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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LISA RENE BROWN,

Defendant and Appellant.

G045367

(Super. Ct. No. 08NF2798)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed in part and reversed in part.

Penners Bergen and Ann Bergen, 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, Alana Cohen Butler, James D. Dutton, and Ifeolu Hassan, Deputy Attorneys General, for Plaintiff and Respondent.

Lisa Rene Brown's vehicle collided with Lynn Phillip's vehicle in the middle of an intersection. They had both taken drugs before the crash, and they were both injured by the impact. Brown was charged with one count of driving under the influence of drugs causing bodily injury (Veh. Code, § 23151, count 1) and having suffered three prior convictions for driving under the influence (Veh. Code, § 23152, subd. (a)). The trial on the priors was bifurcated. The trial court instructed the jury on the elements of count 1, as well as the lesser included offense of driving under the influence. The jury found Brown not guilty of count 1, but guilty of the lesser included offense. The court sentenced Brown to the upper prison term of three years and ordered she pay \$47,531 restitution to Phillips. On appeal, Brown asserts the court should not have ordered her to pay restitution for the crime for which she was acquitted. We agree and reverse the restitution order. In all other respects, the judgment is affirmed.

## I

One early evening in July 2007, Phillips was driving her car westbound on Valencia Mesa. She entered the intersection at Euclid, having a green light. She suddenly heard a loud noise and her airbag deployed. Phillips did not see Brown's car collide with hers in the middle of the intersection. The front of both cars were damaged. Phillips hurt her neck and her knee, both requiring surgeries. She also suffered bruises from her seatbelt. Brown injured her head and her knee. Brown was charged with driving under the influence of drugs causing Phillips bodily injury.

At her trial, the jury heard testimony from Edmundo Martinez Raicho, who witnessed the collision. He was stopped at the red light, southbound on Euclid, approximately six or eight feet from the intersection. He initially told a police officer he thought it was a head-on collision. However, at trial, he testified Brown was making a left-hand turn and collided with Phillips. Raicho said he helped Brown out of her vehicle and she immediately blamed him for the accident. When Raicho tried to make her sit down by the curb, she "didn't want to stand still," and she was walking around and

“moving a lot.” Raucho stated he tried to convince her to sit on the curb because he “didn’t want nobody else [*sic*] to hit her while she walked into the street.”

In addition to describing the collision, Phillips admitted (on cross-examination) she was taking 14 different prescribed medications in July 2007, including Vicodin, Soma, and Celebrex. Phillips explained she had neck surgery earlier that year and took the prescribed medication for pain. She took Vicodin, Soma, and Celebrex the morning before the collision. She did not take any Vicodin that afternoon, although her Vicodin prescription was for 500 milligrams three times a day. She took Celebrex twice a day. Soon after the accident, a police officer drove her home.

Phillips stated she filed a civil lawsuit against Brown. Phillips explained she did not receive any money because the case “was closed because my surgery amounted to more than what her insurance had.” When asked to clarify the status of the civil case, Phillips maintained it was not dismissed and she did not get a judgment against Brown, but her attorney “closed it.”

Fullerton Police Officer Roger Tonon testified he interviewed Brown soon after the accident. Initially, Brown claimed the other car ran a red light and was driving between 55 to 60 miles per hour, causing the crash. After further questioning, Brown explained she pulled into the intersection on a yellow signal and had to wait for several westbound vehicles to clear before she started her left hand turn. Brown said she was in the intersection for approximately 30 seconds. The officer conceded he had never heard of a yellow light that lasted 30 seconds. Tonon also testified Brown did not appear injured. However, Tonon noticed her speech was slurred and something appeared amiss with her eyes.

Fullerton Police officer Paul Irish, a drug recognition expert, also responded to the scene. Irish noticed Brown appeared lethargic and she had slurred speech. He observed Brown’s pupils were constricted and her eyes were bloodshot, “droopy,” and watery. He did not detect the odor of alcohol and Brown denied drinking

alcohol. Irish tried to examine Brown at the accident site but she “was uncooperative.” He could not conduct a field sobriety test because Brown could not stand up.

Irish later saw Brown at St. Jude’s Hospital. Based on her conduct at the hospital (she was slumped over, staggering, sedated, and lethargic), Irish opined she was under the influence of a depressant. He testified Brown was unable to care for herself, let alone able to operate a motor vehicle. Irish asked a blood technician to take a blood sample from Brown.

