

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD GUTIERREZ,

Defendant and Appellant.

B293795

Los Angeles County  
Super. Ct. No. SA096750

APPEAL from order of the Superior Court of Los Angeles County, Lauren Weis Birnstein, Judge. Affirmed with directions.

Marta I. Stanton, 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, Noah P. Hill and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant Harold Gutierrez appeals from a victim restitution order entered after he pled guilty to, and was placed on probation for, assaulting a store owner. He argues the court should have limited restitution for medical expenses to the victim's out-of-pocket costs. We conclude the restitution award was proper. Defendant also asks us to stay the restitution fine and strike the court fees because he lacks the ability to pay them. That issue is not properly before us, however, because defendant explicitly limited his appeal to matters arising at the victim restitution hearing. We therefore affirm with directions to correct an error in the September 13, 2018 minute order.

## **BACKGROUND<sup>1</sup>**

On October 26, 2017, defendant and three other men assaulted store owner Wangup Son after Son refused to sell them cigarettes. Defendant spat in Son's face and, along with the other men, repeatedly hit him in the face. Son tripped over a wine rack and fell. He suffered severe injuries, for which he received extensive medical treatment.

By felony complaint dated October 30, 2017, the People alleged defendant had committed one count of assault with force likely to produce great bodily injury (Pen. Code,<sup>2</sup> § 245, subd. (a)(4); count 1) and personally inflicted great bodily injury

---

<sup>1</sup> We base the factual background on the probation report, which in turn was based on the police report.

<sup>2</sup> All undesignated statutory references are to the Penal Code.

on a non-accomplice (§ 12022.7, subd. (a)). Defendant pled not guilty and denied the allegation.

On November 14, 2017, defendant withdrew his not guilty plea, entered a negotiated plea of no contest under *People v. West* (1970) 3 Cal.3d 595 to count one, and admitted the related great-bodily-injury allegation. As relevant here, sentencing was delayed to give defendant an opportunity to complete 60 days of community labor and attend 26 anger management classes. If he completed those requirements, defendant could withdraw his admission to the allegation. Either way, the court would suspend imposition of sentence and grant defendant three years' formal probation, with time served, on the same terms and conditions. Defendant would be required to pay victim restitution in an amount to be determined.

On September 13, 2018, defendant withdrew his admission to the great-bodily-injury allegation. The court dismissed the allegation, suspended imposition of sentence, and granted defendant three years' probation. Among other terms of probation, defendant was ordered to complete 26 anger management classes.<sup>3</sup> He was also ordered to pay a \$300 restitution fine (§ 1202.4, subd. (b)), a \$40 operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 conviction assessment (Gov. Code, § 70373).

The court held a contested victim restitution hearing on October 24, 2018. After reviewing documents provided by Son,<sup>4</sup>

---

<sup>3</sup> The minute order erroneously states that defendant was required to take 52 anger management classes. In section 3 of the discussion, we order the court to correct the minute order.

<sup>4</sup> On September 6, 2019, we notified the parties that we intended to take judicial notice of the documents considered at the restitution

the court ordered defendant to pay \$66,247.85 in victim restitution.

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

## DISCUSSION

Defendant argues the court should have limited victim restitution for medical expenses to Son's out-of-pocket costs and asks us to stay the restitution fine and strike the fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

### 1. The victim restitution award was proper.

Defendant contends the court abused its discretion by ordering defendant to pay restitution to Son for medical expenses paid by Son's insurance company. We disagree.

#### 1.1. Legal Principles and Standard of Review

The California Constitution requires "that restitution must [be] imposed 'in every case ... in which a crime victim suffers a loss[.]'" (*People v. Giordano* (2007) 42 Cal.4th 644, 655; Cal. Const., art. I, § 28, subd. (b)(13)(A)–(C).) And, under section 1202.4, crime victims "have a statutory right to restitution on the full amount of their losses without regard to the full or partial recoupment from other sources (except the state Restitution Fund). [Citations.]' [Citation.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*).)

---

hearing and placed in the superior court file. (Evid. Code, § 459, subd. (c).) As we have not received a response, we now take judicial notice of those documents. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

“At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim’s testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] ‘Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim. [Citations.]’ [Citation.]” (*Millard, supra*, 175 Cal.App.4th at p. 26, alteration in *Millard*.)

We review victim restitution orders for abuse of discretion, mindful that an order resting on a demonstrable legal error constitutes such an abuse. (*People v. Hume* (2011) 196 Cal.App.4th 990, 995.)

**1.2. Payments made by a victim’s medical insurer do not offset restitution owed to the victim.**

Defendant contends the court erred by valuing Son’s medical expenses as the sum of Son’s out-of-pocket medical costs and the amount paid by Anthem, Son’s insurance company. Including the expenses paid by Anthem, defendant argues, gives Son a “windfall.” (*Millard, supra*, 175 Cal.App.4th at p. 27.) Defendant does not acknowledge that the law on this matter is clear; nor does he argue that any of the cases the People cite on the point were wrongly decided.

