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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL D. KOWITZ,

Defendant and Appellant.

A132409

(Marin County  
Super. Ct. No. CR136557A)

Defendant and appellant Michael D. Kowitz appeals the trial court's order of restitution entered following defendant's guilty-plea convictions on offenses including stalking and identity theft. Defendant also appeals the trial court's order denying him a refund of fines paid based on excess custody credits. We shall reverse the restitution order in part and remand for a dollar calculation of excess custody credits.

**FACTUAL AND PROCEDURAL BACKGROUND**

In May 2006, the Marin County District Attorney filed an information charging defendant with the commission of fourteen felony offenses in relation to his criminal conduct involving Susan Dean and Rena Dean.<sup>1</sup> The information accused defendant of stalking Susan (count 1) and Rena (count 3), in violation of Penal Code, section 646.9, subdivision (a).<sup>2</sup> The information also accused defendant of stalking Susan (count 2) and

<sup>1</sup> Defendant and Susan Dean were married in 2000 and divorced in 2003. Rena Dean is Susan Dean's mother. We shall refer to each by her first name to avoid any confusion.

<sup>2</sup> Further statutory references are to the Penal Code unless otherwise stated.

Rena (count 4) while subject to a restraining order, in violation of section 646.9, subdivision (b). Counts 5, 7 and 9 alleged defendant engaged in unauthorized use of computer data by accessing Susan's online telephone records and PG&E statements between January 2002 and June 2004 (§ 502, subd. (c)(2)); and counts 6, 8 and 10 charged that during the same time period defendant committed identity theft by using Susan's personal information to obtain goods and services (§ 530.5). Count 11 charged defendant with unauthorized access of Rena's internet account (§ 502, sub. (c)(2)); counts 12 and 13 charged defendant committed identity theft against Rena between July 2003 and November 2004 by using her personal information to obtain goods and services (§ 530.5). Count 14 of the information charged defendant with making criminal threats against Rena on or about April 11, 2004 (§ 422). In addition to these felony charges, the information also accused defendant of misdemeanor criminal contempt for disobeying a court order in another Marin County Superior Court case (§ 166, subd. (a)(4)).<sup>3</sup>

When arraigned in May 2006, defendant pleaded not guilty by reason of insanity. Subsequently, defendant withdrew his insanity plea and in June 2006 accepted a plea agreement, pursuant to which he pleaded guilty to stalking, as alleged in counts 1 and 3, against Susan and Rena, in return for dismissal of all remaining counts with a *Harvey*<sup>4</sup> waiver. As part of the plea agreement, the court struck the section 12022.1 subdivision (b) allegations (commission of offense while on bail) related to counts 1 and 3.

Prior to sentencing the Probation department filed a pre-sentence report (PSR) which set forth the facts underlying the charged offenses. The PSR notes that the offenses committed by the defendant involved no physical violence, but the probation officer opined that in terms of victim impact this case represented one of the "greatest intrusions of privacy and threatening behavior" he had ever seen. Illustrative of the harm

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<sup>3</sup> The information further alleged that the offense charged in count 14 is a serious felony (§ 1192.7, subd. (c)(38)) and a violent felony (§ 1170.12, subd. (a)-(c)), and that defendant committed all the offenses (except those alleged in counts 5 and 6) while he was released on bail (§12022.1, subd. (b)).

<sup>4</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

to the victims arising from defendant's conduct, the probation officer notes Susan was forced to change her phone number multiple times to avoid eavesdropping by defendant and every time she changed to a new provider, the very first call she received was from defendant. Defendant accessed Susan's voicemail and deleted saved phone messages, initiated phone calls to Susan and Rena that appeared to come from other persons listed in their phone address books, and drafted and sent emails from their phones. Also, defendant used at least three credit cards belonging to Susan to purchase goods or services.

