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

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC DAVID HALSEY,

Defendant and Appellant.

F064488

(Super. Ct. No. 10CM1123)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Benjamin Owens, 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, Louis M. Vasquez, Leanne LeMon and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Gomes, J., and Poochigian, J.

Pursuant to a plea agreement, appellant, Eric David Halsey, pled no contest to felony child abuse (Pen. Code,<sup>1</sup> § 273a, subd. (a)) and admitted an enhancement allegation that in committing that offense he personally inflicted great bodily injury (§ 12022.7, subd. (d)). The court imposed the agreed-upon sentence of eight years and ordered that appellant pay, inter alia, victim restitution in the amount of \$264,836.57, pursuant to section 1202.4.<sup>2</sup>

On appeal, appellant contends a portion of the amount of victim restitution ordered—\$261,236.57—is not supported by substantial evidence.<sup>3</sup> We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***The Instant Offense***

The factual basis for appellant’s plea was established by a stipulation by the parties that on September 29, 2009, appellant was dating the mother of C., a two-year-old girl, and that the People would have produced evidence at trial that on that date, appellant “physically abused” C., causing “injuries ... that ... ultimately would have been life-threatening had she not received immediate medical treatment ....”

### ***The Restitution Award***

Attached to the report of the probation officer are what the probation officer identifies as “copies of medical bills,” consisting of 22 pages of documents, each of which bears the notation “CHILDREN’S HOSPITAL CENTRAL CALIFORNIA” (the hospital), indicating total charges of \$261,236.57 for medical services provided to C.

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<sup>1</sup> Except as otherwise indicated, all statutory references are to the Penal Code.

<sup>2</sup> Section 1202.4, subdivision (f) provides that “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 in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.”

<sup>3</sup> For the sake of brevity and convenience, we refer to the portion of the restitution appellant challenges on appeal as the restitution award.

At the sentencing hearing, the court stated it had “looked at the reports and the medical request,” and that the court anticipated an offer of proof that C.’s father had paid \$3,600 in “co-payments for weekly counseling sessions.” The court asked defense counsel, “As far as [the amount requested], is [appellant] disputing that any of the attached medical bills were not for the benefit of the child?” Counsel responded, “No, your Honor. We’ll submit it on the evidence.” Thereafter, the court discussed the basis for its ruling and asked defense counsel if he wished to comment. Counsel declined.

### **DISCUSSION**

Appellant contends the court erroneously based the restitution order on “the hospital’s bills” rather than on “the amount paid by the insurer,” and therefore the restitution award was not supported by substantial evidence. Appellant further argues that if information as to the amount paid by “the insurer” was not available at the time of sentencing, “the court should have ordered the amount of restitution to be determined at a later date,” and that “[t]he appropriate remedy is to remand the case for a proper determination of the amount of restitution ....”

#### ***Forfeiture***

The People contend appellant has forfeited his sufficiency-of-the-evidence challenge to the restitution award by failing to raise it below. We agree. In *People v. Brasure* (2008) 42 Cal.4th 1037, 1074-1075 (*Brasure*), the defendant challenged a victim restitution order on the ground that the victim’s loss “was not shown by documentation or sworn testimony.” In holding that the defendant had not preserved the contention for appeal, our Supreme Court stated: “[B]y his failure to object, defendant forfeited any claim that the order was merely unwarranted by the evidence, as distinct from being unauthorized by statute. [Citation.] As the order for restitution was within the sentencing court’s statutory authority, and defendant neither raised an objection to the amount of the order nor requested a hearing to determine it [citation], we do not decide whether the court abused its discretion in determining the amount.” (*Id.* at p. 1075.) Here too, as

appellant does not dispute, he neither objected to the restitution award nor requested a hearing on the matter. Under *Brasure*, appellant has forfeited his sufficiency-of-the-evidence challenge to the restitution order.

Appellant takes issue with the foregoing analysis and conclusion. He argues his claim is not forfeited because the restitution order was “legally unauthorized.” He bases this contention on the “unauthorized sentence” exception to the general forfeiture rule, articulated in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*).

In *Scott*, our Supreme Court stated: “[T]he ‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.... [¶] [A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed *under any circumstance* in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing.... [¶] In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or *factually flawed manner.*” (*Scott, supra*, 9 Cal.4th at p. 354, fn. omitted, italics added.)

