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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DORIS PAYNE, Defendant and Appellant.	D059239 (Super. Ct. No. SCD225948)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

Doris Payne appeals from a judgment convicting her of grand theft. She asserts the trial court erred by (1) excluding expert testimony concerning cross-racial identification, and (2) ordering an improper amount of restitution. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 2, 2010, a woman visited the fine jewelry department at the Macy's store in the Fashion Valley mall in San Diego. The woman spent approximately 45

minutes with the sales clerk viewing various items of jewelry. Then, without paying, the woman left the store with a "pear-shaped" diamond ring with an appraised value of $8,865. The sales clerk (fine jewelry manager Deborah Bryce) identified Payne as the woman who stole the ring.

As we shall delineate below, during the defense case Payne (age 79 at the time of the offense) acknowledged on cross-examination that she had been a career thief who had "traveled a lot and stole jewelry"; she had garnered media attention due to the activity; and a documentary film about her life starring Halle Berry was being filmed. The defense theory of the case was mistaken identity.[1]

Bryce testified that Payne told her she wanted to purchase a ring "with equity" for her 25-year-old daughter while Payne was still living. Payne explained to Bryce that her daughter would be arriving at the jewelry department; she wanted to see her daughter's reaction to the ring so she would know the right piece to purchase for her; but she did not want the clerk to say anything to her daughter because it was going to be a surprise.

During the course of their interaction, Bryce showed Payne about 10 to 15 different pieces of jewelry, including a bracelet, earrings, rings, and pendants. To do this, Bryce opened about four to five glass-topped jewelry display cases with her key, retrieved the items, and placed them on top of the display cases. Payne stood or sat on the other side of the display cases to view the items. During their transaction there "was

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[1] The defense also presented the jury with the possibility that the ring was lost rather than stolen, or that it was stolen by someone other than the woman interacting with Bryce.

a lot of going back and forth to different pieces" and handing of pieces back and forth between Bryce and Payne. Because Payne wanted to know the exact prices of the items, Bryce scanned the items on the register to determine the prices of items that were on clearance and were discounted from the original ticket price.

Shortly before the theft, Payne had selected several items for purchase, including a pendant, earrings, a "baguette" ring, and the pear-shaped ring. Bryce handed the pear-shaped ring to Payne, and Payne held the ring with her thumb and finger. Payne asked Bryce to write down and total the exact prices of the jewelry, including tax, before "ring[ing] them up" for purchase. Bryce turned around to the register that was directly behind her, and decided to write down the original ticket prices of the items before scanning them. While Bryce was doing this, Payne asked her where the restroom was if she needed to use it. Bryce, without turning around, stated that it was on the second floor.

While writing down the ticketed prices, Bryce realized that she had the pendant, earrings, and baguette ring, but she did not have the pear-shaped ring that she had handed to Payne. When Bryce turned around, Payne was "nowhere to be seen." Bryce quickly checked to make sure she had not put the ring back in one of the display cases, which she had not. Bryce ran to the second floor restroom, but Payne was not there.

Macy's never recovered the pear-shaped diamond ring. The ring was a "certified" diamond ring that was valued at $8,865 in a gemological appraisal report.

Bryce described the thief to Macy's loss prevention officer Thalia Duarte. Bryce stated the thief was an African-American female, between 50 and 60 years old, with

"short blonde hair."[2] Bryce told Duarte that the woman was wearing sunglasses, a black dress, black pointy flat shoes, and a camel-colored coat, and she was carrying a black handbag. After speaking with Bryce, Duarte viewed the surveillance videos from the fine jewelry department and observed a woman with "blonde platinum white hair" carrying a black handbag and wearing a black V-neck dress, a camel-colored coat, and sunglasses.[3] A few days later, Duarte also viewed a surveillance video from a Macy's store at Horton Plaza taken on January 5, 2010, which depicted a woman in the fine jewelry department who was attired in similar fashion as the woman at the Fashion Valley Macy's on January 2.[4] In both the Fashion Valley and Horton Plaza videos, the woman's black purse appeared to be a designer Gucci bag. Duarte emailed a picture to Bryce from the Horton Plaza Macy's video.