The PSR details defendant's conduct in the commission of the crimes identified in the Information. The PSR states in April 2004, Susan reported to police that she received several vulgar messages on her cell phone and caller ID showed they originated from a good friend. Susan told police the calls were actually from defendant and defendant had the capacity to make other people's phone numbers appear on caller ID; Susan also stated defendant was tapping into her voicemail and computer, listening to her messages and reading her emails. During that same month, Rena received a call at her home in Arkansas in which she heard a woman screaming before the caller hung up. Rena checked caller ID, which indicated the call came from her daughter Susan. Rena called Tiburon police, as she feared for Susan's safety. However, when the officers dispatched to check on Susan's wellbeing arrived at her home, they found her asleep. Shortly after Rena received this call, someone remotely accessed her phone caller ID system and erased Susan's phone number. Rena flew to San Francisco to visit Susan in April 2004. She received a phone call from defendant just after she got off the plane. Defendant stated, "Welcome to San Francisco, you shithead." Rena's caller ID indicated that the call was initiated from a San Francisco Airport number. Susan, when interviewed by police officers regarding the call, told them the only way defendant could have known about Rena's trip to San Francisco was by listening to Rena's phone conversations with

Susan during which they planned the trip.<sup>5</sup> Attached to the PSR were restitution claim forms from Susan and Rena. Susan sought restitution in the amount of \$18,427.99 and Rena sought the sum of \$4,707.

The trial court conducted a sentencing hearing on July 24, 2006. Defendant was sentenced to state prison for the aggravated term of three years on count 1 and a consecutive term of 8 months (one-third the mid-term) on count 3, however execution of the sentence was suspended and defendant was granted supervised probation for a period of 5 years. With respect to the issue of restitution, the minute order on the sentencing proceeding states, “Defendant to make restitution for damages as to count(s) 1, 3 in an amount and manner to be determined by the probation officer and ordered by the court. Defendant advised of the right to hearing and consents to a subsequent determination of restitution”; however, the record does not contain an order setting a restitution amount.<sup>6</sup>

Some five years later, in 2011, defendant filed a “Request for Court Order Setting Amount of Restitution” (request). In his request, defendant challenged the victims’ restitution claims in the PSR and explained that he had been unable to request a restitution hearing for a number of reasons, including “a lengthy hospitalization following his release from custody, persistent mental health problems that required appointment of a conservator and debilities that left him unable to travel or communicate effectively.”

The trial court held restitution hearings in March and June 2011. The trial court issued its restitution order on June 16, 2011, awarding Susan and Rena the amounts claimed in the PSR. On June 17, 2011, defendant filed a timely notice of appeal from the court’s restitution order. Subsequently, defendant filed a motion for reconsideration of

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<sup>5</sup> During the investigative phase of the case, members of the high tech task force executed a search warrant on defendant’s residence and officers seized nine computers as well as other electronic and media devices. Subsequently, forensic examination of the devices seized from defendant’s residence confirmed he had the capability to send emails and make telephone calls from one computer or telephone while making it appear the call originated from a fictitious or different device. Forensics also showed defendant had obtained access to or created online accounts for Susan’s telephones and utilities and that he had used Rena’s password to eavesdrop on and manipulate her email account.

<sup>6</sup> The record does not contain a reporter’s transcript of the sentencing hearing.

the restitution order and the trial court denied defendant's motion for reconsideration on July 18, 2011. On August 2, 2011, defendant filed a notice of appeal from the court's order denying his motion for reconsideration.

On July 20, 2011, after the trial court denied his request for reconsideration of its restitution order, defendant filed a "Custody Credit Calculation," arguing that because "the number of custody credits he earned far exceeds both the jail sentence imposed and all associated fines," he was entitled to a refund for monetary fines he had paid. At a hearing held on July 29, 2011, the court ruled that it was without authority "to refund fines that have been paid even if a defendant at some point serves time and gets credits that result in an excess of custody credits." However, at a further hearing to determine custody credits held on August 4, 2011, the court awarded defendant "267 days in excess credits."<sup>7</sup> On January 5, 2012, this court issued an order granting defendant's unopposed motion to amend the Notice of Appeal (NOA) dated August 2, 2011, deeming the NOA amended to include an appeal from the refund request denial of July 29, 2011.

