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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIK BRODIN, Defendant and Appellant.	B236497 (Los Angeles County Super. Ct. No. PA068580)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Erik Brodin of theft of utility service, and following a hearing the trial judge ordered restitution in the amount of $12,890.47. Brodin appeals, arguing there was insufficient evidence to support his conviction, the court's instruction on theft of utility services was constitutionally deficient, and the restitution amount was based on speculation. We affirm.

BACKGROUND

An information filed March 18, 2011 charged Brodin and Christian Arambulo with cultivation of marijuana, in violation of Health and Safety Code section 11358, theft of utility services in violation of Penal Code[1] section 498, subdivision (b), and possession of marijuana for sale, in violation of Health and Safety Code section 11359. After trial, a jury convicted Brodin of theft of utility services and acquitted him of the two marijuana counts.[2]

Prosecution case

At trial, Wendell Wiedner testified that he lived on Merridy Street in Chatsworth, across the street from 21206 Merridy (hereinafter 21206 or the house). On July 17, 2010, there was a power outage in the neighborhood, and Wiedner saw Department of Water and Power (DWP) workers across the street checking what was wrong. They were unable to get to the meter at 21206, because a dog was barking in the back yard. Wiedner suggested they go next door, but they were unable to see the meter for 21206 from there. Wiedner had Brodin's telephone number and offered to call him. Brodin answered the call, saying that he wasn't home. Wiedner told Brodin that DWP wanted to check his meter, because "there was a lot of juice coming in on the line." Brodin said, "he wasn't doing nothing." As far as Wiedner knew, Brodin was living by himself at 21206, and had moved in seven or eight months ago. Wiedner had seen Brodin about a dozen times. Brodin's primary mode of transportation was a bike; Wiedner had seen a car in the

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] Brodin was tried with Arambulo, who was also convicted of theft of utility services. Arambulo is not a party to this appeal.

driveway that probably belonged to a friend that Wiedner had seen there. Wiedner had never been in the house or the front or back yard, except when the owner, Scott Singer, was fixing up the house before renting it out.

Dennis Ketterling, a line patrol mechanic for DWP, testified that he went to Merridy Street on July 17, 2010 to investigate a call that the lights were out in the neighborhood. He saw that a transformer had been tripped. The transformer typically ran at around 5.2 amps,[3] and was set to trip at double that load (around 10 amps).

When Ketterling reset the meter, it registered three amps. He watched it for a while, and then the meter suddenly jumped "to 13.5 . . . way over what it should be, and as a line man [he] kind of ducked," because the transformer could trip again and spew oil. Ketterling climbed down from the pole and looked to see where the excessive electricity was going. A large amount was going to two houses, one of which was 21206. Wiedner introduced himself and took Ketterling to the back yard of the house next to 21206, where the meter showed normal usage. Ketterling then jumped up on the wall of 21206 (where a dog was in the back yard), and saw that the 21206 meter was barely moving. If the meter had been hooked up properly, the excessive ("unheard of") amount of electricity for a residential address would have made the meter spin fast. A wire between the poles on either side of 21206 was distorted by the heat of the electricity flow.

Ketterling thought there might be energy diversion, because the meter reading did not match the excessive amperage he saw at the pole. He contacted the DWP energy diversion unit. Ketterling asked Wiedner (about the owner of 21206), "what's he got going, a grow house?" Wiedner then called a person Ketterling assumed was the owner of the house, "giving him a hard time." Ketterling heard Wiedner asking if he had a "marijuana garden" inside 21206, and saying "you are using all the electricity . . . from the transformer," resulting in the power outage.

Ketterling left, and came back about an hour and a half later with the energy diversion unit. The usage at 21206 had gone down from 340 amps to 8.2 amps, and the

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[3] Amperage is the amount of electricity used (the "load").

meter was spinning at the same rate as before. DWP knocked at the front door but no one answered. The car that had been in the driveway was gone.