It is not the case that the restitution order here could not be imposed “under any circumstances” in the instant case. (*Scott, supra*, 9 Cal.4th at p. 354.) Appellant’s argument that the court based the restitution order on the amount of the hospital’s bills rather than on the amount paid by the insurer is in essence a claim that the order was “factually flawed.” (*Ibid.*) Thus, the restitution award was not unauthorized.

Appellant also contends his claim is properly before us by virtue of the fact that he is raising a claim of insufficiency of the evidence. In support of this contention, he relies chiefly on *In re K.F.* (2009) 173 Cal.App.4th 655 (*K.F.*), where the court held that an appellate challenge to a restitution award under Welfare and Institutions Code section 730.6, “which is the parallel provision [to restitution requirements for adult offenders] applicable to juvenile offenders” (*In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016

(*Anthony M.*)), was cognizable on appeal even though the claim had not been raised in the juvenile court. The appellate court relied on the principle that “[s]ufficiency of the evidence has always been viewed as a question necessarily and inherently raised in every contested trial of any issue of fact, and requiring no further steps by the aggrieved party to be preserved for appeal.” (*K.F.*, at pp. 660-661.)

The court acknowledged the holding of *Brasure* on the forfeiture issue but noted that *Brasure* “was a capital murder case in which the court dealt with at least a dozen major contentions before reaching the one relevant here” (*K.F.*, *supra*, 173 Cal.App.4th at p. 660), and stated that *Brasure* could not be read “as a repudiation or abandonment of the rule ... that no predicate objection is required to challenge the sufficiency of the evidence on appeal” (*K.F.*, at p. 661). “The Supreme Court itself,” appellant asserts, “explicitly reaffirmed the stated rule in *People v. Butler* (2003) 31 Cal.4th 1119, 1126.” (*Ibid.*) However, the very recent case of *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), which was decided after initial briefing was completed in the instant case, refutes this view of *People v. Butler*, *supra*, 31 Cal.4th 1119 (*Butler*) and leads us to a different conclusion.<sup>4</sup>

In *McCullough*, the defendant argued that the evidence did not establish he had the ability to pay a \$270.17 jail booking fee. (*McCullough*, *supra*, 56 Cal.4th at pp. 590-591.) The California Supreme Court agreed that under the statute in question appellant had the right to a determination of ability to pay (*id.* at pp. 592-593), but the court held the defendant forfeited his challenge to the sufficiency of the evidence to support the fee because he did not object when the court imposed it (*id.* at p. 591). The Supreme Court rejected the defendant’s argument that “his challenge [came] within the general rule that “a judgment ... not supported by substantial evidence” may be challenged for the first

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<sup>4</sup> We invited, and both parties submitted, supplemental briefing on the applicability of *McCullough* to the issues raised here.

time on appeal” (*id.* at p. 593) and that the Supreme Court should “simply ‘... follow *Butler*’” (*id.* at p. 596).

The court in *McCullough* found *Butler* inapposite. The court explained: “In *Butler*, we held that ‘a defendant may challenge the sufficiency of the evidence’ to support imposition of an involuntary HIV testing order [under section 1202.1] ‘even in the absence of an objection.’ [Citation.] Our analysis flowed from our recent sentencing forfeiture cases; we would review an appellate challenge not based on a contemporaneous objection if the trial court had been acting in excess of its authority. ‘Just as a defendant could appeal an HIV testing order, without prior objection, on the ground he had not been convicted of an enumerated offense [citations], he should be able to do so on the ground the record does not establish the other prerequisite, probable cause.’” (*McCullough, supra*, 56 Cal.4th at p. 595.)

The court noted that in *Butler*, it had “confronted the apparent problem that the factual component of a probable cause finding seemed to place it outside the rule that we will only review for the first time on appeal “clear and correctable error” that is ‘independent of any factual issues presented by the record.’ (*Scott, supra*, 9 Cal.4th at p. 354.)” (*McCullough, supra*, 56 Cal.4th at p. 595.) However, the court “observed that the issue presented in *Butler* extended beyond mere disagreement over the import of certain facts” because “‘Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.’” (*McCullough, supra*, at p. 595.)

