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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.

KENNETH DONALD HUBBELL,

Defendant and Appellant.

A136171

(Sonoma County
Super. Ct. No. SCR-521207)

Kenneth D. Hubbell (appellant) was convicted, following a jury trial, of two counts of misdemeanor assault. On appeal, he contends the trial court abused its discretion when it ordered victim restitution in the amount of \$34,119.69. As we shall explain herein, we reduce the total restitution order to \$33,884.24, but otherwise affirm.

PROCEDURAL BACKGROUND

Appellant and his codefendant, John Allen Graham, were charged by amended information with (1) assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)),¹ with an allegation that they had personally inflicted great bodily injury on their victim (§ 12022.7, subd. (a)); and (2) battery resulting in the infliction of serious bodily injury (§ 243, subd. (d)). The information further alleged that appellant had suffered a prior strike conviction, pursuant to section 1170.12.

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

Following a trial, a jury convicted appellant of two counts of the lesser included misdemeanor offense of assault (§ 240).²

On July 9, 2012, the trial court suspended imposition of judgment and placed appellant on 36 months of conditional sentence. The court also ordered victim restitution in the amount of \$34,119.69, jointly and severally with codefendant Graham.

On August 2, 2012, appellant filed a notice of appeal.

FACTUAL BACKGROUND³

The victim in this case, Manuel Orozco, testified at trial that, on the night of September 14, 2007, he attended a birthday party at Club Seven, a night club in Santa Rosa. He had about five alcoholic drinks before going outside between 1:00 and 1:30 a.m., early on the morning of September 15, 2007. After Orozco briefly stepped outside, nightclub security employees would not allow him to reenter the club. He got into an argument with the security employees and the club's manager. He became frustrated when the manager started mocking him and told him he could not wait for his friends out on the sidewalk, but had to leave. When he realized he would not be allowed back into the club, Orozco went back to his car at the parking structure. Since he was not the "designated driver," he had to wait at his car for his friends to leave the club. He decided to read while he waited and, as he went to the trunk of the car to get his book, two bouncers from the club, whom he identified at trial as appellant and his codefendant Graham, approached him.

Graham got in Orozco's face and was yelling at him, saying he had been rude to the wrong person and that the manager had sent Graham and appellant "to take care of [him]." Graham began calling Orozco a "fucking punk" and "pussy" and telling Orozco to hit him, which Orozco did not do. At that point, appellant struck Orozco in the back of

² The jury convicted appellant's codefendant, Graham, of the lesser included misdemeanor offenses of assault (§ 240) and battery (§ 242).

³ We set forth only those facts that are most relevant to the issues raised on appeal.

his head, which knocked him over. The two men then maneuvered him toward the stairwell area of the parking structure, where appellant again hit him in the head. Graham and appellant said they had already called the police, and Orozco sat down in the stairwell to wait for them to arrive.

Eventually, Orozco stood up and started to walk away. Graham then kicked him in the lower spine and he fell forward and hit the ground. Appellant and Graham started kicking him in the head and punching him repeatedly, mostly in the head. “Things were getting fuzzy” once he started getting hit in the head, and he could not remember how long the attack lasted. Other than grabbing Graham’s leg at one point to try to keep from being kicked, Orozco did not fight back or threaten the two men in any way.

Surveillance videotape from the time of the incident was played for the jury and Orozco described what was happening on the tape as it played. According to Orozco, the tape showed appellant and Graham approaching the garage and then showed Orozco moving toward the stairwell. It showed appellant hitting him and later showed Orozco on the ground with appellant and Graham on each side of him, with one of them hitting him in the head. The video then showed him being pulled by his arm and Graham kicking him again in the back of the head. The video also showed appellant grabbing him and hitting him.

After the attack, Orozco was eventually transported to a hospital where he was treated for his injuries. He had a bloody face, a black eye, bruising across his nose, a huge bruise in his temple area, as well as cuts and bruises around his upper lip. He also had to have dental treatment because his two front upper teeth had been broken and chipped during the attack. The pain from his injuries was severe. “One of the persistent pains were severe migraines . . . and they continue today. They start over here on my right hand side temple, and it radiates to the back of my head.”