Ketterling explained that shorts, crossed wires, or bad motors could also cause high amperage. He never smelled or observed marijuana, and never examined the electrical system inside the house.

Los Angeles Police Department Detective Eric Bixler, an expert on indoor and outdoor marijuana cultivation, was notified by DWP about 21206. Detective Bixler went to 21206 on July 21, 2010. Detective Bixler called Brodin, told him he was investigating a marijuana cultivation operation at the house, and asked him if he knew about it. Brodin said, "yes." Detective Bixler asked Brodin if he would like to talk to him at Devonshire station. Brodin told Detective Bixler he was at his parent's house in Los Angeles, and said he would be at the station in two hours, but he never showed up. Brodin never said he was cultivating marijuana, but when Detective Bixler asked if he was growing it Brodin did not deny it. Brodin's and Arambulo's names were on the DWP utility bill for 21206.

Detective Bixler saw three air conditioners on one side of 21206, and the windows were blacked out. No one came or went during the hour that he watched the house.

Detective Bixler then saw a green 4Runner back into the driveway. Mitch Caliboso and Brodin exited the car (Brodin from the passenger side). The two men went into the garage and carried out six to eight large trash bags, put the bags in the back of the car, closed the back and drove off. Detective Bixler followed the vehicle to a large dumpster about three or four blocks away. Caliboso and Brodin stopped the 4Runner, got out of the car, opened the back, threw the trash bags into the dumpster, and drove off. Detective Bixler cut open a couple of the bags, and saw black mylar commonly used in cultivation operations, back tarp paper, and rock wool (which was grow media). He drove back to 20216 and waited for Brodin and Caliboso to return, but they did not; Detective Bixler drove by several times during the next week but did not see Brodin or Caliboso.

Detective Bixler obtained a search warrant for 21206 and entered the house on July 28, 2010. He observed what he believed "to be a dismantled marijuana cultivation operation." He saw ducts that could be used for air conditioning to cool down marijuana grow lights, bolts or hooks hanging from the ceiling consistent with what he had seen in almost every other grow house, and a gas line that was consistent with a CO2 generator. Almost every grow operation used a CO2 generator, because pumping CO2 into a room could yield 25 to 30 percent more marijuana. Detective Bixler also saw several 55-gallon water containers built up with two-by-fours, one or two with water pumps consistent with a hydroponic grow. There were six air conditioners for the 1900 square foot house, "unheard of unless you are growing marijuana." Detective Bixler had been in grow houses both before and after grows had been dismantled. The house was consistent with a dismantled grow that had been completely cleaned up, with more evidence than usual (the watering containers and pumps, the tubing and ducting, and the air conditioners). The house had a lot more marijuana growing equipment than Detective Bixler had seen in other places where a grow had been dismantled.

To estimate the amount of marijuana that could be grown (in the rooms that were now mostly empty), Detective Bixler focused on the number of lights. A 1000-watt bulb was the most commonly used (up to 10 lights to a room so as not to burn the plants), and each produces 1100 grams of dried bud, which contained the highest level of THC. There was no need to know the number of pots. Indoor grow operations produced marijuana with a higher THC content. The lights are kept on for 12 hours and off for 12 hours, with air conditioning to keep the air temperature between 68 and 75 degrees. To keep the CO2 level high, most growers used a natural gas line hooked up to a CO2 generator. Planting to harvest takes 60 days.

The cost of setting up an indoor cultivation operation (installing new air conditioners, building more grow rooms, bringing in all the tables, pumps and everything else) in a San Fernando Valley home runs between $50,000 and $100,000.

Detective Bixler viewed photographs of 21206 and pointed out holes (now patched) in the walls and ducting on the floor, which were typical of the venting used in

most grow houses to move cool air from one room to the other. A black tub containing water mixed with fertilizer was typical of active cultivation, in which water was pumped up to the tables holding the plants. Each room had a water trough. The windows were blacked out to control the light coming in, and tubes were consistent with air conditioning ducts. One bedroom had a natural gas line coming into it for a CO2 generator. The detective testified that these modifications are exclusive to marijuana cultivation operations. Four bedrooms appeared to have been used for cultivating marijuana, and another room had a bed and some clothes. In one bedroom was a roll of black sheeting similar to what Detective Bixler saw Brodin and Caliboso throw into the dumpster.

