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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY SAMUEL BRIONES,

Defendant and Appellant.

B285379

Los Angeles County  
Super. Ct. No. LA082672

APPEAL from orders of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed in part, reversed in part, and remanded with directions.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Jeffrey Samuel Briones appeals from the trial court's award of restitution to two victims of his crimes. Briones did construction, painting, electrical, and other work on the victims' homes even though he did not have a contractor's license. As to one of the two restitution awards, we find forfeiture and, in any event, no abuse of discretion. As to the second award, we reverse and remand for the court to reconsider the proper amount of restitution. The court and the parties believed they were bound by a previously governing appellate decision, but in fact that case had been reversed. We also strike the \$10 crime prevention fine, as the parties agree it was unauthorized.

#### **FACTS AND PROCEDURAL BACKGROUND**

1. ***Briones falsely tells the victims he is a licensed contractor and the victims pay him to work on their homes***<sup>1</sup>

In July 2015, Stephanie Tavelman and Karen Jimich<sup>2</sup> met Briones. Kathleen Andrews, a realtor, recommended Briones to both of them.<sup>3</sup> Tavelman hired Briones to paint, change some lighting, and put hardwood floors in her home. Briones also

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<sup>1</sup> Because this case settled before trial, we take the facts from the testimony at the preliminary hearing and at the restitution hearings.

<sup>2</sup> This victim's name appears in the record as "Karen Jimich," "Caren Jinich," and "Karen Jinich." We use the first spelling that appears and mean no disrespect if we are incorrect.

<sup>3</sup> Andrews also was a victim of Briones's crimes in this case. Briones stipulated to the amount of restitution to Andrews, and that part of the restitution award is not at issue in this appeal.

installed a water heater in Tavelman's home. Tavelman signed a contract that Briones presented. In the upper left-hand corner of the document Briones's name appeared with an address in Agoura Hills and a license No. C10858885. Tavelman asked Briones if he was a licensed contractor. Briones said, "yes," and pointed to the license number on the contract. It was "extremely" important to Tavelman that Briones be a licensed contractor; she "was very clear that [she] wanted a licensed contractor."

Tavelman and her husband paid Briones a total of \$19,300.<sup>4</sup> Briones never completed the work on the Tavelmans' home. Briones had an unlicensed subcontractor—a man named Greg—install the floors. There were a number of problems with Greg's work. There also were deficiencies in Briones's electrical work: the Tavelmans had to hire a licensed electrician to reconnect floor outlets, to replace wiring in a chandelier Briones installed that was not up to code, and to secure the chandelier properly. In addition, Briones's installation of the water heater was defective: the venting ducting from the heater dislodged from the exhaust duct and the Tavelmans had to pay a deductible before having the problem repaired under a home warranty.

Karen Jimich hired Briones in about August 2015 to work on a home she was buying in Chatsworth. Briones was present when Jimich was talking to a man about doing some painting and other tasks; Briones told Jimich she should hire him instead because he was a licensed contractor. Briones gave Jimich a

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<sup>4</sup> Twelve thousand dollars of this total was paid by Stephanie Tavelman's father, Dr. William Fein, directly to Briones. Fein essentially bought the hardwood floors as a gift for his daughter and her husband.

contract or invoice with his name on it, a business address, and a license No. C10858885. Jimich never would have hired Briones had she known he was not a licensed contractor.

Initially, Jimich wanted Briones to paint and perhaps “fix[ ] some of the bathrooms”; Briones suggested Jimich also “take a wall down and do a lot of different things.” Originally, the agreed-upon price was \$9,000. Eventually Briones’s fee reached \$15,000. Half of the work Briones was supposed to do “stayed undone.” “There were a lot of things that were not even finished.” Briones claimed “that wasn’t part of the original plan,” and he told Jimich if she did not pay him more money he would “not finish the work and would just leave it.” At times, Briones refused to leave Jimich’s home unless she gave him more money.

Contractor’s license No. C10858885 in fact belonged to a man named Kenny Marshall.

