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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.

JUSTIN TRAY BUCHANAN,

Defendant and Appellant.

2d Crim. No. B265028
(Super. Ct. No. F490891001)
(San Luis Obispo County)

Justin Tray Buchanan appeals from a \$4,158 victim restitution order imposed following his conviction of inflicting corporal injury upon a cohabitant (Pen. Code,¹ § 273.5, subd. (a)) and other crimes. Appellant was ordered to pay the restitution to the California Victim Compensation Board (the Board) as reimbursement for payments the Board made on behalf of the victim for the costs of ongoing mental health therapy sessions.

¹ All statutory references are to the Penal Code.

He contends the trial court erred in refusing to conduct an in camera review of the Board's records to determine whether they contained information necessary for him to dispute the amount of restitution ordered (§ 1202.4, subd. (f)(4)(C)).

We conclude appellant cannot challenge the order to the extent it includes \$2,772 in restitution previously ordered and from which no appeal was taken. As to the remainder of the order, we agree that the court erred in refusing to review the Board's records. The records are not included in the record on appeal, so the error cannot be deemed harmless. Accordingly, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Because appellant pled no contest, the relevant facts are derived from the probation report. On June 7, 2013, appellant was living with the victim in her apartment. The police went to the apartment that afternoon in response to a report that a suicidal male had ingested a large amount of prescription medication. The victim reported to one of the officers that appellant was suffering from delusions and had threatened to kill her. She "advised that she herself had mental health issues and she was seeing a psychiatrist." She regularly recorded her therapy sessions and had spoken to her therapist about appellant's strange behavior. Earlier that day, she "discovered [appellant] listening to the recordings of her therapy sessions." Appellant slapped the victim, grabbed her by the neck, lifted her off the floor, and forced her to the ground. He held her down for about a minute, then went to the bathroom and swallowed handfuls of prescription pills.

Appellant was agitated when the police arrived and it took six officers to restrain him. He spent the night in the hospital. The following day, he attempted to kick and bite the police officers who transported him to jail.

Appellant was interviewed at the county jail on December 18, 2013. He stated that he had been diagnosed with major depression with psychiatric features and was currently taking medication for the disorder. He had little memory of the incident but regretted what he had done.

The victim's mother told appellant's probation officer that the victim "is a special needs (autistic) person" and requested that the victim receive \$165 in restitution to replace a shopping cart appellant had broken and to reimburse her for the costs of cleaning up damage appellant had caused to her apartment. The victim also submitted a \$279 claim to the Board for "mental health."

Appellant pled no contest to infliction of corporal injury upon a cohabitant, false imprisonment (§ 236), obstructing or resisting an executive officer (§ 69), and battery on a peace officer or emergency staff (§ 243, subd. (b)). In January 2014, the court suspended imposition of sentence and placed appellant on four years probation. By stipulation, appellant also agreed to pay \$297 in victim restitution to the Board and an additional \$165 directly to the victim.

In February 2014, the Board paid the victim an additional \$693 for continued mental health treatment. The probation department asked the court to order appellant to pay \$990 in restitution, which included the \$297 in restitution that he had been previously ordered to pay. Appellant waived his presence at the March 2014 restitution hearing and counsel

submitted on the request for restitution. The court issued a restitution order and abstract of judgment in the amount \$990. In October 2014, the Board paid the victim an additional \$1,782 for mental health treatment. The court issued a restitution order and abstract of judgment in the amount of \$2,772, which included the prior award of \$990. Appellant did not appeal from either of these orders.

On January 12, 2015, the court summarily revoked appellant's probation. On January 29, 2015, the probation department reported that the Board had paid the victim an additional \$891 for mental health treatment and asked the court to issue a new restitution order in the amount of \$3,663. In March 2015, appellant waived his right to a probation violation hearing and admitted the violation. The court stayed execution of a three-year prison sentence, and placed appellant back on three years of probation.

In May 20, 2015, appellant moved the court to conduct an in camera review of the Board's records regarding the victim's claims for restitution. In support of the motion, appellant submitted a declaration stating that (1) the victim "suffers from depression and regularly sees a psychiatrist and was receiving mental health counseling before I met her and before the incident in the instant case occurred"; (2) the victim "was not injured as a result of the events in the instant case" and "refused medical attention and declined an emergency protective order"; and (3) "the incident in question has nothing to do with the counseling [the victim] has received and continues to receive, but rather is due to her pre-existing mental health conditions for which she was receiving mental health counseling prior to the incident and prior to making her acquaintance."

