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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE,

Plaintiff and Appellant,

v.

STEVEN ANDREW DEHLE,

Defendant and Appellant.

C067384

(Super. Ct. No.
MCYKCRBF05406)

"Defendant Steven Andrew Dehle pleaded no contest to vehicular manslaughter. (Pen. Code, § 192, subd. (c)(1); further undesignated statutory references are to the Penal Code.) In exchange, the court dismissed three other counts related to the incident in question and it was agreed defendant would not be sent to state prison for more than four years. Imposition of sentence was suspended and defendant was placed on probation for three years on the condition, among others, that he serve 365 days in the county jail. Following a hearing, the

trial court ordered defendant to make restitution to the decedent's surviving spouse in the amount of \$622,750.45." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1383 (*Dehle*)). On defendant's appeal to this court, we reversed the restitution order because the trial court allowed the restitution hearing to go forward without the presence of the prosecutor. (*Id.* at pp. 1390-1391.)

In February 2011, following a contested restitution hearing in which the prosecutor participated, the trial court ordered defendant to pay \$737,804.45 to the surviving spouse and \$1,500 to the County of Siskiyou, for a total of \$739,304.45.

Defendant again appeals contending (1) the trial court erred reversibly when it refused to consider the decedent's comparative fault, and (2) his trial counsel rendered ineffective assistance when he failed to challenge the trial court's determination that defendant owed restitution for the entire amount of attorney fees the surviving spouse had incurred in a civil wrongful death action and settlement.

The People cross-appeal contending the trial court erred when it reduced defendant's restitution obligation by \$197,383.55, the amount the surviving spouse received in the civil settlement. We shall affirm the judgment.

FACTS

Portions of our statement of facts are taken from our published opinion in *Dehle*. (*Dehle, supra*, 166 Cal.App.4th at pp. 1383-1386.)

The Offense

On an evening in February 2005, California Highway Patrol officers arrived at a motor vehicle accident scene and found a Jeep resting on its side. John Bodine's head was crushed under the Jeep's roll bar.

The officers spoke to defendant, who was the driver, and his two backseat passengers. Defendant told an officer that the Jeep's throttle had stuck, causing the Jeep to accelerate. He swerved to avoid a pole and lost control of the Jeep at which point it overturned. An officer detected an odor of alcohol while talking to defendant. Defendant admitted that he had consumed several beers after the accident occurred but claimed he had not consumed any alcohol before the accident. He failed a field sobriety test; his blood alcohol content was 0.11 percent.

It appears that none of the occupants of the Jeep was wearing a seatbelt.

The two passengers told an officer that defendant did not drink any alcohol before the accident but, after the accident, he drank four to five beers in quick succession. The officer detected the odor of alcohol while talking to each of the passengers.

In a written statement prepared for the probation report, defendant explained that "the gas pedal stuck on the Jeep[.] I tried to get it unstuck as this had worked in the past." Perhaps in response to preliminary hearing testimony that the Jeep could have been stopped by depressing the clutch, defendant explained that, "having just put a new engine in the Jeep I didn't want to blow it up," evidently by removing the load from the fast-turning engine. Defendant did not address the alternative of turning off the ignition switch.

First Restitution Hearing

In October 2006, after the terms and conditions of defendant's probation were set, the prosecutor asked the trial court to "expressly authorize [counsel for the decedent's surviving spouse, Debra Bodine] to conduct the restitution hearing on behalf of the victim. . . . [H]is knowledge of the case will allow much more full and accurate airing of the issues involved than if I handle it with him assisting me." Defendant objected that private counsel should not be allowed to perform the functions of the district attorney. The trial court ruled: "First of all, I think it's necessary and appropriate for the district attorney's office to participate in the restitution portion of these proceedings, and so without necessarily implying that [Bodine's counsel] doesn't have a right to have a presence either, I think it's the district attorney's responsibility to be present. [¶] So I expect the district

attorney's office to continue to participate in that." The prosecutor replied, "Oh, absolutely."

At a conference in November 2006, the prosecutor renewed his request to have Bodine's counsel represent Bodine at the restitution hearing, stating that her counsel was "in a much better position to concisely present the case than" was the prosecutor. Defendant again objected.

In January 2007, the court conducted the restitution hearing. Neither the district attorney nor any of his deputies were present. Again, defense counsel objected to the prosecutor's absence but this time the trial court overruled the objection. The court reasoned that the hearing was limited to the issue of direct victim restitution, and "I just kind of think we're wasting a resource to have some other person sit at the counsel table today."

