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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.

ANTHONY LAMAR MITCHELL,

Defendant and Appellant.

B283172

(Los Angeles County
Super. Ct. No. MA067286)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed and remanded with directions.

William L. Heyman, 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, Senior Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Anthony Lamar Mitchell appeals from a victim restitution order entered following his conviction on a plea of no contest to attempted murder and other charges after Mitchell forced his ex-girlfriend into the backseat of her car and deliberately crashed it into several parked cars. Mitchell contends the trial court erred in ordering him to pay \$17,598.10 in restitution to the owner of one of the damaged vehicles because the owner did not qualify as a “victim” under Penal Code section 1202.4.¹ Because we do not read the restitution statute as narrowly as Mitchell does, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The October 15, 2015 Incident*

On October 15, 2015 Mitchell went uninvited to the home of M. Penn, his ex-girlfriend. When Penn arrived, Mitchell rushed toward her, tackled her, and proclaimed his love for her. Mitchell hit Penn in the head, placed her in a chokehold, and strangled her until she lost consciousness. When Penn awoke, she was naked, and Mitchell was wiping her body with a wet cloth. The next day, Mitchell returned to Penn’s house and threatened to kill her. In connection with this incident, the People charged Mitchell with inflicting corporal injury on someone with whom he had a dating relationship within seven years of a conviction for domestic violence (§ 273.5, subd. (f)([1])), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)),

¹ Statutory references are to the Penal Code.

false imprisonment by violence (§§ 236, 237), and making a criminal threat (§ 422, subd. (a)).

B. *The June 1, 2016 Incident*

While the charges arising out of the October 15, 2015 incident were pending, Mitchell went to Penn's home on June 1, 2016 and asked her to drive him to a probation hearing. Penn refused. Mitchell became upset, slapped Penn in the face, grabbed the keys to Penn's car, and forcibly put her in the car.

Mitchell pulled the car out of the driveway and drove "erratically" through the city, speeding and running stop signs. Mitchell told Penn, "If I'm going to die, you're going to die with me. We're going to die together." Mitchell raced down a small residential street and drove into several parked cars, including a recreational vehicle (RV) owned by Arturo Cortez and a car owned by another individual. Penn heard a loud "boom" and felt her car come to a stop. Penn could not move and lost consciousness. Cortez's neighbor, who was inside his house at the time of the collision, heard "a loud crash," went outside, and saw several cars in his front yard. The neighbor saw Mitchell take Penn out of the car and put her down in the middle of the street.

The People charged Mitchell with kidnapping (§ 207, subd. (a)), inflicting corporal injury on someone with whom he had a dating relationship within seven years of a conviction for domestic violence (§ 273.5, subd. (f)(1)), assault with a deadly weapon (§ 245, subd. (a)(1)), contempt (§ 166, subd. (c)(1)), and attempted murder (§§ 187, subd. (a)(1), 664). The People also alleged that Mitchell committed these offenses while released from custody on bail in a pending case (arising out of the October 15, 2015 incident) within the meaning of section 12022.2

and that Mitchell attempted to kill Penn willfully, deliberately, and with premeditation. The trial court consolidated the two pending cases against Mitchell.

C. *The Plea Agreement*

The parties negotiated an agreement to resolve the two cases: Mitchell pleaded no contest to attempted murder, inflicting corporal injury on someone with whom he had a dating relationship within seven years of a conviction for domestic violence, and making a criminal threat, admitted the on-bail allegation, and received a total prison sentence of 13 years. The People dismissed the remaining six counts and struck the allegation that the attempted murder was willful, deliberate, and premeditated. At the April 4, 2017 hearing on Mitchell's plea, the following exchange occurred:

"The Court: In this case, there will be actual restitution. The People will be dismissing several charges against you with the understanding that you will be financially responsible for all the losses incurred in this case, not just the charges to which you have pled. Do you understand that?

"[Mitchell]: Yes, your Honor.

"The Court: And do you agree to that?

"[Mitchell]: Yes, your Honor.

"The Court: Counsel join in the *Harvey* waiver?

