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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY BRYAN LABANI,

Defendant and Appellant.

C064939

(Super. Ct. No.
08F6451)

Defendant Troy Bryan Labani pleaded no contest to grand theft and admitted the theft involved property of over \$100,000 in value, rendering him ineligible for probation. As part of the plea agreement, it was agreed that should the amount of restitution be determined to be less than \$100,000, he would be entitled to withdraw his admission to that enhancement and to the probation ineligibility condition.

After a hearing, victim restitution was set at \$111,640.09, plus a 10 percent administrative fee. Defendant now contends the restitution amount should be reduced by \$21,020, and accordingly, he also should be permitted to withdraw his enhancement admission and agreement regarding the probation ineligibility condition.¹ We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We limit our recitation of the facts to those necessary for resolution of the issues on appeal.

Defendant's personal business, O'Malley's Property Management, was hired by Saybrook Capital (Saybrook) in February 2005 to manage the Stoneridge Apartments in Tulsa, Oklahoma. Saybrook had an operating account for the complex with Union Bank.

In 2007 defendant stopped providing Saybrook with bank statements, and Saybrook's vice president, David Rodriguez, noticed first small, then large, transfers of money from the operating account into another account that had no connection to the Tulsa apartment complex. Approximately \$173,000 was unaccounted for. After defendant failed to repay the money as promised, Rodriguez filed a theft report.

¹ Although defendant states the total amount of the reduction he seeks is \$20,020, he contests three portions of the restitution award that actually total \$21,020. Respondent repeats this mathematical error.

Defendant was charged with grand theft (Pen. Code, § 487, subd. (a))² and embezzlement of over \$400 (§ 503). It was further alleged as to both offenses that the value of the property exceeded \$100,000 (§ 1203.045, subd. (a)) and defendant caused property damage in excess of \$50,000 (§ 12022.6, subd. (a)), and that the offenses constituted white collar crime consisting of a pattern of related felony conduct that involved the taking of more than \$100,000 (§ 186.11).

On February 10, 2009, defendant entered into a plea agreement wherein he pleaded no contest to grand theft and admitted the allegations that he caused property damage in excess of \$50,000 and the value of the property exceeded \$100,000 -- the latter of which rendered him ineligible for probation. As part of the plea agreement, it was agreed that defendant would be permitted to withdraw his plea to the enhancement and probation ineligibility allegation if the amount of restitution was subsequently determined to be less than \$100,000.

A protracted restitution hearing was held on December 4, 2009, March 5, 2010, and March 8, 2010. Rodriguez testified and provided documentation at the restitution hearing. He holds a credential as a chartered financial analyst and oversaw the records of expenditures made by defendant. Prior to the hearing, he had researched the amounts unaccounted for,

² Further undesignated statutory references are to the Penal Code.

including expenses associated with payroll for the apartment complex, construction and maintenance expenses, management fees, and insurance payments, and attempted to reconstruct the unauthorized transfers using forensic accounting techniques. He was not, however, provided with full access to defendant's corporate account records.

Defendant also testified and provided some documentation at the hearing. He disputed the total amount of restitution owed, claiming certain figures provided by Rodriguez did not account for his legitimate business expenses and those legitimate expenses should be offset. He acknowledged, however, that he did not have documentation, such as invoices, canceled checks, or bank statements, for many of those expenses. There was also a \$20,000 mathematical error, which Rodriguez conceded.

At the conclusion of the evidence, making adjustments for the mathematical error and offsets for those expenses that appeared to be legitimate, the prosecution claimed the total restitution amount should be \$111,640.09. Defendant argued that Rodriguez did not adequately investigate his figures and if he had -- and if he had used proper accounting methods -- all of the moneys would be accounted for as legitimate business expenses.

The trial court expressly found Rodriguez's testimony to be credible and uncontested by expert testimony. As for defendant's credibility, the trial court "severely questioned" his accuracy and provided, as an example of one of defendant's unbelievable statements, defendant's claim that he had certain

documentation but, despite numerous requests for time to obtain those documents, did not think he would be asked about them. Concluding defendant had failed to meet his burden in undermining the amount of restitution being claimed, the trial court set the amount at \$111,640.09. The trial court noted that this amount gave defendant "the benefit of the doubt on th[e] questionable amounts."

