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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.V., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.V.,

Defendant and Appellant.

E052859

(Super.Ct.No. INJ021588)

OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., Judge. Affirmed in part; reversed in part and remanded with directions.

Eric Cioffi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

The Riverside County District Attorney's Office filed a Welfare and Institutions Code section 602 petition (the petition) alleging that defendant and appellant J.V. (minor) committed auto theft (Veh. Code, § 10851, subd. (a)), grand theft (Pen. Code, § 487), misdemeanor vandalism causing less than \$400 in damages (Pen. Code, § 594, subd. (b)(2)), and theft of retail merchandise not exceeding \$400 (Pen. Code, § 490.5). Minor admitted the truth of all of the allegations in the petition. The juvenile court granted him probation under the deferred entry of judgment (DEJ) program (Welf. & Inst. Code, §§ 790, 791, subd. (b)) for 36 months. One of his probation conditions required him to pay restitution to the victims.

Minor's sole contention on appeal is that the juvenile court abused its discretion when it set the amount of victim restitution he owed at \$14,962.59. We agree and remand the matter.

FACTUAL BACKGROUND¹

On or about July 14, 2010, minor unlawfully took a Mercedes SL500, a Rolex watch, and cash. He apparently returned the watch and car, but the car had some scratches on it. On August 4, 2010, minor shoplifted merchandise from a Sears store.

¹ Because minor admitted the truth of the allegations in the petition and the record does not contain a probation report, this statement of the facts is taken from the allegations contained in the petition.

ANALYSIS

The Prosecution Did Not Make a Prima Facie Showing of the Victims' Losses

Minor argues that the court abused its discretion in setting the amount of victim restitution at \$14,962.59 because the prosecution did not establish a prima facie basis for that amount. He contends that the error was compounded at a contested restitution hearing when the court put the burden on him to refute the amount of restitution set at the previous hearing. He further asserts that he presented evidence to refute the amount. We conclude that the matter should be remanded for the court to properly determine the amount of victim restitution.

A. Relevant Proceedings

Minor admitted the truth of the allegations in the petition, and the court placed him on probation and set a restitution hearing.

On November 18, 2010, a restitution hearing was held before Judge H. Morgan Dougherty. Defense counsel informed the court that just that morning, he received a statement of loss claiming over \$14,000 in restitution. He stated that he was not going to stipulate to that amount. The probation officer requested the court to set restitution, and then if defense counsel chose to contest the amount, another hearing could be set. The court stated that the present hearing was actually a contested restitution hearing, but proposed to “just take the contested hearing off calendar with the understanding that at this point there is no current order for restitution.” The prosecutor replied that, procedurally, the court had to set restitution before it could be contested. The prosecutor then stated, “we do have the documentation. And the number we would ask be set is

\$14,000.” The probation officer interjected that the actual number was \$14,962.59. The prosecutor added that the restitution amount should have been set at the dispositional hearing, but was not. The court noted that “we are doing it backwards” because the prosecution did not previously have information regarding the restitution.

The court proceeded to state, “This is a stolen car that was damaged.” The prosecutor added that there were also some expensive watches, jewelry, and computers. The court asked if those items were in the car, and the prosecutor said, “No, in the house.” The court stated, “So they broke in the house, stole some items, and took the car.” Defense counsel confirmed. The prosecutor explained that minor’s friend let him stay in his house while his family was away. Minor took the family’s car to the beach, and took some gold necklaces and Rolex watches with him. The court replied, “Maybe the car wasn’t damaged. Maybe it was the jewelry. [¶] In any event, I’ll fix that amount. It will be subject to a contested hearing. Because I agree, you can’t have a contested hearing until the restitution is set. That is only a prima facie number. He has a right to contest it, and he is.”

Defense counsel confirmed that he was contesting the amount and asked that a hearing be set. Defense counsel asserted that the prosecutor had the burden to bring the witnesses forward. The court instructed the prosecutor to “contact these people and have them get the receipts or records that they have regarding these items.” The prosecutor agreed.

On January 24, 2011, a contested restitution hearing was held before a different judge, with a different prosecutor present. The court confirmed that restitution was

previously set in the amount of just over \$14,000 and that minor asked for a contested restitution hearing. Defense counsel contended that there needed to be “an initial causation showing” in order to determine the economic loss incurred as a result of minor’s conduct. Defense counsel asserted, “The court in this matter has not received any information other than a \$14,000 claim, an amount. And the court then set that amount As to the amount of restitution claimed, your Honor, the victim must present evidence showing that there were losses and that the losses were caused. The amount of restitution must be proved by a preponderance of the evidence.” Defense counsel cited a case to state that, in order to aid the court in determining the amount of restitution to be imposed, the probation report should reflect the investigation undertaken by the probation officer in recommending the restitution amount. Defense counsel, however, informed the court that there was no probation officer’s report in this case. The court responded that defense counsel did not ask for a probation report, since he had minor admit the allegations. The court stated that the matter came before Judge Dougherty, and that he set the amount at \$14,962.59. Defense counsel explained that when the probation officer presented the amount to Judge Dougherty, he offered no supporting information. Defense counsel then asked the court to set restitution in the amount of \$679.96, and noted that he filed a memorandum on January 6, 2011, which included copies of police reports. Defense counsel asserted that the memorandum contained “the only substantiation thus far provided to the court” for the amount of restitution. He reiterated that there was no basis for the restitution amount previously set.