"[Counsel for Mitchell]: Yes, your Honor."²

² *People v. Harvey* (1979) 25 Cal.3d 754. "A *Harvey* waiver is a defendant's agreement, as part of a plea bargain, to allow the sentencing court to consider facts supporting dismissed counts." (*People v. Brooks* (2017) 15 Cal.App.5th 331, 334, fn. 3.)

D. *The Restitution Hearing*

The People sought restitution for the damage to Cortez's RV. Mitchell argued he did not have to pay restitution to anyone other than Penn because "those individuals or entities were not the direct objects of his criminal acts as defined in the charged offenses." The People argued the trial court could order Mitchell to pay restitution for "losses arising out of the criminal conduct for which [Mitchell] has been convicted," regardless of whether the information named the victim seeking restitution.

At the hearing, Cortez testified he did not see Mitchell drive into the parked cars, but he rushed home when his wife called him about the collision. When he arrived, he saw a car, which "was pretty damaged," his RV, which had been "pushed into the neighbor's yard," and Penn's car, which was "very damaged." Cortez testified he received \$17,598 from his insurance company for the damage to the RV.³

The trial court ruled Cortez was a victim and entitled to restitution because Mitchell's conduct in trying to kill Penn by crashing her car "was completely volitional." The trial court stated the evidence (including Mitchell's statements to witnesses) showed Mitchell's "erratic driving" and "running of the stop signs" were "affirmative acts on the part of [Mitchell] to try to kill the victim. These were not unintentional acts, and they are the sum and substance of the basis for [the attempted murder charge,] amongst other things, so I do find restitution is

³ The court must order full restitution regardless of the victim's insurance coverage. (See *People v. Birkett* (1999) 21 Cal.4th 226, 246; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1216.)

appropriate.” The court ordered Mitchell to pay Cortez \$17,598.10 in restitution. Mitchell timely appealed.

DISCUSSION

Mitchell argues the trial court erred in ordering him to pay restitution to Cortez because the amended information did not name Cortez as a victim, Cortez “was not a direct or immediate object” of the criminal conduct for which Mitchell was charged, and Cortez does not fit under any of the definitions of “victim” listed in section 1202.4, subdivision (k). The People argue that we should dismiss Mitchell’s appeal because he did not obtain a certificate of probable cause and that, on the merits, the trial court’s restitution order was proper.

A. *Mitchell Did Not Need a Certificate of Probable Cause To Appeal the Restitution Order*

Section 1237.5 provides, in pertinent part: “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” Nevertheless, “two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and

the penalty to be imposed.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 74; accord, *People v. Hurlic* (2018) 25 Cal.App.5th 50, 55; see Cal. Rules of Court, rule 8.304(b)(4).)

Mitchell’s appeal falls under the second exception. The trial court ordered restitution after accepting and convicting Mitchell on his plea, the validity of which Mitchell does not challenge. Mitchell argues “the restitution ordered to be paid to . . . Cortez was not part of the losses incurred in this case” and “[i]t was never stated at the change-of-plea hearing . . . that [he] would also be responsible for losses incurred by third parties” Rather than seeking to invalidate a term of his plea, Mitchell seeks to enforce a term of his plea, namely, restitution for “all the losses incurred in this case,” as he understood that phrase. Mitchell’s interpretation of what occurred at the hearing may be incorrect, but he is not challenging the validity of his plea. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1220 [defendant did not need a certificate of probable cause to appeal an order requiring restitution to the Victim Compensation Board because the appeal challenged the trial court’s failure to “give effect to the terms of her plea” to pay only the victim’s out-of-pocket expenses].) Mitchell did not need a certificate of probable cause to appeal the order requiring him to pay restitution to Cortez.⁴

⁴ Although not raised by the People, Mitchell arguably failed to comply with California Rules of Court, rule 8.304(b)(4)(B), by not stating on his notice of appeal that he was invoking an exception to the certificate requirement (which Mitchell could have done by checking the box on the form notice of appeal that states, “This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea”). Mitchell stated on his notice of appeal only that he was