## **DISCUSSION**

### **A. *Restitution***

#### **1. *Applicable Legal Principles***

The California Constitution provides that crime victims have a right to restitution when they suffer losses as a result of criminal activity. (Cal. Const., art I, § 28, subd. (b)(13)(A) & (B); see *People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).) This constitutional mandate is implemented by section 1202.4 (see *Giordano, supra*, 42 Cal.4th at p. 656), which provides in pertinent part: "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim . . ." (§ 1202.4, subd. (f).) The restitution order "shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's

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<sup>7</sup> Defendant's probation expired on August 1, 2011.

criminal conduct . . . .” (§ 1202.4, subd. (f)(3).)<sup>8</sup> Further, “[t]he court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (§ 1202.4, subd. (g).) Moreover, because section 1202.4 uses the language “including, but not limited to [the enumerated losses]” (§ 1202.4, subd. (f)(3)), a trial court may “compensate a victim for any economic loss which is proved to be the direct result of the defendant’s criminal behavior, even if not specifically enumerated in the statute” (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1046), and should construe the statute broadly and liberally to compensate a victim for any economic loss which is proved to be the direct result of the defendant’s criminal behavior. (See, e.g., *People v. Moore* (2009) 177 Cal.App.4th 1229, 1232 and *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1508.)

The standard of proof at a restitution hearing is preponderance of the evidence, not proof beyond a reasonable doubt. (See *People v. Gemelli* (2008) 161 Cal.App.4th 1539,

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<sup>8</sup> For purposes of victim restitution, we must apply the law in effect on the date the defendant committed his crime. (See *People v. Martinez* (2005) 36 Cal.4th at 384, 389; see also *People v. Birkett* (1999) 21 Cal.4th 226, 247, fn. 21; *People v. Bernal* (2002) 101 Cal.App.4th 155, 161, fn. 4.) The latest crime alleged in the information and the latest crime defendant pleaded guilty to occurred, at the latest, on December 1, 2004. In November 2004, former § 1202.4 provided that restitution may include, “but [is] not limited to,” economic losses such as “(A) Full or partial payment for the value of stolen or damaged property. . . . [¶] (B) Medical expenses. [¶] (C) Mental health counseling expenses. [¶] (D) Wages or profits lost due to injury incurred by the victim . . . . [¶] (E) Wages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution. . . . [¶] . . . [¶] (H) Actual and reasonable attorney’s fees and other costs of collection accrued by a private entity on behalf of the victim. [¶] (I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim. (J) Expenses to install or increase residential security incurred related to a crime, as defined in subdivision (c) of Section 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks.” (Former § 1202.4, subd. (f)(3).)

(Stats. 2004, ch. 223, § 2, p. 2426, 2438, effective August 16, 2004.) All references to “former § 1202.4” are to this statute.

1542.) “Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. (Citation.) The defendant has the burden of rebutting the victim’s statement of losses, and to do so, may submit evidence to prove the amount claimed exceeds the repair or replacement cost of damaged or stolen property. [Citation.]” (*Id.* at p. 1543.) On appeal, we review a trial court’s restitution order for abuse of discretion. (*Giordano, supra*, 42 Cal.4th at p. 663.) The abuse of discretion standard “ ‘asks in substance whether the ruling in question “falls outside the bounds of reason” under the applicable law and the relevant facts [citations].’ [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the [ ] victim’s economic loss.” (*Giordano, supra*, 42 Cal.4th at pp. 663-664.)

## **2. Analysis**

As stated above, in its restitution order the trial court awarded Susan restitution in the amount of \$18,427.99, the total amount claimed in the PSR. The court’s total restitution award is comprised of separate items for credit card fraud (\$5,150.23), hotel expenses (\$1,171.94), legal expenses (\$5,000) and moving expenses (\$7,105.82). The trial court also awarded Rena the restitution amount claimed as set forth in the PSR, \$4,707. We will first address defendant’s contentions regarding Rena’s restitution award and then evaluate the propriety of the trial court’s award to Susan.

Regarding the trial court’s award of \$4,707 to Rena, defendant argues that only \$1,396.09 is supported by documentation attached to the PSR. Therefore, defendant contends that Rena’s award must be reduced in the amount of \$3,310.91. We find that defendant’s argument has merit. The PSR states that “Restitution request claims are attached. . . . Rena Dean is claiming a total of \$4,707.” The sole documentation attached to the PSR in support of Rena’s restitution claim includes a receipt dated July 5, 2005, for installation of security doors in the amount of \$883.44 and a US Bank credit card statement in Rena’s name for the period May 20, 2005 through June 21, 2005. There are handwritten notations next to certain line items on the credit card statement. For

