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

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THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR VERNON HOBBS et al.,

Defendants and Appellants.

C073840

(Super. Ct. Nos. CR535642 &  
CR535641)

Defendants Arthur Vernon Hobbs and Robert Keith Dennis, Jr., each pleaded no contest to first degree burglary (Pen. Code, § 459)<sup>1</sup> and admitted three prior prison term enhancements (§ 667.5, subd. (b)). The trial court sentenced both defendants to nine years in state prison and imposed various fines and fees, including an \$890 fine. At a

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

subsequent restitution hearing, the trial court ordered \$2,206.40 in victim restitution, imposed jointly and severally on both defendants.

On appeal, defendants contend: (1) the trial court did not make the required finding that the burglary offense was not a violent felony for the purposes of determining custody credit; (2) the restitution order for barn repair constituted an improper windfall; (3) the restitution order for lost fuel was not supported by the evidence; and (4) the \$890 fine should either be stricken or remanded for the trial court to state the statutory basis of the fine and its component parts. We remand for the trial court to recite the statutory basis of the fine and its component parts and affirm the judgment in all other respects.

## BACKGROUND

### *The Crime*

In the early morning hours of December 24, 2011, a Colusa County Sheriff's Department deputy conducted a traffic stop on a pickup truck towing a flatbed trailer. Defendant Dennis was the driver and defendant Hobbs was in the passenger seat. Among the items on the trailer were three ATV's, a portable generator, a pressure washer, a television, and miscellaneous hunting clothes. The truck contained several boxes of shotgun shells, a yellow pry bar, and bolt cutters. The deputy determined one of the ATV's was stolen from the Hunter Creek Duck Club, located approximately 10 to 12 miles from the traffic stop.

Deputies went to the club and learned that numerous trailers on the premises had been burglarized. Some of the trailers had their doors pried open with yellow paint left on the door frames. In other trailers, the windows were smashed. Most of the items on the flatbed trailer were taken from these trailers.

### *Plea Agreement*

Defendants were charged in case Nos. CR53564-1 and CR53564-2 with multiple counts of burglary and other offenses stemming from the break-in at the duck club. They were also charged in case Nos. CR53585-1 and CR53585-2 with second degree burglary

and receiving stolen property stemming from a break-in at a barn and theft of a pressure washer at a ranch owned by Allen Cabral. As part of the plea agreement, the remaining charges in both cases were dismissed with a *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*) waiver.

During the plea colloquy, defendant Hobbs asserted that he expected to be serving half-time on the burglary charge. The trial court said it was not making any promises but it was unaware of anything which would not make the crime half-time.

#### *Restitution Hearing*

Allen Cabral testified that on or about December 24, 2011, someone stole a pressure washer on his property as well as tried to break into a barn and shop. An officer told him the pressure washer was found in the defendants' possession. Defendant Dennis used to work at the ranch under a different name.

The burglars used a crowbar to pry open some wood on one side of the barn, breaking about four boards. Because the building was so old, pieces of wood made today did not properly fit, which meant the entire wall had to be replaced. Replacing the wall cost about \$1,100 for wood and paint. It took thirty 1 by 12-foot boards to replace the wall.

Cabral's employee discovered that the lock and handle on a fuel tank had been broken and about 300 gallons of fuel was missing. The fuel tank was always locked. Cabral was not aware of any other break-ins besides this one. The pressure washer was taken from a garage, which was about 20 feet from the fuel pump.

The parties stipulated that the value of the missing fuel was \$1,106.40.

The trial court ordered \$2,206.40 in victim restitution, finding sufficient evidence that the losses were products of the charged thefts and that the defendants were jointly and severally liable to Cabral for the restitution award.

## DISCUSSION

### I

Defendants contend the trial court erred in failing to make a finding that the burglaries were not violent felonies and, therefore subject to 50 percent credit for time in prison.

A defendant is generally entitled to 50 percent worktime credit for time served in state prison. (§ 2933.) Persons convicted of violent felonies are limited to 15 percent worktime credit. (§ 2933.1.) First degree burglary is not a violent felony unless it is plead and proven that the residence was occupied by a nonaccomplice at the time of the burglary. (§ 667.5, subd. (c)(21); *People v. Garcia* (2004) 121 Cal.App.4th 271, 275-276 (*Garcia*)).