In *McCullough*, the defendant’s challenge to the booking fee on the ground that the evidence did not support the conclusion he had the ability to pay the fee presented a different situation. The court “conclude[d] that defendant’s ability to pay the booking fee here does not present a question of law in the same manner as does a finding of probable cause. Defendant may not ‘transform ... a factual claim into a legal one by asserting the

record's deficiency as a legal error.' [Citation.] By 'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.] ... [W]e hold here that because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal."

(*McCullough, supra*, 56 Cal.4th at p. 597.)

Thus, *McCullough* makes clear that *Butler* found the claim raised there not forfeited because it presented a question of law, and that the *Butler* court did not, as the court in *K.F., supra*, 173 Cal.App.4th at p. 661 stated, "explicitly reaffirm[] the ... rule" that "no predicate objection is required to challenge the sufficiency of the evidence on appeal." The question that remains is: Does the reasoning underlying *McCullough's* conclusion that a challenge to the sufficiency of the evidence supporting a jail booking fee cannot be raised for the first time on appeal apply to the sufficiency-of-the-evidence challenge to the restitution order here? We conclude it does.

As indicated above, the key to the court's holding was that the claim before the court was a factual one. The court held that claim could not be raised for the first time on appeal "*because a court's imposition of a booking fee is confined to factual determinations ....*" (*McCullough, supra*, 56 Cal.4th at p. 597, italics added.)

The court found support for its conclusion in *Scott*. The court noted: It had "determined [in *Scott*] that the requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advanced the goals of proper development of the record and judicial economy. Given that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally here, we see no reason to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time

on appeal ‘should apply to a finding of’ ability to pay a booking fee under Government Code section 29550.2.’” (*McCullough, supra*, 56 Cal.4th at p. 599.)

A restitution award, like the booking fee at issue in *McCullough*, is “confined to factual determinations” (*McCullough, supra*, 56 Cal.4th at p. 597) and is of less moment than the imposition of a prison sentence, which results in the denial of personal liberty. Therefore, under *McCullough*, the rule permitting sufficiency-of-the-evidence challenges for the first time on appeal should not apply to restitution awards. Notwithstanding that, as the *K.F.* court pointed out, the Supreme Court considered other issues in *Brasure*, the holding in *Brasure* remains controlling on this point.

Appellant seeks to distinguish *McCullough*. He first points to the portion of the opinion where the court lists several statutes “where the Legislature has similarly required a court to determine if a defendant is able to pay a fee before the court may impose it ....” (*McCullough, supra*, 56 Cal.4th at p. 598.) After noting, “In contrast to the booking fee statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay determination” (*ibid.*), the court explained: “We note these statutes because they indicate that the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no procedural safeguards or guidelines for its imposition. In this context, the rationale for forfeiture is particularly strong” (*id.* at p. 599). Appellant argues the same considerations do not apply here because the six-figure restitution award cannot be considered de minimis and “victim restitution involves procedural protections for the defendant, including the rights to a hearing and to present evidence, suggesting the legislature considers the imposition of victim restitution more onerous than the jail booking fee.”

However, as demonstrated above, the court in *McCullough* found the defendant’s claim forfeited because it was “confined to” factual matters. (*McCullough, supra*, 56 Cal.4th at p. 597.) The discussion in *McCullough* summarized above provides an additional reason for, but is not essential to, the court’s holding. As the court made clear

in both *McCullough* and *Scott*, it is not only de minimis claims that are subject to forfeiture. (*McCullough*, at p. 599.)

Appellant also argues that *McCullough* is distinguishable because “determining the ability to pay a jail booking fee is a purely factual matter,” whereas an “award of victim restitution may involve legal determinations,” such as “whether an individual is a victim” or “the proper method of valuation for a particular loss.” We disagree. Appellant’s challenge to the restitution award raises neither of these matters. The question here, as in *McCullough*, is one of factual support for the challenged order.

Finally, appellant suggests that even if we were to find forfeiture, we should exercise our discretion to reach the merits. We decline to do so. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [“the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue”].)

