Filed 3/9/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TRACY F. ALFORD, Defendant and Appellant.	A109478 (Alameda County Super. Ct. No. 146177)

Defendant was convicted following a jury trial of second degree robbery (Pen. Code, § 211), and the jury also found that he suffered eight prior serious felony convictions (Pen. Code, §§ 667, subds. (a)(1) & (e)(2)(A), 1170.12, subd. (c)(2)(A)). He was sentenced to an aggregate state prison term of 40 years to life. In this appeal he claims that the trial court erroneously informed the jury on the consideration of hearsay evidence, the prosecutor committed misconduct, and imposition of a court security fee violated the prohibition against ex post facto laws. We find that the court's comment upon the evidence did not constitute prejudicial error, no prosecutorial misconduct was committed, and the court security fee was valid. We therefore affirm the judgment.

STATEMENT OF FACTS

Aurora Pomales was working as a cashier at Albertson's market on MacArthur Boulevard in Oakland around noon on June 10, 2003, when a man she subsequently identified as defendant appeared at her check stand. Pomales described him as African-

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and II of the Discussion, and footnote 6.

American, “six feet to about six, one,” black hair “with a little gray on the sides” in a “short cut” Afro, and a goatee. She testified that defendant was wearing black jeans, a blue-and-white-checkered long-sleeved shirt with buttons, and carried a black sweater over his arm.

Defendant placed three items on the check stand counter: prepackaged shrimp, lasagna, and a bag of chocolate chip morsels. Pomales scanned defendant’s items, placed them in a plastic bag, and told him the total amount owed. He then said, “This is a robbery,” and told her to “be very quiet.” Pomales testified that she also observed defendant lift the front of his shirt to display “a little side piece” of a handgun tucked into his pants. Defendant instructed Pomales to give him $10 and $20 bills, and cautioned her, “Be very quiet. I don’t want to hurt everybody in here.”

Pomales opened the cash drawer and extracted “the 10’s and 20’s” as defendant requested. When she handed the bills to defendant he said, “Put it in the plastic bag.” Defendant again directed Pomales to “be very quiet,” as though she “was [*sic*] still working and not make a big scene.” Defendant then left the store and walked to the right on MacArthur Boulevard. After defendant was gone, Pomales told the “front manager” of the store, Juan Cook, that she “just got robbed.”

Catrina Sansoni, an “administrator-clerk” at the Albertson’s market, testified that immediately after defendant walked out of the door, Pomales announced that she was “robbed.” Sansoni had been checking merchandise and “ordering candy” at the front of the store “by the checkers” when she observed a “Black” man she identified as defendant proceed through cash register No. 1 with “a few items.” As Pomales began to “ring up the items,” Sansoni saw defendant “lift up his shirt” to reveal a “black handle” just above his pants. Pomales momentarily “froze,” then reached into the register and handed defendant “some cash.” Defendant walked out of the store with the bag. Sansoni pointed out to Pomales that a police vehicle was in the Albertson’s parking lot. Sansoni also observed defendant “running down MacArthur Boulevard” toward High Street.

Pomales ran to Sergeant Rafael Delgadillo’s patrol vehicle in the parking lot. She told him that she was a cashier at Albertson’s and “just got robbed. She described the

suspect to Sergeant Delgadillo as African-American, about 40 years old, with gray hair "on the side," wearing black jeans "and a checkered-blue-and-white shirt, holding a black sweater and an Albertson's bag." Pomales returned to the store as Delgadillo drove out of the parking lot onto MacArthur Boulevard.

Sergeant Delgadillo notified dispatch of the robbery, provided the description he received from Pomales, and stated that the suspect "was last seen eastbound on MacArthur toward High Street." He drove in that direction on MacArthur Boulevard. When he reached the corner at Maybelle Street he observed defendant in a blue-checkered shirt and black pants walking on the east side of the road toward Redding Street. Sergeant Delgadillo drove behind defendant, and noticed that he was also wearing black shoes and carrying a black jacket. When defendant reached the corner of Redding and Maybelle, he dropped the black jacket on the grass, then walked eastbound on Redding. Defendant was the only person Sergeant Delgadillo observed in the area that matched the description given by Pomales.

