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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.

JOSE ANTONIO PEREZ,

Defendant and Appellant.

B236949

(Los Angeles County
Super. Ct. No. YA077830)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed.

Jolene Larimore, 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, Linda C. Johnson, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Jose Antonio Perez appeals from the judgment entered following his conviction of an unspecified offense. Defendant contends the trial court abused its discretion by ordering him to pay the victim's attorney fees as restitution. We affirm.

BACKGROUND

Defendant told a social acquaintance, Paul Donovan, that he had the rights to digitize and upload numerous independent films for sale on distribution sites such as iTunes. Donovan paid defendant \$20,000 pursuant to a written contract that required defendant to use Donovan's money only for this film venture. Defendant promised to repay Donovan in three months and to account for expenditures. Defendant did not repay Donovan at the end of three months, and gave him counterfeit work invoices. Donovan reported the theft to police on March 26, 2010. In the course of the investigation, police learned that defendant had no rights to use or profit from the films, and he had used Donovan's \$20,000 for personal purposes.

On or about March 6, 2010, Donovan hired Graham Law Corporation to file a civil action against defendant to recover his money. At some point after the civil complaint was filed in April of 2010 and before August 17, 2010, Donovan substituted Kimberly Frasca as his attorney. Defendant's preliminary hearing in this case was scheduled for October 12, 2010, but he waived preliminary hearing. The information was filed on October 26, 2010, and charged defendant with obtaining money by false pretenses and grand theft.

Defendant's default was entered in Donovan's civil case—apparently sometime late in 2010 or early 2011, but defendant succeeded in having it set aside. Although the appellate record contains no documents reflecting the disposition of the charges, it appears defendant's sentencing hearing was conducted on May 6, 2011, at which time he was granted probation and ordered to pay Donovan \$20,000 as restitution.

At a restitution hearing conducted on October 19, 2011, the prosecutor acknowledged that defendant had paid Donovan \$20,000, but asked the court to order defendant to pay Donovan \$10,312.67 for attorney fees he incurred in his civil litigation

against defendant. The prosecutor informed the court that Donovan had already paid his first attorney, Graham, \$5,487.24, and his second attorney, Frasca, \$4,825.43. The prosecutor submitted a stack of bills addressed to Donovan containing itemized entries for costs incurred and fees charged by Attorneys Graham and Frasca, along with payments to the attorneys by Donovan.

Defense counsel recognized that the civil suit preceded the criminal charges, but complained that the reasonableness of the fees had not been shown because the defense had not received a retainer agreement for Attorney Graham and the bills just showed the time spent and did not include information such as the attorney's billing rate and experience level. Defense counsel also argued that the trial court was required to employ a lodestar calculation. The prosecutor explained that Donovan had already paid the attorney fees in issue, and indeed had incurred additional fees and travel expenses, for which he was not seeking restitution. She also argued that a lodestar calculation was not required, citing *People v. Taylor* (2011) 197 Cal.App.4th 757 (*Taylor*).

After reviewing the documentation submitted by the prosecutor and pertinent authorities cited by the parties, the trial court concluded that no lodestar calculation was required. It then found "that the billable hours and amounts are reasonable under the circumstances, but also I put a lot of weight on the fact that the victim has already paid for this. [¶] When you're looking at ultimately what's reasonable under the circumstances, when somebody pays something out of their own pocket without knowing for sure if they're ever going to be reimbursed, it says a lot." The court ordered defendant to pay Donovan restitution for attorney fees of \$10,312.67, plus legal interest from the date of sentencing.

DISCUSSION

Defendant contends that the trial court abused its discretion by awarding unreasonable attorney fees. He argues that it was unnecessary for Donovan to hire attorneys because defendant "never disputed the \$20,000 economic loss," and "agreed to pay the \$20,000 as part of his plea agreement." He further complains that it was

unreasonable to spend \$10,000 in legal fees to attempt to recover \$20,000, the fees were more than “a standard one quarter contingency fee,” and that Donovan provided no explanation for “hir[ing] two different attorneys to do the same work.”

