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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM EDWARD MORRISON,

Defendant and Appellant.

B231058

(Los Angeles County
Super. Ct. No. YA 076997)

APPEAL from an order of the Superior Court of Los Angeles County.

James R. Brandlin, Judge. Affirmed.

Christine C. Shaver, 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 E.
Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant William Edward Morrison pled guilty to making criminal threats and the court dismissed the remaining 16 counts charged in the amended information. After a restitution hearing, the court order defendant to pay victim restitution of \$20,117.03. Defendant contends the order should be modified to delete the \$17,800 awarded for the value of a ring and a pair of earrings as the *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) was invalid, the waiver did not cover the loss of items at issue, and the order was arbitrary. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural Background

In an amended information, appellant was charged with one count each of criminal threats, first degree residential burglary, dissuading a witness, and stalking and 13 counts of intentional and knowing violation of a domestic relations court order. Pursuant to a plea agreement, appellant pled no contest to criminal threats.

Prior to the restitution hearing, the prosecution filed a motion to revoke probation which was scheduled to be heard on the same day as the restitution hearing. At the probation revocation hearing, the court revoked probation and imposed a sentence of three years in state prison. Following the restitution hearing, the court imposed a victim restitution order in the amount of \$20,117.03.

Appellant filed a timely notice of appeal from the restitution order.

II. Facts

A. Preliminary Hearing

Appellant and Marlene Roberts began dating in 2006, eventually moving in together. In 2009, even though Roberts and appellant had separated, they lived next door to each other in an apartment complex in Manhattan Beach. On November 11, Roberts was walking to the complex laundry room when appellant opened his door and asked her to come in. When Roberts refused, appellant grabbed her by the arm and threw her into his living room. In response to Roberts's attempt to leave, appellant walked towards his bedroom and said, "You better run out of here, because I'm going to fucking kill you."

Knowing appellant kept a firearm next to his bed, Roberts took his threat seriously. Frightened for her life, Roberts ran, contacted the police and reported the incident. Roberts requested and received an emergency protective order that day.

On about November 18, Roberts had her landlord repair a plumbing leak in her apartment. While the repairs were being done, Roberts stayed at a hotel. Roberts recalled that just before leaving her apartment, she put her Rolex watch on the bed. When Roberts returned home, the watch was missing. Within a day or two, Roberts found a white bag on her doorstep. When Roberts and the police opened the bag, her watch, a cinnamon doughnut and a note from appellant were inside. Roberts never gave appellant permission to enter her apartment or to take her watch.

B. Restitution Hearing

When Roberts reported the loss of her watch to the police, they asked her to check if other items were missing. Roberts filed a supplemental report two days later. Roberts reported her watch, ring and earrings were missing. Roberts estimated the value of the engagement ring as \$17,000 and the value of the earrings as \$800. Roberts had received the engagement ring from her ex-husband and the earrings from her grandmother for Roberts's wedding. The ring had three one-karat diamonds (one for each of her sons) and was set in 24-karat gold. Roberts obtained an estimate of the value of the ring by calling the jeweler in San Francisco where the ring had been purchased. After Roberts described the ring, the jeweler told her what it would cost to duplicate the ring. As for the earrings, Roberts asked a jeweler and received an estimate based on "the price of the cultured pearls and diamonds."

Appellant testified and acknowledged entering Roberts's apartment and going into the bedroom and taking (and later returning) the Rolex watch. However, appellant denied taking the ring or earrings or ever having seen them.

DISCUSSION

Appellant contends that the restitution order must be modified as the *Harvey* waiver was invalid, or if it was not invalid, it was improperly applied or the order must be

reversed as it was arbitrary. A restitution order is reviewed for abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.)

I. Court Proceedings.

A. Plea Agreement

As part of his guilty plea, appellant executed the court's standard form indicating that he had been advised of the many consequences of such a plea and that he understood them. In addition to the typewritten consequences on the form, a handwritten portion stated: "1203.3 diagnostic w/3 yr state prison lid, 10 yr protective order, *Harvey* waiver, restitution." Both appellant and his counsel signed and dated the form on June 21, 2011, as did the prosecutor. That day the case was called for trial, and the parties indicated they had reached an agreement. The court addressed defense counsel and confirmed the terms of the plea agreement:

The Court: It is my understanding the defendant is going to be entering a plea to Count 1, violation of Penal Code section^[1] 422, criminal threats. [¶] The disposition is that he would be referred to the Department of Corrections under Penal Code section 1203.3 with a three-year state prison lid. [¶] There will be a ten-year protective order, a *Harvey* waiver, and restitution as to all counts that were charged in the Amended Information. [¶] Is that your understanding?

