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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS LUKE MILEY,

Defendant and Appellant.

C069519

(Super. Ct. No. S10CRF0120)

Defendant Nicholas Luke Miley pled no contest to vandalism exceeding \$400. Imposition of sentence was suspended and defendant was placed on probation for three years on the condition, among others, that he pay victim restitution in the amount of \$25,844.70 for damage to the residence vandalized.

On appeal, defendant contends the trial court erred when it entered the restitution order because the majority of the victim's loss was not caused by defendant or his crime. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At a contested restitution hearing, victim Robert Jones testified that for more than 25 years he had owned the residence that was vandalized by defendant's marijuana growing operation. During the 15 years he personally had lived in the residence, he never had any problems with mold.

When Jones rented the property to defendant and his fellow tenants in July 2009, the tenants executed, inter alia, a rental agreement that included a mold addendum. In the addendum, the tenants indicated that they had inspected the dwelling before occupancy and had not observed, inter alia, any moisture leaks or mold. At this time, Jones went to the house and did not see any evidence of a marijuana growing operation or any leakage from the exterior of the residence. From July 2009 to May 2010, no one from the residence complained that there were any problems with the residence or asked for permission to do any work on the residence.

On May 12, 2010, officers executing a search warrant found 172 marijuana plants growing in the residence. To facilitate their growing operation, defendant and his cohorts had:

(1) removed drywall and studs; (2) removed carpet and floor trim from two bedrooms; (3) damaged and/or removed doors and floor vents; (4) cut large holes in the ceilings of two bedrooms to vent moisture into the attic and to run water lines from the bathroom for irrigation; (5) damaged window blinds and drywall; and (6) caused significant mold damage.

After defendant was arrested and Jones recovered the property, Jones attempted to repair the damage that defendant's marijuana growing operation had caused. Jones submitted a list that detailed the expenses he had incurred in trying to remedy the damage. Jones also submitted several documents that detailed the various services that had been performed to repair the residence. He said each of the services was necessary due to the condition of the residence when it was recovered from defendant and his fellow tenants.

Jones incurred damages in the amount of \$25,844.70, which included, inter alia, over \$9,000 in mold-related treatments.

A May 24, 2010, environmental testing report stated:
"Considering the evident conditions (visible fungal growth, extent and location of fungal growth, elevated moisture presence, etc.) currently existing, it appears that the building materials throughout the loft and the attic became wet and were not dried properly or in a timely manner and unusual microbial amplification began to proliferate. Furthermore, considering the reported recent history, evidence of plant growing, flex ducts venting into the attic and the lack of observed or noted past water intrusion incidents, it is *highly probable that the moisture generated during said growing process entirely caused or as a minimum contributed significantly to the current uncharacteristic fungal presence in the attic and loft.*"
(Italics added.) In May 2010, Jones spent approximately \$7,625 to have the mold described in this report remediated.

In April 2011, Jones discovered that mold had reappeared. Jones spent \$2,200 to have the newly discovered mold remediated.

Christopher Miley testified for the defense at the restitution hearing. Miley stated that he lived in the residence and that mold was present when he and defendant moved in. Notwithstanding the presence of mold, Miley signed the mold addendum because he "just believed it to be a formality for [him] to move [into the house]." Miley claimed the house had several water leaks, which he reported to Jones. Miley claimed that Jones did not enter the house or walk through the premises when Miley signed the lease in 2009.

Christopher Sweet, a mold expert, testified for the defense. Sweet testified that he inspected the residence after defendant was arrested. It was his opinion that the mold was caused by water leakage from outside the house and not from the marijuana growing operation. In his career, Sweet had inspected only two other marijuana growing operations.

Following Sweet's testimony, Jones testified in rebuttal. Jones explained that, when he regained possession of the residence, he went up into the attic and found that 100 percent of the attic was damp. The attic "insulation was totally soaked due to vents" that led from the rooms below. For example, the insulation was "soaked" right in the area where a 10-inch venting pipe went up to the attic. Jones explained that he did not believe defendant "ever recirculated the air like they said, or if they did, there were several other pipes going up there" to the attic. Prior to defendant's tenancy, Jones had used the

attic for storage for about 20 years and had never seen moisture in the attic. Jones had replaced the roof in 2006.

Defendant filed points and authorities contending there was no evidence that the cannabis cultivation caused the mold growth inside the residence.

The trial court tentatively found that Jones was entitled to restitution in the amount of \$25,844.70. The court explained that "what seems to be forgotten in this case" was "that it is a vandalism case with evidence of a marijuana grow[ing operation], that the defendant and/or the uncharged cohorts, you know, that placed new venting holes in the wall, wearing issues, water pipes. It's inconceivable that they weren't a contributing factor to the moisture. They had no authorization to do the work, no permits. They did not disclose to the landlord the grow[ing operation]. [¶] Further, there was no notice to the landlord after the arrest took place and yet they were quick enough to have an expert come in and prepare a report which they never shared with the landlord, thereby causing the landlord to have to secure his own report. His own report, which he could reasonably rely on, showed that the work that needed to be done had to be done. [¶] The burden of proof in this matter is a preponderance. The defendant's conduct was a substantial factor, it need not be the sole factor. [Citations.] The Court would find that the activities and the work done by the defendant were after proximate cause of the damage to the victim."