Sometime after the Fashion Valley Macy's theft, Duarte and Bryce were shown pictures of Payne that appeared in the newspaper or on the Internet. Duarte's boss showed Duarte an Internet article that discussed Payne's past history and included a picture of Payne, and told Duarte something to the effect of "[t]his is your case." Within a month after the theft, a Macy's staff person showed Bryce a newspaper article that included a photograph of Payne; when Bryce saw the photo she stated it was the woman

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2 Bryce provided a similar description to the police.

3 The video cameras captured images from a distance of 11, 26, and 50 feet. Duarte acknowledged that they did not provide a clear image of the thief's face.

4 Duarte testified that the Horton Plaza video showed a woman carrying a camel-colored coat and a black purse on her arm, and wearing a black V-neck dress, black pointy shoes, and the same glasses as the woman in the Fashion Valley video.

who stole the pear-shaped ring. During this same time period, Bryce's husband emailed her an article about Payne. A Macy's loss prevention officer also emailed Bryce a photograph of a woman in a video taken at a Macy's store on January 4, 2010, but Bryce told the loss prevention officer the woman depicted in this video was *not* the thief.[5]

At trial, Bryce provided a description of the thief that was similar to the one she gave to Duarte. Bryce testified the thief was a light-skinned African-American; she was a "more mature woman"; and she had "yellowish" hair that was cut "very close to her head." She was wearing a heavy camel-colored coat and a black dress with a "lacy little camisole" underneath. The woman's eyeglasses were large, circle-shaped glasses with an "iridescent quality" and "orange and peach tones." Bryce noticed that Payne was wearing these same glasses at the preliminary hearing.

Bryce testified that during the 45-minute period when she was with the woman, they were about three to four feet apart. They talked about jewelry and other subjects (including hair and Payne's "bad eye"). While they were talking, Bryce looked at the woman and noticed her facial features. Bryce testified that she had no doubt that Payne was the woman at the jewelry department at the time of the theft.

At trial, loss prevention officer Duarte also identified Payne, stating that Payne was the woman seen in the Macy's videos from both the Fashion Valley and Horton Plaza stores. Further, Duarte testified that when she saw Payne in the courtroom during the

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[5] Bryce explained that the woman's "hair was different. . . . [I]nstead of being flat to the head, it was bushied out . . . more Afro'd. . . . [T]he face seemed very full in the cheeks . . . . The glasses were different . . . ." When testifying on her own behalf during the defense case, Payne likewise testified that she was not the woman in this video.

current trial, she noticed that Payne was carrying what appeared to be the same Gucci purse as depicted in the Fashion Valley and Horton Plaza Macy's videos. The surveillance videos were shown to the jury.

After the authorities apprehended Payne, she waived her *Miranda*[6] rights and spoke with Detective Thomas Jacques for about 20 to 30 minutes. Prior to his interview with Payne, Jacques had read several articles about her on the Internet. When Jacques told Payne that she was a suspect in a crime that he was investigating, she stated that she did not like to, and would not, lie to law enforcement, but she would not "come out and confess to an act itself." Jacques did not show Payne the Fashion Valley surveillance video, but he told her that the video showed her engaging a jewelry salesperson in conversation, looking at items, and "then placing an item in her pocket and then walking out." Jacques testified that Payne admitted that she was the person in the video. However, Payne told him that she did not believe he could see her "commit the act" on the video. Jacques responded that he "saw it very well."

During the interview, Detective Jacques talked about the ring at the Fashion Valley Macy's, and it appeared that Payne understood what he was talking about. Payne told Jacques that she took a taxi cab to the Macy's store; she had the cab wait for her; and she left in the cab after being at the store for about one hour. When Jacques asked her what she did with the ring, Payne said that right after she left Macy's she sold it for $1,800 to a person she found listed in the phone book. Jacques asked if she could

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6 *Miranda v. Arizona* (1966) 384 U.S. 436.

provide the information so he could retrieve the ring, but she said she was not "comfortable in doing that." When Jacques asked how much she was willing to sell rings for, Payne said she would accept one third of the price of the ring.

