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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. IGNACIO RAMIREZ, Defendant and Appellant.	H037264 (Monterey County Super.Ct.No. SS110070A)

Defendant Ignacio Ramirez pleaded no contest to four offenses related to his driving of a stolen 2008 Lexus and a subsequent car chase with police officers that resulted in the car being demolished. He entered his plea with the understanding that he would receive probation and that two other charges would be dismissed. The court suspended the imposition of sentence and granted three years' formal probation. After a restitution hearing, the court ordered defendant to pay the victim $35,235.02.

Defendant challenges the order of restitution, claiming that it is excessive by approximately $4,800 and therefore provides a windfall to the victim.[1] We conclude that

[1] Defendant in his opening brief also challenged the constitutionality of a probation condition requiring him at all times to stay at least 100 yards from the victim. Defendant subsequently moved to withdraw this argument on the ground of mootness, based upon the fact that defendant had been subsequently arrested and his probation had

the court did not abuse its discretion in imposing the victim restitution order. Accordingly, we affirm.

FACTUAL BACKGROUND[2]

During a routine patrol in east Salinas on January 9, 2011, officers with the Salinas Police Department attempted to stop a 2008 stolen Lexus. The driver, later identified as defendant, failed to stop and the police gave pursuit. The Lexus ultimately crashed into a telephone pole and a fire hydrant at Griffin and John Streets. Defendant and the front passenger fled on foot and were apprehended a short distance from the crash. A passenger in the back seat who remained in the car was found to be in possession of a loaded handgun. The passenger who attempted to flee was also in possession of a loaded semi-automatic firearm. Both passengers were known members of the Norteño criminal street gang. The police later determined that defendant's driver's license had been suspended for driving under the influence. After booking, defendant stated that he wanted to be housed " 'with Northerners.' " On the same day, the police executed a search warrant at defendant's home and the search revealed several items that were considered to be Norteño paraphernalia and graffiti.

PROCEDURAL BACKGROUND

Defendant was charged by information with unlawful driving or taking of a vehicle without the owner's consent, a felony (Veh. Code, § 10851, subd. (a); count 1); evading an officer by driving with a willful disregard for the safety of persons and property, a felony (Veh. Code, § 2800.2, subd. (a); count 2); hit and run resulting in physical injury, a felony (Veh. Code, § 20001, subd. (a); count 3); permitting a loaded

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been revoked. (See *In re R.V.* (2009) 171 Cal.App.4th 239, 245.) We granted that motion.

[2] The facts underlying the conviction are taken from the probation report.

firearm in a vehicle, a felony (Pen. Code, § 12034, subd. (a); count 4)[3]; street terrorism, a felony (§ 186.22, subd. (a); count 5); and driving while his driver's license was suspended for drunk driving, a misdemeanor (Veh. Code, § 14601.2, subd. (a); count 6). It was alleged further that defendant committed three of the offenses (counts 1, 2, and 4) for the benefit of, at the direction of, or in association with the Norteño criminal street gang (§ 186.22, subd. (d)). He pleaded no contest to counts 1, 2, 4, and 5, and admitted the gang allegation as to count 4, based upon the understanding that he would receive felony probation. On May 17, 2011, the court suspended imposition of sentence and granted three-years' probation on the condition that he serve 180 days in county jail for the count 4 conviction and 180 days concurrently for the count 5 conviction. It dismissed the remaining counts and enhancements. The court further set a hearing on victim restitution.

The court received briefs and testimony from the victim—identified as "Tony"—in connection with the issue of victim restitution. On August 16, 2011, the court ordered victim restitution in the amount of $35,235.02, plus interest at 10 percent from January 9, 2011.

Defendant filed a timely notice of appeal. It was stated in the notice that the appeal related to matters occurring after the plea, specifically including the victim restitution order, and did not challenge the validity of that plea. The order requiring the defendant to pay victim restitution is appealable. (§ 1237, subd. (a); *People v. Guardado* (1995) 40 Cal.App.4th 757, 763.)

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[3] Further statutory references are to the Penal Code unless otherwise stated.

DISCUSSION

I. *The Restitution Order*

A. *Background*

The victim, Tony, was called as a witness at the restitution hearing on August 16, 2011. He testified that on April 17, 2010, he purchased the 2008 Lexus IS 250 that was involved in the incident with defendant. He bought it from a car dealer as a certified preowned vehicle for $28,995. Tony made a $6,500 down payment and made eight monthly payments of $598.11. The Lexus was stolen on December 26, 2010, and was recovered after it had crashed on January 9, 2011; it was demolished. In addition, Tony lost some personal items from the car, namely, some school textbooks worth about $600, and miscellaneous personal property valued at approximately $70 to $80.

The Lexus was insured. The insurer, based upon its own valuation of the Lexus at $26,727, paid Tony $28,491.88 (after the deductible of $1,000). In addition, due to the loss of his car, Tony missed two days' work, causing him to lose $240 in wages, plus $26 for the two hours of work missed to attend the restitution hearing.[4]

The People contended that the restitution amount should be based upon the following components: the down payment; the monthly payments made by Tony; the amount of the loan payoff; the deductible; and incidental losses. Although the figure was not stated by the prosecutor, it appears that, using his formula, the total restitution amount requested was $36,395.02. Defendant in briefing and at oral argument indicated that the restitution order should be for $29,491.88 (the amount paid by the insurance company, plus the deductible), plus the incidental losses.

