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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HAKOB GHAZARYAN et al.,

Defendant and Appellant.

2d Crim. No. B230377
(Super. Ct. No. F447294)
(San Luis Obispo County)

Hakob Ghazaryan, Hakob Vardanyan and Khachi Mkrtchyan appeal an \$18,606.40 restitution order, imposed following their pleas of no contest to one count of theft of account information or access cards, one count of receiving stolen property, and several counts of second degree commercial burglary. (Pen. Code, §§ 484e, subd. (d), 459, 496, subd. (a).)¹ Mkrtchyan also pled no contest to possession of a forged driver's license (§ 470, subd. (b)).² The trial court sentenced Ghazaryan and Vardanyan to two years in state prison, and Mkrtchyan, to three years in state prison.

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

² Mkrtchyan and Vardanyan were charged with 14 commercial burglary charges; Ghazaryan, with 12. Each appellant pled no contest to all charged offenses. A fourth defendant, Hamlet Ramazyan, who is not a party to this appeal, was charged with appellants in many of the just-described offenses. The prosecution also charged him with failure to appear when it filed the July 27, 2010 amended complaint.

It also ordered them to pay \$18,606.40 in restitution, jointly and severally, to Citibank.³ Appellants contend that the court abused its discretion by awarding restitution to Citibank. We agree and vacate the restitution order.

BACKGROUND⁴

On May 20, 2010, a customer reported a fraudulent credit card charge to the Santa Maria Best Buy store. The same card was used later that day, at a Best Buy in San Luis Obispo. San Luis Obispo Police Department officers learned that two white males purchased electronic equipment with several Green Dot credit cards that day at the Best Buy in San Luis Obispo, and at a nearby Sears store. Four men used stolen credit cards to purchase merchandise at WalMart and K-Mart stores in Pismo Beach on May 20.

Officers arrested and searched appellants on May 20, 2010, and recovered several counterfeit credit cards. Some cards that appeared to be Green Dot or Meta Bank cards bore numbers associated with Citibank accounts. Other cards were issued by Bank of America and US Bank. Officers also recovered new jewelry, electronic equipment, and laptop computers from appellants' vehicles. The recovered merchandise was in its original packaging, with a receipt from the merchant (WalMart, Best Buy, Game Stop, K-Mart, Radio Shack, T.J. Maxx).

The amended complaint names the following businesses as victims of commercial burglaries: Santa Maria Home Depot; Santa Maria Staples; Santa Maria WalMart; Santa Maria Best Buy; Santa Maria Game Stop; Santa Maria Radio Shack;

³ The record refers to multiple Citibank entities, including Citibank N.A., Citibank (South Dakota) N.A., Citigroup, Citicorp Data, Citi Security and Investigative Services, and Citigroup Investigative Services. Because Citibank (South Dakota) N.A. owns and issues Citibank credit card accounts, we conclude that the trial court ordered appellants to pay restitution to Citibank (South Dakota) N.A., and we hereafter refer to it as "Citibank."

⁴ Because there was no preliminary hearing before appellants entered their pleas, we derive the facts from the clerk's transcript, the probation report and police records in the confidential clerk's transcript.

Arroyo Grande WalMart; Arroyo Grande K-mart; Arroyo Grande Radio Shack; Arroyo Grande Game Crazy; Arroyo Grande Office Max; San Luis Obispo Office Max; San Luis Obispo Home Depot; and San Luis Obispo T.J. Maxx. It did not name any victim of the grand theft access card information, receiving stolen property, or forged driver's license offenses. It does not name Citibank, or any bank, as a victim of any offense.

On August 10, 2010, appellants entered no contest pleas to all offenses, as charged in the amended complaint: one count of grand theft of access card information (§ 484e, subd. (d)); multiple counts of second degree commercial burglary (§ 459); and one count of receiving stolen property (§ 496, subd. (a)). Mkrtchyan also pled to a driver's license forgery charge.

