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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.

RONALD JORDAN,

Defendant and Appellant.

G049754

(Super. Ct. No. 11HF2340)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Ronald Jordan, in pro. per.; and Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

As described in a concurrently filed opinion, defendant Ronald Jordan was convicted of four counts of robbery and two counts of assault with a firearm in connection with a November 10, 2008 bank robbery at a Bank of America location in Lake Forest, California (the bank). (*People v. Jordan* (Oct. 23, 2014, G049462 [nonpub. opn.].) Taking into account these and other convictions, as well as defendant's criminal history, the court sentenced defendant to 43 years in prison. (*Ibid.*)

This appeal pertains to a postjudgment restitution hearing at which the court ordered defendant to pay \$49,265.25 to Bank of America. (See Pen. Code, § 1202.4, subd. (f).) David Aguilar, a protective services manager with Bank of America, was the sole witness at the restitution hearing. Aguilar immediately responded to the bank the day of the robbery. The same day, Aguilar supervised the audit procedure pursuant to which the bank's losses were calculated. Along with Aguilar and the assistant manager at the bank, two affected tellers participated in the process. Aguilar was present while this procedure took place, observing the counting activities performed by the other participants in the audit. But Aguilar did not actually count the money or enter the amount counted by the other individuals into the computer system. "As they're manually counting the money that was in the cash drawer it's inputted into our system. Once they've gone through every single denomination and they've counted it, . . . the system will then compare the amount that was inputted and compare it to the amount that was previously held the previous day in the actual box, and then the system will generate whether you have a loss or whether you're over for that particular period."

The day after the robbery, Aguilar prepared a summary report calculating the total amount of money taken during the robbery, \$49,265.25, which consisted of \$32,401.50 taken from one teller and \$16,863.75 taken from the other teller. This report was admitted as an exhibit. Aguilar agreed with the prosecutor that the report was "made in the regular course of business." This same auditing process is still the custom and practice of Bank of America. To complete his report, Aguilar used the computer entry

records created by the tellers counting the money the previous day. Aguilar was unable to comply with the district attorney's request to produce the records created by the tellers who actually counted the money. The computer entries created by the tellers in 2008 were purged by the system sometime between 2008 and 2012. There was no way to retrieve the records generated by the tellers that participated in the audit. But Aguilar believed his report was accurate because he relied on the teller entries and/or his own notes concerning those entries to prepare the report.

Defense counsel objected to the admissibility of the exhibit on hearsay grounds, arguing that Aguilar's testimony and his report were not appropriate sources of evidence to prove the amount stolen. Moreover, defense counsel claimed the exhibit lacked foundation because it merely summarized the total amount lost at each teller's station rather than listing the underlying data (i.e., the denomination counts entered into the computer system and the comparison number used to calculate the difference).

The court received the exhibit as "a pretty good example of a business record. We had the record that appears to have been prepared, from what the witness is indicating, within the customary order and business practice." "The witness himself actually prepared the document . . . at or near the time of the incident. This was a day later He was right there watching them make the count. [¶] With all that, it falls within the proper parameters of reliability. The court is satisfied that it's reliable."

Defendant filed a notice of appeal with regard to the restitution order. We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts and procedural history of the case. Counsel did not argue against defendant, but advised the court no issues were found to argue on his behalf. (See *People v. Wende* (1979) 25 Cal.3d 436.) We have reviewed the entire appellate record and conducted an independent analysis of the court's findings and order. We concur with defendant's appointed counsel. There is no issue to argue on defendant's behalf.

Defendant was given 30 days to file written argument on his own behalf. Defendant responded with an untimely five-page supplemental brief. We vacated submission of the matter and permitted the filing of the brief. Defendant's brief argues the court abused its discretion in three ways: (1) the exhibit prepared and presented by the bank employee witness, which provided the factual basis for the amount stolen from the bank, was inadmissible; (2) there was "insufficient information to support the documented loss from the financial institution" (i.e., a lack of substantial evidence); and (3) the court failed to consider defendant's inability to pay the amount ordered, given his financial condition and status as a prisoner.

With regard to the admissibility of the exhibit, we agree with the court that it qualified as a business record. "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271; cf. *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 785 [reports prepared by employee "in the course of his official responsibility to investigate and determine the causes of industrial accidents" were admissible as business records].)

Once the admissibility of the exhibit and Aguilar's authenticating testimony was established, it was clear that there was substantial evidence in the record supporting the restitution award. The court awarded the same amount to Bank of America that Aguilar's report indicated was lost in the robbery. The standard of proof at a restitution hearing is preponderance of the evidence. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.) "In reviewing the sufficiency of the evidence, the "power of the appellate court begins and ends with a determination as to whether there is any substantial evidence,

contradicted or uncontradicted,” to support the trial court’s findings.”” (*Id.* at pp. 468-469.)

Finally, the court was not required to consider the defendant’s ability to pay the restitution award. “The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order.” (Pen. Code, § 1202.4, subd. (g); see *People v. Draut* (1999) 73 Cal.App.4th 577, 582 [court abuses discretion if it reduces restitution award to victim based on defendant’s ability to pay].) We also note defendant did not raise the question of his ability to pay restitution at the hearing.

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.