DISCUSSION

I

Certificate of Probable Cause

Preliminarily, we address the People's argument that the trial court's denial of defendant's request for a certificate of probable cause is fatal to his appeal. (§ 1237.5.) The People contend that defendant's appeal "seeks -- at least partially -- to withdraw his plea." Thus, they contend, defendant's appellate claims are "in substance a challenge to the validity of his plea" and require the issuance of a certificate of probable cause.

The first portion of defendant's appeal, however, challenges as an abuse of discretion only the amount of restitution ordered by the trial court. This claim does not require a certificate of probable cause. (See *In re Harrell* (1970) 2 Cal.3d 675, 706 [no certificate of probable cause required to challenge matters subsequent to plea, not challenging its validity].)

The second portion of defendant's appeal, that he is entitled to withdraw his plea, is actually seeking to *enforce*

the terms of the plea agreement, not challenge the plea's validity. No certificate of probable cause is required when a defendant "simply seeks to implement the full terms of the bargain by raising appellate challenges to the exercise of individualized sentencing discretion within the agreed maximum that were reserved by the agreement itself." (*People v. Buttram* (2003) 30 Cal.4th 773, 790.) In any event, defendant's argument is premised on successfully challenging the amount of restitution. Because we uphold the trial court's restitution order, we do not reach the issue of withdrawal of his plea, so the question of any requisite certificate of probable cause is moot.

II

Victim Restitution

Defendant argues the victim restitution order is excessive because he is entitled to offsets in the amounts of (1) \$15,000 for tile installation, (2) \$4,050 for payroll expenses, and (3) \$1,970 for payment for advertisement in the Apartment Guide, for a total of \$21,020. We find no error.

We review a challenge to the amount of victim restitution for abuse of discretion. (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469 (*Baker*).) As we have noted, "'A victim's restitution right is to be broadly and liberally construed.'" [Citation.]" (*People v. Moore* (2009) 177 Cal.App.4th 1229, 1231.) ""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.]” (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

“Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.] ‘If the circumstances reasonably justify the [trial court’s] findings,’ the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citation.]” (*Baker, supra*, 126 Cal.App.4th at p. 469.)

Here, the prosecution made a prima facie case for restitution in the amount \$172,902.09. Defendant was able, through evidence and stipulation, to establish he was entitled to offsets and adjustments, leaving the amount in victim restitution at \$111,640.09. Defendant contends the trial court erred in not setting off an additional (1) \$15,000 for tile installation, (2) \$4,050 for payroll expenses, and (3) \$1,970 for payment for advertisement in the Apartment Guide.

Although defendant argues that the only basis for denying the offsets is that he “did not keep perfect records,” his claims for these offsets were unsubstantiated by any meaningful

documentation at all. He relies substantially on his own testimony, which the trial court expressly found not credible, and the failure of the *victim* to provide additional documentation.

Tile Installation

Specifically, with respect to the \$15,000 claimed for tile installation, defendant provided two receipts from Carpet Depot in Oklahoma City, Oklahoma. One receipt was dated March 27, 2006, and purported to be a "down payment on tile" in the amount of \$3,500, showed a balance owed of "0," and had the notation "check #1049." That receipt indicated that Chris Walters would pick up the materials. The other receipt was dated July 26, 2006, and purported to be the "Final Payment on Tile & Carpet" in the amount of \$3,500 and had the notation "Visa." Defendant also supplied a notarized letter from the owner of Carpet Depot that stated defendant purchased approximately 30,000 square feet of ceramic tile "for an apartment project" at the Stoneridge Apartments address and paid in three to five payments totaling \$15,000 over the summer of 2006. Defendant testified that he paid for the tile with his credit card but did not have the credit card statement.

