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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DALE WOODS THOMPSON,

Defendant and Appellant.

C067273

(Super. Ct. No. F4617)

An information accused defendant Michael Dale Woods Thompson of aggravated assault on a peace officer (Pen. Code, § 245, subd. (c); count I); assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count II); resisting a peace officer (Pen. Code, § 69; count III); unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a); count IV); in the alternative, receiving stolen property (Pen. Code, § 496, subd. (a); count V); and three prior prison terms (Pen. Code, § 667.5, subd.

(b)). A jury convicted him on count four, acquitted him on alternative count five, and deadlocked on the remaining counts.

The prosecution filed an amended information that added, in count VI, a charge of misdemeanor resisting a peace officer. (Pen. Code, § 148, subd. (a).) Defendant pleaded no contest to count VI and admitted one prior prison term allegation. In exchange, counts I, II and III were dismissed. Defendant was sentenced to state prison for two years on count IV plus one year for the prior prison term. A concurrent county jail term of one year was imposed on count VI. The court imposed a \$300 restitution fine (Pen. Code, § 1202.4), a \$300 restitution fine suspended unless parole is revoked (Pen. Code, § 1202.45), a \$60 court facilities assessment (Gov. Code, § 70373), and restitution to the owner of the stolen car in an amount to be determined (Pen. Code, § 1202.4, subd. (f); count IV). Defendant was awarded 346 days' custody credit and 346 days' conduct credit.

Defendant appealed to this court from the judgment and sentence. In an unpublished opinion, we rejected defendant's contention that the officers' conduct violated his Fourth Amendment rights. (*People v. Thompson* (Feb. 2, 2012, C065090).)

At a contested restitution hearing, defendant objected that imposing victim restitution following the jury deadlock would be unjust. The prosecutor understood defendant to further object that the costs incurred were not causally attributable to defendant's crime.

The trial court found that Detective Richard DiBasilio's injuries resulted from defendant's interference with DiBasilio's performance of his duties. The court ordered defendant to make restitution on count VI in the amount of \$8,253.42 to the "CSAC Worker's Comp Primary Pool," which had provided medical treatment for the injuries DiBasilio had received while arresting defendant. (But see Pen. Code, § 1202.4, subd. (k) [insurer not defined as direct victim].) Defendant did not obtain a certificate of probable cause. The parties concur that a certificate is not required.

On appeal, defendant contends the restitution order was erroneous because (1) the plea, which contemplated restitution to the owner of the stolen car, did not also contemplate restitution for the detective's injuries, (2) defendant's conduct was not a proximate cause of the injuries, and (3) the trial court failed to apply principles of comparative liability in calculating the amount of the award. We shall remand for further proceedings.

FACTS AND PROCEEDINGS

On May 27, 2009, the Calaveras County Sheriff's Department searched John Palmer's property for stolen cars. At a briefing prior to the search, defendant and Jimmy Guadagnolo were mentioned as associates of Palmer. A white sports car, which had been reported stolen, was also discussed in connection with defendant and Palmer.

At Palmer's residence, deputies recovered a different stolen car but they did not find Palmer or the white car. However, on the way back to the station, Detective Alan Serpa spotted a white car matching the description of the car discussed at the briefing. Serpa radioed Detectives DiBasilio and Wade Whitney, alerting them that the white car was headed in their direction.

Detective DiBasilio saw the white car speeding toward him and driving on, or just left of, the double yellow line. As the car passed his sport utility vehicle (SUV), DiBasilio recognized the driver as defendant. DiBasilio and Detective Whitney turned their SUV around to pursue the white car, but they could not catch it. DiBasilio stopped and asked a man sitting by the side of the road if he had seen the white car, and the man said it had sped by. Further up the road, DiBasilio asked a service technician if he had seen the white car. The technician said no cars had passed in the last 15 minutes. Knowing that defendant was somewhere in the area, and that he was associated with Guadagnolo and Palmer, the detectives decided to check Guadagnolo's residence, which was only a half-mile away.

Upon arriving at Guadagnolo's residence, Detectives Whitney and DiBasilio found the white car parked at the end of the driveway. Defendant, who was looking under the car's hood, stood up and made eye contact with DiBasilio. DiBasilio yelled, "Sheriff's Department, stop." Defendant moved toward the car door. Defendant got into the driver's side of the car and a female companion got into the passenger side. DiBasilio again

yelled at defendant to stop and grabbed onto the steering wheel through the open window in an effort to stop the car. While DiBasilio gripped the wheel, defendant drove the car in reverse at what DiBasilio opined was high speed. The motion of the car knocked DiBasilio to the ground.