Sergeant Delgadillo stopped his patrol vehicle on Redding and approached defendant "at gunpoint." He ordered defendant to drop to the ground, face down, and "put his hands to his side." Defendant complied, and was handcuffed when backup officers arrived a few minutes later. When defendant was pat searched, a leather billfold was found in his front pants pocket that contained sixteen $10 bills and six $20 bills.

Pomales was then transported by other officers from Albertson's to the scene of defendant's detention two or three blocks away at "the end of the block" on Redding Street for a "field showup." Pomales was told that the officers would "pull somebody out of a police car" to determine if she recognized him as the robber. As soon as Pomales saw defendant she declared, "That's him." Defendant had the same "face and clothing," particularly the checkered shirt and the black jacket, as the man who robbed her. Pomales had "[n]o doubt" of her identification.

Sansoni was also taken separately to the detention scene to view someone to "see if it was the man that just robbed the store." Defendant had been taken from the car and was standing in the street. When an officer asked Sansoni, "Is that the man?" she

immediately replied, "Yes, he is." She recognized the "clothes he was wearing, the structure of his body, and his face." Like Pomales, Sansoni expressed no doubt of her identification of defendant.

Sergeant Delgadillo subsequently discovered a "discarded Albertson's bag" on Maybelle Street where he had first seen defendant. When shown the contents of the bag, Pomales stated that the "food products in it" were the "same" as those brought by defendant to her check stand. No identifiable fingerprints were recovered from the bag or the items inside it. Pomales also identified the black jacket discarded by defendant as he walked eastbound on Redding as similar to the one he carried over his arm in the Albertson's store. Sergeant Delgadillo and other officers also conducted an extensive search of the area for a firearm, but "none was found." The Albertson's surveillance videotape was reviewed by Sergeant Delgadillo and Pomales, but it did not depict the face of the suspected robber.

DISCUSSION

I. The Court's Explanation of the Admission of Hearsay Evidence.

Defendant argues that the trial court committed error in its explanation to the jury associated with the admission of hearsay evidence of "Pomales's out-of-court statements regarding her identifications of [him] as the perpetrator." The court's statements followed a hearsay objection by the defense to an inquiry about the content of the witness's statement when she observed defendant appear from out of the police vehicle at the scene of his detention.[1] The objection was overruled, and the court advised the jury: "Just so you understand, as you know by now, hearsay is an out-of-court statement. So generally, you don't receive hearsay as evidence. However, there'[re] certain things called exception[s] to the hearsay rule. There'[re] certain Court-approved exceptions to the hearsay rule deemed to be trustworthy. That's why they're exceptions." The court went on to elucidate for the jury that if a question "goes to the state of mind" of the witness to explain "later action" or a "prior identification, these are what are known as

[1] Pomales responded, "That's him."

exceptions to the hearsay rule that'[ve] been deemed to be trustworthy enough to be considered as evidence." Defendant complains that the court's comments upon hearsay exceptions may have been improperly understood by the jury to mean that "identifications in this case made by the witnesses were, as a matter of fact and law, trustworthy." He claims that the court thereby invaded the sole province of the jury to determine the "trustworthiness of the identifications," and violated the court's duty to confine comment upon the evidence to fair and impartial remarks.

Article VI, section 10 of the California Constitution authorizes comment upon the evidence by the trial court; it "provides, in pertinent part: 'The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.' " (*People v. Monterroso* (2004) 34 Cal.4th 743, 780 [22 Cal.Rptr.3d 1, 101 P.3d 956].) " 'On its face, the constitutional language imposes no limitations on the content or timing of judicial commentary, deferring entirely to the trial judge's sound discretion. The appellate courts have recognized, however, that this powerful judicial tool may sometimes invade the accused's countervailing right to independent jury determination of the facts bearing on his guilt or innocence. Hence, the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]' [Citation.]" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1217-1218 [120 Cal.Rptr.2d 477, 47 P.3d 262].) "Thus, a trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict.' [Citation.] 'We determine the propriety of judicial comment on a case-by-case basis.' [Citation.]" (*People v. Monterroso*, *supra*, at p. 780.)