**2. *Briones is charged, pleads no contest, and agrees to pay restitution to all of the victims; the court determines the restitution amounts***

**a. *The charges and plea***

The People charged Briones with six felony counts, one count of first degree residential burglary in violation of Penal Code section 459, and one count of “using, with intent to defraud, an incorrect contractor’s license number,” in violation of Business and Professions Code section 7027.3, as to each of the three victims. On May 1, 2017, Briones entered into a plea agreement with the People. Briones pled no contest to one of the Business and Professions Code counts (alleged as to victim Tavelman). The deputy district attorney told the court, “There’s gonna be

*Harvey* waivers<sup>5</sup> regarding the balance of counts.” In taking waivers of Briones’s rights, the prosecutor said, “There’s gonna be a restitution hearing that will be set regarding that count, the victim being Stephanie Tavelman. However, there are additional counts you are charged with, and the People are inclined to dismiss those charges upon your plea, provided that you agree to pay any reasonable restitution. Do you agree to pay reasonable restitution on the dismissed counts?” Briones’s attorney answered, “Yes.” She added that she had told Briones if he paid “full restitution,” he might ask the court for a reduction of his felony conviction to a misdemeanor. Briones confirmed that he understood the parties’ agreement.

Briones then entered a plea of no contest and the court accepted the plea. In accordance with the parties’ agreement, the court suspended imposition of sentence, placed Briones on formal felony probation for five years, gave him credit for time served in the county jail (30 actual days, doubled), and ordered him to perform 30 days of CalTrans work and to pay restitution to the victims. Briones accepted those terms. The prosecutor dismissed the remaining five counts.

b. *The court orders Briones to pay restitution to the Tavelmans*

The court set a restitution hearing for June 7, 2017. On May 31, 2017, Stephanie Tavelman’s husband Frank filed a pleading entitled, “Victim Request for Restitution; Points & Authorities.” Tavelman asked for restitution of \$21,029, consisting of the \$19,300 the Tavelmans had paid Briones; \$65

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<sup>5</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

for the deductible on the water heater;<sup>6</sup> \$900 for the repairs by the licensed electrical contractor; and \$764 for Frank Tavelman's lost vacation time to attend court hearings on three different dates.

On June 7, 2017, the court continued the restitution hearings for the Tavelmans and Jimich to July 19, 2017. On that date, Frank Tavelman was present and called to testify, but Briones's attorney said Briones had "some health issues" and "he feels like he's going to have a seizure now." The court continued the hearing to August 23, 2017. On August 23, Frank Tavelman was sworn and testified. Tavelman first confirmed that everything in his May 31 written request for restitution was true. Tavelman answered questions on direct, cross,<sup>7</sup> and redirect examination.

At the conclusion of Tavelman's testimony, the court discussed the restitution issue with the parties. The unlicensed subcontractor, Greg, had paid the Tavelmans \$5,300 "as an attempt to fix the cost to repair/replace the sub-standard flooring," according to Frank Tavelman. The parties disagreed about whether Briones should receive a credit or offset for Greg's

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<sup>6</sup> Tavelman noted the \$65 was "not the correct measure of loss"—that would be "the full cost of repair"—but the Tavelmans were "unable to determine the full amount of the service call . . . ."

<sup>7</sup> A defendant who has pleaded guilty or no contest has no right to confront or cross-examine the victims or other witnesses at the restitution hearing, which is essentially a sentencing proceeding. (*People v. Cain* (2000) 82 Cal.App.4th 81, 85-87.) Here, neither the prosecutor nor the victims objected to cross-examination.

payment. The court stated, “The princip[les] of victim restitution are well known, and according to law they’re to be broadly construed. Nevertheless, as I understand it, *the only objection to the restitution that’s been requested* by Mr. Tavelman is to the \$5,900 payment [sic]<sup>8</sup> that the defendant wants as an offset. . . . Is that correct, [defense counsel]?” (Italics added.) Briones’s lawyer answered, “I believe that Mr. Tavelman indicates that he’s not entitled to an offset. However, my client’s position is that he is entitled to an offset because he’s the one that instructed the money to be given back.” The court said, “No, I understand that. I didn’t make myself clear. *It appears the only matter in dispute from the figures requested by Mr. Tavelman is the \$5,900. Is that right or wrong?*” (Italics added.) Defense counsel answered, “*That’s correct.*” (Italics added.)