Dr. Ed West, an emergency room physician at Santa Rosa Memorial Hospital, reviewed Orozco’s medical records and testified that, based on the results of tests,

including a CT scan, it was determined that Orozco had fractures of both his external nasal bones and his nasal septum, soft tissue swelling under and behind his eyes, a concussion, and multiple injuries about the face, including a half-inch laceration that was closed with wound adhesive. He was given a tetanus shot and was released from the hospital with non-narcotic pain medication about four hours after he arrived.

Both Graham and appellant testified at trial, stating that it was Orozco who was the aggressor during the incident. They each testified that Orozco was angry and screaming, that he threatened to kill Graham, and that he punched Graham in the testicles. Graham did acknowledge that he hit Orozco on the top of the head three or four times and then “kicked him in his ass” after Orozco tried to grab his legs. At one point, appellant tried to get Orozco into a restraint hold, which appellant said was shown in the video. Both defendants denied kicking Orozco in the head or punching him in the face.

DISCUSSION

Restitution Award

I. Trial Court Background

Orozco sought restitution in the amount of \$41,756.94, to reimburse him for expenses incurred as a result of the September 15, 2007 incident. The expenses for which he requested restitution included medical and dental costs, travel expenses, credit bureau expenses, and lost wages. The restitution hearing took place on May 23, 2012. At the hearing, Orozco submitted copies of medical and dental bills, and testified about his injuries and medical expenses.⁴

Orozco also testified about and provided copies of a collection bill from the Credit Bureau of Ukiah in the amount of \$550.10, and a returned check charge, also from the

⁴ Orozco had previously won a default judgment against the club as well as against appellant and Graham, and had received \$7,000 out of the total judgment amount of \$144,535.97.

Credit Bureau of Ukiah, for \$25.83. Both of these expenses resulted from his nonpayment of medical bills related to the attack that were not covered by insurance.

In addition, Orozco provided an itemized list he had prepared, which showed the dates he had missed work due to either court appearances or migraine headaches resulting from the attack. He testified that he worked for the County of Mendocino,⁵ and had missed 495.25 hours of work since September 15, 2007, the day after the attack, because of court-related activities and migraines he began to have after the incident. He had lost \$20,998.60 in wages and benefits due to having to take time off. He had never suffered from migraines before the attack.

Orozco testified that MRIs and other tests were done in the weeks following the attack, in an effort to discern why he was having so many migraines and why he had so much lower back pain. Shortly after the attack, while he still had physical injuries, a doctor had told him “that the headaches would probably go away, or they might not go away.” A month after the incident, he went to see a doctor because of the migraines. The doctor ordered another MRI because he wanted “to check to see if there was any further damage” that could have been causing the headaches.⁶ After 2007, Orozco consulted with a doctor once about the migraines. The doctor said there was no hemorrhaging or other permanent damage, and offered a prescription for the pain. But Orozco “said no; I could deal with it.”

Orozco testified that, when he had migraines, he could not go to work; he took paid sick leave for those days. The migraines had been “slowly dissipating” recently, and he had not had one in about a month and a half.

⁵ Orozco testified at trial that he had worked as a senior department analyst at the Mendocino County Health and Human Services Agency since 2004.

⁶ Orozco submitted medical statements showing hospital procedures on several dates in September, October, and December 2007.

The attorneys for both defendants cross-examined Orozco during the hearing, although appellant's attorney asked only one question. The court also asked Orozco quite a few questions, including many related to his headaches and documentation regarding his lost wages. Appellant's counsel objected to the claim for lost wages, as well as the claims related to the collection action. He also argued that appellant should not be required to pay for any medical expenses because the verdict of misdemeanor assault against him (as compared to assault and battery against his codefendant) reflected a jury finding that appellant had not physically attacked Orozco.

In its July 9, 2012 restitution order, the trial court found that all of the claims for medical and dental expenses that Orozco had incurred were reasonable and related to the attack. The court also found that both the collection expenses and travel expenses were incurred as a result of the incident. As to the lost wages and benefits claim, the court rejected the lost benefits portion of the claim because it made no "logical sense," but found that the sum of \$13,361.35 was appropriate to compensate Orozco for his lost wages. The court ordered restitution in the total amount of \$34,119.69, jointly and severally against both defendants, rejecting defense counsel's argument that appellant should not be held responsible for Orozco's injuries because he was not convicted of battery.⁷

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. Section 1202.4, subdivision (f), which implements that constitutional right, provides in relevant part: "[I]n every case in which a victim has suffered economic loss as a result of the

⁷ As the court explained, both appellant and his codefendant "went to the garage and interacted with Manuel Orozco. While it is true that [appellant] was not convicted of a direct battery on Mr. Orozco, the actions of both defendants on the evening in question contributed and were a substantial factor in the injuries suffered by Mr. Orozco." Appellant does not challenge this ruling on appeal.

