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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.

GRAY BOND GRACY,

Defendant and Appellant.

2d Crim. No. B258530  
(Super. Ct. No. F000494174001)  
(San Luis Obispo County)

Gray Bond Gracy appeals from the restitution order entered after he pleaded no contest to an assault on Andrew Jones by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).)<sup>1</sup> Appellant entered his plea pursuant to an agreement which provided he would receive a low-term, two-year sentence and be required to pay restitution to the Victims Compensation and Government Claims Board ("Board"). (Gov. Code, § 13950 et seq.) The court ordered him to pay restitution of \$28,787.90 for lost overtime wages. Appellant contends that the trial court abused its discretion by ordering such restitution without sufficient evidence of Jones's loss. We affirm.

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

## FACTUAL AND PROCEDURAL BACKGROUND

On April 18, 2013, while confined in state prison, appellant punched nurse Andrew Jones in the face multiple times. Jones's injuries included a left eye contusion, blurry vision, nausea, lumbar strain, post-traumatic anxiety, an adjustment disorder, and situational stress. His injuries prevented him from returning to work.

The Board awarded Jones \$28,787.90 for lost overtime pay, which was not covered by workers compensation insurance. The prosecutor sought an order directing appellant to pay restitution of \$28,787.90.

On July 14, 2014, the trial court conducted a restitution proceeding. The prosecutor provided the court with a copy of an employment verification form which showed that (1) Jones had worked for his employer from September 23, 1996, through April 18, 2013; and (2) before April 18, Jones had worked an average of 31.19 overtime hours per month, at a rate of \$61.17 per hour (approximately \$1,907 of overtime wages per month). The employer did not complete the blank space in the verification form section which reads as follows: "Employee would have worked an avg. of \_\_\_ weekly overtime hours if the incident had not occurred." The Board paid Jones \$28,787.90 of overtime wages, for a period of approximately 15 months based upon his average monthly overtime wages prior to the incident.

During the restitution hearing, appellant's counsel objected that there was no evidence that Jones's employer had asked that anyone work overtime in the relevant period. Counsel requested that the prosecution provide documentation to substantiate the assumption underlying the \$28,787.90 restitution award; i.e., that but for his injuries, Jones would have worked an average of 31.19 overtime hours per month. After counsel described the assumption as "speculative," the trial court made the following comments: "It's pretty darn good speculation. I don't know of any government agency that's been adding staff over the last recent history." The court ordered appellant to pay Board \$28,787.90 as restitution.

## DISCUSSION

Appellant contends the trial court abused its discretion in ordering him to pay the victim \$28,787.90 as restitution. His contention is erroneously based on the purported duty of the prosecution to authenticate by live testimony the underpinnings of the claim. While the prosecution does bear the burden of proof to establish the loss and its relationship to the crime, this burden is met by submission of Board's findings and orders. "If, as a result of the defendant's conduct, the Restitution Fund has provided assistance to or on behalf of victim," pursuant to section 13950 of the Government Code,<sup>2</sup> "the amount of assistance provided shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered." (§ 1202.4, subd. (f)(4)(A).) Of course, a defendant has a right to present evidence to rebut the presumption. (*Id.*, subd. (f)(4)(C); *People v. Lockwood* (2013) 214 Cal.App.4th 91, 100-102.) Appellant offered no evidence.

We review restitution orders for an abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) The standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) "'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.]" (*People v. Mearns* (2002) 97 Cal.App.4th 493, 499.)

Section 1202.4, subdivision (a)(1), provides that "a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." Subdivision (f) of that section provides in relevant part: "[I]n every case in which a victim has

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<sup>2</sup> The referenced authority specifically refers to the Board. (See, e.g., Gov. Code, §§ 13951, subd. (a), 13956, subd. (a).)

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. . . . (3) To the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct including, but not limited to . . . (D) Wages or profits lost due to injury incurred by the victim . . . . Lost wages shall include any commission income as well as any base wages. . . ."

Appellant cites *People v. Thygesen* (1999) 69 Cal.App.4th 988 in arguing the trial court abused its discretion in ordering him to pay Jones \$27,787.90 as restitution. *Thygesen* is unavailing. There the trial court ordered a restitution award for a stolen cement mixer. (*Id.*, at pp. 990-992.) The reviewing court concluded there was no evidence presented to the trial court to establish the value of a replacement mixer, or the rental income resulting after the theft. (*Id.*, at pp. 994-995.)

In contrast, here the prosecution made a prima facie showing of Jones's loss by presenting documentary evidence that before the assault he worked an average of 31.19 hours in overtime each month, payable at the hourly rate of \$61.17. It was reasonable to assume that Jones would have continued to work an average of 31.19 overtime hours per month had he not suffered injuries as a result of appellant's assault, payable at the same rate he received before the assault. A prima facie case having been made, appellant was free to produce contrary evidence. He did not do so. The court did not abuse its discretion in ordering appellant to pay the Board the sum it paid to Jones.

DISPOSITION

The restitution order is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jason C. Tran, Supervising Deputy Attorney General, Stephanie C. Santoro, Deputy Attorney General, for Plaintiff and Respondent.