example, adjacent to line items detailing a security service charge for one year in the amount of \$207.36 and hotel and car rental expenses incurred over a two-day period appear the notation, “because of fear to go to Susan’s apartment.” These line items and the accompanying notations support a restitution award to Rena in the amount of \$1,396.09. However, aside from these line items and accompanying notations, the remaining items on the credit card provide no means to establish that the charged amounts were incurred as a result of defendant’s fraudulent activity. Moreover, there are no handwritten notations adjacent to the remaining charges appearing on the credit card statement that support the additional \$3,310.91 in economic losses awarded by the trial court to Rena. Absent any factual basis to support this aspect of Rena’s claim, we conclude that the trial court’s award of an additional \$3,310.91 was unreasonable. Accordingly, because the record supports a restitution award to Rena in the amount of \$1,396.09 for economic losses reasonably related to the crime of which defendant was convicted, we modify the trial court’s restitution order to reflect that she is entitled to restitution in the amount of 1,396.09. (See *People v. Snow* (2012) 205 Cal.App.4th 932, 940 (*Snow*).)

We next turn to defendant’s contentions of error regarding the trial court’s award of restitution to Susan. Susan’s restitution award is comprised of several components. First, Susan sought and was awarded \$5,150.23 for defendant’s fraudulent use of her credit cards and other costs associated with such fraudulent use. Approximately \$2,898.83 of this amount relates to fraudulent credit card charges on three of her credit cards, MBNA, Chase Bank, and Target. Defendant objects to this aspect of the trial court’s award pertaining to unauthorized credit card charges based upon the probation officer’s statement that he believed “one of the [three] banks expressed to Susan that she was not being held responsible for the balance owed on that account and that if one bank had that policy then so might the other two banks.” We find defendant’s argument unavailing. First, the probation officer’s statement, which lacks foundation and amounts to speculative hearsay, provides no basis to reject this aspect of Susan’s restitution claim. And, aside from defendant’s reliance upon the probation officer’s hearsay declaration, he

offered no evidence to dispute the losses suffered by Susan as a result of his unauthorized and fraudulent credit card charges. Accordingly, we find no error in the trial court's award of \$2,898.83 in fraudulent credit card charges claimed by Susan. (See *People v. Gemelli, supra*, 161 Cal.App.4th at p. 1542 [“Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim”].)

Next, defendant assigns error to the trial court’s award of restitution to Susan for time spent (computed at an hourly rate of \$40 per hour) and expenses incurred in discerning the scope of defendant’s credit card fraud and assisting law enforcement in the investigation of her claim. Susan claimed, and the trial court awarded, a total of \$2,251.40 for these investigative expenses, \$1,956 of which was time at \$40 per hour, allocated as follows: \$690 for time spent visiting and calling the Tiburon Police Department; \$133 for time spent calling credit card and credit reporting companies; \$133 for time spent calling Campbell Police and Santa Clara DA; \$400 for time spent compiling documentation for police and DA; and \$600 for time spent reviewing credit card reports and examining incoming monthly credit reports to ensure no further fraud had occurred.<sup>9</sup> Defendant vigorously disputes this aspect of Susan’s claim, asserting that restitution is not available for a victim’s time in dealing with the after effects of credit card fraud. We conclude that Susan is not entitled to restitution for time spent in assisting law enforcement in the investigation of defendant’s fraudulent activities, albeit for reasons that differ from the arguments tendered by the parties.

As required, the starting point of our analysis of this issue is former section 1202.4, which permits restitution for “[w]ages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include any commission income as well as any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter

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<sup>9</sup> The remaining \$295.40 is comprised of the cost of cell phone call charges and included \$239 for the cost of obtaining Privacy Guard and other credit reports.

time period is shown.” (Former § 1202.4, subd.(f)(3)(E).)<sup>10</sup> Thus, the trial court’s award cannot be sustained under former section 1202.4 because Susan failed to present evidence of commission income loss or wage loss, as required by the statute.

