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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOSE M., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE M.,

Defendant and Appellant.

D061071

(Super. Ct. No. J225002)

APPEAL from a judgment of the Superior Court of San Diego County, Carolyn M. Caietti, Judge. Affirmed.

Pursuant to a plea agreement, Jose M. (Jose or Minor) admitted resisting arrest (Pen. Code,<sup>1</sup> § 148, subd. (a)(1).) Jose also agreed to a *Harvey*<sup>2</sup> waiver dealing with dismissed counts of unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)); possessing a stolen vehicle (§ 496, subd. (d)); and possessing stolen property (§ 496, subd. (a)). Jose was continued on probation in the drug court program.

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754, 758.

Following several hearings, the court imposed a restitution order finding Jose and his parents responsible for restitution in the amount of \$29,380.89.

Jose appeals challenging only the amount of the restitution order. He also contends his counsel was ineffective for failing to object to a portion of the order.

Based on our review of the record we will find there is substantial evidence to support the amount of the restitution order. We will also find that Jose has not demonstrated that his counsel was ineffective in representing him at the restitution hearing. Accordingly, we will affirm the juvenile court's order.

#### STATEMENT OF FACTS

Since Jose does not challenge the factual basis for his plea, or the facts underlying the offenses which are subject to the *Harvey* waiver, a brief summary of the facts will suffice. We will discuss the factual basis of the restitution order separately.

On June 5, 2011, Jose was a passenger in a stolen 2011 Chevrolet Camaro, which was being driven by Ivan Guerrero. When the car was stopped by sheriff's deputies, Jose fled, but was caught and arrested. He admitted he knew the car was stolen but denied participation in the theft.

The owner of the Camaro, Dr. Jason Ling, reported the car was damaged and needed repair and that there had been a Rolex watch and expensive guitar in the car when it was stolen. Dr. Ling reported that both items were missing when the car was returned to him.<sup>3</sup>

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<sup>3</sup> Jose does not challenge the trial court's finding that there was in fact a solid gold Rolex watch and an expensive guitar taken from the victim's car. Accordingly, we assume that such losses did occur.

## DISCUSSION

### I

#### *THE RESTITUTION ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE*

The determination of the amount of restitution to be ordered involved several hearings, a letter from the victim and a report from the probation officer. There were two principal components to the order. One portion dealt with the costs associated with the repair of the car after it was returned. The second, and largest amount, dealt with the value of the lost Rolex watch and the guitar. As to the amount of the car repair, Jose contends the court erred in ordering both the cost of repair and the amount of the insurance deductible paid by the victim. Defense counsel did not object to the inclusion of the deductible amount in the restitution order. Recognizing that the issue will likely be deemed forfeited on appeal, he argues his counsel was ineffective. We will discuss the latter point in part II of this opinion.

Regarding the value of the lost Rolex watch and the guitar, Jose contends the differing amounts stated by the victim as the case progressed, and the lack of documentation establishes that there is not sufficient evidence to support the amounts ordered.

#### A. Standard of Review

Juvenile court judges have broad discretion to fix the amount of restitution to be paid by a minor for the harm caused by the minor's criminal activity. (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 692.) "[T]he court may use any rational method of fixing the amount. . . , provided it is reasonably calculated to make the victim whole, and provided it is consistent with the purpose of rehabilitation." (*In re Brittany L.* (2002) 99

Cal.App.4th 1381, 1391-1392; Welf. & Inst. Code, § 730.6, subds. (a)(1) & (h).) Where a juvenile court has a factual and rational basis for the amount of restitution that it has ordered, we will not find an abuse of discretion. (*In re Christopher M.*, *supra*, 127 Cal.App.4th at p. 692.)

When we review the factual basis of the juvenile court's decision we apply the familiar substantial evidence standard of review. Under that standard we do not reweigh the evidence or make credibility decisions. Rather, we review the entire record, drawing all reasonable inferences in support of the trial court's decision. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Carlos T.* (2009) 174 Cal.App.4th 795, 804-805.)