Detective Jacques did not prepare a photographic lineup for Bryce to identify the thief. He testified that he chose not to do this because it was clear to him from the surveillance video and from his research that Payne was the thief, and Payne admitted to him that she was the person in the video.

Defense

Testifying on her own behalf, Payne stated that she did not steal the ring from Macy's, and she told Detective Jacques she was not the thief. Payne acknowledged having a general conversation with Jacques about selling jewelry, but she denied telling him that she sold the Macy's ring for $1,800. She testified that Jacques asked her how she sold jewelry and whether she fenced it or pawned it. She told him that jewelry could easily be sold to persons who were listed in the phone book without addresses and who would meet you at hotels, parking lots, or gas stations. When he told her the Macy's ring was valued at $9,000, she told him a reputable buyer would not pay more than the actual worth of the item, and because of the mark-up a $9,000 ring from Macy's would sell for $1,600 to $1,700 or less.

Concerning whether she was the woman in the Macy's surveillance videos, Payne testified that Detective Jacques asked her what would she say if he told her that there was a video of her at the Macy's store on January 2. She responded that she would not say anything because they could not have her on video at Macy's on that date.

By the time of trial, Payne had viewed both the Fashion Valley and Horton Plaza Macy's videos. At one point, she testified that she was not the woman in the Fashion Valley video. At another point, she testified that she was depicted in the Fashion Valley video, but claimed the video had been "doctored."[7] She also testified that she was the woman in the Horton Plaza video, but stated that the video was doctored because it was not taken at a Macy's store.

Payne acknowledged that she owned a beige or camel-colored coat and black dresses; that she had carried a Gucci purse to court; and that she had glasses that were "tinted sort of brown." However, she denied being in a Macy's store wearing a camel-colored coat and black dress, and denied being at Macy's on January 2, 2010. She acknowledged that she had been a career jewelry thief and that she stole jewelry off and on for 30 to 35 years, but claimed that she had stopped stealing. She testified that she did not tell Detective Jacques that she went to Macy's on January 2 in a taxi cab, but rather when he asked her how she went to a mall or "wherever to steal," she told him she always took taxi cabs because she did not see well enough to drive.

Jury Verdict and Sentence

The jury convicted Payne of grand theft and burglary. The court sentenced her to five years in prison, consisting of three years for the theft and two one-year terms for two

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[7] However, the record on appeal is not clear as to which video clip she was actually referring to when she made this admission, and she later reiterated that she was not in the Fashion Valley video.

enhancements based on her prior prison terms.[8] She was ordered to pay $8,865 in victim restitution.

DISCUSSION

I. *Exclusion of Expert Testimony on Cross-racial Identification*

Payne argues she was denied her constitutional right to present a defense when the trial court rejected her request to present expert testimony on cross-racial identification.

Background

Prior to commencement of the defense case, defense counsel filed a motion to admit expert testimony on the inaccuracy of cross-racial eyewitness identification. Defense counsel argued the expert testimony should be admitted because Bryce was a Caucasian identifying an African-American, and Bryce's in-court identification was tainted by previous highly suggestive displays of Payne's photo to her. Additionally, defense counsel stated the expert would testify about the "paraphernalia effect," which is particularly applicable cross-racially. Due to this phenomenon, an eyewitness is not carefully "eyeballing the person for 45 minutes"; rather, the witness (especially a sales clerk) focuses on such items as clothing, eyeglasses, and purses, and is "task focused" (i.e., picking out jewelry, going to the register, etc.) rather than "face focused."

The prosecutor urged the court to exclude the expert testimony, arguing that Bryce provided an unequivocal identification based on her interaction with Payne in close

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8 Sentence on the burglary count was stayed.

proximity for 45 minutes. Further, the identification was corroborated by the video surveillance tape and by Payne's admissions to Detective Jacques.

