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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.

MARIA R. LOPEZ-NUNEZ,

Defendant and Appellant.

A134573

(Sonoma County
Super. Ct. No. SCR583967)

Maria R. Lopez-Nunez appeals from an order requiring her to pay \$1,264,540.64 in restitution following her convictions for vehicular manslaughter and leaving the scene of an accident. She contends the court erred in failing to reduce the amount of the restitution award to compensate for the victim's alleged comparative fault. We find no abuse of discretion in the trial court's order and therefore shall affirm the restitution order.

Factual and Procedural Background

On March 9, 2011, defendant pled no contest to one count of vehicular manslaughter (Pen. Code, § 192, subd. (c)(2)). On March 18, 2011, a jury convicted her of one count of leaving the scene of an accident (Veh. Code, § 20001, subd. (a)). Defendant was placed on probation and ordered to serve one year in county jail. On January 24, 2012, this court affirmed defendant's conviction and the granting of probation. (*People v. Lopez-Nunez* (Jan. 24, 2012, A131805) [nonpub. opn.].) In that decision we described the accident as follows:

“Just prior to the accident, the victim was stopped at a red light facing the eastbound direction. Defendant was stopped across the intersection, facing westbound. When the light turned green, defendant made a left turn in front of the victim, who crashed his motorcycle into the passenger side of defendant’s vehicle. The motorcycle was thrown into the air and the victim was thrown onto the ground. Three witnesses, who observed the accident, testified that after the collision the vehicle drove away from the intersection. The motorcyclist died as a result of the collision. [¶] A detective testified that left-hand turns were permitted at the intersection only when a green arrow traffic signal was illuminated. The witness, who was also stopped at the red light in the westbound direction, testified that the traffic signal turned green only and no left-turn arrow was illuminated.”

The question of restitution was reserved in the original judgment. In November 2011, the widow of the victim submitted a restitution claim for medical expenses and loss of support in the amount of \$1,264,138.64. Defendant challenged the amount requested, arguing that the court was required to consider the comparative negligence of the victim, Ali Uralli, and reduce the amount of restitution accordingly.

The restitution hearing was held on January 13, 2012. Defendant’s expert testified that he had reviewed the investigative reports from the accident and concluded that there was a “very good possibility” the collision could have been avoided, or at a minimum that the victim’s injuries could have been less severe, had he not “aggressively accelerated into the intersection the minute the light turned green.” His opinion was based on the fact that the driver in the adjacent lane, Mr. Miller, was able to avoid the collision entirely, that the type of motorcycle being driven by the victim was a racing motorcycle, the location of the collision in the intersection, the nature of the damage to the motorcycle, the victim’s injuries, and the fact that the motorcycle was in third gear at the time of the collision. According to the expert, Uralli’s “aggressive acceleration” led to “aggressive braking” before the collision, which in turn caused a longitudinal rotation of his motorcycle resulting in the particularly serious injuries.

On cross-examination, the defense expert acknowledged that neither Miller nor any other witness stated in a post-accident interview that Uralli was speeding or that he accelerated aggressively into the intersection. He also acknowledged that although Uralli entered the intersection ahead of Miller, there is no indication whether Miller hesitated before entering the intersection. Finally, he acknowledged that it was uncertain whether the motorcycle was in third gear at the time of the collision and that it was also possible that it was in second gear and shifted to third gear when the motorcycle hit the ground.

Officer Robert Lankford testified as an expert for the prosecution. He investigated the victim's motorcycle and defendant's car following the collision. He disputed the defense expert's claim that Uralli's motorcycle was designed or modified for racing and instead described it as a "general purpose street motorcycle." To the contrary, certain modifications, including the raised handlebars, made the motorcycle less sporty and more comfortable. He also testified that the location of impact was 22 feet into the intersection not the 40 feet relied on by the defense expert. He believed it was highly likely the motorcycle was in second gear at the time of the collision because a motorcycle generally would not accelerate well if put into third gear so soon after acceleration started. Finally, he testified that aggressive acceleration would have caused a noticeably louder sound.

Following presentation of the expert witnesses, the court found that there was no comparative negligence on the victim's part and awarded the full amount of restitution claimed. Defendant filed a timely notice of appeal.

Discussion

Penal Code section 1202.4 provides for full restitution of victims' economic losses "incurred as the result of the defendant's criminal conduct." We review the trial court's restitution order for an abuse of discretion. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) " " "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." " . . . 'In reviewing the sufficiency of the evidence [to support a factual finding], " "the power of the appellate court begins and ends with a determination as to whether there is any

substantial evidence, contradicted or uncontradicted,' to support the trial court's findings." ' ' (Ibid.)