"After all the evidence I saw there was nothing else this house could have been except for cultivation of marijuana." Detective Bixler believed that when Brodin and Caliboso put the plastic bags with grow media into the dumpster, they were dismantling the grow operation. Detective Bixler did not, however, find any marijuana. He had seen well over 100 marijuana grows. In only five had there been no marijuana present.

To estimate how much was grown, Detective Bixler began with the number of lights in the operation, which he calculated at 30 by counting the hooks in the ceilings in the four rooms. Each 1000-watt bulb would produce 1100 grams of dry bud, and at the end of a 60-day cultivation period, the four rooms would yield a total of 72.5 pounds, which would sell for approximately $253,750 on the street.

An indoor grow could be left unattended for the most part, requiring attention only once or twice a week to maintain the equipment and trim the marijuana leaves. Detective Bixler had spoken with Wiedner, who told him he had seen Brodin come to 21206 (as well as someone else Wiedner did not recognize).

Detective Bixler identified a DMV application for transfer of title, which had been recovered from a brown car inside the garage of 21206. The document showed a transfer from Caliboso to Brodin. Brodin's address was listed as his parents' home, 2162 LeMoyne in Los Angeles, the same address that appeared in his DMV records.

A DWP assistant analyst testified that on June 2, 2010, an internet credit card payment was made on the 21206 power bill, using Brodin's name. That initial payment

did not go through, because the account number was invalid. About seven minutes later, a second payment was made, with the same credit card; it was accepted. The name on the second payment was Arambulo's. The amount of payment was $795.56. Arambulo's name was on the account at the time of the payment; Brodin's name was on the account before March 15, 2010.

David Sanchez, a DWP investigator for 23 years, testified that of his 800 utility theft investigations, 40 percent involved indoor marijuana cultivation. In general, grow operations used overhead lights (1000 watt bulbs) to mimic the sun, and air conditioning for cooling (to compensate for the heat generated by the bulbs). Submersible pumps, fans, air scrubbers, and blowers helped control the indoor environment. All these things were powered by electricity.

DWP looked for high rates of usage, sometimes shown by burned-up power lines or blown transformers. If one residence is drawing an unusual amount of electricity, DWP investigates for safety reasons.

On August 12, 2010, Sanchez went to 21206, because 340 amps were going into the house, which could result in fire, explosion, burns, and lines falling from overburden. In Sanchez's experience, the only other thing that could account for the amount of amperage was indoor marijuana cultivation.

When Sanchez entered 21206, he found six air conditioning units for a 1900 square foot house that already had an adequate central air unit. The air conditioners had been used, but had since been disconnected, and were sitting outside. Air conditioning ducts had been pulled out, some still connected to the wall. He saw oscillating fans and hooks in the ceiling, which were like hooks he had seen in other grow houses for suspending 1000 watt lights. The windows were boarded up, with blinds still hanging between the glass and the plywood. The interior was divided into sub-rooms by drywall. Everything he saw was consistent with indoor marijuana cultivation. He could still smell marijuana in the drywall in the air ducts, although the house had been well-cleaned, and "there was maybe a leaf here or leaf there."

The seal on the electric meter had been cut, and the meter ring was pulled apart from the meter. This typically indicated that someone had gone behind the electric meter to manipulate the service. Agent Sanchez also saw that a punch out hole had been taken out of the back of the panel, to allow a wire to be inserted, and there were "bite marks" on the side line clips, showing that two sets of wires had been shoved onto a too-small side line clip. "Anything connected at the line side would go around the meter. This had two sets of wires which we call double tap on the line side [c]lip so instead of just one set of wires we have two sets of wires. Those extra sets of wires going out and through the bottom of that hole will be the bypass." This was the side before the meter, so that any power drawn would not be read by the meter. Even at 340 amps, the bypassed meter would barely move. A meter that properly read 340 amps would look like a Christmas tree. Sanchez did not find an actual bypass.

