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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS ADAMS DRISCOLL,

Defendant and Appellant.

B278470

(Los Angeles County
Super. Ct. No. GA095011)

APPEAL from an order of the Superior Court of
Los Angeles County. Jared D. Moses, Judge. Affirmed.

James R. Bostwick, Jr., 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, Paul M. Roadarmel, Jr., and Allison H. Chung,
Deputy Attorneys General, for Plaintiff and Respondent.

In an eight-count information filed by the Los Angeles County District Attorney's Office, defendant and appellant Thomas Adams Driscoll was charged with arson of an inhabited structure or property (Pen. Code, § 451, subd. (b); count 1),¹ disobeying a domestic relations court order (§ 273.6, subd. (a); count 2), vandalism causing damage over \$400 (§ 594, subd. (a); count 3); criminal threats (§ 422, subd. (a); counts 4, 7 & 8), and stalking (§ 646.9, subd. (b); counts 5 & 6).

Defendant pleaded guilty to the eight charged crimes pursuant to a negotiated open plea. As part of the negotiated open plea, defendant agreed to pay restitution ordered by the trial court.

On November 20, 2015, the trial court denied probation and sentenced defendant to a total term of three years in prison. In addition, the parties stipulated that defendant owed \$7,723 in restitution to USAA Insurance. The trial court set a date for a victim restitution hearing, at which defendant waived his personal presence.

At the August 19, 2016, restitution hearing, victim Jeanne K. (Jeanne) testified about her economic losses. The trial court ordered defendant to pay \$68,318.88 in direct victim restitution.

This timely appeal ensued. Defendant contends that the trial court wrongfully ordered restitution for Jeanne's attorney fees (\$32,847.50) and lost wages (\$21,106.80).

We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL BACKGROUND

A. The Charged Crimes

Defendant dated Jeanne for about two years, from January 2012 to July 2014. While traveling together in Italy, defendant ejected Jeanne from their hotel room in the middle of the night and broke up with her. He thereafter engaged in menacing behavior against Jeanne, including violent and threatening e-mails and voicemail messages, that culminated in defendant setting fire to Jeanne's house.

At some point, Jeanne hired an attorney to help her obtain a restraining order against defendant.

Defendant was arrested for the charged crimes. While in jail, he telephoned his wife and encouraged her to call Jeanne to ask her to drop the charges and/or speak to Jeanne's priest so that he could "explain to her [that] what she's doing is vile and will send her to hell." He also spoke with his son, referring to Jeanne as a "c---" who "provoked" him.

B. Victim Restitution Hearing

Before the restitution hearing, Jeanne submitted a written victim restitution request that itemized her claimed losses and included copies of receipts and other verification of losses. As is relevant to his appeal, Jeanne claimed \$21,106.80 in lost wages, from "September 16, 2015 to present," based upon an hourly wage of \$43.26. The written reason for the wage loss was "[p]ost-traumatic stress due to arson, threats, dealing with possibility of [defendant] being released from jail, and not sentenced to serve time." She explained that she had to quit her job as a senior media specialist at City of Hope. In support, she attached two pay stubs from City of Hope.

In addition, Jeanne requested attorney fees in the amount of \$50,065. The attorney fees related to obtaining temporary and permanent restraining orders for Jeanne and her son against defendant (\$36,847.50) and preparing for and attending the preliminary hearing in this case (\$13,217.50). In support, Jeanne attached a billing statement and invoice from Blue Capital Law Firm, as well as e-mails related to her payment of the attorney fees.

At the hearing, Jeanne testified that she hired an attorney to help her obtain a restraining order and help her through this criminal case. She had paid all of the attorney fees listed in the victim restitution request with the exception of \$4,000.

