

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW ORNELAS  
MORENO,

Defendant and Appellant.

B291871

(Los Angeles County  
Super. Ct. No. BA456147)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

James M. Crawford, 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, Senior Assistant Attorney General, David E. Madeo and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

---

Defendant and appellant Matthew Ornelas Moreno appeals his convictions for assault with a deadly weapon and disobeying a domestic relations court order. He contends: (1) the conviction for assault with a deadly weapon was not supported by sufficient evidence, (2) the sentence for count 2 should be stayed under Penal Code section 654,<sup>1</sup> and (3) the imposition of direct victim restitution, the restitution fine, and assessments without determining his ability to pay violated due process. We reject each contention and order the judgment of conviction affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. Facts

#### a. Prosecution evidence

In 2013, victim Michelle M. ended her relationship with Ornelas Moreno. In October of 2015, at Michelle M.'s request, a court issued a restraining order against Ornelas Moreno, requiring him to stay 100 yards away from her.

On April 4, 2017, while inside of a Subway sandwich shop, Michelle M. saw Ornelas Moreno driving out of the parking lot. After Michelle M. saw Ornelas Moreno leave, she ran to her car and drove out of the parking lot through a different exit. She drove to a stop sign at the intersection to make a left turn.

While waiting to turn, Michelle M. saw Ornelas Moreno parked across the street from the Subway. Ornelas Moreno accelerated his car and drove directly toward Michelle M.'s car. No other cars or obstacles blocked his path to her. Ornelas Moreno's car collided into the passenger side of her car, pushing

---

<sup>1</sup> All further undesignated statutory references are to the Penal Code.

the tire inward and denting the body. Her car was totaled. Michelle M. estimated that two minutes elapsed from when she left the Subway to when Ornelas Moreno hit her car.

When Ornelas Moreno collided into Michelle M.'s car, she struck her head against the driver's side window. Her chest and leg hit the door. She went to the emergency room and received medication. She felt pain for one week, consisting of headaches, back pain, and soreness.

Raymundo Elorriaga Martinez saw Ornelas Moreno accelerate his car to 50 miles per hour and drive directly at the front passenger side of Michelle M.'s car. Prior to impact, Ornelas Moreno's car braked and swerved. It then hit the rear passenger side.

Los Angeles Police Department Officer Oscar Ordonez saw debris surrounding Ornelas Moreno's car, including its detached front bumper. Officer Ordonez also saw damage to the hood and headlights, and the airbags deployed.

b. Defense evidence

On the date of the incident, from her apartment, Yuritzi Moreno, Ornelas Moreno's mother, heard screeching and a loud bang. She went outside and saw Michelle M.'s car was totaled.

Ornelas Moreno testified in his defense. He saw Michelle M. inside the Subway. He drove out of the parking lot and turned right to go to his mother's apartment building. He was initially unable to enter the apartment building. As he was driving, an orange sports car quickly approached his car from behind. Ornelas Moreno accelerated to 30 miles per hour to avoid the sports car and swerved into the oncoming lane of traffic. He saw a car stopped in front of him. He applied his brakes and swerved to the left, trying to avoid hitting it. But his car collided

into the rear passenger side of the other car at 30 to 35 miles per hour. He noticed the other car was Michelle M.'s car. He made eye contact with her before the collision. Ornelas Moreno denied the collision was intentional.

## 2. Procedure

A jury convicted Ornelas Moreno of assault with a deadly weapon (§ 245, subd. (a)(1); count 1) and disobeying a domestic relations court order (§ 273.6, subd. (a); count 2).

On June 19, 2018, the trial court sentenced Ornelas Moreno to three years in state prison on count 1 and imposed a concurrent term of 364 days on count 2. Ornelas Moreno stipulated to direct victim restitution in the amount of \$1,000. The trial court imposed a restitution fine of \$300, a court operations assessment of \$40, and a court facilities assessment of \$30.

## DISCUSSION

### 1. Sufficiency of Evidence

Ornelas Moreno contends the evidence was insufficient to support the conviction for a violation of section 245, subdivision (a)(1). Specifically, he argues that his car did not qualify as a deadly weapon because the manner in which he used it was not likely to cause great bodily injury. We reject this argument.