In our examination of the trial court's remarks to the jury, we must ascertain what meaning was conveyed to the jury. We focus upon "how would a reasonable juror understand" the court's comment, and whether, so understood, the meaning was

consistent with applicable law. (*People v. Warren* (1988) 45 Cal.3d 471, 487 [247 Cal.Rptr. 172, 754 P.2d 218]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 514 [61 L.Ed.2d 39, 99 S.Ct. 2450].) The test of meaning of the trial court's comments is "whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law" in light of the comments, the entire record of trial, and the arguments of counsel. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 [107 Cal.Rptr.2d 160]; see also see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70-75 [116 L.Ed.2d 385, 112 S.Ct. 475]; *People v. Smithey* (1999) 20 Cal.4th 936, 963 [86 Cal.Rptr.2d 243, 978 P.2d 1171]; *People v. Kelly* (1992) 1 Cal.4th 495, 525 [3 Cal.Rptr.2d 677, 822 P.2d 385]; *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549 [129 Cal.Rptr.2d 513]; *People v. Andrade* (2000) 85 Cal.App.4th 579, 585 [102 Cal.Rptr.2d 254].) We do not judge the challenged comments " ' "in artificial isolation," ' " but rather in the context of the whole trial court record. (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9]; see also *People v. Smithey, supra,* at p. 987; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].) " 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.' [Citation.]" (*People v. Linwood* (2003) 105 Cal.App.4th 59, 73 [129 Cal.Rptr.2d 73].)

We do not interpret the trial court's remarks upon the trustworthiness of hearsay exceptions as a violation of obligation to comment fairly and impartially upon the evidence. More importantly, we do not think *the jury* interpreted the court's explanation, when read in its entirety, as any form of endorsement of the credibility of the identification evidence. The court was attempting to clarify for the jury an evidentiary ruling that admitted hearsay evidence of the victim's statement over objection by the defense. The court may have been somewhat imprudent in the explanation of its ruling – and indeed, may have been better advised to refrain from any discussion of the rationale for exceptions to the hearsay rule – but correctly avoided unfair comment upon the testimony. The court did not advise the jurors that the victim's statement was worthy of belief. (Cf., *People v. Oliver* (1975) 46 Cal.App.3d 747, 752-754 [120 Cal.Rptr. 368].) Rather, the court merely stated that certain categories of hearsay statements are "deemed

to be trustworthy enough to be *considered* as evidence." (Italics added.) Thus, the court directed the jury to consider the evidence, but properly left to the jury the task of determining its trustworthiness or credibility, and finding facts bearing upon defendant's guilt or innocence. (See *People v. Jones* (1992) 10 Cal.App.4th 1566, 1573-1574 [14 Cal.Rptr.2d 9].) The court did not distort the record, withdraw material evidence from the jury's consideration, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. (*People v. Slaughter, supra,* 27 Cal.4th 1187, 1217-1218.) Moreover, the court's comments were temperate, and neither exceeded the bounds of fair and impartial judicial comment nor suggested the manner in which the jury should consider the evidence. (*People v. Linwood, supra,* 105 Cal.App.4th 59, 74.)

Finally, the court additionally specifically instructed the jury in the terms of CALJIC No. 17.30 that, "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." We assume the jurors properly followed and correlated the instructions to understand that they, not the trial court, were vested with the duty to determine the credibility of the evidence. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1077 [99 Cal.Rptr.2d 1, 5 P.3d 68]; *People v. Welch* (1999) 20 Cal.4th 701, 767 [85 Cal.Rptr.2d 203, 976 P.2d 754]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 818 [27 Cal.Rptr.3d 336]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 997 [23 Cal.Rptr.3d 242]; *People v. Adrian* (1982) 135 Cal.App.3d 335, 341-342 [185 Cal.Rptr. 506].) We therefore conclude that the court did not erroneously advise the jury or overstep the bounds of its constitutional privilege to comment on the evidence.

