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

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS LEONARDO BARRIERE,

Defendant and Appellant.

A134247

(Contra Costa County
Super. Ct. No. 05-070288-6)

Jesus Leonardo Barriere (appellant) was previously convicted of, inter alia, numerous counts of lewd and lascivious acts on a child. Following a prior appeal, we affirmed the judgment, with minor exceptions related to sentencing. Appellant now appeals again after the trial court ordered that he pay \$1,000,000 in victim restitution for noneconomic losses, pursuant to Penal Code section 1202.4, subdivision (f)(3)(F).¹ He contends (1) the restitution order violated his constitutional right to a jury trial under both the United States and California Constitutions; (2) section 1202.4, subdivision (f)(3)(F), violates his right to equal protection of the laws under both the United States and California Constitutions; and (3) the trial court abused its discretion in making the award because it did not use a rational method of calculation. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On May 16, 2007, appellant was charged by amended information with eleven counts of forcible lewd and lascivious acts upon a child (Pen. Code, § 288, subd. (b)(1)—

¹ All further statutory references are to the Penal Code unless otherwise indicated.

counts one to ten and count twelve); one count of soliciting a minor to use a controlled substance (Health & Saf. Code, § 11353—count eleven); one count of lewd acts upon a child under age 14 (Pen. Code, § 288, subd. (a)—count thirteen); and two counts of oral copulation of a minor under age 14 (Pen. Code, § 288a, subd. (c)(1)—counts fourteen and fifteen). The information alleged as to count six that appellant had personally used a deadly and dangerous weapon, a knife, in the commission of the offense (Pen. Code, §§ 667.61, subds. (a), (e), 12022.3, subd. (a)). The information further alleged as to counts ten and twelve that appellant personally inflicted great bodily injury (Pen. Code, §§ 667.61, subds. (a), (e), 12022.8), and as to count ten that appellant administered a controlled substance by force (Pen. Code, §§ 667.61, subds. (a), (e), 12022.75).

On December 3, 2009, a jury found appellant guilty of the 15 charged offenses and found true the allegation that he personally used a deadly and dangerous weapon in the commission of count six. The jury failed to make findings on the allegations that appellant personally inflicted great bodily injury in counts ten and twelve or that he administered a controlled substance by force in count ten.

On April 30, 2010, the trial court sentenced appellant to a total term of 99 years to life in state prison.

On May 10, 2010, appellant filed a notice of appeal. In a nonpublished opinion, filed on July 19, 2012, we remanded the matter to the trial court for resentencing on count six, correction of an improper restitution fine imposed, and recalculation of appellant's presentence credits, but otherwise affirmed the judgment. (*People v. Barriere* (A128614).)²

² Because the opinion has been filed in the prior appeal, we deny as unnecessary appellant's request that we take judicial notice of the appellate record and briefs filed in that appeal.

On November 4, 2011, the trial court granted restitution to the victim “Jane Doe” (Jane) for noneconomic losses in the amount of \$1,000,000. On December 5, 2011, appellant filed a notice of appeal from that order.³

DISCUSSION

I. Trial Court Background

On February 10, 2011, the probation department filed a supplemental restitution report in which it recommended that the trial court order \$1,000,000 in restitution for Jane for noneconomic losses, pursuant to section 1202.4, subdivision (f)(3)(F).

On February 16, 2011, a restitution specialist with the Contra Costa County District Attorney’s Office, filed a notice, which was served on appellant and the Public Defender, requesting \$1,000,000 in restitution for Jane. A proposed order for restitution was attached.

On October 18, 2011, appellant filed a “Motion to Set Aside or Modify Restitution Order of February 16, 2011.”⁴

A restitution hearing was held on November 4, 2011, at which Jane was the sole witness. Nineteen years old at the time of the hearing, appellant’s daughter Jane testified that, as a result of appellant’s actions, she had initially met with a psychiatrist, who determined that she did not need medication. She was seeing a counselor regularly and had been in counseling for the last six or seven years. She did not have to pay for the counseling.

Jane had been suicidal when she was 11 or 12 years old, before she told her mother about what her father was doing. She would cut her wrists and once tried to

³ Only those facts related to the restitution order are relevant to appellant’s appeal, and those facts will be discussed in part I, *post*.