The trial court denied the motion, finding the expert testimony was not "appropriate given the facts of this case."[9]

Analysis

In *People v. McDonald* (1984) 37 Cal.3d 351, 367-368,[10] the California Supreme Court recognized that although jurors would know that the accuracy of eyewitness identification can be affected by such obvious physical factors as lighting, distance, and duration, jurors might not fully understand the manner in which it can be affected by certain psychological factors, including cross-racial identification. Accordingly, in appropriate cases the trial court is required to admit expert testimony on psychological factors affecting eyewitness identification. (*People v. Sanders* (1995) 11 Cal.4th 475, 508.) That is, the expert testimony should be admitted when "an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability . . . ." (*People v. McDonald, supra*, 37 Cal.3d at pp. 375-377 [trial court erred in excluding expert identification testimony in case where sole evidence linking defendant to crime was eyewitness identification; accuracy of eyewitness identification was unclear due to

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9 The court did, however, provide a standard instruction to the jury stating that when evaluating witness credibility it could consider whether "the witness and the defendant [are] of different races[.]"

10 Overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896 at page 914.

impediments to observation; one prosecution eyewitness testified defendant was not the perpetrator; and defendant had six alibi witnesses].)

In contrast, a trial court retains discretion to exclude the expert testimony in cases where "there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1112 [trial court had discretion to exclude expert testimony based on corroboration derived from five other witnesses and defendant's admissions]; *People v. Sanders*, *supra*, 11 Cal.4th at p. 509 [no abuse of discretion from exclusion of expert testimony in case where three eyewitnesses identified defendant at lineups and at trial; incident occurred in lighted interior and in close proximity; two eyewitnesses were same race as defendant; and other evidence apart from eyewitness testimony linked defendant to crime].)

Here, Bryce's eyewitness identification of Payne was substantially corroborated by other evidence that gave her identification independent reliability. Detective Jacques testified that Payne admitted to him that she was the woman in the Fashion Valley video and that she sold the stolen ring. In addition to Payne's admissions, the circumstances under which Bryce identified Payne support the reliability of Bryce's identification. Bryce and Payne interacted for 45 minutes in close proximity and during this encounter they engaged in conversation about a variety of matters, including Payne's desire to buy jewelry for her daughter, hair, and Payne's eye problem. Bryce had a prolonged period of close interaction with Payne in the relatively calm environment of a retail store's fine jewelry department; this is not a case involving a fleeting observation of a person during a high-stress event with intervening distractions.

Further, when reporting the theft to loss prevention and testifying at trial, Bryce provided a detailed description of the thief's appearance, and several of the items associated with the thief were observed in Payne's possession during the criminal proceedings. Bryce described the thief as an older African-American woman with short yellow-blonde hair; wearing sunglasses or orange-peach tinted glasses, a black dress, flat black shoes, and a camel-colored coat; and carrying a black purse. Duarte observed that the purse carried by the woman in the surveillance video appeared to be a Gucci purse. Thereafter, when observing Payne in the courtroom, Bryce noticed she was wearing the same tinted glasses as the thief and Duarte noticed she was carrying the Gucci purse.

Because these evidentiary items substantially corroborated Bryce's identification of Payne, the trial court did not abuse its discretion in excluding the expert testimony.

To support her contention of error, Payne asserts that Bryce's trial identification of her as the culprit was highly unreliable because it was tainted by suggestive pretrial displays of her photograph to Bryce, and Bryce was never asked to identify the thief in a neutral photographic lineup. We are not persuaded. As noted above, Bryce had a substantial period of time to observe the thief in an environment undisturbed by any significant distractions. When reporting the theft to loss prevention *before* she was shown the photos of Payne, Bryce provided a detailed description of the thief's appearance, stating that the thief was a 50- to 60-year-old African-American female with short blonde hair, carrying a black purse, and wearing sunglasses, a black dress, black pointy flat shoes, and a camel-colored coat. Further, Bryce acquired a sufficiently

discriminating knowledge of Payne's appearance to recognize that another woman depicted in a Macy's surveillance video a couple of days later was *not* Payne.