II. The Claim of Prosecutorial Misconduct.

We proceed to defendant's contention that the prosecutor committed misconduct by "referring to the fact that there was no explanation for various items of evidence," in violation of *Griffin v. California* (1965) 380 U.S. 609, 615 [14 L.Ed.2d 106, 85 S.Ct. 1229] (*Griffin*). During closing argument the prosecutor asked of the jury: "What didn't

you hear? You did not hear any evidence to suggest that anyone else did the robbery." The prosecutor added: "There was not one shred of evidence to indicate the Defendant was anywhere else at the time of the robbery, and you can be assured of the fact [that defense counsel] would make sure, if there was any evidence of this nature that existed, you would have it, and you don't have it." After defense counsel's objection was overruled,[2] the prosecutor told the jury: "There's no evidence that the Defendant was anywhere at that time, around 12:00 noon on June 10th, 2003, except in the Albertson's committing the robbery, wearing the shirt that you've seen, taking the money that you heard about." Defendant claims that the "prosecutor's argument was a not-so-subtle attempt to urge the jury to draw an inference of guilt" from defendant's "election not to take the stand and provide an explanation or an alibi," as prohibited by *Griffin*.

" ' "Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." [Citation.] We also have said "it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." [Citations.] *Griffin's* prohibition against " 'direct or indirect comment upon the failure of the defendant to take the witness stand,' " however, " 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' " [Citations.]' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1266-1267 [32 Cal.Rptr.3d 838, 117 P.3d 544]; see also *People v. Harrison* (2005) 35 Cal.4th 208, 257 [25 Cal.Rprt.3d 224, 106 P.3d 895].)

The prosecutor's argument that no evidence was presented to suggest anyone else committed the robbery, or that defendant was "anywhere else at the time of the robbery" does not fall within the *Griffin* proscription against comment upon the defendant's failure to testify. As we read the record before us, the prosecutor referred not to defendant's

[2] And the trial court admonished the jury: "Please keep in mind that if the defense does not – decides not to present evidence, you're not to hold that matter against the defense or the Defendant."

failure to personally contradict the evidence of his guilt with his own testimony, but instead commented fairly upon the state of the evidence, and specifically the absence of defense evidence to contradict the testimony of the prosecution's witnesses or to offer any evidence in opposition to the prosecution's case. (*People v. Hughes* (2002) 27 Cal.4th 287, 373-375 [116 Cal.Rptr.2d 401, 39 P.3d 432].) "*Griffin* v. *California, supra*, 380 U.S. 609, does not prohibit the prosecution from emphasizing the defense's failure to call logically anticipated witnesses or the absence of evidence controverting the prosecution's evidence." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1051 [5 Cal.Rptr.2d 230, 824 P.2d 1277].) We find that the prosecutor's statements "would be understood by any juror as a comment on the failure by the defense to produce an alibi witness for the crucial period. This type of comment has specifically been found not to be *Griffin* error." (*People v. Echevarria* (1992) 11 Cal.App.4th 444, 452 [13 Cal.Rptr.2d 840].) Thus, the prosecutor did not violate *Griffin* by referring to the failure of the defense to produce evidence that defendant did not commit the crime. (*People v. Stewart* (2004) 33 Cal.4th 425, 505-506 [15 Cal.Rptr.3d 656, 93 P.3d 271].)

III. The Imposition of a Court Security Fee.

Defendant's final argument is that the court erroneously imposed a $20 security fee upon him pursuant to Penal Code section 1465.8, which provides, in subdivision (a)(1): "To ensure and maintain adequate funding for court security, a *fee* of twenty dollars ($20) shall be imposed on every *conviction* for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code."[3] (Italics added.) Section 1465.8 did not become effective

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[3] The remainder of section 1465.8 reads: "(2) For the purposes of this section, 'conviction' includes the dismissal of a traffic violation on the condition that the defendant attend a court-ordered traffic violator school, as authorized by Sections 41501 and 42005 of the Vehicle Code. This security fee shall be deposited in accordance with subdivision (d), and may not be included with the fee calculated and distributed pursuant to Section 42007 of the Vehicle Code. [¶] (b) This fee shall be in addition to the state penalty assessed pursuant to Section 1464 and may not be included in the base fine to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. [¶] (c) When bail is deposited for an offense to which this section applies,

until August 17, 2003, two months after the Albertson's robbery was committed. Defendant therefore claims that the court security fee must be stricken as both an unconstitutional ex post facto law and violative of the prohibition in Penal Code section 3 (hereafter section 3) against "retroactive application of newly enacted law."[4]

