

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS VASQUEZ REYNAGA,

Defendant and Appellant.

E058226

(Super.Ct.No. RIF1201925)

OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.

Affirmed.

Melissa Hill, 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, and Charles C. Ragland, Parag Agrawal and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Carlos Vasquez Reynaga was convicted of second degree murder (Pen. Code, § 187¹) and discharging a firearm at an occupied motor vehicle (§ 246). The jury further found true that in the commission of both offenses, defendant personally discharged a firearm and caused great bodily injury or death. (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8), 667.) The trial court sentenced him to a total term of 40 years to life and ordered him to pay \$8,949.18 to the Victim Restitution Fund. He appeals, contending the trial court erred by (1) overruling his objection to evidence of anonymous tips, (2) failing to instruct the jury on aider and abettor liability, and (3) imposing restitution in the sum of \$1,800 for the cost of relocating a witness. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

On November 23, 2009, Ignacio Duarte (victim) and two friends, Constantino Perez and David Herrera, went to Angel's Bar to drink. Also at the bar were defendant and his cousin, Jose Bueno. The victim and his friends left Angel's Bar in victim's car before 2:00 a.m. on the morning of November 24. As the victim was driving, a dark-colored Chevrolet Suburban (SUV) being driven by defendant began "tailgating" his car. The two vehicles engaged in "tailgating and cutting each other off" on State Route 91 (S.R. 91, or freeway). As the victim exited the freeway, defendant followed. At the intersection of Lincoln Avenue and Pomona Avenue, when the vehicles were close,

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

defendant “opened fire” on the victim’s car, causing it to swerve off the road and crash into the side of the Best Western Motel. The victim had been struck in the back of the head with a bullet and died within minutes.

Esvin Gurrola, a security guard for the Best Western Motel, was in his car when he witnessed the incident. He called 911 and tried to follow the SUV on S.R. 91 in order to get a license number; however, the SUV sped away. Although Perez told the police there were two males in the SUV, he was unable to provide any details other than a rough description of the driver. In March 2010, the Corona Police Department sent out a press release offering a \$5,000 reward for information leading to the arrest and conviction of the person responsible for the shooting. A female responded anonymously and provided the name of defendant but no other details. A photographic lineup that included defendant’s photograph was shown to Perez and Herrera; they identified defendant as someone who had been at Angel’s Bar on the night of the shooting. Perez believed the man had been playing pool with a young, thinly built Hispanic male in his early 20’s.

According to Cody Alva, best friend of Timoteo Reynaga,² in the early morning hours on the day of the incident, Alva accompanied Timoteo to pick up defendant and drive to the location of the incident. Officers were directing traffic. Defendant admitted shooting at the car and said that he was trying to scare, not hurt, the people because they had cut him off. The next day, Alva saw a newspaper report of the road rage shooting.

² Timoteo Reynaga is defendant’s brother.

When he showed the article to defendant, defendant said he “didn’t intend to shoot somebody,” only scare them, shooting over the car.

Alva told Nicole Bramlett that he was nervous because he had given the gun to defendant. He told Bramlett that he wanted to call in an anonymous tip to get reward money. In June 2010, Alva had been arrested for a minor traffic-related offense. He offered to provide information about the shooting in exchange for getting out of jail. Alva told police where the shooting had occurred, gave them the name of the shooter (defendant), and the caliber of the gun that he believed was used, i.e., a Smith & Wesson .40-caliber semiautomatic, which Alva had given to defendant a week prior to the shooting. Alva was concerned that he would be accused as an accessory to the shooting because he had given the gun to defendant.

Six months prior to defendant’s trial, Alva ran into Timoteo, who accused Alva of “ratt[ing]” on his brother. Timoteo put on a pair of brass knuckles and lunged at Alva. Timoteo looked at Alva, made a slashing motion across his neck, and said, “You’re fucking dead.”

In November 2011, an anonymous e-mail addressed to the Corona Police Department stated that Jose Bueno was the passenger in the SUV and Carlos Reynaga was the driver and the shooter. The e-mail also provided locations where the police could find both men. Detective Fanchin contacted Bueno, who was under arrest in connection with a fraud investigation. In a February 28, 2012, interview Bueno discussed the shooting, identifying defendant as the driver and the shooter.