Susan implicitly acknowledges the absence of evidence to support an award of restitution for time assisting law enforcement in investigation of defendant’s crimes. However, she contends that the trial court was justified in imposing this item of restitution pursuant to its broad discretion in awarding restitution as a condition of probation. Under settled law, courts may impose restitution as a condition of probation in order to foster the goals of reformation and rehabilitation of the probationer, “to the end that justice may be done” and “amends may be made to society.” (§ 1203.1, subd. (j); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1122 [trial court may order restitution as a condition of probation where the victim’s loss was not the result of the crime underlying the defendant’s conviction, but where the trial court finds such restitution will further the reformation and rehabilitation of the probationer]; *People v. Goulart* (1990) 224 Cal.App.3d 71, 79 [in imposing restitution as a condition of probation, “[a] court may also consider crimes which were charged but dismissed [citation]; uncharged crimes, the existence of which is readily apparent from the facts elicited at trial [citation]; or even charges of which the defendant was acquitted, if justice requires they be considered. [Citation.]”].) Nevertheless, where restitution is imposed as a condition of probation, courts remain subject to “ ‘[t]he only limitation the Legislature placed on victim restitution,’ ” namely, “ ‘the loss must be an “ ‘*economic loss*’ ” incurred as a result of the defendant’s criminal conduct.’ [Citation.]” (*People v. Garcia* (2011) 194 Cal.App.4th 612, 617 [italics added].) Susan’s argument that the trial court was empowered to impose restitution as a condition of probation fails because she did not present evidence that the restitution for her time, valued at \$40 per hour, constitutes an economic loss (i.e. lost

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<sup>10</sup> The current statute not only provides that lost wages or commissions may be claimed as restitution (§ 1202.4, subd.(f)(3)(E), but also provides restitution may be awarded for “Expenses for a period of time reasonably necessary to make the victim whole, for the costs to monitor the credit report of, and for the costs to repair the credit of, a victim of identity theft, as defined in Section 530.5.” (§ 1202.4, subd. (f)(3)(L).)

wages or lost commissions) as required by statute. Therefore, the trial court erred when it awarded Susan \$1,956 as restitution for the hours she expended in assisting law enforcement officers investigating losses she sustained as a result of defendant's fraud. On the other hand, the remaining \$295.40, comprised of the cost of cell phone call charges, including \$239 for the cost of obtaining Privacy Guard and other credit reports, is an actual economic loss related to defendant's crime and the trial court did not abuse its discretion in awarding restitution in that amount as a condition of probation.

Defendant also disputes the trial court's award of restitution to Susan for hotel expenses in the amount of \$1,171.94. Documentation attached to the PSR in support of this claim establishes that Susan checked into hotels on six separate occasions for stays of one or two nights following "terroristic threats" by defendant. On one occasion Susan checked into two hotels on the same night because she was afraid defendant had followed her to the first hotel. Defendant contends that the court should have disallowed her claim for hotel expenses on the basis of the probation officer's statement at the restitution hearing "that the expenses were only incurred on weekends at 'upper class hotels' and included times when [defendant] was incarcerated." As we previously stated, these comments by the probation officer are insufficient to refute Susan's prima facie case for restitution. In all events, the record establishes that the hotels listed by Susan were all local Marin County hotels (with the exception of one in Campbell) and the expenses were reasonable, for example a night at the Four Points Hotel in San Rafael cost \$155.07—Susan was not required to stay at a low-price hotel when fleeing in fear of defendant's sinister stalking behavior. Susan's hotel stays all occurred in April and May 2004, at the height of defendant's stalking activities, just before Susan fled Marin County to her mother's home in Arkansas in June 2004 because she "did not feel safe" in Marin County, where she continued to receive disturbing cell phone calls and emails from defendant.<sup>11</sup> In sum, Susan's hotel expenses were an economic loss Susan incurred due

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<sup>11</sup> It is unclear whether the probation officer's comment that "[p]art of the time the defendant was actually in custody, she is still submitting claims," pertains specifically to the claim for hotel expenses. Also, the record fails to establish that defendant was in

to the fear she experienced as a direct result of defendant's criminal behavior. Defendant failed to establish these expenses were unreasonable. Thus Susan is entitled to restitution in full for hotel expenses. (See *People v. Moore, supra*, 177 Cal.App.4th at p. 1232.)

