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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
RANDY SCOTT BARR,  
  
Defendant and Appellant.

C065777  
  
(Super. Ct. No.  
06F5260)

Following his convictions for embezzlement (Pen. Code, § 508)<sup>1</sup> and grand theft (§ 487, subd. (b)(3)), the court ordered defendant to pay \$40,000 in victim restitution and denied his section 17, subdivision (b) motion to reduce the felony convictions to misdemeanors. On appeal, defendant contends the

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

restitution order and denial of his motion constituted abuses of discretion. We affirm the judgment.

#### FACTUAL BACKGROUND

Between 2003 and 2006, defendant Randy Scott Barr worked at the Cheese Cakes Unlimited restaurant for his close friends, Nicholas Parker and Cory Gabrielson. In early 2004, they trained him for a position as manager, stressing the need for accurate daily record keeping, documenting daily sales and entering daily financial data in the computer accounting program.

Among defendant's duties as manager was daily bookkeeping. At the end of each day, the servers would turn in their cash, checks, and credit card slips. The server would generate an "X-out" ticket, a calculation of the total sales for each server generated by a program in the cash register. The X-out ticket was checked against the cash, check and credit receipts of the server to ensure they matched. As the manager, defendant collected these records and then created a "Z-out" ticket. The "Z-out" ticket was a calculation of the day's total sales generated by a program in the cash register. Defendant was responsible for verifying the server totals and ensuring that cash totals balanced. He then prepared a "daily envelope" containing all the checks, credit card slips, X-out and Z-out tickets, and wrote the daily sales amount on the front of the envelope. The cash was placed in a separate bag, which was deposited in the bank generally once a week. Cheese Cakes Unlimited retained the daily envelopes as part of their business

records. On February 20, 2006, defendant abruptly quit his job as manager. After his departure, Parker resumed responsibility for the financial records of the restaurant. Almost immediately, the actual daily cash amounts "increased drastically" from the periods reported during defendant's time as manager. Parker and Gabrielson then noticed several discrepancies between the slips in the daily envelopes and the amounts written on the outside. Parker examined all the records for the period of time when defendant was the manager and noted serious discrepancies on an almost daily basis. Parker and Gabrielson did a "recomputation" of the restaurant's daily sales figures for the period of March 13, 2004, through February 2006. The difference between the collective amount of revenue taken in, and the revenue reported by defendant, was \$44,141.66.

There were occasional innocent discrepancies noted in the accounting as a result of human error, missing server slips, comped meals and tips paid out to cooks and servers. Also, during some of the relevant time frame, there was another employee suspected of embezzling approximately \$5,500 in cash.

#### PROCEDURAL HISTORY

Following a jury trial, defendant was convicted of embezzlement (§ 508) and grand theft. (§ 487, subd. (b)(3).) Prior to sentencing, defendant moved to have his convictions reduced to misdemeanors under section 17, subdivision (b). Defendant's motion challenged the strength of the evidence at trial, and whether the entirety of the monetary discrepancies could be attributed to defendant. The motion pointed out

defendant's lack of any significant criminal history, his active family and community life, the support of his neighbors and his employment history. The motion also noted the financial burden a felony conviction would place on defendant's family. The People opposed the motion. The court considered the parties' written and oral arguments on the matter, and denied the motion.

Prior to imposing sentence, the court specifically asked the parties to address the direct victim restitution amount noting, "I did have concerns during the trial about the -- the People having established with sufficient certainty that particular amount [\$44,141.66]. There was another person accused of embezzlement during the same period of time, there were some poor accounting practices, I thought, and the jury didn't make any special finding about the amount embezzled. There were some missing server slips on different occasions, I feel comfortable that it's a high figure . . . ." The People argued the \$44,141.61 figure was appropriate and the exact number could not be determined with greater accuracy. Defendant argued there were a number of ways in which the amount testified to could be inaccurate, and thought the "fair and equitable" resolution was to set the amount of restitution "in the middle."