Bueno testified at defendant's trial pursuant to a grant of immunity. He stated he is defendant's cousin and he was with defendant on the night of the shooting. The two went to Angel's Bar in the SUV. After leaving the bar, they encountered victim's vehicle on the freeway. Defendant was driving the SUV. The two vehicles engaged in tailgating and cutting each other off while on the freeway. After exiting Lincoln Avenue, defendant took a gun from the center console, loaded it, and then fired at the other car as it pulled away from the intersection. No one else pulled out a gun or fired shots. The victim's car crashed, and defendant drove the SUV onto S.R. 91 with the security vehicle following.

After losing the security vehicle, defendant parked the SUV near Corona High School and his wife picked them up. Bueno was dropped off at his apartment. Defendant put the gun in a bag and told Bueno to "put it away" for him. Bueno passed the gun to Jose Gonzales, who took it to his father's residence and hid it. Later, Bueno saw the SUV at a house in Riverside, where defendant was hiding it.

On February 29, 2012, the SUV was located in the driveway of a vacant house on Toronto Street in Riverside. Defendant was the current renter. Defendant's mother owned the SUV and had not seen it in two years. A test of the SUV revealed gunshot residue on the driver's and passenger's side headliner, and the passenger side door area. It was not possible to determine where the shooter was sitting when the gun was fired. None of the samples of gunshot residue contained all three elements of lead, antimony, and barium. A person who works with metal, such as a welder, could leave traces of lead and barium: Bueno was working as a welder at the time of the shooting.

III. DISCUSSION

A. The Trial Court Did Not Err in Admitting Evidence of Anonymous Tips Over Defendant's Evidence Code Section 352 Objection.

Defendant contends the trial court erred in admitting evidence of the anonymous tips over his Evidence Code section 352 objection. We disagree.

1. Further Background Facts

The prosecution sought to introduce evidence of the anonymous tips. The defense moved to exclude the evidence based on Evidence Code section 352. The trial court held an Evidence Code section 402 hearing to consider the matter.

At the Evidence Code 402 hearing, defendant argued that evidence of the anonymous tips was more prejudicial than probative. (Evid. Code, § 352.) After the prosecutor explained how she was going to use the anonymous tip evidence, the trial court found the evidence to be admissible. The court stated:

“[Evidence of the anonymous tips] would come in not for the truth of the matter but to simply show why the officers did what they did, so I'll be happy to admonish the jury that it's not coming in for its truth. Technically, it's hearsay . . . but the People are not offering it for its truth. They're offering just to show why, after the case went cold, the officers are now banging on certain people's doors. Otherwise, it just looks like they're randomly contacting people with no reference to anything, no rhyme or reason as to why they're doing what they're doing. So I'll admonish the jury that they're not to consider it for its truth.”

Pursuant to the court's ruling, Detective Fanchin testified that he had received an anonymous phone call from a female who provided the name of Carlos Reynaga. The detective further testified that in November 2011 he received an anonymous e-mail from an unidentified source in Mexico identifying Bueno as the passenger in the SUV and defendant as both the driver and the shooter.

Following introduction of the e-mail evidence, the trial court admonished the jury: "This information is not being presented to you for the truth of the statement. Simply to show why others may have done things later on so it makes this officer's actions later on or somebody else's plain. But the statements themselves are not being presented as truthful information." At the close of evidence, the trial court further instructed the jury as follows: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

In closing argument, the prosecutor went over the evidence, including the anonymous tips, and explained the course of the police investigation:

"So March 2010 . . . the police have no information at this point. March 2010, the police announce there's a reward for information leading to the arrest and conviction of the person who killed [the victim]. We've got a murder here. Somebody is dead. Somebody that didn't have a gun, somebody that is unarmed is dead. In that same month, they get a female that calls them with an anonymous tip indicating the defendant is the shooter. In March of 2010, that same month as soon as they get that information, they put the defendant's picture in a photo lineup. And remember, [Herrera] and [Perez]

are shown that lineup. They can't identify him. They say no, they didn't see him in the car. But also remember they don't get a look at whoever is in that car. They don't get a clear look at anybody.

