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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AVNIL PRASAD,

Defendant and Appellant.

H037160

(Monterey County

Super. Ct. No. SS081295)

I. STATEMENT OF THE CASE

Defendant Avnil Prasad pleaded no contest to one count of reckless driving. (Veh. Code, § 23105, subd. (a).) The court suspended imposition of punishment and placed defendant on probation with various conditions including that he pay \$109,914.81 in restitution to the victims.

On appeal from the restitution order, defendant claims the court erred in failing to offset the amount of restitution by the insurance settlement that the victims received.

We affirm the order.

II. THE ACCIDENT

Around 4:30 p.m., on Saturday, January 5, 2008, defendant was driving a pickup truck that he did not own eastbound on Blanco Road in Monterey County at around 55 m.p.h. It was cloudy, cold, windy, and wet. Traffic was heavy. At the same time David Hart was driving his wife and son westbound at 40 to 50 m.p.h. Suddenly

defendant lost control of his truck, started sliding counter-clockwise into the westbound lane, and slammed into the Harts's vehicle. Both vehicles were severely damaged. Defendant, Mr. and Mrs. Hart, and their son were injured. Two witnesses stated that defendant was speeding, tailgating, and passing cars before the accident; defendant denied it. A defense accident reconstruction expert opined that defendant was driving slowly when his rear tires lost traction on a muddy part of the road causing him to fishtail and swerve into the Harts's vehicle.

III. OFFSET AGAINST THE RESTITUTION ORDER

A. Background

At the restitution hearing on May 11, 2011, the court reviewed two exhibits. People's Exhibit One included an itemization of the Harts's losses, including lost income, the services provided to each, and the cost of those services. The total reported loss was \$172,603.83. Exhibit One also included a breakdown of the disbursement of the proceeds of an insurance settlement obtained by the Harts's attorney which revealed a net disbursement to the victims of \$110,805.81.

The court also reviewed defense Exhibit A. It included a copy of the Harts's complaint for damages against defendant, Sunena Devi Kumar, Ron Kumar, Kumar Inc., Kumar Electric, and Jet Electric. It also included unsigned copies of documents in which the Harts released any claims they had against these named defendants. At the hearing, the prosecutor represented that the settlement funds had come from an insurance company under a policy for the owner of the truck that defendant was driving the day of the accident.

In a letter to the court, defendant asserted that he was an employee of Jet Electric. He explained that his cousin, a project manager for Jet Electric, gave him the truck, and its windshield wipers did not work properly. He further stated that after the accident, his cousin, Ronald Kumar, and Kumar's mother, Sunena Kumar, tried to influence him not to tell his attorney that he worked for Jet Electric.

The prosecutor sought \$128,229.45 in restitution. Defense counsel challenged the amount included for “Lost Wages” because Mr. Hart apparently received some “additional family medical leave.” Concerning the insurance settlement that the Harts received, counsel conceded that under existing law, defendant was not entitled to a credit or offset. After reviewing this information, the court adjusted the amount the Harts’s claimed for lost wages and ordered defendant to pay a total of \$109,914.81 as restitution.¹

B. The Right to Restitution

“In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights. . . . Proposition 8 established the right of crime victims to receive restitution directly ‘from the persons convicted of the crimes for losses they suffer.’ (Cal. Const., art. I, § 28, subd. (b)(13)(A).)” (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) Article I, section 28, subdivision (b), of the California Constitution 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. [¶] (B) Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.”

In implementing Proposition 8, the Legislature enacted Penal Code section 1202.4, which provides, in relevant part: “(a)(1) It is the intent of the Legislature that a victim of 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.

[¶] . . . [¶] (3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . the following: [¶] . . . [¶] (B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment. [¶] . . . [¶] (f) [I]n every case in which a victim has

¹ The prosecutor apparently accepted a deduction of \$18,315.64.

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. 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. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . . [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. . . . [¶] (2) Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of any third party. . . . [¶] (3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following: [¶] . . . [¶] (B) Medical expenses. [¶] . . . [¶] (D) Wages or profits lost due to injury incurred by the victim [¶] . . . [¶] (H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim. [¶] . . . [¶] (g) The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record."

C. Appellate Review

We review the propriety of a restitution order for abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) A court abuses its discretion only if its decision is arbitrary or capricious or based on a demonstrable error of law. (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.) We affirm the order if there is a factual and rational basis for the restitution award. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.) We do not reweigh or reinterpret the evidence presented at a restitution hearing;

instead, we determine whether there was sufficient evidence to support the inferences drawn by the trier of fact. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.)

D. Discussion

Defendant contends that the court was required as a matter of law to offset the final amount of the Harts's losses by the net amount of the insurance settlement they received.

The Attorney General argues that defendant forfeited his claim because counsel did not object to the restitution order on that ground and instead conceded that under existing law, defendant was not entitled to an offset.