Regarding her lost income, she explained that in July 2015, she had been working 50 hours a week at City of Hope. However, she stopped working on September 16, 2015, after the district attorney informed her that defendant could receive probation in this case. She was emotionally distraught because of the possibility that defendant could be released from custody and not sent to prison. Her emotional distress affected her job performance, caused her to miss work, and was the direct result of defendant's behavior in this case. She arrived at the amount of lost wages requested by multiplying her monthly salary by three; the amount she requested did not include the freelance work that she could not complete during the relevant time, so the amount she was requesting was actually lower than the actual amount of lost wages suffered as a result of defendant's conduct.

After hearing Jeanne's testimony, reviewing the relevant case law, and entertaining oral argument, the trial court issued its order awarding Jeanne restitution. Regarding attorney fees, the trial court noted that the amount she paid to obtain a

restraining order was appropriate, particularly given the “[r]eally [w]retched, God-awful e-mails [and] messages” that defendant sent; “just the cruelty and awfulness of it and taunting about loss and really terrible stuff.” But, the trial court was not convinced that she was entitled to restitution for the fees that she incurred related to preparing and attending the preliminary hearing. Thus, it awarded her \$32,847 in attorney fees.

As for lost wages, the trial court found that Jeanne was “tremendously traumatized” and that the amount that she was requesting was “very reasonable.” It awarded her \$21,106.80.

DISCUSSION

Defendant challenges those portions of the restitution award reimbursing Jeanne attorney fees and lost wages.²

A. Relevant Law

Victim restitution is a “constitutional mandate.” (*People v. Giordano* (2007) 42 Cal.4th 644, 655; Cal. Const., art I, § 28, subd. (b).) This mandate for restitution is implemented through section 1202.4. Subdivision (a)(1) of section 1202.4 provides: “It is the intent of the Legislature 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.” Subdivision (f), in effect in 2014 at the time of defendant’s crimes, provides, in relevant part: “[I]n 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, based on the amount of loss claimed

² Because we reach the merits of defendant’s argument, we offer no opinion on the People’s claim that defendant is estopped from raising this objection on appeal.

by the victim or victims or any other showing to the court.” The court shall order full restitution “unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (§ 1202.4, subd. (b).) Subdivision (f)(3) continues: “To the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, *including, but not limited to*” 11 enumerated categories of expenses, including lost wages (§ 1202.4, subd. (f)(3)(D), italics added) and “[a]ctual and reasonable attorney’s fees and other costs of collection accrued by a private entity on behalf of the victim” (§ 1202.4, subd. (f)(3)(H)).

The People have the burden of establishing the amount of restitution by a preponderance of the evidence. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) Once the People have made a prima facie showing of a victim’s loss, the burden shifts to the defendant to establish that the loss is other than the amount claimed by the victim. (*Ibid.*)

We review the trial court’s restitution order for abuse of discretion. (*People v. Millard, supra*, 175 Cal.App.4th at p. 26.) There is no abuse of discretion as long as the determination of economic loss is reasonable, producing a nonarbitrary result. (*People v. Giordano, supra*, 42 Cal.4th at p. 665.)

B. Analysis

1. *Attorney Fees*

Defendant first argues that section 1202.4, subdivision (f)(3)(H), limits the recovery of attorney fees to sums incurred to collect recoverable economic losses resulting from his criminal conduct; because the requested attorney fees do not fall within

this statutory language, defendant contends that the award of attorney fees was improper. We disagree.

Section 1202.4, subdivision (f)(3), expressly provides that the enumerated list, including subparagraph (H), is a nonexclusive list of examples of reimbursable expenses. “Because the statute uses the language ‘including, but not limited to’ these enumerated losses, a trial court may compensate a victim for any economic loss which is proved to be the direct result of the defendant’s criminal behavior, even if not specifically enumerated in the statute.” (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1046; see also *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1508 [“The only limitation the Legislature placed on victim restitution is that the loss must be an ‘economic loss incurred as a result of the defendant’s criminal conduct’”].) As our Supreme Court has held: “Given the constitutional and legislative intent to provide restitution for all crime victim losses, and the expressly nonexclusive list of categories of loss included in the direct restitution statute, we decline to read into that statute an implied limitation on restitution . . . based on a failure to enumerate that type of loss explicitly.” (*People v. Giordano*, *supra*, 42 Cal.4th at p. 660.)