On the other hand, Rodriguez had testified that construction work for improvements would be paid by Stoneridge Acquisition, LLC, and its limited partner, Key Bank, not by defendant, and would be paid upon receipt of a release of lien to the contractor who performed the work, not to any supplier. Furthermore, although some construction work was being done at

the Stoneridge Apartments, there was no documentation that tile work was performed there. Nor did Rodriguez receive any statement or other proof as to what credit card or bank account was used. Moreover, Chris Walters Construction and the other construction company that worked on the apartments were paid their bid price in advance, and that price included materials.

Defendant failed to produce documentation that tile work was actually performed on the Stoneridge Apartments, that \$15,000 worth of tile was used, or to even prove his form of payment was from his own account. In light of testimony that payment for materials by defendant would be wholly contrary to Saybrook's standard business practices, and that no explanation of a reason for variance was provided, the trial court reasonably concluded defendant failed to meet his burden to disprove the amount of loss claimed.

Payroll Expenses

As to the \$4,050 for payroll expenses, defendant claimed two entries on his operating expenses spreadsheet and repeated on his reconciliation report, in the amounts of \$1,050 and \$3,000, established that those amounts were legitimate payroll expenses. The operating expenses spreadsheet merely lists the two amounts with corresponding dates of April 20, 2007, and April 23, 2007. In the reconciliation report, defendant merely noted "Invoice Reimburse" on the first entry and "Reimb 6/06 Payroll" on the second entry. The reconciliation report also includes an entry on April 12, 2007, for "4/15/07 Payroll" in

the amount of \$13,960.29, and an entry on April 30, 2007, for "4/30/07 Payroll" in the amount of \$8,600.00.

Defendant testified he was reimbursing himself for payroll from June 2006 because the Stoneridge account was not initially sufficiently funded and it finally had sufficient funds to reimburse him. According to defendant's operating expenses spreadsheet, he had paid almost \$20,000 of Stoneridge's payroll that had yet to be reimbursed. Rodriguez, however, had reviewed the financial statements, including payroll, and determined that the amounts transferred into and out of the accounts did not match and that other documentation showed transfers which, in sum, indicated defendant owed a significant amount to Stoneridge.

Indeed, defendant's reconciliation report also has two additional entries, both on April 16, 2007, which also purport to "Reimburse" "06" and "6/06" payroll, in the amounts of \$7,500 and \$7,750. The total amount defendant's own spreadsheet claims he paid for payroll on behalf of Stoneridge for the month of June 2006 is \$10,183.01; and by the end of June 2006, the spreadsheet reflects defendant was allegedly owed (by Stoneridge) only \$13,672.57 for payroll expenses he had allegedly advanced. (SCT 215) Yet, also by his own records, he had reimbursed himself, specifically for "6/06," a total of \$16,300 (which amount does *not* include the additional \$3,000 he failed to attribute to any specific time period but which he now disputes as well). (SCT 225) Thus, defendant's own inconsistent records undermine his claim.

In sum, the trial court could reasonably conclude that the two documents, prepared by defendant, failed to adequately establish that the two amounts, totaling \$4,050, were legitimate payroll expenses or that defendant was owed that amount in reimbursement for payroll a year earlier.

Apartment Guide

And finally, as to the \$1,970 for payment for advertisement in the Apartment Guide, defendant provided Rodriguez and the court with a photocopy of a check issued in that amount to "The Apartment Guide." In the memo line of the check, defendant wrote "May & June SROK." The check was written on defendant's company account, rather than the checking account associated with Stoneridge. Rodriguez noted it was possible that was a legitimate expense related to the Stoneridge Apartments, but that without further supporting documentation, it could not be verified.

Defendant testified that he wrote the check on his account because the Apartment Guide wanted immediate payment and that is the checkbook he carries with him. Defendant acknowledged he managed other properties, including some he listed in the Apartment Guide, but stated that none of those properties advertised in the Tulsa Apartment Guide. Defendant could not provide an invoice.

There is no documentation on the check or otherwise indicating the payment was made to the *Tulsa* Apartment Guide, not another area guide in which other properties defendant managed may have advertised.

Once again, the trial court could reasonably find defendant failed to meet his burden of proof.

We do not find an abuse of discretion.

DISPOSITION

The judgment is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ BLEASE _____, J.

_____ HOCH _____, J.