Restitution

Prior to the sentencing hearing, the probation department prepared a report for each appellant which stated that (1) the district attorney "strongly" objected to the plea agreement and recommended appellants be sentenced to 10 years in state prison; (2) the arrest reports revealed that each appellant, along with three codefendants, used counterfeit credit cards to purchase items from numerous retail stores and used counterfeit Citibank credit cards to purchase merchandise totaling \$55,360.50.

Each probation report indicated that a letter was sent to the victims to advise them of the date and time of sentencing, their right to make a statement, and their right to request restitution. Each report further stated that no responses had been received. The restitution section of each probation report stated: "According to the arrest report, stolen items from K[-]Mart, Wal[M]art, Office Max, Radio Shack and Game Crazy were recovered. Victim Witness was contacted and reported the victims have not filed a claim with the Victim Compensation and Government Claims Board. Based on this information and the extensive number of victims involved, it is recommended restitution be ordered in an amount to be determined. [¶] The Court is referred [to] the attached letter from Citibank who is requesting restitution in the

amount of \$55,360.50." Amy M. Mowen of Citigroup Investigative Services had submitted a letter dated August 13, 2010, stating that Citibank sustained a financial loss of \$55,360.50 as a result of appellants' crimes.

Each probation report further recommended that restitution be ordered in an amount to be determined at a restitution status determination hearing set for April 21. Each report also recommended that "restitution be paid jointly and severally by [appellants] in the amount of ~~\$55,360.50~~ \$18,606.40 to Citigroup Investigative Services." (The smaller number is written above the printed, larger figure that is crossed out, in handwriting.)

During the January 4, 2011 sentencing hearing, the prosecutor asked the trial court to order appellants to pay restitution to Citibank in the amount of \$18,606.40. Appellants' counsel objected and stated that there was no loss to any of the victims because the investigating officers recovered all of the merchandise that appellants took from the victims. The prosecutor stated that the matter was further complicated because some of the stolen goods found in appellants' possession were returned to the merchants "but the merchants weren't necessarily crediting the amounts back to Citibank." She added that some of the merchandise had not been returned to the merchants, and it remained in possession of the police department.

Detective Vitale of the San Luis Obispo Police Department explained that he met with Ted Manjoras, the investigator for Citibank credit card matters. Manjoras provided Vitale with a list of credit card numbers and the dollar amount of losses that comprised the \$55,360.50 figure. Vitale could not directly associate some of those credit card numbers with the individuals he arrested. The \$18,606.40 restitution figure was based on the value of the merchandise appellants acquired from the victims on May 20, 2010.

The trial court did not "know how much to order [appellants] to pay in restitution" or "whether anyone ha[d] suffered any actual losses if the property resided in the police department possession or was returned to them and we just don't have a number." It did not make a preliminary finding that there was no proof of restitution

because "if the property ha[d] not been returned" to the merchants, "they're still out the money"

The court proposed setting a restitution hearing date, and having the police return any property in their possession to the merchants. It said, "hopefully, there's a record somewhere of what was returned to whom so I can actually come up with a financial loss to someone that I can order these defendants to pay."

Vitale then advised the court: "The merchants did not incur a loss. The merchants are paid by the bank. [¶] . . . [¶] [W]hen a card is swiped and the signature is obtained, it's a good transaction. The bank incurs the loss." He said: "The banks have communicated to me that they have no way of liquidating the property into a liquid form to reimburse their loss accounts or the fraud accounts." The "banks write off . . . the fraud amounts."

Vitale added: "[T]here is a detailed record of what was returned to the merchants and what wasn't. In a perfect world [the police] take the property back to the merchants. The merchants credit back the fraudulent accounts. The banks [and] stores are even. [¶] [I]f the merchants don't provide necessary information per the agreement with Visa and MasterCard and the banks, they actually take a loss. [¶] [I]t would take hundreds of hours to determine which bank got refunded. . . . So [under] our new policy [the police] hold all property [and] notify the banks. [T]he banks do the charge back or facilitate the property however they want. At that point they own the property once the transaction was completed under these . . . forms of fraud."