A. Section 1465.8 as an Ex Post Facto Law.

We first examine the ex post facto implications of section 1465.8. "The United States Constitution, article I, sections 9 and 10 and the California Constitution, article I, section 9 prohibit the passage of ex post facto laws." (*In re Evans* (1996) 49 Cal.App.4th 1263, 1268 [57 Cal.Rptr.2d 314]; see also *People v. McVickers* (1992) 4 Cal.4th 81, 84 [13 Cal.Rptr.2d 850, 840 P.2d 955]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295-296 [279 Cal.Rptr. 592, 807 P.2d 434].)[5] "[T]he ex post facto clauses of the state and federal Constitutions are 'aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." ' [Citations.]" (*People v. Grant* (1999) 20 Cal.4th 150, 158 [83 Cal.Rptr.2d 295, 973 P.2d 72].) " 'An *ex post facto law* is a retrospective statute applying to crimes committed before its enactment, and substantially injuring the accused. . . .' [Citation.] If a crime is committed before the 'effective date' of a statute and the statute retroactively increases the punishment for the crime or eliminates a defense, the statute violates the ex post facto clauses." (*People v. Jenkins* (1995) 35 Cal.App.4th 669, 672 [41 Cal.Rptr.2d 502].)

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and for which a court appearance is not necessary, the person making the deposit shall also deposit a sufficient amount to include the fee prescribed by this section. [¶] (d) Notwithstanding any other provision of law, the fees collected pursuant to subdivision (a) shall all be deposited in a special account in the county treasury and transmitted therefrom monthly to the Controller for deposit in the Trial Court Trust Fund. [¶] (e) The Judicial Council shall provide for the administration of this section."

[4] We requested supplemental briefing from the parties on this later issue in view of *People v. Carmichael* (2006) 135 Cal.App.4th 937, [38 Cal.Rptr.3d 32] which was filed after the parties had filed their briefs.

[5] "Article I, section 10, clause 1 of the federal Constitution states in pertinent part: 'No state shall . . . pass any . . . ex post facto law . . . .' Article I, section 9 of the California Constitution similarly states that an 'ex post facto law . . . may not be passed.' The California provision is analyzed in the same manner as its federal counterpart." (*People v. Castellanos* (1999) 21 Cal.4th 785, 790 [88 Cal.Rptr.2d 346, 982 P.2d 211].)

"[T]he high court has made clear that an ex post facto violation does not occur simply because a criminal defendant loses ' "substantial protections" ' [citation], or suffers some ' "disadvantage" ' after the crime occurs. [Citations.]" (*People v. Ansell* (2001) 25 Cal.4th 868, 884 [108 Cal.Rptr.2d 145, 24 P.3d 1174].) "The ex post facto clause does not prohibit all increased burdens; it only prohibits more burdensome punishment." (*People v. Acuna* (2000) 77 Cal.App.4th 1056, 1059 [92 Cal.Rptr.2d 224].) "[W]hether a retroactive criminal statute is deemed procedural or substantive, it contravenes the ex post facto clause only if it redefines criminal conduct or aggravates punishment." (*People v. Frazer* (1999) 21 Cal.4th 737, 757 [88 Cal.Rptr.2d 312, 982 P.2d 180], citing *Collins v. Youngblood* (1990) 497 U.S. 37, 45-46 [111 L.Ed.2d 30, 110 S.Ct. 2715].) "The effect of the ex post facto prohibition is to invalidate: '[(1)] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [(2)] Every law that aggravates a crime, or makes it greater than it was, when committed. [(3)] Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [(4)] Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.' [Citations.]" (*People v. Mesce* (1997) 52 Cal.App.4th 618, 622 [60 Cal.Rptr.2d 745].)

The fundamental threshold inquiry in our ex post facto analysis in the present case is to " 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' [Citation.] If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is ' "so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." ' [Citation.] Because we 'ordinarily defer to the legislature's stated intent,' [citation], ' "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,'

[citations]." (*Smith v. Doe* (2003) 538 U.S. 84, 92 [155 L.Ed.2d 164, 123 S.Ct. 1140]; see also *People v. Castellanos, supra,* 21 Cal.4th 785, 802.)

