

**NOT TO BE PUBLISHED**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

RAMON GARCIA-CORNEJO,

Defendant and Appellant.

C068104

(Super. Ct. No. CM032795)

Defendant Ramon Garcia-Cornejo pleaded no contest to second degree robbery in the theft of marijuana plants, admitted he was armed with a firearm, and also admitted being an accessory after the fact to the crime of evading an officer causing injury. Sentenced to six years in state prison, defendant also was ordered to pay, jointly and severally with his codefendant, restitution totaling \$171,652 to two people injured in the car crash that followed his codefendant's attempt to evade police.

On appeal, defendant contends his trial counsel provided ineffective assistance at sentencing by (1) failing to urge the

court to impose a lesser sentence, and (2) failing to object to the restitution order.

The latter contention has merit. We shall reverse the restitution order and remand for the trial court to conduct a restitution hearing.

### **FACTUAL AND PROCEDURAL BACKGROUND**

At the time of these events, the robbery victim was tending a marijuana garden belonging to individuals with recommendations for medicinal use of marijuana. Surprised by a group of three men armed with "long" guns, one of whom called out in Spanish "Don't move or we will shoot you," the victim ran away and called 911. The intruders removed 74 marijuana plants from the garden and left a shotgun at the scene. Police responding to the 911 call passed a white van that smelled strongly of marijuana. The police gave chase; the van drove into oncoming traffic and crashed into a sedan.

Three men fled the van, which later proved to be stolen. Marijuana plants and guns were found inside the van; the guns also proved to have been stolen in the San Jose area. The three occupants of the sedan struck by the van were taken to the hospital. One, Ishmael Siapco, suffered serious injuries.

Defendant and codefendant Jose Francisco Rios-Magana were apprehended the next day. Rios-Magana's injuries were consistent with his having been the driver of the van at the time of the collision.

Upon his arrest, defendant admitted he had been hired in San Jose to harvest marijuana; he learned that the marijuana was stolen when he arrived at the garden and joined the others in carrying plants to the van.

Defendant and Rios-Magana were both charged with second degree robbery (as to which it was alleged they were armed during the crime) and receiving stolen property. Rios-Magana was also charged with evading an officer and defendant was charged with being an accessory after the fact to the evasion.

Defendant pleaded no contest to second degree robbery and being an accessory after the fact, and admitted the arming enhancement. (Pen. Code, §§ 211, 32, 12022, subd. (a)(1).)<sup>1</sup> He agreed his maximum potential state prison term sentence would be six years eight months.

### ***Imposition of the Upper Term Sentence***

The presentence probation report, which the court read and considered, noted that defendant entered this country illegally a month before the robbery, and had no criminal record in the state.

In a written statement, defendant denied knowing in advance that the "merchandise" he had been hired to move was marijuana, denied going into the garden, and denied any knowledge of firearms at the scene. He made the plea agreement because his

---

<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant's sentencing on March 29, 2011.

attorney told him he was an accomplice, and "it was the only thing [he] could do." Defense counsel said he was "prepared to submit the matter" following the trial court's stated intention to sentence defendant to six years in prison, adding that defendant "would like the Court to know that he merely came up here to go to work. He's always worked. And that's all he wanted to do was work. He didn't know what he was getting into when he got into the van in Sacramento."

Explaining its decision to sentence defendant to six years in prison (including an upper term sentence on the robbery conviction), the court noted that the crime involved the threat of great bodily injury; the victim was particularly vulnerable because he was surprised, at home, and outnumbered; the manner in which the crime was carried out indicated planning and professionalism, by the number of people sufficient to move a large quantity of marijuana, the crime involved a large quantity of contraband; and defendant is currently convicted of a crime (being an accessory after the fact in Rios-Magana's evasion of police) for which a concurrent sentence is being imposed.

### ***Victim Restitution Order***

The presentence report prepared by the probation department did not recommend defendant be ordered to pay victim restitution. It recommended only that the court reserve jurisdiction to determine amounts of restitution due to Timothy Miller and Sharon Smith, owners of the stolen firearms recovered from the van. That occupants of the sedan struck by Rios-Magana

had suffered injuries was mentioned in the probation report under the heading "Collateral Information"; they were not identified as victims; and no information was provided regarding the medical expenses they had incurred.