While the car was moving backwards, Detective DiBasilio grabbed the car door and the steering wheel and was able to pull his upper body into the car. He believed his feet were off the ground. DiBasilio drew his firearm, pointed it in defendant's face, and ordered him to stop, at which point defendant took his foot off the accelerator. Defendant yelled at DiBasilio, "you shot me," but DiBasilio had not fired his gun.

Fearing that defendant was going to drive over Detective DiBasilio, Detective Whitney fired one shot into the white car. After hesitating for less than a second to see if the car would stop, Whitney fired additional shots until it did. Whitney fired eight shots in total, striking defendant several times and striking DiBasilio once in the shoulder.

Defendant testified that he went to Guadagnolo's residence to pick up Christine Carnahan. Defendant admitted that he had exceeded the speed limit on his way there. When he got to Guadagnolo's house, defendant tried to cool off the overheating car with a garden hose. While doing so, defendant saw an unmarked vehicle pull into Guadagnolo's driveway, but he could not tell that it was law enforcement. Defendant backed up the car to get away from Detective DiBasilio, because he did not

know who DiBasilio was. Defendant then recognized Detective Serpa and was planning to stop the car when he was shot.

Defendant's plea agreement was stated as follows:

"[THE PROSECUTOR]: . . . I think we have a resolution. I have a First Amended Information and it adds count [VI], a misdemeanor violation of Penal Code Section 148. The defendant is going to enter a non-contest plea to that count. [¶] He has already been convicted of [Vehicle Code section] 10851 by a jury. He is going to admit the prison prior that is still outstanding. [¶] We have agreed to stipulate to the midterm of two years on the 10851 plus the one year on the prison prior. [¶] We would submit to the Court if the Court wanted to impose any jail time or anything on the misdemeanor [Penal Code section] 148. [¶] It's my understanding [defendant] wants to waive a probation report and proceed to sentencing at this time.

"THE COURT: Okay. You may provide the Court with an Amended Information."

Neither the question of victim restitution in general, nor the number of victims, nor the amount of restitution was made a part of the agreement.

At sentencing a few moments later, the trial court addressed the issue of victim restitution as follows:

"THE COURT: . . . [¶] . . . You will also be required to pay restitution to the owner of the vehicle in Count [IV] . . . [¶] . . . in an amount to be determined. [¶] That restitution is pursuant to 1202.4 subdivision (f) of the Penal Code." There

was no discussion of restitution for Detective DiBasilio's injuries.

DISCUSSION

We first consider defendant's contention the restitution order was erroneous because his plea to resisting a peace officer did not contemplate restitution for the detective's injuries. Our analysis is aided by *People v. Villalobos* (2012) 54 Cal.4th 177 (*Villalobos*), which was decided after briefing in this case was completed.

Villalobos advises courts to "distinguish 'two related but distinct legal principles' implicated" in cases such as the present one. (*Villalobos, supra*, 54 Cal.4th at p. 181.) "First, 'before taking a guilty plea the trial court must admonish the defendant of both the constitutional rights that are being waived and the direct consequences of the plea.' [Citation.]" (*Ibid.*) Because Detective DiBasilio suffered damage at the hands of defendant during the course of his criminal conduct, victim restitution to DiBasilio was mandatory (Pen. Code, § 1202.4, subds. (a), (f); *Villalobos*, at pp. 180-181) and, thus, a direct consequence of defendant's plea (see *Villalobos*, at pp. 181-182).

The record makes plain that defendant was not advised of the possibility he would be ordered to make restitution to Detective DiBasilio. The trial court should have advised defendant of this consequence.

Because the advisement is not constitutionally mandated, the trial court's error is forfeited absent timely objection. (*Villalobos, supra*, 54 Cal.4th at p. 182.) Defendant's objection at the restitution hearing was timely, because restitution for Detective DiBasilio's injuries had not been recommended in the probation report or discussed at sentencing. Although the objection failed to clearly "distinguish" the "'two related but distinct legal principles'" elucidated by *Villalobos* (*id.* at p. 181), that failure may be ascribed to the lack of clarity that previously had existed in this area of the law. We therefore exercise our discretion to consider the advisement issue notwithstanding any deficiency in defendant's timely objection.

We shall remand to the trial court for a determination whether the misadvisement was prejudicial. (*Villalobos, supra*, 54 Cal.4th at pp. 182, 184.) A showing of prejudice requires defendant to demonstrate that it is reasonably probable he would not have entered his plea if he had been told about the victim restitution for Detective DiBasilio. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on another point in *Villalobos*, at p. 183.)

