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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

NOAH FRANK HERMAN SCHNABEL,

Defendant and Appellant.

C066887

(Super. Ct.
No. LF011108A)

Defendant Noah Frank Herman Schnabel entered a negotiated plea of guilty to resisting a peace officer causing death or serious bodily injury (Pen. Code, § 148.10) and driving with a blood alcohol content of .08 percent or more, a misdemeanor (Veh. Code, § 23152, subd. (b)) with a prior violation within the past 10 years (Veh. Code, § 23540), in exchange for no state prison at the outset, a lid of 12-months in county jail as a condition of probation, and dismissal of the remaining counts and allegations.

After a hearing and over defendant's objection, the trial court ordered defendant to pay direct victim restitution in the

amount of \$19,950. The court granted formal probation for a term of five years subject to certain terms and conditions including one year in county jail. Defendant waived his right to appeal except for the issue of victim restitution.

Defendant appeals, challenging the restitution order. He claims the prosecutor's representations concerning the exhibits she presented as to the amount the victim claimed for restitution are an insufficient factual basis to support the order. We affirm the judgment's order for victim restitution.

FACTS

On December 24, 2008, California Highway Patrol (CHP) Officer Michael Walling stopped defendant who was driving a pickup truck on Highway 99. Defendant smelled of alcohol, failed field sobriety tests, and tested at a blood alcohol level of 0.13 percent. As Officer Walling attempted to arrest defendant, defendant grabbed the officer by the shirt, ripping the uniform, and they both fell to the ground. Another officer intervened and defendant resisted. A third officer used a stun weapon but defendant continued to struggle. The officers were finally able to control defendant.

Officer Walling sustained an injury to his left ankle and lost consciousness for several minutes while he waited for medical aid. Officer Walling suffered a broken fibula of his left leg, requiring surgery. A metal plate and screws were inserted into his ankle to reposition his leg bone.

As a result of his injury, Officer Walling was off duty beginning December 24, 2008. At the preliminary hearing on April 7, 2009, Officer Walling testified that he returned to limited duty in mid-March but had another surgery scheduled to remove the plate and screws. The prosecutor represented that Officer Walling returned to duty on June 1, 2009.

On August 19, 2010, prior to the restitution hearing, the prosecutor filed a motion supporting victim restitution in the amount of \$19,850.05 for lost wages and \$99.95 for Officer Walling's uniform shirt. The prosecutor attached two exhibits reflecting the manner in which Officer Walling's pay was calculated. While worker's compensation payments covered Officer Walling's regular pay, he missed overtime and shift differential pay from December 24, 2008, to June 1, 2009, when he returned to duty. The first exhibit entitled, "Michael Walling's Pay Calculation Sheet" reflects the gross amounts for the officer's regular pay, overtime, and shift differential pay for each month from December 2007 through January 2009. The document's heading states, "(8/10/2010) Belinda Stevenson -- Walling Pay Calculation Sheet 1.xls." The second exhibit is exactly the same but includes the prosecutor's handwritten notes calculating the officer's total overtime pay from December 2007 to November 2008 as \$18,092.56 and total shift differential pay during the same time frame as \$1,757.49, for a combined total of \$19,850.05.

At the hearing on November 18, 2010, defendant had no objection to the amount sought for the ripped shirt. He did object to the amounts sought for overtime and shift differential pay as "excessive." He also objected to the computation.

Called by the prosecutor, CHP Sergeant Kim Abercrombie testified that one of her duties was the assignment of overtime positions for CHP officers who worked DUI checkpoints or highway maintenance projects which, at the time of Officer Walling's injury, were regularly and consistently available on a weekly basis because of existing grants and contracts. Prior to his injury, Officer Walling was on the rotation list for overtime and was consistently available for overtime and shift work assignments. Sergeant Abercrombie explained that shift differential pay is additional pay for time worked other than an 8:00 a.m. to 5:00 p.m. shift. Sergeant Abercrombie was not the custodian of records for the CHP and she did not prepare the prosecutor's exhibits.