Defendant also assigns error to the trial court's award of \$5,000 for Susan's legal expenses. Defendant argues that Susan sought reimbursement for legal expenses that were incurred in civil proceedings which preceded his conviction of the current criminal charges. In positing this argument, defendant interprets the restitution statutes too narrowly. Under California law, trial courts may award restitution as a condition of probation based on uncharged conduct related to the charged offenses. For example, in *Snow, supra*, 205 CalApp.4th 932, the appellate court affirmed the trial court's order of restitution to the victim of false imprisonment for a dental crown defendant knocked out of her mouth in a uncharged assault defendant committed two years before the offense of conviction because (1) "defendant's past prior violence . . . was a circumstance that is directly related to his false imprisonment of the victim as it contributed to the element of menace and vitiated the victim's consent" and (2) "requiring restitution for the dental crown serves the goal of deterring future assaultive conduct by defendant against the victim or anyone else with whom he establishes an intimate relationship." (*Id.* at p. 940.) Here, the record indicates Susan sought reimbursement for legal expenses incurred in obtaining civil restraining orders against defendant and defendant was charged in the criminal indictment with stalking Susan and Rena in violation of these restraining orders. These restraining order based charges were dismissed with a *Harvey* waiver. Nevertheless, just as in *Snow, supra*, requiring defendant to pay restitution for Susan's legal expenses in obtaining restraining orders—orders relevant to the proof of crimes with which defendant was charged, serves the goal of deterring any future stalking conduct by defendant against the victims or anyone else. Furthermore, as to the amount awarded, the record demonstrates Susan incurred \$2,500 in legal expenses to obtain the

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custody in April and May 2004, when Susan incurred the hotel expenses, that Susan was informed defendant was in custody, or that she was apprised of the length of defendant's incarceration such that her fear related to defendant's conduct was unreasonable.

restraining order in the Marin County Superior Court, and the PSR states that Susan also obtained a restraining order against defendant in Jonesboro, Arkansas. Because the trial court could reasonably infer that the legal expenses incurred in obtaining the Arkansas restraining order were approximate to those expended in obtaining the Marin County restraining order, the trial court did not abuse its discretion by awarding Susan restitution for the \$5,000 claimed in legal fees.

The final aspect of Susan's restitution award challenged by defendant is the court's award of \$7,105.82 for relocation expenses. Susan incurred these expenses when she moved from California to Arkansas, and then from Arkansas to Connecticut to escape defendant's threatening behavior. Defendant contends the trial court erred in awarding relocation expenses because by statute, such expenses must be verified by law enforcement or a mental health professional. Defendant's contention has merit.

Former section 1202.4 provides in pertinent part that restitution may include: "Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section *shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.*" (Former § 1202.4, subd. (f)(3)(I) [italics added].) Here, the trial court awarded relocation expenses solely on the basis of the receipts that were attached to the PSR. No verification by law enforcement or a mental health treatment provider that relocation was necessary for the personal safety or emotional well-being of the victim was provided. (Cf. *People v. Mearns* (2002) 97 Cal.App.4th 493, 498, 501-502 [where defendant raped victim at knifepoint and threatened her son if she reported the crime, trial court did not abuse its discretion in awarding victim restitution in the amount of \$13,575, representing the difference between the sale price of victim's original mobile home and the purchase price of her new mobile home, in light of police officer's testimony that victim was in constant fear of being assaulted again and was in fear of her son's safety].)

The trial court justified its award of relocation expenses absent verification on the grounds that Marsy's Law superseded the verification requirement of section 1202.4, subdivision (f)(3)(I).<sup>12</sup> The court stated Marsy's Law was "superior to the statute" as it was "of Constitutional dimension" and contained no requirement that law enforcement verify any item of restitution. We disagree.

Of course, if there is a conflict between a provision of the California Constitution and a statutory provision, the Constitution trumps the statute. (See *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 595; *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, 527 ["The California Constitution trumps any conflicting provision of the Family Code".]) Here, there is no conflict between Marsy's Law and the verification requirement under former section 1202.4. Marsy's law established certain rights victims enjoy within the criminal justice system. For example, pursuant to Marsy's law, crime victims have the right to be notified of and to be present at all public proceedings, to be heard at any proceeding and to receive a copy of the pre-sentence report upon request (see Cal. Const., art. I, § 28, subd. (b)(7), (8), (11)). However, Marsy's Law did not establish the constitutional right to victim restitution; rather, that right was enshrined in the California Constitution when Proposition 8 was enacted by the voters on June 8, 1982. (*People v. Birkett* (1999) 21 Cal.4th 226, 230.) Proposition 8, inter alia, added article I, section 28(b) to the California Constitution, directing "the Legislature to adopt, within one calendar year, laws implementing the 'right' of 'all persons who suffer losses as a result of criminal activity' to receive 'restitution from the persons convicted of the crimes,' and ensuring that '[r]estitution shall be ordered' from convicted criminals 'in every case . . . in which a crime victim suffers a loss' unless 'compelling and extraordinary reasons' weigh against restitution." (*Ibid.*) Marsy's Law merely reaffirmed a victim's right to "seek and secure" restitution (see Cal. Const., art. I, § 28, subd. (b)(13)(A)). In sum, the general

