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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAURICIO GONZALEZ, Defendant and Appellant.	B291052 (Los Angeles County Super. Ct. No. BA465842)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Bork, Judge. Affirmed.

Christopher Muller, 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, Noah P. Hill, Corey J. Robins and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Mauricio Gonzalez of unlawful taking or driving a vehicle without consent. On appeal, he contends that the trial court prejudicially erred in its jury instruction for the offense. He also argues that the evidence was insufficient to support the verdict. Finally, Gonzalez claims that the imposition of the restitution fine and assessments without determining his ability to pay violated due process.

Under a taking theory of guilt, a felony violation of Vehicle Code section 10851, subdivision (a), requires proof of a vehicle valued over $950, and the intent to permanently deprive the owner of its possession. Under a posttheft driving theory, an intent to temporarily deprive the owner of possession is required, but a vehicle value is not. Because the jury instruction allowed for a felony conviction under either theory, but did not include the elements required for the taking theory, it erroneously provided for a legally valid theory and a legally invalid theory. However, the error was harmless beyond a reasonable doubt. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *Prosecution Evidence*

On February 1, 2018, Manuel Martinez, Jr., parked his 1999 Honda Civic near the place where he worked. He and his father purchased the car in 2017. The car's "pink slip" remained in it when he left. When Martinez returned later in the day, the car was missing. Martinez reported the car stolen.

On February 24, 2018, Los Angeles Police Officer Oscar Gamboa saw Gonzalez driving Martinez's Civic. After stopping Gonzalez, Gamboa found a shaved key in the ignition. The

shaved key was altered to operate the ignition of the car. Gamboa arrested Gonzalez, and had the car impounded.

Martinez and his father were notified about the recovery of the Civic. When it was returned to them, they found damage to the interior and exterior. The pink slip was in the vehicle. However, the pink slip contained new writing which purported to be the signature of Martinez's father. Neither Martinez nor his father signed the pink slip. They did not give Gonzalez or anyone else permission to the drive the Civic.

In January of 2010, California Highway Patrol Sergeant Matthew Petrella pulled over a 1997 Honda Accord driven by Gonzalez. Petrella found a shaved Honda key in the ignition. Petrella recognized that such shaved keys could operate ignitions or open locks which they were not originally intended to fit. Petrella determined that Gonzalez was not the registered owner of the car, and arrested him.

In June of 2012, Los Angeles County Sheriff's Deputy Omar Bobadilla pulled over Gonzalez who was driving a stolen 1991 Honda Accord. The key ring recovered from the ignition contained five shaved keys. Gonzalez also had two shaved pieces of metal which could be used to disengage locks. Bobadilla arrested Gonzalez.

b. *Defense Evidence*

Gonzalez testified in his defense. In 2010, he pleaded guilty to a felony violation of unlawfully taking or driving a vehicle. In 2012, he pleaded guilty to felony violation of unlawfully taking or driving a vehicle with a prior conviction. He did not go to trial on either case.

On February 13, 2018, Gonzalez first saw the Honda Civic parked on Olympic Boulevard. The Civic caught his attention because it had a "for sale" sign on it. He called the number listed on the sign, and arranged to meet the seller, who identified himself as Manuel. When the seller arrived, he allowed Gonzalez to inspect the Civic. At Gonzalez's request, the seller showed him the pink slip, which contained the VIN and license plate number of the Civic. Gonzalez paid the seller $700 for the Civic. The seller gave a key to Gonzalez, who observed it to be a normal key with normal wear and tear.

Gonzalez confirmed that neither Manuel Martinez, Jr., nor his father, was the man who sold the Civic to him. Gonzalez never submitted any paperwork to the DMV because he had neither time nor money to do so. He did purchase a car cover, a stereo, and a speaker box for the Civic.

Gonzalez was arrested on February 24, 2018. He denied knowing that the Civic was stolen.

