Filed 9/24/19 P. v. Cortez CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. BALNORE CORTEZ, Defendant and Appellant.	B291280 (Los Angeles County Super. Ct. No. TA145443)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Lonergan, Judge. Modified and, as so modified, affirmed.

Teresa Biagnini, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Noah Hill and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Balnore Cortez of unlawful taking or driving a vehicle without consent and driving when privilege suspended or revoked for a DUI conviction after a prior conviction. Cortez appeals, contending: (1) the trial court prejudicially erred in its jury instruction on felony unlawful taking or driving a vehicle without consent; (2) the application of Proposition 47 to the taking theory of liability for Vehicle Code section 10851 leads to absurd consequences and violates equal protection; (3) the sealed transcript of the hearing regarding disclosure of peace officer personnel files must be reviewed to determine whether the court below abused its discretion; (4) the trial court violated his due process rights by imposing the restitution fine and assessments without determining his ability to pay; and (5) a clerical error in the abstract of judgment must be corrected.

We order a correction to the abstract of judgment as to count 3, and in all other respects affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts

On February 20, 2018, at approximately 6:45 p.m., victim Gustavo Gonzalez parked his 1999 black Honda Civic in a parking lot at the Los Amigos Mall in South Los Angeles. At 7:40 p.m., when Gonzalez returned to the parking lot, his car was not where he had parked it. In the mall security office, Gonzalez watched a surveillance video that depicted a person drive off in his car, minutes after he parked it. Gonzalez was unable to see the face of the person depicted in the video. At 8:36 p.m., Gonzalez reported his car stolen to the Los Angeles Police Department. Gonzalez never gave anyone permission to drive his car.

At approximately 8:40 p.m., Los Angeles County Sheriff Deputies Sandoval and Ortiz saw Gonzalez's Civic stopped in the middle of Golden Street, in the City of Compton. A woman was exiting the Civic. As the deputies approached, the Civic accelerated. The abrupt movement caused the woman to nearly fall. The deputies discovered that the Civic was reported stolen, based on a record check of the license plate.

Before the deputies activated their patrol car's emergency lights and siren, Cortez pulled to the side of the road. The deputies pulled up behind the Civic, and ordered out all of the occupants. Cortez and a young girl exited the Civic. Deputy Sandoval found a shaved key in the ignition.

Deputy Ortiz asked Cortez if the Civic belonged to him. Cortez replied, "No." Deputy Ortiz read Cortez his *Miranda* rights. Cortez acknowledged he understood and agreed to speak to him. Deputy Ortiz asked Cortez if the owner of the Civic gave him permission to drive it. Cortez told him, "No," and stated that the car "might be stolen." Deputy Ortiz asked Cortez where he was going to drop off the car if it was not his. Cortez stated that he did not know where the owner lived. The deputies arrested Cortez.

The next day, the Civic was returned to Gonzalez. The Civic was not damaged, except for a bent sun visor. Gonzalez confirmed that he did not know Cortez, and did not give him permission to take his car.

Cortez's DMV record indicated that his drivers license was revoked or suspended on April 7, 2011. The record further indicated that Cortez was notified verbally and by written order. Cortez's record also indicated that his license was revoked on May 8, 2012, for a prior conviction for DUI. He was verbally

notified of this revocation. Cortez's driving privilege was never reinstated.

Cortez was also involved in a prior incident involving a stolen car. On November 30, 2017, an automatic license plate reader notified Beverly Hills Police Officer Lynnsey Diamond that a stolen car was traveling on Wilshire Boulevard. Officer Diamond stopped the car, and found Cortez in the driver's seat. Officer Diamond ordered Cortez to drop the car key out of the window. Cortez complied. Officer Diamond observed that the key was shaved. She also found additional shaved keys inside of the car.

2. Procedure

The case proceeded to jury trial. The trial court bifurcated the determination of the truth of the prior conviction allegations. (Pen. Code, §§ 666.5, 667.5, subd. (b).)[1] After the People rested, the trial court dismissed count 2, possession of burglar's tools (§ 466), pursuant to section 1118.1. A jury convicted Cortez of count 1, unlawfully taking or driving a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)), and count 3, driving when privilege suspended or revoked for DUI conviction after a prior offense (Veh. Code, § 14601.2, subds. (a) & (d)(2).)