The court found the prosecution had "substantiated . . . the vast majority" of the \$44,141.66 figure, but felt it was appropriate to make a downward adjustment to account for some of the discrepancies noted. The court considered the evidence at trial and found \$40,000 was a fair and reasonable amount for restitution and approximately equaled the amount embezzled as

proved by a preponderance of the evidence. Defendant was granted three years felony probation, conditioned on serving 120 days in county jail.

#### DISCUSSION

##### I

Defendant contends the trial court abused its discretion in ordering him to pay \$40,000 in victim restitution. In making this argument, defendant claims any award of direct victim restitution would be speculative, there was no expert accountant to differentiate between losses due to accounting error and embezzlement, and there is no evidence of fraud. We find no abuse of discretion.

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 the defendant to make restitution to the victim in an "amount that is sufficient to fully reimburse" the victim for those losses. (§ 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.]" (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.) There is no abuse of discretion where there is a rational and factual basis for the amount of restitution ordered. (*Ibid.*) "[T]he 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.]' [Citation.]" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 686-87.)

The trial court may consider almost any kind of information in calculating restitution. (*People v. Phu* (2009) 179 Cal.App.4th 280, 283-284.) There is no requirement that the order 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.) A trial court may accept statements by the victims of the crimes about the value of the property stolen, and such statements constitute prima facie evidence of value for purposes of restitution. (*People v. Prosser, supra*, 157 Cal.App.4th at p. 690.) "'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. Tabb* (2009) 170 Cal.App.4th 1142, 1154.) Upon a prima facie showing of loss, the burden shifts to the defendant to rebut the victim's statement of losses. (*People v. Gemelli, supra*, 161 Cal.App.4th at p. 1543.)

Here, the trial testimony by Parker and Gabrielson reflected their calculations of their losses during the relevant period at \$44,141.66. This testimony was prima facie evidence of their loss. At sentencing, defendant made no argument

disproving the amount of the claim, rather he argued as a general proposition there were possible inaccuracies in the amount and posited the "fair and equitable" thing to do was to set the amount "in the middle." On appeal, defendant still makes no argument disproving the amount of claimed economic losses. At best, his arguments challenge the weight to be given the evidence supporting the claim. The weight of the evidence is not a matter within this court's province on review. (See *People v. Tabb, supra*, 170 Cal.App.4th at p. 1154.)

In reaching its determination of the amount of restitution due, the court found the prosecution had "substantiated . . . the vast majority" of the \$44,141.66 figure, but also felt given some of the noted discrepancies it was appropriate to adjust the amount downward. The court considered the victims' statements of their losses and determined \$40,000 was a fair and reasonable amount for restitution and approximately equaled the amount embezzled as proved by a preponderance of the evidence. The trial testimony provides a rational and factual basis for this determination. Accordingly, we find no abuse of discretion.

## II

Defendant next contends the trial court abused its discretion in denying his motion to reduce his felony convictions to misdemeanors under section 17, subdivision (b). He contends "[b]ecause there was no competent evidence to support any dollar amounts that the jury found - the jury findings were based on speculation and their felony findings should be struck. And certainly no proof of the element of

fraud." Defendant's argument, to the extent he makes one, again challenges the weight to be accorded the evidence. On appeal, we do not reweigh the evidence. Again, we find no abuse of discretion.

Section 17, subdivision (b) allows a trial court to choose between alternative felony or misdemeanor punishment based on the language of the charging statute. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974.) A court's discretion is to be exercised in accordance with the rules of law and not moved by sympathy or prejudice. (*Id.* at p. 977.) A party attacking a court's discretionary sentencing ruling must show that the decision was irrational or arbitrary. (*Ibid.*) "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citation.]" (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.) A trial court "'exceeds the bounds of reason'" when its decision goes beyond an individualized consideration of "'the offense, the offender, and the public interest.'" (*Id.* at p. 978.)

The record reflects the trial court considered the facts and circumstances of the case, defendant's lack of any significant criminal history, his social history, his active family and community life, the support of his neighbors, his employment history, whether defendant would be a danger to the community and the financial burden a felony conviction would place on defendant's family. After considering these factors,

the court denied the motion finding it was not in the interests of justice to reduce the felonies to misdemeanors. The court properly considered the relevant factors and acted to achieve legitimate sentencing objectives. Accordingly, we find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

MAURO, J.