In *People v. Millard, supra*, 175 Cal.App.4th at pages 39-41, the court held that in cases involving “merely criminal negligence, in contrast to the intentional crimes and torts,” a trial court may apply principles of comparative negligence to reduce the amount of restitution ordered under section 1202.4 if the victim’s negligence was also a “substantial factor” in causing his or her economic losses. Relying on *Millard*, defendant contends that the court abused its discretion by failing to properly apply the law of comparative negligence to reduce her responsibility for the collision. She argues that the court erred in finding that her “own criminal negligence precluded a finding that Mr. Uralli was partially at fault.” Alternatively, she argues that the court erred in “overlook[ing] substantial evidence in support of a determination that Mr. Uralli’s own conduct was a substantial factor in causing his injuries.”

Defendant emphasizes the trial court’s initial reservations regarding the applicability of comparative fault principles to the determination of restitution in a criminal case and characterizes certain comments by the court as reflecting a misunderstanding of the law. The court initially expressed concern that allowing expert testimony on comparative fault at the restitution hearing would conflict with the court’s pre-trial ruling that expert testimony on the comparative fault of the victim would not be admissible because the victim’s actions were not a superseding intervening cause of the collision. The court, however, ultimately admitted the evidence, explaining that “[t]he substantial factor standard set forth for establishing comparative negligence for purposes of restitution is substantially lower than the intervening or superseding factor required to sever criminal liability. Accordingly, the defendant will be permitted to introduce expert testimony at the restitution hearing regarding the alleged comparative negligence of the victim for purposes of establishing victim restitution.” After hearing the expert testimony, the court again indicated some uncertainty about whether fault should be apportioned when the evidence showed that “the accident was completely avoidable had Ms. Lopez-

Nunez not been unlawfully in the intersection at the time.”¹ Nonetheless, the court went on to expressly find that the manner in which Mr. Uralli drove the motorcycle was not shown to be a substantial factor in causing the collision.

The court explained, “the defendant’s expert testimony was based upon mere speculation about what may or may not have occurred when Mr. Uralli was entering the intersection. [¶] . . . [M]ost importantly for this court, the defense expert’s opinions were based upon the testimony of Mr. Charles Miller [the driver in the car adjacent to the victim], yet Mr. Miller did not testify to witnessing any of the behaviors that had been assumed by the defense experts. Specifically – and [the expert] conceded this on cross-examination – [Miller] did not say that Mr. Uralli was speeding. . . . [H]e didn’t say he heard or saw any acceleration – rapid, aggressive acceleration. He did not describe excessive noises that you might associate with excessive acceleration. And whether or not Mr. Miller, himself, delayed entering the intersection is unknown. [¶] Furthermore, their placements in the intersection of Mr. Uralli as compared to Mr. Miller, Mr. Uralli was in the closer lane that would have first encountered Ms. Lopez-Nunez being unlawfully in the intersection. And so his entering the intersection and not being able to avoid [the collision] would seem to this court to be an anticipated event in comparison to Mr. Miller, who is in the lane to the right of him and further away from that vehicle being in the intersection. [¶] Also, the defense expert did concede on cross-examination that it was most likely that Mr. Uralli was in second gear. And the speculation about how his motorcycle came to be in third gear, offered by both of the witnesses, varied between rolled into that gear upon impact with the ground or potentially that Mr. Uralli, himself, clicked it into another gear as he was leaving the motorcycle. [¶] So given that the

¹ The court began its explanation of its ruling as follows: “So the Court does recognize that the issue really is the causation question and whether or not Mr. Uralli’s actions were a substantial factor in causing his own injuries and that—although the defense expert did testify that Mr. Uralli could have avoided the collision, he also testified and conceded that the accident was completely avoidable had Ms. Lopez-Nunez not been unlawfully in the intersection at the time—the same time that Mr. Uralli was lawfully entering the intersection.” The court then went on to give the explanation quoted in text.

expert's testimony is based upon speculation, the Court does not find that Mr. Uralli's actions were a substantial factor in causing the collision that led to the injuries towards his death. So I would be making the finding that there was no action by Mr. Uralli that would be considered a substantial cause."

As noted by the Attorney General, we need not address defendant's primary argument construing the court's statements as improperly holding that defendant's criminal negligence precludes a finding that the victim was partially at fault, and arguing that this determination was erroneous. This interpretation of the court's remarks is highly questionable, but in all events the court's alternative ground for rejecting defendant's apportionment argument is amply supported by the record.

Contrary to defendant's argument, the relevant question is not whether she "presented substantial evidence in the form of expert testimony establishing that Mr. Uralli's negligence was a substantial factor in causing his injuries." The proper analysis is whether substantial evidence supports the trial court's factual finding that no action by Uralli was a substantial factor in causing the collision. As set forth above, the trial court gave reasonable, factually sound reasons for rejecting the conclusions reached by the defense expert. The court relied on the lack of credible evidence that the victim "aggressively accelerated" into the intersection or that he could have avoided the accident by using reasonable care. There was no error in the restitution order.

Disposition

The restitution order is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.