The court replied that Judge Dougherty set the amount of restitution, and that it did not know what was presented at the last hearing or what the basis of the amount set was. Defense counsel again stated that there was no proof presented. The court replied, “He [Judge Dougherty] set it. So it’s basically the record.” The court stated that it had no intention of changing the order unless it heard evidence showing that the amount was wrong. The prosecutor interjected that she had a “restitution and realtime report,” which the probation department told her was presented to Judge Dougherty at the last hearing. The prosecutor added, “That’s where he got the amount.”

The court stated that it was waiting to hear evidence as to why the amount Judge Dougherty set was wrong, and if the defense did not move, the amount was going to stand. The court further noted it had been informed that “the witnesses [were] outside,” and that defense counsel could call them if he wished, but if he was attacking the amount, he could not shift the burden to the prosecutor. Defense counsel declined to “take on the burden of proof.” The prosecutor stated that it was the defendant’s burden to show that the probation department’s recommendation was inaccurate, and she declined to call any witnesses, even though the alleged victims were present to testify. The court then affirmed the previous restitution order.

B. There Was No Apparent Evidence to Support the Restitution Order

Welfare and Institutions Code section 730.6 provides that “a victim of conduct for which a minor is found to be a person described in Section 602 who incurs any economic loss as a result of the minor’s conduct shall receive restitution directly from that minor.” (Welf. & Inst. Code, § 730.6, subd. (a)(1).) “[W]e observe that [Welfare and Institutions

Code] section 730.6 parallels Penal Code section 1202.4, which governs adult restitution.” (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) “A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered.” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542 [Fourth Dist., Div. Two] (*Gemelli*)). “At the core of the victim restitution statutory scheme is the mandate that a victim who suffers economic loss is entitled to restitution and that the restitution is to be ‘based on the amount of loss claimed by the victim.’ Thus, a victim seeking restitution (or someone on his or her behalf) initiates the process by identifying the type of loss ([Pen. Code,] § 1202.4, subd. (f)(3)) he or she has sustained and its monetary value.” (*People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886.)

When a trial court’s determination is attacked on the ground that there is no substantial evidence to sustain it, the ““power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted,” to support the trial court’s findings.’ [Citations.]” (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469; see also, *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Here, as the People assert, the question before this court is whether the prosecution established a prima facie showing of the amount of restitution that was set. The problem is that the record on appeal does not contain any actual evidence to support the restitution amount of \$14,962.59. Although the prosecutor at the contested restitution hearing told

the court that Judge Dougherty “got the amount” from a “restitution and realtime report” that was presented to him, there is no such report in the record for this court to review. Furthermore, although defense counsel indicated that he received a statement of loss with that amount on the morning of the initial restitution hearing, there is no indication that the court received that statement, since there is no copy of it in the record. Thus, this record contains no substantial evidence to support the trial court’s finding of the amount of loss sustained by the victims.

Rather, the record reflects that Judge Dougherty simply based the restitution amount of \$14,962.59 on the probation officer’s oral statement at the hearing. As a result, the People contend that “the probation officer’s determination of the amount of restitution—as [] conveyed to the court at the initial restitution hearing—was sufficient to establish a prima facie showing of the amount of restitution.” Specifically, the People claim that “the weight of authority sanctions the trial court’s reliance on the statements of the probation officer to establish the victim’s prima facie showing of economic losses.” However, none of the cases cited by the People support that claim. They all discuss evidence, such as a probation report, which included information on the victim’s loss, along with a recommendation on the amount of restitution owed, or the victim’s loss statement filed with the police. (See *People v. Collins* (2003) 111 Cal.App.4th 726, 734; *People v. Pinedo* (1998) 60 Cal.App.4th 1403, 1406; *In re S.S.* (1995) 37 Cal.App.4th 543, 545-546; *People v. Foster* (1993) 14 Cal.App.4th 939, 947, superseded by statute on other grounds, as stated in *People v. Sexton* (1995) 33 Cal.App.4th 64, 70-71; *People v. Hartley* (1984) 163 Cal.App.3d 126, 130, superseded by statute on other grounds, as

stated in *White v. Yates* (C.D. Cal., Mar. 21, 2008, No. CV 07-44-JVS(E)) 2008 U.S. Dist. Lexis 32140; *Gemelli, supra*, 161 Cal.App.4th at p. 1544; *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1274 [Fourth Dist., Div. Two].)

We additionally note that the only apparent evidence in the record as to the victims' losses is contained in the restitution memorandum, which was filed by minor on January 6, 2011, prior to the contested restitution hearing. The memorandum included police property reports indicating that the losses totaled approximately \$819.96 (\$130 in stolen cash, \$130 in "clothing/furs," \$460 in property damaged, and another \$99.96 in "clothing/furs.") This amount even differs from the \$679.96 restitution amount that defense counsel argued at the contested hearing. The discrepancies in the amounts asserted by the parties demonstrates the need for some explanation and clarification of the victims' losses.

Ultimately, given the record before us, we cannot say that the amount of restitution set by the court was supported by substantial evidence. We conclude that the juvenile court abused its discretion in ordering minor to pay \$14,962.59 in restitution to the victims. The order must therefore be reversed, and the matter remanded to the juvenile court to conduct a new restitution hearing to set the amount of restitution, based on the evidence presented.

DISPOSITION

The \$14,962.59 restitution order is reversed, and the case is remanded to the juvenile court to conduct a restitution hearing to set the amount of victim restitution, based on the evidence presented. In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MILLER
J.