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 or victims or any other showing to the court." A defendant is entitled to a restitution hearing to "dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).)

"At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] 'Once the victim has . . . made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim. [Citations.]' [Citation.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*)). " '[D]irect victims of crime have a statutory right to restitution on the full amount of their losses without regard to the full or partial recoupment from other sources (except the state Restitution Fund). [Citations.]' [Citation.]" (*Ibid.*)

" ' "The standard of review of a restitution order is abuse of discretion. 'A victim's restitution right is to be broadly and liberally construed.' [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." ' [Citations.]" [Citation.]' [Citation.] 'In reviewing the sufficiency of the evidence [to support a factual finding], " '[t]he 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." [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.]' [Citation.] 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.]" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045 (*Keichler*)).

A. *Lost Wages*

Appellant contends there was an inadequate factual basis for \$11,353.54 of the lost wages awarded by the trial court.⁸ In particular, he argues that Orozco's testimony alone is not enough, without any additional corroborating evidence, to provide a factual and rational basis for this portion of the restitution order.

“[I]t is well settled that ‘statements by the victims of the crimes about the value of property stolen constitute “prima facie evidence of value for purposes of restitution.” [Citations.]’ [Citations.]” (*People v. Prosser* (2007) 157 Cal.App.4th 682, 690-691 (*Prosser*)). Appellant attempts to distinguish cases such as *Prosser*, in which the victim's testimony alone provided a factual basis regarding the value of stolen property. Appellant asserts that, unlike testimony about the value of property, Orozco's testimony about his lost wages “does not involve the value of a loss, but rather its existence,” since the trial court had only Orozco's word that he had taken sick leave from work due to headaches.

Section 1202.4, subdivision (f), however, states that a restitution award may be “based on the amount of loss claimed by the victim . . . or any other showing to the court,” is expressly applicable to “[w]ages or profits lost due to injury incurred by the victim” (§ 1202.4, subd. (f)(3)(D)), as well as to losses based on stolen property (§ 1202.4, subd. (f)(3)(A); see, e.g., *Millard, supra*, 175 Cal.App.4th at p. 30 [applying prima facie rule to victim's claim for *future* lost earnings].)⁹

⁸ Appellant does not challenge the portion of the award for lost wages that resulted from Orozco's physical symptoms in the first two weeks after the incident or from his court appearances.

⁹ In addition, appellant's attempt to distinguish the need to determine the *value* of a loss in a stolen property case from the need to determine the *existence* of a loss here is misplaced. A victim's testimony about stolen property must of course include information about what property was taken, as well as its value, and often the only proof of the existence of that property in the first instance is the testimony of the victim/owner.

In the present case, the trial court heard the victim’s testimony—on both direct and cross-examination—about his initial injuries and ongoing symptoms, as well as about his lost wages due to those injuries and symptoms.¹⁰ The court also reviewed documentary evidence in the form of both receipts for medical and dental care following the attack and a list in which Orozco detailed the dates he missed work and the wages he lost due to the migraine headaches. Based on the evidence presented at the hearing, the court reasonably found that the prosecution had made a prima facie showing and that appellant did not satisfy his burden to show that Orozco had not lost wages due to residual physical symptoms from the attack.¹¹ (See *Millard, supra*, 175 Cal.App.4th at p. 26.)

We conclude that the evidence presented at the restitution hearing on the issue of lost wages provided an adequate factual basis to support the trial court’s award. (See *Keichler, supra*, 129 Cal.App.4th at p. 1045.) Appellant goes to great lengths in his briefing to attack Orozco’s credibility and the trustworthiness of his testimony. “However, ‘[d]eferential review is particularly necessary when, as here, the factual determination depends in part on judging a witness’s credibility,’ and we must uphold such a determination if it is supported by substantial evidence. [Citation.]” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1545, quoting *People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.) Moreover, we will “ ‘not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact.’ [Citation.]” (*Gemelli*, at p. 1546.)