Moreover, Mitchell does not challenge the requirement in his plea that he must pay restitution, only the court's exercise of discretion in calculating "all the losses incurred in this case" and whether that phrase includes damage to Cortez's RV. (See *People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320 ["restitution awards are vested in the trial court's discretion"].) "[W]hen the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was 'part of [the] plea bargain.' [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself." (*People v. Buttram* (2003) 30 Cal.4th 773, 786; see *id.* at p. 787 [defendant's appeal of his sentence to the agreed-upon maximum term did not attack the validity of the plea because the negotiated maximum sentence "left open a variety of sentencing choices within that limit"]; *People v. Hurlic, supra*, 25 Cal.App.5th at p. 56 [same].)

appealing from the "Restitution order made on 06/07/2017." We liberally construe the notice of appeal, however, in favor of its sufficiency. (Cal. Rules of Court, rule 8.304(a)(4); see *People v. Lloyd* (1998) 17 Cal.4th 658, 665 [a notation of "Rule 31(d)" (the predecessor to rule 8.304(b)) and the statement "Defendant hereby appeals from the . . . 'sentence'" were sufficient to appeal a matter that occurred after entry of the plea and did not challenge the validity of the plea]; cf. *People v. Way* (2003) 113 Cal.App.4th 733, 736 [notice of appeal did not impliedly state the defendant appealed noncertificate grounds because the notice stated the appeal was from the "final judgment of conviction," as opposed to the "sentence," and did not refer to Cal. Rules of Court, rule 31(d)].)

B. *The Trial Court Did Not Abuse Its Discretion in Ordering Mitchell To Pay Restitution to Cortez*

1. *Applicable Law and Standard of Review*

The California Constitution, as amended in 1982 by Proposition 8, provides in relevant part that “all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer” and that “[r]estitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” (Cal. Const., art. I, § 28, subd. (b)(13)(A)-(B); see *People v. Martinez* (2017) 2 Cal.5th 1093, 1100 (*Martinez*) “[u]nder the California Constitution . . . every crime victim has a right to be compensated by the defendant for losses incurred as a result of the defendant’s crime”]; *People v. Nichols* (2017) 8 Cal.App.5th 330, 341 “[v]ictim restitution is mandatory under the California Constitution”). “In passing Proposition 8, the electorate expanded victims’ access to compensation . . . and instruct[ed] the Legislature to adopt legislation to implement this directive.” (*Martinez*, at p. 1100.)

“The Legislature’s response [is] currently codified in section 1202.4” (*Martinez, supra*, 2 Cal.5th at p. 1100), which states that “a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” Section 1202.4, subdivision (f), further provides that, “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.”

Although ““““[a] victim’s restitution right is to be broadly and liberally construed”””” (*People v. Nichols, supra*, 8 Cal.App.5th at p. 342), the court’s power to order restitution is not unbounded. “When judgment is imposed and the defendant sentenced to a period of incarceration (in prison or jail), the court may order restitution only for losses arising out of the ‘criminal conduct for which the defendant has been convicted.’ [Citations.] This result is dictated by the language of section 1202.4, which looks to ‘the defendant’s *conduct*’ [citation] and by the unfairness that would result if a defendant were held responsible for losses caused by conduct underlying charges that were dismissed or of which he was acquitted.” (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1274; see *People v. Williams* (2017) 7 Cal.App.5th 644, 696-697 [“““[t]he term ‘criminal conduct’ as used in subdivision (f) means the criminal conduct for which the defendant has been convicted”””].) Thus, “[a]pplication of these provisions depends on the relationship between the victim’s loss and the defendant’s crime.” (*People v. Martinez, supra*, 2 Cal.5th at p. 1098.)

“[W]e apply the abuse-of-discretion standard to the trial court’s determination of predominantly factual matters regarding restitution.” (*People v. Brunette* (2011) 194 Cal.App.4th 268, 277; see *People v. Williams* (2010) 184 Cal.App.4th 142, 146 [“[o]rdinarily, the standard of review of a restitution order is abuse of discretion”].) “[W]hen the legal basis for a restitution award is under challenge,” however, we independently review “the legality of the restitution award in light of the applicable statutes and any relevant decisional law.” (*Brunette*, at p. 277; see *Williams*, at p. 146 [“when the propriety of a restitution order turns on the interpretation of a statute, a question of law is raised, which is subject to de novo review on appeal”].) “[A]

restitution order “resting upon a “demonstrable error of law” constitutes an abuse of the court’s discretion.”” (*People v. Sy* (2014) 223 Cal.App.4th 44, 63.)