Cortez waived his right to a jury trial on the prior conviction allegations. The trial court found true the prior conviction allegations for count 1 and count 3. The trial court also found true four prior felony convictions that were alleged as prior prison commitments under section 667.5, subdivision (b).

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

On count 1, unlawfully taking or driving a vehicle without consent with a prior conviction, the trial court sentenced Cortez to the middle term of three years. On count 3, the trial court imposed and stayed a 286-day jail sentence.[2] The trial court imposed three additional years for three prior prison term commitment allegations under section 667.5, subdivision (b). The total aggregate term of imprisonment was six years in state prison. The trial court imposed a $300 restitution fine (§ 1202.4, subd. (b)), and a parole revocation restitution fine in the same amount, which was stayed unless and until parole is violated (§ 1202.45). The trial court ordered Cortez to pay a $40 court security fee (court operations assessment) per count (§ 1465.8), and a $30 facility assessment (criminal conviction assessment) per count (Gov. Code, § 70373).

Cortez filed a timely notice of appeal.

DISCUSSION

1. The Trial Court's Failure to Instruct on Elements Necessary for a Felony Conviction Under Vehicle Code Section 10851

Cortez contends that the trial court improperly instructed the jury on both a legally valid theory of liability and a legally invalid theory for unlawfully taking or driving a vehicle under Vehicle Code section 10851, subdivision (a). We agree for the reasons set forth below.

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[2] We presume that the trial imposed and stayed the 286-day jail sentence, pursuant to section 654.

a. *Proposition 47 and Vehicle Code Section 10851, Subdivision (a)*

Vehicle Code section 10851, subdivision (a),[3] proscribes two forms of conduct: (1) taking and (2) posttheft driving.[4] (See *Van Orden*, *supra*, 9 Cal.App.5th at p. 1283, 1285.) The former involves unlawfully taking a vehicle or driving it away, with the intent to permanently deprive the owner of possession. (See *Garza*, *supra*, 35 Cal.4th at 876.) The later consists of driving the vehicle after the theft is complete, or after a substantial break from the theft, with the intent to temporarily deprive its owner of possession. (*Ibid.*; *Van Orden*, at pp. 1286—1287.) Taking is a form of theft. (See *People v. Page* (2017) 3 Cal.5th 1175, 1183 (*Page*); *Garza*, at p. 871.) On the other hand, posttheft driving is

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[3] Vehicle Code section 10851, subdivision (a), provides, "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense."

[4] The court in *People v. Van Orden* also discusses two additional forms of conduct. (See *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1283 (*Van Orden*).) One, referred to as pure theft, is the taking of a vehicle accomplished without driving it. The court provided the example of conveying the stolen vehicle by freight directly into a warehouse. (See *id.*) For simplicity's sake, we include this form of conduct under the "taking" category. A second form of conduct, referred to as pure driving or joyriding, is driving with the intent to temporarily deprive its owner of possession. (See *id.* at pp. 1285—1286; *People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) For our discussion, we include this form of conduct with posttheft driving.

not. (See *Page*, at p. 1183; *Garza*, at p. 871; *Van Orden*, at p. 1283.)

Section 490.2, the ameliorative petty theft provision under Proposition 47,[5] mandates misdemeanor punishment for a defendant who "obtain[s] any property by theft," when the property is worth no more than $950. (§ 490.2, subd. (a); *Page*, *supra*, 3 Cal.5th at p. 1183; *Van Orden*, *supra*, 9 Cal.App.5th at pp. 1287—1288.) Based on the interpretation of Proposition 47 by the Supreme Court in *Page*, depending on the theory of guilt, some violations of Vehicle Code section 10851, subdivision (a), are punishable only as misdemeanors. (See *Page*, at p. 1183.) Others are punishable as wobblers, i.e., either misdemeanors or felonies.