The lines leading up to 21206 were set up for only 100 amps, and a sagging line would show overheating from excess amps.

An exhibit showing the history of the electrical billing for 21206 covered December 31, 2009 to July 12, 2010. Service was put in Brodin's name on December 31, 2009. During the period that Brodin's name was on the bill, the consumption recorded by the meter was consistent with overuse of the central air conditioner. The central air conditioner was on the meter, so its use would register on the meter.

Sanchez estimated the power consumption in each one of the four rooms that he believed were used to cultivate marijuana. The hook patterns were consistent with the use of 30 1000-watt bulbs. To the bulb usage, Sanchez added the extra air conditioners in the house assuming they were connected, using the wattage listed on each unit. He also added the air scrubbers (filters), basing wattage estimates on the earlier marijuana grows he had investigated. He assumed that some equipment would be on 24 hours a day (the filters), some 12 hours a day (air conditioners and lights), and some five and a half hours a day (the air conditioner in a smaller room). Sanchez estimated the cultivation would have used 545.65 kilowatt hours a day. When everything was on at the same time, the house would draw 380 amps.

Sanchez believed there was a bypass at 21206, beginning about two weeks after Brodin signed for service, when there was a spike in usage during the next sixty-day billing period. The amperage the DWP found on July 17, 2010 (340 amps) was close to the estimate Sanchez based on his observations.

The owner of 21206, Scott Singer, testified that he renovated the house before renting it out, leaving it in perfect condition. After July 2010, Singer had to call a crew to clean out the house.

Harut Pashayan testified that he was a friend of Brodin from high school. After Pashayan came back from college, in December 2009 he and Brodin had an agreement to move in and live together. A lease agreement for 21206 Merridy showed Pashayan and Brodin as the occupants and Pashayan's signature. During the period from January to July 2010, Brodin lived with his parents on Lemoyne.

Before moving in, Pashayan changed his mind because of monetary and family issues, and told Brodin he couldn't afford it. In March 2010 and even before then, Pashayan asked Brodin to take him off the lease. On March 22, 2010, Brodin answered: "I think we got you off the lease." On September 8, 2011, Pashayan sent an email to Brodin: "'Here you go, bro. So you know what I'm gonna give them to save my ass. It just says, hey, I got your text. I think I got you off the lease." Pashayan thought he had not been taken off the lease, and wanted to use Brodin's message to save himself from being in the situation of having to testify.

Defense case

Brodin testified that he was a 26-year-old college student who lived on Lemoyne Street with his parents. He knew Mitch Caliboso from high school, but did not know Caliboso's cousin Arambulo before the criminal proceedings. At the end of 2009, Caliboso brought him the 21206 lease agreement. Brodin signed it because Caliboso, who told him he was going to live in the house and needed a cosignor to qualify for the lease agreement, paid him $200. The lease agreement was blank except for the information that Brodin filled out and Pashayan's information, although Brodin initialed

the bottom of the pages. Brodin's bank account information was written on the lease in someone else's handwriting, and he did not remember how it got there.

Brodin never moved in to 21206, never left belongings there, and never even entered the house. He went over to the house in February 2010 with Caliboso to get acquainted with Caliboso's pit bull, and was introduced to Wiedner, whom he saw around the house after that. He went over to 21206 no more than 10 times to feed and walk the dog when Caliboso was out of town, and sometimes brought the mail into the garage and turned on the lawn sprinklers. Caliboso had agreed to pay him $30 every time he went to the house, but didn't pay in full. He never intended to move into the house and had no intention to cultivate marijuana there. He rode his bike to the bus, took the bus, and then rode his bike the rest of the way to 21206. Brodin never smelled anything unusual, and never inspected the electrical system. He was not familiar with electrical systems or with construction. Brodin didn't see the air conditioning units in the back yard, because the yard was enclosed front and back and the dog was always in the front.

