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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. MARK EDWARD HILL, Defendant and Appellant.	A144907 (Sonoma County Super. Ct. No. 655981)

Defendant pleaded no contest to felony burglary of a building owned by Target, with the understanding that the trial court could order restitution to the victims of a dismissed charge of felony burglary of a building owned by Montessori Services. At sentencing, the court tentatively ordered defendant to pay $40,000 as restitution to Montessori Services. At defendant's request, the court scheduled a hearing to allow defendant to challenge the amount of restitution. Following a hearing on April 20, 2015, the trial court vacated its earlier restitution order and directed defendant to pay $35,343.14 as restitution to Montessori Services. On appeal defendant presents various arguments challenging the April 20, 2015, restitution order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On July 28, 2014, Montessori Services employee Ann Killeen reported to the police that the company building had been burglarized the night before sometime after 5:00 p.m. A search of the building revealed a number of missing items, including office

[1] Because defendant waived a preliminary hearing, the facts are taken, in part, from the police reports and the probation department presentence report.

equipment, company checks, several antiques, and a company credit card. Several employees also reported their personal items had been stolen, including silver flatware with a value of $18,345, as listed in an appraisal provided to the police. Later on July 28, 2014, Killen reported to the police that the stolen company credit card had been used the night before (from 5:36 p.m. to 8:21 p.m.) without authorization at "Valero Flyers," "Subway," and "All City Taxi," and later declined at Target and All City Taxi. A police investigation of the use and attempted use of the Montessori Services company credit card resulted in the detention and arrest of defendant and a codefendant.

The Sonoma County District Attorney filed a felony complaint against defendant, charging him with felony burglary of a building owned by Montessori Services[2] (Pen. Code,[3] § 459) (count one), felony burglary of a building owned by Target (§ 459) (count two), misdemeanor burglary of a building owned by Subway (§ 459) (count three), and felony forgery related to the use of a credit card (§ 484f, subd. (b)) (count four).

At a change of plea proceeding on January 28, 2015, defendant pleaded no contest to count two (felony burglary of a building owned by Target), with the understanding that the remaining counts would be dismissed.[4] In his written plea agreement, defendant acknowledged, in pertinent part, that he understood "the Court can consider the dismissed charges in determining the appropriate sentence in my case and in ordering restitution to the victim(s) of the dismissed charges."[5] The court confirmed defendant had initialed the

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[2] Although the felony complaint listed the owner as "MONTESSORI SCHOOL," the building was owned by an entity identified as Montessori Services.

[3] All further unspecified statutory references are to the Penal Code.

[4] The plea agreement also encompassed two other criminal actions, which are not at issue on this appeal.

[5] "In *People v. Harvey* (1979) 25 Cal.3d 754, 758-759 [159 Cal. Rptr. 696, 602 P.3d 396] (*Harvey*) our Supreme Court held that facts underlying charges dismissed as part of a negotiated plea may not, absent contrary agreement by the defendant (now called a *Harvey* waiver), be used to impose adverse sentencing consequences. The principle expanded to cover victim restitution [citation] and was soon codified. (Stats. 1988, ch. 287, § 1, p. 989, adding . . . § 1192.3, subd. (b) ['If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, . . . the court shall obtain a

written change of plea form, and had no questions about the consequences of his no contest plea. The sentencing hearing was scheduled for February 26, 2015, with defendant waiving the "five-day" time period to receive the probation department presentence report. The prosecution informed the court there was a "potential" for a restitution hearing to be held on the day of sentencing, as "restitution will be reserved and then there is a disputed amount."

Before sentencing, the probation department submitted a presentence report, which was received by the court on February 25, 2015. The report described the circumstances leading up to the charges against defendant. When interviewed by the probation department officer, defendant denied any involvement in the Montessori Services burglary and asserted he did not know the credit card was stolen and believed the credit card belonged to his codefendant. When asked why he entered a plea, given his denial of any wrongdoing, defendant said he had taken the deal because he would be released from jail at the time of sentencing based on credit for time served.

The probation department officer also reported he had spoken to a Montessori Services employee, Jane Campbell, who said the burglary had a " 'huge' " impact on the business. An external computer hard drive, with important data, had been taken, and the business had incurred significant labor costs in recreating the documents that were on the stolen hard drive. Campbell also said a set of flatware, appraised at $18,000, had been taken, and the estimated total loss was $40,000. Campbell submitted restitution information supporting a $40,000 loss to the District Attorney and she planned to attend the sentencing hearing.