Brown tested positive of Butalbital, a barbiturate and depressant. Forensic scientist, Ines Collison, testified the Butalbital in Brown’s bloodstream was higher than therapeutic levels and approximately 20 percent higher than expected in a chronic drug user. Collison stated the drug can cause dizziness and has a sedative effect. She stated, “[I]t slows down the functioning of the brain, starting [with] the conscious, and the things that we want to do, and afterwards it starts to slow down the functioning of the unconscious type of actions in our body.” She added the drug slows down a person’s reflexes and impairs a person’s ability to perform interactions at the same time.

On cross-examination, Collison testified about the general effects of Soma and Vicodin (consumed by Phillips the morning of the accident) on the human body. Collison stated Soma is a muscle relaxant and a depressant. It has the effect of slowing down the functioning of the brain and nervous system. She stated Vicodin is an opiate and an analgesic to help the body with pain. She stated Vicodin can affect a person’s ability to drive a vehicle because, depending on the concentration and the person’s tolerance, it can cause drowsiness.

The jury found Brown not guilty of driving under the influence causing bodily injury. It found her guilty of the lesser included offense of driving under the influence. At the subsequent court trial for the prior offenses, the court found those allegations to be true. During the sentencing hearing, Phillips stated Brown caused the accident because she attempted to make a left-hand turn in front of her. The court

sentenced Brown to the upper term of three years. In addition, it ordered her to pay \$47,531.17 restitution to Phillips.

## II

Brown asserts the court erred in ordering restitution for Phillips's medical expenses because she was acquitted of driving under the influence *causing bodily injury*. She claims Phillips is not entitled to restitution because her losses were attributable to a crime for which she was not convicted. The Attorney General argues Brown forfeited her claim when she failed to raise it below, and on the merits, the restitution order was authorized because Brown's conviction on the lesser offense was related to the victim's loss.

Addressing the forfeiture argument first, we conclude Brown's challenge to the restitution order is purely legal and is not dependent on factual matters or determinations. She is claiming "that in this nonprobation context, the court imposed the order in excess of its statutory authority." (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179 (*Percelle*)). Claims presenting a purely legal issue are not subject to the waiver rule. (*Ibid.*)

In *Percelle*, defendant was sentenced to state prison after he was convicted of numerous crimes but acquitted of one of two charged vehicle thefts, in connection with the failure to return a rental car that had been rented with another person's credit card number. (*Percelle, supra*, 126 Cal.App.4th at pp. 171, 178.) The trial court ordered defendant to pay restitution to the owner of the credit card that was the subject of defendant's acquittal. (*Id.* at p. 178.) The appellate court struck the order because defendant had not been granted probation, and the restitution order was not authorized based on defendant's acquittal. In so concluding, the court noted that an "objection may be raised for the first time on appeal where it concerns an 'unauthorized' sentence, i.e., one that 'could not lawfully be imposed under any circumstances in the particular case.' [Citation.]" (*Id.* at p. 179.) Similarly, we conclude Brown's purely legal challenge to the

restitution order in this nonprobation case is not subject to the waiver rule, and we proceed to the merits.

A trial court's restitution order is generally reviewed for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) A restitution order that demonstrably rests on an error of law constitutes an abuse of discretion. (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49.)

In California, restitution is constitutionally and statutorily mandated. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498; Cal. Const., art. I, § 28, subd. (b)(13).) “In pertinent part, the California Constitution, article I, section 28, subdivision (b) provides: ‘It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons *convicted of the crimes* for losses they suffer.’ (Italics added.) [Penal Code s]ection 1202.4, subdivision (a), reflects that intention by providing that a ‘victim of a crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant *convicted of that crime.*’ (Italics added.) The court must enter a victim restitution order in every case ‘in which a victim has suffered economic loss *as a result of the defendant’s conduct.*’ ([Pen. Code,] § 1202.4, subd. (f), italics added.)” (*Percelle, supra*, 126 Cal.App.4th at p. 178.)