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[4] Hereafter the victim's claimed lost wages and lost personal items from the car are referred to as incidental losses. It is undisputed that they total $936.

The court ordered victim restitution in the total amount of $35,235.02, plus interest at 10 percent from January 9, 2011. This figure was based upon the figure requested by the People, minus depreciation of $1,160. The depreciation figure was based upon the difference between the original purchase price and a subsequent fair market value of the Lexus ("the [Kelley Blue Book] price that was from July 24 of 2011").

B. *Victim Restitution Orders Generally*

In 1982, the voters passed Proposition 8, under which crime victims became constitutionally entitled to restitution. "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. [¶] 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, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section." (Former Cal. Const., art. I, § 28, subd. (b).)[5] In response to Proposition 8, the Legislature enacted section 1202.4, which required " 'the court to impose a restitution fine "[in] any case in which a defendant is convicted of a felony. . . ." ' [Citation.]" (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).)

Section 1202.4, subdivision (a) provides in part, "(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." The statute provides that, in addition to the restitution fine provided in

[5] Former California Constitution article I, section 28 was amended by initiative measure (Proposition 9) on November 4, 2008. Former subdivision (b) was renumbered subdivision (b)(13) and the text of the subdivision was amended.

subdivision (b), the court must order restitution to the victim(s) of the crime committed. (§ 1202.4, subd. (a)(3)(B).)[6]

Section 1202.4, subdivision (f) provides in relevant part: " . . . [I]n 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 . . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." The statute further provides that, "[t]o the extent possible, the restitution order shall be prepared by the sentencing court, 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 . . . ." (§ 1202.4, subd. (f)(3).)

A victim restitution order has the salutary goal of providing compensation to a victim for his or her economic losses resulting from crimes committed by others. (§ 1202.4, subd. (a).) In addition to that purpose, such an order is intended to rehabilitate the defendant and to deter the defendant and others. (*People v. Crow* (1993) 6 Cal.4th 952, 957; *People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.)

"At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) This proof may include information contained in probation reports. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048 (*Keichler*).) "Once the victim has made a prima facie showing of his or her loss, the burden shifts to the defendant to

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[6] "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." (§ 1202.4, subd. (a)(3)(B).)

demonstrate that the amount of the loss is other than that claimed by the victim. [Citations.]" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 691.) And the standard of proof is preponderance of the evidence, not proof beyond a reasonable doubt. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469 (*Baker*).) The restitution order need not "be limited to the exact amount of the loss in which the defendant is actually found culpable . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; see also *People v. Anderson* (2010) 50 Cal.4th 19, 27.) Further, the award need not "reflect the amount of damages that might be recoverable in a civil action." (*People v. Carbajal*, at p. 1121; see also *People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

Our review of restitution orders is governed by the abuse of discretion standard. (*Giordano*, *supra*, 42 Cal.4th at p. 663; *People v. Hudson* (2003) 113 Cal.App.4th 924, 927.) That "standard is 'deferential,' but it 'is not empty.' [Citation.] '[I]t asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citations].' [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Giordano*, at pp. 663-664.)

C. *Whether Victim Restitution Order Was Proper*

Defendant contends that the victim restitution order was excessive. He claims that the "award with respect to the car gave Tony not only the replacement cost of a similar car, which is all he is entitled to by law (see [§] 1202.4, subd. (f)(3)(A)), but an additional amount." He urges that this "additional amount" consisted of the victim's down

payment and eight monthly payments included in the award, which "resulted in a windfall to Tony." We disagree with defendant's contentions.

The Supreme Court, as noted above, has held that while the restitution order should to the extent practicable, compensate fully the victim for his or her economic loss occasioned by the defendant's criminal conduct (§ 1202.4, subd. (f)(3)), it need not "be limited to the exact amount of the loss in which the defendant is actually found culpable, [or] . . . reflect the amount of damages that might be recoverable in a civil action." (*People v. Carbajal*, *supra*, 10 Cal.4th at p. 1121; see also *People v. Anderson*, *supra*, 50 Cal.4th at p. 27.) "A victim's restitution right is to be broadly and liberally construed. [Citations.]" (*People v. Mearns* (2002) 97 Cal.App.4th 493, 500-501; see also *Baker*, *supra*, 126 Cal.App.4th at p. 467.) There are numerous examples demonstrating the judicial approach of broadly and liberally construing victim restitution. (See, e.g., *In re Alexander A.* (2011) 192 Cal.App.4th 847 (*Alexander A.*); *People v. Phu* (2009) 179 Cal.App.4th 280 (*Phu*); *Keichler*, *supra*, 129 Cal.App.4th 1039; *Baker*, *supra*, 126 Cal.App.4th 463; *Mearns*, *supra*, 97 Cal.App.4th 493.)

