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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LEE GARDNER, SR.,

Defendant and Appellant.

D059314

(Super. Ct. No. SCD226427)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill and David Danielsen, Judges. Affirmed.

BACKGROUND

In June 2010, Kevin Gardner was charged in an information with 19 counts and five enhancements arising from dealings he had with Clifford Lantz, concerning a house Lantz owned in La Mesa. The information alleged three counts of theft from an elder (Pen. Code, § 386, subd. (d))¹; five counts of filing a false instrument (§ 115, subd. (a));

¹ Subsequent unspecified statutory references are to the Penal Code.

one count of attempted grand theft (§ 664/487, subd. (a)); three counts of forgery (§ 470, subd. (d)); two counts of burglary (§ 459); two counts of perjury (§ 118, subd. (a)); two counts of grand theft (§ 487, subd. (a)); one count of use of a personal identification of another (§ 530.5, subd. (a)); and five excessive taking enhancements (§§ 186.11, subd. (a)(1), 186.11, subd. (a)(2), 12022.6, subd. (a)(1), 12022.6, subd. (a)(2), and 1203.045, subd. (a)).

Appellant pled guilty to count 13 (filing a false instrument), count 16 (theft from an elder), and count 19 (perjury), and admitted committing two or more felonies resulting in a taking in excess of \$500,000 (§ 186.11, subd. (a)(2)). The remaining charges and enhancements were dismissed with the court indicating a sentencing range of from four to six years. Thereafter, appellant filed a motion to withdraw his plea. The court (Judge Charles R. Gill) denied the motion and imposed a prison term of six years, consisting of three years for the theft from an elder charge, and three years consecutive for the excessive taking enhancement. The court imposed two-year concurrent terms for each of the other two counts. At a subsequent victim restitution hearing, the court (Judge David Danielsen) ordered appellant to pay \$116,033.63.

On appeal, appellant challenges the victim restitution order and also contends the court erred in denying his motion to withdraw his plea of guilty. We affirm.

FACTS²

Appellant and Lantz, age 82, met when Lantz was at his home in Apple Valley and appellant was living next door with Lantz's neighbor.³ The two struck up a friendship. Lantz, who also owned a home in La Mesa, agreed that appellant could lease the La Mesa house in return for paying \$315 per month in rent and making repairs that would help facilitate the sale of the house. In January 2008, Lantz signed a one-year lease agreement with appellant. Unbeknownst to Lantz, the document was actually a "lease with option agreement." According to Lantz, he and appellant did not discuss such an option and he never offered, nor intended, that appellant would have the right to purchase the property. Lantz indicated that while living in the house, appellant never paid the monthly rent.

On February 12, 2008, a document entitled "lease and option" and signed by appellant and Lantz was recorded in the San Diego County Recorder's Office. A provision was inserted into the document giving the La Mesa property to appellant upon Lantz's death. Lantz did not know of this provision and did not agree to it.

In April 2009, appellant and Lantz signed a month-to-month rental agreement so that Lantz could sell the house if the opportunity arose. Because Lantz viewed appellant

² The facts are taken from the preliminary hearing transcript, the probation report and the transcript of the restitution hearing.

³ The record contains conflicting information regarding the victim's exact age, but it is clear he is over the age of 80.

as his friend, he did not discuss what he was signing with appellant and did not know appellant had added wording to the agreement that gave appellant power of attorney authority. Lantz believed appellant had tricked him into signing this document.

While living in the house, appellant engaged in some repair work. Appellant filed a notarized mechanic's lien in the amount of \$300,000 against the La Mesa property. It was recorded on February 8, 2010. Lantz was unaware the document had been filed. On the same day, a notarized declaration of homestead, signed by appellant, was recorded against the property. The homestead declaration indicated appellant owned 100 percent interest in the house and stated a property value of \$950,000.