Our standard of review is well settled. “ “ “When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.’ ” ” ” (*People v. Nguyen* (2015))

61 Cal.4th 1015, 1054–1055; *People v. Zamudio* (2008) 43 Cal.4th 327, 357; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

“ [I]t is the [trier of fact], not the appellate court which must be convinced of the defendant’s guilt.’ ” (*Nguyen*, at p. 1055–1056.)

“A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” ’ ” the verdict. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) “[We] must presume in support of the judgment the existence of every fact [the trier of fact] could reasonably have deduced from the evidence.” (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) “If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Jennings* (2010) 50 Cal.4th 616, 639.)

As used in section 245, subdivision (a)(1), a deadly weapon is “ ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ ” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 (*Aguilar*).) Some objects have been held to be deadly weapons as a matter of law because “the ordinary use for which they are designed establishes their character as such.” (*Id.* at p. 1029.)

Other objects, including cars, are “not deadly per se.” (*Aguilar*, *supra*, 16 Cal.4th at p. 1029.) However, under certain circumstances, they may be used “in a manner likely to produce death or great bodily injury.” (*Id.* at p. 1030; *People v. Brown* (2012) 210 Cal.App.4th 1, 6–7 (*Brown*).) “In determining whether an object not inherently deadly or dangerous is used as such, the

trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.” (*Aguilar, supra*, 16 Cal.4th at p. 1029.) *In re B.M.* (2018) 6 Cal.5th 528, 534–536, clarified this standard by considering the following factors: (1) whether the object was capable of producing and likely to produce death or great bodily injury; (2) how the object was actually used; and (3) the extent of actual injury or lack of injury.

First, Ornelas Moreno used a car. We are not evaluating innocuous items. (See *In re B.M., supra*, 6 Cal.5th at pp. 536–537 [butter knife]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087 [broomstick]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [pencil].) “Traditionally, cars can be deadly weapons.” (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 458.) When misused, cars are capable of producing, and likely to produce, death or great bodily injury.<sup>2</sup> They weigh several thousand pounds and occupy roads frequented by vehicular and pedestrian traffic. (See *People v. Russell, supra*, 129 Cal.App.4th at p. 785.)

---

<sup>2</sup> (See, e.g. *People v. Bipialaka, supra*, 34 Cal.App.5th at p. 458 [car driven at another car in an intersection but collision avoided]; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5 [car driven at police vehicle]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [car raced through red light and collided with another car]; *People v. Golde* (2008) 163 Cal.App.4th 101, 106–107 [car accelerated toward victim and pursued her]; *People v. Russell* (2005) 129 Cal.App.4th 776, 779 [victim pushed into path of oncoming car]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705 [truck driven close to persons]; *People v. Finney* (1980) 110 Cal.App.3d 705, 716 [car rammed into chasing police cars]; *People v. Claborn* (1964) 224 Cal.App.2d 38, 41 [car aimed at police car].)

They likely produce death and great bodily injury when projected at other cars or persons.

Second, Ornelas Moreno used a car as a deadly weapon. He drove his car directly into Michelle M.'s car, as she was waiting to make a turn. No other cars or obstacles blocked his path to her. Although no expert testimony was presented, Elorriaga Martinez estimated that Ornelas Moreno accelerated his car to 50 miles per hour as it drove at Michelle M.'s car. By his own admission, Ornelas Moreno estimated that he collided into Michelle's car at 30–35 miles per hour. Ornelas Moreno aimed his car directly at the front passenger portion of Michelle's car. Only before impact did he apply his brakes and swerve to collide with the rear passenger portion. The collision still totaled Michelle M.'s car. The right rear tire was pushed in, and the passenger side was dented. Ornelas Moreno's car fared no better. The impact caused front end damage to his car, including the hood and headlights. The front bumper from Ornelas Moreno's car detached. His car's airbags deployed. The evidence showed that he purposefully drove the car into Michelle M.'s car with such force that serious injury was likely.

