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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Defendant and Appellant,

v.

ESTEBAN VICENCIO,

Defendant and Appellant.

E054311

(Super.Ct.Nos. SWF028534 &
SWF10001016)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Petersen, Judge.

Affirmed.

Allen G. Weinberg, 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, William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Esteban Vicencio is serving 45 years to life in state prison after a jury convicted him of sexually abusing a 14-year-old girl at a public park and his 5-year-old grand-niece at the home they shared. Defendant argues the trial court erred when it ordered him to pay \$5,000 in noneconomic damages to the victims for psychological harm under Penal Code section 1202.4, subdivision (f)(3)(F). As discussed below, the award was not transformed into a fine unauthorized by law just because the trial court used the word “fine” from the probation report. Neither does the trial court’s sensible decision to postpone determination of restitution for economic damages mean it did not intend to impose this amount for noneconomic damages.

FACTS AND PROCEDURE

On May 15, 2009, defendant began a conversation at a public park with a 14-year-old girl. Over the course of the next 30 minutes to one hour, defendant kissed the girl several times and showed her his penis. The two met again at the park the next day, where they engaged in more kissing and intimate touching. Two days later, on May 18, the girl reported these events to her school resource counselor, who reported them to the Riverside County Sheriff’s Department.

In January or February of 2009, defendant came to live at his sister’s house in Wildomar. Also living at the home were defendant’s nephew and family. In May 2009, the nephew invited defendant on a family trip to Mexico, along with the nephew’s wife and two children. While on the trip, the nephew’s five-year-old year old daughter revealed that defendant had been touching her private parts while they were driving in the car that day, and that he had been doing similar things at the house where they were

living. After the father confronted defendant and fought with him, defendant ran out of the house where they were staying. The family drove back to Wildomar immediately and reported the incidents to police.

In a second amended information, the People charged defendant with seven counts of lewd acts upon a child under age 16 (Pen. Code, § 288, subd. (c)(1))¹ and one count of oral copulation on a person age 10 or younger (§ 288.7, subd. (b)). The People alleged defendant had a prior “strike” conviction (§§ 667, subs. (c) & (e)(1); 1170.12, subd. (c)(1)) for a sex crime committed in Michigan and a prior prison term (§ 667.5, subd. (b)).

On June 23, 2011, a jury found defendant guilty as charged. On June 30, 2011, the trial court found true the strike and prison prior allegations.

The sentencing hearing was held on August 19, 2011. After denying defendant’s motion to strike the prior strike allegation, the trial court sentenced defendant to 45 years to life as follows: a determinate term of 15 years for the seven lewd acts convictions (three years for one of the counts plus eight months for each of the other six counts, all doubled for the strike prior, plus one year for the prison prior), to be followed by an indeterminate term of 30 years to life for the oral copulation conviction (15 years to life, doubled for the strike prior). This appeal followed.

¹ All section references are to the Penal Code unless otherwise indicated.

DISCUSSION

1. Additional Procedural Details

At the end of the sentencing hearing, the trial court imposed “a fine under Penal Code section 1202.4 (f)(3)(F) of \$5,000 for psychological harm.” Defendant argues this amount, whether termed a “fine” or “restitution,” must be stricken because it was unauthorized and because the trial court did not intend to order any victim restitution at all at that time.²

In the probation report, the probation officer made a number of recommendations, including that defendant “Pay fine of \$5,000.00 for psychological harm, pursuant to Penal Code Section 1202.4 (f)(3)(F).” At the sentencing hearing, after the trial court imposed the prison sentence and calculated custody credits, it went through what appears to be a checklist of additional orders to be imposed, mostly various fines. During this portion of the sentencing hearing, the court stated “Next we come to victim restitution. Do the People have any numbers for me today?” The People did not have any specific numbers or documentation for victim restitution, other than requesting reimbursement to the Victim Compensation Government Claims Board for \$915.07. However, the People did not want to “close out” victim restitution, and so asked the court to authorize the probation department to determine additional amounts.³ The trial court did so, stating,

² We assume without deciding that defendant did not forfeit his right to appeal this issue by not raising it at the sentencing hearing.

³ This was consistent with the recommendation in the Probation Report that defendant “Pay victim restitution to Jane Doe #1 and Jane Doe #2 in an amount
[footnote continued on next page]

“What I’m inclined to do, in the absence of any documentation or proof, sometimes I— usually I get letters. They come from the Board. But here’s what I’m going to do today: I’m going to order that the defense pay—defendant pay victim restitution in an amount to be determined by probation, any dispute to be resolved in a court hearing. I’m just going to reserve it because I don’t have any proof with the documentation that I have today.”

The court then finished the list of additional orders and fines to be imposed, including the \$5,000 “fine” “for psychological harm” under section 1202.4, subdivision (f)(3)(F).

2. *Law and Application*

“With one exception, restitution orders are limited to the victim’s economic damages. The exception is for ‘[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288.’ [Citations.]” (*People v. Smith* (2011) 198 Cal.App.4th 415, 431.) This is the restitution order, which both the trial court and the probation report referred to as a restitution “fine,” that defendant challenges as both unauthorized by law and not intended by the trial court.

A. *The Restitution Amount is Authorized by Law*

Defendant argues that this \$5,000 ordered by the trial court is unauthorized by law simply because both the trial court and the probation report called it a “fine.” Section 1202.4, subdivision (f)(3)(F) does not authorize the court to impose a fine, but rather victim restitution for noneconomic losses, including psychological harm, for felons who

determined by Probation Any disputes as to amount to be resolved in court hearing”

commit felony lewd or lascivious acts upon children, under section 288. We do not see how mistakenly calling the \$5,000 amount a “fine,” while otherwise using the correct terminology and referring to the correct statute and subdivision, makes the restitution award unauthorized, and defendant does not cite any legal authority for this claim.

Defendant does posit that the trial court imposed the \$5,000 as a fine, as recommended in the probation report, because it mistakenly believed it had no discretion as to the amount or imposition at all, and that this was in itself an abuse of discretion, citing *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247 and *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282. Our review of the transcript does not reveal that the trial court believed it had no discretion in imposing this restitution for noneconomic losses under section 1202.4, subdivision (f)(3)(F). Rather, it appears that the trial court simply used the incorrect language provided in the probation report. Unlike in the cases on this point that defendant cites in his briefs, the trial court at no point indicates that it believes it has a mandatory duty to impose this restitution, and it cites the correct statute. Therefore, defendant has not shown that the trial court was mistaken about its discretion with regard to the restitution award for noneconomic losses.

3. The Trial Court’s Reservation was Limited to Restitution for Economic Losses

Defendant also argues the trial court did not intend to order any restitution at all at the sentencing hearing, including noneconomic losses where the defendant violated

section 288.⁴ If true, this would bolster defendant's argument that the court mistakenly believed it had no choice but to impose the restitution "fine" as set forth in the probation report. However, our review of the sentencing hearing transcript simply shows the court acted on the People's statement that it had no specified amounts to request or documents to present regarding restitution for the victims' economic losses generally addressed in section 1202.4, not that it was reserving for future determination the very specific noneconomic losses authorized by section 1202.4, subdivision (f)(3)(F), only in cases where the defendant violates section 288. Although defendant contends the trial court "clearly" intended to postpone the hearing on all restitution orders, including for noneconomic losses under subdivision (f)(3)(F), he just cannot show it based on this record, and thus does not carry his burden on appeal.

⁴ Defendant received fair notice of the amount of noneconomic restitution recommended in the probation report and a hearing on the matter at his sentencing hearing.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.