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

THE PEOPLE,

Plaintiff and Respondent,

v.

DEARYL TUCKER FORD,

Defendant and Appellant.

H037570

(Santa Clara County

Super. Ct. No. C1088686)

A jury found defendant Dearyl Tucker Ford guilty of: (1) second degree burglary; (2) theft or unauthorized use of a vehicle; and (3) vandalism. (Pen. Code, § 460, subd. (b); Veh. Code, § 10851, subd. (a); Pen. Code § 594, subds. (a) & (b)(2)(A)). Defendant claims that the court erred in ordering restitution to one of the victims, and that trial counsel provided ineffective assistance of counsel at the restitution hearing. We deny the claim of ineffective assistance of counsel and affirm the court's restitution order.¹

¹ Defendant also has filed a petition for writ of habeas corpus, which we have ordered considered with the appeal. We have disposed of the petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

BACKGROUND

Defendant stole a 1967 Corvette Stingray from a garage where it was stored for repairs.² The owners recovered the car, but it had sustained damage. The trial court ordered restitution payments to the owners of the car and to the owner of the garage.

I. *Order Relating to the Owner of the Garage*

Defendant stole the Corvette from a garage owned by Max Krewson. Krewson testified that a lock plate was missing from a rear door of the garage after the theft, and the door handle did not work properly. He paid \$311 to replace the lock plate and door handle, and to rekey two front doors. Krewson presented a bill from a locksmith to substantiate the expense, including \$130 for the rekeying of the doors. Defendant, arguing lack of notice, objected to the amount of \$130 for the rekeying. Over defendant's objection, the trial court awarded Krewson restitution in the total amount of \$311.

II. *Order Relating to the Owners of the Car*

The Corvette belonged to David and Susan Duarte. Ms. Duarte testified that the Corvette was in perfect condition at the time it was stolen. When police recovered the Corvette, they observed “[a] tremendous amount of paint damage to pretty much most of the car—the hood area, both sides along the door, and along the trunk area.” The car appeared to be covered in primer, and the interior of the car was damaged. Ms. Duarte testified that the dash board appeared to have been cut with a razor blade, and the “kit panel” on the right-hand side had been scuffed. The battery was also missing.

Frank DeSantiago, the owner of the auto body shop that repaired the Corvette, testified at the restitution hearing. DeSantiago explained that the nature of the damage and the unique, one-piece fiberglass construction of the Corvette body precluded spot repairs, requiring instead that the paint be removed from the entire car. DeSantiago

² We described the facts of the offense more fully in our opinion on defendant's appeal from a denial of his motion to suppress. (*People v. Ford* (H037151).)

testified that the total cost of repairing the car's exterior was \$15,461, including \$11,774 in labor costs, and \$2,911 in materials. A claims supervisor from Farmers Insurance testified that additional costs were incurred in the amounts of \$2,433 for repairs to the interior, \$198 for a new battery, and \$501 for towing and storage.

Defendant's expert opined that DeSantiago had "inflated" some of the repair times (resulting in inflated labor charges), and that the cost was too high. The expert testified that instead of stripping the paint and repainting the entire car, he would have "color sanded" and polished the paint, or he would have used a chemical stripper to try to remove the primer. However, on cross-examination, he admitted that he was not a Corvette specialist, and he had never personally inspected the stolen Corvette. His testimony was based solely on blurry photographs of the vehicle. He conceded that the time necessary for repair would depend on the nature of the damage. But he did not know whether the damage to the exterior of the car was due to primer, spray paint, sanding, or any other cause. He admitted that without knowing the nature of the damage, he could not determine what repairs were necessary.

The trial court noted the defendant's expert's failure to identify specifically what costs were inflated and on what basis he had formed his opinions. The court, crediting the testimony of DeSantiago and the claims supervisor, awarded total restitution in the amount of \$18,594.56 to David Duarte.

DISCUSSION

I. *Standard of Review*

We review the trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) "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." (*Id.* at pp. 663-664.) "No abuse of discretion will be found when there is a factual

or rational basis for the amount of restitution ordered.” (*People v. Hudson* (2003) 113 Cal.App.4th 924, 927.)

II. *Restitution to the Owner of the Garage*

Defendant contends the trial court erred in ordering \$130 of restitution to Krewson for rekeying the garage doors because: (1) defendant was not given adequate notice of or an opportunity to respond to the claim; and (2) the evidence was insufficient to show that defendant caused the loss. We reject defendant’s claims.