⁴ In requesting that the “order” be set aside or modified, appellant appears to have mistakenly believed that the proposed order that accompanied the February 16, 2011 request for restitution was an actual restitution order. At a June 24, 2011 hearing the parties and the trial court had expressed uncertainty about whether such a restitution request or order had been filed.

drown herself in the bathtub. She “had just extreme rage” and felt “there was no reason for me to be here. It was already ruined.”

Jane testified that she continued to experience nightmares and always felt afraid. She repeatedly checked her doors and windows to make sure they were locked and was nervous about her surroundings when she was out in public, such as at the community college where she was a full-time student. She did not trust other people and did not have many friends. She felt like, “If my own father did it, anybody can. So I really don’t trust anybody 100 percent” She socialized mainly with her family and her husband’s family. She did not want to have anything to do with the family she had that was also appellant’s family because it would make her feel “like if I’m with them his presence is somehow with me.”

Jane also was very cautious with her child, including who was around him and who could take care of him. Even when she drove, she would look back to see what cars were behind her. If a car followed behind her for more than five minutes, she would panic and pull over because she was always afraid that appellant’s family members might come looking for her. “So that is like a constant thing for me having to be careful when I’m driving, be careful when I’m on campus walking, be careful with everything. It’s always extra for me.” Jane had talked to her counselor about all of these issues, “but it’s not really getting better.”

Jane’s personal life with her husband had also been affected because appellant had given her a sexual disease that will affect her for the rest of her life. As she stated at the hearing: “I hate it. I just—he ruined my life forever, my health, everything.”

At the conclusion of the hearing, the court ruled as follows: “All right. . . . I think that *People v. Smith* [(2011) 198 Cal.App.4th 415] as we discussed is the word on the issue of whether or not it would proceed via the civil realm. So I’m going to deny the request to have a trial on the issue of those damages civilly. And I am going to say I’m persuaded by Jane Doe’s explanation of how she’s been having to deal with the nightmares and the locking of the doors and the fact that she’s so cautious with her child by virtue of the fact that she was a child when she was robbed of basically her life.

“I think this case is more egregious than the others. And it is not just because it’s her father who perpetrated these horrific acts on her and in the manner in which he did them, but because he’s also left her with a lifelong disease. She has to deal with that every day of her life. And that is something that compounds the severity of what he did knowing that he had the disease and passed it to his own child.

“So having said those things, I am going to reaffirm Judge Haynes’s order and grant the million dollars in restitution.”⁵

II. Legal Analysis

Article I, section 28, subdivision (b)(13)(A)-(C), of the California Constitution, provides crime victims the right to restitution from criminal defendants. Penal Code section 1202.4, subdivision (f), which implements that constitutional right, “requires the trial court to order the defendant to pay restitution to the victim ‘in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.’ ‘The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution’ (§ 1202.4, subd. (f)(1).)” (*People v. Smith, supra*, 198 Cal.App.4th at p. 431 (*Smith*)).

Although restitution orders are generally limited to the victim’s economic damages, under section 1202.4, subdivision (f)(3)(F), restitution shall be ordered for “[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288.” Unlike economic damages, which are concerned with “objectively verifiable monetary losses” (Civ. Code, § 1431.2, subd. (b)(1)), noneconomic damages relate to “subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.” (Civ. Code, § 1431.2, subd. (b)(2); see *Smith, supra*, 198 Cal.App.4th at p. 431.)

⁵ Again, the court and the parties apparently believed an order for restitution for noneconomic damages had already been filed, but no such order appears in the record other than the proposed order filed with the February 16, 2011 notice requesting \$1,000,000 in restitution.

A. Constitutional Right to a Jury Trial

Appellant first contends the trial court's restitution order for noneconomic damages violated his federal and state constitutional rights to a jury trial pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny.

In *Apprendi, supra*, 530 U.S. 466, 490, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In *Blakely v. Washington* (2004) 542 U.S. 296, 303, the Court further explained that the “ ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” A trial court, therefore, may not impose punishment that the jury’s verdict alone does not allow. (*Id.* at p. 304.)

Recently, in *Smith, supra*, 198 Cal.App.4th 415, 433, the Third District Court of Appeal rejected the defendant’s argument that noneconomic damages under section 1202.4, subdivision (f)(3)(F), are indistinguishable from noneconomic damages in the civil context and that, therefore, they should be subject to the jury trial right found in Article I, section 28 of the California Constitution. The court reasoned that a “restitution hearing, whether for economic or noneconomic damages, is a criminal sentencing hearing, not a civil trial,” and held that a victim restitution order for noneconomic damages therefore does not give rise to a jury trial right. (*Smith, supra*, at pp. 433-434.)

