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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS LOPEZ,

Defendant and Appellant.

D061877

(Super. Ct. No. JCF28420)

APPEAL from an order of the Superior Court of Imperial County, Christopher J. Plourd, Judge. Affirmed.

Carlos Lopez appeals a victim restitution order (Pen. Code, § 1202.4, subd. (f))¹ entered after he pleaded no contest to receiving stolen property (§ 496, subd. (a)). The court ordered Lopez to pay \$1,600 in victim restitution. Lopez contends the court erred

¹ All further statutory references are to the Penal Code.

by ordering victim restitution based on a burglary charge dismissed without a *Harvey*² waiver as part of a plea bargain. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On February 22, 2012, Monica Romo returned home from work and discovered her glass door was broken and several items she and her husband owned were missing. The damage and missing property amounted to \$4,360. A neighbor told Romo there had been a blue car parked in front of the Romos' home 30 minutes earlier. Imperial County sheriff's deputies spoke with Romo and began an investigation.

Lopez was driving a blue car when Brawley police officers pulled it over. The two passengers in the car fled. The officers apprehended one of the passengers--Ceasar Anthony Lopez (Ceasar)--but not the other. The officers searched the car and found the Romos' property. Ceasar and Lopez told the police the property belonged to the other passenger, a hitchhiker, who had thrown a large bag in the trunk of the car. Neither Ceasar nor Lopez could explain how some of the Romos' items were found in the car's passenger compartment.

Lopez was charged with residential burglary (§ 459), vandalism (§ 594, subd. (a)), and receiving stolen property (§ 496, subd. (a)). He pleaded no contest to receiving stolen property in exchange for the dismissal of the remaining charges. The *Harvey* waiver provision of the plea agreement was scratched through in ink and "N/A" was

² *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

written next to the provision. The plea agreement also states Lopez's attorney explained to him that restitution is one possible consequence of the plea.³

The court ordered Lopez to pay \$1,600 in victim restitution to the Romos for their property loss and damages. Lopez's attorney objected because there was no *Harvey* waiver permitting restitution based on the dismissed charges. The court agreed there was no express *Harvey* waiver, but found a strong nexus between the dismissed burglary charge and the receiving stolen property charge to which Lopez pleaded no contest. The court reasoned that at the time Lopez was stopped, he had possession of the Romos' property, and there was a short period of time between the burglary and Lopez's possession of the stolen property. The court also found Lopez made false statements because he blamed a transient for putting stolen property in the trunk but was unable to explain the stolen property found in the passenger compartment. The court placed Lopez on three years' probation and ordered him to pay the Romos \$1,600 in victim restitution.

DISCUSSION

Subject to exceptions not present here, "in 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 . . ." (§ 1202.4, subd. (f).) However, "[i]f restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to

³ The provision reads, "My attorney has explained to me that other possible consequences of this plea may be: (Circle applicable consequences)." "(9) restitution" was circled.

[*Harvey, supra*, 25 Cal.3d 754] from the defendant as to the dismissed count." (§ 1192.3, subd. (b).) Lopez contends the court erred by ordering him to pay victim restitution based on the dismissed burglary charge because there was no *Harvey* waiver. He alternatively argues even if no *Harvey* waiver was required, there is insufficient evidence linking him to the dismissed burglary charge to warrant the victim restitution order.

A

Standard of Review

We review a restitution order for abuse of discretion.⁴ (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) The court abuses its discretion "when its determination is arbitrary[,] capricious[,] or ' " 'exceeds the bounds of reason, all of the circumstances being considered.' " [Citations.]' " (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121 (*Carbajal*)). No abuse of discretion will be found if there is a factual and rational basis for a victim restitution order. (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562.)

B

The Restitution Order Was Proper

The court generally must obtain a *Harvey* waiver if it considers the defendant's conduct underlying a charge dismissed by the plea bargain when calculating victim restitution. (§ 1192.3, subd. (b).) *Harvey* waivers require a defendant to explicitly agree

⁴ Lopez asks us to apply a de novo standard of review. Contrary to his assertion, the restitution order was neither an unauthorized sentence, nor a failure to properly apply California law. (*Harvey, supra*, 25 Cal.3d at p. 758 [*Harvey* applies only where charges are not transactionally related].) The proper standard of review is abuse of discretion.

to the court's consideration of the conduct underlying the dismissed charges. In the absence of a *Harvey* waiver, a court may nevertheless refer to the conduct on which dismissed charges are based when the "[f]acts surrounding a dismissed charge . . . are 'transactionally related' to defendant's admitted offense."⁵ (*People v. Klaess* (1982) 129 Cal.App.3d 820, 823.) Courts may exercise discretion in ordering restitution "where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation]." (*Carbajal, supra*, 10 Cal.4th at p. 1121). Further, courts have broad discretion to protect and reimburse victims for economic loss. (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1208-1209.)