[Defense Counsel]: It is, your honor.

The court then addressed appellant, noting that it had the two-page guilty plea and advisement of rights form in front of it, and asked if the initials and signature on it were his. Appellant confirmed that they were and that he had read and understood the rights, "as well [as] the consequences of entering a plea to this charge." Appellant stated he had waived and given up each of the rights contained on the form. The court then explained to appellant the various specific rights he was waiving and the specifics of the plea

¹ All statutory references are to the Penal Code.

agreement such as a diagnostic exam and the effects of having a “strike.” In addressing appellant directly, the court did not mention the *Harvey* waiver or victim restitution.

The court advised appellant there was a mandatory restitution fine of \$200 that could go all the way to \$10,000. The court next asked appellant if he had had sufficient time to discuss the plea and its consequences with his counsel. Appellant confirmed that he had. Finally, in response to the court’s inquiry, appellant stated he had no additional questions for his attorney, the prosecutor or the court. The court took the plea and entered an interim protective order requiring appellant to refrain from annoying, vexing, etc, Roberts.

B. Sentencing Hearing

On September 21, after both appellant and his victim addressed the court, the court noted that because appellant had 229 actual days of custody credit, perhaps the victim’s safety would be better served by imposing a suspended sentence and placing appellant on formal probation. The court also noted the diagnostic report of the Department of Corrections and Rehabilitation recommended probation. After hearing from counsel, the court determined sending appellant to prison would not provide the same level of insurance to the victim as would placing appellant on probation with a prison sentence hanging over his head. The court imposed and suspended a three-year sentence and placed appellant on formal probation for a period of five years. In doing so, the court imposed a series of terms and conditions of probation, including a jail term of 365 days, with 343 days of precustody credits. The terms also included “a 10-year restraining order” and “restitution to the victim in an amount and manner as prescribed by the probation officer, subject to a hearing, if requested.” Appellant agreed to the conditions of probation.

C. Restitution Hearing

Because the parties were unable to reach a stipulation regarding the amount of restitution, the initial December 12 restitution hearing was postponed. The court permitted the prosecutor to file a motion to revoke probation, which included

documentation of repeated violations of the protective order. The court reserved jurisdiction to address the issue of restitution.

The court conducted a hearing on January 13, 2011. During the prosecutor's examination of Roberts, appellant's counsel objected to any questions regarding the engagement ring and the earrings because appellant had not been charged with the theft of those items. Following testimony, the court tentatively ruled it was precluded from ordering restitution based on the ring and earrings because it was sentencing appellant to prison rather than imposing probation. The prosecutor pointed out that count 2 was a residential burglary charge and the plea agreement had a *Harvey* waiver. Appellant's counsel pointed out the loss of the ring and earrings had not been the subject of testimony at the preliminary hearing. The court gave the parties a brief recess to research the issue.

Following the break, the court concluded that as the plea agreement contained a *Harvey* waiver, it could consider the dismissed counts in determining resolution. The court pointed out that while the *Harvey* waiver was not in the plea transcript, it was on the *Tahl* form, i.e., the written plea agreement. As for appellant's argument that the only missing item mentioned at the preliminary hearing was Roberts's watch, the court asked if that was not simply a matter of being the "easiest connection for the D.A. to be able to show that your client was the one [who] went into the victim's apartment." The court pointed out that its "analysis of the evidence and my findings are based upon what's heard during this hearing, not what's heard in some other reported hearing not in front of me." Following argument, the court found appellant was no longer a suitable candidate for probation, revoked and terminated probation, and lifted the stay of execution on appellant's sentence.