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<sup>12</sup> On November 4, 2008, California voters passed Proposition 9, also known as the "Victims' Bill of Rights Act of 2008: Marsy's Law." (See *People v. Smith* (2011) 198 Cal.App.4th 415, 437.)

affirmance of a victim’s right to seek and secure restitution articulated in Marsy’s Law in no way conflicts with the Legislature’s implementation of victims’ right to restitution through existing statutory provisions, such as 1202.4.<sup>13</sup> Accordingly, we reject the trial court’s reasoning that relocation expenses must be awarded as restitution because the lack of a verification requirement in Marsy’s Law trumps section 1202.4’s specific verification requirement.

The Attorney General (AG) takes a different tack on this issue, arguing that the verification requirement is merely permissive, not mandatory, and thus does not constitute a condition precedent to restitution for relocation expenses. On this point, the AG relies on *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532 (*Gananian*).

In *Gananian*, plaintiff appealed from a judgment dismissing his action against the San Mateo County District Attorney (DA) seeking declaratory relief that under Education Code section 15288 (section 15288) the DA was required to investigate and prosecute alleged violations of law asserted by plaintiff and associated with expenditures of voter-approved school bond funds.<sup>14</sup> (*Gananian, supra*, 199 Cal.App.4th at p. 1535.) The appellate court affirmed, rejecting plaintiff’s assertion that section 15288 “create[d] an affirmative, nondiscretionary duty on the part of district attorneys to investigate and prosecute alleged crimes” related to the expenditure of school bond funds. The court noted that “[Not] every statute which uses the word ‘shall’ is obligatory rather than permissive [and] . . . there are unquestionably instances in which other factors will indicate that apparent obligatory language *was not intended to foreclose a governmental entity’s or officer’s exercise of discretion.*” (*Id.* at p. 1540 [italics added].) The court

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<sup>13</sup> Because we reject the trial court’s reliance on Marsy’s Law, we need not address defendant’s argument, set forth in his Supplemental Letter Opening Brief filed in this court on March 13, 2012, that application of Marsy’s Law to his case would violate the rule against ex-post facto legislation.

<sup>14</sup> That section provides: “It is the intent of the Legislature that upon receipt of allegations of waste or misuse of bond funds authorized in this chapter, appropriate law enforcement officials *shall* expeditiously pursue the investigation and prosecution of any violation of law associated with the expenditure of those funds.” (Educ. Code, § 15288 [Italics added].)

stated section 15288 “must be construed in a manner consistent with th[e] bedrock principle of prosecutorial discretion,” noted section 15288 did not “directly compel[] law enforcement officials to act in a specified manner [but was] . . . deliberately put in the form of a mere declaration of intent that they act in that manner,” and concluded section 15288’s “unique wording . . . suggests it was intended as a statement of legislative policy or preference rather than as a command.” (*Id.* at p. 1541.)

*Gananian* is easily distinguished. Unlike the statutory language in issue in *Gananian*, the verification requirement found in 1202.4 does not constitute a general statement of legislative intent regarding restitution awards. Rather, the word “shall” introduces a limiting precondition specific to an award of restitution for relocation expenses, which expressly conditions restitution for “[e]xpenses incurred by an adult victim in relocating away from the defendant” upon verification that relocation expenses are necessary for “the personal safety of the victim” or “for the emotional well-being of the victim.” (Former § 1202.4, subd. (f)(3)(I).) In this context, the use of the word “shall” is patently obligatory, not permissive, and we are not free to ignore this Legislative directive. (Cf. *People v. Ortiz* (1997) 53 Cal.App.4th 791, 800, fn. 6 [“where the statute requires a specific basis for determining the loss, as in the case of stolen or damaged property (see current § 1202.4, subd. (f)(3)(A)), the court must determine the loss on that basis. [Citation]”].)