### ***Ineffective Assistance of Counsel***

Appellant argues that if his trial counsel’s failure to object to the restitution award results in forfeiture of the issue, he (appellant) has been denied his constitutional right to the effective assistance of counsel. We disagree. Preliminarily, we summarize the applicable law regarding ineffective assistance of counsel. We next summarize the legal principles applicable to the merits of appellant’s claim that the evidence did not support the restitution award.

### ***Ineffective Assistance of Counsel***

“The burden of proving ineffective assistance of counsel is on the defendant.” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To meet this burden, “a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant ....” (*People v. Lewis* (2001) 25 Cal.4th 610, 674.)

“‘[An] appellate court’s inability to understand why counsel acted as he [or she] did cannot be a basis for inferring that he [or she] was wrong.’” (*People v. Bess* (1984)

153 Cal.App.3d 1053, 1059.) ““Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.”” [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 437 (*Lucas*)). If the record on appeal ““sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected,” and the “claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

### Restitution

As indicated earlier, appellant contends as follows: The court erred in basing the restitution award on the amount billed for the victim’s medical expenses, whereas the “court should have based its determination on the amount paid by the insurer.” And, because there was no evidence before the court of the amount paid by “the insurer,” the court should have ordered the amount of restitution to be determined at a subsequent hearing, and the matter should be remanded for such a hearing.

As can be seen from the foregoing, appellant’s argument concerns the significance, for purposes of determining the proper measure of restitution for medical expenses, of the amount billed by the medical care provider, as opposed to the amount paid by an insurer to the provider. We find four cases particularly relevant to this matter.

First, in *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 (*Hanif*), the court reduced the trial court’s award of past medical expenses in a personal injury action from the amount billed to the amount paid by Medi-Cal. (*Id.* at p. 644.) In *People v. Bergin* (2008) 167 Cal.App.4th 1166 (*Bergin*), the court applied the reasoning of *Hanif* to a section 1202.4 victim restitution award. In upholding a restitution award based on “the amount the medical providers accepted from [the victim’s] insurer as full payment for their services, plus the deductible paid by [the victim]” (*Bergin*, at p. 1168), and rejecting

the People’s claim that the proper measure of restitution was “the amount billed by [the victim’s] medical providers” (*ibid.*), the court stated: “[T]here is no reason why the *Hanif* principle—that ‘an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation’ [citation]—should not be applied in a criminal restitution case” (*id.* at pp. 1171-1172).

The *Bergin* court noted that in *Anthony M.*, *supra*, 156 Cal.App.4th 1010, “in analogous circumstances—a restitution order in a juvenile offender case—another court reached the same conclusion ....” (*Bergin*, *supra*, 167 Cal.App.4th at p. 1172.) In *Anthony M.*, the health care provider billed an amount in excess of one million dollars for medical care for the victim (*Anthony M.*, at p. 1013), and the minor “proffered undisputed evidence that the victim’s parents were insured by Medi-Cal, which had made a partial payment” of far less than that amount (*id.* at p. 1015). The juvenile court ordered the minor to pay victim restitution for medical expenses based on the amount billed, rather than on the amount actually paid by Medi-Cal. (*Ibid.*) The Court of Appeal reversed the order, holding that, because “the victim [was] only liable for the amount expended by Medi-Cal, ... the juvenile court erred by ordering victim restitution for past medical expenses in excess of the actual amount expended or incurred.” (*Id.* at p. 1014.) The court “remand[ed] the matter for further proceedings to determine the total amount paid by Medi-Cal ....” (*Id.* at p. 1019.)

Finally, in *K.F.*, *supra*, 173 Cal.App.4th 655, another juvenile restitution case, the court upheld the portion of the restitution award for medical services for which, the evidence showed, the victim had been billed by “KAISER CALIFORNIA NORTH” but for which the evidence did not establish payment by Medi-Cal or any other third party. The court acknowledged “some uncertainty” as to the amount billed “arising from the well-known status of Kaiser Hospitals as a health maintenance organization providing medical services to its members rather than a medical service provider with a conventional creditor-debtor relationship to its patients,” but because the record was

“entirely silent on this subject,” the court found it “unnecessary, and indeed impossible” to consider whether the amount of restitution should be something less than the total amount billed. (*Id.* at pp. 663-664.)