For the same reasons, we are unpersuaded by Payne's contention that the reliability of Bryce's identification was significantly diminished by the fact that Bryce thought the thief was 50 to 60 years old, whereas Payne was 79. Bryce accurately identified Payne as an older woman, and substantial corroborative evidence (including the evidence of Payne's admissions to the detective and of her possession at trial of items associated with the thief) supported the reliability of Bryce's identification. Payne has not shown the trial court's ruling was an abuse of discretion.

Alternatively, even assuming arguendo the court should have admitted the evidence, any error was harmless even if we apply the stricter harmless beyond a reasonable doubt standard. (See *People v. Pollock* (2004) 32 Cal.4th 1153, 1173; *People v. Boyette* (2002) 29 Cal.4th 381, 428-429 [harmless beyond a reasonable doubt standard applies if evidentiary ruling deprives defendant of meaningful opportunity to present a defense].) The record contains compelling evidence that Payne was the thief at the Fashion Valley Macy's on January 2. Bryce provided a detailed description of the perpetrator's appearance after a prolonged period of close observation. Bryce's description of the thief matched the appearance of the woman in the Horton Plaza Macy's video, and at trial Payne admitted that she was the woman in the Horton Plaza video. Further, Payne admitted at trial that she owned clothing and accessories (a camel-colored coat, black dresses, brown tinted glasses, and a Gucci purse) that matched the items observed on the thief, and Payne was seen in possession of two matching items (the

glasses and purse) while in court. According to Detective Jacques, Payne admitted to him that she was in the Fashion Valley video and that she stole the ring.[11] Considering all this evidence together, there is no reasonable possibility that the jury might have reached a different verdict had it heard the expert testimony on identification.

II. *Amount of Restitution*

Payne asserts the trial court exceeded its statutory authority and abused its discretion when it awarded victim restitution based on the retail value—rather than the wholesale value or replacement cost—of the ring. She contends the case should be remanded to the trial court for a restitution hearing to determine the cost for Macy's to replace the ring. If this issue is forfeited on appeal due to her counsel's failure to object before the trial court, she argues her counsel provided ineffective representation by failing to object.

As we shall explain, we conclude that Payne has forfeited her challenge to the amount of restitution because she did not request a restitution hearing to challenge the amount. In any event, even if we reach the issue on the merits, the evidence presented at trial supports the amount awarded by the trial court.

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11 Arguably, Payne also admitted at one point during her testimony that she was depicted in the Fashion Valley video (although she claimed the video was "doctored"). We have not relied on this evidentiary item in our analysis because of the lack of clarity in the appellate record as to which video clip Payne was referring to when she made this admission. (See fn. 7, *ante*.)

Background

The amount of restitution requested by Macy's was set forth in the probation report. The probation officer contacted Macy's loss prevention office, and was told that Macy's was requesting $8,865 in restitution. This amount was supported by a gemological appraisal report for the ring that was introduced at trial. At sentencing, the court ordered restitution in this amount. Defense counsel did not request a restitution hearing and did not object to the amount of the award.

The trial record includes several evidentiary items related to the economic loss arising from the theft of the ring. Bryce testified that although the ring stolen by Payne was not a "famous piece," it was a "certified" diamond ring. The prosecution submitted into evidence a gemological appraisal report for the ring which valued it at $8,865. Bryce testified that the appraisal report gave "an exact description of a pear-shaped diamond that is flanked with two other diamonds." Bryce explained that the report was written by an outside party to fully describe the characteristics of the diamonds and the gold setting. The appraiser described the carat weight of the diamonds and the particular nuances of the diamonds including any "inclusions" or "feathering."

Bryce stated that the stolen ring was priced at "over [$]8,000," and she "believ[ed]" that Macy's ticketed price for the ring was higher than the appraisal price. Further, she testified that on the date of the theft Macy's was having a sale which discounted jewelry items. However, the record contains no information whether the stolen ring was discounted on the date of the theft.