In *Keichler*, *supra*, 129 Cal.App.4th 1039, the court rejected a challenge to restitution orders to three victims (each a member of the Hmong community) assaulted by the defendant. There was testimony that in the Hmong culture, it is believed that an attack or an assault on a person may result in one or more of the souls of that person leaving the body, resulting in illness. (*Id.* at pp. 1042-1044.) There was evidence that one of the traditional Hmong methods of remedying this condition is to perform a spirit-calling ceremony, which includes the use of flowers, candles, string, and animal sacrifice. (*Id.* at p. 1044.) The appellate court, emphasizing that victims' restitution rights are to be liberally and broadly construed, affirmed the restitution awards that included reimbursement to each of the victims for conducting such a ceremony, likening it to "the

psychological treatment a western practitioner might provide to his or her patient." (*Id.* at p. 1047.)

After the defendant in *Phu*, *supra*, 179 Cal.App.4th 280 was convicted of conspiracy to sell marijuana in which there was evidence that he had conducted a growing operation out of a house where there had been an illegal diversion of electrical power, the court ordered victim restitution of nearly $25,000 in favor of the utility company. (*Id.* at pp. 282-283.) The appellate court rejected the defendant's claim that the award was excessive because of a lack of definitive proof of the commencement date of the illegal diversion of power; the defendant contended the award should have been calculated based upon the diversion of power commencing five months later than as claimed by the utility. (*Id.* at pp. 283-284.) Conceding that the commencement date of the diversion " 'was necessarily speculative' " (*id.* at p. 284), the court held: "Relying on the later date to calculate [the utility's] losses almost certainly would have resulted in a restitution award that would fall short of fully compensating the victim for the losses suffered. Selecting the earlier date was the best guarantee that the victim would receive full compensation." (*Ibid.*)

And in *Alexander A.*, *supra*, 192 Cal.App.4th at page 851, the minor, after admitting a petition alleging, inter alia, that he had vandalized a car, challenged a victim restitution order of approximately $8,200 imposed pursuant to Welfare and Institutions Code section 730.6.[7] This order was made based upon an estimate submitted by the victim to repair the car, notwithstanding the evidence that the value of the car was between $1,800 and $5,300. (*Alexander A.*, at p. 851.) The appellate court rejected the

[7] "Penal Code section 1202.4, subdivision (f)(3)(A), the provision governing restitution in criminal proceedings for stolen or damaged property, contains identical language to Welfare and Institutions Code section 730.6, subdivision (a)(1), which governs restitution in juvenile proceedings for stolen or damaged property." (*Alexander A.*, *supra*, 192 Cal.App.4th at p. 853, fn. 3.)

minor's claim that the award provided the victim with a windfall of "$3,000 to $5,000." (*Id.* at p. 852.) It held that "applying a strict civil [tort] standard to restitution in juvenile court for stolen or damaged property unduly limits the court's discretion to determine the amount of restitution" (*id.* at p. 856), and that, "adopt[ing] . . . a more flexible standard . . . , restitution is not limited to the replacement value of the victim's [car]." (*Ibid.*; see also *In re Dina V.* (2007) 151 Cal.App.4th 486.)

The dispute here concerns whether the court used an appropriate method of determining the victim's economic losses resulting from the destruction of his car. As in *Alexander A.*, *supra*, 192 Cal.App.4th 847, defendant disputes the order because he claims that it is not reasonably related to the value of the car. Defendant's position is premised on the notion that the only method available to the court in determining the amount that would make the victim whole was the selection of the insurance company's valuation of the Lexus. It is certainly true that the court *could have* based its calculation on the amount the insurer provided to the victim (plus the deductible and incidental losses), as a reasonable means of compensating the victim fully for his economic loss. But its selection of the amounts paid by the victim to the car dealer along with the payoff amount due (plus the deductible and incidental losses) was also a rational method of making the victim whole. And the court factored in the possibility that an award equaling the amount the victim paid for the car—both actually through the down payment and monthly payments, and constructively through the payoff obligation—might provide a windfall by failing to consider the victim's use of the Lexus for eight months. It therefore reduced the restitution amount by $1,160, an amount it deemed appropriate to reflect depreciation. The fact that an alternative method of determining restitution was available here is of no consequence in determining whether the court erred in ordering victim restitution by using another formula. (See *People v. Akins*, *supra*, 128

Cal.App.4th at p. 1389 [fact that there may be other methods of calculating victim's loss irrelevant to inquiry of whether method used by court constituted abuse of discretion].)

We bear in mind that a victim's right to restitution for economic losses resulting from the defendant's criminal acts is to be construed broadly and liberally (*People v. Prosser*, *supra*, 157 Cal.App.4th at p. 686), and that a victim restitution order should be reversed " ' only if the appellant demonstrates a clear abuse of discretion. [Citation.]' " (*Id.* at p. 690.) The court here employed a rational method of attempting to calculate the victim's economic losses. Because there was "a factual and rational basis for the amount of restitution ordered by the trial court" (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562), the order must be affirmed.

DISPOSITION

The victim restitution order of August 16, 2011, is affirmed.

Duffy, J.*

I CONCUR:

Rushing, P.J.

Premo, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.