Third, Michelle M. was injured. Actual injury to a victim and physical contact are not required to support a conviction. (*Brown, supra*, 210 Cal.App.4th at p. 7; *In re D.T.* (2015) 237 Cal.App.4th 693, 699.) If injuries do result, their nature and location are relevant for determining whether an object was used in a manner capable of producing and likely to produce great bodily injury or death. (*Brown*, at p. 7; *In re D.T.*, at p. 699; *In re B.M., supra*, 6 Cal.5th at p. 536.) Michelle M. hit her head and chest, as well as her leg. She went to the emergency room. She injured vital areas, not only her extremities. For one week after

the collision, she felt pain, consisting of headaches, back pain, and soreness. The evidence shows that serious injury was likely, even if it did not come to pass.

Viewing the facts in the light most favorable to the judgment, we conclude the jury's finding that Ornelas Moreno used the car as a deadly weapon is supported by substantial evidence.

2. Section 654 does not prohibit the sentence on count 2

Ornelas Moreno argues that under section 654, the trial court should have stayed the sentence for count 2 for violating a restraining order because it was based on an indivisible course of conduct with the assault with a deadly weapon in count 1. We reject his argument.

Section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective." (*People v. Corpening* (2016) 2 Cal.5th 307, 311 (*Corpening*).)

First, we determine if the different crimes were completed by a single physical act. (*People v. Jones* (2012) 54 Cal.4th 350, 358 (*Jones*); *Corpening, supra*, 2 Cal.5th at p. 311.) If so, section 654 bars multiple punishment for the multiple offenses. (*Jones*, at p. 358; *Corpening*, at p. 311.) The determination "depends on whether some action the defendant is charged with having taken



separately completes the actus reus for each of the relevant criminal offenses.” (*Corpening*, at p. 313.) The facts of the case dictate whether multiple convictions are based on a single physical act. (*Id.* at p. 312; *People v. Mesa* (2012) 54 Cal.4th 191, 196.) When the facts are undisputed, the application of section 654 raises a question of law, which is reviewed under the de novo standard. (*Corpening*, at p. 312.)

Second, if the case involves more than a single act, we would consider whether that “ ‘ ‘course of conduct’ ’ ” reflects a single intent and objective versus multiple intents and objectives. (*People v. Correa* (2012) 54 Cal.4th 331, 335–336 (*Correa*); *Jones, supra*, 54 Cal.4th at p. 359; *Corpening, supra*, 2 Cal.5th at p. 311; *People v. Mesa, supra*, 54 Cal.4th at p. 199.) Section 654 applies where there was a course of conduct which violated more than one statute but constituted an “indivisible transaction.” (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.) If the offenses were incident to one objective, the defendant may not be punished for more than one. (*Correa*, at p. 336; *Perez*, at p. 551.) But if the defendant harbored multiple objectives, he or she may be punished for each offense, even though they shared common acts. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) We only reach this second step if more than one physical act served as the basis for convicting the defendant of multiple separate crimes. (*Jones*, at pp. 359–360; *Corpening*, at p. 316.)

When a trial court sentences a defendant for two crimes, without suspending the sentence for one, it implicitly finds the acts involve more than one objective. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731; *People v. Islas* (2012) 210 Cal.App.4th 116,

129.) The trial court's express or implied findings are subject to the substantial evidence standard of review. (*Islas*, at p. 129; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438; *Osband*, at pp. 730–731.) We review the trial court's determination of a defendant's intent and objective for sufficient evidence in a light most favorable to the judgment and presume the existence of every fact that could reasonably be deduced from the evidence. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

Ornelas Moreno's failure to stay away from Michelle M. was the basis of the violation of the domestic relations court order.<sup>3</sup> Michelle M. first noticed Ornelas Moreno as he was driving out of the Subway parking lot. He left the parking lot, but he returned to a location across the street. By driving away and returning, Ornelas Moreno completed the act necessary for a violation of section 273.6, subdivision (a).

Ornelas Moreno's assault on Michelle M. was a separate act from his failure to stay away from her. His second act occurred after Michelle M. drove out of the driveway and positioned her car in the left turn lane. He was waiting on Pico Boulevard, across the street from the Subway. When he had a clear path to Michelle M.'s car, he projected his car into it. This second act resulted in the assaultive collision. The assault occurred after guilt was already established for the violation of section 273.6, subdivision (a).