Analysis

Pursuant to Penal Code[12] section 1202.4, the trial court is required to award restitution to a victim who has suffered economic loss as a result of the defendant's conduct. (§ 1202.4, subd. (f).) The restitution order shall be "sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ." (§ 1202.4, subd. (f)(3).) The restitution amount should be "based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) The "'court's discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole.'" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) On appeal, we review the trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) We draw all reasonable inferences in favor of the court's order, and affirm if there is substantial evidence to support it. (*Id*. at p. 666; *People v. Millard, supra*, 175 Cal.App.4th at p. 26.)

The defendant has the right to a restitution hearing "to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).) To provide notice to the defendant, the amount of restitution claimed by the victim may be set forth in the probation report, and the defendant may then request a restitution hearing. (See *People v. Cain* (2000) 82 Cal.App.4th 81, 86.) At the restitution hearing, the burden is on the People to make a

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12 Subsequent statutory references are to the Penal Code.

prima facie showing of the amount of the victim's loss. (*People v. Millard, supra*, 175 Cal.App.4th at p. 26.) However, if the defendant fails to request a restitution hearing to challenge the determination of restitution, the issue is forfeited on appeal. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075; *People v. Foster* (1993) 14 Cal.App.4th 939, 944.)

In *Brasure*, the victim told the probation officer the amount of her economic losses, and without objection, the court ordered that amount of restitution. (*People v. Brasure, supra*, 42 Cal.4th at p. 1074.) On appeal, the defendant argued the restitution order was inappropriate because the economic loss "was not shown by documentation or sworn testimony." (*Id*. at p. 1075.) The *Brasure* court concluded: "But by his failure to object, defendant forfeited any claim that the order was merely unwarranted by the evidence, as distinct from unauthorized by statute. [Citation.] As the order for restitution was within the sentencing court's statutory authority, and defendant neither raised an objection to the amount of the order nor request a hearing to determine it (see § 1202.4, subd. (f)(1)), we do not decide whether the court abused its discretion in determining the amount." (*Ibid*.)

Here, as in *Brasure*, Payne's challenge to the amount of restitution is forfeited because she failed to request a restitution hearing to challenge the court's determination of the amount.[13]

In any event, even if we reach the issue on the merits, Payne has not shown the amount of restitution was improper. Payne contends that pursuant to the statutory scheme, the trial court may not award restitution to a retailer based on the retail price (as opposed to the replacement cost or wholesale price) of a stolen item, unless there is a showing of lost profits. This contention does not defeat the trial court's order because, drawing all inferences in favor of the court's order, the record in this case supports an award that includes compensation for lost profits.

Section 1202.4 sets forth a nonexhaustive list of compensable losses, including: (1) payment for "the value of stolen . . . property" based on the "replacement cost of like property," and (2) "profits lost due to injury incurred by the victim." (§ 1202.4, subd.

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13 Payne contends that there is no forfeiture because the amount of restitution was unauthorized by statute. (See *People v. Brasure*, *supra*, 42 Cal.4th at p. 1075.) As we shall explain below, the record does not show the trial court exceeded its statutory authority; hence, the forfeiture may not be avoided on this basis.

In her reply brief, Payne also asserts there is no forfeiture because a defendant may challenge the sufficiency of the evidence to support an order for the first time on appeal. This rule is inapplicable here because defendant never requested a restitution hearing where the question of the prosecution's evidentiary presentation would have been litigated. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1075; see *People v. Cain*, *supra*, 82 Cal.App.4th at p. 86.)

(f)(3)(A), (D).)[14] Accordingly, when the defendant has stolen property from the victim, the amount of restitution is properly based on the cost of replacing the property with a like item. (*People v. Foster, supra*, 14 Cal.App.4th at pp. 945-946 [restitution order for residential burglary could properly be based on original amount paid by victim to purchase Persian rug; original cost of stolen item may be treated as evidence of replacement cost]; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995 [restitution order for theft of rental company's cement mixer should be based on cost to purchase mixer of like type and age, not cost to purchase new mixer].) Further, when the stolen item is from a business establishment, the amount of restitution may include the profits lost by the business due to the theft. (*Thygesen, supra*, 69 Cal.App.4th at pp. 993-995 [cement mixer rental company entitled to both replacement cost of stolen property and loss of profits from inability to rent the property; for "a victim who is in business[,] [t]he

