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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER PATTERSON,

Defendant and Appellant.

C064053

(Super. Ct. No. SF089866A)

Following a jury trial, defendant Jennifer Patterson was convicted of embezzlement. (Pen. Code, § 487, subd. (b)(3).)<sup>1</sup> The jury also found true the enhancement allegation that she took property valued at over \$65,000. (§ 12022.6, subd. (a)(1).) In addition to her prison sentence, defendant was ordered to pay \$150,000 in direct victim restitution. On appeal, defendant contends there was insufficient evidence to support the true finding that she stole more than \$65,000 and

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

the trial court abused its discretion in ordering her to pay \$150,000 in direct victim restitution. We conclude the reasonable inferences drawn from the evidence provide substantial evidence supporting the enhancement allegation. Furthermore, we conclude there is a rational and factual basis for the restitution award. Accordingly, we affirm the judgment.

#### FACTUAL BACKGROUND

In 1993, defendant was hired as the office manager for Don and Nita Rienhart<sup>2</sup> at their charter bus service, Delta Charter (Delta). As office manager, defendant had a wide range of responsibilities including overseeing the company's income and making bank deposits. Among the services offered by Delta was special operations bus order (SOBO). Delta required passengers to pay for SOBOs in cash, although a few regular customers were allowed to pay by check. When there were not enough passengers on the trip, the run would be cancelled. Occasionally, for promotional purposes, some passengers were given complementary passes for the trip. Also, SOBO trips were logged by the driver, indicating the date, destination, and number of passengers on the bus. At the end of the trip, the driver turned in the cash to the office in an envelope. Defendant was the only employee in the office to open the envelopes containing

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<sup>2</sup> Many of the witnesses in the case share surnames. For clarity, witnesses with the same surnames will be referred to by their first names.

the SOBO cash and was responsible for reconciling the cash turned in with the drivers' work logs.

In 1997, Lisa Woolen was hired to help in the office. After about two years, Woolen noticed that when SOBO money came in, defendant would shred the envelope and place the cash in her desk drawer. Defendant would later count the cash, prepare a deposit slip, and have Woolen deposit it in defendant's personal bank account. Initially, Woolen seldom made these deposits. But, in 2001 and 2002, she made the cash deposits to defendant's account almost daily. Defendant did not have Woolen deposit all of the cash, she put some of the cash directly in her purse. Defendant explained the money was to reimburse her for expenditures she had made on the company's behalf.

Defendant also would tell Don that SOBO trips had been cancelled when they had not been. The cash from SOBO runs was deposited into Delta's account only when Don was aware that a SOBO trip had gone.

At the beginning of 2002, the Rienharts' accountant, Percy Campbell, questioned defendant about the lack of SOBO cash. Defendant told him there was no more SOBO cash because the casinos were paying for the trips.

Becoming suspicious about the large amount of money and the increasing frequency of the deposits, Woolen began recording when she made the deposits. She also kept the drivers' logs for the SOBO trips. From June 14, 2001, through November 26, 2002, Woolen deposited \$58,475 in cash from SOBO trips into

defendant's account. Woolen believed defendant was stealing the SOBO cash and expressed her concerns to the Rienharts in a letter. Woolen advised the Rienharts that her records suggested, between June 14, 2001, and November 26, 2002, defendant had stolen almost \$59,000. She attached her records to the letter and noted, "[t]here was a lot more before June 14, 2001. This is just the date I started to keep records."

Don and Nita investigated the matter further. Woolen provided them with the drivers' logs, work orders, and deposit receipts for November and December 2002. Woolen also gave them copies of defendant's bank deposits.

For the month of November 2002 and the first half of December 2002, \$11,000 in cash was missing and had apparently been deposited in defendant's personal account. Don estimated approximately \$10,000 per month was received in cash, but not deposited into Delta's accounts. Nita estimated no more than 10 percent of Delta's income derived from cash payments. Don estimated the income generated by SOBO trips represented between 8 and 11 percent of Delta's gross receipts. The gross receipts before any deduction for missing SOBO cash were \$1,033,779 in 2001 and were \$870,271 in 2002.

Nita confronted defendant about stealing the money. Defendant denied the accusation, but upon Nita's request, resigned. Don and Nita attempted to calculate the amount of cash missing for the years 2001 and 2002. They examined drivers' logs from the SOBO runs, multiplied the number of

passengers by the fare and deducted the amount of cash that had been deposited. They determined that \$139,200 was missing from the 2001 runs and \$98,291 from the 2002 runs for a total of \$237,491. Some testimony indicates this total is \$225,205. However, \$237,491 is the correct amount.