"The second principle is the constitutional due process requirement that 'both parties, including the state, must abide by the terms of [a plea] agreement' and '[t]he punishment may not significantly exceed that which the parties agreed upon.' [Citation.]" (*Villalobos, supra*, 54 Cal.4th at p. 182; see also *People v. Walker, supra*, 54 Cal.3d at p. 1024.)

The Attorney General claims defendant forfeited any contention with respect to the scope of the plea agreement because his only objection was that his criminal conduct did not cause the detective's workers compensation expenses. We disagree.

Although the prosecutor represented that the defense was objecting on this ground, defense counsel added a further objection. Counsel noted that defendant had pleaded to count VI to take advantage of an agreement for a mid-term sentence on count IV and argued that, if the prosecution had believed the case *was worth substantial restitution, it would have retried the deadlocked counts in lieu of accepting a plea to the new count VI.* This effectively suggested that the post-plea motion for *substantial* victim restitution exceeded the scope of the parties' agreement. We thus consider defendant's argument on its merits.

Defendant was advised that, in connection with the new count VI, there "could be up to \$1,000 in fines, up to \$1,000 to the restitution fund, with a minimum \$100 restitution fine and a minimum \$1400 probation, parole revocation restitution fine [sic]." Defendant was further advised that, in connection with count IV on which the jury had found him guilty, there "could be up to a \$10,000 restitution fine." The Attorney General reasons that, because defendant had been advised that he faced up to \$11,000 in total restitution, *including victim restitution and restitution fines*, the order to pay \$8,253.42 for Detective DiBasilio's injuries does not significantly exceed what the

parties had agreed upon. (Citing, e.g., *People v. Collins* (2003) 111 Cal.App.4th 726, 732; see *Villalobos, supra*, 54 Cal.4th at p. 182.)

However, *Villalobos* has since explained that "'restitution' and 'restitution fines' are distinct, nonoverlapping penalties and that *advisement of one does not entail advisement of the other*. (See [Pen. Code,] § 1202.4, subd. (a) [describing defendant's obligation to pay 'restitution']; *id.*, subd. (b) [describing a 'restitution fine' as a 'separate and additional' penalty].)" (*Villalobos, supra*, 54 Cal.4th at p. 185, italics added.) Thus, the advisement of the \$10,000 restitution fine on count IV does not entail advisement that defendant could face \$8,253.42 in victim restitution on count VI.

But this does not mean that the parties *agreed* there would be *no* victim restitution. Rather, as *Villalobos* explains, a failure to make a statutorily mandated punishment an express term of a defendant's plea agreement does not render imposition of such punishment a violation of the plea agreement. (*Villalobos, supra*, 54 Cal.4th at p. 184; see *In re Moser* (1993) 6 Cal.4th 342, 353-357; *In re McClellan* (1993) 6 Cal.4th 367, 379-380.) Instead, it means the parties left the amount of victim restitution to the discretion of the trial court. Defendant's contention that the victim restitution award exceeded the scope of the plea agreement has no merit. The point is that the plea agreement made no mention one way or the other regarding victim restitution for the injuries to Detective DiBasilio. That was a subject that was outside the agreement.

This brings us to defendant's contentions that (1) his conduct was not a proximate cause of Detective DiBasilio's injuries, and (2) the trial court failed to apply principles of comparative liability in calculating the amount of the award. Neither claim has merit.

Defendant reasons the causal connection between his conduct and Detective Whitney's use of his gun was "too tenuous" to constitute a proximate cause of Detective DiBasilio's injuries. We disagree.

"There are two aspects of causation at play here: cause in fact (also called direct or actual causation), and proximate cause. 'An act is a cause in fact if it is a necessary antecedent of an event.' [Citation.] . . . [¶] The question defendant's argument actually raises is whether there is a *proximate* causal connection between his criminal conduct and the [injury to the detective]. As our Supreme Court has explained in the context of tort law, '[t]o simply say . . . that the defendant's conduct was a necessary antecedent of the injury does not resolve the question of whether the defendant should be liable. In the words of Prosser and Keeton: "[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" [Citation.] Therefore, the law must impose limitations on liability other than simple causality. These

additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. [Citation.] As Justice Traynor observed, proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." [Citation.]" (*People v. Jones* (2010) 187 Cal.App.4th 418, 424-425 (*Jones*).)