Here, the court properly exercised its discretion and determined the charges of burglary and receiving stolen property were transactionally related. The court considered evidence of Lopez's underlying conduct relating to the Romos' property loss, including: (1) the Romos' property was found in his car; (2) his story about a hitchhiker was not credible, as he could not explain why some stolen property was found in the passenger compartment; (3) there was a short period of time between the burglary and his arrest; and (4) the car he was driving was the same color as the car parked at the Romos' house when it was burglarized. These facts allowed the court to draw a reasonable inference that the Romos' loss was caused at least in part by Lopez's underlying conduct related to receiving stolen property. The court also provided Lopez's counsel the opportunity to

⁵ We use the terms "transactionally related" and "nexus" interchangeably here.

"negate or prove that these inferences [showing a nexus] are not accurate," but counsel declined, stating there was no information other than what had already been provided through discovery. The transactional relationship between Lopez's actions and the dismissed burglary charge provides a factual and rational basis for the restitution ordered. The court properly exercised its discretion by ordering Lopez to pay victim restitution.

The mere possibility Lopez was not involved in the burglary is not enough to overcome the court's careful weighing of the facts connecting him to the crime. Because the court properly determined the burglary was transactionally related to the crime of receiving stolen property, Lopez's reliance on *People v. Scroggins* (1987) 191 Cal.App.3d 502 is misplaced. In *Scroggins*, the trial court erroneously ordered the defendant to pay restitution to burglary victims whose property was never found in the defendant's possession or linked to the defendant. (*Id.* at pp. 504, 506.) The victims in that case were missing some property and the defendant was convicted of receiving stolen property belonging to people living in the same apartment complex. (*Ibid.*) Because there was no showing the defendant proximately caused the losses, the court struck the restitution condition of probation. (*Id.* at p. 506.) Here, the Romos' stolen property was in Lopez's possession. From this, the court could reasonably infer that Lopez proximately caused the loss, thus providing a rational basis for the court's restitution order. Moreover, "California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction." (*Carbajal, supra*, 10 Cal.4th at p. 1121.)

Lopez argues that a plain reading of section 1192.3 requires a *Harvey* waiver when the court considers any dismissed charge. The statute requires a waiver "pursuant to [*Harvey*]." (§ 1192.3, subd. (b).) However, in *Harvey* the court held a waiver is necessary when charges are not transactionally related. (*Harvey, supra*, 25 Cal.3d at p. 758.) The court in *Harvey* distinguished *People v. Guevara* (1979) 88 Cal.App.3d 86, 92-94, which held that a sentencing court can consider circumstances underlying dismissed charges transactionally related to admitted charges. (*Harvey, supra*, 25 Cal.3d at pp. 758-759.) *Harvey* applies only when the court considers an unrelated charge. (*Ibid.*) Here, the court properly found the charges were related.

Still, we note the importance of a proper *Harvey* waiver. Without a transactional relationship between the burglary and stolen property charges, the absence of a *Harvey* waiver here would have required denial of the victim restitution. (*Harvey, supra*, 25 Cal.3d at pp. 758-759.) A proper *Harvey* waiver should explicitly state the defendant understands the court may use the dismissed charges in determining victim restitution if the charges are related to an admitted charge. Further, courts should explain the consequences of the *Harvey* waiver to a defendant in open court and reiterate defendant's stipulation to the waiver. (*People v. Beck* (1993) 17 Cal.App.4th 209, 216.)

The provision here states only that restitution is a possible consequence of the plea agreement. A valid *Harvey* waiver would have expressly informed Lopez that the court could consider the dismissed burglary and vandalism charges. (*Harvey, supra*, 25 Cal.4th at p. 758.) Under the circumstances here, a sufficient nexus exists between burglary and receiving stolen property and, thus, a *Harvey* waiver was not required.

DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.