“In June of 2010, Cody Alva comes forward and tells the police the defendant is the shooter. And remember, Cody does not know about Jose Bueno. He never mentioned him. He said he heard there was a cousin in the car, but he doesn't know who it was. The case goes cold after that for a period of time, more than a year. And then in November 2011, we get an anonymous e-mail identifying the defendant as the shooter. This person knows that Jose Bueno is the passenger and also gives details.

“In February of 2012 police pick up Jose Bueno. Jose Bueno admits he was in the car and defendant is the shooter. He corroborates what that e-mail says. The defendant gets arrested in that same month.”

At the next break in the proceeding, during defense counsel's closing argument, he stated that the prosecutor improperly implied the e-mails could be offered for the truth of the matter asserted by using the word “corroborates,” which would be against the court's admission. The court reminded counsel that the jurors would be told their arguments are not evidence. The court informed defense counsel that he may clarify that nothing in the e-mails was allowed for the truth of the matter. As soon as the jury returned, defense counsel reiterated that nothing the attorneys say is evidence. Defense counsel addressed the e-mail: “Another thing I'd just like to bring to your attention. During the course of the argument this morning, there was reference made to e-mails. Keep in mind, again,

when that information was admitted for your consideration, it was admitted for the limited purpose only to show subsequent actions of Detective Fanchin. He utilized the e-mail and based on information from the e-mail, he did certain subsequent actions. The essence of what was in the e-mail was not admitted for the truth of the matter. So you cannot consider whatever information was in the e-mail for the truth of the matter. I hope that's clear, in other words, to suggest, for example, that whatever Detective Fanchin found out later in the investigation may have been corroborated by earlier e-mail was not necessarily appropriate. Your Honor told you not to consider the e-mail contained in it. It was just to show what Detective Fanchin did subsequently.”

2. *Standard of Review*

Evidence Code section 352 permits the exclusion of relevant evidence where “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” We review a trial court order denying a motion to exclude evidence under this section for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) ““A trial court’s exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]”” (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.) In this instance, the

trial court did not exceed the bounds of reason in admitting evidence of the anonymous tips.

3. Analysis

Anonymous tips are hearsay to the extent they are offered to prove the truth of the matters stated. (Evid. Code, § 1200, subd. (a).) The prosecutor, however, argued that the evidence was admissible on the nonhearsay basis that it explained the conduct of the police, and the trial court admitted it on that basis. Defendant maintains that the conduct of the police was irrelevant.

Hearsay evidence is defined as “a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200.) However, as the California Supreme Court has explained: “An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, *and* the nonhearsay purpose is relevant to an issue in dispute. [Citations.] (*People v. Turner* (1994) 8 Cal.4th 137, 189, italics added, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; see *People v. Livingston* (2012) 53 Cal.4th 1145, 1162 [admission of statement for nonhearsay purpose of explaining conduct]; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [“one important category of nonhearsay evidence—evidence of a declarant’s statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The

statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.”].)

Here, evidence of the anonymous tips was not used to prove that defendant killed the victim. Instead, it was used to explain the officer's reasons for showing defendant's picture to Herrera and Perez, and for contacting defendant. (*People v. Samuels* (2005) 36 Cal.4th 96, 122.) Given the fact that more than two years had passed since the killing of the victim, an explanation of why officers focused their investigation on defendant was relevant. The jury was apprised of the nonhearsay purpose for introducing this evidence. Ultimately, the trial court twice, and defense counsel in closing, admonished the jury it could consider the evidence regarding the anonymous tips for no purpose other than to explain why the officers focused suspicion on defendant two years after the shooting. We presume the jurors understood and followed the instructions given by the trial court. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) The admonitions were clear and straightforward in explaining the limited use of the anonymous tips.