The court then determined the amount of restitution:

As relates to the issue of restitution, I do find by a preponderance of the evidence that restitution is due and owing in this matter to Marlene Roberts, the victim in count 1. [¶] Based upon the *Harvey* waiver, the Court is going to order restitution as follows: the amount of \$20,117.03. [¶] That includes the amounts previously

indicated by the Court as to Exhibits People's 2, 3, 5, and 6. But also as it relates to the value of the engagement ring and pearl earrings as indicated by the victim, [who] the Court finds to be truthful. [¶] I do find that the defendant is criminally responsible, and order him to pay restitution in that amount.

II. The Harvey Waiver was not invalid or improperly applied.

A. Valid Waiver

In *People v. Harvey*, *supra*, 25 Cal.3d at page 758, the Supreme Court held that the trial court could not consider any of the facts underlying dismissed counts because, absent an agreement to the contrary, a plea bargain implicitly includes the understanding the defendant will not suffer any adverse sentencing consequences by reason of the facts underlying the dismissed counts. “To avoid the *Harvey* restriction, prosecutors often ‘condition[] their plea bargains upon the defendant agreeing that the sentencing court may consider the facts underlying the not-proved or dismissed counts when sentencing on the remainder.’ Defendants may accept this relatively minor potential consequence in order to avoid other convictions or sentencing enhancement terms. This agreement is known as a ‘*Harvey* waiver.’ A *Harvey* waiver permits the sentencing court to consider the facts underlying dismissed counts and enhancements when determining the appropriate disposition for the offense or offenses of which the defendant stands convicted.” (Citations omitted.) (*People v. Munoz* (2007) 155 Cal.App.4th 160, 167.) A *Harvey* waiver may permit a court to consider dismissed counts for purposes of restitution. (See *People v. Campbell* (1994) 21 Cal.App.4th 825, 830.)

The question is whether the *Harvey* waiver in the case at bar included considering the facts underlying the dismissed counts for purpose of awarding restitution. “‘Because a “negotiated plea agreement is a form of contract,” it is interpreted according to general contract principles.’” (*People v. Feyrer* (2010) 48 Cal.4th 426, 437.) The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties, which is determined by objective manifestations of their intent as well as extrinsic

evidence of objective matters such as the circumstances surrounding the negotiation of the contract and the subsequent conduct of the parties. (*Ibid.*)

In the instant case, appellant (and his counsel) initialed the following provision on the plea agreement: “1203.3 diagnostic w/3 yr state prison lid, 10 yr protective order, *Harvey* waiver, restitution.” At the hearing where the court took the plea, it confirmed defense counsel’s understanding “[t]here will be a ten-year protective order, a *Harvey* waiver, and restitution as to all counts that were charged in the Amended Information.” Although the court did not mention the *Harvey* waiver or restitution to appellant, it confirmed that appellant had read and understood his rights and the consequences of entering a plea and that he had had sufficient time to discuss the plea and its consequences with his counsel. Furthermore, the court advised appellant that he could be subject to a mandatory restitution that could range from \$200 to \$10,000. At the sentencing hearing, one of the terms of probation was “restitution to the victim in an amount and manner as prescribed by the probation officer.” Thus, appellant agreed to the consideration of the facts of the underlying counts for purposes of awarding victim restitution.

Appellant asserts the *Harvey* waiver was invalid and the restitution order must be modified as the court did not specifically advise him of the *Harvey* waiver or explain the consequences of his plea, including the fines associated with a *Harvey* waiver. Citing *People v. Oberreuter* (1988) 204 Cal.App.3d 884, disapproved on another point in *People v. Walker* (1991) 54 Cal.3d 1013, 1022, appellant argues that a restitution fine was not part of the plea form. The court there concluded that the restitution fine had to be stricken because it was not part of the plea bargain and the defendant had not been advised a possible or mandatory fine could be imposed as possible punishment before he entered his plea. (*People v. Oberreuter, supra*, 204 Cal.App.3d at pp. 888-889.)

Even though appellant objected to the amount of restitution awarded, he seeks only to modify the order; he did not object to the failure to admonish him of all the consequences of his plea. (*People v. Walker, supra*, 54 Cal.3d at pp. 1022-1023 [unlike

an admonition of constitutional rights, advisement as to the consequences of a plea is not constitutionally mandated, and such an error is waived absent a timely objection.].) In addition, the court advised appellant about the possibility of a restitution fine.