The court stated it would “take the matter under submission as to the \$5,900” and “issue a ruling shortly.” The next day, the court issued a written order awarding the Tavelmans the full amount they had requested. The court wrote, “Upon inquiry from the Court, the defendant identified only a single area of disagreement: a \$5,300 payment made to the victim by a sub-contractor in a failed attempt to bring the flooring up to contract specifications.” The court continued, “There is no

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<sup>8</sup> Frank Tavelman’s written restitution request stated Greg had paid the Tavelmans \$5,300. On cross-examination at the August 23 hearing, Briones’s lawyer asked Tavelman, “And you received \$5,900 back for the wood floors that you paid out to the floor person; correct?” Tavelman answered, “That was from Greg, the floor person. Correct.” (Contrary to the suggestion in Briones’s counsel’s question, the Tavelmans did not pay Greg directly. They wrote checks to Briones.)

evidence in the record that this payment came from the defendant. The defense was unable to cite any authority to support its argument that the victim’s damages should be off-set by payment from a third party.” The court noted, “Off-sets are disfavored in calculating restitution in criminal cases.” After discussing cases involving insurance and similar issues, the court ordered Briones to pay the Tavelmans restitution of \$21,029.

c. *The court orders Briones to pay restitution to Jimich*

On September 20, 2017, the court conducted a hearing to determine the amount of restitution to be paid to Karen Jimich. Jimich made a number of payments to Briones—always in cash—for a total of approximately \$13,955. Briones also testified at the hearing. Briones said he told Andrews, the realtor, what work needed to be done on Jimich’s home. Briones claimed he had not worked as a contractor on the job; instead, he “just help[ed]” Jimich through Andrews to “coordinate” what various workers were doing and “locked up the house” at the end of the day.<sup>9</sup> Briones testified Jimich paid “the floor [guy], the painter and . . . the rug guy” directly. Briones said he had received only “\$700 for everything.”

At the conclusion of the testimony, the prosecutor cited *People v. Walker* (2016) 6 Cal.App.5th Supp. 38 (*Walker I*), an Appellate Division case. The prosecutor argued, “In cases involving an unlicensed contractor, the People’s position is that the Legislature determined that full recoupment of payment is

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<sup>9</sup> To the extent Briones purported to assert he did not commit the charged crimes against Jimich, his plea and *Harvey* waiver bar that claim. (*People v. Weatherton* (2015) 238 Cal.App.4th 676.)



required even if a person who employed such a contractor is benefitted or enriched thereby . . . .” The prosecutor asked the court to award Jimich the full amount she had paid Briones, \$13,955.

Briones’s counsel (apparently referring to *Walker I*) responded, “True, the law does state that the victim in this case gets reimbursed whole with whatever amount they paid.” But, she argued, Jimich “paid the contractors directly”; “it wasn’t all paid to Mr. Briones.” The court stated, “I would be the first to admit that the *Walker* decision is a pretty harsh decision, but wouldn’t that allow unlicensed contractors to essentially insulate themselves from having to make restitution to the victim by simply having the victim hand the money to the subcontractors as opposed to giving the money to the general contractor?” Defense counsel argued that “the work was done . . . .” The court continued, “I agree with you. And I think that the rule is extremely harsh, bordering on unfair, but, unfortunately, that’s the rule.” The prosecutor said, “As draconian as the law is, there is no fine line. . . . The law is pretty clear, your Honor. All the amount that she requested for, whether she paid for somebody else or whether she paid him, has to be refunded to her.” Defense counsel disagreed but said she would “submit.”

The court then ruled: “[H]owever it was divided up Mr. Briones arranged for these individuals to work essentially in the capacity as subcontractors. Whether the money was handed to the subcontractors or handed to Mr. Briones in my estimation is not a matter of any particular moment here. . . . [W]hat is relevant is that Mr. Briones was the one who was contacted by the realtors. He was the one who was put in contact with Ms. Ji[m]ich. He was the one who arranged for the individuals to

come out and do the work. And he was the one or he actually received a cut for that. And under the policies that are set forth in the *Walker* case I think that he is responsible for making sure that the victim is made whole in full. Again, whether this is fair or whether this is a draconian rule I think is open to some debate, but the problem is that it's supported by the statutes and supported by the case law and it's a rule I'm compelled to follow. Therefore, I'm going to order restitution to Ms. Ji[m]ich in the amount of \$13,955."