Defense counsel stated that he needed the documents from CHP establishing Officer Walling's gross amount of overtime and shift differential pay. The prosecutor responded, "You don't need those papers because you got the actual figures here." The court queried, "What if you just happen to make a mistake" The prosecutor represented that she obtained the forms with the numbers from CHP's "custodian of records." The court asked, "How do we know that? [I]s she here to verify that she is the custodian?" Abercrombie was not the custodian. The

prosecutor stated as "an officer of the court, I can submit this on behalf of the victim." Defendant's attorney insisted that he "need[ed] to see the numbers."

Sergeant Abercrombie explained that fluctuation in the amounts from month to month depended on the types of jobs available. On cross-examination, Sergeant Abercrombie explained that regular pay, overtime pay, and shift differential pay was "computer generated" and that there was "a way to extrapolate" which the custodian of records could produce. Defendant's attorney attempted to show the "layers of hearsay" in documenting an officer's time. Defendant's attorney reiterated his request to see the documents. The prosecutor stated that the documents she submitted were what was sent to her by CHP. The prosecutor explained to the court that in calculating the overtime and shift differential pay the officer missed, she used a monthly average of both types of pay based on the amounts the officer earned the year prior to his injury and multiplied it by six, the number of months the officer missed. The prosecutor stated that she obtained the previous year's pay figures from the CHP and that the exhibits were generated by CHP except for the handwritten calculation of the averages which the prosecutor did herself. The prosecutor represented that Dorthea Wilson and Belinda Stevenson, who are involved in paying CHP personnel and are custodians of record, provided the documents. Defense counsel commented, "We don't know that" the figures on the exhibits came from the CHP custodian of records. The trial

court accepted the prosecutor's representations as from an "[o]fficer of the Court" and admitted the documents.

The prosecutor equated the lost overtime and shift differential pay with lost commissions, which are calculated during a 12-month period of time prior to the crime (Pen. Code, § 1202.4, subd. (f)(3)(D)). Unlike commissions, defense counsel argued that overtime and shift differential pay were not included by the Legislature in the statute. Defense counsel also argued the prosecutor's calculations were not correct because the unusual amount of overtime in August 2008 skewed the average of the total amount. Should the trial court award restitution, defense counsel argued that the amount should be \$13,642.30 in overtime pay and \$1,854.32 in shift differential pay, for a total of \$15,496, using December 2007 through June 2008, which corresponded to the months the officer was off work.

The trial court ordered defendant to pay victim restitution in the amount of \$19,950 stating, "[T]he statute does contemplate full compensation, and at this stage with the representation that those figures are actually from the CHP, it looks like [the prosecutor] has followed the procedure that is laid out in 1202.4 of the Penal Code"

DISCUSSION

Defendant contends the exhibits were insufficient to establish a prima facie showing of the victim's losses and to support the restitution order. Citing cases in which restitution was ordered based on the victim's opinion of the

value of property, defendant complains that "the restitution order does not rest at all on any statement by the victim." Defendant argues that the prosecutor's personal representation as to the origin of the exhibits is not evidence and cannot support the order.

The People initially argue that defendant failed to object to the nature of the proof used by the prosecutor in support of the victim's claim for restitution. The record reflects otherwise. The People claim in the alternative that evidence such as hearsay can be used as evidence at a restitution hearing, citing *People v. Cain* (2000) 82 Cal.App.4th 81 (*Cain*), and that the trial court properly ordered \$19,950 in victim restitution. We agree.

A.

Purpose of Victim Restitution

Article I, section 28, subdivision (b)(13)(A), of the California Constitution states it "is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer." Implementing this right of restitution, Penal Code section 1202.4, subdivision (a)(1), provides that a "victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime."

Penal Code section 1202.4 provides, in relevant part, as follows:

"(f) . . . [I]n every case in which a victim has 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, all of the following: [¶] . . . [¶] (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. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown."