Specifically, if the theory of guilt is taking (i.e. theft-related), and the vehicle worth is either unproven or $950 or less, the offense is always a misdemeanor. (*Page*, *supra*, 3 Cal.5th at p. 1187.) If the worth is over $950, the offense is a wobbler. Accordingly, to obtain a felony conviction under a taking theory of guilt, the prosecution must prove as an element that the vehicle taken was worth more than $950. (*Id.* at p. 1183; *Van Orden*, *supra*, 9 Cal.App.5th at p. 1288.)

Proposition 47 does not mandate misdemeanor punishment if the theory of guilt is posttheft driving. Under such a theory, a

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[5] Passed in 2014, Proposition 47 (the Safe Neighborhoods and Schools Act) reduced the punishment for certain theft and drug-related offenses, making them punishable as misdemeanors rather than felonies or wobblers. Pertinent to our discussion, Proposition 47 amended section 490.2, which provides that "obtaining any property by theft" is petty theft and is to be punished as a misdemeanor if the value of the property taken is $950 or less. (§ 490.2, subd. (a).)

violation of Vehicle Code section 10851, subdivision (a), would not be a form of theft covered by section 490.2. The offense under a posttheft driving theory would remain a wobbler, regardless of the vehicle's value.

In the information, the People did charge Cortez with unlawful taking or driving a vehicle without consent. The trial court instructed the jury, pursuant to CALCRIM No. 1820, that to prove Cortez guilty of a violation of Vehicle Code section 10851, "the People must prove that: 1. The defendant took or drove someone else's vehicle without the owner's consent; and 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time." (CALCRIM No. 1820 (Mar. 2018 ed.).) The instruction provided the element of taking a vehicle, as well as the alternative of driving a vehicle, without the owner's consent. This language provided for both theories of taking and posttheft driving.[6]

However, the instruction contained two deficiencies for the elements required for a felony conviction on a taking theory for a violation of Vehicle Code section 10851, subdivision (a). First, the instruction failed to require proof of the vehicle value exceeding

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[6] The trial court did not instruct the jury how it was to decide upon which theory to rest a verdict of guilty. The trial court never told the jurors they had to agree unanimously that the defendant committed the same specific criminal act. (See CALCRIM No. 3500.) The unanimity instruction is required " 'if one criminal act is charged, but the evidence tends to show the commission of more than one such act,' " and the prosecution does not " ' "elect the specific act relied upon to prove the charge to the jury." ' " (*People v. Brown* (2017) 11 Cal.App.5th 332, 341.) Omission of the unanimity instruction raises doubt about the verdict's basis.

$950. (See *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856 (*Gutierrez*); *People v. Jackson* (2018) 26 Cal.App.5th 371, 378; *Page*, *supra*, 3 Cal.5th at pp. 1187—1188.) Second, the instruction stated that the intent to deprive could be "for any period of time." For the taking theory, as a theft based offense, the intent must be "to permanently deprive the owner of its possession." (*Gutierrez*, at p. 856.) These deficiencies allowed for a felony conviction of Vehicle Code section 10851, subdivision (a), under a legally incorrect theory of taking,[7] even though the instruction may have satisfied the elements under a legally correct theory of posttheft driving.

b. *Prejudicial Error*

The Attorney General concedes that the trial court instructed the jury on a legally valid and a legally invalid theory of liability. However, he contends that the error was not prejudicial. We agree.

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu* (2014) 59 Cal.4th 155, 167; *Gutierrez*, *supra*, 20 Cal.App.5th at p. 857; *People v. Aledamat* (Aug. 26, 2019, S248105) __ Cal.5th __ [2019 WL 4009139].) " 'An instruction on an invalid theory may be found harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the

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[7] A " 'legally incorrect theory' " is one " 'which, if relied upon by the jury, could not *as a matter of law* validly support a conviction of the charged offense.' " (*People v. Calderon* (2005) 129 Cal.App.4th 1301, 1306; *People v. Harris* (1994) 9 Cal.4th 407, 419.)

findings necessary" under a legally valid theory.' " (*Gutierrez*, at p. 857*; In re Martinez* (2017) 3 Cal.5th 1216, 1226; *People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1203—1205.)

