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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.

EILEEN MARIE SILVEY,

Defendants and Appellant.

A143087

(Del Norte County

Super. Ct. No. CRF12-9735)

Defendant Eileen Marie Silvey appeals from the trial court’s July 25, 2014 victim restitution order, in which the court, after defendant had been found guilty of embezzlement and forgery upon a negotiated disposition of the numerous charges against her, ordered her to pay \$39,586.81 to the victim, the Del Norte Senior Center. Defendant contends on appeal that she must be allowed to withdraw her “no contest” plea because she received ineffective assistance of counsel or, in the alternative, requests that we remand the matter to the trial court to offset the restitution amount she has been ordered to pay by certain other amounts. We conclude defendant’s claims lack merit and affirm the court’s order in its entirety.

**BACKGROUND**

**I.**

*The Negotiated Disposition of Defendant’s Criminal Case*

On December 11, 2012, the Del Norte County District Attorney filed a criminal complaint charging defendant with ten counts of felony embezzlement (Pen. Code, § 504;

counts 1–10),<sup>1</sup> four counts of second degree burglary (§ 459; counts 11–14) and one count of felony forgery (§ 470, subd. (d); count 15). Defendant was accused of embezzling funds from the Del Norte Senior Center (Senior Center or Center) and related misconduct while working as a manager there.

At the beginning of the June 27, 2013 hearing, the court, at the prosecutor's request, dismissed 10 of the 15 counts against defendant and amended count three. In the middle of the preliminary hearing, the prosecutor informed the court that the parties had negotiated a disposition of the remaining charges. With the court's approval, the People reduced the forgery charge in count 15 to a misdemeanor, to which defendant entered a no contest plea. The remaining charges, the felony embezzlement charges in counts one through four, were dismissed without prejudice, except defendant waived her rights under *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*) regarding restitution for them. This allowed the court to consider dismissed counts one through four in determining what, if any, victim restitution defendant should pay (*id.* at p. 758), which the parties left to the court to decide at a later date. The total funds defendant embezzled as alleged in these counts, as amended, were \$514.87 (count one), \$479.99 (count two), \$900 (count three, as amended) and \$800 (count four).

That same date, June 27, 2013, the court suspended imposition of sentence and ordered defendant placed on summary probation for one year, without having to serve any jail time, subject to her remaining law abiding and paying whatever victim restitution the court ordered. If she completed probation successfully, including paying any restitution ordered, her case would be dismissed pursuant to section 1203.4.

Subsequently, the prosecution asked that defendant pay \$900 in victim restitution, but the Senior Center asked for considerably more. The court asked the probation department to prepare a report on the issue.

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<sup>1</sup> All statutory references herein are to the Penal Code unless otherwise stated.

## II.

### *The Debate Regarding Victim Restitution*

In a September 2013 report, the probation department related that the Senior Center sought \$500,000 in restitution for five categories of losses. First, it sought the \$36,764.84 it had paid for a forensic audit of its accounts upon its discovery of defendant's mishandling of funds, as well as \$1,699 related to defendant's improper purchase of a vehicle. The Senior Center provided documentation for these requests.

In addition, the Senior Center sought \$18,000 for its executive director's time spent dealing with the aftermath of defendant's misuse of funds; \$19,000 in attorney fees; and approximately \$500,000 in government grants lost because of defendant's misconduct. It did not provide documentation for these three requests.

The probation department recommended the court order \$38,133.33 in restitution, the total amount of loss the Senior Center had documented, and that the court maintain jurisdiction.

At a September 2013 restitution hearing, the parties, including the Senior Center, argued their respective positions. The court ordered briefing because they disagreed and the Center's request was "vastly higher than expected based on the limited *Harvey* waiver."