More recently, in *Southern Union Co. v. United States* (2012) 132 S.Ct. 2344, 2357 (*Southern Union Co.*), the United States Supreme Court held that *Apprendi* applies to the imposition of criminal fines. In that case, the defendant company had been convicted of an environmental offense, which called for a maximum fine of \$50,000 for each day the relevant statute was violated. (*Southern Union Co., supra*, at p. 2349.) The jury had not made a specific finding as to the number of days of violation, and the trial court therefore made that finding. (*Ibid.*) The high court reversed, after holding that the trial court’s factual finding as to the number of days the defendant committed the offense violated *Apprendi*. (*Southern Union Co., supra*, at p. 2357.) As the court explained:

“*Apprendi*’s ‘core concern’ is to reserve to the jury ‘the determination of facts that warrant punishment for a specific statutory offense.’ [Citation.] That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses.” (*Southern Union Co.*, *supra*, at p. 2351.)

As we shall discuss, we agree with respondent that the holding in *Southern Union Co.* does not apply in the circumstances of this case, in which the trial court exercised its discretion to determine the amount of victim restitution based on Jane Doe’s noneconomic losses.

Appellant first argues that, as with a criminal fine, victim restitution for noneconomic losses constitutes punishment. California courts, however, have uniformly concluded that victim restitution is not primarily criminal in nature. (See, e.g., *People v. Millard* (2009) 175 Cal.App.4th 7, 35-36 [primary purpose of a victim restitution hearing is “to provide a victim with a civil remedy for economic losses suffered, and not to punish the defendant for his or her crime”]; *People v. Harvest* (2000) 84 Cal.App.4th 641, 648-649 [“Although restitution has an element of deterrence [citation], the primary purpose of victim restitution is to provide monetary compensation to an individual injured by crime”].) As the cases point out, the chief purpose of a victim restitution order is to compensate the victim for losses, not to punish the defendant for the offense committed. (Compare *Southern Union Co.*, *supra*, 132 S.Ct. at p. 2350 [criminal fines are penalties imposed by the state based on commission of offenses].)

In addition, victim restitution is distinguishable from a criminal fine in that a fine has a statutory maximum as to the amount of money that may be ordered. With victim restitution, the purpose of which is full reimbursement for all losses incurred, there is no specified limit on the amount that may be awarded. (*People v. Harvest*, *supra*, 84 Cal.App.4th at p. 647.) Thus, victim restitution orders—whether for economic or noneconomic losses—are simply not comparable to criminal fines. Accordingly, just as there can be no *Apprendi* violation where the trial court imposes a restitution fine within the range prescribed by statute (see *Southern Union Co.*, *supra*, at p. 2353; *People v.*

Kramis (2012) 209 Cal.App.4th 346, 351), there can be no such violation where the court orders victim restitution, for which “no maximum is prescribed.” (*Southern Union Co.*, *supra*, 132 S.Ct. at p. 2353 [observing that there can “be [no] *Apprendi* violation where no [statutory] maximum is prescribed”]; cf. *United States v. Phillips* (9th Cir. 2012) 704 F.3d 754, 770-771 [distinguishing *Southern Union Co.*, by observing, in the context of criminal forfeiture, that “[a] judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum”].)

For these reasons, appellant was not entitled, under either the federal or state Constitutions, to a jury trial on the amount of victim restitution to be ordered pursuant to section 1202.4, subdivision (f)(3)(F).

B. Equal Protection

Appellant also contends section 1202.4, subdivision (f)(3)(F), violates his right to equal protection of the laws under both the United States and California Constitutions. Specifically, he asserts that subjecting only those defendants convicted of violating section 288, and not those convicted of any other crime, to victim restitution for noneconomic losses unjustifiably singles out this group of criminal offenders.

“ ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.] . . . [¶] . . . [¶] Under the equal protection clause, we do not inquire ‘whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1200 (*Hofsheier*).) The second requirement is to show that the challenged law bears no “rational relationship to a legitimate state purpose.” (*Hofsheier, supra*, 37 Cal.4th at p. 1200.)⁶

⁶ Although there are two additional standards for measuring challenged classifications for equal protection purposes, most legislation is subject to the rational relationship test, and the *Hofsheier* court used that standard in its analysis. (*Hofsheier*,

A similar argument was recently rejected by the appellate court in *Smith, supra*, 198 Cal.App.4th 415, in which the defendant, who had been convicted of violating section 288, contended that section 1202.4, subdivision (f)(3)(F), violated his equal protection rights because it “deprives child molesters of a civil jury determination of noneconomic damages liability but does not so deprive other criminals.” (*Smith, supra*, at p. 434.) The *Smith* court concluded the contention was meritless because “child molesters are not similarly situated with other criminals.” (*Ibid.*) The court further concluded that the differential treatment was “rationally related to a legitimate public purpose. Enacted as part of a broader effort to protect child victims of sexual abuse (Stats. 1995, ch. 313, § 5), the noneconomic loss provision of section 1202.4, does just that—helps to protect child victims of sexual abuse, both by increasing punishment for offenders and by compensating those victims for psychological harm. Differentiating between child victims and other victims is rational based on the vulnerability of children in general and society’s interest in protecting children. Therefore, even though section 1202.4 allows restitution orders for noneconomic damages against child molesters only, it does not violate the equal protection provisions of either the federal or state constitution.” (*Smith, supra*, at p. 435.)

Appellant asserts that *Smith* is not dispositive because the court in *Smith* did not address his specific contention when it compared child sexual abuse victims with adult victims. Appellant’s equal protection argument, according to appellant, is distinguishable because it involves comparing offenders convicted of sex offenses against children under section 288 and offenders convicted of other sex offenses, *also against children*. We conclude that even this more specific comparison, involving only those sex offenders who commit crimes against children, does not negate the conclusion reached in *Smith*.

First, we reject appellant’s suggestion that this case resembles *Hofsheier, supra*, 37 Cal.4th 1185, 1193, in which the defendant was convicted, pursuant to section 288a,

supra, 37 Cal.4th at p. 1200.) Here, appellant argues that there is “no rational basis” for the different treatment of offenders convicted of section 288 offenses.

subdivision (b)(1), of voluntary oral copulation with a minor who is 16 or 17 years of age, for which lifetime sex offender registration was mandatory. The defendant claimed the mandatory registration requirement violated his right to equal protection because defendants convicted of voluntary sexual intercourse with minors of the same age under (§ 261.5, subd. (c)) were subject to discretionary registration. (*Hofsheier, supra*, at p. 1192.) Our Supreme Court agreed, first holding that defendants convicted of voluntary oral copulation with adolescents 16 to 17 years old and defendants convicted of voluntary intercourse with adolescents in that same age group were similarly situated for equal protection purposes. (*Id.* at p. 1200.) The court further held that that there was no rational basis for concluding that defendants convicted of the former crime “constitute[d] a class of ‘particularly incorrigible offenders’ [citation] who require[d] lifetime surveillance as sex offenders.” (*Id.* at p. 1207.) The court therefore held that mandatory sex offender registration for defendants convicted of voluntary oral copulation violated equal protection of the law. (*Ibid.*)

Appellant claims that, like the voluntary oral copulation statute at issue in *Hofsheier*, section 1202.4, subdivision (f)(3)(F), improperly distinguishes between offenders based only on the nature of the sexual act. He asserts that there is no rational justification for subjecting defendants convicted pursuant to section 288 to payment of victim restitution for noneconomic losses, “while allowing defendants convicted of sex crimes such as rape, penetration, and sodomy against children to have claims of noneconomic damages litigated in the civil courts by juries.”

Appellant’s situation is not analogous to the defendant in *Hofsheier*, in which both offenses involved voluntary conduct with 16- and 17-year-old minors. While a defendant accused of sexually victimizing a young child could instead be charged with offenses such as rape or sodomy—should the defendant’s acts fit the statutory definition of those crimes—the statutes related to those other offenses have a much broader scope than does section 288 in that they also encompass adult victims and largely require only general intent. (See, e.g., § 261 [rape]; § 289 [sexual penetration]; § 286 [sodomy].) Section 288, on the other hand, is concerned with lewd and lascivious acts against young

children (and other dependent persons) and requires that the perpetrator commit the acts with the specific intent to arouse him or herself or the child.⁷ Hence, people convicted of violating section 288 are simply not comparable to those convicted of the other sex offenses mentioned by appellant. (Compare *Hofsheier*, *supra*, 37 Cal.4th at p. 1200; cf. *People v. Brandao* (2012) 203 Cal.App.4th 436, 446 [misdemeanor offense of annoying and molesting a child is not comparable to voluntary sex offenses at issue in *Hofsheier* and other similar cases]; *Smith*, *supra*, 198 Cal.App.4th at p. 434.)