Bodine's counsel called three witnesses: the decedent's employer, a retired economics professor, and Debra Bodine. Defendant called a certified public accountant.

In April 2007, the trial court found that Debra Bodine had suffered economic loss as a result of defendant's criminal conduct. Defendant's liability was reduced by the amount of a civil wrongful death settlement. Although it was undisputed that Debra Bodine's attorney received \$100,000 and costs in fees for pursuing the settlement, the trial court did not award Debra Bodine attorney fees because her attorney "declined to submit an itemized statement setting forth actual time spent on the case"

and, therefore, the court did not have "sufficient information to determine the reasonableness of the fees."

Following a subsequent hearing in which the district attorney's office participated, defendant was ordered to pay \$500 per month toward his restitution obligation. Payment of those sums was made an express condition of defendant's probation.

Second Restitution Hearing

Following our remand, a restitution hearing was scheduled for September 2010. The prosecution's witnesses were present, but defendant did not appear. The prosecution asked for an order requiring defendant to pay for its expert witness fees for the hearing. At the contested restitution hearing in February 2011, the court ordered defendant to pay \$1,500 to the County of Siskiyou for the missed appearance.

At the February 2011 hearing, evidence was presented on the issue of what Debra Bodine had lost as a result of John Bodine's death. (*People v. Giordano* (2007) 42 Cal.4th 644, 657-662.) There was no issue of what John Bodine may have lost prior to his death and no issue of personal economic loss he may have sustained following his death. (*People v. Runyan* (2012) 54 Cal.4th 849.)

Defendant was ordered to make restitution to Debra Bodine in the amount of \$737,804.45. Further relevant facts are set forth in the Discussion.

DISCUSSION

I

Defendant contends the trial court erred when it refused to consider the issue of comparative fault in fixing the appropriate amount of restitution.

Background

In *Dehle*, this court considered the prejudice that may have flowed from the district attorney's absence from the first restitution hearing. We remarked: "The district attorney, having left the proceedings, did not allow the People to be heard on several issues that may have affected a fair and just result on the question of victim restitution. While we express no opinion on the resolution of these issues, they include, among others, the following: given the fact that it appears that the decedent was not wearing a seatbelt at the time of the accident, whether the decedent's own negligence contributed to his death and whether defendant should be required to make restitution for economic harm caused in part by the victim himself." (*Dehle, supra*, 166 Cal.App.4th at pp. 1388-1389.)

At the second restitution hearing, defendant's counsel argued that *Housley v. Godinez* (1992) 4 Cal.App.4th 737 allows the trier of fact to "establish[] a figure for comparative negligence, wherein somebody had not complied, basically is not seatbelted in and that was in some way attributable to the injuries [*sic*]. I think there's left plenty of evidence for the court to conclude that that is the case. [¶] As the trier of

fact the court is in a position to put whatever percentage figure it wants on that comparative fault issue."

When the prosecutor asked for "two minutes" to address the issue of comparative fault, the trial court responded, "[o]n the comparative fault, you know what, I don't believe it's appropriate. I am not going to consider it. [¶] . . . [¶] . . . So that is where we are. [¶] . . . [¶] . . . I know that the court of appeals [*sic*] suggested that maybe--I am familiar with the case that [defendant's counsel] gave me. I am familiar with the concept. I think that I'm going on restitution law and making the victim whole."

The prosecutor responded: "Factually, though, your Honor, Mr. Bodine did have a statutory duty to have a belt on. But under [Vehicle Code section] 235--27315(D), [defendant] had the exact same duty to insure that everyone in his vehicle was belted. [¶] So to say one breached the duty necessarily says the other one did. So we can't really assign fault either way. Both breached the same duty. So it's a wash."

The trial court invited both counsel to "put more points" on the record after a recess. Following the recess, the court asked defense counsel whether he had concluded his arguments. Defense counsel indicated he had no further argument.

In its ruling, the trial court did not reduce the restitution award based on John Bodine's comparative fault. Nor did it expressly address the prosecution argument that the concurrent negligence of driver and passenger was "a wash."

Analysis

In his opening brief, defendant conceded that the trial court "apparently accepted the prosecution's theory [that "the corresponding duties" of driver and passenger "nullified each other"] as its authority to 'not consider'" comparative fault; in defendant's view, this theory was "without merit or legal basis." In his reply brief, defendant backtracks and claims the trial court "summarily rejected the concept of comparative analysis without regard to the evidence." The reply claim has no merit. The court's receipt of the prosecutor's factual argument and solicitation of further arguments from both sides make plain that comparative fault was not rejected summarily. Rather, the court impliedly rejected comparative fault after soliciting and hearing the proffered arguments.