In its subsequent briefing, the Senior Center requested \$144,753.89 in restitution, consisting of \$36,764.83 for the cost of the forensic audit, \$1,698.94 for defendant's improper purchase of a vehicle, \$2,380.12 in lost wages and \$103,910 in "lost administrative funding."<sup>2</sup> It argued the trial court had broad discretion to order restitution as a condition of probation pursuant to the California Constitution, sections 1203.1 and 1202.4, and case law. It also requested the court retain jurisdiction to determine further restitution for losses that could not yet be ascertained, such as attorney fees and other administrative funding. Subsequently, in April 2014, the Senior Center also asked for \$7,680 in attorney fees. Ultimately the total restitution request was \$151,111.81.

Defendant opposed the Senior Center's request, arguing restitution was limited by her "bargained for no contest plea." She contended the preliminary hearing had revealed

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<sup>2</sup> "Grant funding" and "administrative funding" appear to be one and the same thing.

evidentiary problems for the prosecution, leading to the agreed-to disposition, in which she pled no contest to count 15 and to a *Harvey* waiver on counts one through four. Thus, she continued, “restitution is only available as to the five counts” and “[e]verything else was dismissed without a *Harvey* waiver and cannot be considered for purposes of computing restitution.” “Limiting the restitution figure . . . was obviously a material part of the plea agreement . . . . [Senior Center counsel] was present during the preliminary hearing and . . . stated an objection on the record at the time of the plea. The Court could have rejected the plea agreement but it did not.” Thus, “the only figures that [could] be pursued, as a result of the plea agreement,” were \$514.87 (count one), \$479.99 (count two), \$900 (count three), and \$800 (count four), for a total of \$2,694.86. Defendant also disputed these sums, particularly those stated in counts one and two, which she claimed to have repaid, but she did not provide a declaration or any documentation that she had done so.

The court held further restitution hearings. In October 2013, the prosecution and defense asserted their agreement had contemplated restitution for the four *Harvey*-waivered counts and that lost administrative funding could not be considered under their agreement. The defense argued that if restitution were considered beyond the dismissed counts, defendant should be allowed to withdraw her no contest plea.

The matter was continued and at the end of January 2014, the court held a further hearing. Its tentative view was that “there is a very clear *Harvey* waiver . . . for Counts 1, 2, 3, 4 and 15, and I believe that that’s what we’re limited to, restitution that arises out of those counts. So the expansion that the senior center was seeking for a loss of grant funding for other matters that would not be specifically related to those five counts, would not be considered for purposes of this restitution hearing.” The Senior Center’s counsel, referring to the five counts, argued the Center was entitled to “any economic loss that can be attributable to that particular criminal activity.” The court then heard testimony from an accountant who assisted in the forensic audit and continued the matter again.<sup>3</sup>

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<sup>3</sup> The court continued the matter because the Senior Center’s counsel had mistakenly subpoenaed witnesses for later in the day, when defense counsel was unavailable.

After another continuance in March 2014 to allow more briefing, the court held a further restitution hearing in April 2014. It heard testimony and argument, and took the matter under submission.

### III.

#### ***The Court Orders Defendant to Pay \$39,586.81 in Victim Restitution.***

On July 25, 2014, the court ordered defendant to pay a total of \$39,586.81 to the Senior Center. In an eight-page ruling, the court reviewed section 1202.4 and case law, and stated, based on *People v. Brown* (2007) 147 Cal.App.4th 1213, 1226, that “[t]he amount of restitution ordered as a probation term cannot be the subject of plea bargaining. A court cannot order an amount of restitution less than the full amount owed by the defendant based upon a negotiated plea, unless the record contains a statement of compelling and extraordinary reasons supporting the lesser award.”

The court rejected the argument by the defendant and the People that it could only consider the losses stated in counts one through four, for which defendant made a *Harvey* waiver. It noted, “[s]uch a narrow reading of the statute would . . . violate the clear intent the Victim’s Rights Act and its implementing legislation to provide full restitution to victims who suffer economic loss.” Citing a number of cases, the court concluded that “[r]estitution orders made as a condition of probation may include dismissed and unfiled charges when there is a relationship between those charges and the crimes for which the defendant was convicted or future criminal conduct.”