A grant deed signed by appellant on February 8, 2010, as "attorney in fact" for Lantz and granting appellant 100 percent interest in the property, was also recorded on February 8. A page, blank except for the words "Grantor/Mortgagor" and the signatures of Clifford Lantz and Evelyn Lantz, was attached to the grant deed. Also attached was a notarization acknowledgment executed by the notary more than two years before the date the grant deed was signed. The blank page and notary acknowledgment appear to have come from a notarized modification agreement signed by the Lantzes and recorded on July 17, 2007. The notary who notarized the modification agreement did not notarize the grant deed and had not notarized any documents since July 2009.

Using these documents, appellant successfully transferred the Lantzes' property to himself on February 8, 2010. In February 2010, appellant contacted a real estate agent, stated he needed to quickly sell the La Mesa property or he would lose it and he wanted

to list the house for \$800,000. Ultimately, the mortgagor foreclosed on the property; the property sold in early 2011 for \$277,400.

While appellant was living at the La Mesa property, he continually asked Lantz for money; Lantz paid appellant approximately \$12,000 for renovation repairs.

The court (Judge Danielsen) ordered appellant to pay \$116,033.63 in victim restitution: \$9,600 for unpaid rent; \$14,233.63 for charges on the Home Depot credit card; and \$92,600 for the equity Lantz lost on the house because of foreclosure.

RESTITUTION ORDER

Restitution Hearing

Two witnesses testified at the April 19, 2011 restitution hearing: Probation Officer Forbes and appellant. Forbes, who had filed a lengthy probation report and a supplemental report which included details about victim restitution, testified concerning the amount of unpaid rent, unauthorized Home Depot credit card charges and the value of the La Mesa property. Appellant's challenge to the restitution amount concerns only the court's determination of the value of the property.⁴

According to Forbes, she spoke with two real estate agents, Dana Rosas, the real estate agent appellant contacted when he tried to sell the house, and Dennis Grimes, the real estate agent who assisted Lantz in 2010. Rosas told her she had informed appellant she valued the house between \$600,000 and \$700,000, depending on whether appellant

⁴ Because appellant does not challenge the amount the court imposed for unpaid rent and unauthorized credit card charges, we need not review that evidence.

completed certain renovations. She also told Forbes that homes comparable to Lantz's property sold in 2009 for between \$435,000 and \$475,000. Grimes informed her he listed the house for Lantz for \$429,900 and received five to 10 offers ranging from \$350,000 to \$400,000. He was not able to complete a sale because of problems with title. To resolve that, he offered appellant \$5,000 to quitclaim the property back to Lantz, but appellant refused. The house sold at foreclosure in early 2011 for \$277,400.

Appellant testified he had a lease option for the La Mesa home and he made monthly rental payments to Lantz, but he could not recall the amount. According to appellant, the monthly rent varied depending on the labor and materials he expended to improve the property. He was working on the house, hoping to increase the equity. He opined the property was "derelict and abandoned" and that the amount obtained at foreclosure was "probably adequate." The court sustained as irrelevant efforts by appellant's counsel to offer evidence concerning the amount of money appellant had put into the property for improvements.⁵

In setting the amount of restitution, the court noted there was "no issue in my mind" as to the rent due and owing and set that figure at \$9,600; and "no doubt in my mind" for the unauthorized credit card charges and set that figure at \$14,233.63. The court acknowledged that the valuation of the house was "all over the board," but relied on

⁵ The sentencing statement submitted on appellant's behalf on October 25, 2010, included a property inspection report dated August 12, 2010, reflecting \$24,381.18 for property improvements made by appellant, including materials, labor and "markup."

testimony the house could have been sold in 2010 for \$400,000. Using that valuation, the court concluded Lantz lost \$92,600 in equity calculated as follows: \$400,000 sales price; less \$30,000 in commissions and costs; less \$277,400 at foreclosure (which included approximately \$19,000 paid to Lantz after all liens were satisfied). The court noted appellant's claim the value of the house was unknown "highly ironic," as it was appellant's conduct that interfered with Lantz's efforts to sell the house before the "bank swoop[ed] in and foreclose[ed]." The court also found appellant's unwillingness to quit claim the property back to Lantz "despicable."