The *K.F.* court distinguished *Anthony M.*: “The key fact [in *Anthony M.*] was that the provider had sought payment from Medi-Cal; this had the effect of *precluding* the provider from ‘seeking payment from the [victim] for any unpaid balance other than the nominal deductible or cost-sharing amount.’ [Citations]. In those circumstances, the court held, the victim’s losses were limited to the sums paid by Medi-Cal.... [¶] *Anthony M.* is best understood as resting on the conclusion that because the service provider was *barred* from recovering the cost of services from the victim, the victim could not be found to have ‘incurred’ those costs for purposes of a criminal restitution order.... To constitute evidence of a ‘loss incurred,’ there must be some basis to conclude that the victim is ‘liable or subject to’ a charge. Where collection of the charge is barred by law, the victim is not liable or subject to it, and the charge is not ‘incurred.’ This rationale has no application here, where no such legal bar to recovery appears.” (*K.F.*, *supra*, 173 Cal.App.4th at p. 662.)

From these cases, we glean the following: Where the amount billed for medical services exceeds the amount paid by a third party which, like Medi-Cal, is precluded from recovering from the patient the unpaid balance, restitution is limited to the amount of the third-party payment. (*Anthony M.*, *supra*, 156 Cal.App.4th 1015.) However, as in *K.F.*, restitution may be based on the total amount billed where the evidence does not establish any such third-party payment.

### Analysis

Appellant likens the instant case to *Anthony M.* He argues that just as in that case, where insurance coverage was provided by the State of California, through the Medi-Cal program, here too the State of California is obligated to pay at least some portion of the victim’s injuries because the victim is insured through the California Children’s Services

Program (CCS) and the Healthy Families Program (Healthy Families). (See *Tapia v. Pohlmann* (1998) 68 Cal.App.4th 1126, 1128, fn. 1 [CCS is a state-funded program administered by counties “providing medical assistance to minors whose parents met specified eligibility requirements. (Health & Saf. Code, § 123800 et seq.)”]; *People v. Guamelon* (2012) 205 Cal.App.4th 383, 395, fn. 5 [“In 1997, the Legislature enacted the Healthy Families Act (Ins. Code, § 12693 et seq.) to provide low-cost insurance to children under 19 years of age who do not qualify for no-cost Medi-Cal”]; Health & Saf. Code, § 123870, subd. (a)(2) [“Children enrolled in the Healthy Families Program who have a CCS program eligible medical condition under [Health and Safety Code] Section 123830, and whose families do not meet the financial eligibility requirements of paragraph (1), shall be deemed financially eligible for CCS program benefits”].) Given this coverage under CCS and Healthy Families, appellant argues, counsel could have had no rational tactical reason for not objecting to a restitution order that did not take such coverage into account. Appellant argues further that if there was no information about such coverage, counsel was remiss in not requesting that the amount of the payments made or to be made to the hospital under these programs be determined at a later hearing. (See § 1202.4, subd. (f) [“If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court”].)

However, in *Anthony M.*, as indicated earlier, there was “undisputed evidence” that (1) the victim’s parents were insured by Medi-Cal, and (2) Medi-Cal had made a partial payment to the medical services provider. (*Anthony M.*, *supra*, 156 Cal.App.4th at p. 1015.) The instant case presents a far different situation.

The only references to CCS and Healthy Families are notations in the hospital billing documents considered by the court below, to wit, the following: On each of the 22 pages, above the list of services and charges, appear the notations “CCS ONLY SARS” and “BLUE CROSS HEALTHY FA,” and on seven pages appear the notations

“CCS ONLY SARS,” opposite of which is what appears to be a subtotal of charges, and “ESTIMATED INSURANCE DUE,” opposite of which is a blank space.

These notations contain what appear to be references to CCS and Healthy Families, but unlike the undisputed evidence of Medi-Cal coverage in *Anthony M.*, they do not establish that the victim’s parents were insured under these programs. The record here admits of the possibility that appellant’s counsel did not object to the restitution award because he had information that the victim’s parents were not insured and/or were ineligible for coverage, under these programs. Given this possibility, we cannot say that ““the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.””” (*Lucas, supra*, 12 Cal.4th at p. 437.) Therefore, appellant’s claim of ineffective assistance of counsel fails.

#### **DISPOSITION**

The judgment is affirmed.