Defendants assert that the trial court had a duty to find that defendants would be entitled to 50 percent worktime credits. In support of this novel proposition, they cite *Garcia*, which states: “As with other sentencing facts, proof that a first degree burglary falls within section 667.5, subdivision (c)(21), is properly presented to the sentencing court. [Citation.]” (*Garcia, supra*, 121 Cal.App.4th at p. 279.)

*Garcia* does not support the point claimed by defendants, as the statement addressed whether a defendant had a right to a jury trial on whether a burglary was a violent felony. (*Garcia, supra*, 121 Cal.App.4th at pp. 278-279.) Determining a prisoner’s worktime credits is a matter for the Department of Corrections and Rehabilitation rather than the trial court. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 31.)

Defendants’ argument also overlooks a finding made by every trial court that awards presentence credits. Pursuant to section 4019, a defendant is entitled to presentence conduct credits of two days for every two days served. (§ 4019.) Defendants convicted of violent felonies are limited to 15 percent presentence conduct credits pursuant to section 2933.1. (§ 2933.1.) The trial court awarded defendants

presentence conduct credits at the two-for-two rate pursuant to section 4019, and checked the box marked section 4019 in both defendants' abstracts of judgment.

We therefore reject defendants' frivolous claim, as it lacks legal support and overlooks the trial court's findings.

## II

Defendants attack the restitution award to Cabral, claiming the award of restitution for the entire side of the barn, rather than the four boards, was excessive and that there is insufficient evidence tying them to the loss of the fuel. We disagree.

When a victim incurs economic loss as a result of a crime, the victim is entitled to restitution from the person convicted of that crime. (§ 1202.4, subd. (a)(1).) Restitution is limited to crimes for which defendant has been convicted (*People v. Percelle* (2005) 126 Cal.App.4th 164, 180; *People v. Rubics* (2006) 136 Cal.App.4th 452, 460) or for counts dismissed with a *Harvey* waiver pursuant to a plea agreement. (§ 1192.3, subd. b.)

Restitution for economic loss shall be in an amount established by the trial court based on the amount claimed by the victim. (§ 1202.4, subd. (f).) Once the People have made a prima facie showing of economic loss, the burden shifts to the defendant to demonstrate that the restitution amount is not proper or should be different. (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172 (*Chappelone*).

The trial court may not make an order that is arbitrary or capricious. (*Chappelone, supra*, 183 Cal.App.4th at p. 1172.) We review the trial court's restitution order for abuse of discretion. (*Id.* at p. 1173.) Where there is a factual and rational basis for the order, an abuse of discretion will not be found. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) In determining whether there is a factual basis for the order, we apply the substantial evidence standard. (*Ibid.*) But "the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.] 'If the circumstances reasonably justify the [trial court's] findings,' the

judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citation.]” (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.)

A.

Defendants claim the trial court afforded Cabral an improper windfall by awarding restitution to replace the entire 30-foot wall of the barn when they damaged only four boards during the burglary. They claim there was no evidence Cabral tried to locate barn boards of similar age “for the minimal repair.” According to defendants, “given this age of recycling, one would reasonably assume such old barn boards should be readily available.” They assert Cabral’s contention that he had to replace the entire wall because new boards did not fit properly was unreasonable, as the “case involved minimal damage to an old barn, not a home or other complex where matching existing wood dimensions might be more critical.” Defendants claim restitution should be limited to five of the 16 linear foot boards used to replace the wall. Evidence at the restitution hearing established a cost of \$1.80 per linear foot for the boards, making the restitution award equal to \$144.

It is true, as defendants point out, that the restitution statutes are not designed to give windfalls, but to make victims whole. (*Chappelone, supra*, (2010) 183 Cal.App.4th at p. 1172.) However, their argument ignores the standard of review for restitution awards. Here, the victim testified that modern boards could not fit where the old boards were removed by defendants, requiring the entire wall to be replaced. Defendants’ claim that old boards must have been readily available or that adequate repair could have been achieved with boards that did not fit is speculation with no basis in the record. The prosecution presented evidence that part of one wall of Cabral’s barn was damaged by defendants, the age of the barn required the wall to be replaced, and that the cost of replacement was \$1,100. Since defendants presented no evidence to the contrary, it was

not an abuse of discretion for the trial court to award restitution commensurate with the prima facie case established at the restitution hearing.

B.