Notwithstanding the above, defendant asserts the “‘investigation’ proffer was just a subterfuge to bring before the jury hearsay to corroborate the testimony of less than credible witnesses, Cody Alva and Jose Bueno, that [defendant] was both driver and shooter.” To credit defendant's argument would require us to conclude a limiting instruction could not be effective to keep the jury from using the evidence in an impermissible manner. But this is not, for example, a case in which the evidence subject to the limiting instruction was powerfully incriminating—such as with the confession of a

codefendant. (See, e.g., *People v. Aranda* (1965) 63 Cal.2d 518, 530, superseded by statute on another ground as stated in *People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

The anonymous tips in this case were properly subject to the almost invariable assumption of the law that jurors follow their instructions that the United States Supreme Court has applied in many varying contexts. (*Francis v. Franklin* (1985) 471 U.S. 307, 325, fn. 9; *Tennessee v. Street* (1985) 471 U.S. 409, 414-416 [instruction to consider accomplice's incriminating confession only for purpose of assessing truthfulness of defendant's claim that his own confession was coerced]; *Watkins v. Sowders* (1981) 449 U.S. 341, 347 [instruction not to consider erroneously admitted eyewitness identification evidence]; *Walder v. United States* (1954) 347 U.S. 62, 64 [instruction to consider unlawfully seized physical evidence only in assessing defendant's credibility].) We adhere to the rule that presumes jurors have understood and followed the instructions given by the trial court.

Defendant next contends his federal constitutional right to confront witnesses against him was violated. In support, he relies on *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). He argues his inability to cross-examine the anonymous sources of the tips regarding their identification of defendant as the shooter violated his right to confront witnesses against him. Not so.

Evidence of anonymous tips was admitted for the nonhearsay purpose of explaining why the officers showed defendant's picture to witnesses and went to a home rented by defendant in search of the SUV. By contrast, "*Crawford* was concerned with

the substantive use of hearsay evidence that was admitted within an exception to the hearsay rule. It did not suggest that the confrontation clause was implicated by admission of hearsay for nonhearsay purposes. In fact, *Crawford* expressly stated the confrontation clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’ [Citation.] ‘*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.’ [Citation.] The reason is clear; if hearsay is admitted for a nonhearsay purpose, it does not turn upon the credibility of the hearsay declarant, making cross-examination of that person less important. The hearsay relied upon by an expert in forming his or her opinion is ‘examined to assess the weight of the expert’s opinion,’ not the validity of their contents. [Citation.]” (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747.)

We conclude the admission of evidence of the anonymous tips did not violate the rule against hearsay evidence given the trial court’s limiting instructions. Moreover, defendant’s confrontation rights were not violated by the admission of such evidence.

B. The Trial Court Did Not Err in Failing to Instruct the Jury on Aider and Abettor Liability.

Defendant faults the trial court for failing, sua sponte, to instruct on aiding and abetting, arguing that the jury could have convicted him on the theory that he aided and abetted Bueno while Bueno shot at the victim.

While the People contend this argument was forfeited because defendant failed to ask for an instruction on aiding and abetting in the trial court, in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34, our state’s highest court recognized that defendants “may assert on appeal instructional error affecting their substantial rights,” including instructional error in accomplice instructions. We address defendant’s argument on the merits.

1. Further Background Facts

As the People point out, the conference between the court and counsel regarding jury instructions was only partially preserved on the record; however, defendant never requested an instruction on aiding and abetting.

2. Standard of Review

Courts have a sua sponte duty to instruct on aiding and abetting whenever a prosecutor relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561; *People v. Patterson* (1989) 209 Cal.App.3d 610, 617 & fn. 5 [court erred by failing to give aiding and abetting instruction sua sponte].) Furthermore, a court may instruct on a theory only if it is supported by “substantial evidence.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200-1201.) We review the trial court’s assessment de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

The court’s failure to properly instruct the jury on the elements of aiding and abetting may be subject to either the *People v. Watson* (1956) 46 Cal.2d 818, 836 [it was reasonably probable the error affected the verdict] or *Chapman v. California* (1967) 386

U.S. 18, 24 (*Chapman*) [clear beyond a reasonable doubt that the error did not affect the verdict] standards of review. *Chapman* applies to an instructional error which lowers the prosecution's burden of proving each element of the charged offense beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 491-504.) Thus, an instructional error that omits an element of a charged offense is subject to review under *Chapman* because it allows the jury to find the defendant guilty without finding that that particular element has been proven beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 15-17; *People v. Flood, supra*, at pp. 491-492.)