In *People v. Wallace* (2004) 120 Cal.App.4th 867, 876 [16 Cal.Rptr.3d 152] (*Wallace*), the court reviewed the legislative history of section 1465.8, and determined that "the Legislature imposed the $20 fee for a nonpunitive purpose." The court observed that the express legislative purpose of section 1465.8 is nonpunitive: " '[t]o ensure and maintain adequate funding for court security . . . .' The maintenance of 'adequate funding for court security' purposes is unambiguously a nonpunitive objective." (*Wallace, supra,* at p. 875.) The legislation was part of a trial court funding measure in Assembly Bill No. 1759, and the "only expressed rationale for making Assembly Bill No. 1759 an urgency statute was a budgetary reason: 'In order to provide for changes to implement the Budget Act of 2003, it is necessary that this act take effect immediately.' (Stats. 2003, ch. 159, § 29.)" (*Wallace, supra,* at p. 875.) The assessment is labeled a "fee" throughout the statute, as opposed to a "penalty" or "fine" (§ 1465.8, subd. (b)), and does not increase based on the severity of the crime committed. (*Wallace, supra,* at pp. 875-876.) As extensively catalogued in *Wallace,* the court security fee is collected from civil litigants as well as criminal defendants, and is dependent upon trial court funding levels, which is also inconsistent with a punitive purpose. (*Id.,* at p. 876.) And once collected the fees are specifically earmarked for the "Trial Court Trust Fund." (§ 1465.8, subd. (d).)

The court then turned to the "second inquiry" of the ex post facto test, "whether section 1465.8, subdivision (a)(1) is ' " 'so punitive either in purpose or effect' " ' as to negate the Legislature's intention that the $20 fee be [treated as] a civil disability. [Citations.]" (*Wallace, supra,* 120 Cal.App.4th 867, 876.) The court in *Wallace* failed to discern " ' " 'only the clearest proof' " ' " necessary to transform the denominated civil remedy into a criminal penalty. (*Ibid*.) The court agreed that the fee arose only from the conviction, but found "several countervailing considerations" (*id.* at p. 877) that militated against a finding of punishment: a court security fee can logically be viewed as a non-punitive assessment for the use of court facilities which is designed to make them safer,

particularly where "the same fee is imposed in limited and unlimited civil and probate cases as well"; (*ibid.*) the $20 fee is not so great an amount as to be punitive either in purpose or effect; imposition of the fee does not serve any of the traditionally recognized purposes of punishment, including deterrence or retribution, but instead, like a user fee, has a rational relation to the nonpunitive purpose of promoting court security; finally, the fee is minimal rather than excessive, and furthers the purpose insuring appropriate funding levels for court operations and security. (*Id.*, at pp. 877-878.) The court thus concluded: "Defendant has failed to present the 'clearest proof' that the $20 court security fee, which is imposed in criminal and civil cases, is so punitive in its purpose or effect as to override the Legislature's treatment of it as a nonpunitive measure." (*Id.*, at p. 878.)

We agree with the thorough and persuasive reasoning of the court in *Wallace* that the $20 court security fee authorized by section 1465.8 may be imposed upon a defendant who committed his crime before the effective date of the statute without offending ex post facto principles. (*Wallace, supra,* 120 Cal.App.4th 867, 878-879; see also *People v. Schoeb* (2005) 132 Cal.App.4th 861, 866 [33 Cal.Rptr.3d 889].)

B. Retroactive Application of Section 1465.8.

We turn to the separate but related issue of the statutory limitation upon retrospective operation of penal laws. Section 3 codifies the established principle that, " 'No part of [the Penal Code] is retroactive, unless expressly so declared.' " (*People v. Ansell, supra,* 25 Cal.4th 868, 883, fn. 21; *People v. Callejas* (2000) 85 Cal.App.4th 667, 671, fn. 12 [102 Cal.Rptr.2d 363].) In a very recent case our colleagues in Division Two concluded that the section 1465.8 court security fee may not be retroactively imposed for offenses committed before the statute was effective. (*People v. Carmichael, supra,* 135 Cal.App.4th 937, (*Carmichael*.) The opinion did not confront the ex post facto implications of the law. Rather, the scope of the inquiry in *Carmichael* was limited to whether "section 1465.8 attached a new legal consequence to, and increased appellant's liability for, conduct that occurred before it became effective, regardless of whether the fee constituted 'punishment' within the meaning of the ex post facto clause." (*Id.*, at p.