2. *Procedure*

A jury convicted Gonzalez of driving or taking a vehicle without consent, in violation of Vehicle Code section 10851, subdivision (a) (count 1). Gonzalez waived jury trial on the prior conviction allegations, and admitted a prior strike conviction for robbery, and two prior convictions for the same offense charged in count 1. (Pen. Code, § 666.5.)[1]

The trial court sentenced Gonzales to three years on count 1, doubled under the Three Strikes law. The total aggregate term of imprisonment was six years in state prison. The trial court

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

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 revoked (§ 1202.45). The trial court ordered Gonzalez to pay a $40 court security fee (court operations assessment) (§ 1465.8), and a $30 facility assessment (criminal conviction assessment) (Gov. Code, § 70373).

Gonzalez timely appealed.

DISCUSSION

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

The trial court read CALCRIM No. 1820 to the jury, instructing that for a violation of Vehicle Code section 10851, subdivision (a), "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." Because this instruction included the words "took or drove," it provided for taking or posttheft driving as theories of guilt for a violation of Vehicle Code section 10851, subdivision (a). However, the instruction omitted additional elements that are required under the taking theory. As we will discuss, the trial court improperly instructed the jury on both a legally valid theory of guilt and a legally invalid theory.

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

Vehicle Code section 10851, subdivision (a),[2] proscribes two forms of conduct: (1) taking and (2) posttheft driving.[3] (See *Van*

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[2] Vehicle Code Section 10851, subdivision (a), provides: "Any person who drives or takes a vehicle not his or her own, without

Orden, *supra*, 9 Cal.App.5th at pp. 1283, 1285.) Taking is accomplished by unlawfully taking a vehicle or driving the vehicle away, with the intent to permanently deprive the owner of possession. (*Garza*, *supra*, 35 Cal.4th at p. 876.) Posttheft driving is 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. (*Van Orden,* at pp. 1286—1287.) Taking is a form of theft. (*People v. Page* (2017) 3 Cal.5th 1175, 1183 (*Page*); *Garza,* at p. 871.) Posttheft driving is not. (*Page*, at p. 1183; *Garza,* at p. 871; *Van Orden,* at p. 1283.)

Section 490.2, the ameliorative petty theft provision under Proposition 47,[4] mandates misdemeanor punishment for a

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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 the intent to steal the vehicle . . . is guilty of a public offense."

[3] Two additional forms of conduct were discussed in *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, as involved in *People v. Cuevas* (1936) 18 Cal.App.2d 151, 153. 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. (*Van Orden,* at pp. 1285—1286; *People v. Garza* (2005) 35 Cal.4th 866, 876.) For our discussion, we include this form of conduct under posttheft driving.

[4] 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.

defendant who "obtain[s] any property by theft," when the property is worth no more than $950. (*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. (*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 value is either unproven or $950 or less, the offense is always a misdemeanor. (*Page*, *supra*, 3 Cal.5th at p. 1187.) If the value 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 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.

The instruction in this case allowed the jury to consider whether the offense was predicated on either the taking theory of guilt or the posttheft driving theory of guilt. Consequently, the instruction contained two deficiencies for the elements required

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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.

for a felony conviction on a taking theory. First, the instruction failed to require proof that the vehicle value exceeded $950. (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856; *People v. Jackson* (2018) 26 Cal.App.5th 371, 378; *Page, supra*, 3 Cal.5th at pp. 1187.) 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 possession.' " (*Gutierrez, supra,* 20 Cal.App.5th at pp. 851, 856.) These deficiencies allowed for a felony conviction of Vehicle Code section 10851, subdivision (a), under a legally incorrect theory of taking,[5] even though the instruction may have satisfied the elements under legally correct theory of posttheft driving. Accordingly, instructional error occurred.

b. Prejudicial Error

Gonzalez argues that the instructional error was prejudicial because the record does not demonstrate beyond a reasonable doubt that the jury relied upon the legally correct driving theory. We disagree.

