

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVE DOUGLAS JONES,

Defendant and Appellant.

C067372

(Super. Ct. No. P07CRM1117)

On remand from this court, in which we directed the trial court to "make a clear statement of the calculation method it used" to determine that defendant Steve Douglas Jones should pay \$4,468.40 in victim restitution (*People v. Jones* (2010) 187 Cal.App.4th 418, 420, 427 (*Jones I*)), the trial court changed its mind about the reasonableness of the victim's claim and entered an order increasing restitution to \$5,237.03.

Defendant contends the victim restitution order on remand constitutes an abuse of the trial court's discretion. We disagree and shall affirm the order.

BACKGROUND

Jones I And The Remand

In view of defendant's contention the trial court exceeded the scope of remand, we first examine the underlying dispute and our opinion in *Jones I*.

The victim in this case sought restitution for damage to her camper resulting from a motor vehicle collision with the defendant, in connection with which he pled no contest to driving under the influence of alcohol. (*Jones I, supra*, 187 Cal.App.4th at p. 420.) While it was being repaired, the victim's camper was unavailable for use as a residence in her construction business. (*Id.* at pp. 420-421.) The victim was initially told by the repair shop that repairs would "probably" take "a couple of months, no problem"; in fact, the repairs took nine months to complete. (*Id.* at p. 420.) The victim testified at the restitution hearing that she had incurred lodging and meal expenses of \$6,343.42 during the nine months the camper was unavailable, but she sought reimbursement of only \$3,171.71 -- half of the total loss-of-use damages -- because "cheap motels are about twice as expensive as camping, and eating out is at least twice as expensive as cooking in your own kitchen." (*Id.* at pp. 420-421.)

The victim also sought restitution for damage to her car bumper that occurred in the parking lot of the courthouse when she appeared at a hearing in the defendant's case. (*Jones I, supra*, 187 Cal.App.4th at p. 421.)

At the restitution hearing, the trial court ordered defendant to pay the victim restitution of \$4,468.40. (*Jones I, supra*, 187 Cal.App.4th at p. 421.) The court said it “ha[d] a problem” with the victim’s claim for lodging and meals during the entire nine-month period that the camper was out of commission for repairs; it told the victim “[y]ou . . . have a duty . . . to mitigate your damages” and nine months to repair the camper was “unreasonable in the Court’s view.” (*Id.* at pp. 421, 422.)

Although the amount of the victim’s claim effectively “cut the [nine-month expense] figure in half,” the court instead “doubled the lodging and food figure and then divided it by three months versus nine months to come to what was reasonable.” (*Jones I, supra*, 187 Cal.App.4th at p. 421.) The court did not otherwise disclose what sum it considered appropriate for food and lodging while the camper was being repaired, or otherwise explain its calculation methods or the basis of its restitution award. (*Id.* at pp. 421-422.)

In his appeal from the restitution award in *Jones I*, defendant urged us to reverse the order because the trial court failed to “identify what part of [the restitution award] represented the loss from food and lodging expenses” and may have erroneously taken the full amount paid by the victim for food and lodging while the camper was unavailable (\$6,343.42) and divided it by three (for three months instead of nine months); he also argued the court abused its discretion in beginning its calculation by doubling the sum actually sought by

the victim. (*Jones I, supra*, 187 Cal.App.4th at p. 422.) Finally, defendant challenged the court's restitution award for damage to her car because there was no causal relationship between the damage and his crime. (*Id.* at pp. 422-423.)

In our opinion in *Jones I*, we agreed that, because the court failed to make the requisite "'clear statement of the calculation method used,'" to determine the restitution award, reversal and remand was required. (*Jones I, supra*, 187 Cal.App.4th at pp. 423, 427.) We wrote that "there appears to be no logical reason for 'doubling' the amount of restitution [the victim] sought for food and lodging, before reducing the amount to reflect the reasonable length of time the court apparently believed it should have taken to repair the camper, rather than the time it actually took. Essentially [the victim] admitted she would have spent money on food and lodging expenses even if she had been able to use her camper, and it was her estimate that it cost her twice as much to stay in motels and eat out as it would have cost her to use her camper. If the trial court concluded [the victim] was entitled to compensation for the additional amounts she had to spend on food and lodging for only three months, rather than nine months, then the court should have divided by three the figure [the victim] actually sought in restitution for food and lodging -- \$3,171.71 -- rather than starting with the entire amount [she] spent on food and lodging during the nine-month [repair] period." (*Id.* at p. 424.)