942.) Our colleagues concluded that the "language of section 1465.8, imposing a fee 'on every conviction for a criminal offense,' falls far short of a 'clear and compelling' indication the Legislature intended the statute to be applied retroactively," and thus pursuant to section 3 could not be applied to conduct that predated the effective date of the statute. (*Id.*, at p. 942.)

While we have no quarrel with the assertion in *Carmichael* that section 1465.8 fails to offer an express or clear and compelling legislative expression of retroactive intent, we approach the retroactivity issue from a different perspective. "Penal Code section 3 embodies the general rule that when there is nothing to indicate the contrary it will be presumed that the Legislature intended a statute to operate prospectively and not retroactively. 'That rule of construction, however, is not a straitjacket. . . .' " (*In re Chavez* (2004) 114 Cal.App.4th 989, 993 [8 Cal.Rptr.3d 395], quoting from *In re Estrada* (1965) 63 Cal.2d 740, 746 [48 Cal.Rptr. 172, 408 P.2d 948].) "There remains the question of what the terms 'prospective' and 'retrospective' mean." (*Tapia v. Superior Court, supra,* 53 Cal.3d 282, 288; see also *People v. Acosta* (1996) 48 Cal.App.4th 411, 416 [55 Cal.Rptr.2d 675].)

Of course, the canon of construction articulated in section 3 " 'fully applies to penal measures which increase the punishment for particular crimes. [Citations.]' [Citation.]" (*In re Harper* (1979) 96 Cal.App.3d 138, 141 [157 Cal.Rptr. 759].) "Certainly a law is retrospective if it defines past conduct as a crime, increases the punishment for such conduct, or eliminates a defense to a criminal charge based on such conduct. Such a law, as applied to a past crime, 'change[s] the legal consequences of an act completed before [the law's] effective date,' namely the defendant's criminal behavior. [Citations.] Application of such a law to past crimes would also violate the constitutional rule against ex post facto legislation." (*Tapia v. Superior Court, supra,* 53 Cal.3d 282, 288.)

But, "As the United States Supreme Court has recognized, 'deciding when a statute operates "retroactively" is not always a simple or mechanical task' [citation] and 'comes at the end of a process of judgment concerning the nature and extent of the

change in the law and the degree of connection between the operation of the new rule and a relevant past event' [citation]. In exercising this judgment, 'familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.' [Citation.]" (*People v. Grant, supra*, 20 Cal.4th 150, 157.) "The point of the rule disfavoring retroactivity is to avoid the unfairness that attends changing the law after action has been taken in justifiable reliance on the former law. [Citation.] Hence, the characterization of the application of a statute as retroactive depends on the propensity for unfairness. '[T]he problem in regard to retroactive laws is to determine under what circumstances, for what purposes, with what effects, and to what extent, unfairness results from the time frame within which a statute exerts its influence.' [Citation.]" (*Mahon v. Safeco Title Ins. Co*. (1988) 199 Cal.App.3d 616, 620-621 [245 Cal.Rptr. 103].)

"A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [62 Cal.Rptr.2d 243, 933 P.2d 507]; see also *Daria D.* v. *Superior Court* (1998) 61 Cal.App.4th 606, 614 [71 Cal.Rptr.2d 668].) " 'In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date.' [Citation.]" (*People v. Williams* (2004) 118 Cal.App.4th 735, 747 [13 Cal.Rptr.3d 569].) "This is a pure question of law to which we apply our independent review." (*In re Chavez, supra,* 114 Cal.App.4th 989, 994.)

We commence our inquiry into the retroactivity issue by returning to the premise that section 1465.8 does not enhance defendant's punishment for conduct previously committed. A statute is considered " 'nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.' [Citations.]" (*People v. McVickers, supra,* 4 Cal.4th 81, 85.) The last act or event necessary to trigger the legal

consequence of the court security fee was defendant's conviction, although that was of course necessarily dependent upon his earlier commission of the offense. More importantly, as we have observed, the purpose and impact of section 1465.8 are nonpunitive: to promote and fund court security, when necessary. (*Wallace, supra,* 120 Cal.App.4th 867, 877-878.) And because the court security fee does not constitute punishment for past crimes, we do not perceive any unfairness that attends the lack of notice of a change in the law following the commission of the offense. (See *People v. McVickers, supra,* at pp. 89-90.)