Defendant counters that the court's allegedly erroneous failure to give him credit involves a question of law on undisputed facts; and because the court failed to give an offset, the resulting restitution order is not supported by sufficient evidence. He asserts that he is allowed to challenge the sufficiency of evidence on appeal notwithstanding counsel's concession and failure to object below.

Defendant's effort to avoid forfeiture by contorting an alleged legal error into a claim of insufficient evidence is unconvincing. However, it is settled that "an order resting upon a 'demonstrable error of law' constitutes an abuse of the court's discretion. [Citations.]" (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49 (*Jennings*)). Thus, we address his claim that as a matter of law he was entitled to an offset.

As a general rule, there is no offset for amounts that a victim receives as compensation for losses from a collateral source that is *independent* of the defendant, such as Medicare or the victim's own insurance. This is so even if the restitution order results in a double recovery. (*People v. Birkett* (1999) 21 Cal.4th 226, 246; *People v. Hamilton* (2003) 114 Cal.App.4th 932, 940-941 (*Hamilton*); *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272.) As the court in *People v. Hume* (2011) 196 Cal.App.4th 990 (*Hume*) explained, "[A]lthough a restitution order is not intended to give the victim a windfall [citation], a third party source which has reimbursed a direct victim for his or her

loss may pursue its civil remedies against the *victim or perpetrator*. ‘[T]he possibility that the victim may receive a windfall because the third party fails to exercise its remedies does not diminish the victim’s right to receive restitution of the full amount of economic loss caused by the perpetrator’s offense.’ [Citation.]’ (*Id.* at p. 996.)

On the other hand, a defendant is entitled to an offset for amounts paid to the victim by the defendant’s own insurer. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 167-168.) “[P]ayments from the defendant’s own insurance company are different from other sources of victim reimbursement because (1) the defendant purchased the insurance, and the payments are not fortuitous but rather are precisely what the defendant bargained for; (2) the defendant paid premiums to keep the policy in force; (3) the defendant has a contractual right to have the insurance company make payments to the victim on his or her behalf; and (4) the insurance company has no indemnity or subrogation rights against the defendant. [Citation.]” (*Hume, supra*, 196 Cal.App.4th at pp. 996-997.)

The right to an offset is less clear when the victim receives payment from an insurer under a policy that the defendant did not personally procure but which was not completely collateral to and independent of the defendant.

For example, in *Jennings, supra*, 128 Cal.App.4th 42, the defendant was driving under the influence and got into an accident that injured his passenger. (*Id.* at pp. 46.) The injured passenger received compensation for her injuries from the defendant’s mother’s insurance company and signed a settlement releasing her and the defendant from all claims arising from the accident. (*Id.* at p. 47.) The trial court ordered full restitution and denied an offset after finding that the defendant’s mother, not the defendant, was the insured. (*Id.* at p. 48.) In a motion to modify the restitution order, the defendant presented evidence that the defendant was a named insured and a named driver on the policy, his name was on the declarations page, and he had helped pay the insurance premiums. Moreover, the insurer indicated that it had no subrogation rights

based on the claims it had paid on the defendant's behalf. (*Ibid.*) The trial court again denied an offset. (*Id.* at p. 53.)

On appeal, the court explained that the critical factual question concerning whether a defendant is entitled to an offset is whether the defendant "is an insured on whose behalf the settlement payments were made." (*Jennings, supra*, 128 Cal.App.4th at p. 53.) The court noted undisputed evidence that the defendant was an insured under his mother's policy. The court further noted that the policy expressly listed the defendant as an insured; no one challenged the authenticity of that document; and after the accident, the insurer excluded the defendant from the policy. Furthermore, the insurer paid the settlement expressly on the defendant's behalf, and in return, the injured passenger released her claims against the defendant. Under these circumstances the defendant was entitled to an offset. (*Id.* at pp. 53-54.)

In *People v. Short* (2008) 160 Cal.App.4th 899 (*Short*), the defendant was driving his employer's vehicle while under the influence and got into an accident that injured another driver. (*Id.* at p. 901.) The victim sued the defendant and the defendant's employer; the employer's insurance company settled with the victim, and the victim released all claims against the defendant and his employer. (*Id.* at p. 902.) The defendant then sought an offset against the restitution award. The trial court denied an offset because the defendant had not procured the insurance policy, he was not a named insured on the policy, and he had not helped pay the premium. (*Ibid.*)

In reversing, the appellate court noted that the employer's commercial vehicle policy insured the employer and "[a]nyone else while using with your permission a covered "auto" you own, hire or borrow" An 'umbrella' policy insured the employer and "[a]ny person (other than Your partners, executive officers, directors, stockholders or employees) or organization with respect to any Auto owned by you, loaned to you or hired by you or on Your behalf and used with Your permission." (*Short, supra*, 160 Cal.App.4th at p. 904, italics added.) Moreover, at the restitution hearing, the People did

not dispute that the defendant was acting within the course and scope of his employment and was driving the employer's vehicle at the time of the accident. Thus, although the defendant was not expressly listed as an insured, he was a member of the class of insureds covered under the policy, the insurer was contractually obligated to pay on behalf of the defendant, and it did so in return for a release of both the defendant and his employer from further liability. (*Id.* at p. 905.)

