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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID NIEUWENDAAL,

Defendant and Appellant.

B277345

(Los Angeles County
Super. Ct. No. PA082881)

APPEAL from an order of the Superior Court of
Los Angeles County, Daniel B. Feldstern, Judge. Affirmed.

Jonathan P. Milberg, 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, Victoria B. Wilson and Theresa A. Patterson,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Nieuwendaal pled no contest to stalking victim S.B.,¹ violating a protective order S.B. obtained against him, and burning down the home S.B. rented. The court sentenced him to an agreed term of five years, four months, and ordered him to pay approximately \$120,000 in restitution to S.B. and the owner of the rental home.

This appeal concerns only a \$35,000 portion of the restitution award to S.B. for her lost income. Defendant contends S.B. should not have been awarded any restitution for lost income because she failed to prove that his conduct proximately caused her loss. In the alternative, he argues the trial court erroneously calculated S.B.'s lost income using gross rather than net numbers. We find no abuse of discretion and affirm the award.

BACKGROUND

Defendant stalked S.B. between December 21, 2014 and January 23, 2015. In doing so, he violated a protective order she obtained against him. On January 23, 2015, he set fire to the home she lived in.

Defendant was charged by amended information with two counts of arson of property (Pen. Code, § 451, subd. (d)),² one count of felony stalking (§ 646.9, subd. (a)), and one count of misdemeanor disobedience of a protective order (§ 273.6, subd. (a)). Pursuant to a plea agreement, defendant pled no contest to the charges. The court sentenced defendant to the term prescribed under his plea agreement, five years, four months, and issued a 10-year protective order for S.B. pursuant to section

¹ We refer to the victims by their initials to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

² All further statutory references are to the Penal Code unless otherwise indicated.

646.9, subdivision (k). The plea agreement also provided that defendant would be required to make full restitution pursuant to section 1202.4, subsection (f). The parties were unable to agree on an amount, however, so the court set the matter for a hearing.

At the August 2016 restitution hearing, the prosecution called two witnesses: S.B. and R.K., S.B.'s former landlord. R.K. testified that her corporation owned the home defendant burned down. R.K. testified that she rented the home to S.B. for \$2,300 per month. R.K. had been unable to rent the house since the January 23, 2015 fire, however, because it was "ruined." R.K. requested restitution for the rental income she had lost over the previous 18 months, a total of \$41,400 (\$2,300 per month x 18 months). The court ordered defendant to pay R.K. the full amount she requested.³

S.B. also testified about her losses. She testified that she stayed at a hotel for approximately two weeks immediately following the fire. She testified that she spent \$1,337.18 on those accommodations, and introduced a corroborating hotel invoice as an exhibit. After checking out of the hotel, S.B. moved into an R.V. owned by a friend. The friend did not charge her rent but required her to pay for insurance and maintenance expenses. S.B. testified that she spent a total of \$4,790.32 in connection with the R.V., and introduced four exhibits supporting that

³ R.K. also requested approximately \$30,000 for repair costs that were not covered by her insurance. She did not know exactly how much she spent and did not have any documentation with her, so the court postponed an order for that amount "until the parties have had a chance to meet and confer and share documents." It is not clear from the record when such conference was held or what the ultimate restitution order for R.K. was.

testimony.

S.B. testified that all of her personal belongings were destroyed in the fire. She created a two-page inventory of the items and their estimated replacement value that was introduced into evidence. She testified that she factored in depreciation and “called around a lot of places and did an average” rather than using high or low prices when estimating the items’ value. In total, she estimated that the furniture, housewares, clothing, electronics, and other miscellaneous items destroyed in the fire were worth \$37,660.