Copies of 12 “Health Insurance Claim Forms” the victim submitted to the Board were also attached to the motion. The heavily-redacted forms, which appellant received in response to a discovery subpoena, indicate that the victim sought reimbursement of \$130 for each of 42 weekly or semi-weekly individual therapy sessions that took place from July 9, 2013, through January 20, 2015, and \$140 for one session on March 10, 2015. A certification from the Board’s custodian of records indicates that the Board had paid the victim a total of \$4,158 on these claims.²

At the hearing on the motion, defense counsel offered that appellant was prepared to testify if necessary and made an offer of proof he would testify among other things that the victim was regularly seeing a psychiatrist and receiving mental health counseling when the incident occurred. In opposing the motion, the prosecutor argued that “[appellant’s] opinions about the victim’s mental health . . . arise without foundation.” The prosecutor referred to the victim’s statements in the probation report and offered, “The fact that the victim has psychological problems actually should put him on notice that she is more fragile[.] I think it’s perfectly understandable why this person would be in counseling related to the incident.”

² The certification also states “that the records are accurate reproductions of bills that were submitted to and paid by the [Board] in the amounts indicated, by or on behalf of the [named] victims.” The victim’s claims, however, totaled \$5,730. The record discloses no reason for this discrepancy.

The court denied appellant's motion and entered an order for victim restitution in the amount of \$4,158. The court found "a declaration of the testimony of [appellant] to be insufficient" and added, "there is just no way I can consider his opinion that the mental health treatment she is receiving is due only to preexisting mental health conditions and not related to the domestic violence she suffered in this case." The court also credited the prosecutor's observation that "when people are receiving mental health counseling, . . . that probably makes them more fragile and more likely to need further mental health treatment when they are victimized as was true in this case."

DISCUSSION

Appellant contends the court erred in refusing to review the Board's records pursuant to section 1202.4, subdivision (f)(4)(C). He claims he presented evidence tending to rebut the presumption that the victim's ongoing mental health treatment was a direct result of his criminal conduct.

As a threshold matter, we conclude that appellant cannot challenge the restitution order to the extent it includes \$2,772 that was previously ordered. At his January 2014 sentencing, appellant stipulated to pay \$297 in restitution for the victim's mental health treatment. In March 2014, he was ordered to pay an additional \$693 for the victim's continued treatment. The following October, the court ordered him to pay an additional \$1,782. Appellant did not appeal from any of these orders or the ensuing judgments. Moreover, the time to appeal those judgments has long since expired and the judgments are now final. Those orders are enforceable in the same manner as civil money judgments. (§ 1214, subd. (b).) Although appellant

timely appealed from the most recent order requiring him to pay a total of \$4,158 in restitution, we only have jurisdiction to review that order to the extent it includes the \$1,386 he was not previously ordered to pay. (*People v. Denham* (2014) 222 Cal.App.4th 1210, 1213-1214; *People v. Guardado* (1995) 40 Cal.App.4th 757, 763.) Even aside from the jurisdictional issue, appellant forfeited his right to challenge the order to the extent it includes the amounts previously ordered by failing to challenge the prior orders.

To the extent the order requires appellant to pay an additional \$1,386 for the victim’s mental health treatment, we agree that the court abused its discretion in declining to review the Board’s records as contemplated in subdivision (f)(4)(C) of section 1202.4. California crime victims have the right to receive restitution for losses attributable to the defendant’s actions. (Cal. Const., art. I, § 28, subd. (b)(13)(B); § 1202.4, subd. (a)(1).) “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[.]” (§ 1202.4, subd. (f)(3).) The types of economic losses recoverable by victims include the costs of mental health counseling. (*Id.* at subd. (f)(3)(A)-(C).)