“[S]ection 1202.4, subdivision (f)(3), provides that ‘[t]o the extent possible, the restitution order ... shall be of a dollar amount that is sufficient to *fully reimburse* the victim ... for every determined economic loss incurred as the result of the defendant’s criminal conduct, including ... [¶] ... [¶] (B) Medical expenses.’ ... To ‘fully reimburse’ the victim for medical expenses means to reimburse him or her for all out-of-pocket expenses

actually paid by the victim or others on the victim's behalf (e.g., the victim's insurance company)." (*Millard, supra*, 175 Cal.App.4th at p. 27.)

To be sure, the "concept of 'reimbursement' of medical expenses generally does not support inclusion of amounts of medical bills in excess of those amounts accepted by medical providers as payment in full." (*Millard, supra*, 175 Cal.App.4th at p. 27.) Here, however, the court awarded restitution based on Son's out-of-pocket costs and the expenses paid by Son's medical insurer, *not* the totals billed by the medical providers.

The court ordered defendant to pay \$66,247.85 in restitution to Son, of which \$1,494.40 was for lost profits and damage to Son's store and \$64,753.45 was for medical expenses. The court arrived at the medical expense total by adding the "amount due to your provider" lines on the insurance claim summaries, which are the total of Anthem's payments and Son's coinsurance payments. The court added \$1,200 to compensate Son for the uncovered medical services from his November 27, 2017 claim, but did *not* award Son the \$8,759.75 in uncovered services from his November 9, 2017 claim. Looked at another way, the restitution award included all \$16,027.73 of Son's out-of-pocket medical expenses and about 85 percent of the payments made by Anthem.

This was not an abuse of discretion.<sup>5</sup>

---

<sup>5</sup> We also note that the court ordered Son to disgorge to Anthem any payments that exceeded his out-of-pocket costs. Neither party argues this order was improper.

**2. Defendant's ability to pay fines and fees is not properly before us.**

Defendant also argues the court erred when it imposed court fees and a restitution fine without first considering his ability to pay under *People v. Dueñas, supra*, 30 Cal.App.5th 1157. That issue is not properly before us.

On September 13, 2018, the court suspended imposition of sentence and placed defendant on three years' probation. At that hearing, defendant was ordered to pay a \$300 restitution fine (§ 1202.4, subd. (b)), a \$40 operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 conviction assessment (Gov. Code, § 70373). The court also ordered him to pay victim restitution in an amount to be determined at a later hearing. The restitution hearing was held on October 24, 2018, and defendant was ordered to pay \$66,247.85.

On October 25, 2018, defendant filed a document entitled, "Notice of Appeal of Judgment (Restitution Order)." The notice of appeal states:

Defendant, Harold Gutierrez, hereby appeals from the judgment rendered on *October 24, 2014* in Department W82 of the Los Angeles County Superior Court. This appeal follows defendant's entry of [a] plea of no contest.

This appeal raises only matters occurring after the entry of the plea which do not challenge the validity of the plea, to wit: *the order of restitution made by the court on October 24, 2018.*

Defendant is indigent and requests the appointment of counsel on appeal.

(Italics added.) (See *People v. Arriaga* (2014) 58 Cal.4th 950, 960 [certificate of probable cause not required when defendant appeals from an “ ‘order made after judgment’ ”].)

Defendant’s notice of appeal specifically states that the appeal is from the October 24, 2018 restitution order. It does not mention the court’s September 13, 2018 order granting probation. Although defendant could have appealed from the earlier order, he chose not to.

Certainly, notices of appeal in criminal cases must be construed liberally. (Cal. Rules of Court, rule 8.304(a)(4).) But here, in twice referencing the October 24, 2018 restitution order, defendant explicitly excluded the earlier September order. (*Ibid.* [notice of appeal in criminal case must specify “the particular judgment or order being appealed”].) Accordingly, on this record, we lack jurisdiction to consider either defendant’s challenge to the fine and fees imposed on September 13, 2018, or his contention that imposition of the fine and fees violated his plea agreement.

In any event, in apparent acknowledgement of defendant’s limited financial resources, the court below ordered the fine and fees stayed until defendant finished paying victim restitution.

**3. The court is directed to correct the minute order of September 13, 2018.**

To the extent a minute order diverges from the proceedings it purports to memorialize, it is presumed to be the product of clerical error. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) “Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), may order



correction of a minute order that does not accurately reflect the oral pronouncement of sentence (*id.* at pp. 185–188).

As discussed, under the plea agreement, defendant was required to complete 26 anger management classes—and the reporter’s transcript reflects that the sentencing court properly ordered him to complete 26 anger management classes. The minute order of September 13, 2018, however, indicates defendant is required to take 52 anger management classes—twice as many. The minute order is wrong and must be corrected. (See *People v. Mitchell*, *supra*, 26 Cal.4th at pp. 185–188 [discussing the importance of correcting inaccurate abstracts of judgment on appeal].)

## **DISPOSITION**

The victim restitution order is affirmed. Upon issuance of the remittitur, the trial court is directed to correct the minute order of September 13, 2018, to reflect that defendant was required to complete only 26 anger management classes, and to send a certified copy of the corrected minute order to the Los Angeles County Probation Department.

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

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.