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[14] Section 1202.4, subdivision (f)(3) states in part: "To the extent possible, the restitution order . . . shall be of 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 stolen or damaged property shall be the replacement cost of like property*, or the actual cost of repairing the property when repair is possible. [¶] . . . [¶] (D) *Wages or profits lost due to injury incurred by the victim*, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor . . . . [¶] (E) *Wages or profits lost by the victim*, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, *due to time spent as a witness or in assisting the police or prosecution*." (Italics added.)

economic loss may well include the loss of revenue the stolen item would have produced"].)[15]

However, a restitution order "is not intended to provide the victim with a windfall"; rather, it is intended to compensate for the victim's "actual loss." (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172.) For example, in *Chappelone*, the court held a restitution award to a Target store based on the retail, rather than the wholesale, price of stolen merchandise was improper because the award exceeded the cost to replace the property and provided the store with a windfall. (*Id.* at pp. 1178-1179.) The *Chappelone* court noted that the prosecutor presented no evidence that the store lost any profits as a result of the theft. (*Id*. at p. 1178.) The court reasoned: "[T]here was no evidence that there was not a comparable replacement to sell to Target's customers. These were not unique products, but were mass-produced consumer goods that Target sold in abundance. Indeed, the fact that Target is a massive, nationwide retail store with a system for tracking goods suggests the items stayed in stock and no customer was ever

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15 At one point in her briefing on appeal, Payne, citing section 1202.4's statutory language, argues the trial court may not award compensation for lost profits due to stolen merchandise as opposed to lost profits (or wages) due to physical injury. Section 1202.4's reference to reimbursement for lost profits describes the profits as "due to injury incurred by the victim" (§ 1202.4, subd. (f)(3)(D)) or "due to time spent as a witness or in assisting the police or prosecution" (§ 1202.4, subd. (f)(3)(E)). (See fn. 14, *ante*.) Arguably, the reference in subdivision (f)(3)(D) to lost profits due to "injury" can include economic injury (i.e., from stolen merchandise) as well as physical injury. In any event, the statute expressly indicates the listed reimbursable losses are nonexhaustive; i.e., stating that the victim shall be fully reimbursed "for *every* determined economic loss incurred as the result of the defendant's criminal conduct, including, *but not limited to*, all of the following . . . ." (§ 1202.4, subd. (f)(3), italics added.) Thus, lost profits due to a business enterprise's lost economic opportunities are within the contemplation of the victim restitution statute.

deprived of a purchase." (*Id*. at p. 1179.) *Chappelone* concluded that because there was no evidence that Target lost any profit due to the defendants' theft, the court's order based on the retail price of the merchandise was improper. (*Id*. at pp. 1178-1180.)

Here, the trial record shows that the stolen ring was not a stock item, but rather was a certified diamond ring with particular unique characteristics identified in a gemological report. Unlike the circumstances evaluated in the *Chappelone* case, this is not a stock-type, mass-produced item that can be readily replaced and quickly offered to the public for purchase. The fact that the ring was professionally appraised based on the specific characteristics of its diamonds supports an inference that Macy's suffered a loss unique to that ring—i.e., that particular diamond ring was permanently removed from Macy's inventory and it forever lost the opportunity to sell it.

Given the unique attributes of this piece of fine jewelry, the trial court could properly conclude that to make Macy's whole, it should be awarded a restitution amount based on the appraised value of the stolen diamond ring. To the extent the appraised value exceeded the wholesale cost of the ring and thus compensation for profit was included in the restitution award, the court could reasonably find that this was appropriate. The court could reasonably conclude that Macy's was entitled to compensation based on the permanent loss of the opportunity to sell a certified diamond ring that had been appraised based on its particular characteristics.[16]

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16 Because we have addressed the merits of the court's order notwithstanding the forfeiture, we need not discuss defendant's contention that her counsel was ineffective for failing to object to the amount of restitution.

Payne's challenge to the amount of the restitution order fails.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.