For the same reasons, we also conclude that the Legislature’s decision to provide noneconomic damages only for victims of defendants convicted of violating section 288 bears a “rational relationship to a legitimate state purpose.” (*Hofsheier*, *supra*, 37 Cal.4th at p. 1200.) Section 1202.4 does not unfairly single out defendants convicted of offenses pursuant to section 288. Rather, permitting restitution for noneconomic losses only against those defendants is reasonably based on the understanding that the focus of section 288 is specific intent sex crimes against young children and that any offense committed pursuant to that section is, necessarily, particularly egregious and especially harmful to the young victim. (Cf. *Smith*, *supra*, 198 Cal.App.4th at p. 435 [“Differentiating between child victims and other victims is rational based on the vulnerability of children in general and society’s interest in protecting children”].)

There was no equal protection violation.

C. Abuse of Discretion

Appellant’s final contention is that the trial court abused its discretion when it awarded Jane Doe \$1,000,000 in noneconomic damages because it did not use a rational method of calculation.

⁷ For example, section 288, subdivision (a), provides in relevant part: “[A]ny person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.”

“Generally speaking, restitution awards are vested in the trial court’s discretion and will be disturbed on appeal only when the appellant has shown an abuse of discretion. [Citation.] . . . ‘ “While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.” ’ [Citation.] ‘ “When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.” ’ [Citation.]” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.)

In *Smith, supra*, 198 Cal.App.4th 415, 436, the appellate court found that this standard was not applicable to victim restitution for noneconomic losses since, “[u]nlike restitution for economic loss, . . . [restitution] for noneconomic loss is subjectively quantified.” The *Smith* court adopted a standard of review based on the civil jury instruction regarding noneconomic loss. (*Smith*, at p. 436, quoting CACI No. 3905A (2009 ed.) [“ ‘No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.’ ”]) As the court explained: “The obvious difference between the review of a civil award of noneconomic damages and a criminal restitution order for noneconomic damages is that the trial court, not a jury, makes the determination in the first instance. Even with that difference in mind, we see no reason to adopt any other standard of review. We therefore affirm a restitution order for noneconomic damages that does not, at first blush, shock the conscience or suggest passion, prejudice or corruption on the part of the trial court. [¶] Admittedly, this standard is not as delimited as the review of a restitution order for economic damages. By their nature, economic damages are quantifiable and thus awards of economic damages are readily reviewed for whether they are ‘rationally designed to determine the . . . victim’s economic loss.’” [Citation.] Noneconomic damages, however, require more subjective considerations. Thus, the different standard is justified.” (*Smith, supra*, 198 Cal.App.4th at p. 436.)

Applying this different standard, the *Smith* court held that the trial court did not abuse its discretion when it ordered the defendant to pay \$750,000 in restitution for noneconomic losses to the victim who had suffered years of sexual abuse. (*Smith, supra*, 198 Cal.App.4th at p. 436.) We agree with the court in *Smith* that the standard of review for restitution orders for economic losses is not directly applicable to review of an order for noneconomic losses, which requires a more subjective analysis.

In the present case, the court ordered appellant to pay \$1,000,000 in restitution for noneconomic losses to Jane Doe, who also suffered many years of repeated sexual abuse by her father, abuse that started when she was seven years old and included frequent intercourse by the time she was eight. Jane also continues to suffer from a sexually transmitted disease, with which her father infected her and which, as the trial court said, she has to deal with “every day of her life.” In addition, Jane testified to the ongoing emotional and psychological effects of the abuse, which continue to trouble her despite years of counseling. That she has been able to move forward with her life in some respects is a testament to her own strength and the support of her family. Jane’s fortitude does not, however, diminish the horrific nature of the abuse or the lasting traumatic effects which persist, in the trial court’s words, “by virtue of the fact that she was a child when she was robbed of basically her life.”

The restitution order in this case “does not shock the conscience or suggest passion, prejudice or corruption on the part of the trial court.” (*Smith, supra*, 198 Cal.App.4th at p. 436.) There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.