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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.

DEMETRIUS EUGENE,

Defendant and Appellant.

B259289

(Los Angeles County
Super. Ct. No. BA333770)

APPEAL from an order of the Superior Court of Los Angeles County, Melissa Widdifield, Judge. Reversed and remanded.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Demetrius Eugene was convicted of multiple counts of perjury by declaration (Pen. Code,¹ 118, subd. (a)) and grand theft (§ 487, subd. (a)). He appeals the trial court's restitution award on the ground that portions of the restitution award concern losses caused by criminal conduct other than the conduct of which he was convicted. The Attorney General agrees that the restitution order must be reversed, and argues that remand is necessary to ascertain the appropriate restitution award and to impose a mandatory fine under section 186.11, subdivision (c). We reverse the restitution order and remand the matter to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

We have previously considered Eugene's challenges to his convictions and sentence in *People v. Eugene* (Aug. 26, 2013, B240874) [nonpub. opn.]. Our recitation of the underlying facts comes from our opinion in that matter. "Over a period of several years, Eugene participated in a series of complex child care fraud activities, acting as both a fraudulent provider of child care and a fraudulent employer of parents receiving funds for government-subsidized child care. On February 23, 2009, the District Attorney filed an information in Case No. BA333770 charging Eugene and a codefendant with 87 counts of grand theft and perjury by declaration, as well as multiple special enhancement allegations. Sixteen counts were alleged against Eugene, nine of grand theft and seven of perjury by declaration. After a jury trial, Eugene was convicted on December 29, 2011, of six counts of grand theft and six counts of perjury by declaration. Additionally, the jury found that the total taking involved more than \$200,000." (*People v. Eugene* (Aug. 26, 2013, B240874), at p. 2.) On appeal, this court reversed the judgment with respect to one global count of grand theft that encompassed all the other grand thefts. (*Id.* at p. 8.)

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

On August 15, 2014, the court ordered Eugene to pay victim restitution of \$456,836.61, minus sums already paid, plus 10% interest from December 29, 2011.² Eugene appeals.

DISCUSSION

I. Restitution Order

Restitution orders are reviewed for an abuse of discretion (*Luis M. v. Superior Court* (2014) 59 Cal.4th 300, 305), but when a defendant is sentenced to a period of incarceration, the court may only order restitution for losses arising out of the criminal conduct for which the defendant has been convicted. (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1274; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1246-1249.)

The parties agree, as do we, that the trial court's restitution order included losses relating to counts on which Eugene was not convicted or for which his conviction was reversed. After his conviction on one count of grand theft was reversed on appeal, Eugene stood convicted of five counts of grand theft, each of which involved child care fraud concerning a different parent: counts 44 (Darline Lewis); 48 (Danita Eugene); 53 (Lisa Williams); 65 (Andrea Barrett); and 72 (Wendy Haynes). The restitution award of \$456,861.61 matches the total loss figure on Exhibit 3, a document entitled "Losses (By Payment History) 03 Demetrius Eugene." The losses listed on this exhibit, however, included not only those losses concerning the five parents listed above, but also losses involving many other parents. We agree with the parties that the additional losses that arose from conduct other than the conduct of which Eugene was convicted could not properly serve as the basis for a restitution award and that the trial court abused its discretion by including these additional amounts in the restitution award.

² Other criminal charges arising from the child care fraud were filed against Eugene in Case No. BA332599 (*People v. Eugene, supra*, B240874, at p. 2), and the cases were disposed of together. Restitution was also ordered in Case No. BA332599. Eugene appealed the restitution order in Case No. BA332599, but that appeal was later dismissed at his request.

Although the parties agree that the restitution award must be confined to losses on the counts on which Eugene was convicted, they disagree about the calculation of those losses. Eugene asks this court to impose a restitution award of \$143,387.62. The Attorney General argues that Eugene's calculation fails to adequately cover the losses on count 65 and that the evidence before the trial court supports a higher restitution award on that count than Eugene calculated. Moreover, the Attorney General argues that Eugene's posited restitution award amount fails to include the losses attributable to count 72. We conclude that the matter must be remanded to the trial court so that the court may determine and include the proper losses relating to the counts for which Eugene stands convicted.

II. Section 186.11, Subdivision (c)

Section 186.11, subdivision (c) provides for the imposition of a fine when a defendant has been convicted of multiple felonies involving fraud or embezzlement. If the pattern of felony conduct involves the taking of more than \$100,000 but less than \$500,000, the statute requires that the fine "shall not exceed one hundred thousand dollars (\$100,000) or double the value of the taking, whichever is greater." (§ 186.11, subd. (c).) The section 186.11, subdivision (a)(3) fine is mandatory, and the failure to impose it results in an unauthorized sentence. (*People v. Denman* (2013) 218 Cal.App.4th 800, 816-817.)

The Attorney General contends that Eugene's sentence is unauthorized because the jury found true the special allegation under section 186.11, subdivision (a) that Eugene's crimes involved fraud and a pattern of related felony conduct, and that the losses exceeded \$100,000, but the trial court failed to impose a fine under section 186.11, subdivision (c) in the amount of double the value of Eugene's taking. We have reviewed the jury's verdict and see that the jury did find true a special allegation under section 186.11, subdivision (a)(3) that the offenses involved fraud and a pattern of related felony conduct, and that the losses exceeded \$200,000. On remand, therefore, the trial court is

instructed to determine and impose the appropriate fine pursuant to section 186.11, subdivision (c).

DISPOSITION

The restitution order is reversed and the matter remanded for the trial court for further proceedings concerning restitution and Penal Code section 186.11, subdivision (c).

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.