The final loss S.B. testified to was her lost income. S.B. worked as a real estate appraiser. She testified she was unable to work during the period of December 2014 and January 2015 that preceded the fire, “because I was being stalked nonstop.” After the January 23 fire, she was unable to work because she could not get internet access in the R.V. She explained that she relied on the internet to perform all facets of her job, including communicating with lenders, conducting research, evaluating comps, and writing reports. She estimated that, from December 2014 through May 2015, the only period she computed, she lost \$52,015 in “potential jobs.” She therefore requested that amount in restitution from defendant.

S.B. testified that she based her estimate of \$52,015 in lost income on “[e]very e-mail I received while I was unable to work.” S.B. explained that lenders offered her work via email; “you respond, yes, I’m going to accept this job.” Each job paid between \$275 and \$450, and she typically accepted 15 to 20 jobs per month. Between December 2014 and May 2015, she could not accept any jobs because she was “unable to complete the report.” She was able to check and catalogue the emails using the

internet at her mother's house, but could not stay there using her mother's internet "[f]or hours and hours on end." S.B. did not introduce any of the emailed job offers into evidence, though she stated, "I have every document."

She did, however, introduce one page of Schedule C from her 2013 federal income tax return, entitled "Profit or Loss from Business." That document reported that S.B. earned \$54,125 in "gross profit" from her business, but, after expenses, retained only \$11,873, or approximately 22 percent, in "net profit." S.B. testified that she did not use the tax return to calculate her estimated income loss. She explained, "I was told I needed some kind of legal document to show past income, so I brought that." The court asked S.B. how her gross income in 2014 compared to that stated on the 2013 tax return, and she estimated that it was "23, 24,000 maybe." She explained that was "substantially" less in 2014 than what she normally made, but "[t]he interest rates changed, so there was less work; and that's when things begun [sic] to happen." S.B. testified "there was a lot more work" in 2015 than in 2014.

The court ordered defendant to pay the full amounts S.B. requested for the hotel (\$1,337.18), R.V. expenses (\$4,790.32), and lost property (\$37,660), for a total of \$43,787.50.

As for S.B.'s request for lost wages, the court made the following remarks: "[T]he document that she provided in support of this was, I'd just call it Life Before Arson. And that was her 2013 income tax return, which her gross receipts in her business as a real estate appraiser was [sic] \$54,125. So that's documented. She is claiming \$52,015 based upon her assessment of lost earnings due to her inability to conduct her business online. She explained that she is required - - she does appraisals,

so that requires her to do a lot of research and there's a great deal of communication that's required in order for her to simply do her job." "I believe her testimony that she stopped counting after the six months. In other words, she put together a six-month schedule and analysis; but I believe there were continued losses after that that just weren't [¶] . . . [¶] established or claimed here. I suppose it could go a lot higher. Could have."

After hearing argument from defense counsel that S.B. should only be entitled to \$6,000, the approximate net income her 2013 tax return predicted for her lost six months of work, the court resumed its remarks. "Well, she did indicate that the following year [2014] there was a downturn because of the market and other forces that reduced her income. That wasn't established in any finite way, but - - so some of her lost earnings were due to market forces as well. But putting together the entire testimony with regard to this, . . . it is reasonable that in that type of profession you are relying on internet services to constantly speak with and communicate with lenders and get comps, which she talked about. That's part and parcel of anybody who is making appraisals of real estate; and I can see how that disruption in her life, having to lose that service, can impact that type of job, that type of employment, because it's very online-dependent. And what the amount is, I don't know that I'm comfortable awarding the 52,000; but I know that there's a loss there. And as I say, it could be more; but I'm trying my best to focus on the numbers that she provided."

The prosecutor interjected, "And, your honor, she did testify that when she was working consistently, she was making between \$275 to \$450 per job. I averaged those two numbers, which comes to \$362. And then she also did testify that she

would accept between 15 and 20 a month. So if you use \$362 and just use the lower number of 15, that comes to approximately \$5,437 a month. And then it's been 16 months so if you times that by 16, the number is 87,000. So the number that she gave is a lot lower, which I think makes her also credible. She's not coming in here asking for, you know, really high, inflated numbers. It's actually much lower than. [sic] But I also know that this is potential and we don't have a definitive document."

