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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DMITRY KOGAN,

Defendant and Appellant.

2d Crim. No. B282507
(Super. Ct. No. 2014003101)
(Ventura County)

A jury convicted Dmitry Kogan of arson of property of another. (Pen. Code, § 451, subd. (d).)¹ The trial court placed Kogan on summary probation for 36 months and included a term that he serve 360 days in county jail. We affirmed Kogan's conviction. (*People v. Kogan* (July 25, 2017, B277702) [nonpub. opn.])

The trial court required Kogan to pay victim restitution as a condition of probation. Following a contested

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

restitution hearing, the court ordered Kogan to pay the victim \$3,500. On appeal, Kogan contends the court abused its discretion by relying on the victim's exaggerated and unreasonable claims of damage. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The victim, Kevin Reid, is a self-employed handyman. He owns the 1986 Ford Econoline E350 van that was damaged by Kogan's commission of the arson offense. Kogan climbed onto a roof of a building and splashed a flammable liquid on the van, before setting it on fire. At the restitution hearing, Reid testified that he had obtained a \$7,333.76 estimate for the van's repair from the Painting Place. He further testified that the repair would take two weeks and that he would need to rent a van during that period to continue to work. The estimated cost of the rental was \$1,376.48.

Reid had customized the van, and if he "had to buy one tomorrow, it would be about \$60,000." The customization included interior carpeting, a security system, an electrical system for plugging in power tools, and two batteries. The van had been repainted in 1994, and its mileage was about 600,000.

Reid testified that although the arson fire started on the van's roof, the entire van needed to be repainted because the accelerant went down the sides of the van and left marks that etched into the primer. During the preliminary hearing, Reid stated that repairing "[j]ust the top of [the van] alone is going to run about \$800 to \$900. That doesn't include the sides that were etched as well, so those need to be repainted. Actually, the whole van probably needs to be repainted at this point."²

²At the close of the restitution hearing, the trial court took "judicial notice of the preliminary hearing testimony . . . for

Reid also sought compensation for the 60 hours that he spent preparing for the criminal case. Of those 60 hours, Reid spent about 25 hours appearing in court (including travel time), and another 35 hours gathering documents and information. He requested \$65 per hour because that is the rate he charges his customers. Reid's annual income varies between \$45,000 and \$60,000.

Defense counsel challenged the 60 hours of lost work claimed by Reid. Counsel argued that she had sent two subpoenas requesting information regarding specific work projects or jobs that Reid had lost because he was required to appear in court, and that Reid had provided none of the requested information.

Defense counsel also claimed that the \$7,333.76 estimate to repair the van was unreasonable. Although the defense did not object to the repainting of the van's roof, counsel argued that Reid had failed to present credible evidence that the van's sides were damaged.

The trial court took the matter under submission. The court noted that, regardless of the specific jobs that Reid was prepared to work at the time he was required to appear in court, the court would consider what Reid's "lost opportunity would be if he could have had jobs during those times and didn't and whether \$65 an hour is an appropriate measure of that." The court also observed that the estimated time of 20 to 25 hours that Reid spent as a witness, and the rate of \$65 per hour, appeared to

whatever use it may be." We similarly take judicial notice of the preliminary hearing transcript, which was included in the record in the prior appeal (Case No. B277702). (See Evid. Code, §§ 452, subd. (d), 459.)

be reasonable if the court came to the “conclusion that he lost opportunity during that time to make that money since it was dead in the middle of the day.” The court noted that the analysis regarding the other time that Reid spent gathering documents and information “is a little more problematic.”

The trial court also needed additional time to consider the restitution for damage to the van. The court stated that, even with a 30-year-old van with over 600,000 miles and a 20-year-old paint job, “it appears that [the van] has been maintained very well over the years.” The court explained that it needed to decide “whether a work van requires a full paint job as opposed to painting just the panels that were affected,” and that it would consider the trial testimony it recalled concerning the “extent and location of damage” to the van.