In contrast to these cases, the reviewing court in *Hamilton, supra*, 114 Cal.App.4th 932, reversed an offset. There the defendant shot a man working for his mother and was convicted of assault with a deadly weapon. The victim later sued the defendant and his mother. The mother's insurer settled the claim on her behalf and obtained a release of all claims against her and the defendant. (*Id.* at p. 935.) The trial court gave the defendant what amounted to an offset against the restitution amount. (*Id.* at pp. 935-937, 941, 944.)

On appeal, the court concluded that the defendant was not entitled to an offset because there was no evidence that his mother's insurer settled the claim on the defendant's behalf. Rather, the evidence established that the insurer settled the civil suit only on the mother's behalf. The settlement and release listed only her. Although the defendant was mentioned, it was only in the caption referring to the civil suit. In a letter accompanying the settlement document, the insurer said that it had resolved the claim against her, and she was now released her from the lawsuit. The insurer further noted that it had been able to "extricate" the defendant from the lawsuit, but it had no authority to secure a complete release from liability for him given the restitution order. *Hamilton, supra*, 114 Cal.App.4th at p. 943.) The court concluded that because the settlement with the victim was not made on the defendant's behalf, he was not entitled to an offset against his restitution obligation. (*Ibid.*)

Collectively, these cases establish that a defendant is entitled to an offset when the evidence before the trial court shows that money the victim received as an insurance

settlement was paid on the defendant's behalf. With this in mind, we turn to the facts of this case.

First, the documentary evidence presented at the hearing supported the court's calculation concerning the amount of the restitution order. Defendant does not suggest otherwise. Rather, he claims only that he was entitled to an offset against *that* amount.

Next, it is settled that the party seeking an offset or credit to, or modification of, the restitution order has "the burden of proof as to 'each fact the existence or nonexistence of which is essential to the claim for relief . . . he is asserting.' [Citations.]" (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1137.) Thus, it was incumbent on defendant to present evidence showing that the settlement received by the Harts's was paid on his behalf because he was covered under the pickup truck owner's insurance policy.

Here, defendant did not present evidence of the insurance policy, the nature of the policy, the coverage provided by the policy, the insureds named in the policy, or even whose policy it was. Other than defendant's own statements, which the trial court was not obligated to credit, there was no actual evidence showing who owned the truck or that defendant was the owner's employee.² Defendant also presented no evidence showing that he was driving the truck under circumstances that would have provided coverage under the terms of the unidentified policy or that under the policy, the insurer was obligated to cover defendant. Last, defendant provided no evidence showing that the

² The Harts's complaint alleged that Kumar, Inc. was the registered owner of the truck and that defendant was an employee of Kumar, Inc. However, these allegations do not conclusively establish the facts alleged.

Defendant implies that his status as an employee covered by the insurance policy was established by the fact that the prosecutor did not dispute defendant's statements about being an employee. However, the issue of defendant's status as an employee was never raised at the hearing, the prosecutor was not required to dispute information in defendant's written statement, and the court was not required to credit the statements defendant made.

settlement related to claims arising from defendant's conduct as opposed to claims relating only to the other defendants—i.e., negligent failure to maintain and negligent entrustment.

In short, the only evidence before the court was that the Harts agreed to a settlement in which they released defendant and numerous other defendants named in the Harts's lawsuit from future claims. As *Hamilton* illustrates, the mere fact that defendant was extricated from further legal liability in the release does not establish as a matter of law that the underlying settlement was made on his behalf or that he was entitled to an offset.

Finally, we note that because the Harts did not receive payment from defendant's own insurance policy, the cases discussed above—*Jennings*, *Short*, and *Hamilton*, all of which predated defendant's restitution hearing—put defendant on notice concerning the evidence he needed to produce to show that the settlement was paid on his behalf. At the hearing, the parties expressly referred to the *Hamilton*, where, as noted, the court held that the defendant was not entitled to an offset because the evidence did not show that the insurer had paid the victim on the defendant's behalf. Defense counsel acknowledged *Hamilton*, disagreed with its reasoning, but then conceded that defendant was not entitled to an offset.³

Given the record, we reject defendant's claim that the undisputed evidence established as a matter of law that he was entitled to an offset because the settlement was paid on his behalf. Accordingly, we do not find that the restitution order rests on a demonstrable legal error or that the trial court abused its discretion. Ironically, even if we accepted defendant's effort to characterize his claim as insufficiency of the evidence, the

³ Under the circumstances, we have no opinion concerning the correctness of counsel's concession. However, defendant does not claim that counsel rendered ineffective assistance in connection with the restitution hearing. Nor has he filed a petition for a writ of habeas corpus to assert such a claim.

insufficiency relates to the evidence he needed to present to establish his right to an offset and not to the evidence supporting the court's restitution order.

IV. DISPOSITION

The restitution order is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.