Brodin didn't have a car. As part of the payment for taking care of the dog and the yard, Caliboso gave him a 1989 Nissan which never ran well and which Brodin never registered with the DMV. Brodin met Singer once, at a nearby restaurant where Caliboso gave Singer some cash.

After Wiedner called him, Brodin called Caliboso and asked if it was true that marijuana was being grown in the house. Later, when Detective Bixler called him and asked if Brodin knew why he was calling, Brodin answered yes because five minutes earlier, "Joe across the street" called and said a detective would call him. He was shocked to hear that marijuana growing was involved, and wanted to go talk to Detective Bixler to clear his name, but he called "multiple attorneys and they all said don't go."

One day in July 2010, he met Caliboso at the house to organize the garage and throw out some trash. Caliboso arrived in a green 4Runner. Brodin denied arriving in the car with Caliboso, and testified that he was already in the garage. He and Caliboso filled the truck with trash bags and drove to a nearby dumpster, where they tossed the bags. He didn't know what was inside. That was the last time he was at 21206.

Brodin's name and financial information were on the electric bill, but he only found out about it in March 2010, when he picked up the mail at 21206 and saw a letter from DWP in his name. He called Caliboso and asked him why. He never paid the electrical bill, and didn't know whose name the bill was in after his name was removed. He never attempted to pay the bill online or by telephone. He called DWP later and told them the bill should not be in his name; they checked and told him it was now in someone else's name. The card number that was used to make the payment in June 2010 was not his.

Arambulo, Brodin's codefendant, testified that he never lived at 21206, but he helped Brodin move a bed and a desk into the garage. On March 15, 2010, Brodin called Arambulo and asked him to put the utility bill in Arambulo's name, because Brodin thought his service would be cut off. Arambulo called DWP and gave them his information, but he never saw the bills or thought he would have to pay DWP, and believed the bill would be in his name for only a month or two. He had no reason to believe that marijuana was being grown at 21206, and no reason to think that Brodin wasn't living there. Arambulo never paid DWP anything, did not make the June 2, 2010 online payment, and did not have a credit card with those numbers.

Character witnesses testified that Brodin was law-abiding and honest, and was at his parents' house nearly every day. Brodin's brother testified that he had driven over to 21206 with Brodin, where Brodin, who did not have a key, fed the dog without going inside.

DISCUSSION

I. Substantial evidence supported the guilty verdict.

Brodin argues that the evidence was insufficient to show that he had the specific intent to commit theft of utility services. We disagree.

We apply the substantial evidence standard, examining the evidence in the light most favorable to the judgment, and determining whether the evidence is reasonable, credible, and of solid value so as to allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) The

question is not whether *we* believe that the evidence establishes guilt beyond a reasonable doubt; instead, we review the evidence favorably to the prosecution to determine whether any rational jury could have reached the verdict that it did. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) "'If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed.'" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) We examine the bare legal sufficiency of the evidence, not its weight. (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

There was sufficient evidence for a rational jury to conclude that Brodin violated section 498, subdivision (b). The statute provides: "Any person who, with intent to obtain for himself or herself utility services without paying the full lawful charge therefor, or with intent to enable another person to do so, or with intent to deprive any utility of any part of the full lawful charge for utility services it provides, commits, authorizes, solicits, aids, or abets any of the following shall be guilty of a misdemeanor: [¶] (1) Diverts or causes to be diverted utility services, by any means. [¶] (2) Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function by tampering or by any other means. [¶] (3) Tampers with any property owned by or used by the utility to provide utility services. [¶] (4) Makes or causes to be made any connection with or reconnection with property owned or used by the utility to provide utility services without the authorization or consent of the utility. [¶] (5) Uses or receives the direct benefit of all or a portion of utility services with knowledge or reason to believe that the diversion, tampering, or unauthorized connection existed at the time of that use, or that the use or receipt was otherwise without the authorization or consent of the utility."