Here, overwhelming evidence established a posttheft driving theory of guilt. Deputies Sandoval and Ortiz observed Cortez driving the Honda Civic. Sandoval further discovered a shaved key in the ignition. Cortez admitted that he believed the Civic was stolen, had no permission to drive it, and knew nothing about its owner. These admissions reflected Cortez's intent to deprive the owner of his possession of the Civic.

In contrast to this overwhelming evidence, no evidence proved Cortez stole the Civic. No one identified Cortez as the thief. No evidence showed he was at the location of the theft. No evidence indicated how Cortez came into possession of the Civic. Based on the entirety of evidence, it is clear beyond a reasonable doubt that the jurors would not have considered the taking theory of guilt.

The arguments of counsel are not inconsistent with this conclusion. Defense counsel never addressed the taking theory. Instead, he exclusively invited the jurors to view Cortez's statement with caution because it was not recorded. As discussed, Cortez's statement consisted of admissions to support a posttheft driving theory.

At one point, the prosecutor referred to the time that passed between the theft of the Civic and the deputies' discovery of Cortez driving it. Cortez now argues that this reference supported a taking theory. But the context of the prosecutor's comment reflects a different interpretation. The prosecutor mentioned the passage of time between the theft and Cortez's driving to reinforce the strength of evidence which supported the

posttheft driving theory. Specifically, she contrasted the slight evidence which amounted to probable guilt under a taking theory with the overwhelming evidence to conclude guilt "beyond all reasonable doubt" under a posttheft driving theory.

The evidence and arguments of counsel leave no reasonable doubt that the jury reached its verdict under the legally valid posttheft driving theory. Accordingly, we conclude the instructional error was harmless.

2. The Absurd Consequences Doctrine

Cortez also contends that the application of Proposition 47 to Vehicle Code section 10851, subdivision (a), results in an absurd consequence by requiring a misdemeanor conviction for taking a vehicle with a value of $950 or less, while permitting a felony conviction for unlawfully driving a vehicle of the same value.[8] Specifically, he argues that it is illogical and absurd to punish a person who merely drives a car worth $950 or less more seriously than one who steals it. He further invites us to extend the holding of *Page* to all defendants convicted under a driving theory of Vehicle Code section 10851, subdivision (a). We reject Cortez's argument and decline his invitation.

Principles that govern statutory construction require interpreting the language in a statute with its " 'ordinary meaning,' " and construing it "in the context of the statute as a whole and the overall statutory scheme." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) Under the so-called absurd consequences doctrine, "[the] language of a statute should not be given a literal meaning if doing so would result in absurd consequences" which

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[8] This issue is pending review in the Supreme Court. (See *People v. Bullard*, review granted Feb. 22, 2017, S239488.)

the Legislature or the electorate did not intend. (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 673; *People v. Cook* (2015) 60 Cal.4th 922, 927; *People v. Hagedorn* (2005) 127 Cal.App.4th 734, 743.) "To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment." (*In re Michele D.* (2002) 29 Cal.4th 600, 606.)

The literal meaning of Proposition 47 as applied to Vehicle Code section 10851, subdivision (a), does not result in an absurd consequence. (See *People v. Morales* (2019) 33 Cal.App.5th 800, 807.) As the Attorney General asserts, reasonable minds may disagree as to the culpability between stealing a vehicle and unlawfully driving it. Driving can present a greater risk to public safety. Driving may be done on multiple occasions for extended periods of time. In contrast, the initial theft encompasses a single incident which may only include the driving to complete the theft.

The absurd consequences doctrine should only be used "most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government. (Cal. Const., art. III, § 3.)" (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698; *People v. Schoop* (2012) 212 Cal.App.4th 457, 470.) Proposition 47 does not present an extreme case here. Accordingly, the plain language of Proposition 47 does not warrant the application of the absurd consequences doctrine in this case.

3. Equal Protection

Cortez also argues that the different punishment for persons convicted under a taking theory and those convicted under a driving theory violates the equal protection clauses of the

United States and California Constitutions. We reject this argument.