In light of the broad statutory language that includes a nonexhaustive list of items of restitution and interpretative case law, we conclude that where a victim incurs the economic loss of attorney fees as a result of a defendant’s criminal conduct, the trial court may order restitution for that expense, regardless of whether the attorney fees were incurred as a cost of collection.

Urging reversal, defendant directs us to subdivision (f)(3)(H) of section 1202.4, which identifies “[a]ctual and reasonable attorney’s fees and other costs of collection accrued by

a private entity on behalf of the victim” as a category of restitution. According to defendant, pursuant to *People v. Fulton* (2003) 109 Cal.App.4th 876 (*Fulton*), the trial court was not permitted to award attorney fees not associated with collection costs. We disagree. As defendant correctly notes, the *Fulton* court held that pursuant to section 1202.4, subdivision (f)(3)(H), “actual and reasonable attorney fees incurred by a victim as a result of the defendant’s criminal conduct are recoverable as restitution, but they are limited to reasonable attorney fees incurred to collect restitution otherwise permitted under the statute.” (*Fulton, supra*, at pp. 884–885.) Defendant essentially construes this language as holding that any losses in the form of attorney fees are recoverable only as a cost of collecting restitution of other types of economic losses caused by his criminal conduct. Like the trial court, we reject that interpretation. “[I]t’s just not a reasonable interpretation to say because there’s a subsection (H), you can’t get attorneys fees for any other things. I think that language makes it clear you can.” It follows that we conclude that subparagraph (H) of section 1202.4, subdivision (f)(3), is applicable here.³

In so ruling, we note that defendant’s interpretation of section 1202.4 contravenes the intent of that statute to

³ During oral argument, defendant’s counsel directed us to *Walker v. Appellate Division of Superior Court* (2017) 14 Cal.App.5th 651, 659, wherein the court held: “Reasonable attorney fees incurred by the victim are recoverable as an item of restitution only to the extent that they were incurred in efforts to recover economic damages sustained by the victim as a result of the criminal conduct.” Nothing in this language precludes the restitution award here. Jeanne incurred the economic loss of these attorney fees as a result of defendant’s conduct.

compensate Jeanne for any economic loss incurred as a result of defendant's crime. A rule of statutory construction will not be applied to defeat legislative intent. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387, 1392–1393.) Here, the trial court awarded Jeanne attorney fees incurred to obtain a restraining order against defendant. Although this economic loss is not expressly enumerated in section 1202.4, it was a direct result of defendant's constant threats and harassment. (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1525.)

Finally, defendant argues that Jeanne “may have been able and may still be able to have the court in the civil-restraining-order case order [defendant] to pay her attorney fees.” A civil suit was unnecessary because section 1202.4, subdivision (a)(3)(B), specifically requires the trial court to order “[r]estitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment.” (See also § 1202.4, subd. (i).)

2. *Lost Wages*

Defendant next argues that the restitution award for lost wages “was improper because (1) it was not established that [Jeanne's] wage loss was caused by [defendant's] criminal conduct and (2) because the court did not articulate a rational basis for the award.” We disagree.

“Section 1202.4, subdivision (f) provides for a direct restitution order ‘in every case in which a victim has suffered economic loss as a result of the defendant's conduct.’ The order is to be for an amount ‘sufficient to fully reimburse the victim or victims for every determined economic loss incurred as a result of the defendant's criminal conduct.’ [Citation.] The statute does

not distinguish between economic losses caused by physical injuries and those caused by psychological trauma.” (*People v. Brasure* (2008) 42 Cal.4th 1037, 1074–1075.)

