

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

(Butte)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON JESS GARCIA,

Defendant and Appellant.

C067451

(Super. Ct. Nos.  
CM031221, CM032412,  
CM032599)

In sentencing defendant Jason Jess Garcia to state prison for offenses in three separate cases (CM031221, CM032412, CM032599), the trial court ordered defendant to pay restitution in the amount of \$15,600 to cover a victim's losses from a burglary defendant had not been charged with. Defendant appeals, contending the restitution order must be stricken as unauthorized. In the alternative, he claims insufficient evidence supports the amount of the order above \$650, the value of a returned nonfunctional laptop which was found in the motel

room of defendant and codefendant Misty Gilbert. Finally, he claims there was insufficient evidence that his conduct was a substantial factor in rendering the \$650 laptop nonfunctional.

The People respond that the restitution order to the particular victim was authorized in part because defendant entered a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*) with respect to the dismissed counts, one of which was receiving stolen property, to wit, credit cards and a laptop, the victim's laptop, which was found in defendant and codefendant's possession more than 15 months after the burglary of the victim's home. The People concede that although the evidence supports a finding that the victim's total losses from the burglary amounted to \$15,600, there is no evidence linking defendant to the burglary. The People argue that by failing to object, defendant has forfeited his claim concerning the value of the returned nonfunctional laptop and that substantial evidence supports an order of \$650. We will order modification of the victim restitution order, reducing it to \$650.

#### FACTS AND PROCEEDINGS

On January 4, 2009, Patti A. discovered that her home had been burglarized and she called the sheriff's department. She lost "two laptop computers, a plastic jar of rare coins and miscellaneous rings." Patti A. signed, under penalty of perjury, an itemized list of missing property valued at \$15,600.

On August 29, 2009, sheriff's deputies found defendant to be in possession of a stolen car that defendant claimed he had

bought from someone other than the owner. Defendant produced the bill of sale but the person listed was never found.

(CM031221)

On December 18, 2009, a surveillance tape from Wal-Mart showed defendant taking a wallet and cell phone belonging to Ronnie J. When the wallet was returned, \$500 was missing.

(CM032599)

On April 14, 2010, Michelle B. discovered that her car had been broken into and that her purse and credit cards which she had left inside the car were missing. The next day, defendant attempted to use one of Michelle B.'s credit cards at a store. An investigation of the vehicle burglary led sheriff's deputies to defendant's motel room which he shared with codefendant Gilbert. A search of their room revealed, among other things, one of Patti A.'s laptops, which did not work. Patti A. valued the laptop at \$650. (CM032412)

Defendant entered a negotiated plea of no contest to receiving a stolen vehicle (CM031221), identity theft (CM032412) and grand theft (CM032599) in exchange for dismissal of the remaining counts and allegations [vehicle theft (CM031221), receiving stolen property, to wit, credit cards and a laptop computer, vehicle burglary, and an on-bail enhancement (CM032412)] with a *Harvey* waiver.

The probation report recommended that defendant pay victim restitution to Patti A. in the amount of \$650, to reimburse Patti A. for the stolen but returned nonfunctional laptop. Defendant told the probation officer that he had purchased the

laptop from his cousin for \$150 but denied knowing it was stolen.

On the date originally set for sentencing, the prosecutor asked the trial court to impose a restitution award of \$15,600 to cover Patti A.'s entire loss from the burglary. Sentencing was continued.

Five months later, the prosecutor renewed his request for \$15,600 in restitution to Patti A. Defense counsel declared a conflict stating "[t]hat's a crime that was committed by another client" whom defense counsel had represented and that defendant was "not responsible." Defense counsel added that "[t]here's no evidence whatsoever other than the fact that he had one of the computers that [defendant] had anything to do with it." Defense counsel was relieved and new counsel appointed. Sentencing was continued.

A month later, at sentencing, the defendant's new attorney asked the trial court retain jurisdiction to modify the amount. He said: "I'm not sure that I have ever at any time indicated since I took over this file that there was a dispute. I think that to the extent that there would be any dispute, and I don't know that there is, that the Court's retaining jurisdiction to modify that order would address that satisfactorily." The court stated, "We did reach a conclusion on how to proceed on the issue of restitution that was in dispute." New counsel submitted the matter of restitution to Patti A. in the amount of \$15,600 but asked the court to retain jurisdiction to modify the order if necessary.

The court sentenced defendant to state prison for an aggregate term of four years four months, imposed various fees and fines, awarded custody credit, ordered defendant to pay victim restitution to Patti A. joint and severally with Gilbert in the amount of \$15,600, and reserved jurisdiction to modify that amount and to determine the restitution amount for the remaining victims.

### DISCUSSION

Crime victims have the constitutional right "to receive restitution directly 'from the persons convicted of the crimes for losses they suffer.' [Citation.]" (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).) "A victim's restitution right is to be broadly and liberally construed." (*People v. Mearns* (2002) 97 Cal.App.4th 493, 500; see also *People v. Moore* (2009) 177 Cal.App.4th 1229, 1231.)