"The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment." (*People v. Morales* (2016) 63 Cal.4th 399, 408; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) " 'In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment . . . we apply different levels of scrutiny to different types of classifications.' " (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836 (*Wilkinson*).) At a minimum, " 'a statutory classification must be rationally related to a legitimate governmental purpose.' " (*Id.* at p. 836.) Classifications " 'affecting fundamental rights' " or based on a suspect class are reviewed under the strict scrutiny standard. (*Ibid.*)

Even assuming the classes are similarly situated, Cortez further fails to show that the different punishment is not justified. Preliminarily, we reject Cortez's argument that the strict scrutiny standard applies for his equal protection claim. Specifically, Cortez contends that a conviction for Vehicle Code section 10851 affects a criminal defendant's fundamental right of personal liberty by exposing him or her to felony sentencing. However, a defendant " 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' " (*Wilkinson*, *supra*, 33 Cal.4th at p. 838; *People v. Acosta* (2015) 242 Cal.App.4th 521, 527 (*Acosta*); *People v. Martinez* (2016) 5 Cal.App.5th 234, 243.) "[T]he rational basis test applicable to equal protection challenge involving 'an alleged sentencing disparity.' " (*Wilkinson*, at p. 838; *Martinez*, at p. 243.)

To support his equal protection argument even under a rational basis standard, Cortez again relies on his assessment of the different culpability between theft and driving. As in his absurd consequences argument, Cortez contends here that the theft offenders are more culpable, and there is no rational basis for treating the more culpable class of offenders less harshly.

Again, we reject this argument. Under the rational basis test, " ' "equal protection of the law is denied only where there is no 'rational relationship between the disparity of treatment and some legitimate governmental purpose.' " [Citations.]' " (*Martinez*, *supra*, 5 Cal.App.5th at p. 244; *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*).) The underlying rationale need not be " 'empirically substantiated.' " (*Johnson*, at p. 881.) To mount a successful rational basis challenge, a party must negate every basis "that might support the disputed statutory disparity." (*Ibid.*)

Drawing from the Attorney General's previous assertion, we recognize that the electorate could have rationally concluded that driving poses a higher risk to public safety than theft. Additionally, as suggested in *People v. Acosta*, the electorate may have decided to proceed in an incremental manner to prosecute the different theories of crimes, "as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system." (*Acosta*, *supra*, 242 Cal.App.4th at pp. 527—528.) Either reason provides a rational basis for the different treatment of taking a vehicle and driving the vehicle. Accordingly, Cortez's equal protection argument fails.

4. Review of Peace Officer Personnel Records Under *Pitchess*

Prior to trial, Cortez moved for discovery of the personnel records of Deputies Sandoval and Ortiz, under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and its progeny. The court below granted the motion limited to the categories of fabrication of evidence, false arrest, and acts of moral turpitude. The court reviewed the records in camera for both deputies, and ordered that discovery be disclosed to the defense.

At Cortez's request with no opposition from the Attorney General, we have reviewed the sealed record of the in camera proceedings. We conclude the court below satisfied the minimum requirements in determining whether to disclose information from the personnel records for Deputies Ortiz and Sandoval. (*See People v. Mooc* (2001) 26 Cal.4th 1216, 1225.) No abuse of discretion occurred.

5. The Restitution Fine and Assessments

Cortez claims that the trial court erred in imposing the restitution fine, the parole revocation restitution fine, the court operations assessment, and the court facilities assessment, without having ascertained his ability to pay. He relies on *People v. Dueñas*, which held that due process of law requires the trial court to conduct an ability to pay hearing before it imposes the assessments, and stay the restitution fine until ability to pay has been demonstrated. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).)

As Cortez concedes, he raised no objection in the trial court based on his inability to pay. The Attorney General argues that Cortez forfeited his challenge on appeal because he did not raise his objection in the trial court.

The statutes authorizing the restitution fine and assessments do not provide for consideration of a defendant's ability to pay. (§§ 1202.4, subd. (c); 1465.8, subd. (a); Gov. Code, § 70373, subd. (a).) At the time of Cortez's sentencing, *Dueñas* had not yet been decided. Division Seven of this district held in *People v. Castellano* that a defendant's failure to object to the fine and fees, before *Dueñas* was decided, was not a forfeiture of the issue. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139.) The court reasoned that the holding of *Dueñas* was "a newly announced constitutional principle that could not reasonably have been anticipated at the time of [the defendant's] trial." (*Castellano*, at p. 489.) The court commented that prior to *Dueñas*, no California court "had held it was unconstitutional to impose fines, fees or assessments without a determination of a defendant's ability to pay." (*Ibid*.)