As the People point out, aiding and abetting is not a crime; it is a theory of criminal liability. (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1049, fn. 8.) Of course, this does not mean instructional errors regarding aiding and abetting cannot violate the federal Constitution. For example, aiding and abetting instructions that fail to require the jury to find the necessary specific intent are subject to the *Chapman* standard. (*California v. Roy* (1996) 519 U.S. 2, 5-6; *People v. Prettyman* (1996) 14 Cal.4th 248, 271.) But giving no aiding and abetting instructions whatsoever requires the jury to find the defendant guilty, if at all, solely on the theory that he or she was the direct perpetrator. This does not lower the prosecution's burden of proof in any way. Quite the contrary: it raises it, by restricting the prosecution to one theory of guilt rather than two. Under such instructions, if the jury finds the facts are such that the defendant was an aider and abettor rather than a perpetrator, it must acquit him or her. Thus, such an error (if error it is) can rarely be prejudicial.

3. *Analysis*

Here, the prosecution never raised aiding and abetting as a theory of culpability. Indeed, neither side argued aiding abetting culpability. Rather, the People's case against defendant was premised on his being the driver and the shooter. It was the prosecution's theory that "The defendant is the shooter. He's the murderer. And this is murder." The prosecutor reviewed with the jury the elements the People needed to prove in order to get a conviction on all the charges, murder and personal discharge of a firearm. The prosecutor then reviewed the evidence that supported each element of the charged offenses. She argued that defendant committed a first degree murder and there is no issue that he discharged a firearm causing the victim's death.

In contrast, the defense argued there was reasonable doubt as to whether defendant was the shooter.³ The defense questioned Bueno's motive for identifying defendant as the shooter, pointed out that neither Herrera nor Perez was able to identify defendant as the driver of the SUV, and noted that the gunshot residue was "inconclusive evidence." Defense counsel argued that the evidence showed Bueno was present and, "very conceivably the one firing the weapon." However, this argument was based on nothing more than speculation. Defense counsel stated: "I hope to make an extensive presentation to [the jury] and persuasive one that there is reasonable doubt about

³ In attempting to absolve himself of all criminal liability, defendant argued that he did not fire the weapon, but if he did, he should be convicted of nothing more than second degree murder or voluntary manslaughter. Predicting the defense argument, the prosecutor urged the jury to consider only the evidence and not the "made up stuff."

[defendant] being the shooter in the car. By the same token, as his representative, I need to comment on the evidence that's been presented. [¶] I certainly feel the evidence that [the prosecutor] just talked about leaves [the jury] with the greatest degree of probability that was shown as somewhere between second-degree murder and voluntary manslaughter." But at no point did the defense make any argument relating to aider and abettor liability, for example, by arguing that defendant did not share the original intent of the actual shooter.

Moreover, the evidence did not support an aider and abettor theory of liability. Rather, the evidence supported the finding that defendant was the shooter: The SUV was owned by defendant's mother. Alva gave the gun used in the shooting to defendant. Defendant was the driver. The driver was the shooter. The SUV was found at a residence rented by defendant. Defendant admitted that he "busted" (shot) at the victim's car. As such, aiding and abetting instructions were not required because the evidence only supported the theory that defendant was a "direct perpetrator."

Finally, it is important to note that aider and abettor liability is only vicarious in the sense that the aider and abettor is liable for another's actions as well as his own. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) Thus, the giving of aiding and abetting instructions would have only broadened the possibility of a conviction and the absence of such instructions was to defendant's advantage because the jury was able to convict only if it concluded that he had personally assaulted the victim with a deadly weapon. To the extent there was error, therefore, it was harmless.

We conclude the trial court did not have a sua sponte duty to instruct on the principles of aiding and abetting because neither side introduced this theory into the case, and the lack of any substantial evidentiary support for an aiding and abetting theory negated the need for such instructions.