First, defendant received adequate notice of Krewson’s restitution claim. Defendant claims “the probation report does not state who claimed a \$200 loss or what caused the loss.” Defendant is incorrect. The probation report summarizes Krewson’s statement to the probation officer. Krewson stated that he suffered a financial loss of \$200 to his back door. Accordingly, the probation report recommended a restitution fine of \$200 to Krewson. Although the trial court ultimately awarded a slightly higher amount, the probation report gave defendant adequate notice that Krewson’s damages in that approximate amount would be at issue in the restitution hearing. (*See People v. Blankenship* (1989) 213 Cal.App.3d 992, 997 [defendant’s due process rights are protected when the probation report gives notice of the amount of restitution claimed].)

Second, the evidence is sufficient to support the amount of restitution for the rekeying of Krewson’s front doors. Krewson substantiated the amount of the expense via the locksmith’s bill. Furthermore, the evidence presented at trial demonstrated that Krewson justifiably incurred the expense as a result of defendant’s conduct. Shortly before the theft, a witness at the garage saw one of defendant’s associates remove an object from Krewson’s desk and leave the garage with defendant. Police testified that the manner in which the lock plate on the garage door had been removed indicated that the plate was removed from the inside of the garage. Krewson could reasonably infer that the thief still had a key to the garage, causing him to rekey the locks. The evidence is

therefore sufficient to form a “factual or rational basis” for the restitution award. (*People v. Hudson, supra*, 113 Cal.App.4th at p. 927.)

III. *Restitution to the Owners of the Corvette*

Defendant contends trial counsel provided ineffective assistance of counsel with respect to the restitution award to David Duarte, owner of the Corvette. Defendant, noting the trial court’s observation that his expert lacked specifics, argues that trial counsel should have elicited more specific testimony from the expert to identify particular flaws in DeSantiago’s estimates. Defendant claims trial counsel should have asked his expert exactly which of DeSantiago’s repair times were inflated, and what a reasonable repair time would have been. Defendant’s claim fails because he cannot show that he was prejudiced by counsel’s conduct.

A. *Applicable Legal Standard*

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694.)

“ ‘Tactical errors are generally not deemed reversible; and counsel’s decision-making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, [the appellate court] will affirm the judgment “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” ’ ” (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.) “ ‘Finally, prejudice must be affirmatively proved; the record must demonstrate “a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' ' ' (Id. at p. 624.)

"It is the defendant's burden on appeal [or in a petition for writ of habeas corpus] to show that he or she was denied effective assistance of counsel and is entitled to relief. [Citations.] '[T]he burden of proof that the defendant must meet in order to establish his [or her] entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.' [Citation.]" (*In re Hill* (2011) 198 Cal.App.4th 1008, 1016.)

B. *Ineffective Assistance of Counsel*

Defendant cites no case law to support his contention that trial counsel's failure to ask specific questions of an expert constituted deficient conduct. But we need not decide whether trial counsel's conduct was deficient because the record shows there is no reasonable probability that trial counsel's conduct would have resulted in a different outcome.

In particular, trial counsel could not have successfully elicited more specific testimony from the expert because the expert had no basis on which to offer such testimony. The expert admitted that he was not a Corvette specialist, and more critically, that he had never actually inspected the Corvette. He admitted that he did not know the nature of the damage to the car's exterior, or what type of substance had been applied to it. Furthermore, he admitted that without knowing the nature of the damage he could not determine what repairs were necessary. Without knowing what repairs were necessary, he could not have reliably testified as to how an alternate repair method would have required less time or expenditure. By contrast, DeSantiago was able to examine the Corvette in person, and his shop actually performed the repairs. When trial counsel asked DeSantiago exactly how he knew the car's paint had been damaged, he responded, "Because I looked at it. I have eyeballs to see with. I've been doing this all my life."

Thus, even if defendant's trial counsel had been able to elicit more specific testimony from his expert, it is unlikely that the trial court would have credited such testimony against the evidence offered by the prosecution. Because defendant does not demonstrate a reasonable probability of a different outcome, he cannot show he was prejudiced. His claim of ineffective assistance of counsel fails.

DISPOSITION

The judgment is affirmed.

MÁRQUEZ, J.

WE CONCUR:

ELIA, ACTING P.J.

BAMATTRE-MANOUKIAN, J.