the opportunity to present what would be evidence of a prior inconsistent statement if a proper foundation was laid. Further evidence on the subject would have consumed considerable time in relitigating the unemployment insurance benefits determination in the middle of a criminal trial. As it was, the defense was also able to present and argue evidence about Smith's motives for lying in the instant case based on his past attempts to have multiple doctors give him prescription narcotics and certify him for disability benefits. Exclusion of Complin's impeachment evidence did not remove the issue of Smith's credibility from the jury. The trial court did not abuse its discretion.

Defendant also argues that exclusion of the evidence violated defendant's federal constitutional right to present a defense. "Evidence Code section 352 must bow to the

due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense We do not mean to imply, however, that a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.’ ” (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

Defendant’s claim must fail. As he states in his brief, “[a] correct ruling under Evidence Code section 352 means that there has been no denial of the federal constitutional right to present a complete defense.” (See *People v. Frye* (1998) 18 Cal.4th 894, 948.) Since we have found that the court did not abuse its discretion under section 352, defendant’s federal constitutional rights were not violated.

ATTORNEY FEES

Next, defendant asserts that, notwithstanding his failure to object at sentencing, the order to pay attorney fees was made without any basis in the record for finding an ability to pay and therefore requires reversal.

The trial court ordered defendant to pay “attorney’s fees not to exceed \$1,000” pursuant to section 987.8. Before doing so, the trial court had to determine that the defendant had the present ability to pay all or a part of the cost. (§ 987.8, subd. (b).) “ ‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position. . . . Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant’s financial capability to

reimburse the county for the costs of the legal assistance provided to the defendant.” (§ 987.8, subd. (g)(2).)

The evidence regarding defendant’s ability to pay came from the probation report. It stated, “[s]ince 1993, the defendant has been employed off and on for A. A. Distributors as a newspaper distributor making \$6.75 an hour until his arrest in the present matter. The defendant also reports additional employment at temporary agencies.” The probation report also indicated that defendant had been in jail for over a year and four months since his arrest on October 19, 2001. Defendant was 34 years old, single with no children, had completed the 11th grade and claimed to have 189 credits towards his diploma as of 1987, but never received it as this information was lost. The probation report stated that defendant was given a “Statement of Assets” form to complete and bring to court at the time of sentencing. If he did so, a copy does not appear in the record. Defendant did not object to the attorney fee order at the time of sentencing or request a hearing on the issue of his ability to pay.

In the light of section 987.8, subdivision (g)(2)’s requirements, defendant’s financial situation was at the time of sentencing as follows: (A) He had been incarcerated for 17 months at the time of his sentencing. (B) He was sentenced to seven years in state prison. “Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.” (§ 987.8, subd. (g)(2)(B).) The court did not find unusual circumstances. (C) While defendant most likely would work in prison, his wages would not even approach the \$6.75 per hour he was making from A. A. Distributing. (D) Defendant was 34 years old, would be released from prison while relatively young, and had no dependents.

The present ability to pay established by this record is doubtful. Our Supreme Court has stated, “Recoupment statutes such as section 987.8 [subdivision] (b) reflect a legislative concern for ‘replenishing a county treasury from the pockets of those who

have directly benefited from county expenditures.” ’ [Citations.] ‘ “Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs.” ’ [Citations.]” (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.) “Defendant may not be able to pay the [full amount] ordered by the trial court, but he may be able to pay something, and if he can, he is obligated by the statute to do so.” (*Id.* at pp. 1068-1069.) The matter must be remanded to the trial court for a determination of defendant’s present ability to pay. (*Id.* at p. 1068.)

DISPOSITION

The “not true” finding on the prior conviction in Santa Clara County Superior Court case No. 149886 and the order requiring reimbursement of attorney fees are reversed. In all other respects the judgment is affirmed. The matter is remanded to the trial court for proceedings consistent with this opinion.

Premo, Acting P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Walsh, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.