C. The Trial Court Did Not Err in Ordering Defendant to Pay \$8,949.18 to the Restitution Fund.

During sentencing, the prosecutor informed the trial court that the Victim's Compensation and Government Claims Board (Board) had paid \$8,949.18 to victims, including \$1,800 applied for Alva's relocation expense. Defendant did not raise any objection. The court ordered defendant to pay \$8,949.18 to the Restitution Fund. On appeal, defendant acknowledges that he failed to object to the restitution award at the trial level; however, he claims that such objection was not necessary because the restitution order was unauthorized. (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1095.) "Defendant's claim that the trial court exceeded its statutory authority under section 1202.4, subdivision (f), falls within the 'unauthorized sentence' exception. The claim presents a legal question that is 'clear and correctable' by an appellate court without reviewing factual circumstances. [Citation.] Such a claim does not implicate the trial court's sentencing discretion, but rather whether the restitution order 'could . . . lawfully be imposed under any circumstance in the particular case.' [Citation.]" (*Ibid.*)

1. Standard of Review

“The standard of review of a restitution order is abuse of discretion. ‘A victim’s restitution right is to be broadly and liberally construed.’ [Citation.] “‘When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.’” [Citations.]” (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.)

2. Analysis

In California, a victim is entitled to restitution and the trial court is required to order restitution. (Cal. Const., art. I, § 28, subd. (b)(13); § 1202.4, subd. (f).) The order must be sufficient to reimburse the victim “for every determined economic loss incurred as the result of the defendant’s criminal conduct . . .” (§ 1202.4, subd. (f)(3).) If the defendant disputes the amount, he is entitled to a hearing on his or her challenge. (§ 1202.4, subd. (f)(1).)

“Section 1202.4 does not, by its terms, require any particular kind of proof. However, the trial court is entitled to consider the probation report, and, as prima facie evidence of loss, may accept a property owner’s statement made in the probation report about the value of stolen or damaged property.’ [Citations.] “‘This is so because a hearing to establish the amount of restitution does not require the formalities of other phases of a criminal prosecution. [Citation.] When the probation report includes information on the amount of the victim’s loss and a recommendation as to the amount of

restitution, the defendant must come forward with contrary information to challenge that amount.” [Citation.]” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.)

Relevant to this case, section 1202.4, subdivision (f)(4) includes a special provision that applies when state funds are used to provide assistance to or on behalf of a victim: “(A) If, as a result of the defendant’s conduct, the Restitution Fund has provided assistance to or on behalf of a . . . derivative victim . . . the amount of assistance provided *shall be presumed to be a direct result of the defendant’s criminal conduct and shall be included in the amount of the restitution ordered.* (§ 1202.4, subd. (f)(4)(A), italics added.) This language establishes a rebuttable presumption that the amount paid by the Restitution Fund was authorized and proper.

“Every rebuttable presumption is either “(a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.” [Citation.] [Citation.] [¶] As noted, subdivision (f)(4)(A) provides in relevant part: ‘If, as a result of the defendant’s conduct, the Restitution Fund has provided assistance . . . on behalf of a victim . . . the *amount of assistance provided shall be presumed to be a direct result of the defendant’s criminal conduct and shall be included in the amount of the restitution ordered.*’ (Italics added.) [¶] The statute’s use of the word ‘direct’ signifies that the payment is presumed to have resulted *directly, or in fact*, from the defendant’s criminal conduct. [Citation.] Stated differently, the defendant’s conduct is presumed to be a cause in fact of the Board’s payment. [Citation.] This presumption affects the burden of proof because it imposes upon defendant the burden to prove the nonexistence of the

presumed fact—that is, to prove his conduct is *not* a cause in fact of the Board’s payment. [Citation.] ¶ Since the subdivision (f)(4)(A) presumption affects the burden of proof, a defendant challenging the presumption cannot prevail unless he establishes that his conduct did not cause the victim’s injuries.” (*People v. Lockwood* (2013) 214 Cal.App.4th 91, 100-101, original italics.)

Here, because defendant failed to object to the restitution order, he failed to carry his burden of proving that the award was improper. Consequently, the trial court acted within its discretion in ordering defendant to pay \$8,949.18 to the Restitution Fund.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.