The court also rejected the argument by the defendant and the People that it could not order restitution for the cost of the forensic audit. Relying on section 1202.4, subdivision (f)(3)(H), it concluded that “[f]ees and costs of investigation to determine the extent of the victim’s loss may be included as a cost of collection if they were incurred as a result of the defendant’s criminal conduct . . . .”

Turning to the specific restitution the Senior Center requested, the court ordered defendant to pay restitution divided into three categories, and denied the Center’s other requests. First, the court stated, defendant was to pay what she and the prosecution had agreed to, that being \$514.87 for count one, \$479.99 for count two, and \$800 for count four, as well as \$955.00

for count three—“the amount that is acknowledged to be owed for restitution for this count by Defendant.”

Second, the court ordered defendant to pay \$36,764.83 for the forensic audit. It cited testimony by the district attorney’s investigator that the auditor helped him verify defendant’s criminal activity for counts one and two, and that “without the initial accounting by the Victim’s accountant, and [the auditor’s] expertise as a [certified public accountant], the District Attorney’s office might not have been involved in a criminal case against Defendant.” The court noted defendant did not object to the cost of the forensic audit other than to argue her *Harvey* waiver limited the amount of restitution that the court could order.

Third, the court ordered defendant to pay victim restitution for lost wages in the amount of \$72.12 pursuant to section 1202.4, subdivision (f)(3)(E). This was for the Senior Center’s executive director’s meetings with the district attorney.

The court denied the Senior Center’s request for attorneys fees because the Center had not actually been billed yet by its attorney, and the Center did not present information to enable the court or defendant to evaluate the fees’ reasonableness.

The court also denied the Senior Center’s request for \$103,910 in lost administrative funding. The court found the Center had not established the loss was related to defendant’s criminal conduct.

The court issued two other orders. It relieved defendant’s attorney and appointed a new one for her,<sup>4</sup> and continued the matter so defendant could move to withdraw her no contest plea in light of the restitution order.

#### IV.

#### *Defendant’s Subsequent Motions*

Defendant subsequently moved to withdraw her no contest plea, and for reconsideration and a stay of the restitution order, both of which the People opposed. Among other things, defendant contended that she had discovered the Senior Center had in or around June 2014 received \$100,000 from its insurance carrier for claims related to defendant’s embezzlement.

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<sup>4</sup> Defendant states this was because her first counsel, a public defender, was elected Del Norte County District Attorney on June 3, 2014.

On September 17, 2014, before the court had ruled on her new motions, defendant filed a notice of appeal from the court’s order of “July 29, 2014.” The record does not contain such an order. However, defendant’s request for a certificate of probable cause, which the court granted, indicates she appealed from the July 25, 2014 restitution order.

Two days after defendant filed her notice of appeal and obtained a certificate of probable cause, the court denied her motions to withdraw her plea and for reconsideration and a stay of the restitution order.

## DISCUSSION

### I.

#### *Defendant Does Not Establish She Received Ineffective Assistance of Counsel.*

First, defendant “respectfully requests that she be allowed to withdraw her no contest plea” because she received ineffective assistance of counsel. She argues that her first counsel should have, but did not, move to withdraw her no contest plea within the statutorily allowable time period “when it became apparent that the restitution award was going to be considerably more than contemplated by the plea bargain.” We agree with the People that defendant does not establish that she received ineffective assistance of counsel.<sup>5</sup>

On appeal, a defendant must demonstrate by a preponderance of the evidence that he or she is entitled to relief for ineffective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) To do so, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and that this resulted in prejudice to the defendant. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

A defendant’s burden is difficult to carry on direct appeal. (*People v. Vines* (2011) 51 Cal.4th 830, 876 (*Vines*.) We may not reverse for ineffective assistance of counsel on direct appeal unless the record affirmatively discloses that counsel had no rational tactical purpose for his or her act or omissions. (*Ibid.*) The trial record often sheds no light on the issue. (See, e.g.,

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<sup>5</sup> Defendant did not move to withdraw her plea in connection with the court’s July 25, 2014 restitution order—the only order appealed from here. However, the defense’s opposition to the Senior Center’s restitution request states that defendant should be allowed the opportunity to do so if the court ordered significant restitution. Because the People do not argue forfeiture, we address the merits of defendant’s argument.