Detective Lori Darneal from the San Joaquin County Sheriff's Department examined defendant's and Delta's bank records. She noted between December 20, 2000, and April 17, 2003, there was a pattern of large cash deposits into defendant's account. Between January 2001 and December 2002 a total of \$58,583 in cash was deposited to defendant's account. There was also evidence of over \$9,000 in checks written to defendant from Delta, which appeared to be reimbursements.

Defendant's husband, David, was hired as a mechanic by Delta in 2003 and later became the director of maintenance. David claimed he bought parts, propane, uniforms, gasoline, and cleaning supplies with his own money and Don reimbursed him for those expenses with cash. David also testified that Don paid other mechanics in cash, and would pay employees for unused vacation time in cash. Defendant's mother-in-law, Katherine, worked for Delta as a bus driver and then a driver trainer. She testified that Don unofficially kept track of excess driver hours and paid the drivers cash for those hours. Katherine also testified that Don paid her in cash for unused vacation time. She reported she had seen a lot of people being paid in cash.

Various other witnesses testified as to cash payments received from Don. The payments included payment for extra hours worked and mechanical work on the buses. Jack Gumm, a mechanic hired to repair diesel engines, testified that in February 2001, Don directed defendant to take cash from an envelope in Don's desk to pay Gumm \$1,300 for repairs.

Woolen denied that cash was used to pay for salaries or overtime. Don denied paying cash for overtime hours. He also denied paying mechanics in cash.

David also had a side business that operated primarily in cash, approximately \$800 a month. He would often give defendant the cash to deposit into her account. Defendant played bingo and slot machines at the casinos. Based on her W-2 forms, defendant had won over \$14,000 in 2001 and over \$11,000 in 2002. Some of the money was deposited in the bank and some was spent. David believed the large cash deposits came from defendant's bingo winnings and his side business. Based on Detective Darneal's examination of David's business records she concluded the income associated with that business was unrelated to the deposits Woolen made to defendant's account.

#### PROCEDURAL HISTORY

Defendant was charged with grand theft by embezzlement. (§ 487, subd. (b)(3).) It was further alleged she had embezzled amounts exceeding \$200,000. (§ 12022.6, subd. (a)(2).) Following a jury trial, defendant was found guilty of grand theft, and the enhancement allegation that she had taken

property exceeding \$65,000 in value was found true. (§ 12022.6, subd. (a)(1).) The allegation that she had taken property exceeding \$200,000 in value was found not true. The jury also found true the statutory prohibition against probation that defendant had taken property exceeding \$100,000 in value. (§ 1203.045, subd. (a).)

Defendant was sentenced to an aggregate term of two years and four months in prison. She was ordered to pay \$150,000 in direct victim restitution.

## DISCUSSION

### I

#### *Enhancement Allegation*

Defendant contends there was insufficient evidence to support the enhancement allegation that she took more than \$65,000 in cash from Delta. She contends "[t]he only evidence in support of the finding is the cash deposited in [defendant's] bank account, and the single statement of Woolen that she saw [defendant] put cash in her purse. From this evidence the jury must have inferred that every penny of cash deposited into [defendant's] account was stolen from Delta Charter and, further, that she pocketed an additional \$6,418 in cash which she did not deposit." She argues this inference is not supported by the evidence.

"In reviewing a claim of insufficient evidence, we review the record in its entirety, considering the evidence most favorably to the prevailing party, and determine whether any

rational trier of fact could have found the prosecution proved its case beyond a reasonable doubt.” (*People v. Zavala* (2005) 130 Cal.App.4th 758, 766.) In making this assessment, we draw all reasonable inferences from the record in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not weigh the evidence or decide the credibility of the witnesses. (*Ibid.*) Substantial evidence includes circumstantial evidence and the reasonable inferences this evidence allows. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Initially, we note the jury found beyond a reasonable doubt that defendant had stolen more than \$100,000. Defendant does not challenge that finding on appeal and thus implicitly concedes the sufficiency of the evidence supporting it. Plainly, if there is sufficient evidence supporting the finding that defendant stole more than \$100,000, then there is sufficient evidence she stole more than \$65,000. But even without this implicit concession, there is sufficient evidence to support the allegation defendant stole over \$65,000.

