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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FARIAS OCHOA,

Defendant and Appellant.

F063565

(Super. Ct. No. VCF250707)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Donn Ginoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

* Before Hill, P. J., Wiseman, J. and Levy, J.

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On February 18, 2011, appellant, Jose Farias Ochoa, entered a laundromat and removed a candy machine from the premises. A jury found appellant guilty of second degree commercial burglary (Pen. Code,¹ § 459; count 1) and possession of burglar's tools (§ 466; count 2) and the court found that he had served a prior prison term (§ 667.5, subd. (b)). On August 23, 2011, the court sentenced him to a total prison term of three years (the middle term of two years for count 1, plus one year for the prison prior) and ordered him to pay \$350 in victim restitution. Appellant now contends he is entitled to be resentenced pursuant to section 1170, subdivision (h), which became operative on October 1, 2011. He also challenges the sufficiency of the evidence supporting the court's order of victim restitution. We affirm.

DISCUSSION²

I. Realignment

Appellant contends that, although he was sentenced on August 23, 2011, he is entitled to be resentenced under the "2011 Realignment Legislation addressing public safety" (Stats. 2011, ch. 15, § 1), despite the fact the sentencing changes made by this and subsequent related legislation expressly apply "prospectively to any person sentenced on or after October 1, 2011." (§ 1170, subd. (h)(6).) In *People v. Cruz* (2012) 207 Cal.App.4th 664, this court held the changes "apply only to persons sentenced on or after

¹ Further statutory references are to the Penal Code unless otherwise specified.

² Appellant has not challenged the sufficiency of the evidence supporting the convictions. In light of the contentions raised on appeal, a detailed recitation of the facts of the underlying offenses is unnecessary. Relevant facts will be set forth as necessary in our discussion of appellate issues.

October 1, 2011, and such prospective-only application does not violate equal protection.” (*Id.* at p. 668, fn. omitted.) We decline to revisit the issue.

II. Victim Restitution

Appellant contends that \$50 must be stricken from the victim restitution order because that amount is unsupported by the evidence presented at trial.

At trial, the laundromat owner testified the candy machine cost “approximately \$250” and the candy inside the machine cost “[a]bout \$50.” At the sentencing hearing, the People sought \$350 in restitution: \$300 for the candy machine and \$50 for the candy. In support of the request, the People referred to both the trial testimony and the probation report. The probation report stated the laundromat owner “advised the machine was valued at \$300.” The court thereafter ordered appellant to pay victim restitution in the amount of \$350, noting “[t]hat’s \$300 for the machine and \$50 for the candy that was taken.”

The general principles governing the determination of the amount of victim restitution in criminal cases are well established. We start from the premise that “[a] victim’s restitution right is to be broadly and liberally construed.” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 500 (*Mearns*)). When a criminal defendant’s conduct causes economic losses to the victim, the trial court must order the defendant to make restitution “based on the amount of loss claimed by the victim ... or any other showing to the court.” (§ 1202.4, subd. (f).) “The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (§ 1202.4, subd. (g).)

The trial court has broad discretion to calculate the amount of restitution ordered. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664.) We review a trial court’s restitution order for abuse of discretion. (*Mearns, supra*, 97 Cal.App.4th at p. 498.) Abuse is established only if the trial court’s decision is arbitrary or capricious (*People v.*

Akins (2005) 128 Cal.App.4th 1376, 1382) or is based on a demonstrable error of law (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49). No abuse of discretion is shown simply because the order does not reflect the exact amount of the loss. (*Akins*, at p. 1382.) We will find no abuse of discretion where there is a factual and rational basis for the amount of restitution ordered by the trial court. (*Mearns*, at p. 498.)

Preliminarily, we note appellant's claim on appeal is forfeited because defense counsel neither objected to the restitution order at sentencing nor requested a separate restitution hearing to present evidence to contest the order. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) In any event, there is a factual and rational basis for the restitution order because it was based on evidence presented at trial and appellant's probation report. (See *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543 ["as prima facie evidence of loss, [the trial court] may accept a property owner's statement made in a probation report about the value of stolen or damaged property"].) The property owner testified at trial that the candy was worth \$50 and stated in the probation report that the candy machine was valued at \$300. Appellant provided no contrary evidence. Therefore, the court did not abuse its discretion in setting the amount of victim restitution at \$350.

DISPOSITION

The judgment is affirmed.