Accordingly, Penal Code section 1202.4 limits “restitution awards [in the non-probation context] to those losses arising out of the criminal activity that formed the basis of the conviction” because “the term ‘criminal conduct’ as used in subdivision (f) means the criminal conduct for which the defendant has been convicted.” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1247 [(*Lai*)].)” (*People v. Woods* (2008) 161 Cal.App.4th

1045, 1049 (*Woods*).<sup>1</sup> As noted by the court in *Percelle*, this means that “in the nonprobation context, a restitution order is not authorized where the defendant’s only relationship to the victim’s loss is by way of a crime of which the defendant was acquitted.” (*Percelle, supra*, 126 Cal.App.4th at p. 180.)

The *Lai* case is also instructive. Defendant had been charged with numerous counts of welfare fraud. The trial court sentenced defendant to state prison and ordered restitution not only for the loss incurred by acts committed within the charged period (1985 to 2000) but also for amounts obtained beforehand. The appellate court concluded that it was error to include amounts within the restitution award that could not be attributed to the charged crimes, holding that “when a defendant is sentenced to state prison, section 1202.4 limits restitution to losses caused by the criminal conduct for which the defendant was convicted.” (*Lai, supra*, 138 Cal.App.4th at pp. 1246-1249.)

Brown’s reliance on the case *Woods, supra*, 161 Cal.App.4th 1045, is also appropriate. In *Woods*, defendant was convicted as an accessory to murder after it was proven the shooter gave him the murder weapon as the shooter ran away from the scene. The appellate court held defendant’s criminal conduct, which took place after the murder had occurred, had no causal connection to the victim’s economic loss and therefore it was improper to order him to pay restitution for losses stemming from the murder. (*Id* at pp. 1049-1052.)

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<sup>1</sup> We distinguish restitution orders in the probation context in which a defendant may be ordered to pay restitution for crimes of which he or she was not convicted as a condition of probation. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) This stems from “the notion ‘that the granting of probation is not a right but a privilege, and that if the defendant feels that the terms of probation are harsher than the sentence for the substantive offense he is free to refuse probation. [Citation.]’” (*Percelle, supra*, 126 Cal.App.4th at pp. 179-180.) This consideration is not present when a defendant is sentenced to state prison and the court must look strictly to Penal Code section 1202.4.

In the case before us, Brown was charged with driving under the influence causing bodily injury in violation of Vehicle Code section 23153, subdivision (a). For this crime, the prosecution had the burden of proving not only that Brown was driving a vehicle under the influence of drugs, but also that she “committed an illegal act [or] neglected to perform a legal duty” and the illegal act “caused bodily injury to another person.” (CALCRIM No. 2100.)

The prosecutor’s theory of the case was Brown, while under the influence of drugs, violated Vehicle Code section 21801 by failing to yield when making her left hand turn. On this point, the jury was instructed, “The driver of a vehicle intending to turn left or complete a U-turn must yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at [anytime] during the turning movement, and must continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety.”

The jury acquitted Brown of this charge, finding she was only guilty of the lesser included offense of driving under the influence of a drug. Based on this verdict, it appears the jury rejected the theory Brown committed an illegal act causing Phillips’ injuries. This is not entirely surprising, given the evidence Phillips was also under the influence of an array of prescription medications, and the conflicting reports from Phillips, Brown, and the witness about the details of the accident. We agree with Brown’s argument that because the jury acquitted her of all criminal responsibility for Phillips’ injuries, the trial court should not have imposed financial responsibility for those injuries based merely on the conviction she was driving under the influence. To award restitution would require the court to ignore the jury’s verdict Brown was not guilty of “causing” bodily injury. Stated another way, Phillips’ losses were beyond the criminal conduct of which Brown was convicted.

The Attorney General asserts that regardless of the jury’s verdict, it was Brown’s burden to demonstrate the collision was *not caused* by her extremely intoxicated

driving. It offers no legal authority to support this theory on appeal. Not surprisingly, we also found no authority authorizing this court to reweigh the evidence and ignore the jury's verdict Phillips' injuries (and resulting economic loss) were not *caused* by Brown's criminal conduct. (Pen. Code, § 1202.4, subd. (f) [for restitution victim must have suffered economic loss "as a result of the defendant's conduct"].)

Accordingly, the restitution order directing payment of \$47,531 to a victim is for criminal conduct that is outside of the criminal acts of which Brown was convicted. (*Lai, supra*, 138 Cal.App.4th at p. 1249.) To this extent, the order exceeded the limits of Penal Code section 1202.4, constituting an abuse of the trial court's discretion.

### III

The judgment is modified to strike the order requiring Brown to pay \$47,531 in victim restitution. In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.