"There is no reason why the various principles involved in determining proximate causation under California tort law should not also apply in awarding victim restitution under California criminal law. As we have noted, under the governing statute, '[t]o the extent possible, [a] 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'

[Citation.] The causal connection embodied in the words 'as the result of' is certainly indicative of direct causation. Just as in tort law, however, the law must impose limitations on liability for victim restitution other than simple direct causality or else a defendant will face infinite liability for his or her criminal acts, no matter how remote the consequence." (*Jones, supra*, 187 Cal.App.4th at p. 425.)

Defendant claims his actions were not a proximate cause of Detective DiBasilio's injuries because Detective Whitney's firing a gun at defendant was an independent intervening cause.

""In general, an 'independent' intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be 'independent' the intervening cause must be 'unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.' [Citation.] On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability. 'A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. [Citation.] "[] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.'"" [Citation.]" (*Jones, supra*, 187 Cal.App.4th at p. 427.)

In this case, defendant was convicted of unlawfully taking a vehicle, the white sports car. Defendant was working on the stolen car when the officers came upon him. It might reasonably have been contemplated that officers would search for, find, and attempt to recover a stolen car. It might further have been contemplated that the officer would attempt recovery by reaching through an open window, seizing the steering wheel, and reaching

for the ignition switch that, it turned out, was not present on the steering column. Defendant should have foreseen the possibility of harm to an officer who reaches through the window, is knocked to the ground as the car is put in motion, and then manages to pull his upper body through the window while the car remains in motion. (*Jones, supra*, 187 Cal.App.4th at p. 427.)

As noted, the precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act. (*Jones, supra*, 187 Cal.App.4th at p. 427.) Thus, defendant need not have foreseen that a fellow officer would attempt to stop the car by firing shots in a manner that endangered and ultimately injured Detective DiBasilio. (*Ibid.*) It is enough that defendant should have foreseen the possibility of harm to DiBasilio if defendant put the car in motion--or allowed it to remain in motion--while DiBasilio was hanging precariously out the window.

In any event, it is eminently foreseeable that, during a rapidly unfolding police situation, an officer may perform any number of hazardous acts that might not be performed under less emergent circumstances. The mere fact Detective Serpa had prudently determined it was too dangerous for *him* to fire a gun from *his* vantage point, which was not the same as Detective Whitney's, does not absolve defendant of liability for restitution to Detective DiBasilio.

Defendant claims the trial court erred when it failed to apply principles of comparative liability when it calculated the amount of victim restitution. We disagree.

Defendant's argument is based on *People v. Millard* (2009) 175 Cal.App.4th 7 (*Millard*), in which the defendant crashed his SUV into a motorcycle being driven by the victim. The defendant was convicted of driving under the influence while committing an act forbidden by law and causing bodily injury to another person. (Veh. Code, § 23153, subd. (a); *Millard, supra*, at p. 13.) In determining the amount of victim restitution, the trial court considered comparative fault principles. The trial court noted that the defendant's offense was a "negligence[-]type crime" and characterized the defendant's conduct as a "simple illegal left turn." (*Millard*, at p. 37.) The trial court also found that the victim was driving at high speed, was driving an unsafe vehicle, was untrained in motorcycle driving, and had taken no evasive maneuvers to avoid the collision. (*Ibid.*) The trial court ultimately found that the victim was "25 percent comparatively at fault for the accident" and concluded that his "restitution amount should be reduced by 25 percent to reflect his comparative negligence in causing the accident." (*Id.* at p. 24.)

In contrast to *Millard*, defendant's crime was not a result of his negligence but was an intentional act that caused injury to the victim. Detective DiBasilio orally informed defendant that he was with the sheriff's department and repeatedly demanded that defendant stop. Ignoring DiBasilio's orders,

defendant put the car in reverse and dragged DiBasilio with him. Because defendant put DiBasilio in great danger, Detective Whitney felt compelled to act. Because defendant's intentional interfering and resisting DiBasilio in his line of duty led to DiBasilio's injuries, *Millard* does not support the application of comparative fault principles in this case.

Moreover, *Millard* is distinguishable because the present victim, Detective DiBasilio, was not negligent and is entitled to full restitution. Because DiBasilio did nothing that would reduce his entitlement to restitution for his losses, the court had no occasion to apply principles of comparative fault.

DISPOSITION

The restitution order is reversed and the matter is remanded to the trial court for a determination whether the failure to advise defendant of the requirement that he make restitution for the detective's injuries was prejudicial.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.