2. *Cortez Is Entitled to Restitution*

Mitchell contends Cortez is not a “victim” within the meaning of section 1202.4 for three reasons: (1) his ex-girlfriend was “the individual, and the only individual, named in all nine counts in the amended information,” (2) the crimes charged were “assaultive crimes . . . against a person,” of which Cortez “was not a direct or immediate object,” and were not property- or automobile-related crimes, and (3) Cortez was not a “victim” under the definition of that term in section 1202.4, subdivision (k). None of these contentions has merit.

First, whether the information specifically named Cortez as a victim does not resolve whether he is entitled to restitution for his losses. For example, in *People v. Walker, supra*, 231 Cal.App.4th 1270 the defendant pleaded guilty to four counts of “DUI causing injury” after he hit eight vehicles carrying a total of nine passengers. (*Id.* at p. 1273.) The charging document named only four of the nine people the defendant hit, but the trial court ordered the defendant to pay restitution to individuals not named in the charging document. The court in *Walker* affirmed the award, explaining “the losses suffered by any of the persons in the vehicles involved in that instance [of driving under the influence] are losses arising out of ‘the criminal conduct for which the defendant has been convicted.’ [Citation.] Whether these potential victims were specifically named in the charging document is irrelevant. Section 1202.4 imposes no such duty to name, and judicially imposing such a duty would make a victim’s entitlement to restitution turn on the happenstance of whether

the prosecutor located or named that victim before the defendant pled or was convicted. Such absurd results are to be avoided.” (*Id.* at pp. 1275-1276.) Similarly, Cortez’s right to restitution did not depend on the prosecutor’s choice of which victims to name in the information or the decision whether to bring additional charges based on the same “criminal conduct” on which the attempted murder charge was based.

Second, to evaluate Mitchell’s argument that Cortez was not a direct object of Mitchell’s crime, we look to the criminal conduct of the attempted murder offense, not whether Cortez was an intended victim. (See *Walker, supra*, 231 Cal.App.4th at pp. 1274-1275 [trial court “may order restitution only for losses arising out of the ‘criminal conduct for which the defendant has been convicted,’” which “turns on what conduct is encompassed by the crime”].) Mitchell pleaded guilty to attempted murder, one element of which is “a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Sánchez* (2016) 63 Cal.4th 411, 457; see §§ 187, subd. (a), 664.) Mitchell’s direct but ineffectual act toward killing Penn was intentionally crashing into other cars with Penn as his passenger. This conduct directly caused economic loss to several victims, including Cortez.

Both parties cite the California Supreme Court’s opinion in *People v. Martinez, supra*, 2 Cal.5th 1093. *Martinez* supports the People, not Mitchell. The Supreme Court in *Martinez* held that “direct victim restitution is available when the victim’s losses are caused by conduct that does, in fact, constitute a crime.” (*Id.* at p. 1105) The Supreme Court explained: “If, for example, a thief steals a car and a third party reckless driver damages it, we do not doubt that the owner would be entitled to reimbursement from the thief under section 1202.4, subdivision (f). But that is because the owner has incurred losses resulting from the thief’s

criminal conduct (namely the unlawful deprivation of his or her property)” (*Ibid.*) Just like the owner of the stolen car in the Supreme Court’s example, Cortez suffered loss “resulting from” Mitchell’s criminal conduct of driving into parked cars in a direct but ineffectual effort to kill Penn.

