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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.

KURT DUNCAN NAEGELE,

Defendant and Appellant.

2d Crim. No. B255370
(Super. Ct. No. F441746)
(San Luis Obispo County)

Kurt Duncan Naegele appeals from restitution orders imposed by the trial court as a condition of his probation after he pled no contest to gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a));¹ driving a vehicle while under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a)); and driving with a .08% blood alcohol level (*id.*, subd. (b)). Appellant also admitted that he caused injury to two surviving victims, and that his blood alcohol level exceeded .15 percent, among other allegations. The trial court suspended the imposition of sentence and placed him on four years probation with various terms and conditions, including serving 365 days in jail and paying restitution. The court

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

ordered him to pay victim restitution to Laura Dahlman, the widow of Darren Dahlman; to Mr. Dahlman's parents; to Christopher Pennell; and to Ryan Doheny. Appellant contends that the court abused its discretion by (1) failing to consider the victims' comparative negligence in calculating restitution; (2) failing to consider the joint and several liability of a corporation that was named as appellant's codefendant in related civil actions; (3) failing to apply the full amount which appellant's insurer paid to the victims as an offset to the restitution awards; (4) failing to use the correct method to assess the reasonableness of attorney fees; and (5) ordering him to pay Doheny \$2 million for lost income. We reverse the order awarding Doheny \$2 million for lost income, and the orders awarding restitution to Laura Dahlman and Pennell to the extent such orders are attributable to attorney fees. We affirm the orders in all other respects and remand for further restitution proceedings.

FACTUAL AND PROCEDURAL BACKGROUND²

Kirk and Shannon Wickstrom hosted a large party to celebrate Shannon's birthday at the Hearst Ranch in San Simeon over the weekend of September 18, 2009. The guests included Darren and Laura Dahlman, Ryan and Lisa Doheny, Christopher and Colleen Pennell, and appellant and his wife, Christy Naegele. They arrived before dinner, socialized, and drank a variety of alcoholic beverages.

After dinner, appellant, Ryan Doheny, Christopher Pennell and Darren Dahlman, along with Steve Benson and a man identified in the record as "Mike," went "off-roading" on the ranch, in appellant's Range Rover. They took alcoholic beverages with them. At some point, they dropped off Benson and Mike at the ranch bunk house.

Appellant, Doheny, Pennell, and Dahlman resumed off-roading around the ranch. They headed toward the ranch airport, with appellant driving, Pennell sitting in the front passenger seat, and Dahlman and Doheny sitting in the

² The facts are taken from the transcript of the preliminary hearing.

rear seats. Doheny and Dahlman both screamed, "Hit it," when appellant reached the tarmac. He accelerated and drove approximately 100 miles an hour. The Range Rover skidded, crashed through a fence at the end of the tarmac, became airborne, rolled, and landed on its left side at the bottom of a hill.

Doheny testified that he was "knocked out" after the crash. When he came to, the other men were unconscious. He was unable to find his cell phone. He crawled through the Range Rover's moon roof, found a truck, and drove to find help. Dahlman died at the scene. Pennell, appellant and Doheny all suffered major injuries.

[REDACTED]³

Plea and Restitution

Appellant pled no contest to gross vehicular manslaughter and other offenses, and admitted several enhancement allegations. Appellant's counsel proposed a three-year probation term and informed the court that he "believe[d] that the restitution [had been] taken care of or [would] be taken care of through insurance." The trial court invited comment from the prosecutor. He responded, "Well, my position in terms of what the sentence should be is indicated in the probation report. I believe the probation recommendation is an indicated sentence from the court." The prosecutor also stated, "otherwise, [counsel for appellant] is correct and summarized the disposition of the case." The court later commented, "I'm glad restitution has been taken care [of]. Probation will look into that. If they say you owe something, and if you and your attorney think it's reasonable, then you

³ The trial court sealed many documents relevant to the restitution proceedings. In accordance with the California Rules of Court, the sealed documents were filed under seal in this court. (See Cal. Rules of Court, rule 8.46(b)(1).) We have filed both a redacted and sealed opinion. Our redacted opinion, which is part of the public record, does not include information which is only contained in the sealed portion of the record. Our unredacted, sealed opinion is filed concurrently with this redacted opinion.

pay as directed by probation. If you disagree with it, you have a right to a hearing." The court granted appellant probation and set the matter for a restitution hearing.

The probation department submitted a memorandum which recommended that the court order appellant to pay restitution, as follows: \$70,211 to Mr. Dahlman's parents; \$2,122,885.09 to Doheny for medical expenses and lost wages; \$930,146.17 to Pennell for medical expenses and lost wages; and \$7,867 to Laura Dahlman for medical expenses and mileage. In a subsequent memorandum, the probation department recommended that appellant pay Laura Dahlman an additional \$4,397,867, which included a supplemental claim for lost income attributable to her deceased husband's earnings.

Appellant challenged the proposed restitution for Pennell, Doheny and Laura Dahlman, among other reasons, because it was punitive; it omitted an offset for \$1 million that his insurer paid the victims; and it contravened appellant's understanding at the time he entered his plea, that restitution had been taken care of, which the court acknowledged, without any objection by the prosecutor.