The statute also provides: "(c) In any prosecution under this section, the presence of any of the following objects, circumstances, or conditions on premises controlled by the customer or by the person using or receiving the direct benefit of all or a portion of utility services obtained in violation of this section shall permit an inference that the customer or person intended to and did violate this section: [¶] (1) Any instrument,

apparatus, or device primarily designed to be used to obtain utility services without paying the full lawful charge therefor. [¶] (2) Any meter that has been altered, tampered with, or bypassed so as to cause no measurement or inaccurate measurement of utility services." Subdivision (d) makes the offense chargeable as a felony if the value of all utility services obtained in violation of this section totals more than $950.

The prosecution's theory was that Brodin had aided and abetted in the theft of utility services, and the jury was instructed on aiding and abetting liability. A person who aids and abets the commission of a crime or advises and encourages its commission is a principal in the crime and shares the guilt of the actual perpetrator. (§ 31.) A person aids and abets when he or she, "'with knowledge of the unlawful purpose of the perpetrator,'" and with "'the intent or purpose of committing, encouraging, or facilitating,'" commission of the crime, "'by act or advice aids, promotes, encourages or instigates, the commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

The evidence showed that Brodin's name and financial information appeared on the rental lease for 21206. Pashayan testified that he was initially on the lease with Brodin, and they had planned to move in and live together; later, Brodin told Pashayan he got him off the lease. The electrical service was in Brodin's name from the end of December 2009 until March 15, 2010. Arambulo testified that Brodin called him on March 15 and asked him to put the utility bill in Arambulo's name. An initial attempt to make an internet payment on the utility bill on June 2, 2010, was in Brodin's name. Brodin's name and signature were on an application for a transfer of title inside a car inside the garage of 21206. Arambulo also testified that he helped Brodin move a couch and desk into the garage. Brodin visited the house regularly; Wiedner, the neighbor, thought he lived there by himself. When Wiedner met Ketterling, the DWP mechanic investigating the power outage, Wiedner called Brodin, asking him if he had a "marijuana garden" inside the house and telling him of the excessive power usage. An hour and a half after Wiedner called Brodin, the electricity usage at 21206 had plummeted back to normal levels. When Detective Bixler called Brodin and told him he was investigating

21206, Brodin answered, "yes" when asked if he knew about a marijuana cultivation at the house.

Brodin testified that he never intended to move into the house and never entered it, going over only to feed and walk the dog, occasionally collect the mail, and turn on the sprinklers, all for Caliboso, who had paid him to sign the lease. Brodin and Caliboso went into the garage to take out trash bags, which they loaded into a truck and took to a dumpster.

All this evidence shows that Brodin was closely connected to 21206 and to its utility service, beginning in December 2009 and through the time that the house's excessive power usage caused the power outage on Merridy Street. Even if the jury accepted Brodin's characterization of his visits to the house, there was evidence from which the jury could conclude the following: Brodin had leased the house and set up the utility account; one payment attempt was made in Brodin's name; Brodin kept a car at the house, moved furniture into the garage, and removed and disposed of trash from the garage; Brodin fed and walked the dog whose barking kept the DWP investigator out of the house's back yard; the power usage at 21206 plummeted after Wiedner called Brodin; when called by Detective Bixler and asked if he knew about a marijuana cultivation operation at 21206, Brodin said, yes. Viewing this evidence in the light most favorable to the prosecution, we conclude that a reasonable jury could conclude that Brodin acted with the intent to facilitate acquisition of utility services for 21206 Merridy without paying for those services.

Brodin points out that there was no actual bypass found at 21206. Ketterling, however, testified that at the time of the power outage on July 17, 2010, much more amperage was going into 21206 than appeared on the meter. Detective Bixler testified that 11 days later (and a week after he saw Brodin and Caliboso dispose of the trash bags containing mylar and grow medium), the interior of 21206 was consistent with a dismantled grow that had been cleaned up completely. Sanchez testified that three weeks after the power outage, the condition of the meter was consistent with the dismantling of a bypass that had formerly been in place—with a cut seal, a pulled-off meter ring, a

punch-out hole in the back of the panel, and marks on the side line clips consistent with the connection of wires that would not have been read by the meter. This was ample evidence from which the jury could conclude that the meter at 21206 had been bypassed prior to the cleanup of the interior of the house.