The Supreme Court also stated in *Martinez* that a court must “order restitution for losses incurred as a result of the means by which the defendant committed the offense.” (*Martinez, supra*, 2 Cal.5th at pp. 1105-1106.) The Supreme Court again explained by illustration: “So, for example, if a burglar breaks a window to enter a home, he or she may be ordered to pay for the broken window in victim restitution, even though the burglary statute requires the prosecution to prove only that the defendant entered the house with the intent to commit a felony. [Citation.] If the burglar happens to have committed the prohibited entry by some means that causes damage to the home, a trial court certainly can—and must—take the damage into account in ordering restitution.” (*Id.* at p. 1106.) This example confirms Cortez’s right to restitution from Mitchell because Mitchell attempted to murder Penn by means of driving Penn’s car into Cortez’s RV. The trial court properly ordered restitution for all the damage Mitchell caused in trying to kill Penn. (See *People v. Pierce* (2015) 234 Cal.App.4th 1334, 1336-1337 [owner of a stolen car, two utility companies, and a property owner were “entitled to full restitution for the economic loss they suffered as a result of defendant’s conduct” where the defendant pleaded no contest to robbery after his accomplice drove a stolen car into a telephone pole while attempting to evade the police, causing damage to the pole and a nearby house]; see also *People v. Foalima* (2015) 239 Cal.App.4th 1376, 1396-1397 [murder victim’s daughter was “entitled to compensation” for

clothes and household items destroyed by a fire set to destroy evidence of the murder because the defendant's conduct in killing the victim "was a substantial factor and the proximate cause" of the damages].)

Third, section 1202.4, subdivision (k), does not preclude an award of restitution for the damage to Cortez's property. Section 1202.4, subdivision (k), lists five categories of persons or entities that, "[f]or purposes of this section," the term "victim" "shall include." The categories include persons who had a familial relationship with the "actual victim" and corporate or government entities that were "direct" victims of a crime. (See § 1202.4, subd. (k)(1)-(5).) Mitchell argues that, because there was no evidence of any familial relationship between Cortez and Penn, and Cortez was not a corporation or government agency, Cortez is not a "victim" for purposes of section 1202.4. Mitchell misses the point of subdivision (k). Section 1202.4, subdivision (k), describes what the word "victim" "shall include," but it does not exclude an actual victim, which, as discussed, Cortez was. (See *People v. Lewis* (2016) 4 Cal.App.5th 1085, 1093 ["an interpretation [of a statute] that would lead to absurd results should be avoided"].) Because Cortez was an actual victim, he is entitled to restitution. (See section 1202.4, subd. (a)(1) ["a victim of crime . . . shall receive restitution"]; *People v. Ortiz* (1997) 53 Cal.App.4th 791, 796-797 ["[i]n view of the strongly expressed concern for persons who have suffered loss as the result of criminal conduct, our Supreme Court has given the term 'victim' a broad and flexible meaning"].)

Mitchell argues for the first time in his reply brief that he did not plead no contest to attempted murder arising out of the June 1, 2016 incident, but to "an act against Penn on October 15, 2015 that could have resulted in Penn's death" (the chokehold).

Mitchell points out that, when he pleaded no contest to attempted murder, the court made a reference to the October 15, 2015 date and that the information and abstract of judgment stated the attempted murder occurred on October 15, 2015. Mitchell argues the “events on October 15, 2015 had nothing to do with [Penn’s car] hitting Cortez’s RV, which happened over seven months later, on June 1, 2016.” We do not consider such arguments raised for the first time on reply. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 353; *People v. Jacobs* (2013) 220 Cal.App.4th 67, 83.) In any event, the People did not charge Mitchell with attempted murder in connection with the October 15, 2015 incident. And Mitchell admitted that he was out on bail when he attempted to kill Penn, which the People could only have alleged in connection with the June 1, 2016 incident, and that, at the time he attempted to kill Penn, he had been released from custody in case number MA067286, which was the 2015 case.

C. *The Abstract of Judgment Must Be Corrected*

The People point out that the abstract of judgment should be corrected to reflect that Mitchell pleaded no contest to violating section 273.5, subdivision (f)(1), not section 273.5, subdivision (f)(2). We agree and direct the trial court to make that correction. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [“[c]ourts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts”]; *People v. Amaya* (2015) 238 Cal.App.4th 379, 385 [same].) The abstract of judgment must also be corrected to reflect that the attempted murder to which Mitchell pleaded no contest occurred in 2016, not 2015.

DISPOSITION

The judgment is affirmed. The matter is remanded with directions for the trial court to correct the abstract of judgment to state that Mitchell pleaded no contest to violating section 273.5, subdivision (f)(1), not section 273.5, subdivision (f)(2), and to state Mitchell committed attempted murder in 2016, not 2015. The trial court is also directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.