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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JAMES PERRY,

Defendant and Appellant.

D060378

(Super. Ct. Nos. SCD223402,  
SCD230842)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Judgment affirmed as modified and remanded with directions.

This appeal involves two criminal cases. On February 14, 2011, in San Diego County Superior Court case No. SCD223402, Michael James Perry pleaded guilty to two felony assault counts and admitted he used a deadly weapon in the commission of both offenses. Pertinent to this appeal is (1) Perry's plea of guilty to count 3, which charged him with assaulting the victim with a deadly weapon or by means of force likely to produce great bodily injury in violation of Penal Code<sup>1</sup> section 245, subdivision (a)(1) (hereafter § 245(a)(1)); and (2) his admission that he personally used a deadly or

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

dangerous weapon (a drum) in the commission of this aggravated assault within the meaning of former section 12022, subdivision (b)(1) (hereafter § 12022(b)(1)) and section 1192.7, subdivision (c)(23). That criminal case arose from Perry's act of injuring the female victim by hitting her in the back of the head with a small drum.

On that same date, Perry pleaded guilty in the second case—No. SCD230842—to four counts of making a criminal threat in violation of section 422. That case arose from Perry's four acts of threatening his public defender with death or great bodily injury (counts 1, 3, 6, & 8), and his act of throwing and destroying a laptop computer the court had provided to him to assist him in the courtroom due to his hearing impairment (count 5: vandalism over \$400 in violation of § 594, subds. (a) & (b)(1)). The court dismissed count 5.

Perry agreed to a *Harvey*<sup>2</sup> waiver in both cases. On July 14, 2011, the court sentenced Perry in both cases to a total prison term of 12 years eight months, including a consecutive one-year enhancement in case No. SCD223402 for the personal use of a deadly or dangerous weapon (§ 12022(b)(1)).

On July 22 of that year, following a restitution hearing, the court ordered Perry to pay restitution in the amount of \$733 (one-half the replacement cost of \$1,466) for the loss of the computer and amended the judgment accordingly.

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<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754. A *Harvey* waiver permits a sentencing court to consider counts that were dismissed under a plea bargain and were transactionally related to the admitted offense. (*Id.* at pp. 758-759; see also 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 274, p. 361.)

Perry appeals, contending (1) the one-year count 3 weapon use enhancement in case No. SCD223402 must be stricken from the judgment because use of the weapon was an element of his count 3 assault conviction, and (2) the \$733 restitution award in case No. SCD230842 for the destruction of the laptop computer must be reversed, and the matter remanded for further consideration, because the court abused its discretion by not using a rational method of considering depreciation in determining the restitution amount.

We modify the judgment by striking the one-year weapon use enhancement in case No. SCD223402 and affirm the judgment as so modified.

#### FACTUAL BACKGROUND

As the remaining facts underlying the two cases are not pertinent to this appeal, we need not summarize them.

#### DISCUSSION

##### I

##### *COUNT 3 WEAPON USE ENHANCEMENT (CASE NO. SCD 223402)*

Perry contends the count 3 consecutive one-year enhancement in case No. SCD223402 for his use of a weapon (§ 12022(b)(1)) must be stricken from the judgment because use of the weapon was an element of his aggravated assault conviction (§ 245(a)(1)). The Attorney General concedes that Perry is correct. We conclude the enhancement must be stricken.

Section 245(a)(1) provides: "Any person who commits an assault upon the person of another with a *deadly weapon or instrument other than a firearm* shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not

exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment." (Italics added.)

Section 12022(b)(1) provides: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, *unless use of a deadly or dangerous weapon is an element of that offense.*" (Italics added.)

"[T]he conduct of the accused, rather than the prosecution's pleading, determines whether use of a deadly weapon is an element of a section 245[(a)(1)] conviction." (*People v. McGee* (1993) 15 Cal.App.4th 107, 110.)

Here, Perry's hitting the victim in the head with a drum constituted the aggravated assault of which he was convicted. Therefore, his use of the drum as a "deadly weapon or instrument other than a firearm" (§ 245(a)(1)) in committing the aggravated assault was an element of that offense, and the weapon use enhancement imposed under section 12022(b)(1) must be stricken. (§ 12022(b)(1); *People v. McGee, supra*, 15 Cal.App.4th at p. 110.)

## II

### *RESTITUTION (CASE NO. SCD230842)*

Perry also contends the \$733 restitution award in case No. SCD230842 for his destruction of the laptop computer must be reversed, and the matter remanded for further consideration, because the court abused its discretion by not using a rational method of

considering depreciation in determining the restitution amount. We reject this contention.