“Wages or profits lost due to injury incurred by the victim,” within the meaning of section 1202.4, subdivision (f)(3)(D), “necessarily arise following the occurrence of the crime, and it is likely that many injured crime victims will lose wages or profits for weeks, months, or possibly years following a restitution hearing.” (*People v. Giordano, supra*, 42 Cal.4th at p. 658.) “Nothing in the language of the Constitution suggests an intent to limit the right to restitution for financial losses occurring within a particular time frame, or restitution to expenses incurred before sentencing.” (*People v. Phelps* (1996) 41 Cal.App.4th 946, 950.) “Loss,” within the meaning of the California Constitution, article I, section 28, subdivision (b), must be construed broadly and “refers to a victim’s injuries, requiring restitution for all expenses necessary to treat those injuries, regardless of when they arise.” (*People v. Phelps, supra*, at p. 950.) “The only qualification is that the loss must be ‘the result of criminal activity.’” (*Ibid.*)

Substantial evidence confirms that Jeanne’s loss of income from September 15, 2015 (the date that she quit her job upon learning that defendant could be released from custody), to November 20, 2015 (the date that defendant was sentenced to state prison), was the direct result of defendant’s criminal activity that was a cause in fact of Jeanne’s psychological trauma that would not have occurred had defendant not terrorized and stalked her. (*People v. Jones* (2010) 187 Cal.App.4th 418, 424–427.)

Jeanne began working as a senior media specialist at City of Hope in July 2015, but stopped working on September 16, 2015, as a result of the emotional distress caused by learning that defendant could be released from custody. As she testified, her emotional distress was a direct result of the trauma she had endured as a result of defendant's behavior in this case.

First, there is ample evidence that on September 15, 2015, the parties discussed the possibility of an open plea that could have resulted in probation; the prosecutor relayed that information to Jeanne on that date; and Jeanne suffered psychological trauma upon learning that defendant could have been released from custody, causing her to fear for her safety, to be unable to perform her work, and to quit her job.

Moreover, while in custody, defendant encouraged his wife to harass Jeanne and "take that bitch down." He even asked his wife to speak to Jeanne's priest so that he could explain to her that what she was doing to him was vile and would send her to hell. In a jail conversation with his son, defendant referred to Jeanne as a "c---" and said that she had provoked his conduct. Defendant subsequently pleaded guilty to the charged crimes.

This evidence supports the trial court's finding that defendant's conduct was a proximate cause for Jeanne's psychological trauma that resulted in lost wages. (*People v. Millard, supra*, 175 Cal.App.4th at pp. 29–30.)

Defendant further argues that the trial court failed to make a clear statement of the method it employed in calculating Jeanne's wage loss. Because defendant did not object to the amount of restitution ordered, this claim is forfeited on appeal. (*People v. Anderson* (2010) 50 Cal.4th 19, 26, fn. 6.)

Setting aside this procedural obstacle, defendant's argument lacks merit. The trial court did not abuse its discretion in awarding restitution because there is a factual and rational basis for the amount that was awarded. (*People v. Millard*, *supra*, 175 Cal.App.4th at p. 26.) Jeanne testified that, beginning in July 2015, she worked 50 hours per week at City of Hope. As evidenced by her pay stubs, Jeanne's hourly wage was \$43.26. Assuming she worked 50 hours a week, she would have earned \$432.60 in one day (\$43.26 multiplied by 50 is \$2,163; \$2,163 divided by 5 is \$432.60). Between September 15, 2015, and November 20, 2015, there are 49 business days. Thus, Jeanne would have earned \$21,197.40 (\$432.60 multiplied by 49).⁴

It follows that her request for \$21,106.80, which is less than what she would have earned, was more than appropriate, and the trial court's award of that amount was not an abuse of discretion.

⁴ Notably, this amount does not take into account monies that Jeanne could have earned from freelance work that she could not complete. And, although it could have, the trial court did not impose 10 percent interest as of the date of lost wages. (*People v. Wickham* (2013) 222 Cal.App.4th 232, 238; § 1202.4, subd. (f)(3)(G).)

DISPOSITION

The order is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT