

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GLENN KANE JACKSON,

Defendant and Appellant.

A139736

(Marin County
Super. Ct. No. SC170537)

Defendant Glenn Kane Jackson appeals a restitution order entered after he pled guilty to, among other things, numerous violations of the Corporations Code in connection with the sale of securities. He contends the court abused its discretion in applying a rescissionary measure to calculate the amount of restitution. We shall affirm the order.

Factual and Procedural History

In October 2012, defendant was charged by information with 24 counts of making a false statement/omission of a material fact in an offer or sale of a security (Corp. Code,¹ §§ 25401, 25540, subd. (b)); one count of making a fraudulent offer, purchase, or sales of a security (§ 25541); and two counts of grand theft by embezzlement (Pen. Code, § 487, subd. (a)). The information also included numerous sentence enhancement allegations under Penal Code sections 12022.6 and 186.11.

¹ All statutory references are to the Corporations Code unless otherwise noted.

In April 2013, defendant pled guilty to all counts and admitted all of the special allegations in exchange for the commitment that his prison sentence would not exceed seven years.² According to the probation department's presentence report, "approximately three million dollars was received from fifteen victims — investors for the purpose of trading foreign exchange currency. Of the three million dollars received approximately 1.7 million was transferred to trading accounts (of which 1.1 million was lost and approximately \$600,000.00 was transferred back to bank accounts for the defendants personal use) and approximately 1.1 million was never deposited into any trading account, but was converted to the defendant's own uses."

In May 2013, the court held a restitution hearing. The prosecution presented evidence to support its request that defendant be ordered to pay restitution to the victims in the total amount invested by the victims of the fraud, less money returned by defendant to some investors, plus 10 percent interest from the date of investment. Defense counsel argued that rescission was not a proper measure of restitution in this case because the investor victims were aware of the risks when they purchased the securities. The defense presented expert testimony regarding the "legitimate" business expenses, trading losses and management fees earned by defendant that he argued should be subtracted from the victim's initial investment. Defendant requested that restitution be ordered in the range of \$600,000 rather than the \$3.8 million requested by the prosecution. The court ordered restitution to the victims in the total sum of \$3,820,151, noting, "I did conduct a very lengthy restitution hearing with the parties, and I have read the briefs in support of the differing restitution amounts. I am satisfied with the case law submitted and the code sections submitted by the prosecution and feel that their amount is the accurate amount."

Defendant filed a timely notice of appeal.

² Defendant was sentenced in conformity with his plea to a total term of seven years in state prison. The court also imposed a restitution fine of \$2,200 (Pen. Code, § 1202.4, subd. (b)), a parole revocation fine in a like amount (Pen. Code, § 1202.45), a court operations assessment in the amount of \$1,080 (Pen. Code, § 1465.8), and a Penal Code section 186.11, subdivision (c) fine of \$4,826,569. Defendant does not challenge on appeal the prison term or any of these fines or assessments.

Discussion

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), par. (13)(A) & (B); see *People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*)). This constitutional mandate is implemented by section 1202.4, which provides in pertinent part: “[I]n 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 criminal conduct” (§ 1202.4, subd. (f)(3).) 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).)

A trial court’s restitution order is reviewed for abuse of discretion. (*Giordano*, *supra*, 42 Cal.4th at p. 663.) The abuse of discretion standard “ ‘[a]sks 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.” (*Id.* at pp. 663–664.) “When there is a factual and rational basis for the amount of restitution ordered, no abuse of discretion will be found.” (*People v. Phu* (2009) 179 Cal.App.4th 280, 284.)

In this case, the court calculated the amount of restitution as the total amount invested by the victims, less amounts returned to some investors, plus 10 percent interest as of the date of investment. This approach is consistent with section 25501, which

authorizes a civil action for rescission based on a violation of section 25401.³ The court undoubtedly relied on section 25501 in measuring the victims' losses for purposes of ordering restitution. However, we do not believe, as defendant argues, that the court felt bound to calculate restitution in this manner. While the prosecution incorrectly argued that the court was required to calculate restitution under section 25501, defendant's sentencing brief correctly disputed that argument and reiterated that restitution is governed by Penal Code section 1202.4, not the civil remedy available under the Corporations Code.⁴ The court's comments at the hearing do not, as defendant suggests, indicate that the court failed to exercise its independent judgment in choosing the rescissionary measure to calculate the amount of restitution.

The court's reliance on section 25501, though not mandated, was nonetheless rational and reasonable in this case. The Legislature has determined that rescission is an appropriate remedy for a violation of section 25401. (§ 25501; see also § 25530 [authorizing the Commissioner of Corporations to bring an action in the name of the people of the State of California seeking relief, including but not limited to, a claim for restitution or disgorgement or damages on behalf of persons injured by a violation of section 12401.].) Application of the same remedy to calculate restitution is a reasonable

³ Section 25401 reads in relevant part "It is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following: [¶] (a) Employ a device, scheme, or artifice to defraud. [¶] (b) Make an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. [¶] (c) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person." Section 25501 reads in relevant part: "Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him, who may sue either for rescission or for damages (if the plaintiff or the defendant, as the case may be, no longer owns the security) Upon rescission, a purchaser may recover the consideration paid for the security, plus interest at the legal rate, less the amount of any income received on the security, upon tender of the security."

⁴ The Attorney General acknowledges on appeal that section 25501 "does not mandate the restitution awarded in this case."

means of ensuring that a victim is fully reimbursed for all economic loss incurred as the result of a defendant's criminal conduct. (§ 1202.4, subd. (f)(3).)

Defendant argues that in this case restitution should be "limited to monies actually converted . . . to his own use" because the victims "were repeatedly and clearly warned in writing" of the risks of their investments and "there was no evidence that when the funds were solicited, [he] did not fully intend to operate a legitimate business entity and actively invest in foreign currency exchange trading." He suggests that "[a]warding the investors the full amount of the money invested, and not deducting legitimate business expenses and trading losses, would result in . . . a windfall" for the victims. Defendant argues, in effect, that his criminal conduct did not cause the victims to lose their entire investments. His misconduct caused only the loss of the moneys he misappropriated to his own uses, he argues, and not the losses caused by market downturn and normal operating expenses.

Defendant's argument ignores the impact of his plea. Defendant was charged with willfully offering and selling a security to the victims "by means of written and oral communications which included untrue statements of material facts and omissions of material facts necessary in order to make the statements made in light of the circumstances under which they were made not misleading." Some counts specified that the untrue statements of material facts included "false statements of earnings" or "false account statements." Under section 25401, " "[a] fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision." ' ' " (*People v. Butler* (2012) 212 Cal.App.4th 404, 421.) "[K]nowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in section 25401." (*People v. Simon* (1995) 9 Cal.4th 493, 522.) Therefore, in pleading guilty to each count as charged, defendant acknowledged that he knowingly and intentionally made false or misleading statements or omissions of material facts in connection with the sale of securities to the victims. Despite any warnings the victims may have received regarding

the potential risks of their investments, the false statements and/or omissions undoubtedly impacted the victims' decision to accept those risks. The trial court was not required to assume that the victims would have made the same investments absent those misrepresentations. The court could reasonably assume that defendant's misrepresentations caused the victims to suffer the loss of the total amounts invested and not returned, greater than merely the amount that defendant embezzled.

We find no abuse of discretion in the trial court's restitution order.

Disposition

The restitution order is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.