A distinct separation in time delineated the two acts. Two minutes elapsed between Michelle M. leaving the Subway and

---

<sup>3</sup> The trial court instructed the jury with CALCRIM No. 2701, which required proof that a court lawfully issued a written order that the defendant stay away from Michelle M. (See CALCRIM No. 2701.)

Ornelas Moreno assaulting her. The separation in time was brief, but even simultaneous physical acts can be distinct for purposes of section 654. (*Jones, supra*, 54 Cal.4th at p. 358.) Ornelas Moreno positioned his car across the street from the Subway, where he remained. This separation in time afforded Ornelas Moreno an opportunity to reflect before committing the next crime. (*People v. Louie* (2012) 203 Cal.App.4th 388, 399; *People v. Beamon, supra*, 8 Cal.3d at p. 639, fn. 11; *People v. Gaio* (2000) 81 Cal.App.4th 919.)

We conclude substantial evidence supports the trial court's implicit finding that Ornelas Moreno harbored separate objectives for the separate acts. We accordingly affirm the trial court's decision to impose the sentence on count 2.

3. Due process claims for direct victim restitution order, restitution fine, and assessments

Ornelas Moreno claims that the trial court erred in imposing the victim restitution order, the restitution fine, court operations assessment, and court facilities assessment, without having ascertained his ability to pay. He relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*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.

First, *Dueñas* does not apply to direct victim restitution. (*Dueñas, supra*, 30 Cal.App.5th at p. 1169.) Accordingly, we reject Ornelas Moreno's argument that a determination of ability to pay was required before the trial court ordered direct victim restitution.

Second, as to the restitution fine and assessments, the Attorney General argues that Ornelas Moreno forfeited his

challenge on appeal because he did not raise his objection in the trial court. As Ornelas Moreno concedes, he raised no objection in the trial court based on his inability to pay.

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 Ornelas Moreno's sentencing, *Dueñas* had not yet been decided. Division 7 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, 137–138.) 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 the defendant's ability to pay.” (*Ibid.*)

Disagreeing with *Castellano*, Division 8 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*, *supra*, 34 Cal.App.5th at p. 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, 16; *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 Ornelas Moreno 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 pp.139–140.) Although it is not Ornelas Moreno’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.)

Ornelas Moreno 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. (See *id.* at p. 786.) Here, the record shows no such impediment.

Ornelas Moreno 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. Ornelas Moreno is a certified optician with some college education. He lives with his family in a home. He was 24 years old when sentenced. His prior employment shows past income-earning ability. There is no reason to believe that he will be unable able to secure employment and earn an income when released from prison.

Finally, we recognize that Ornelas Moreno's ability to pay is evaluated in light of his total financial obligations, which includes direct victim restitution. (See *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531; *People v. Corrales* (2013) 213 Cal.App.4th 696, 702; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1250.) However, the \$1,000 restitution amount does not change our conclusion. First, the amount is not excessive. Second, his stipulation to the amount demonstrates his willingness and ability to pay. Third, Ornelas Moreno's representation by private counsel, his posting of bail twice during the pendency of this case,<sup>4</sup> and residence with his family also suggest that he has access to financial resources.

Based on the record, any reasonable trial court would still have imposed the restitution fine and assessments even if it had separately considered Ornelas Moreno's ability to pay under *Dueñas*. Remand would be futile. Accordingly, we conclude any error is harmless beyond a reasonable doubt.

---

<sup>4</sup> The record shows that Ornelas Moreno initially posted a bond for a \$60,000 bail amount. Because Ornelas Moreno arrived late for one of his court dates, the trial court issued a bench warrant with a bail amount of \$75,000, and ordered the original bail forfeited. When Ornelas Moreno did appear, the trial court remanded him into custody. He later posted another bond for \$75,000. The trial court remanded Ornelas Moreno into custody when the jury convicted him.

## **DISPOSITION**

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

HANASONO, J.\*

We concur:

EDMON, P. J.

LAVIN, J.

---

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