## DISCUSSION

### 1. *Courts liberally construe crime victims' constitutional right to restitution*

Under Article I, section 28, subdivision (b), of the California Constitution, victims of crimes have a constitutional right to restitution. Our Constitution reflects "the strong public policy seeking to provide crime victims with direct restitution for all the 'losses they suffer.'" (*People v. Fulton* (2003) 109 Cal.App.4th 876, 885.) Accordingly, "in 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." (Pen. Code, § 1202.4, subd. (f).) Penal Code section 1202.4, subdivision (f)(3) lists a number of losses and expenditures that qualify as recoverable economic losses. The list is not inclusive; the statute refers to losses "including, but not limited to" the enumerated items. For damaged property, the statute provides for "[f]ull or partial payment for the [property's] value," calculated as "the replacement cost of like property, or the

actual cost of repairing the property when repair is possible.”

(Pen. Code, § 1202.4, subd. (f)(3)(A).)

“ ‘ “A victim’s restitution right is to be broadly and liberally construed.” ’ ” (*People v. Baker* (2005) 126 Cal.App.4th 463, 467.)

A trial court may “ ‘use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole . . . .’ ” (*People v. Goulart* (1990) 224 Cal.App.3d 71, 83.)

“The standard of proof at a restitution hearing is preponderance of the evidence . . . .” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1319; *Baker*, at p. 469.) The defendant bears the burden of proving the victim’s restitution estimate is inaccurate. (*Goulart*, at pp. 83-84; see also *People v. Foster* (1993) 14 Cal.App.4th 939, 946.) “ ‘The standard of review of a restitution order is abuse of discretion.’ ” (*Baker*, at p. 467.)

## **2. The Walker case**

As noted, the prosecutor and the court relied on the Appellate Division’s published decision in *Walker I, supra*, 6 Cal.App.5th Supp. 38, in setting the amount of restitution Briones was to pay his victims. In that case, the defendant Walker was charged with seven misdemeanor counts, including a violation of Business and Professions Code section 7027.3.

(*Walker I*, at p. 40.) He pled no contest to a violation of Business and Professions Code section 7028, subdivision (a), contracting without a state contractor’s license. (*Walker I*, at p. 40.)

Walker’s victim sought restitution of the entire sum she had paid Walker to work on her home. The Appellate Division relied on Business and Professions Code section 7031, subdivision (a), in holding Walker’s victim was entitled to “full recoupment of payment.” (*Walker I*, at pp. 43-44.) The court acknowledged that statute authorized a *civil* action by a person who has hired an

unlicensed contractor “ ‘to recover all compensation paid to the unlicensed contractor for performance of any act or contract.’ ” (*Id.* at p. 43.) But, the court concluded, the same public policy applied in a criminal case brought against an unlicensed contractor. (*Id.* at pp. 43-45.)

When the Tavelmans submitted their written request for restitution on May 31, 2017, *Walker I* was the law. However, on August 22, 2017—the day before the August 23 restitution hearing—Division 5 of this court reversed *Walker I*. Walker had filed a petition for a writ of mandate challenging the Appellate Division’s decision, the Court of Appeal had summarily denied it, and the Supreme Court had granted Walker’s petition for review and transferred the matter back to the Court of Appeal. (*Walker v. Appellate Division of Superior Court* (2017) 14 Cal.App.5th 651, 655 (*Walker II*).)

The Court of Appeal noted, “the plain language of section 7031 restricts the statute to civil proceedings.” (*Walker II, supra*, 14 Cal.App.5th at p. 657.) The court stated, “[t]he plain language of Penal Code section 1202.4 limits the trial court’s restitution order to actual economic losses suffered by the victim in the circumstances of [the] case,” quoting Penal Code section 1202.4, subdivision (f)(3)(A)’s reference to “ ‘the actual cost of repairing the property when repair is possible.’ ” (*Walker II*, at p. 656.) The court added, “The restitution order is not intended to provide the victim with a windfall; instead, a victim is entitled to reimbursement only for his or her actual loss.” (*Ibid.*) Accordingly, the Court of Appeal concluded, Walker’s victim was entitled to the portion of repair and repainting not caused by normal weathering, plus the cost of installing windows, less the amount remaining unpaid to Walker for his work. (*Id.* at p. 655.)