Disagreeing with *Castellano*, Division Eight of this district in *People v. Frandsen* decided that failure to object to the restitution fine and assessments amounted to forfeiture. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.) *Dueñas* relies on longstanding due process principles and precedent. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1166—1168 [discussing *Griffin v. Illinois* (1956) 351 U.S. 12, 17; *In re Antazo* (1970) 3 Cal.3d 100, 108; *Bearden v. Georgia* (1983) 461 U.S. 660, 667–668].) *Frandsen* did not view *Dueñas* as " 'a dramatic and unforeseen change in the law' " which would allow for an exception to the forfeiture doctrine. (*Frandsen*, at p. 1154.)

We need not decide whether Cortez forfeited his challenge to the restitution fine and assessments because we conclude any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Johnson*, *supra*, 35 Cal.App.5th at p. 139–140.) Although it is not Cortez's burden on appeal to establish his eligibility for relief, we find the error harmless because the record demonstrates he cannot make such a showing. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035.)

Cortez contends that he is unable to pay the restitution fine and assessments, which total $370. He does not ground his contention in any facts in the record, but asserts that he currently lacks income and assets. We reject his contention.

Ability to pay does not require existing employment or money on hand. (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) Ability to pay may be based on the person's ability to earn when the person has no physical, mental or emotional impediment which precludes the person from finding and maintaining employment. (*Id*. at 786.) Here, the record shows no such impediment.

Cortez has capacity to earn, unlike the defendant in *Dueñas*, who was a mother of two children, suffered from cerebral palsy, and had no home nor job. At sentencing, Cortez was 33 years old. He was described as "able-bodied" and requested fire camp. There is no reason to believe that he will be unable to secure employment and earn an income when released from prison.

We can also consider Cortez's ability to earn prison wages. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397; *People v. Gentry* (1994) 28

Cal.App.4th 1374, 1376.) Wages in state prison currently range from $12 to $56 a month depending on the prisoner's skill level.[9] (Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1); Cal. Dept. of Corrections and Rehabilitation, Operations Manual, ch. 5, art. 12, § 51120.6, pp. 354–355 (Jan. 1, 2019) (<https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/08/Ch_5_2019_DOM.pdf?label=Chapter%205%20Adult%20Custody%20and%20Security%20Operations&from=https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/> [as of Sep. 23, 2019], archived at < https://perma.cc/SG24-V2LH >.) Even if Cortez earns the minimum prison wage, it is a readily available source of income. Based on the record, any reasonable trial court would still have imposed the restitution fine and assessments even if it had separately considered Cortez's ability to pay under *Dueñas*. Remand would be futile. Accordingly, we conclude any error is harmless beyond a reasonable doubt.

6. Correction of the Abstract of Judgment

Cortez contends, and the Attorney General properly concedes, that the abstract of judgment incorrectly reflects a sentence of 286 days in county jail for count 3, driving when license suspended or revoked for DUI conviction after prior offense. The parties agree that the trial court imposed and stayed 286 days county jail as a sentence on count 3.

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[9] Half of any wages earned (along with half of any deposits made into a prisoner's trust account) are deducted to pay any outstanding restitution fine. (§ 2085.5, subd. (a); Cal. Code Regs., tit. 15, § 3097, subd. (f); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1093–1094.) Because Cortez can use the remainder of his prison wages to pay his court obligations, we can consider the entire wage amount earned in evaluating his ability to pay. (See *Gentry*, *supra*, 28 Cal.App.4th at p. 1377.)

Accordingly, the trial court is to correct its error in Cortez's abstract of judgment. (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1631 ["the abstract of judgment must be corrected to reflect the trial court's oral pronouncement at sentencing"].)

DISPOSITION

The clerk of the superior court is directed to modify the abstract of judgment to reflect the correct sentence for count 3 and forward a corrected copy to the Department of Corrections and Rehabilitation. The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HANASONO, J.*

We concur:

EDMON, P. J. DHANIDINA, J.

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