For 2001 and 2002, Delta’s gross receipts, after deducting missing SOBO cash, were \$1,678,656. Don estimated the SOBO trips accounted for between 8 and 11 percent of Delta’s gross receipts, or between \$134,292 and \$184,652. Nita estimated the

SOBO trips represented no more than 10 percent of Delta's gross receipts, or approximately \$167,865. The drivers' logs and work orders showed over \$200,000 in cash was missing from the 2001 and 2002 SOBO runs. From June 14, 2001, through November 26, 2002, defendant had Woolen make cash deposits of \$58,475 into her account from the cash from the SOBO runs. Woolen made "a lot more" deposits to defendant's account at defendant's behest before June 14, 2001. In 2001 and 2002, approximately \$10,000 per month was missing from the company's cash deposits.

Defendant was the only person who handled the cash from the SOBO runs. She kept the cash in her desk and had Woolen deposit some of the cash into her personal bank account. Defendant also put some of the cash in her purse. That is, there was well over \$100,000 in cash missing from Delta's deposits and almost \$60,000 in cash deposits recorded to defendant's account.

It was reasonable for the jury to infer from this evidence that defendant stole more than the amounts reflected in her bank deposits and reasonable to infer that the total amount of stolen cash was more than \$65,000. Accordingly, there was substantial evidence to support the allegation that defendant took over \$65,000 from Delta.

## II

### *Victim Restitution*

Defendant also contends the trial court abused its discretion in ordering her to pay \$150,000 in restitution to the Rienharts. Defendant's main complaint about the restitution

award is that it resulted in a windfall to the Rienharts. Specifically, she contends "[t]here is no evidence at all that any sum over \$100,000 was taken by [defendant]. If the remainder of the unaccounted for cash was, in fact, used to pay business expenses, then the trial court awarded the Rienharts \$50,000 to which they were not entitled."

Under section 1202.4, where the victim has suffered economic loss as a result of the defendant's criminal conduct, the court is required to order defendant to make restitution to the victim or victims in an "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).) "A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.) The trial court may consider almost any kind of information in calculating restitution. (*People v. Phu* (2009) 179 Cal.App.4th 280, 283-284.) "'Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.]' [Citation.]" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.)

Here, the jury found beyond a reasonable doubt that defendant stole over \$100,000. We note that the record in this

case could have supported a higher restitution award than was ordered. The jury findings put the amount of loss between \$100,000 and \$200,000. There was evidence of \$237,491 in missing cash. Accordingly, a restitution award of up to \$200,000 could have been supported by the record. Since the evidence could have supported a higher award of restitution, we can discern no abuse of discretion where the trial court orders restitution in a lesser amount after taking into account unrecorded cash payments by Don and complementary fares. Contrary to defendant's claim, this award did not result in a windfall to the victims.

Moreover, there was a rational and factual basis for the specific restitution award. Victims' statements of their losses are prima facie evidence of the economic losses incurred as a result of defendant's criminal conduct. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1154.) While the trial court did not explain its calculations to arrive at the \$150,000 restitution award, the record supports at least one rational and factual basis for the amount of the award. The company's gross receipts for the years 2001 and 2002, less the missing cash, totaled \$1,678,656. Typically, the SOBO cash represented between 8 and 10 percent of Delta's gross receipts. Utilizing these numbers to calculate the Rienhart's losses allows complementary fares and promotional rates to be captured in the losses. It would be reasonable to accept 9 percent as an average for the amount of SOBO cash. Using this average percentage, 9 percent of

\$1,678,656 (the gross receipts for 2001 and 2002) equals \$151,079. In addition, there was evidence that Don made some payments from cash. It would not be irrational to accept that some of Don's cash payments had been made from SOBO cash and reduce the \$151,079 amount to reflect these legitimate cash payments. While the restitution award must be rational and factual, it need not reflect the exact amount of the loss the defendant is found culpable of causing or that the order set an amount of damages that might be recoverable in a civil action. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) Here, there was a rational and factual basis for the direct victim restitution award of \$150,000. We conclude there was no abuse of discretion.

### III

#### *Error in Abstract of Judgment*

There is a clerical error in the abstract of judgment that requires correction. The abstract indicates defendant was sentenced on an enhancement, section "12022.6(A)(A)." The correct section is 12022.6, subdivision (a)(1). Accordingly, we direct the trial court to correct this clerical error and amend the abstract of judgment to reflect the correct statute.

#### DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the correct section on the sentencing enhancement and to forward a certified

copy of the amended abstract to the Department of Corrections  
and Rehabilitation.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.