Moreover, an interpretation of verification requirement as obligatory does not present, as the AG suggests, “a serious question of an improper delegation of the judicial power to the law enforcement agency.” On the contrary, “[i]t is now well settled that without violating separation of powers principles, the Legislature may enact laws that govern the procedures and evidentiary rules applicable in judicial proceedings provided that the rules ‘do not defeat or materially impair’ the core functions of the judiciary, which derive from Article III, section 3 of the California Constitution. (Citation.)” (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1129.) Nothing in section 1202.4, subdivision (f)(3)(I) defeats or materially impairs the core function of the judiciary; indeed, the verification requirement set forth therein aids the trial court by ensuring that

any economic loss for relocation expenses is compensated only if it is a consequence of the crime defendant committed against the victim.

Accordingly, because the trial court awarded restitution for relocation expenses absent verification as required by statute, we must reverse that part of the trial court's restitution order.

To reiterate, we conclude that the record supports a restitution award to Susan in the amount of \$9,366.17, comprised of the following items; \$2,898.83 in fraudulent credit card charges; \$295.40 for actual expenses incurred in calling credit companies, including \$239 for obtaining credit reports; \$1,171.94 for hotel expenses; and \$5,000 for legal expenses. The following items of restitution awarded to Susan by the trial court are disallowed: \$1,956 for time (valued at \$40 per hour) spent contacting law enforcement and credit card companies; and, \$7,105.82 in relocation expenses.

***B. Refund of Fines Paid***

***1. Background***

The custody credit calculation filed with the court on July 20, 2011, states that under the version of section 4019 in effect at the time of his sentencing, defendant is entitled to a total of 632 days in custody credits for time spent in county jail plus 150 days for time spent in the state mental hospital, for a total of 812 days. Defendant notes that as a condition of probation, he was required to serve 18 months (545 days) in county jail. On that basis, defendant asserted that excess credits available for application to fines is 267 days (812 days minus 545 days). Defendant further asserted that pursuant to section 2900.5, excess custody credits should have been applied to fines imposed at the time of sentencing, adding, "Unfortunately, [defendant] has now paid these fines. He should be reimbursed those amounts since his excess custody credits should have, and now may be, applied in satisfaction of the monetary fines." As noted above, at a subsequent hearing held on the matter, the trial court denied defendant's request for a refund of fines already paid.

## 2. *Merits*

Section 2900.5 provides in pertinent part: “In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, . . . all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, and days served in home detention pursuant to Section 1203.018, *shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence. . . . In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines.*” (§ 2900.5 [italics added].)

Noting that section 2900.5 grants trial courts discretion to offset excess custody credits against fines due and payable when imposing sentence, defendant contends that because he paid all fines imposed before the full extent of his excess custody credits were assessed, the statute, properly interpreted, allows the court to issue a refund for fines he paid. We disagree. Nothing in the language of the statute empowers the court to issue a refund against fines already paid, and the trial court properly concluded it was without authority to order such a refund. Nevertheless, the court has a mandatory duty under the statute to *credit* “all days” of custody against either the term of imprisonment imposed or the fines imposed. (§ 2900.5.) Here, the trial court determined that defendant’s custody credits totaled 812 days, exceeding by 267 days his sentence of 545 days in county jail. However, the trial court failed to *credit* the 267 days of excess custody at \$30 per day, or more, in the court’s discretion. Accordingly, we remand for the trial court to determine

the dollar amount of the credit defendant is entitled to under section 2900.5 for 267 days of excess custody.<sup>15</sup>

**DISPOSITION**

The trial court's order of restitution is affirmed in part and reversed in part, as explained above. The court's order denying defendant a refund of fines paid is affirmed but we remand for the trial court to determine the dollar amount of the credit to which defendant is entitled under section 2900.5.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

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<sup>15</sup> Although we conclude that section 2900.5 does not empower the trial court to issue a refund against fines already paid, when the trial court has corrected the judgment to reflect the express custody credit to which defendant is entitled, we do not preclude defendant from filing a claim for a refund pursuant to Government Code section 900 et seq., nor do we express any opinion concerning the merit of any such claim.