“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.” (Pen. Code, § 1202.4, subd. (a)(1); undesignated statutory references are to the Penal Code.) Section 1202.4, subdivision (f)(3)(H) authorizes restitution for “[a]ctual and reasonable attorney’s fees and other costs of collection” incurred by the victim as a result of the defendant’s criminal conduct.

A victim’s right to restitution is broadly and liberally construed. (*Taylor, supra*, 197 Cal.App.4th at p. 761.) The trial court may consider evidence that would be inadmissible during trial. (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1274–1275 [computer printout showing total billed for victim’s care].) The standard of proof is a preponderance of the evidence. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) “Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim.” (*Taylor*, at p. 761.)

The trial court has broad discretion to choose a method for calculating the amount of restitution, but “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.” (*People v. Giordano* (2007) 42 Cal.4th 644, 663–664.) “No abuse of that discretion occurs as long as the determination of economic loss is reasonable, producing a nonarbitrary result. Factors relevant to that determination will necessarily depend on the particular circumstances before the court.” (*Id.* at p. 665.) “No abuse of discretion is shown simply because the order does not reflect the exact amount of the loss, nor must the order reflect the amount of damages

recoverable in a civil action. [Citation.] In determining the amount of restitution, all that is required is that the trial court ‘use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ [Citation.] The order must be affirmed if there is a factual and rational basis for the amount. [Citation.]” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

At the restitution hearing, defendant did not dispute that Donovan had paid the attorney fees for which restitution was sought, nor did he submit any evidence that the fees charged and paid were unreasonable. We have reviewed the packet of bills submitted by the prosecutor at the hearing. These documents contain itemized entries for costs incurred and fees charged by the two attorneys who successively represented Donovan, along with payments to the attorneys by Donovan. Each cost is described by nature, amount, and payee. Each entry for professional services reflects the nature or purpose of the service, the time spent, and the amount charged for that service. These documents provided a factual and rational basis for the restitution award. Although the total fees may appear high when compared to the amount stolen by defendant, they were nevertheless incurred as a result of defendant’s criminal conduct, and the trial court found them to be reasonable. The court was not required to reduce the fees to a fixed proportion of the amount of the theft.

Defendant’s argument that it was unnecessary for Donovan to hire attorneys is both legally irrelevant and ignores the facts. Courts have rejected claims that a victim was not entitled to attorney fees incurred in civil litigation to recover their losses because the victim could have simply relied upon the prosecutor to obtain restitution for him or her. (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409–1410; *People v. Fulton* (2003) 109 Cal.App.4th 876, 889.) At the time Donovan commenced his civil action, no criminal charges had been filed against defendant. Thus, Donovan had no expectation of restitution at that time. In addition, neither the civil litigation nor the criminal charges prompted defendant to pay Donovan immediately the \$20,000 he now claims he “never

disputed.” Indeed, after Donovan obtained a default judgment against defendant in the civil suit, defendant successfully moved to set it aside.

Defendant’s reply brief questions the inclusion in the prosecutor’s documentation of Donovan’s legal bills from a third law firm. A careful review of the statements from the firm of Russakow Greene Tan reveals that Kimberly Frasca was the attorney handling the case at that firm. It thus appears she simply moved from the firm of Frasca Rooney to Russakow Greene Tan sometime after Donovan retained her. At the restitution hearing, defendant’s attorney recognized that there were three firms, but just two attorneys, and did not contend the number of attorneys rendered the fees unreasonable.

Finally, we note that although there is a split among appellate districts as to whether a lodestar calculation is required or even appropriate to determine the reasonableness of attorney fees under a contingency fee agreement for purposes of victim restitution (cf. *Taylor, supra*, 197 Cal.App.4th at pp. 762–764 [lodestar calculation neither required nor appropriate for victim restitution]; *People v. Millard* (2009) 175 Cal.App.4th 7, 32–33 [lodestar calculation required]), defendant does not contend that the trial court erred by following *Taylor*. Accordingly, we need not address whether *Millard* should be applied to fees calculated at an hourly rate.

The trial court did not make an arbitrary or capricious restitution award. It used a rational method that can reasonably be said to have made Donovan whole. Accordingly, we affirm.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.