Laura Dahlman, William Dahlman (the father of Darrell Dahlman) and Pennell testified at the restitution hearing. Appellant did not testify or present evidence at the hearing. After taking the matter under submission, the court issued a written order in which it denied appellant's motion to withdraw his plea, and directed him to pay victim restitution, as follows: \$905,252.24 to Laura Dahlman; \$70,211 to Mr. Dahlman's parents; \$896,378 to Mr. Pennell; and \$2,127,394.12 to Mr. Doheny.

DISCUSSION

"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 seek and secure restitution from the persons convicted of the crimes causing the losses they suffer." (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Section 1202.4 implements this important constitutional policy by requiring the court to order

direct victim restitution in "every case in which a victim has suffered economic loss as a result of the defendant's conduct." (*Id.*, subs. (f) & subd. (a)(1).)

The standard of proof at a restitution hearing is by a preponderance of the evidence. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) We review restitution orders for an abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) We will not disturb the trial court's determination unless it is arbitrary, capricious and exceeds the bounds of reason. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

Comparative Negligence

Citing *People v. Millard* (2009) 175 Cal.App.4th, 41-42 (*Millard*), appellant argues that the trial court abused its discretion by failing to consider the victims' comparative negligence in calculating the victims' restitution awards. We disagree.

In *Millard*, the defendant was convicted by a jury of driving under the influence of alcohol and causing bodily injury. (Veh. Code, § 23153, subd. (a).) At trial the evidence showed that the victim, a motorcycle rider, was traveling at an excessive speed at the time of the accident and bore substantial responsibility for his own injuries. Accordingly, the trial court reduced the restitution for the victim's economic losses by the 25 percent of fault it found attributable to the victim. The court explained that it did so "under the concept that it should order full restitution unless it finds compelling and extraordinary reasons for not doing so." (*Millard, supra*, 175 Cal.App.4th at p. 37.) The reviewing court found no abuse of discretion or error in the trial court's use of comparative fault principles in determining the amount of restitution "when the victim's negligence was also a substantial factor in causing his or her economic losses." (*Id.*, at p. 41.) Here, however, the trial court did not find that appellant's victims bore "substantial responsibility" for their injuries, nor did it numerically allocate the parties' comparative negligence. The court acknowledged that the victims' decisions to ride with appellant in his

condition contributed to the crash, but expressly found that "the defendant's alcohol-impaired, terribly reckless driving . . . was *the substantial factor* for the crash." (Italics added.) While a court has discretion to employ civil comparative fault principles in structuring a restitution order (*id.*, at pp. 41-42), section 1202.4 does not require a court to employ them.

Joint and Several Liability in Related Civil Litigation

Appellant claims that the trial court abused its discretion by failing to consider that he and Hearst, as codefendants in the victims' related civil cases, "could be jointly and severally liable for victim restitution." He argues that the principles underlying the joint and several civil liability of criminal codefendants should require the court to consider the joint and several liability of a criminal defendant with a codefendant in a related civil matter. We disagree. There is no authority which requires a court to consider his joint and several liability with a civil codefendant in such circumstances.

Offset Claims

Appellant contends that the trial court abused its discretion by failing to offset Laura Dahlman's award by \$451,000. In so arguing, he asserts that his insurer provided policy coverage limits of \$1 million for distribution among Laura Dahlman, Pennell and Doheny, and Pennell and Doheny admitted having received \$450,000, and \$99,000, respectively. Therefore, he claims Laura Dahlman necessarily received \$451,000 (the balance of the \$1 million insurance proceeds) and the court erred by failing to offset her restitution award by that amount. We disagree.

Once a victim makes a prima facie showing of economic loss, the burden shifts to the defendant to disprove the amount of loss claimed by the victim. The defendant is entitled to an offset for amounts paid to the victim by the defendant's own insurer. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 167-168.) A defendant seeking an offset to a restitution award has the burden of proof as to

each fact essential to claim for relief. (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1137.)

Appellant failed to meet his burden of showing the facts essential to his offset claim. (*People v. Vasquez, supra*, 190 Cal.App.4th at p. 1137.) He did not present evidence at the restitution hearing to prove that Laura Dahlman received \$451,000 of his insurance proceeds. She testified that she received approximately \$200,000 from appellant's insurance proceeds, and that most of that sum was applied to attorney fees. The court allowed her \$200,000 for attorney fees and declined appellant's offset request. Appellant did not present evidence regarding the payment of the additional \$251,000 for which he claimed an offset.

Attorney Fees

Appellant further argues that the trial court abused its discretion by failing to apply the proper criteria to assess the reasonableness of the amounts of attorney fees it awarded to Pennell and Dahlman. We agree.