Applicable Law

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).)

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* (2009) 175 Cal.App.4th 7, 26.) "No abuse of discretion is shown simply because the order does not reflect the exact amount of the loss, nor must the order reflect the amount of damages recoverable in a civil action. [Citation.] In

determining the amount of restitution, all that is required is that the trial court 'use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.' [Citation.] The order must be affirmed if there is a factual and rational basis for the amount." (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

Analysis

On appeal appellant challenges the victim restitution fine, claiming the amount the court imposed to reimburse the victim for the equity he lost in the La Mesa property was improper. In three interrelated arguments, appellant asserts (1) the offenses he admitted did not cause the victim's loss of equity; (2) it is unclear how the court calculated the loss of equity; and (3) the court failed to consider relevant evidence. The contentions fail.

First, the record makes clear the court determined that the false documents appellant filed, including the grant deed, clouded title to the La Mesa property and prevented Lantz from selling the property in 2010 in order to avoid foreclosure. This delay contributed to a decrease in Lantz's equity in the house. Because appellant pled guilty to filing a false instrument—the grant deed—(§ 115, subd. (a)), and that act interfered with Lantz's efforts to sell the house, appellant's assertion Lantz did not suffer economic loss as a result of criminal conduct he admitted is simply inaccurate. Consequently, the authority he cites in support of his assertion there must be a direct link between the victim's loss and the crimes the appellant admitted (i.e., *People v. Percelle* (2005) 126 Cal.App.4th 164) is inapplicable.

Second, although the court acknowledged the value of the house was "all over the board," ranging from a high of \$950,000 as stated by appellant on the fraudulent homestead declaration to a low of \$350,000 offered by a potential buyer in 2010, there was ample evidence to support the court's finding that Lantz could have sold the house for \$400,000 in 2010 if appellant had not clouded title. Using that figure and reducing it by \$30,000 for commissions and costs, the court calculated the lost equity by comparing that figure (\$370,000) to the amount recovered at foreclosure (\$277,400). Contrary to appellant's argument, there was substantial evidence to support the court's conclusion the victim lost \$92,600 in equity and the court clearly set forth the manner in which it calculated this dollar amount.

Finally, appellant contends the court erred when it did not allow him to introduce evidence regarding the value of improvements (approximately \$24,381) he claims he made to the house. The argument fails. Where a court uses a rational method to calculate damages to make the victim whole, there is no error if the restitution order does not reflect the exact amount of the victim's loss. (*People v. Akins, supra*, 128 Cal.App.4th at p. 1382.) Likewise, the amount of damages need not reflect the manner in which damages are calculated in a civil action. (*Ibid.*)

Here the court used a rational method to calculate damages. It considered the conflicting evidence regarding the value of the house, selected a figure in the low range (\$400,000), reduced that figure to account for commissions and costs (\$30,000) and compared that figure to the value of the house at foreclosure (\$277,400). The trial court

was not required to take into account all possible variables that could increase or decrease the amount of the victim's exact loss. The court did not abuse its discretion in calculating the loss of equity and did not err in declining to consider evidence of alleged improvements in its calculations.

DENIAL OF MOTION TO WITHDRAW GUILTY PLEA

Background

On September 7, 2010, appellant appeared for a change of plea hearing. Before questioning appellant under oath, the court referenced a brief off-the-record conversation setting forth the details of the plea bargain. As the court explained, in exchange for appellant pleading guilty to three counts and admitting the excessive taking enhancement, the balance of the information would be dismissed. The court indicated a sentence of four to six years and noted there was a "potential for mitigation," depending on appellant's efforts to execute documents that would help the victim. Appellant's counsel added he had told appellant about the custody credits he had accumulated and informed him his sentence would be "a half-time sentence."