At the sentencing hearing, however, the prosecution argued that, because defendant was an accessory after the fact to Rios-Magana's evasion of police, defendant should be jointly and severally responsible with Rios-Magana for "the restitution amount for Ishmael Siapco and Marian Knoefler."<sup>2</sup> Acknowledging that the presentence report included no information about the expenses incurred by these victims, the prosecutor announced that the amount of their expenses was now "available": "The amount ordered on behalf of Ishmael Siapco . . . was \$170,000. And for Marian Knoefler . . . , it was \$1,652.23. We'd also ask that that also be subject to future modification. And also we would ask that the Court reserve restitution for Gina Siapco<sup>[3]</sup> as well as Sharon Smith."

Without objection from defense counsel, the court ordered defendant to pay restitution to Timothy Miller and Sharon Smith, in an amount to be determined, and ordered him to pay restitution "jointly and severally" with codefendant Rios-Magana

---

<sup>2</sup> Knoefler was the driver of the sedan struck by Rios-Magana; Ishmael Siapco was a passenger in the sedan.

<sup>3</sup> Gina Siapco was a second passenger in the sedan struck by Rios-Magana.

to Ishmael Siapco of \$170,000 and to Marian Knoefler of \$1,652.23. Defense counsel made no objection.

### **DISCUSSION**

Defendant contends on appeal his attorney provided ineffective assistance at the sentencing hearing, by failing to advocate that he receive a lesser sentence, and failing to object to the restitution order. Only the latter contention has merit.

A criminal defendant has the right to the assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" (*Ledesma*, at p. 215.)

The burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) "'In 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." [Citations.] 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.'" (In re Harris (1993) 5 Cal.4th 813, 832-833; see also *People v. Ledesma*, supra, 43 Cal.3d at pp. 216-217; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].)

In reviewing a claim of ineffective assistance on appeal, we accord great deference to trial counsel's tactical decisions (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070), and reverse "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission'" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22).

If the defendant fails to establish the prejudice component, the reviewing court need not determine whether counsel's performance was deficient. (See *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1712.)

## I. Argument Regarding the Court's Sentencing Choice<sup>4</sup>

Defendant contends his counsel rendered ineffective assistance in failing to advocate for a shorter term and in failing to bring to the court's attention defendant's lack of a prior criminal record, history of gainful employment, expression of remorse, and claim that he did not knowingly agree to participate in illegal behavior.

We first note that, during his brief argument, defense counsel did in fact alert the court to the fact of defendant's work history, and defendant's assertion that he had no advance knowledge of his cohorts' illegal plans.

Assuming counsel's failure to advance any further argument amounted to deficient performance, we find no reasonable probability the trial court would have given defendant a lesser sentence based on the factors it cited in aggravation (rule 4.421) and mitigation (rule 4.423). (See also rule 4.420(b) [in exercising discretion to choose among upper, middle or lower term, court shall consider circumstances in aggravation or mitigation].)

A single aggravating factor may support a sentencing choice. (*People v. Hall* (1994) 8 Cal.4th 950, 963-964). Here, many of the factors relating to the crime weighed in favor of

---

<sup>4</sup> Defendant also suggests counsel could have urged the court to dismiss the weapon enhancement. This contention is forfeited, however, because he provides neither supporting argument nor citation to authority. (Cal. Rules of Court, rule 8.204(a)(1)(B); further rule references are to the California Rules of Court.)

the court selecting the upper term. Defendant's crime was serious, involved the threat of great bodily harm (rule 4.421(a)(1)); and he used a firearm (rule 4.421(a)(2)) to rob the victim at a time the victim was particularly vulnerable, i.e., alone at home (rule 4.421(a)(3)) and outnumbered by armed men (rule 4.421(a)(4)). Stealing a van and guns in advance of the crime, and traveling a great distance to commit it, showed planning and sophistication (rule 4.421(a)(8)), and the crime involved a large quantity of marijuana (rule 4.421(a)(10)). Finally, defendant was convicted here of another crime that merited a consecutive sentence (rule 4.421(a)(7)).

Nor are the "mitigating" facts defendant contends his counsel should have argued particularly helpful to his cause. For example, defendant emphasizes his lack of a prior criminal record in the United States (rule 4.423(b)(1)), but the probation report shows he only arrived in this country one month before his arrest for the present crime. Defendant's claim he did not knowingly agree to participate in illegal behavior (rule 4.423(a)(1), (4)) is inconsistent with his admission to the arresting officers that he was an active participant in this crime (rule 4.423(b)(3)).