II. The jury was properly instructed on theft of utility services.

Brodin argues that the jury instruction given by the court describing theft of utility services was constitutionally deficient because it did not instruct the jury that the prosecution needed to prove his intent beyond a reasonable doubt.

At the trial court's request, the prosecutor formulated an instruction which mirrored the language of section 498, with deletions and additions to fit the facts of the case.[4] Brodin's attorney discussed the instruction with the prosecution and the court,

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[4] The instruction provided: "Any person who, with intent to obtain for himself utility services without paying the full lawful charge therefore, or with the intent to enable another person to do so or with intent to deprive any utility of any part of the full lawful charge for utility services it provides, commits, authorizes, solicits, aids, or abets any of the following:

"1. Diverts or causes to be diverted utility services, by any means; or

"2. Prevents any utility meter, or other device used in determining the charge for utility from accurately performing its measuring function by tampering or by any other means; or

"3. Tampers with any property owned by or used by the utility to provide utility services; or

"4. Uses or receives the direct benefit of all or a portion of utility services with knowledge or reason to believe that the diversion, tampering or unauthorized connection existed at the time of that use, or that the use or receipt was otherwise without the authorization or consent of the utility; and

"5. The value of [the] utility service obtained unlawfully was greater than $950[.]

"To prove the defendant guilty of this crime, the People must prove that the defendant committed, authorized, solicited, aided or abetted any of the following:

"1. The diversion of utility services, by any means; or

"2. Prevention of any utility meter or other device used in determining the charge for utility from accurately performing its measuring function by tampering or by any other means; or

stipulated to its inclusion of the $950 amount necessary for a felony conviction, and made no objection when the court gave the instruction to the jury. "At the time the court discussed jury instructions, defense counsel agreed the evidence supported [the giving of the instruction] and did not object to the . . . proposed wording." (*People v. Bolin* (1998) 18 Cal.4th 297, 326.)

In any event, no error occurred. The jury instructions echoed the language of the statute. "This was proper. 'The language of a statute defining a crime . . . is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.) Brodin's attorney did not request any amplification, and Brodin does not identify

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"3. Tampering with any property owned by or used by the utility to provide utility services; or

"4. Use of or receipt of the direct benefit of all or a portion of utility services with knowledge or reason to believe that the diversion, tampering, or unauthorized connection existed at the time of that use or that the use or receipt was otherwise without the authorization or consent of the utility; and,

"5. When the defendant took one of the above actions he did so with the intent to obtain for himself utility services without paying the full lawful charge therefore, or with the intent to enable another person to do so, or with the intent to deprive any utility of any part of the full lawful charge for utility services it provides; and,

"6. The value of the utility service obtained unlawfully was greater than $950[.]

"The presence of any of the following objects, circumstances or conditions on premises controlled by the customer or by the person using or receiving the direct benefit of all or a portion of utility services obtained in violation of this section shall permit an inference that the customer or person intended to and did violate this section:

"1. Any instrument, apparatus or device primarily designed to be used to obtain utility services without paying the full lawful charge therefore.

"2. Any meter that has been altered, tampered with, or bypassed so as to cause no measurement or inaccurate measurement of utility services."