At the sentencing hearing held on February 26, 2015, the trial court denied defendant's request for probation and, in pertinent part, imposed a split sentence on count two of eight months in jail (with credit for time served) to be followed by mandatory supervision. The prosecution indicated the case had been resolved with a *Harvey* waiver

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waiver pursuant to People v. Harvey (1979) 25 Cal.3d 754 . . . from the defendant as to the dismissed count.']).)" (*People v. Weatherton* (2015) 238 Cal.App.4th 676, 678, fn. omitted (*Weatherton*).)

so as to allow for an award of restitution to the victims of the Montessori Services burglary, which was the subject of a dismissed count. Montessori Services employee Jane Campbell, present in the courtroom, stated Montessori Services was seeking $40,000 in restitution. She submitted a "breakdown" of the losses, consisting of spreadsheets (People's Exhibits 1 & 2), detailing actual and replacement costs of stolen items belonging to the company and its employees, as well as expenses the company had incurred to date to reconstruct and print data that had been on an external computer hard drive that was stolen during the burglary (hereinafter referred to as data recovery expenses). Campbell also stated Montessori Services' insurer had reimbursed losses of approximately $7,000, but the insurance claim was "still ongoing." Defendant opposed the request for restitution on the ground that the trial court could order restitution for defendant's use of the company's credit card, but "there was no nexus" to order restitution for any of the other items as defendant never had possession of those items. Without commenting specifically on defendant's argument, the court tentatively ordered defendant to pay $40,000 as restitution to Montessori Services. At defendant's request, the court scheduled a restitution hearing to allow defendant to contest the amount of restitution awarded to Montessori Services.

About two months after sentencing, on April 20, 2015, the trial court held a hearing on the amount of restitution to be awarded to Montessori Services. The prosecution submitted on the "previously set restitution amount," based on People's Exhibits 1 and 2, that had been earlier marked as exhibits at sentencing. Defendant argued he did not think the two documents (People's Exhibits 1 and 2) were sufficient on their face for a restitution order. He repeated his earlier argument that restitution could not be ordered for the items listed in the documents because there was no showing, by way of either police reports or the probation department presentence report, that those items were actually in the building at the time of the burglary or that defendant ever possessed those items. The court rejected defendant's argument, noting the court had obtained a *Harvey* waiver from defendant at the time he entered his no contest plea. The court then reviewed, line by line, the items listed on People's Exhibits 1 and 2, and

deleted sums described as replacement costs for a computer and an external computer hard drive, as well as an additional sum that did not correspond to any listed stolen item. The court vacated its previous restitution order, and, after deleting the noted sums, entered a new order directing defendant to pay $35,343.14, as restitution to Montessori Services. [6] Defendant timely appeals from the order of restitution entered on April 20, 2015.

DISCUSSION

Defendant challenges the court's April 20, 2015, restitution order on various grounds, none of which requires reversal.

Section 1202.4 obligates the trial court to order a convicted defendant to pay direct "[r]estitution to the victim or victims [of defendant's conduct] . . . in accordance with subdivision (f)." Subdivision (f), in relevant part, states, that when " 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. . . ." As a reviewing court, we will not overturn a trial court's restitution order unless we find an abuse of discretion. (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794 ["[t]he trial court must use a rational method [to calculate the restitution amount] that could reasonably be said to make the victim whole and may not make an order which is arbitrary or capricious" and thus an abuse of discretion.)

We initially conclude the trial court obtained a valid *Harvey* waiver from defendant, which permitted the court to order defendant to pay restitution for losses incurred by the victims of the dismissed counts, including the victims of the Montessori Services burglary. (*Weatherton, supra*, 238 Cal.App.4th at p. 683.) In arguing to the contrary, we note defendant misreads the *Weatherton* opinion, decided by our colleagues in Division 2. In *Weatherton*, the defendant there argued, in pertinent part, that " 'even

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[6] The court further stated restitution remained reserved as Montessori Services was free to submit an additional restitution claim when it ascertained the actual costs of the computer and the external computer hard drive.

where there is a valid *Harvey* waiver, if the defendant contests the allegations in the dismissed counts, the prosecution bears the burden of proving the allegations in said counts by a preponderance of the evidence,' " and defendant has the right to present evidence that would controvert his culpability for the dismissed counts. (238 Cal.App.4th at p. 681.) Our colleagues in Division Two actually rejected Weatherton's arguments, holding, in pertinent part, that after a valid *Harvey* waiver, the prosecution is not "required to prove the corpus delicti of the dismissed counts, whether by a preponderance of the evidence or other standard, above and beyond what was produced at the preliminary examination" (*id*. at p. 685), and the defendant is not entitled to a "reopening" of "the actual existence or occurrence of a criminal act as alleged in a dismissed count" (*id*. at p. 683). In other words, after a valid *Harvey* waiver, "[o]nly the amount of . . . restitution" remains at issue, not the victim's "entitlement to what restitution could be proven." (*Id.* at p. 686.)

