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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHELSEA JOHNSON,

Defendant and Appellant.

A147062

(Solano County  
Super. Ct. No. FCR286011)

After pleading no contest to charges of involuntary manslaughter (Pen. Code,<sup>1</sup> § 192, subd. (b) and second degree burglary (§ 459), appellant was placed on probation with several conditions. The court held a contested hearing on restitution and ordered appellant to pay \$68,187.50 in victim restitution. A codefendant, Dezmon Frazier, was tried separately in this matter and, on appeal, we reversed the trial court's order of restitution, remanding the case for further hearing on the issue of restitution. Based on our ruling in that appeal, we now reverse the trial court in this matter and remand for further hearing consistent with our decision in *People v. Frazier* (Aug. 31, 2016, A145958) [nonpub. opn.] (*Frazier*).

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<sup>1</sup> Unless otherwise stated, all statutory references are to the Penal Code.

## STATEMENT OF FACTS<sup>2</sup>

“The following is summarized from Fairfield Police Department crime report #11-06549, on 6/28/11. The police were dispatched to a robbery at a local business. The police located the victim sitting on a chair near the back door. He was slumped over and there was blood dripping from his mouth and nose. The victim was seventy years old.

“Upon entering the store, the officers felt the effects of pepper spray, and could not enter the business. The officers attempted to speak to the victim, but he remained slumped over, and was non-responsive. There were items and merchandise scattered around the floor. While the victim was being treated by emergency medical personnel, officers were able to speak to him. He stated there were three subjects responsible for the robbery. He was in distress and having difficulty in responding. While being transported to the hospital, the victim suffered from cardiac arrest and died.

“On 6/29/11, an autopsy was conducted on the victim. The cause of death was cardiac arrhythmia, which was as a result of the emotional distress caused by the assault during the robbery. Officers obtained a copy of the video surveillance from a nearby gas station. A male subject, later identified as Co-defendant Williamson, is observed sitting outside of a coffee shop when he was picked up by a vehicle.

“On 7/5/11, Co-defendant Williamson was contacted at his residence and transported to the police station. He initially told the police he was not inside the victim’s business when the robbery occurred. When confronted with evidence to the contrary, he was given his Miranda Admonishment [*Miranda v. Arizona* (1963) 384 U.S. 486]. He admitted he was involved in the robbery and homicide.

“Co-defendant Williamson stated he was with four other subjects, who he identified as Co-defendants Frazier, Johnson, Smith and Young. They planned to commit

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<sup>2</sup> The Statement of Facts is quoted from the probation report because appellant pleaded no contest and no trial was conducted.

the robbery of the victim's store. The offender [appellant] was the driver of the vehicle and picked him up. They drove to the victim's business. Upon arrival, he entered the store as he was 'casing' it, and then left.

“Co-defendant Williamson was then picked up by the offender and Co-defendant Johnson at the gas station. They returned to the victim's business. Co-defendants Frazier, Smith, Williamson and Young exited the vehicle and went inside to commit the robbery. Co-defendant Young was identified as the person using the pepper spray. Co-defendant Frazier was inside the store and Co-defendant Smith waited outside of the doorway and helped to take the cash register and cigarettes to the vehicle. Co-defendant Williamson admitted he was also inside the store and acted as a lookout. He was initially booked into Juvenile Hall as he was a minor.

“On 7/6/11, the offender was arrested. She was given her Miranda Admonishment. She admitted her involvement in the robbery and homicide with Co-defendants Frazier, Smith, Williamson and Young. She agreed to assist in the robbery by driving the vehicle. She stated Co-defendant Frazier took the cash register. She drove co-defendants Frazier and Smith to Vacaville after the robbery. She received \$5.00 for her involvement in the robbery. She was booked into custody.”

On April 16, 2015, the probation officer filed a probation report, stating in relevant part: “A claim was submitted through the victim compensation board for the amount of \$68,187.50 for the following expenses: Funeral and burial, \$5,000.00; loss income, \$52,889.60; future loss income, \$10,110.40; counseling, \$187.50.” The documents supporting the report included the victim's federal income tax return Schedule C, Profit or Loss From Business forms for 2009 and 2010. In 2009, the victim's gross income was \$37,787 and in 2010 it was \$33,676, making the average gross income \$35,731.50 per year.

The district attorney sought a restitution sum of \$68,187.50 per the details of the Victim Compensation and Government Claims Board (Board). It was requested

appellant and codefendants Frazier and Young be jointly and severally liable. Appellant objected to the request, arguing the restitution should be based on the business's net profits and not its gross income for the relevant years. The specific amount claimed was based on the net profits of \$8,807.50 per year.

On October 1, 2015, the court issued an order directing the codefendants to pay \$68,187.50 to the Board for the claims on behalf of the victim.

### **DISCUSSION**

Codefendant Dezmon Frazier appealed the restitution order involved in this case in *Frazier, supra*, A145958. On August 31, 2016, we determined the restitution order of the trial court below was incorrect because the “losses awarded should have been limited to net profits from the victim’s business, that is[,] the business’s gross revenues less any operating expenses, including labor, materials, and rents.” (*Id.* at p. \*3.) We were responding to codefendant Frazier’s claim “[a]t the restitution hearing the trial court set the lost income to the victim’s spouse at \$63,000, to be paid to the Victim Compensation Program. . . . [T]his amount was based, in error, on the gross, not net, income of the victim’s retail dairy product business, Travis Dairy.”

The Attorney General concedes the legal issue raised in this case and in *Frazier* at the restitution hearing is the same. She acknowledges the restitution order “was issued in both cases, based on the same factual record.” She asks us to review the identical records we were asked to consider in the *Frazier* appeal.

Appellant has attached a copy of our decision in *Frazier, supra*, A145958, and asks us to take judicial notice of the ruling under Evidence Code section 451, subdivision (a). We conclude this appeal would involve a review of the same evidence and materials already reviewed by another panel of this division. The trial court stated the order of restitution was joint and several as to appellant and Frazier. We will take judicial notice of that ruling, causing this court to now conclude the restitution order here

must be set aside because the amount is based on gross income and not net income. We remand to the trial court for proper recalculation of the restitution amount in the case.

### **DISPOSITION**

We reverse the award of restitution. We remand for a recalculation of the amount of restitution consistent with our determination in *Frazier, supra*, A145958. In all other respects, the judgment is affirmed.

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Dondero, J.

We concur:

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Humes, P. J.

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Margulies, J.