*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–268.) In that case, we must affirm unless there could be “ ‘no conceivable reason for counsel’s act or omissions.’ ” (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Further, there is a strong presumption that counsel’s actions fell within the wide range of reasonable professional assistance. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436–437.)

Defendant also must establish prejudice, “that is, a reasonable probability of a more favorable outcome in the absence of the assertedly deficient performance.” (*People v. Stewart* (2004) 33 Cal.4th 425, 495.) This prejudice must be a “ ‘demonstrable reality,’ not simply speculation.’ ” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Defendant makes two legal arguments in support of her contention that her first counsel was ineffective because he did not seek to withdraw her plea. First, she asserts, and the People agree, that under the circumstances she was entitled, pursuant to section 1018, to move to withdraw her no contest plea within six months of the court’s June 27, 2013 order placing her on one-year summary probation, i.e., by December 24, 2013, but that the trial court lacked jurisdiction to allow her to withdraw her plea after that time. This is correct. (See *People v. Miranda* (2004) 123 Cal.App.4th 1124, 1132–1133 [court loses jurisdiction to allow a plea withdrawal six months after entry of a probation order, if entry of judgment is suspended].) Further, defendant asserts, relying on *People v. Brown, supra*, 147 Cal.App.4th 1213, that “an award of victim restitution in amount greatly exceeded that specified in plea agreement violates that agreement, resulting in an opportunity to withdraw plea.” Thus, she contends, her first counsel gave her ineffective assistance of counsel by failing to withdraw her no contest plea by December 24, 2013.

We disagree that counsel gave ineffective assistance here. Defendant does not establish that her counsel should have known she had the right to withdraw her plea if the court ordered restitution greater than the amounts stated in the relevant counts of the complaint. *Brown* is inapposite to the present circumstances because it ruled that the defendant in that case, while not necessarily entitled to a reduction of the restitution ordered, should have been allowed the opportunity to change his plea because the restitution ordered was greater than the amount *specifically agreed to* by the parties in their plea agreement. (*People v. Brown, supra*,

147 Cal.App.4th at pp. 1217–1218.) Here, on the other hand, the parties, regardless of what they expected the court to order in restitution, left it to the court to determine that amount at a later date. Under these circumstances, defendant did not have any guaranteed right to withdraw her plea and we see no reason why her counsel should have thought that she did.

Moreover, we see no reason why her counsel should have believed the court’s ordering of a larger amount of restitution than the amounts stated in the relevant counts somehow violated the parties’ plea agreement. To the contrary, as the People point out, the California Constitution, article I, section 28 provides, “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28 (b)(13)(A).) Further, section 1202.4, subdivision (a) states that “[i]t is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” Section 1202.4, subdivision (f) provides in relevant part that in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require the defendant to make 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 court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record.”

Thus, we are left the question of whether her counsel provided ineffective assistance for not moving to withdraw defendant’s no contest plea prior to December 24, 2013, in light of the possibility that the court would order defendant to pay a restitution amount that exceeded what was stated in the relevant counts of the complaint. There is no affirmative indication in the record that counsel provided ineffective assistance. To the contrary, the record indicates multiple conceivable reasons why counsel did not so move. First, the negotiated disposition was very favorable to defendant, enabling her to be found guilty of only one count, a misdemeanor, and, perhaps most importantly, eliminating the possibility that she would serve any jail time. A counsel could have reasonably believed that withdrawal of her no contest plea would jeopardize these favorable results.