The court also defined the terms "'[c]ustomer,'" "'[d]ivert,'" and "'[t]amper,'" as provided in section 498, subdivision (a).

language in the instruction that the jury would have difficulty understanding without guidance. No further explication was necessary. (*People v. Poggi* (1988) 45 Cal.3d 306, 327.) Although there is no published jury instruction for theft of utility services, published instructions are "'"not themselves the law, and are not authority to establish legal propositions or precedent . . . . At most, when they are accurate, . . . they restate the law." [Citation.]'" (*People v. Bergen* (2008) 166 Cal.App.4th 161, 173, fn. 7.) If a published instruction conflicts with the statute, the statute controls. (*Ibid.*)

Brodin argues that the instruction directed a verdict of guilty because, like section 498, subdivision (c), it stated that the presence of a device designed to obtain services without paying, or a meter that has been tampered with, bypassed, or altered to cause inaccurate measurement, "shall permit" an inference that the person intended to violate the statute. This language, far from directing a verdict, merely tells the jury only that it is *permitted*, not compelled, to find intent if either a device or an altered meter is present. Brodin further complains that the instruction does not inform the jury that they must find the presence of a device or an altered meter beyond a reasonable doubt. The jury, however, was instructed that the prosecution had to prove Brodin guilty beyond a reasonable doubt, and "[w]henever I tell you the People must prove something I mean they must prove it beyond a reasonable doubt." Reading the instructions as a whole, and presuming as we must that the jury was capable of understanding and correlating the instructions, we see no error. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

III. The trial court properly made the restitution order based on DWP estimates.

Brodin argues that the trial court's restitution order of $12,890.47 to DWP was not supported by substantial evidence and was entirely speculative. We disagree.

The trial court held a restitution hearing on October 27, 2011. The parties represented that they were unable to agree on a stipulated restitution amount. The prosecution requested that the court base a restitution amount on Sanchez's trial testimony estimating that the amount of electricity diverted was $12,890.47, and also sought investigative costs of $1,890. Brodin's attorney argued that since the jury found that Brodin was not guilty of cultivating marijuana, there was no rational basis for using

Sanchez's estimate, which was based on the electricity necessary to cultivate marijuana, extrapolating from the remains of a cultivation operation at 21206. The prosecutor rejoined that Sanchez's figures were consistent with maximum use of the items found in the house, and the amount of amperage he estimated had been used was consistent with what the DWP found going to the house, when it responded to the power outage.

The trial court stated that Sanchez testified at length and gave a basis for his testimony, evidentiary requirements for restitution "are minimal," and nothing contradicted Sanchez's testimony. The court therefore granted restitution in the amount of $12,890.47 jointly and severally against Brodin and Arambulo.[5]

"[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.) We review a restitution order for an abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663–664.) If there is a factual and rational basis for the amount of restitution ordered, we will not find that the trial court abused its discretion. (*Baker*, at p. 467.) To the extent that Brodin challenges the sufficiency of the evidence to support the amount of restitution ordered, we apply the substantial evidence standard, and will affirm the award if there is any substantial evidence to support the trial court's findings, without reweighing the evidence. (*Id.* at pp. 468–469.)

Brodin first argues that the restitution award was "nothing more than speculation," because as Brodin's attorney argued at the hearing, the jurors found Brodin not guilty on the marijuana charges. This ignores, however, that at trial the prosecution was required to prove beyond a reasonable doubt that Brodin was guilty of committing, or aiding and abetting the commission of marijuana cultivation and possession. The not guilty verdict on the marijuana charges does not prohibit the trial court from finding, by a

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[5] The court properly excluded the costs of DWP's investigation. "[P]ublic agencies are not directly 'victimized' for purposes of restitution under . . . section 1202.4 merely because they spend money to investigate crimes or apprehend criminals." (*People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077; see *People v. Martinez* (2005) 36 Cal.4th 384, 393, fn. 1.)

preponderance of the evidence, that the amount of utility services stolen by Brodin was consistent with the amount estimated to be necessary to grow marijuana at 21206. Further, the estimate was consistent with the amount of amperage going to 21206 which Ketterling measured when DWP arrived on the scene of the power blackout. The restitution award was therefore supported not only by Sanchez's projection of the amount used by a cultivation operation, but by the amount actually detected at the scene. This constitutes substantial evidence supporting the restitution award, and because the award has a factual and rational basis, the trial court did not abuse its discretion in ordering $12,890.47 in restitution.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.