In *People v. Adames* (1997) 54 Cal.App.4th 198, 214 [62 Cal.Rptr.2d 631], the court held that "section 3 does not bar application of the AIDS testing mandate to appellant" pursuant to subdivision (e)(6) of section 1202.1, "although section 288 was not listed as an offense for which such testing was required when he committed the offense (§ 288.5) for which he was convicted." The court concluded that "subjecting a defendant to AIDS testing is not punishment. It is therefore clear that no increase in punishment occurs by requiring appellant to submit to AIDS testing although, when committed, his offense was not one which triggered the AIDS testing requirement. Accordingly, the subject AIDS testing order is not invalid as a retroactive application of section 1202.1." (*Adames, supra,* at p. 214.)

We reach the same conclusion here. Without any provision in section 1465.8 that subjected defendant to increased punishment for a past offense, we find that imposition of a court security fee following his conviction after the effective date of the statute did not invoke the requirement in section 3 of an *express declaration* of retroactivity.

Still, " 'A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. [Citations.] . . . Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us.' " (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1460 [118 Cal.Rptr.2d 118], quoting from *Western Security Bank v. Superior Court, supra,* 15 Cal.4th 232, 243.) "In the absence of such an express declaration of legislative intent for retroactive application, a court may

look to a variety of other factors to determine such legislative intent, such as the context of the legislation, its objective, the evils sought to be remedied, the history of the times and similar legislation, public policy, and/or contemporaneous statutory construction." (*Borden v. Division of Medical Quality* (1994) 30 Cal.App.4th 874, 882 [35 Cal.Rptr.2d 905].)

We think the enactment of section 1465.8 as part of an urgency measure (Assem. Bill No. 1759) to implement the Budget Act of 2003 by imposing a court security fee "on every conviction for a criminal offense," is indicative of a legislative intent to implement the statute immediately to apply to all pending cases. (*Wallace, supra,* 120 Cal.App.4th 867, 875.) Retroactive application of section 1465.8 is also imperative to properly facilitate the stated objective of the legislation to ensure and maintain adequate funding for court security. The imposition of the fee upon defendant did not interfere with any antecedent rights. Defendant had no vested interest in avoiding a minimal contribution to court security that was necessitated by the charges filed against him. Although the robbery offense was committed before the law was enacted, the proceedings for which the fee was collected took place almost exclusively after the effective date of the statute. Thus, the change in the law to collect a $20 fee for court security did not, in our view, carry with it a propensity for unfairness that disfavors retroactive application. (See *People v. Grant, supra,* 20 Cal.4th 150, 157.) Defendant also did not incur additional punishment from imposition of the fee, and "a substantial and disadvantageous change is prohibited only if it 'inflicts greater punishment, than the law annexed to the crime, when committed.' [Citation.] Unless the consequences are penal in nature, defendants cannot rely on statutes in existence at the time of the crime, or otherwise complain of oppressive retroactive treatment." (*People v. Ansell, supra,* 25 Cal.4th 868, 884; see also *People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 927 [128 Cal.Rptr.2d 794].)

Upon examination of the context, history, purpose and impact of the law, we conclude that the Legislature intended to apply section 1465.8 retrospectively to defendant's case. Therefore, imposition of a court security fee upon defendant was not error.

DISPOSITION

Accordingly, the judgment is affirmed.[6]

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Swager, J.

We concur:

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Marchiano, P. J.

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Margulies, J.

[6] We have received a request directly from defendant to have his appointed attorney present additional issues related to the trial court's jurisdiction to proceed in the case following the filing of the information, the validity of the admonitions to defendant at his arraignment, and the propriety of an amendment of the information. Although defendant is represented by counsel, we have reviewed the record and find that the additional claims he has presented to us do not merit consideration on appeal. We therefore deny defendant's request to direct his appellate attorney to "file further grounds for reversal."

Trial Court	Alameda County Superior Court
Trial Judge	Honorable Leo Dorado
For Defendant and Appellant	John F. Schuck, under appointment by the Court of Appeal
For Plaintiff and Respondent	Bill Lockyer, Attorney General Robert R. Anderson Gerald A. Engler Assistant Attorneys General Seth K. Schalit Morris Lenk Deputy Attorneys General

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