"[T]he *primary* purpose of victim restitution is to fully reimburse the victim for his or her economic losses." (*People v. Jennings* (2005) 128 Cal.App.4th 42, 57.) "[V]ictim restitution is limited to economic loss [except as provided in § 1202.4, subd. (f)(3)(F) (psychological harm for section 288 victims)] but is unlimited in the amount that can be ordered. The collection procedures for a restitution order are clearly

meant to be civil. [Citations.] . . . [T]he Legislature intended victim restitution as a civil remedy rather than as a criminal punishment.'" (*People v. Millard* (2009) 175 Cal.App.4th 7, 35; Pen. Code, § 1202.4, subd. (i) [victim restitution order enforceable as if it were a civil judgment].) "[A] trial court may compensate a victim for any economic loss which is proved to be the direct result of the defendant's criminal behavior, even if not specifically enumerated in the statute.'" (*People v. Moore* (2009) 177 Cal.App.4th 1229, 1232.)

B.

Standard of Review

"The standard of review of a restitution order is abuse of discretion. "A victim's restitution right is to be broadly and liberally construed." [Citation.] "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.]' [Citation.]" (*People v. Baker* (2005) 126 Cal.App.4th 463, 467; *People v. Giordano* (2007) 42 Cal.4th 644, 663-664; *People v. Hudson* (2003) 113 Cal.App.4th 924, 927.) "In reviewing the sufficiency of the evidence, the "power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings.' [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not

proof beyond a reasonable doubt. [Citation.]” (*Baker, supra*, 126 Cal.App.4th at pp. 468-469.) “[T]he court’s discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole.

[Citations.] . . . ‘‘‘. . . [S]entencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes.”

[Citation.]’ [Citation.] [¶] This is so because a hearing to establish the amount of restitution does not require the formalities of other phases of a criminal prosecution.

[Citation.]’’’ (*Id.* at p. 470.) The scope of a trial court’s discretion when restitution is imposed as a condition of probation is broader. (*Giordano, supra*, 42 Cal.4th at p. 663, fn. 7.)

“Once the record contains evidence showing the victim suffered economic losses . . . this showing establishes the amount of restitution the victim is entitled to receive, unless challenged by the defendant.” (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

C.

Analysis

Here, the prosecutor filed a motion supporting victim restitution and attached two exhibits she received from CHP concerning the officer’s monthly gross regular pay, overtime pay, and shift differential pay beginning in December 2007

through January 2009. The prosecutor used a 12-month period of time prior to the offense to calculate the average monthly overtime and shift differential pay and multiplied those figures by six months, the number of months the officer was off duty as a result of the injury caused by defendant. Defendant did not offer contrary evidence. The trial court accepted the exhibits as having been generated by CHP based on the prosecutor's representations and accepted the prosecutor's method of calculating the victim's loss of overtime and shift differential pay.

The prosecutor's exhibits obtained from CHP established prima facie evidence of the officer's lost overtime and shift differential pay as a result of defendant's criminal conduct. Defendant had the opportunity to present contrary evidence, having had the prosecutor's exhibits for three months, but did not do so. Sergeant Abercrombie testified that Officer Walling was on the rotation list for overtime and was consistently available for overtime and shift work assignments which, at the time of his injury, were regularly and consistently available on a weekly basis because of existing grants and contracts. Sergeant Abercrombie also testified that although she was not the custodian of records, regular pay, overtime pay, and shift differential pay were computer generated and could be produced by the custodian of records. The prosecutor represented that she obtained the exhibits from CHP's custodian of records. The court could reasonably conclude that the prosecutor's exhibits

were reliable and provided an accurate accounting of the officer's lost overtime and shift differential pay. (See *Cain, supra*, 82 Cal.App.4th at pp. 87-88.) We conclude that the trial court did not abuse its discretion in awarding restitution in the amount requested by the prosecutor on behalf of the officer.

DISPOSITION

The judgment (order for victim restitution) is affirmed.

HOCH, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.