The court then began its preliminary inquiry of appellant, starting with questions about any drugs, alcohol or medications appellant was taking. Upon learning appellant was taking heart medication, the court asked several questions to determine if the medication affected his ability to understand the proceedings. At one point, appellant noted the medication was impacting his ability to understand the proceedings but when asked, do "you believe that even though you're taking this medication, you understand

what's going on here today?" appellant responded, "Yes, sir." The court then inquired whether appellant had had enough time to speak with his attorney; when he said he "would like a little more" time, the court stopped the proceedings to permit appellant to talk with his attorney.

When the proceedings resumed, appellant stated he had had enough time to speak with his attorney and in response to a question from the court, stated he could not "think of any reason" why the court "should not take [his] plea of guilty this morning" In response to further questions, appellant confirmed he had initialed the boxes on the change of plea form and signed the form to indicate that he had "read and understood this form." He further stated he had discussed the form with his attorney, his counsel had answered any questions he had about the form, and he had no questions of the court.

Appellant's counsel then recited the factual basis for appellant pleading guilty to counts 13, 16 and 19 and admitting the excessive taking enhancement. When the court asked appellant if everything his attorney had said was "true and correct," appellant stated, "[e]xcept for the \$500,000, sir." Upon further inquiry and appellant's counsel stating that the estimated value of the house "did come in at over \$500,000," appellant again told the court that to his knowledge, the factual basis for the plea concerning the value of the house was not accurate. At that point, the court stated "[w]e're going to either trail this or we're going to confirm it" and took another recess at counsel's request.

Following the recess, appellant stated he was prepared to proceed, but when asked, "as it relates to the factual basis . . . including the dollar amounts, . . . is that all true and

correct?" appellant stated "I can just take their word for it, Your Honor." The court then stated:

"Mr. Gardner, I need to caution you because I can tell that there's hesitancy on your part to proceed with this. For me to accept your plea of guilty, in other words to facilitate the plea bargain that has been discussed, I have to be convinced that what you're doing is a knowing, intelligent and voluntary waiver of your rights. [¶] What you're portraying to me now is contrary to that, so I guess the question for you is do you want to go forward with this or do you want to go to trial?"

The court told appellant it needed to know whether he wanted to go forward with the plea bargain or go to trial and stated "the only person that can make that decision is you." Upon receiving no audible answer, the court confirmed the matter for trial, passed back the change of plea form and wished appellant "[g]ood luck."

Later in the day, the case was recalled at appellant's request. His counsel explained he had talked further with his client and answered questions he had, including his client's misplaced concern that the prosecutor determined the length of the sentence, not the court. The court asked appellant if he wanted to proceed and he confirmed he did. The court then asked, "You're sure about that?" Appellant stated, "Yes, sir." The appellant also stated he had no questions he wanted to ask the court.

Continuing with the hearing, the court asked appellant if the factual basis for his change of plea was "true and correct" and appellant said, "Yes." The court then asked appellant several questions and confirmed he understood the various consequences of his change of plea; the constitutional rights he was waiving; the fact he was waiving those rights; and the specific terms of the plea bargain—he would plead guilty to counts 13, 16

and 19; admit the excessive taking allegation; the balance of the information would be dismissed; and the court would consider a sentence between four and six years. When the court asked appellant, "Other than what we have talked about this morning, have you been promised anything or threatened in any way in order to get you to plead guilty," appellant stated, "No, sir." After appellant pled guilty to counts 13, 16, and 19, and admitted the enhancement, the court accepted appellant's plea, set a sentencing date and considered and rejected appellant's request that he be released from custody pending sentencing.

On October 27, 2010, the date set for sentencing, the court granted appellant's *Marsden* request and appointed new counsel. In January 2011 new counsel filed a motion to allow appellant to withdraw his guilty plea. Counsel asserted the original attorney had denied appellant effective representation as he had failed to prepare a defense, misled appellant by telling him he could later withdraw his plea, and informed him he would be released from custody pending appeal. There were no declarations or evidence presented in support of the motion. At the hearing on January 19, 2011, counsel submitted on the pleadings except to reiterate his contention appellant's guilty plea was "coerced."