Regarding defendant's challenge to the restitution award for repairs to the bumper of the victim's car damaged in the court parking lot, we could not determine from the record whether the trial court actually awarded restitution for this item. (*Jones I, supra*, 187 Cal.App.4th at p. 424.) But inasmuch as we were remanding the case for "further proceedings consistent with this opinion" (*id.* at p. 428), we directed the trial court to determine on remand whether the defendant's criminal conduct actually constituted a proximate cause of the damage to her car bumper for purposes of ordering restitution for its repair (*id.* at pp. 425-427).

Hearing On Remand

On remand, the court issued a tentative ruling, increasing restitution to the victim from \$4,468.40 to \$5,237.03. That increase is chiefly attributable to the victim's claim for food and lodging expenses: the court ordered defendant to pay \$3,171.71, equal to one-half of the victim's food and lodging expense for the entire nine-month period during which the camper was being repaired.

In a written motion to "conform" any new restitution order to our opinion in *Jones I*, defendant argued that increasing the amount of restitution ordered after a successful appeal is a denial of due process and akin to punishing him for a successful appeal; he also argued the court's tentative ruling exceeded the scope of the limited remand.

The court conducted a hearing and rejected defendant's objections to an increase in the restitution amount. In the

court's view, the first restitution order effectively "superimposed [the Court's] own opinion that the repair took longer than it should have. That was an erroneous conclusion on the part of this Court." In contrast, the court declared, it now accepts and "adopts" the victim's testimony that the camper repairs took nine months, and that her food and lodging restitution recovery for that period should be half of the total \$6,343.42 incurred, or \$3,171.71.

DISCUSSION

The California Constitution provides that "all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer." (Cal. Const., art. I, § 28, subd. (b).) Statutory provisions implementing this directive "have been broadly and liberally construed." (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1525.)

In relevant part, Penal Code¹ section 1202.4, subdivision (f)(3) provides that the victim restitution award "shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following:" Ensuing subparagraphs of section 1202.4 list certain categories of loss awards which are specifically authorized. But, because

¹ Further statutory references are to the Penal Code.

of the "including, but not limited to" language, a trial court may compensate the 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. (See *People v. Mearns* (2002) 97 Cal.App.4th 493, 499.)

"The trial court's allocation of restitutionary responsibility must be sustained unless it constitutes an abuse of discretion or rests upon a demonstrable error of law.'" (*People v. Draut* (1999) 73 Cal.App.4th 577, 581, quoting *In re S.S.* (1995) 37 Cal.App.4th 543, 550.) "A trial court abuses its discretion when it determines an award amount using other than 'a rational method that could reasonably be said to make the victim whole' or when an award is arbitrary or capricious." (*Draut*, at p. 582, quoting *People v. Thygesen* (1999) 69 Cal.App.4th 988, 992; see also *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172-1173.) The term "economic losses" is entitled to an "expansive interpretation." (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1133.)

Did the trial court abuse its discretion in ruling on remand that the victim may recover food and lodging expenses incurred over the entirety of the nine-month period she could not use the camper because it was being repaired?

No: the victim carried her initial burden under section 1202.4 by showing that food and lodging expenses she paid were a direct consequence of defendant's criminal conduct. Nothing more was required to justify the award:

"Subdivision (f) of the restitution statute states that, where a

crime results in an economic loss to the victim, the court *shall* order the person convicted of that crime to pay *full restitution* to the victim for his loss, unless the trial court finds 'compelling *and* extraordinary' reasons to order a lesser award." (*People v. Draut, supra*, 73 Cal.App.4th at p. 581.)

Defendant properly admits in this appeal that there is no California authority for the proposition that section 1202.4 requires a crime victim to mitigate his or her damages. Indeed, some restitution provisions are arguably inconsistent with requiring a victim to mitigate her damages, such as those allowing the court to choose between awarding as restitution for damaged property its market value or its feasible repair cost, without requiring the court to choose the lower-cost alternative. (§ 1202.4, subd. (f)(3)(A); Welf. & Inst. Code, § 730.6, subd. (h)(1); see *In re Dina V.* (2007) 151 Cal.App.4th 486, 489.)

Even were we to agree with defendant that the court must apply civil damages principles of mitigation, his argument misconceives that burden of proof. A civil plaintiff's failure to mitigate damages is an affirmative defense which must be pleaded and proved in a civil action. (*Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 86, disapproved on another point in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.) If we were to apply civil mitigation principles to restitution, when a valid item of economic loss was shown by the victim in a restitution proceeding, it would be incumbent upon the defendant to

introduce evidence that the victim unreasonably failed to mitigate or avoid the damage. Absent such evidence, the proof of loss would stand unrefuted, and a restitution award based on it would be upheld if it was rationally calculated and supported by substantial evidence. (See *People v. Thygesen, supra*, 69 Cal.App.4th at p. 993.)

Here, the parties do not dispute that her loss of the use of the camper was a direct consequence of defendant's criminal conduct. The victim introduced evidence she incurred \$6,343.42 in food and lodging expenses during the nine-month period the camper was out of commission for repairs. She sought to recover only half of that amount, or \$3,171.71, reasoning that she would likely have incurred something approaching that amount for groceries or other expenses even if she had the use of the camper. Defendant cross-examined the victim regarding her grocery purchases, but introduced no evidence that the victim could have avoided or minimized those expenses by having a different shop perform the repairs. Since the victim's food and lodging expenses were a proximate cause of the damage caused to her camper by defendant, and reasonably incurred by the victim, there is no basis for disturbing the award.

We also reject defendant's contention that the instant restitution order is void because it "was in excess" of the remand we ordered in *Jones I*. In *Jones I*, this court expressly "reversed the restitution order and remanded for the court to make a proper restitution order on a record that includes the required statement" (*Jones I, supra*, 187 Cal.App.4th at p. 427),

and "for further proceedings consistent with this opinion" (*id.* at p. 428). This disposition did not require the trial court on remand to adhere to its prior reasoning. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 885, 887, pp. 946-949, and cases cited therein.)

Nor, as defendant suggests, does the "law of the case" doctrine operate to prevent the trial court from concluding on remand that the victim is entitled to recover her expenses for the nine months the camper was out of commission, because it previously denied recovery for the full nine months. The doctrine of "law of the case" deals with the effect of a first appellate decision on a subsequent retrial or appeal in the same case: "[T]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 301; *Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363, 376.) Not every word that appears in an appellate opinion becomes the law of the case: only "a principle or rule of law necessary to the decision" must be adhered to in subsequent proceedings. (*People v. Stanley* (1995) 10 Cal.4th 764, 786.)

Here, we do not read our decision in *Jones I* as depending in any way on the trial court's prior determination that the victim had a duty to mitigate her damages. We wrote only that "[i]f the trial court concluded that [the victim] was entitled to

compensation for the additional amounts she had to spend on food and lodging for only three months, rather than nine months," then the court appears to have used an erroneous formula. (*Jones I, supra*, 187 Cal.App.4th at p. 424.) Whether the trial court was correct in its conclusion that the victim was entitled to only three months' food and lodging expenses was not determined in *Jones I*, and it was neither necessary nor essential to our determination that the trial court failed to "make 'a clear statement of the calculation method used'" as required. (*Id.* at p. 423; see *People v. Stanley, supra*, 10 Cal.4th at p. 786; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, §§ 473-477, pp. 531-537.)²

DISPOSITION

The victim restitution order is affirmed.

We concur: ROBIE, Acting P. J.

BUTZ, J.

MAURO, J.

² Finally, we reject defendant's argument that the court's ruling was "legally invalid" because it cited case law that cannot be cited as authority and other "irrelevant" authority. We review the trial court's ruling, not its reasoning and, if sound legal grounds exist for the trial court's ruling, we will not reverse it because the court reasoned erroneously from published or unpublished opinions. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 346-349, pp. 397-402, and cases cited therein.)