¹⁰ Specifically, Orozco testified that he had to use his sick leave when he could not work due to the migraine headaches. (See *In re K.F.* (2009) 173 Cal.App.4th 655, 666 [depletion of sick leave due to injuries from an assault is a compensable loss because sick leave “credits consumed would not be available to cover future illnesses or for whatever other beneficial purpose the employer might allow”].)

¹¹ The court did, however, reject Orozco’s \$6,236.44 claim for lost benefits, based on the facts that it made no logical sense and that Orozco had not testified about it.

Here, not only did Orozco testify about the migraines from which he suffered and submit a list detailing the dates he missed work and the wages he lost, he also provided medical and dental records related to the initial injuries to his face and head, as well as records of subsequent tests that he testified were performed in an attempt to determine the cause of his continuing headaches. Defense counsel had the opportunity to cross-examine Orozco at the hearing, to attempt to cast doubt on his credibility and question the basis for his lost wages claim, and also could have investigated the claim or requested additional documentation, such as employer records. (See, e.g., *Prosser, supra*, 157 Cal.App.4th at p. 692 [if defendant found victims' descriptions of stolen property insufficient to enable him to rebut proffered values, she could have sought greater detail on cross-examination or receipts or other materials to enable her to meet her burden]; *In re People v. S.S.* (1995) 37 Cal.App.4th 543, 548 [“If further details were needed, appellant could attempt to procure them”].)

As previously discussed, we find that the testimony and documentary evidence presented at the restitution hearing constituted substantial evidence in support of the lost wages portion of the restitution ordered by the trial court. There was no abuse of discretion. (See *Keichler, supra*, 129 Cal.App.4th at p. 1045.)

B. Collection Fees

Appellant contends the restitution award should be reduced by the \$577.38 the court included in its order for the amount of the credit bureau's collection bill and the returned check charge, both of which were related to Orozco's failure to pay a medical bill. Appellant argues that, because there is no evidence other than Orozco's testimony to show that the medical tests underlying the bill sent for collection were medically necessary, the court should not have found appellant responsible for these charges.

We find that the trial court had a sufficient factual basis to conclude that the collection fees and the returned check fee were connected to medical costs resulting from the attack. In addition to the collection bureau notices, Orozco's testimony supports the

trial court's decision to include these expenses in the restitution order. Thus, substantial evidence supported the court's findings as to the collection fees and returned check charge. (See *Keichler, supra*, 129 Cal.App.4th at p. 1045.)

The amount the court ordered in restitution does not, however, quite match the amount of the charges in question. The collection fees paid by Orozco were \$550.10 and the returned check charge he paid was \$25.83, for a total of \$575.93. The court, however, ordered payment of \$577.38 for these expenses. Although respondent is correct that a restitution order need not reflect the exact amount of the 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 and capricious." (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.) Here, although the additional amount ordered is tiny, the record offers no reasonable explanation for the extra \$1.45 (an error of addition seems most likely), and we therefore must reduce the total amount of restitution ordered by that amount. (See *ibid.*)

C. Dental Charges

Appellant contends the amount of restitution ordered for dental expenses—\$2,275—should be reduced by \$234 because the trial court did not take into account an insurance adjustment in the total charges paid to the dentist who treated Orozco. Respondent agrees.

The dental bill submitted at the restitution hearing shows a \$234 "Delta Health Adjustmen[t]," which apparently reflects a credit by the dentist against the total owed by Orozco's dental insurer. Since neither Orozco nor his dental insurer paid this \$234 to Orozco's dentist, the restitution order must be reduced by that amount, to \$2,041. (See *Millard, supra*, 175 Cal.App.4th at pp. 27-28 [victim is entitled to reimbursement only for amount actually paid by his or her insurer for medical services].)

DISPOSITION

The judgment is affirmed. The restitution order is modified as follows: The amount of restitution ordered for the collection fees shall be reduced by \$1.45 to \$575.93, and the amount of restitution ordered for the dental services shall be reduced by \$234 to \$2,041, with the total restitution order reduced to \$33,884.24. The restitution order is otherwise affirmed.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.