Because defendant lodged no objection to the trial court's calculation of the amount of restitution owed to Montessori Services, he has forfeited his appellate arguments that the award was excessive because it was disproportionate to the crime to which he pleaded no contest and the penalty imposed for that offense. "An objection to the amount of restitution may be forfeited if not raised in the trial court. 'The unauthorized sentence exception is "a narrow exception" to the waiver doctrine that normally applies where the sentence "could not lawfully be imposed under any circumstance in the particular case," for example, "where the court violates mandatory provisions governing the length of confinement." [Citations.] The class of nonwaivable claims includes "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings." ' [Citation.] The appropriate amount of restitution is precisely the sort of factual determination that can and should be brought to the trial court's attention if the defendant believes the award is excessive. Here, because defendant did not object to the amount of restitution in the trial court, he forfeited our consideration of the issue on appeal." (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218 (*Garcia*).)

We reject defendant's contentions that the trial court erred as a matter of law in awarding certain sums as restitution. "[T]he provisions of section 1202.4, subdivision (f)(3) are merely examples of types of loss that are compensable, examples that are provided *without limitation*." (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1183 (*Chappelone*); see *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1046 (*Keichler*) ["a trial court may compensate a victim for any economic loss which is proved to be the direct result of the defendant's criminal behavior, even if not specifically enumerated in the statute"].) Thus, the trial court here could and did appropriately award an aggregate sum of $10,652.15 as data recovery expenses incurred to date as a consequence of the burglary (see *Chappelone, supra*, at p. 1182 & fn. 9 [trial court found to have properly ordered defendant to pay restitution for victim's costs of investigation and transporting and storing recovered merchandise]; *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543, 1545 (*Gemelli)* [trial court found to have properly ordered defendant to pay restitution for burglary victim's costs of employee salaries and obtaining professional assistance at a higher rate of pay to reconstruct paperwork stolen during burglary].) [7] Additionally, Section 1202.4, subdivision (f)(2), provides that the determination of the amount of restitution "shall not be affected by the indemnification or subrogation rights of a third party," except for assistance paid to the victim from the California Victim Compensation and Government Claims Board. Here, the probation department report indicated there had been no "payouts" from the Victim's Compensation Board to the victims of the Montessori Services burglary. Thus, the trial court could and did appropriately exclude an offset for payments made by Montessori Services' insurer for a portion of the losses. (See *People v. Birkett* (1999) 21 Cal.4th 226, 246 ["the Legislature could rationally conclude that the criminal restitution scheme should always require the offender to pay the full cost of his crime, receiving no windfall from the fortuity that the victim was otherwise reimbursed, but that the rights of reimbursing third parties, aside

[7] The sum of $10,652.15, was not requested as an expense "to prepare the demand" for restitution, as suggested by defendant.

from the state's own Restitution Fund, should be resolved in other contexts"]; accord, *People v. Hamilton* (2003) 114 Cal.App.4th 932, 944.)

Additionally, we see no merit to defendant's appellate claim that the procedures that were employed by the trial court for determining the amount of restitution require reversal and a new restitution hearing. He complains Montessori Services' losses were computed based on spreadsheets provided by Montessori Services with no backup documentation or testimony by anyone with personal knowledge as to the basis for any losses. "In fact, no testimony was taken under oath nor was there any cross-examination at the sentencing hearing when Ms. Campbell testified; she was not produced for the subsequent restitution hearing." However, having failed to raise these issues in the trial court, defendant has forfeited his appellate claims of error. (See *Garcia, supra,* 185 Cal.App.4th at p. 1214.) In all events, we find no reason to reverse on the grounds asserted by defendant.