Defendants' attack on restitution for the lost fuel is likewise unfounded. Noting the theft was reported on December 26, 2011, two days after their arrest, defendants claim there is no evidence to support Cabral's testimony that the fuel was taken at the same time as the theft of the pressure washer and damage to the barn. Since Cabral testified that the fuel pump was last checked on December 23, 2011, defendants claim the fuel could have been taken any time between then and December 26, "when Mr. Cabral discovered the lock on the fuel handle had been broken." Noting fuel was not recovered from the trailer when they were arrested, defendants conclude there is insufficient evidence tying their crime to the lost fuel to support the restitution award. Finally, defendants claim there is insufficient evidence 300 gallons were taken, as this amount was an estimate from Cabral, with no evidence as to how he came up with that amount.

According to Cabral's testimony, an employee found out the pressure washer was missing on or about December 24. Cabral's employee discovered the fuel tank's lock and handle were broken. An examination of the fuel facility determined that about 300 gallons were missing. Cabral was not sure when the sheriff's department was contacted, but it was on or about December 26. Asked on cross-examination when he discovered the missing fuel, Cabral replied, "It was there the day -- it was all there the day prior."

Cabral's testimony provides substantial evidence that the fuel was taken at the same time as the barn was damaged and the pressure washer stolen. While the probation report states the fuel was discovered missing on December 26, under the substantial evidence standard, resolving this conflict in the evidence is a matter for the trial court, not us. The pump was always locked and Cabral testified there were no other break-ins or burglaries during this period. The trial court could reasonably conclude that the fuel was taken by the defendants during their burglary of the Cabral ranch. Since Cabral estimated

that 300 gallons were missing and defendants did not establish his methods were faulty or his estimate was incorrect, it was not an abuse of discretion for the trial court to award restitution based on that amount.

### III

The trial court imposed, on each defendant, an \$890 “criminal fine” without specifying the fines’ statutory basis. The defendants waived recitation of the statutory basis for the fines and fees. The initial abstracts of judgment did not list these fines. The trial court subsequently issued an appendix to both abstracts describing the statutory basis for each fine and its component parts. The breakdown and statutory basis for both fines and their component parts are described as follows: “\$200.00 base fine, \$200.00 pursuant to PC 1464, \$140.00 per GC 76000, \$20.00 per 76104.6, \$80.00 per GC section 7610417, \$100.00 per GC section 70272, \$40.00 per GC section 76000.5.”

Defendants contend the trial court did not give an adequate statutory basis for this fine and its component parts when pronouncing sentence. They contend section 672<sup>2</sup> cannot provide a statutory basis for the base fine as it was discretionary and not part of the trial court’s pronounced judgment. They additionally note that one of the listed fines, the Government Code section 70272 fine, does not exist. Defendants ask us to strike the fine or to remand for the trial court to recite the basis for the fine and its components. The Attorney General agrees that the cases should be remanded to detail the basis for the fine and its components.

The judgment orally pronounced by the trial court is the sentence; a court clerk cannot supplement the judgment orally pronounced by adding missing fines, fees, or

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<sup>2</sup> Section 672 provides: “Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.”

assessments to the minutes or abstract. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388 (*Zackery*)). In addition, the abstract of judgment must separately list, with the statutory basis, all fines, fees, and penalties imposed. (*People v. High* (2004) 119 Cal.App.4th 1192, 1201.)

This case does not present the problem found in *Zackery*, where the clerk wrote into the abstract discretionary fines and fees not included in the trial court's judgment. (*Zackery, supra*, 147 Cal.App.4th at pp. 387-388.) Unlike *High*, the abstract here at least attempts to set forth the basis of the fines, fees, and assessments.

While the trial court ordered a fine, the judgment did not specify the fine's statutory basis. The court obtained waivers from defendants and tried to provide the necessary basis in the appendices to the abstracts, but that effort was insufficient. The appendices do not provide the statutory basis for the base fine and include a nonexistent provision. In addition, the numbers do not add up, as the fine, fees, and assessments listed in the appendices total \$780 rather than the \$890 fine they purport to describe.

We shall therefore remand for the trial court to properly recite and record the statutory basis for the fine and its components.

#### DISPOSITION

Both cases are remanded for the trial court to separately list, with the appropriate statutory basis, all fines, fees, assessments, and penalties imposed by the trial court. In all other respects, the judgments are affirmed. The trial court is directed to prepare amended abstracts on both cases reflecting the statutory basis for all fines, fees, and assessments, and to forward certified copies to the Department of Corrections and Rehabilitation.

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NICHOLSON, Acting P. J.

We concur:

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BUTZ, J.

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DUARTE, J.