Further, counsel could have reasonably believed he would obtain a relatively favorable result on the restitution issue itself. Indeed, the record suggests this was a correct view in hindsight. Prior to the defense counsel's December 24, 2013 statutory deadline to move to withdraw defendant's plea, he knew the Senior Center sought \$144,753.89 in restitution, consisting of \$36,764.83 for the cost of the forensic audit, \$1,698.94 for defendant's improper purchase of a vehicle, \$2,380.12 in lost wages and \$103,910 in lost administrative funding. The court's July 25, 2014 order that defendant pay \$39,586.81 was for just 27 percent, approximately, of what the Senior Center requested.

Finally, defendant has not met her burden of showing that she was prejudiced by any purported ineffective assistance of counsel. To the extent she claims that if she had withdrawn her plea "it appears very unlikely that she would ever be prosecuted," this is pure speculation and is thus insufficient to establish prejudice. (See *People v. Fairbank*, *supra*, 16 Cal.4th at p. 1241.) The record indicates she faced possible jail time and that the court likely would have ordered her to pay most, if not all, of the restitution it ordered on July 25, 2014, since most of that restitution was for a financial audit that related to each and all of the embezzlement charges against her.

In short, defendant's ineffective assistance of counsel argument is without merit.

## II.

### ***Defendant Does Not Meet Her Burden As Appellant Regarding Her Alternative "Offset" Claims.***

Defendant argues in the alternative that we must remand her case to the trial court for a determination of the amount of restitution she owes because the trial court did not offset the amount it ordered her to pay, \$39,586.81, by her purported prior payments towards restitution and the Senior Center's purported receipt of a \$100,000 reimbursement from its insurance carrier. We disagree. We must presume the judgment is correct in the absence of any affirmative showing by defendant that the court erred in the only ruling appealed from, the court's July 25, 2014 restitution order. Defendant makes no such showing.

First, regarding her purported prior payments towards restitution, defendant does not cite to anything in the record indicating she attempted to show in opposition to the Senior Center's

request, via testimony, declaration, documentation or other evidentiary support, that she made such payments. Instead, she refers on appeal only to certain preliminary hearing testimony, and does not establish that this testimony was in the record of the proceedings that led up to the court's issuance of its July 25, 2014 restitution order. To the contrary, in that ruling, the trial court found regarding the relevant restitution amounts ordered that defendant and prosecution had agreed to defendant paying, or that defendant had acknowledged owing, these amounts. Defendant does not challenge this finding in her appellate claim. "On appeal, we presume the judgment is correct and we will not reverse unless the appellant establishes error occurred and that the error was prejudicial. [Citation.] When a challenge to the sufficiency of the evidence is made, the appellant bears the burden of setting forth a fair and accurate statement of the facts. [Citation.] It is not sufficient to assert there was error; the appellant must support his claim by citations to the record." (*People v. Mays* (2007) 148 Cal.App.4th 13, 33–34.) Because defendant has not met her burden of establishing the court erred in its findings, we affirm this aspect of the court's order.

Defendant's contention that any restitution amount should be offset by the Center's purported receipt of a \$100,000 reimbursement from its insurance carrier is based on assertions and arguments that she made in her motion for reconsideration of the court's July 25, 2014 ruling. We do not address the merits of this appellate claim because defendant's reconsideration motion, and the court's rejection of it after defendant filed a notice of appeal from the court's July 24, 2014 reimbursement ruling, are not before us. Again, the July 25, 2014 order is the *only* order defendant has appealed from. Defendant does not establish that there is anything in the record regarding the proceedings leading up to this order that refers to any insurance issue. Therefore, defendant has not established a basis for remanding the July 25, 2014 order for the purpose of an "insurance" offset. (See *People v. Mays, supra*, 148 Cal.App.4th at pp. 33–34.)

#### **DISPOSITION**

The order appealed from is affirmed in its entirety.

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STEWART, J.

We concur.

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RICHMAN, Acting P.J.

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MILLER, J.

*People v. Silvey* (A143087)