"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.) " 'An instruction on an invalid theory may be found

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[5] 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.)

harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the 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, the trial court's omission was harmless beyond a reasonable doubt. The prosecution's evidence and argument exclusively addressed a posttheft driving theory of guilt. Officer Gamboa testified that he found Gonzalez driving the stolen car being operated by a shaved key, which supported his knowledge that the car was stolen. The defense evidence attempted to raise doubt that Gonzalez knew the car was stolen. No evidence showed how the theft occurred, or who committed it. No evidence connected Gonzalez to the theft. No evidence showed he drove the car to complete the theft. Twenty-three days after the car was originally stolen, the police caught Gonzalez driving it. This time gap indisputably qualifies as a substantial break between the theft and the driving. (*Page*, *supra*, 3 Cal.5th at p. 1189.) Consequently, Gonzalez's act constituted only posttheft driving, rather than an effort to complete the theft.

Gonzalez argues that a taking theory was supported by the prior crimes evidence introduced under Evidence Code section 1101, subdivision (b). Gonzalez reasons that the trial court instructed that the prior incidents could be considered as evidence of a common plan or scheme specifically for taking vehicles. However, the trial court did not instruct the jury as Gonzalez argues. The trial court instructed that the evidence could be considered to support a determination that Gonzalez had "a common plan or scheme to commit the offense alleged in this case." It was not limited to taking vehicles. Additionally, the two

prior incidents involved only acts of posttheft driving, not acts of taking.

The entire record supported only a posttheft driving theory of guilt. The erroneous instruction's deficiencies did not contribute to the verdict. We conclude that it is clear beyond a reasonable doubt that the jury based its verdict on the legally valid theory of posttheft driving.

2. *A Violation Under the Posttheft Driving Theory Does Not Require Proof of Value Exceeding $950*

Gonzalez contends that a felony conviction on a posttheft driving theory should require proof of a vehicle value of more than $950. He bases his contention on three grounds. First, Gonzales reasons that a violation of Vehicle Code section 10851, subdivision (a), under a posttheft driving theory, should qualify as a theft offense under section 490.2. Second, he claims that absurd consequences would result by permitting felony punishment for driving a vehicle valued at $950 or less, and requiring only misdemeanor punishment for taking a vehicle of the same value. Third, he argues that different treatment of the two classes of offenders violates equal protection. We reject Gonzalez's contention on each ground.

a. Posttheft Driving Is Not a Theft Offense Under Section 490.2

The Supreme Court has dismissed the first basis of Gonzalez's argument.. As discussed earlier, the Supreme Court in *Page* preserved its earlier distinction of the taking theory of guilt versus the posttheft driving theory under Vehicle Code section 10851, subdivision (a). (*Page*, *supra*, 3 Cal.5th at pp. 1182—1183; *Garza*, *supra*, 35 Cal.4th at p. 866; *Van Orden, supra*, 9 Cal.App.5th at p. 1283.) In clear language, the Court

held, "obtaining an automobile worth $950 or less *by theft* constitutes petty theft under section 490.2 and is punishable only as a misdemeanor." (*Page*, at p. 1187 (italics added); *People v. Liu* (2018) 21 Cal.App.5th 143, 152.) Under the taking theory, felony punishment only attaches if the vehicle value exceeds $950.

More recently, *People v. Lara* (2019) 6 Cal.5th 1128, 1137, definitively confirmed that a theory of posttheft driving "does not require proof of vehicle value in order to be treated as a felony." Although "a theft-based violation of Vehicle Code section 10851 may be punished as a felony only if the vehicle is shown to have been worth over $950, a violation committed by posttheft driving may be charged and sentenced as a felony regardless of value." (*Id*. at p. 1136.)

b. *Absurd Consequences*

Gonzalez claims that Proposition 47 would result in absurd consequences if a violation under a taking theory required misdemeanor punishment if the vehicle value is $950 or less, and a violation under a posttheft driving theory allowed felony punishment for the same vehicle value.[6] First, he reasons that it would be anomalous to apply Proposition 47 to other stolen property possession crimes, but not to stolen car driving. Second, he believes that it would be counterintuitive to punish driving a stolen car more harshly than taking that same car.

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

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

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 the Legislature or the electorate did not intend. (*In re Michele D.* (2002) 29 Cal.4th 600, 606; *Bruce v. Gregory* (1967) 65 Cal.2d 666, 674; *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.*, at p. 606.)