*A. Background*

As a result of his hearing disability, Perry was provided a laptop computer and a second reporter during the trial in case No. SCD230842 to allow him to view the transcription of the oral proceedings in real time. Perry destroyed the computer during the trial when he threw it in the courtroom.<sup>3</sup> The probation officer reported that the replacement cost for the computer was \$1,345.

At the evidentiary restitution hearing, Lynda Abas, an information technology manager for the Superior Court of San Diego County, testified that the cost to purchase the computer in 2001 was \$2,427.39, and the cost of the replacement computer was \$1,466.15. She testified the destroyed computer was no longer manufactured, and the replacement computer was slimmer and faster, and had more memory and a built-in wireless capability.

Perry told the court, "I know I have a responsibility to pay for the computer. I knew I would have to pay for it when I threw it, but it doesn't seem right to pay \$1,500 for a computer that's 10 years old. I don't see how it could be valued at \$1,500 10 years later."

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<sup>3</sup> As a result of his act of destroying the computer, Perry was charged in case No. SCD230842 with one count of vandalism over \$400 in violation of section 594. As noted, Perry agreed to a *Harvey* waiver, and the court dismissed that count.

## 1. *Ruling*

The court stated it was required "to use a rational method to set restitution" and acknowledged the resale value might be very low. Noting that the new computer "does more than the original computer did," the court stated that "the court is entitled to have a computer that would be sure enough to do whatever the original one did." The court then took the replacement cost of \$1,466, cut it in half, and ordered Perry to pay the resulting amount—\$733—in restitution for the loss of the original computer.

## B. *Applicable Legal Principles*

Section 1202.4, subdivision (f)(3)(A) provides:

"(f) . . . [I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. [¶] . . . [¶](3) 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 . . . damaged property. *The value of . . . damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.*" (Italics added.)

A crime victim's right to restitution must be broadly and liberally construed. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*)). A trial court has broad discretion in setting the amount of restitution. (*People v. Stanley* (July 9, 2012) \_\_ Cal.4th \_\_ (2012 Cal. Lexis 6360); *Millard*, at p. 26.) The trial court may use any rational method in determining the amount of restitution as long as it is reasonably calculated to make the victim whole. (*Millard*, at p. 26.)

In *Millard*, this court explained that "[a]t a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss." (*Millard, supra*, 175 Cal.App.4th at p. 26.) Once the People have made a prima facie showing of the victim's loss, the burden shifts to the defendant to demonstrate the amount of the loss is other than that claimed by the victim. (*Ibid.*)

"There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

#### 1. *Standard of review*

A restitution order is reviewed for abuse of discretion, and no abuse of discretion will be found by the reviewing court when there is a factual and rational basis for the amount of restitution ordered by the trial court. (*Millard, supra*, 175 Cal.App.4th at p. 26.)

#### C. *Analysis*

In ordering Perry to pay restitution in the amount of \$733 for the loss of the laptop computer he destroyed in the courtroom, the court did not use the original purchase price of the 10-year-old computer (\$2,427). Instead, it used the cost of the replacement computer—\$1,466—and ordered Perry to pay half that amount—\$733—in victim restitution, thereby acknowledging depreciation of the original computer as a factor in determining the restitution amount. A court may "rationally use a cost basis for

determining the amount of restitution for most items and [is] not required to use a strict fair market value standard at the time [the victim's loss occurred]." (*In re Brian S.* (1982) 130 Cal.App.3d 523, 532.)

Here, the court's method of calculating the appropriate value of a replacement laptop computer was rationally based on both the actual cost of the replacement computer and depreciation of the original computer before Perry destroyed it. Thus, the court did not abuse its discretion. (See *Millard, supra*, 175 Cal.App.4th at p. 26.)

Perry complains that "the court did not avail itself of other easily available sources online as to how depreciated computers—certainly not a rare commodity—may be valued." However, the court was not required to limit the amount of restitution to the exact amount of the loss caused by Perry's willful destruction of the computer. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1121.) In any event, at the restitution hearing the People met their burden of presenting a prima facie showing of the cost to replace the computer, and Perry's speculative remarks to the court failed to meet his burden of showing the amount of the loss was some lesser amount. (See *Millard, supra*, 175 Cal.App.4th at p. 26.)

#### DISPOSITION

The count 3 section 12022(b)(1) enhancement in case No. SCD223402 is stricken. As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment reflecting the striking of that enhancement and to

forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.