When the Board provides assistance on behalf of a victim, “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).) There is a rebuttable presumption that the amount paid by the Board was proper and “imposes upon defendant the burden to prove the nonexistence of the presumed fact—that is, to prove his conduct is *not* a cause in fact of the

Board's payment. [Citation.]" (*People v. Lockwood* (2013) 214 Cal.App.4th 91, 101 (*Lockwood*)).) If a defendant offers evidence tending to rebut the presumption, the defendant may obtain the sealed Board records in order to challenge the presumption. (§ 1202.4, subd. (f)(4)(C); *Lockwood*, at p. 101.) The trial court must then "examine the sealed records in camera to determine whether the information is necessary for the defendant to dispute the amount of restitution. If the court finds that the sealed records are necessary, the defendant is entitled to use *both* his original evidence *and* the sealed material in his effort to rebut the subdivision (f)(4)(A) presumption." (*Lockwood*, at p. 101.) We review a restitution order for abuse of discretion. (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) Where there is a rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court. (*Ibid.*)

The defendant in *Lockwood*, like appellant, was convicted of inflicting corporal injury upon a cohabitant. (*Lockwood, supra*, 214 Cal.App.4th at p. 94.) The defendant was ordered to pay over \$20,000 to reimburse the Board for payments it had made to the victim's medical providers. The majority of those costs were attributed to a seven-day hospitalization precipitated by the victim's suicide attempt more than five months after the assault. At the restitution hearing, the defendant offered a declaration the victim had filed in dissolution proceedings against her former husband. The declaration recounted several instances when the victim's husband had committed domestic violence against her, including one incident that took place a month before the defendant's assault. (*Id.* at p. 95.) The trial court found this evidence failed to rebut the

presumption that the Board's payments were made as a direct result of the defendant's criminal conduct and on that basis declined to review the Board's records. (*Id.* at p. 99.)

The Court of Appeal found that the trial court had not only abused its discretion in failing to review the records, but also that the records should have been disclosed to the defendant because "an in camera [re]view of the additional records would have shown that they were relevant to the dispute." (*Lockwood, supra*, 214 Cal.App.4th at p. 101.) The trial court was faulted for "relying on an erroneous interpretation of section 1202.4, subdivision (f)" by requiring the defendant to actually rebut—rather than merely present evidence tending to rebut—the presumption that the Board's payments were made as a direct result of the defendant's criminal conduct. (*Id.* at p. 102.) The Court of Appeal nevertheless deemed the error harmless because "the records established that defendant's criminal conduct played more than an infinitesimal or theoretical part in the emotional or mental injuries for which the victim was treated . . . and defendant could not have successfully used the Board's records to rebut the presumption that the amount of assistance provided . . . was a direct result of his criminal conduct. [Citation.]" (*Id.* at p. 104.)

Here, appellant offered evidence that the victim had preexisting mental issues and was regularly seeing a therapist prior to the assault. This evidence tends to rebut the presumption that the victim's ongoing therapy sessions—and in particular sessions that took place over a year later—were a direct result of appellant's criminal conduct. Moreover, the evidence of these facts was sufficient; indeed, the facts were an integral part of the case. Although appellant failed to establish a

foundation for the other statements in his declaration, he had sufficient personal knowledge to state that the victim had mental issues and was seeing a therapist. The facts are also included in the probation report, which was before the court during the restitution hearing. The trial court, however, focused on appellant's inadmissible statements and erroneously reasoned, as the trial court in *Lockwood* did, that appellant had to actually rebut the statutory presumption as a prerequisite to the court's in camera review. Appellant was required to present evidence tending to rebut the presumption. He did. The court's failure to conduct an in camera review of the Board's records was thus an abuse of discretion.

In anticipation of our conclusion, the People urge us to "conduct an independent review of the sealed records, which demonstrates that the error was harmless." The records to which the People refer, however, are merely probation reports and a confidential mental evaluation of appellant. Although the claim forms are included as attachments to appellant's motion, they are heavily redacted. Accordingly, we must reverse the restitution order and remand for further proceedings. (*People v. Harvest* (2000) 84 Cal.App.4th 641, 650 [victim restitution does not constitute punishment for double jeopardy purposes].)

DISPOSITION

The June 16, 2015 victim restitution order is reversed and the matter is remanded for a new restitution hearing. Prior to the hearing, the trial court shall conduct an in camera review of the Board's records to determine whether they contain information necessary for appellant to dispute the

additional \$1,386 in restitution he was ordered to pay pursuant to the June 16, 2015 order. (§ 1202.4, subd. (f)(4)(C).)

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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