Appellants' counsel restated their objections , adding that restitution must be based on "specific evidence," which was lacking here. The prosecutor argued that it was reasonable to hold appellants liable for \$18,606.40 because "they created the problem that the store and the bank has to deal with and that's what they stole." She said that because of the way the financial dealings work between Citibank and the merchants, the bank was not restored to their earlier position when the property was returned to the merchants. The trial court ordered appellants to pay \$18,606.40 in

restitution to Citibank because they stole this property and "put[] the bank in a position where it suffered a loss."

DISCUSSION

Appellants contend that the trial court abused its discretion by ordering them to pay restitution to Citibank. We agree.

"The standard of review of a restitution order is abuse of discretion." (*People v. Tuan Quong Duong* (2010) 180 Cal.App.4th 1533, 1537.) "A restitution order 'resting upon a "demonstrable error of law"' constitutes an abuse of the court's discretion. . . .' [Citation]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 24-26.)

Section 1202.4, which authorizes trial courts to award restitution, is a mandatory restitution statute. (*People v. Anderson* (2010) 50 Cal.4th 19, 28 (*Anderson*)).) The present version of section 1202.4 resulted from "a lengthy and complex evolution that began with the 1982 adoption of Proposition 8, also known as the Victims' Bill of Rights. That measure added article 1, section 28 to the California Constitution, which provided: '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 restitution from the persons convicted of the crimes for losses they suffer.' (Cal. Const., art. 1, § 28, former subd. (b).) [Fn. omitted.]" (*Anderson, supra*, at pp. 27-28.)

Section 1202.4, subdivisions (a)(1) and (f), provide: "It 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 any defendant convicted of that crime. [¶] . . . [¶] [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 or victims or any other showing to the court."

"The term 'victim' is specifically defined in section 1202.4, subdivision (k)[(2)] and encompasses '[a]ny corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or

instrumentality, or any other legal or commercial entity *when that entity is a direct victim of a crime.*' [Citation.] '[S]ection 1202.4, subdivision (k) permits restitution to a business or governmental entity only when it is *a direct victim* of crime.' [Citation.])" (*Anderson, supra*, 50 Cal.4th at p. 28.)

Citibank is not a direct victim of appellants' crimes. Appellants neither admitted nor pled no contest to any count charging them with taking information, cards, or merchandise from Citibank. Rather, they pled to charges, as alleged in the amended complaint, which named only merchants as victims. Vitale's May 25, 2010 report concerning the counterfeit credit cards states that they bore identification numbers, including many that were issued from Bank of America and U.S. Bank. Other reports indicate that appellants used a Chase Bank customer account and Citibank customer account information in fraudulent transactions. Vitale testified that Citibank incurred losses when it paid the merchants. Despite those losses, the merchants remain the direct victims of appellants' crimes.

Citibank holds a position similar to that held by the insurer in *People v. Birkett* (1999) 21 Cal.4th 226, a probation case involving a restitution order. In *Birkett*, the court held that insurers were not crime victims for purposes of restitution where they paid policyholders for crime-related losses. (*Id.* at pp. 245-246.) Citibank incurred losses when it paid direct victims of the crimes here. More recent adult probation cases recognize that courts now possess broader, discretionary authority under section 1203.1, where restitution is imposed as a condition of probation. (*Anderson, supra*, 50 Cal.4th at p. 31.) In contrast, where a court sentences defendants to state prison (as the trial court did here), section 1202.4 imposes its mandatory requirements in favor of a victim's right to restitution, the statute is explicit and narrow. (*Id.* at p. 29.) In such cases, third parties who reimbursed the victim are left to their separate civil remedies, if any, to recover any such prior indemnification from the victim. (See *People v. Birkett, supra*, at p. 246.)

DISPOSITION

The order of restitution is vacated.

NOT TO BE PUBLISHED.

COFFEE, J.*

We concur:

GILBERT, P.J.

PERREN, J.

* Retired Associate Justice of the Court of Appeal, Second Appellate District, Div. 6, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

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