Penal Code section 1202.4, subdivision (f)(3) provides that the court shall order the defendant to make restitution to the victim in "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: [¶] (A) Full or partial payment for the value of stolen or damaged property. The value of the stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible." (See also *Giordano, supra*, 42 Cal.4th at p. 654.)

For a defendant sentenced to prison, “[c]ourts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction.” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049 (*Woods*); see also *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247 (*Lai*) [construing “criminal conduct” language in Pen. Code, § 1202.4, subd. (f)].)

In *Harvey*, the court concluded that facts of dismissed charges which are “transactionally related” to the admitted charge may be relied upon in sentencing but held that “facts underlying, and solely pertaining to” dismissed counts cannot be relied upon “absent . . . any contrary agreement.” (*Harvey, supra*, 25 Cal.3d at p. 758, italics omitted; see also *People v. Moser* (1996) 50 Cal.App.4th 130, 132-133.) The “contrary agreement” is a *Harvey* waiver.

Here, defendant initialed a written *Harvey* waiver that said: “(Harvey Waiver) I stipulate the sentencing judge may consider my prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations or cases when granting probation, ordering restitution or imposing sentence.” Thus, the court could consider the dismissed counts for purposes of sentencing and for purposes of victim restitution in this case. (Pen. Code, § 1192.3, subd. (b); *People v. Beck* (1993) 17 Cal.App.4th 209, 214-216.)

The dismissed count of receiving stolen property reflected defendant’s criminal conduct involving Patti A. While there was

no evidence he burglarized her home, the evidence reflected that he possessed her laptop that was stolen in the burglary. The crime of receiving has been "considered as even more serious than the theft itself." (*In re Plotner* (1971) 5 Cal.3d 714, 726.) Defendant's receipt of the stolen laptop was related to the theft of it when the victim's home was burglarized. The trial court did not err in ordering victim restitution for the laptop.

Defendant misplaces his reliance on *Woods, supra*, 161 Cal.App.4th 1045, *Lai, supra*, 138 Cal.App.4th 1227, and *People v. Percelle* (2005) 126 Cal.App.4th 164. Each case is distinguishable; none of the defendants in those cases entered a negotiated plea bargain with a *Harvey* waiver which expressly allowed the trial court to consider dismissed counts in ordering victim restitution. (*Woods*, at p. 1048; *Lai*, at pp. 1234-1235; *Percelle*, at p. 168.)

Contrary to defendant's claim, the amount of \$15,600 is supported by substantial evidence. Patti A. signed, under penalty of perjury, an itemized list and submitted the list to law enforcement. The prosecutor referred to the list, in asking the court to order \$15,600: "In the police report is an itemized listing from one of the victims, Patti [A.], signed under penalty of perjury. And I can count up the total amount taken from her \$15,600 from her and her husband." Although defendant's original attorney challenged the amount, his substituted counsel did not.

Although there is sufficient evidence to support the victim's claim of \$15,600 value, there is no evidence to support defendant's responsibility for the entire amount. There is no evidence reflecting that defendant was the burglar. There is no evidence defendant was in possession of any of the items stolen in the Patti A. burglary other than the laptop. The laptop had not been recently stolen when defendant was found to be in possession of it--almost 16 months separated the burglary and defendant's possession of the laptop. Defendant's criminal history includes two arrests for possession of burglary tools and a misdemeanor theft conviction but those offenses occurred several years before the burglary of Patti A.'s home. Defendant's convictions are mostly drug-related. Defense counsel who declared a conflict disputed that defendant was responsible for the burglary.

While it might appear on this record that counsel, for some reason that is not apparent from the record, was willing to accept a restitution order for the full amount subject to the court's agreement to continue its jurisdiction to change the amount of restitution, the simple fact of matter is that, on this record, there is no evidence defendant was involved in the burglary or received any property stolen during the burglary other than the laptop. Under the circumstances, if indeed the record could be read to find that defendant's counsel acceded to the higher amount, there was no evidentiary basis for his doing so and, if he did, defendant suffered the ineffective assistance of counsel.

We conclude that there is insufficient evidence to support the trial court's order making defendant responsible for the victim's total loss of \$15,600. We do find, however, sufficient evidence to support the trial court's order making defendant responsible for the victim's loss of her laptop even though it was returned because, when it was returned, it was not functional.

Defendant complains there is no evidence to show that he could have prevented the damage to the victim's laptop or that his possession of the laptop was a substantial factor in causing her loss. The probation report listed the laptop by model number and included the victim's estimation of value at \$650. Defendant did not challenge the amount. He told the probation officer that he paid his cousin \$150 for the laptop; he did not say he paid for a nonfunctional laptop. The trial court did not abuse its discretion in awarding restitution in the amount of \$650. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048.) Defendant misplaces his reliance upon *People v. Holmberg* (2011) 195 Cal.App.4th 1310. In *Holmberg*, the defendant challenged the probation report's recommendation on restitution, arguing he was not responsible for the victim's losses, but after a hearing, the court concluded otherwise. (*Id.* at pp. 1315-1318.) Here, defendant's new counsel did not challenge the probation officer's recommendation and there was no hearing. *Holmberg* is inapplicable.

## DISPOSITION

The judgment is modified, reducing the amount of victim restitution to Patti A. to \$650. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.