#### B. Car Repair Costs

Jose contends the trial court erred in allowing the amount paid by the victim as a deductible under his insurance policy (\$752.55), while at the same time including the cost of repair (\$2,246.34) and "possibly" the towing fee (\$235). Jose reasons that the insurance company must have paid the repair cost and towing fee. Thus he contends it was error at least insofar as the deductible was included.

Jose does not contend he is not responsible for the repair costs. Thus we focus only on the deductible amount included in the final order. As to that amount, Jose acknowledges there was no objection made in the juvenile court. Because the issue was never raised, there was no factual development of whether there was any problem with including that amount in the order. The failure to raise the issue in the juvenile court prevents this court from conducting any meaningful review of the issue. Accordingly, we consider the issue

forfeited on appeal. (*People v. Simon* (2001) 25 Cal.4th 1082, 1103; *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048.)

We find no error in including the full amount of car repair costs contained in the restitution order.

### C. The Rolex and the Guitar

Jose contends there is not sufficient evidence in the record to support the trial court's award of \$25,000 for the lost Rolex and \$1,000 for the lost guitar. In making his challenge, Jose focuses primarily on the fact that the victim made differing estimates of the loss as the case progressed. His earlier estimates were indeed at variance with his testimony at the restitution hearing held in December 2011. However, any inconsistencies in the victim's statements go to the question of his credibility, an issue for the juvenile court, not for appellate review.

In the juvenile court the victim described his research into the replacement value of the lost guitar. The trial court clearly found the victim to be credible and concluded that obtaining a replacement for the guitar would cost at least \$1,000. That conclusion is supported by the record.

The victim also testified that the lost watch was a solid gold Rolex Presidential, valued in excess of \$25,000. The watch had belonged to the victim's now deceased father. His mother advised him she paid \$25,000 for the watch. Again, the trial court believed the witness, and there was no competing testimony as to value. Thus, we again conclude there is sufficient substantial evidence in the record to support the restitution ordered for the lost watch.

## II

### *INEFFECTIVE ASSISTANCE OF COUNSEL*

Jose contends trial counsel was ineffective for failing to object to the inclusion of the \$752 allocated for the deductible amount on the victim's insurance policy. In order to establish that counsel's performance denied Jose his Sixth Amendment right to the assistance of counsel, Jose must meet the burden of proof established by the U.S. Supreme Court. In *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, the court held that reviewing courts must presume that trial counsel's representation was within the range of reasonable performance. The burden is then on the appellant to show that counsel's performance was objectively deficient, under objective standards and that the defective performance was prejudicial. In order to establish prejudice, the appellant must show that it is reasonably probable that in the absence of the error the result would have been different. (*Id.* at p. 694.) In other words, Jose must not only show counsel erred in failing to object, but that it is reasonably probable that had counsel objected, the court would not have included the deductible amount in the order. Jose has failed on both prongs of the *Strickland* test.

First, we have no idea why counsel decided not to object to this fairly minor amount in a proceeding where thousands of dollars were at stake. In the absence of any explanation, we are left to speculate on why counsel made this particular decision. Further, it is not clear from this record that the court would have sustained an objection to the amount. The record shows that the total cost of repair included the deductible and the other costs of repair. Nothing in the unexplained record indicates that the amounts included in the probation

report do not represent the actual loss. Indeed, the amounts provided by the owner to the probation officer can be considered by the trial court as prima facie evidence of loss.

*(People v. Foster* (1993) 14 Cal.App.4th 939, 946; superseded by statute on other grounds in *People v. Birkett* (1999) 21 Cal.4th 226, 238-245.)

Based on the record before us, we conclude that Jose has failed to meet his burden of showing that trial counsel's representation deprived him of his Sixth Amendment right to counsel.

#### DISPOSITION

The order setting restitution in the amount of \$29,380.89 is affirmed.

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HUFFMAN, J.

WE CONCUR:

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BENKE, Acting P. J.

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McDONALD, J.