B. Proper Application

Appellant argues the *Harvey* waiver was improperly applied because the court went beyond what was contemplated and agreed to by the parties as there was no language about uncharged crimes. At the hearing, the court clarified that there was a *Harvey* waiver and restitution was to all counts charged in the amended information. Appellant also notes that he objected to the prosecutor's questions to Roberts about the ring and earrings on the basis he was not charged with their theft. Although appellant acknowledge that Roberts reported the ring and earrings were missing to the police a couple of days after the burglary, he complains that she did not mention those items at the preliminary hearing and the note he left when he returned the watch did not mention them. Appellant posits that the burglary charge was based solely on the watch, reasoning the other items were uncharged crimes at the time of the waiver. Appellant also suggests the prosecutor would have presented the strongest evidence at the preliminary hearing and omitted facts cannot be underlying facts.

As noted by the superior court, the easiest way to show the larceny element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041) was the watch as the prosecutor had the note from appellant admitting he took the watch. At the preliminary hearing, Roberts admitted she had not been paying attention to what else was in the house when she left her apartment to go to the hotel. In addition, appellant was charged with 17 counts and the focus of the hearing was to present facts to establish his threat to Roberts and his repeated violations of court orders. Although appellant was not charged with the theft of the ring and earrings, the factual basis for those items was developed at the restitution hearing; the ring and earrings were part of the burglary charge and are not uncharged crimes.

III. The order was not arbitrary.

There are “two essential requirements for awarding restitution: (1) the victim must have suffered a loss ‘as a result of the commission of a crime’; and (2) the amount of the loss must be ‘determined’ by the court.” (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 799.) “We interpret the requirement the amount of loss be ‘determined’ by the court to mean the court must decide the amount of the loss on grounds which will withstand review for abuse of discretion. We base our interpretation of the statute on the well-established rule ‘. . . the trial court is vested with broad discretion in setting the amount of restitution [and] it may “use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole.”’ . . .’ Thus, while the amount of restitution cannot be arbitrary or capricious, ‘[t]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action.’” (Citation omitted.) (*Id.* at p. 800; see also *People v. Mearns, supra*, 97 Cal.App.4th at p. 499 [““When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.””].)

Section 1202.4, subdivision (f)(3) requires that the court award an amount of restitution which will fully reimburse the victim for “every determined economic loss incurred as a result of the defendant’s criminal conduct.” “[S]entencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes. [¶] This is so because a hearing to establish the amount of restitution does not require the formalities of other phases of a criminal prosecution.” (Citations and internal quotation marks omitted.) (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1275.) As in *Hove*, there was a separate restitution hearing, at which additional evidence established that as a result of appellant’s burglary of Roberts’s apartment, she lost an engagement ring and a pair of pearl earrings.

Appellant argues the order was arbitrary because Roberts did not provide evidence the items were worth the stated amounts, Roberts had no evidentiary support she talked to the jeweler, and Roberts had no documentary support for the ring and earrings as she did for the other items. However, those other items were for losses (such as medical expenses -- tests, prescriptions, etc.) that were incurred after the events at hand. Although appellant complains Roberts did not give the name of the store or the jeweler, he did not cross-exam her about that information.

In *In re S. S.* (1995) 37 Cal.App.4th 543, 547 the court noted that a property owner's statements of value should be accepted as prima facie evidence of value. In that case, the statements were contained in the probation report. (*Ibid.*) The court stated “the defendant must come forward with contrary information to challenge that amount” and noted the defendant's due process rights were protected as long as he was given notice of the amount of restitution sought and an opportunity to contest that amount. (*Ibid.*) The court also noted that none of the cases it cited held “that the victim must supply a sworn proof of loss or detailed documentation of costs and expenses.” (*Id.* at p. 547, fn. 2.)

In the case at bar, appellant had the opportunity to challenge the estimated values at the restitution hearing. Roberts testified as to how she obtained the estimated value of the ring and earrings; thus, the court had before it sworn proof of the value of her losses. The court stated it found her credible. Roberts did not have to provide documentary proof of the value of the ring and earrings. Accordingly, the court did not abuse its discretion as it used a rational method to fix the amount of restitution.

DISPOSITION

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.