On appeal, appellant contends his guilty plea was not voluntary. In support, he relies on the transcript of the change of plea hearing and asserts he "simply did not believe he was guilty of the charged offenses."

Applicable Law

The defendant has the burden to show good cause for withdrawal of a guilty plea by clear and convincing evidence. (§ 1018; *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207.) Good cause exists if the defendant was operating under mistake, ignorance, inadvertence, fraud, duress, or any other factor overcoming the exercise of free judgment. (*People v. Huricks, supra*, at p. 1208.) A trial court's ruling on a plea withdrawal motion will not be disturbed on appeal unless the defendant shows a clear abuse of discretion. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.) We defer to the trial court's factual findings if they are supported by substantial evidence. (*Ibid.*)

A guilty plea may not be withdrawn simply because the defendant has changed his or her mind. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456; *People v. Knight* (1987) 194 Cal.App.3d 337, 344.) A defendant's failure to produce any support for plea withdrawal except unsworn statements is a factor supporting denial of the motion. (*People v. Goldman* (1966) 245 Cal.App.2d 376, 380, disapproved on other grounds in *In re Smiley* (1967) 66 Cal.2d 606, 626, fn. 14.) Further, a trial court is not required to credit the defendant's statements in support of plea withdrawal because of the defendant's obvious interest in the outcome of the proceeding. (*People v. Beck* (1961) 188 Cal.App.2d 549, 553-554.) A defendant's bare assertion of innocence, without supporting facts credited by the court showing the defendant's free and clear judgment was overcome at the time of the plea, is insufficient to require plea withdrawal. (See *In*

re Brown (1973) 9 Cal.3d 679, 685-686; *People v. Beck, supra*, 188 Cal.App.2d at pp. 552-553.)

Analysis

Contrary to appellant's argument, the court did not abuse its discretion in denying his motion to withdraw his plea. At the change of plea hearing, the court declined to accept appellant's pleas until it was satisfied appellant understood the specifics of the plea agreement; agreed to the terms; voluntarily admitted his guilt; concurred with the factual basis for these admissions; and waived his constitutional rights.

During the first part of the hearing, the court recessed the matter twice: once when it became apparent appellant wanted more time to talk with his attorney and a second time when he expressed disagreement concerning the factual basis for the plea. When the hearing resumed and appellant continued to equivocate, the court told appellant that it would not accept his plea unless appellant convinced the court his plea was voluntary, knowing and intelligent. The court reiterated in clear, direct language that appellant was the one who had to decide whether to change his plea or proceed to trial. Appellant did not respond and the court stopped the proceedings and confirmed the trial date.

At some later point in the day, the court resumed the hearing at appellant's request, but only after confirming appellant was "sure" he wanted to proceed. The remaining part of the hearing was uneventful with appellant unequivocally stating he understood the plea bargain; admitted his guilt; agreed with the factual basis for the plea and confirmed he

had not been threatened, nor given any other promises, in return for his admissions of guilt.

Given appellant's initial ambivalent conduct, the court properly declined to go forward with the plea bargain. Likewise, the court properly accepted appellant's change of plea upon appellant's explicit affirmation he wanted to waive his constitutional rights and accept the plea bargain. The trial court did not err in rejecting appellant's claim his plea was not given freely, knowledgeably and voluntarily.

Nor did the court err in declining to set aside appellant's guilty plea on the basis he maintains he is innocent and believes he has a defense. Under oath, he admitted his guilt and agreed his conduct supported these admissions. The mere fact he later told the probation officer he was not guilty and at the restitution hearing he claimed he had a defense does not amount to clear and convincing evidence he should be allowed to withdraw his plea. Such bare assertions are insufficient, particularly where, as here, appellant did not offer any supporting declarations, witness testimony or evidence in support of his claim of innocence.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.