We presume, as we must, that the trial court properly considered all of the relevant factors in making its decision to sentence defendant to the upper term, and conclude there is no reasonable probability that the court would have imposed a

lesser sentence had defendant's trial counsel argued as defendant now proposes.

## **II. Failure to Object to the Restitution Order**

Under section 1202.4, subdivision (f), with exceptions not applicable here, "[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 . . . in an amount established by court order, based on the amount of loss claimed by the victim . . . or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . ."

A defendant is entitled to a restitution hearing to dispute the determination of the amount of restitution. (§ 1202.4, subd. (f)(1).) As recently explained, "'At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss.

[Citations.] "Once . . . [ . . . the People have] made a prima facie showing of [the victim's] loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.'" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*); see also [*People v.*] *Giordano* [(2007)] 42 Cal.4th [644,] 664 ['The burden is on the party seeking restitution to provide an adequate factual basis for the

claim.'].)" (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172 (*Chappelone*).)

We review the trial court's restitution order for abuse of discretion. (*Chappelone, supra*, 183 Cal.App.4th at p. 1173.) Where there is a factual and rational basis for the order, an abuse of discretion will not be found. (*Millard, supra*, 175 Cal.App.4th at p. 26.) When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination. (*Millard*, at p. 26; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681; see also *People v. Baker* (2005) 126 Cal.App.4th 463, 468-469.)

Defendant contends the court erred, as a matter of law, in requiring him to provide restitution to the car crash victims, inasmuch as he neither evaded the police nor aided and abetted Rios-Magana in his doing so; he was convicted only of being an accessory *after* the evasion. He also contends the restitution award is unsupported by substantial evidence; indeed, the record shows no evidence at all to support the trial court's restitution order.

The People respond that defendant has forfeited his objections to the restitution order since counsel failed to object that (among other things) the evidence was insufficient

to support the restitution order, and failed to seek a hearing on the amount of restitution. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075; but see *In re K.F.* (2009) 173 Cal.App.4th 655, 660 [statement in *Brasure* is dictum, and “[s]ufficiency of the evidence has always been viewed as a question necessarily and inherently raised in every contested trial of any issue of fact, and requir[es] no further steps by the aggrieved party to be preserved for appeal”].)

We conclude, rather, that defense counsel’s failure to object to the restitution order, under the circumstances, constitutes representation that falls below an objective standard of reasonableness. As we have explained, the burden is on the party seeking restitution to provide an adequate factual basis for the claim. (*Chappelone, supra*, 183 Cal.App.4th at p. 1172; *Millard, supra*, 175 Cal.App.4th at p. 26 [a prima facie case for restitution is made by the People based “on a victim’s testimony on, or other claim or statement of, the amount of his or her economic loss”].) Here, defense counsel’s failure to object when no facts were offered in support of the restitution claim falls below an objective standard of reasonableness, and nothing in the record suggests a rational tactical purpose for counsel’s failure to object to a restitution award that was utterly unsupported by any evidence. (*People v. Frye, supra*, 18 Cal.4th at pp. 979-980.) Finally, on this nonexistent record, we conclude defense counsel’s deficient performance was

prejudicial. (See *People v. Woods* (2008) 161 Cal.App.4th 1045, 1049-1050.)

The parties agree that the proper remedy is for us to strike the restitution order and remand for a proper restitution hearing. We agree. (See *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995-996.) Moreover, inasmuch as this matter is being remanded for a restitution hearing, defendant may also raise at that hearing his argument that, given the crimes of which he was convicted, he may not legally be held responsible for restitution for the injuries suffered by the sedan's occupants. (See *People v. Jones* (2010) 187 Cal.App.4th 418, 425-426 (civil tort law principles of causation should be applied in awarding restitution under California criminal law statutes); see also *People v. Woods, supra*, 161 Cal.App.4th at pp. 1049-1050, 1052.)

#### **DISPOSITION**

The restitution award is reversed. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for a restitution hearing in accordance with the views expressed herein.

\_\_\_\_\_  
BUTZ, J.

We concur:

\_\_\_\_\_  
ROBIE, Acting P. J.

\_\_\_\_\_  
MAURO, J.