The literal meaning of Proposition 47 as applied to Vehicle Code section 10851, subdivision (a), does not result in an absurd consequence. (*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 same reasoning applies to driving a stolen car versus possessing other types of stolen property. Valid reasons exist to justify felony punishment for driving.

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, Proposition 47 does not warrant

invoking the absurd consequences doctrine in this case to expand our interpretation of its application to Vehicle Code section 10851, subdivision (a).

c. *Equal Protection*

Gonzalez also argues that Proposition 47 would violate equal protection if drivers of stolen cars were treated differently from car thieves and recipients of stolen cars. 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. . . . [Citations.]' " (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836 (*Wilkinson*).) At a minimum, a " 'classification must be rationally related to a legitimate governmental purpose.' " (*Ibid.*) Classifications " 'affecting fundamental rights' " or based on a suspect class are reviewed under the strict scrutiny standard. (*Ibid.*)

We find the rational basis test applicable here. "[T]he rational basis test [is] applicable to [an] equal protection challenge involving 'an alleged sentencing disparity.' " (*Wilkinson*, *supra*, 33 Cal.4th at p. 838; *People v. Martinez* (2016) 5 Cal.App.5th 234, 243.) Strict scrutiny does not apply. A defendant " 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' " (*Wilkinson*, at p. 838; *People v. Acosta* (2015) 242 Cal.App.4th 521, 527 (*Acosta*); *Martinez*, at p. 243.)

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*.)

Assuming the classes of offenders are situated similarly, there is a rational basis for the distinction in treatment. The court in *Acosta* has suggested legitimate governmental purposes that are equally applicable here. (*Acosta, supra*, 242 Cal.App.4th at pp. 527—528.) First, the electorate was not obligated to extend relief under Proposition 47 to all similar conduct, including violations under the taking and driving theories of Vehicle Code section 10851, subdivision (a). It could move incrementally to evaluate its effects on the criminal justice system. Second, the electorate could have rationally concluded that driving poses a higher risk to public safety than theft. Finally, the electorate could have anticipated that prosecutors would more frequently exercise discretion in charging misdemeanors in cases of posttheft driving of vehicles valued under $950. Because any of these purposes provide a rational basis for the different treatment of taking a vehicle and driving the vehicle, Gonzalez's equal protection argument fails.

d. *Evidence of Car's Value*

As a part of his argument that a felony conviction for Vehicle Code section 10851, subdivision (a), should require a

vehicle valued over $950, under either taking or posttheft driving theory, Gonzalez claims that the evidence at trial was insufficient to support the requisite value. Because we conclude that the offense under a posttheft driving theory does not require proof of value, we need not address this argument.

3. *Due process claim for restitution fine and assessments*

Gonzalez claims that the trial court erred in imposing the restitution fine, court operations assessment, and 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 to stay the restitution fine until ability to pay has been demonstrated. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164 (*Dueñas*).)

The Attorney General argues that Gonzalez forfeited his challenge on appeal because he did not raise his objection in the trial court. Gonzalez 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 Gonzalez'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, 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 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, 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 Gonzalez 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 Gonzalez'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.)

Gonzalez 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 is indigent because he qualified for appointed counsel.

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 p. 786.) Here, the record shows no such impediment.

We can consider Gonzalez's present and future ability to earn, including his ability to earn prison wages and income after release from custody. (*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.[7] (Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1); Cal. Dept. of Corrections and Rehabilitation, Operations Manual (Jan. 1, 2019) ch.5, art. 12, § 51120.6, pp. 354—355; *People v. Rodriguez* (2019) 34 Cal.App.5th 641, 649.) Even if Gonzalez earns the minimum prison wage, it is a readily available source of income during his six-year sentence. In much less than three years, he will satisfy the modest financial burden of $370. He will also have additional time to

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[7] 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 Gonzalez 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. (*Gentry*, *supra*, 28 Cal.App.4th at p. 1377.)

earn money once he is released from prison and supervised on parole.

Gonzalez has the 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. Gonzalez was 47 years old when sentenced. There is no reason to believe that he will be unable to secure employment and earn an income when released.

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

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HANASONO, J.*

We concur:

EDMON, P. J.

EGERTON, 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.