**3. *Briones forfeited any challenge to the restitution order for the Tavelmans and, in any event, Briones has failed to demonstrate that the victims' figures are inaccurate***

Although the Tavelmans cited *Walker I* in their submission, the trial court did not rely on that case in calculating the restitution award to the Tavelmans. As noted, the court twice specifically asked Briones's counsel whether the only issue was that of offset for Greg's payment to the Tavelmans. Counsel confirmed it was. Accordingly, the trial court's written order addressed only that issue. The court correctly concluded Briones was not entitled to an offset. (See, e.g., *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1133-1134; *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1389.) By agreeing his only challenge to the amount the Tavelmans requested concerned the offset, Briones forfeited any objection to the court's calculation of the Tavelmans' economic loss. (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218; *People v. O'Neal* (2004) 122 Cal.App.4th 817, 820.)

In any event, the trial court did not abuse its discretion in awarding the Tavelmans \$21,029 in restitution. Stephanie Tavelman's testimony at the preliminary hearing and Frank Tavelman's testimony at the restitution hearing established that the floors Briones had installed were defective and had not been or could not be repaired, and that Briones's work created other problems including needed repairs to the water heater and the chandelier. Frank Tavelman's lost wages when he was required repeatedly to come to court also were compensable losses. (See Pen. Code, § 1202.4, subd. (f)(3)(E); *People v. Moore* (2009) 177 Cal.App.4th 1229, 1231-1233; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 42.)

4. ***The restitution award to Jimich must be vacated for the trial court to exercise its discretion***

The restitution award to Jimich is different. First, Briones did not limit his challenge to a single issue, as he did for the Tavelman restitution hearing. The Attorney General contends Briones forfeited his claims “by his failure to object.” But everyone—the deputy district attorney, defense counsel, and the trial court—believed *Walker I* required the court to order Briones to reimburse Jimich for the entire amount she had paid him, even though that decision had been reversed about a month earlier. The prosecutor told the court, “[T]he Legislature determined that full recoupment of payment is required even if a person who employed such a contractor is benefitted or enriched thereby . . . .” The prosecutor continued, “In other words, notwithstanding whether or not the victim is satisfied with the work or this contractor can do awesome work above and beyond, the fact that this individual is an unlicensed contractor entitles the victim to recoup the full amount, 100 percent that’s paid . . . .” The prosecutor acknowledged this result was “draconian,” but asserted there was “no fine line” and the full amount Jimich paid “has to be refunded to her.” Defense counsel plainly also believed the court was bound by *Walker I*. Accordingly, she argued only that Briones did not actually receive all of the money.

The trial court shared this belief. The court referred to the *Walker I* rule as “extremely harsh, bordering on unfair” but concluded, “[U]nfortunately, that’s the rule.” The court viewed *Walker I* as “a rule I’m compelled to follow.”

Unlike the Tavelmans’ situation, in which there was no evidence the Tavelmans received any usable work or benefit from Briones, Jimich testified, “half of the things stayed undone,”

suggesting that half of the work *was* done. Jimich said she was “partly” satisfied with the work Briones did on her property: “Some of the work I’m satisfied.” “[A] lot of other things” remained unfinished. Unlike the Tavelmans, who submitted specific figures for repairs that had to be done, there was no testimony, documentation, or other evidence about whether Jimich had to pay for repairs or what she spent to complete the work Briones left unfinished. Because the court mistakenly believed it had no discretion to award anything other than the full amount that Jimich had paid Briones, we must remand the matter for the trial court to exercise its discretion.

**5. *The parties agree the \$10 crime prevention fine must be stricken***

The trial court imposed a \$10 crime prevention fine. Penal Code section 1202.5 requires a \$10 fine in any case in which a defendant is convicted of one of the offenses enumerated in that statute. Burglary in violation of Penal Code section 459 is one of the enumerated offenses. But the burglary counts against Briones were dismissed as part of the plea agreement. A violation of Business and Professions Code section 7027.3 is not an offense listed in Penal Code section 1202.5. Accordingly, the parties agree the \$10 fine imposed for Briones’s conviction of that statute must be stricken.

### **DISPOSITION**

We affirm the trial court's restitution award to the Tavelman victims in the amount of \$21,029 plus statutory interest under Penal Code section 1202.4, subdivision (f)(3)(G). We vacate the restitution award to victim Karen Jimich and remand the matter for the court to conduct such further proceedings as may be appropriate. We strike the \$10 crime prevention fine.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.