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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAHAM SAUCEDO SANCHEZ,

Defendant and Appellant.

B237659

(Los Angeles County
Super. Ct. No. YA082193)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Modified and, as modified, affirmed.

Ava R. Stralla, 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, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Abraham Saucedo Sanchez pleaded guilty to one count of corporal injury to a spouse or cohabitant, and the remaining three counts for the same charge were dismissed. The trial court ordered Sanchez to pay restitution related to the dismissed charges. The prosecutor, however, did not obtain a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, 758 (a “*Harvey* waiver”), which held that when charges are dismissed against a defendant, there should not be any punishment for them. Because the defendant did not agree to waive his rights under *Harvey*, the trial court erred by ordering him to make restitution on the dismissed charges. We therefore modify the judgment to strike those restitution amounts improperly imposed and affirm the judgment as modified.

BACKGROUND¹

A felony complaint alleged against Sanchez four counts of corporal injury to a spouse, cohabitant, and child’s parent (Pen. Code, § 273.5, subd. (a)). On October 6, 2011, Sanchez pled no contest to count 1 for corporal injury, and the remaining counts 2, 3, and 4 were dismissed. The trial court placed Sanchez on probation for five years on the condition he spend 365 days in jail.

At the subsequent restitution hearing on October 13, 2011, defense counsel noted that there was no *Harvey* waiver in the file. Because the witness was present, the trial court elected to proceed with the hearing and consider the waiver issue later. The victim then testified about her damages. The trial court indicated that although there was no *Harvey* waiver, it could impose restitution on the dismissed counts. Over defense counsel’s objection, the court ordered Sanchez to pay \$4,201.67 in restitution, which amount included damages related to the dismissed counts.

¹ The facts underlying Sanchez’s crime are irrelevant to the issues on appeal.

DISCUSSION

A. The *Harvey* waiver.

The trial court's restitution order included damages other than those incurred in connection with count 1. Sanchez therefore contends that because there was no *Harvey* waiver, he is not responsible for damages in connection with dismissed counts 2, 3, and 4. We agree.

Under *People v. Harvey, supra*, 25 Cal.3d 754, a trial court, in determining the disposition, may not consider evidence of any crime as to which charges were dismissed. (*People v. Moser* (1996) 50 Cal.App.4th 130, 132-133.) It is “ ‘improper and unfair’ to permit the sentencing court to consider any of the facts underlying dismissed counts because, absent an agreement to the contrary, a plea bargain implicitly includes the understanding that the defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, dismissed counts.” (*People v. Munoz* (2007) 155 Cal.App.4th 160, 166-167.) The prosecution may, however, obtain a *Harvey* waiver, which “permits a trial court to consider facts underlying dismissed counts in determining the appropriate disposition for the offense of which the defendant was convicted.” (*Moser*, at pp. 132-133; *Munoz*, at p. 167.)

The record here shows that Sanchez pleaded guilty only to count 1 in return for the dismissal of counts 2, 3, and 4, and he agreed “to pay restitution to the victim in this case in an amount to be determined at a later time at a restitution hearing.” Nothing in the record indicates that Sanchez's agreement to pay restitution related to any count other than the count of conviction, that is, count 1. Thus, in the absence of a *Harvey* waiver that his restitution obligation extended to dismissed counts, the trial court erred by imposing restitution on those counts.

The People, however, argue that restitution could be imposed on the dismissed counts because restitution can be imposed as a condition of probation, so long as the restitution award is “reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1123; see also *People v. Lent* (1975) 15 Cal.3d 481, 486-487.) But

Carbajal and *Lent* did not involve a sentence imposing restitution on counts dismissed according to a plea bargain. They have no bearing on whether restitution can be imposed on counts dismissed under a plea bargain where no *Harvey* waiver was given.

Accordingly, because Sanchez did not give a *Harvey* waiver, there was no agreement that the sentence imposed could include restitution on the dismissed counts.

Count 1 to which Sanchez pled no contest, concerned events occurring on or between August 21 to August 27, 2011. The victim, however, testified about these damages relating to the dismissed counts 2, 3, and 4, which concerned events occurring on September 3, 2011, July 8, 2011 and July 30, 2010:

- \$133.77 for an urgent care visit on July 17, 2011 to treat bruising, dizziness and headaches (count 3).
- \$230 for a medical visit on July 31, 2010 to treat injury to her clavicle (count 4).
- \$1,330 for a computer Sanchez damaged on September 3, 2011 (count 2).
- \$446 for work she missed from July 11 to 15, 2011 (count 3).

Because these damages related to the dismissed counts, they could not be ordered as restitution in the absence of a *Harvey* waiver. Two thousand one hundred and thirty-nine dollars and seventy-seven cents must therefore be subtracted from the \$4,201.67 restitution order.

B. Restitution for the damaged cell phones.

The victim testified that defendant damaged three cell phones. The cell phones were not related to any of the charged counts, and therefore Sanchez concedes that the trial court could order him to pay restitution for them as long as the restitution was reasonably related either to the crime of which he was convicted or to the goal of deterring future criminality. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1123.) What Sanchez does *not* concede is that the trial court acted within its discretion in ordering him to pay for the cell phones, because the victim's testimony was vague as to the amount of damage she sustained.

“ ‘ “The standard of review of a restitution order is abuse of discretion. ‘A victim’s restitution right is to be broadly and liberally construed.’ [Citation.] ‘ “When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.” ’ [Citations.]” [Citation.]’ (*People v. Baker* (2005) 126 Cal.App.4th 463, 467 [].) ‘In reviewing the sufficiency of the evidence, “ [t]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the trial court’s findings.” [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.]’ (*Id.* at pp. 468-469.) The trial court ‘ “must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.” ’ [Citation.]” (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045; see also *People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) If there is no substantial evidence to support a restitution award, the trial court will have obviously abused its discretion. (*Thygesen*, at p. 993.)

The victim testified that her Touch 4G phone retailed at \$499; a second one cost \$499.95; and a third cost \$399.95. She was making payments on the two phones costing \$499 or \$499.95 and she was obligated to pay them off. She then explained that “when— you can buy it for \$499.95. However, if you extend your contract for another two years, they do drop it down to between \$129 and \$130. So that was the price that I was paying for it, which I’m still paying but I’m unable to.”

Based on this testimony, Sanchez contends that it is unclear what amount the victim paid on the two phones, about \$499 each or about \$130 each. The victim, however, was entitled to the replacement value of her phones. (Pen. Code, § 1202.4, subd. (f)(3).) She testified that Sanchez broke her phones. She testified that the phones retailed at about \$499. There was no showing that she will once again qualify for any special deal lowering the retail price. We therefore conclude that the trial court did not abuse its discretion by ordering Sanchez to pay the retail price of the phones.

DISPOSITION

The judgment is modified to strike \$2,139.77 from the restitution award, and, as modified, the judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.