"[A] victim seeking restitution (or someone on his or her behalf) initiates the process by identifying the type of loss (§ 1202.4, subd. (f)(3)) he or she has sustained and its monetary value. Where the restitution claimed is attorney fees, this requirement is met when the record contains prima facie evidence of reasonable attorney fees incurred by the victim to recover the economic losses. [Citations.]" (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.) "Once the record contains evidence showing the victim suffered economic losses and incurred reasonable attorney fees to recover those losses, this showing establishes the amount of restitution the victim is entitled to receive, unless challenged by the defendant. In that event, the burden shifts to the defendant to show the portion of the attorney fees that are not recoverable because those fees can be attributed solely to a nonrecoverable category of noneconomic losses. [Citations.]" (*Ibid.*) "[T]he defendant's burden does not arise *until the victim has made a prima facie showing of his or her claimed loss.*" (*Id.*, at p. 886, italics added.)

"A court 'may not determine a "reasonable" attorney fee solely by reference to the amount due under a contingency agreement.' [Citation.] Rather, a court must begin with the lodestar calculation and then make adjustments upward or downward based on the factors discussed in *Ketchum [v. Moses]* (2001) 24 Cal.4th 1122, 1134, 1136], including whether there is a contingency fee arrangement. [Citation.] After considering all relevant factors, a court may ultimately, but is not compelled to, award as reasonable those fees set forth in a contingency fee agreement. [Citation.]" (*People v. Millard, supra*, 175 Cal.App.4th at p. 33; see *People v. Fulton, supra*, 109 Cal.App.4th at p. 889 [performing lodestar analysis to evaluate reasonableness of contingency fee].)

Here, the trial court's ruling does not mention the lodestar factors and the record lacks evidence concerning them. (*People v. Fulton, supra*, 109 Cal.App.4th at p. 886.) Therefore, we will reverse the restitution awards for Laura Dahlman and Pennell to the extent they are attributable to attorney fees.

On remand, the trial court shall make a lodestar analysis to determine the amount of reasonable attorney fees for the recovery of Laura Dahlman's and Pennell's recoverable economic losses. However, "it would be improper to reduce the attorney fees incurred to obtain economic damages merely because those same attorney fees also led to the recovery of nonrecoverable damages (e.g., pain and suffering damages). . . . [W]hen fees cannot be reasonably divided between the pursuit of economic losses as opposed to noneconomic losses, the victim is entitled to be fully reimbursed for all actual and reasonable attorney fees. [Citations.]" (*People v. Fulton, supra*, 109 Cal.App.4th at p. 885; see *In re Imran Q.* (2008) 158 Cal.App.4th 1316, 1322.)

Lost Income

Appellant contends that the court abused its discretion by awarding Doheny \$2 million of victim restitution for lost income. Respondent asserts appellant waived this issue by failing to raise it below. We choose to consider this

issue. (*People v. Williams* (1998) 17 Cal.4th 148, 161, 162, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party[;] [w]hether or not it should do so is entrusted to its discretion".].)

Section 1202.4 governs restitution in criminal cases and describes the type of losses and expenses for which the victim of the crime can receive restitution. "[T]he word 'loss' must be construed broadly and liberally." (*People v. Moore* (2009) 177 Cal.App.4th 1229, 1232.) "[I]n setting the amount of restitution [the trial court] may use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole." (*People v. Tucker* (1995) 37 Cal.App.4th 1, 6.) "The trial court is not required to order restitution equal to the exact amount of the loss, but it must employ a rational method that makes the victim reasonably whole. The restitution order may not be arbitrary or capricious. [Citation.] 'The only limitation the Legislature placed on victim restitution is that the loss must be an ""economic loss"" incurred as a result of the defendant's criminal conduct.' [Citation.]" (*People v. Garcia* (2011) 194 Cal.App.4th 612, 617.)

[REDACTED] Doheny did not testify at the restitution hearing.

The court's restitution order explained that it "arrived at the \$2 [million] figure for lost income based on its review of all the documents submitted by Mr. Doheny: financial, insurance and medical, including those prepared by his psychiatrist and psychologist. The Court has concluded from a review of the evidence that Mr. Doheny's injuries, especially PTSD, have prevented him from pursuing and realizing income he would otherwise have earned through business interests. The Court is convinced by the evidence that Mr. Doheny's assertion of lost income is a valid claim and not based on speculation or wishful thinking."

There is not sufficient evidence to support the finding that Doheny suffered an economic loss of \$2 million. The evidence suggests that he suffered a

loss, but provides no basis for calculating or estimating the amount of his loss.⁴ We will reverse the order awarding Doheny \$2 million for lost income and remand for the purpose of holding a new restitution hearing.

DISPOSITION

The orders awarding restitution to Laura Dahlman and Pennell are reversed, to the extent such orders are attributable to attorney fees, and the order awarding \$2 million to Doheny for his economic loss are reversed. The judgment is otherwise affirmed.

Upon remand, the trial court shall hold a new hearing to determine the amount of reasonable attorney fees for the recovery of Laura Dahlman's and Pennell's respective economic damages, and to determine the reasonable amount of Doheny's economic loss. The court shall also consider further evidence of sums appellant's insurer paid to Laura Dahlman, and modify her award accordingly.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

⁴ [REDACTED]

Michael L. Duffy, Judge
Superior Court County of Los Angeles

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