In a subsequent minute order, the trial court modified probation by ordering Kogan “to pay victim restitution of \$3,500.00 to Kevin Reid.” The court did not state the rationale for its ruling.

DISCUSSION

Standard of Review

Section 1203.1 “gives trial courts broad discretion to impose probation conditions to foster rehabilitation and to protect public safety. ([*People v.*] *Carbajal* [(1995)] 10 Cal.4th [1114,] 1120 [(*Carbajal*)).] The court may impose upon probationers ‘reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer’

(§ 1203.1, subd. (j).)” (*People v. Anderson* (2010) 50 Cal.4th 19, 26 (*Anderson*).)

“We determine whether the restitution order, as a condition of probation, is arbitrary or capricious or otherwise exceeds the bounds of reason under the circumstances. (*People v. Olguin* [(2008)] 45 Cal.4th [375,] 384; *Carbajal, supra*, 10 Cal.4th at p. 1121.) ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality”’ (*People v. Lent* [(1975)] 15 Cal.3d [481,] 486.) Probation is ‘an act of clemency and grace’ (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445), not a matter of right (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459 [disapproved on another ground as stated in *People v. Martinez* (2017) 2 Cal.5th 1093, 1099-1104]). ‘Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria.’ (*Id.* at p. 460.) If the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation. ([*Olguin*], at p. 379.)” (*Anderson, supra*, 50 Cal.4th at p. 32.)

Analysis

Kogan contends the trial court abused its discretion because Reid’s “exaggerated and biased claims” were insufficiently credible to support the \$3,500 restitution order. We disagree.

First and foremost, the probation condition making Kogan liable for the economic loss resulting from his crime fulfills the three *Lent* criteria. (*People v. Lent, supra*, 15 Cal.3d at

p. 486.) The restitution order is related to the arson crime of which Kogan was convicted, and it relates to conduct that is criminal in nature. (*Ibid.*) The order also will hopefully serve the salutary purpose of deterring Kogan from committing any future crimes of this type. (*Ibid.*)

Second, “[t]here is no requirement the restitution order [in a probation case] 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.” (*Anderson, supra*, 50 Cal.4th at p. 27.) “A trial court’s power to order restitution in probation cases is thus broader than its power to order direct victim restitution under section 1202.4 in cases in which the defendant receives a nonprobationary sentence.” (*People v. Martinez, supra*, 2 Cal.5th at p. 1101.)

Third, Kogan has not demonstrated that the trial court exceeded its broad discretion in ordering Kogan to pay Reid \$3,500. Reid submitted proof that the estimated cost to paint the entire van would be \$7,333.76, and that the cost to rent a van while his is being repaired would be \$1,376.48. He also submitted proof that the damage was not just to the van’s roof. He testified that the accelerant went down the sides of the van and left marks that etched into the primer. The court awarded Reid less than half the amount requested for the van repair and rental. It is reasonable to assume, therefore, that the court substantially reduced the requested amount to allow for only the roof and the damaged portions to be repaired. Indeed, the court stated at the hearing that it was going to decide “whether a work van requires a full paint job as opposed to painting just the panels that were affected.”

Finally, the restitution order may have compensated Reid, at least in part, for the wages he lost due to the time he spent appearing as a witness in Kogan's case. (Cf. § 1202.4, subd. (f)(3)(E) [under section 1202.4, a restitution order may include lost wages or profits "due to time spent as a witness or in assisting the police or prosecution"].) The trial court noted that the 20 to 25 hours that Reid spent as a witness, and his labor rate of \$65 per hour, appeared reasonable. Kogan proffered no evidence to rebut those cited amounts. Nor has he persuaded us that the restitution order was arbitrary or capricious under the circumstances. (*Anderson, supra*, 50 Cal.4th at p. 32.)

DISPOSITION

The restitution order is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

David R. Worley, Judge
Superior Court County of Ventura

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