Vehicle Code section 27315, the Motor Vehicle Safety Act, provides in relevant part: "(d) (1) A person shall not operate a motor vehicle on a highway unless that person and all passengers 16 years of age or over are properly restrained by a safety belt. . . . [¶] . . . [¶] (e) A person 16 years of age or over shall not be a passenger in a motor vehicle on a highway unless that person is properly restrained by a safety belt."

Defendant's claim that the prosecution's theory "was without merit or legal basis" is based on *Twohig v. Briner* (1985) 168 Cal.App.3d 1102 (*Twohig*), which remarked in dictum that, "[s]ince the 'seat belt defense' in this state places the burden of 'buckling up' on the passenger [citation], at minimum,

an owner/operator should not remove installed auto safety belts." (*Id.* at p. 1109.)

Twohig is inapposite, because it did not consider a statute similar to the later-enacted Private Passenger Motor Vehicle Safety Act, which now assigns a portion of "the burden of" ensuring seat belt usage to the owner/operator rather than the passenger. (Stats. 1992, ch. 122, § 2, operative Jan. 1, 1996.) Instead, *Twohig* considered a common law defense applicable in civil cases. (*Twohig, supra*, 168 Cal.App.3d at p. 1109; see *Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 342-344.)

Noting the trial court's stated intent to apply restitution law, which is based on "making the victim whole," defendant claims making Debra Bodine whole requires an exercise of discretion, which, he argues, the court did not do with respect to comparative fault. We disagree. The court's implied finding that the negligence of driver and passenger washed out, as argued by the prosecutor, is a valid exercise of the court's discretion. There was no error.

The trial court's ruling finds ample support in the evidence. This is not a case in which an owner/operator made seatbelts unavailable or furnished ones that were inoperable. Nor is it a case in which a victim refused an owner/operator's request to wear a seatbelt. Instead, it is a case in which operable belts were made available, but neither driver nor passenger made sure that they were fastened. The trial court's implied finding that both driver and passenger bore responsibility for that choice, and that their comparative

faults as to seatbelt usage were a wash, is supported by substantial evidence.

II

Defendant contends his trial counsel rendered ineffective assistance when he failed to challenge the trial court's determination that defendant owed restitution for the entire amount of attorney fees the surviving spouse had incurred in obtaining the civil wrongful death settlement.

Background

In the civil litigation, the Estate of John Bodine recovered \$300,000 from defendant's insurer. From that sum, \$100,000 was paid to estate counsel as a contingency fee; and \$2,616.45 was paid to estate counsel for costs. Debra Bodine, as personal representative of the estate, received the remaining \$197,383.55.

In *Dehle*, this court's consideration of prejudice that may have flowed from the district attorney's absence from the first restitution hearing identified the issue "whether it was just to deny Debra Bodine restitution for her attorney fees in the underlying action against the insurance carrier because her attorney refused to produce his billing records." (*Dehle*, *supra*, 166 Cal.App.4th at p. 1389.)

At the second restitution hearing, the trial court ordered defendant to make restitution to Bodine for her attorney fees.

Analysis

Defendant claims his trial counsel rendered deficient performance when he failed to object to the order to make restitution for the attorney fees, to the extent that the fees were attributable to Bodine's civil recovery of noneconomic damages, such as pain and suffering, which are not proper subjects of restitution in this case. (See § 1202.4, subd. (f) (3) (F) [allowing restitution for noneconomic losses only in cases of felony violation of § 288].)

In his opening brief, defendant claimed trial counsel failed to pursue this point because he wrongly believed that victims are not entitled to restitution for attorney fees under any circumstances. (See § 1202.4, subd. (f) (3) (H) [actual and reasonable attorney fees are a proper item of restitution].) Defendant relied on trial counsel's cryptic statement: "Looks like the actual cost [of the underlying litigation] was 2,600. So the, essentially, the attorneys for what looks like relatively small amount of work received a huge windfall, which is the nature of personal injury work. [¶] But that's not [defendant's] problem if the decedent's estate chose to pay somebody to accomplish settlement. I am not aware of any provision of the law that allows for a deduction [from the \$300,000 offset against restitution due to the prior civil recovery] for attorney fees based on pursuit of restitution."

However, in a passage overlooked by defendant but cited by the Attorney General, trial counsel acknowledged that the

"[r]estitution statute says that the reasonable costs of services employed by the victim in order to recover are part of restitution." Trial counsel's theory was that the \$100,000 contingency fee for a recovery of \$300,000 was not reasonable. Defendant's claim that the record on its face shows trial counsel's unawareness of the law (e.g., *People v. Rosales* (1984) 153 Cal.App.3d 353, 361) must fail.

Defendant retorts that trial counsel "provided no evidence or law for the court to make a determination of reasonableness." But counsel noted at the second restitution hearing that the civil attorney had "refused at the prior proceeding to disclose any of his records with regard to how he earned that money and asserted the attorney/client privilege."

On appeal, defendant claims trial counsel "should have pursued" the attorney's records in order to determine, first, whether the \$100,000 fee for the \$300,000 settlement was "'reasonable'"; and second, whether the settlement documents or some other portion of the attorney's work product contains an "apportionment between economic and noneconomic damages." This claim is not properly before us.

" "[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418.)

" "[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In this case, trial counsel was not asked to explain why he did not challenge the civil attorney's invocation of attorney/client privilege. Nor does defendant suggest any reasonable attorney would have known that the claim of privilege could be overcome. Thus, defendant's claim that trial counsel was ineffective for having failed to pursue the records of the underlying civil matter in the face of the claim of privilege, and that counsel thus "argued unreasonableness without evidence or law" to support his argument, must be asserted in habeas corpus proceedings. (See *People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

III

In their cross-appeal, the People contend the trial court abused its discretion when it reduced defendant's criminal restitution obligation by \$197,383.55, the net amount of Debra Bodine's recovery in the underlying litigation. We disagree.

Background

As noted, the Estate of John Bodine recovered \$300,000 from defendant's insurer in the wrongful death settlement. After deduction of attorney fees and costs, Debra Bodine received \$197,383.55.

In ordering defendant to make restitution to Debra Bodine, the trial court reduced its gross restitution award by \$197,383.55, because there had been "enough of a showing" that the restitution order reflected the same items of loss as the civil recovery. As to the People's argument that defendant had the burden of proving that the criminal restitution order was duplicative of an amount already paid in the civil settlement, the court stated "we respectfully disagree."

Analysis

Settlement payments made to a victim by a defendant's insurer are an offset to the defendant's restitution obligation to the extent that those payments are for items of loss included in the restitution order. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 168.)

We review the trial court's restitution order for abuse of discretion. (*People v. Giordano, supra*, 42 Cal.4th at p. 663.)

The People claim the trial court abused its discretion because there was no substantial evidence that the \$197,383.55 payment from the insurer, or any portion thereof, was for items of loss later included in the restitution order. However, the only item of evidence discussed by the People in their cross-appeal is the "Disbursal Statement" from Debra Bodine's civil attorney. The People correctly note that the disbursal statement does not include the requisite information.

However, the trial court also had before it the "Settlement and Release of All Claims" between Debra Bodine and defendant. That document states that the settlement extends to "all claims for any kind of injury, damage or death directly or indirectly arising out of the incident that occurred on February 26, 2005." Thus, the settlement included economic damages. Neither the parties at the hearing, nor the Attorney General on appeal, have identified what portion, if any, of the settlement had been for losses later omitted from the criminal restitution order.

When reviewing a claim that a trial court abused its discretion, because its ruling is not supported by substantial evidence, the appellate court "must review the evidence in the light most favorable to the [judgment], and must presume every fact the [fact finder] could reasonably have deduced from the evidence." (*People v. Boyer* (2006) 38 Cal.4th 412, 479; see *id.* at pp. 479-480.)

Here, the economic loss compensated for in the restitution order was more than twice the amount of the civil settlement. The trial court reasonably could deduce from the evidence that the civil settlement was for items of loss included in the criminal restitution order. (*People v. Boyer, supra*, 38 Cal.4th at pp. 479-480.) Had Debra Bodine's counsel focused his civil collection efforts on noneconomic damages, for the purpose of minimizing a future offset against a criminal restitution order, he would have had an incentive to produce sufficient records to show this had occurred. Instead, Debra Bodine's counsel did the opposite, claiming his records were shielded by attorney/client privilege.

"If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citing *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The fact the court could have deduced that a portion of the civil settlement was for noneconomic damages does not warrant reversal of the judgment.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ MAURO _____, J.

_____ HOCH _____, J.