Defendant objected that, even if the court were to find that the marijuana cultivation contributed to the mold that was remediated in May 2010, there was no evidence that the cultivation could have caused the subsequent mold growth that was remediated in April 2011. Defendant urged the court to remove from its restitution order the expenses incurred for the April 2011 remediation.

The trial court refused defendant's request, explaining the "problem with mold is . . . that . . . it grows off of spores. Once those spores have infected the premises, they're going to come back. The Court's finding is the marijuana grow was a substantial factor." The court confirmed its tentative ruling.

DISCUSSION

Defendant contends the trial court erred when it ordered him to pay \$25,844.70 in restitution, the majority of which he claims was not caused by him or the crime he committed. Specifically, he argues the restitution "relating to mold growth should not have been charged to" him, because, as "the defense expert testified, the mold was caused by long-standing problems to the structure," which had "water damage that could only be caused by years and years of water entering the house," and could not have been caused by "the short-term [marijuana growing operation] in this case." We are not persuaded.

"The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) "In granting probation, courts

have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]” (*Id.* at pp. 1120-1121.)

This court reviews a restitution order for abuse of discretion. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045). We must “determine whether the restitution order, as a condition of probation, is arbitrary or capricious or otherwise exceeds the bounds of reason under the circumstances.

[Citations.] ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality”’

[Citation.]” (*People v. Anderson* (2010) 50 Cal.4th 19, 32.)

Defendant argues there was insufficient evidence to support the trial court’s finding that his conduct was a substantial factor in both mold infestations. “‘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’

[Citation.]” (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681; fn. & italics omitted.)

Defendant’s lack of substantial evidence argument is based solely on the testimony of his witnesses. Considering all the

testimony before the court, there is ample evidence supporting the judgment.

First, there was substantial evidence that the residence had not been infested by mold prior to defendant's tenancy. Jones testified that, during the 15 years he personally had lived there, he never had any problems with mold. When Jones rented the property to defendant and his fellow tenants in July 2009, the tenants executed a rental agreement that included a mold addendum. In the addendum, the tenants indicated that they had inspected the dwelling before occupancy and had not observed any moisture leaks or mold. At this time, Jones went to the house and did not see any evidence of leakage from the exterior to the interior of the residence. Thus, even if water from the exterior had penetrated the wood framing and had caused framing members to rot, as the defense expert claimed, the court could deduce that the leakage had not resulted in mold infestation prior to defendant's tenancy. This is so notwithstanding Christopher Miley's dismissal of the rental agreement's mold addendum as a mere formality.

Second, the trial court could credit the May 2010 environmental report's finding that "it is highly probable that the moisture generated during said growing process entirely caused or as [sic] a minimum contributed significantly to the current uncharacteristic fungal presence in the attic and loft." The report is consistent with Jones's rebuttal testimony that, when he regained possession, he entered the attic and found that 100 percent of the attic was damp; the attic "insulation was

totally soaked due to vents" that led from the rooms below. Prior to defendant's tenancy, Jones had used the attic for storage for about 20 years and had never seen moisture in the attic.

Thus, contrary to defendant's argument, the evidence amply supported an award for the 2010 mold remediation. The fact this evidence was contradicted by the defense expert does not entitle defendant to reversal on appeal. (*People v. Superior Court (Jones)*, *supra*, 18 Cal.4th at p. 681.)

Defendant protests that the evidence showed "no mold damage to any of the rooms where the plants were actually grown." But the trial court could deduce that defendant's makeshift ventilation system had carried the moisture away from those areas to other portions of the residence.

This leaves the \$2,000 associated with the 2011 mold remediation. The trial court reasoned that defendant was responsible for the 2011 expenses because the "problem with mold is . . . that . . . it grows off of spores. Once those spores have infected the premises, they're going to come back."

Defendant claims the trial court's reasoning overlooks the defense expert's testimony that, even though the spores may be present, they do not develop into a mold infestation absent high humidity or water intrusion into the residence. Because defendant's growing operation had been removed a year prior to the 2011 remediation, it could not have supplied the requisite humidity and, in any event, it had nothing to do with water intrusion, he argued.

Given the extensive amount of damage caused by defendant's actions, the court nevertheless acted within its discretion when it ordered restitution for the 2011 remediation. The order, imposed as a condition of probation, was neither arbitrary, capricious nor did it exceed the bounds of reason under the circumstances. (*People v. Keichler, supra*, 129 Cal.App.4th at p. 1045.)

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

BLEASE, J.