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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO CERVANTES PEREZ,

Defendant and Appellant.

B235689

(Los Angeles County
Super. Ct. No. PA064150)

APPEAL from an order of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Reversed and remanded for further proceedings.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Ernesto Cervantes Perez appeals from a restitution order, contending his constitutional rights were violated when the trial court conducted the restitution hearing in his absence. We reverse the restitution order and remand for a new hearing.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2009, Perez pleaded no contest to two counts of home invasion robbery and was sentenced to an aggregated state prison term of eight years. No request for victim restitution under Penal Code section 1202.4 was made at that time.

Maria Martinez was one of the robbery victims. On March 9, 2009, she filed a Victim Restitution Request claiming \$14,800 in restitution plus 10 percent per annum for jewelry and cash taken in the robbery. (Pen. Code, § 1202.4.)

After two continuances, the trial court set a restitution hearing for July 18, 2011. On that date, neither the victim nor Perez was present in court. The trial court denied defense counsel's request to have Perez brought to court from the Oklahoma prison where he was currently being housed by the California Department of Corrections and Rehabilitation. The court reset the restitution hearing for August 29, 2011.

At the hearing on August 29, 2011, the defense counsel objected to holding the restitution hearing in Perez's absence. Defense counsel informed the trial court that Perez had not waived his right to be present, and it was "unlawful" to proceed without his permission.¹ Counsel further stated if Perez were present, he could assist in her cross-examination of Martinez. The court overruled counsel's objection, and the hearing was conducted.

Martinez testified with the assistance of a Spanish-language interpreter that she was the victim of a home-invasion robbery in January 2009, during which gold bracelets, chains, rings and cash were forcibly taken. She estimated the total value of her loss as \$14,000, of which \$3,000 was cash. Martinez no longer had receipts for the jewelry and was testifying to their value from memory. Martinez purchased the jewelry during the 12

¹ Codefendant Ivan Galeana Ibarra waived his right to be present at the restitution hearing. He is not a party to this appeal.

years she worked at a laundry, saving about \$50 from each paycheck to pay for the bracelets, chains and rings. Martinez did not read or write either English or Spanish. One of her daughters helped her complete the Victim Restitution Request.

On cross-examination, Martinez acknowledged she had told police, and had her daughter write on the Victim Restitution Request, that five chains had been stolen, but she testified the number of chains taken was actually 12. She later testified there were five, not 12 chains stolen during the robbery. Martinez also acknowledged she had told police the five chains were worth \$2,000, but she had her daughter write they were worth \$6,300. Martinez could not describe the stolen chains; she no longer remembered them. Martinez recalled the chains were 14 karat gold, two were “twisted” chains, one of which weighed 35 grams and cost \$3,000, the other twisted chain cost \$2,000. The fourth chain cost about \$1,000 and the fifth chain cost \$800. Martinez admitted she was “making up” the prices because she could no longer remember them.

Martinez testified four or five rings had been taken. She denied telling police that no rings had been stolen. Martinez was unable to describe the rings or to explain why the Victim Restitution Request showed six rings were stolen. Martinez could not recall the value of any of the rings, but then estimated their total value as \$500. On redirect examination, Martinez testified she had made two payments of \$75 on one of the rings.

When asked by defense counsel what bracelets were missing, Martinez testified she could not remember. Nor could Martinez explain why she had her daughter make a claim in the amount of \$3,650 for the stolen bracelets on the Victim Restitution Request. Martinez testified she could no longer remember how she estimated the value of the bracelets in making her restitution claim.

Martinez testified she initially told police that \$2,000 in cash had been stolen. Later, she realized she had an additional \$1,000 in a purse that was also taken in the robbery. The money came in weekly installments from one of Martinez’s daughters. A total of \$6,000 was in a drawer and her purse and after the robbery Martinez had only \$3,000 left.

Martinez initially testified she was 71 years old, but one of her daughters, who was present in the courtroom, reminded her she was close to 76 years old. Martinez explained in the months prior to the hearing she had suffered a stroke. The medication she was currently prescribed was affecting her memory.

Following argument by counsel the trial court found that five chains worth \$2,500, four bracelets worth \$1,350 and \$3,000 in cash were taken from Martinez. The court found no evidence to support the value of the stolen rings. Accordingly, the court calculated the total restitution as \$6,850.²

At the close of hearing, the trial court stated to defense counsel that Perez would receive a copy of the restitution order, “[a]nd if he wishes to set it for further hearing, we can have him ordered out at a later date, if he objects to that amount. But based on what I heard today, I really find this is the most reasonable way to set the amount of the loss, and based on the testimony that I heard today it just made it a very difficult hearing to have.”

DISCUSSION

Maintaining he had both a statutory and a constitutional due process right to be present at his restitution hearing, Perez contends he was deprived of those rights when the hearing occurred in his absence, and without his waiver of his right to be present.

Perez had the right to be present at the restitution hearing. (*People v. Robertson* (1989) 48 Cal.3d 18, 60 [defendant has constitutional and statutory right to be present at sentence modification hearing and imposition of sentence]; *People v. Wilen* (2008) 165 Cal.App.4th 270, 287 [right to be present “includes the defendant’s presence at ‘critical stage[s] of the criminal prosecution,’ which includes ‘sentencing and pronouncement of judgment.’ [Citations.]”]; *People v. Cain* (2000) 82 Cal.App.4th 81, 87 [restitution hearing under section 273.5 is “part and parcel of the sentencing process”].) Although

² The court found Perez and codefendant Ibarra were jointly and severally liable for the \$6,850 in victim restitution.

the hearing could have been conducted without Perez had he waived his right to be present (*People v. Davis* (2005) 36 Cal.4th 510, 530), he did not do so.

Nonetheless, when confronted as we are in this case with a defendant's improper absence from a critical stage of prosecution, courts have routinely considered whether the error was harmless or prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705], as to the federal constitutional right, and *People v. Watson* (1956) 46 Cal.2d 818, 836, as to the right under state law. (*People v. Romero* (2008) 44 Cal.4th 386, 419.) Moreover, a defendant like Perez "whose right of personal presence [is] denied bears the burden of demonstrating prejudice." (*People v. Wilen, supra*, 165 Cal.App.4th at p. 290.)

Perez argues his absence from the restitution hearing deprived him of the right to fully defend against the restitution claims, made by an elderly victim, who, due to her medical condition, prescription medication or passage of time, no longer remembered what items were taken and how much they were worth. The People concede the trial court improperly denied Perez's right to be present at the hearing, and do not dispute that defendant was thereby denied the opportunity to fully contest the restitution claims. However, the People argue Perez was not prejudiced because he thereafter failed to take advantage of the trial court's invitation to seek a further hearing to challenge the restitution order. "Indeed, except for this appeal, [Perez] can still inform the superior court that he contests the amount in the court's decision and testify before the court with the aid of defense counsel," citing Penal Code section 1202.4, subdivision (f)(1).

The trial court, the People, and defendant all agree that he was entitled to a hearing at which he was present. We agree as well; as he was not provided the opportunity to contest the claims before the order was entered, he was prejudiced.

DISPOSITION

The restitution order is reversed and the matter remanded for further proceedings in accordance with this opinion.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.