"Restitution hearings are intended to be informal." (*Weatherton, supra,* 238 Cal.App.4th at p. 684.) "Section 1202.4 does not, by its terms, require any particular kind of proof." (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.) At sentencing here Montessori Services employee Jane Campbell was present in court and confirmed that the sums listed in the spreadsheets (People's Exhibits 1 & 2) represented the losses and expenses incurred by the company and its employees as a consequence of the burglary. Campbell's statement, together with the exhibits, were sufficient to constitute prima facie evidence of value for the purposes of awarding restitution to Montessori Services. (See *People v. Baumann* (1985) 176 Cal.App.3d 67, 81[" '[d]ue process does not require a judge to draw sentencing information through the narrow net of courtroom evidence rules[;] . . . sentencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes' "]; see also *Gemelli, supra,* 161 Cal.App.4th at p. 1543 [victim's unverified statements of loss may serve as adequate factual basis for restitution]; *Keichler, supra,* 129 Cal.App.4th at p. 1048 ["statements by the victims of the crimes about the value of the property stolen constitute 'prima facie evidence of value for purposes of restitution,' " quoting from

People v. Foster (1993) 14 Cal.App.4th 939, 946; "but see *People v. Harvest* (2000) 84 Cal.App.4th 641, 653 (*Harvest*) [probation officer's report 'may satisfy notice requirements for due process [citation], but it cannot take the place of evidence' "].) Once Montessori Services [i.e. the People] made a prima facie showing of its losses and expenses, the burden shifted to defendant to show that the amount of losses and expenses was "other than that claimed by the victim." (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*).) Defendant made no attempt to demonstrate that the amount of losses and expenses was other than that claimed by Montessori Services. The detailed information provided in the spreadsheets submitted by Montessori Services at sentencing "was more than adequate to advise defendant of [the losses and expenses]. If defendant believed supporting documentation or additional information was necessary to effectively rebut the amount claimed, it was up to [him] to obtain it. Having failed to do so, [he] did not meet [his] burden of proof." (*Gemelli, supra,* at p. 1545.)

Defendant also argues the restitution award constitutes "unconstitutional punishment" because insofar as the restitution award at issue is deemed punishment, he was entitled to the procedural protections (jury trial and proof beyond a reasonable doubt) afforded by *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), and its progeny, including *Southern Union Co. v. United States* (2012) 567 U.S. ___ [183 L.Ed.2d 318, 132 S.Ct. 2344] (*Southern Union*). However, defendant has forfeited his appellate constitutional claim because he failed to object on this ground in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) In all events, even if properly before us the constitutional claim is meritless.

"[B]ecause the grant of a direct restitution order is not a monetary penalty, it is not subject to *Apprendi* and *Southern Union*. Prior to *Southern Union*, the *Apprendi* 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.' (*Apprendi, supra,* 530 U.S. at p. 490, italics added.) [¶] Thereafter, in *Southern Union*, the United States Supreme Court held that Sixth Amendment right to a jury applies to "sentences of criminal fines." (*Southern Union*,

supra, . . . [183 L.Ed.2d at p. 325].) In reaching its decision, the Supreme Court held that '[c]riminal fines, like . . . other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses.' (*Id*. at p. ___ [183 L.Ed.2d at p. 327].) [¶] However, neither *Apprendi* nor *Southern Union* applies to direct victim restitution because direct victim restitution is not a criminal penalty. (*People v. Pangan* (2013) 213 Cal.App.4th 574, 585-586 [152 Cal.Rptr.3d 632].) '[D]irect victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits. It is not increased "punishment." ' (*Id.* at p. 585.) Section 1202.4 imposes no statutory limits on the amount of direct restitution a court may order. [¶] For the same reasons, the court's determination may be established by a preponderance of the evidence. The higher standard of proof applies to facts that increase a crime's penalty beyond what a judge could impose based on the applicable statute and the facts in the record. (*Blakely v. Washington* (2004) 542 U.S. 296, 301 [159 L.Ed.2d 403, 412, 124 S.Ct. 2531].) Since direct restitution is not a criminal penalty and is not subject to a statutory maximum amount, it is not subject to a jury trial and may be imposed based on the preponderance of the evidence." (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1398-1399; accord, *People v. Wasbotten* (2014) 225 Cal.App.4th 306, 309; *Chappelone*, *supra*, 183 Cal.App.4th at p. 1184; *Millard*, *supra*, 175 Cal.App.4th at pp. 35-36; *Harvest*, *supra*, 84 Cal.App.4th at pp. 645, 650 [maj. opn. by Hanlon, P.J.][8].)

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[8] For the reasons stated in the text of this opinion, we decline defendant's suggestion that we adopt any contrary position expressed by retired Justice Marcel B. Poché in his dissenting opinion in *Harvest*, *supra*, 84 Cal.App.4th at p. 657.

DISPOSITION

The restitution order filed on April 20, 2015, is affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.