The court made the following ruling: "In situations like this I'm usually going to err in some level of caution and be a little more conservative. So, yes, she did testify that she was receiving about 15 or 20 jobs per month. You take the lower number of 15 and you take the mid range of what each job would cost, and you come up with what you said, which is about \$5,400 a month. She's claiming for six months, at least that's the information that was provided, so that's about 32,000. And I believe that if I set the number at \$35,000 with the kind of information that I'm working with today, . . . that would be my order. She may feel that that's low, but she came in to make this claim and this is what she provided." The court thus set the restitution for S.B.'s lost wages at \$35,000, for a total due her of \$78,822.50.⁴ With the restitution to R.K., the total amount of defendant's restitution order was \$120,222.50.

Defendant timely appealed.

DISCUSSION

I. Legal Principles

The California Constitution provides crime victims with a

⁴ The numbers actually add up to \$78,787.50. (\$1,337.18 + \$4,790.32 + \$37,660 + \$35,000 = \$78,787.50.) Defendant does not contest the \$35 discrepancy.

“right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28(b)(13)(A). Section 1202.4 likewise states, “[i]t is the intent of the Legislature that a victim of a 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.” (§ 1202.4, subd. (a)(1).) Section 1202.4, subdivision (f) implements the right to restitution. It provides, in relevant part, 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, based on the amount of loss claimed by the victim or victims or any other showing to the court.” Subdivision (f)(3) further states that the restitution order “shall identify each victim and each loss to which it pertains, and 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 . . . [¶] . . . [¶] [w]ages or profits lost due to injury incurred by the victim” (§ 1202.4, subd. (f)(3)(D).)

A victim’s right to restitution “is to be broadly and liberally construed.” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 500.) Accordingly, trial courts have expansive discretion as to the type of information and calculation methods they may use in determining restitution. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664; *People v. Phu* (2009) 179 Cal.App.4th 280, 283-284.) “Section 1202.4 does not, by its terms, require any particular kind of proof. . . . Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of

losses claimed by the victim. [Citation.] The defendant has the burden of rebutting the victim's statement of losses, and to do so, may submit evidence to prove the amount claimed exceeds the repair or replacement cost of damaged or stolen property." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) The prosecution may make its prima facie case that defendant's conduct was a substantial factor in a victim's loss with "a victim's testimony on, or other claim or statement of, the amount of his or her economic loss." (*People v. Millard* (2009) 175 Cal.App.4th 7, 26; *People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1321-1322 [substantial factor].) The standard of proof is preponderance of the evidence. (*People v. Gemelli, supra*, 161 Cal.App.4th at p. 1543.)

To calculate the victim's loss, trial courts simply "must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*People v. Giordano, supra*, 42 Cal.4th at pp. 663-664.) Our review is for abuse of discretion. (*Id.* at p. 663.) No abuse of discretion will be found where there is a factual and rational basis for the amount of restitution ordered. (*People v. Phu, supra*, 179 Cal.App.4th at p. 284.)

II. Analysis

Defendant first contends S.B. should not have been awarded any restitution for her lost income "since she never proved by a preponderance of the evidence that [his] crimes were the proximate cause of her loss." He argues that S.B.

“acknowledged that she was working and earning considerably less in 2014 than she had previously due to a downturn in the real estate market,” which was before he “began stalking her and before he set fire to the house she was renting on January 23, 2015.” Defendant further claims that S.B.’s “bald assertion that, at precisely the same time [he] committed these crimes, the market dramatically improved was unsupported by any evidence whatsoever,” and that his crimes “had nothing to do with any unforeseeable upswing in the real estate market or [S.B.]’s inability to take advantage of it.” He contends S.B. should have accessed the internet at her mother’s house or at “venues such as cafes and libraries,” or used the \$2,300 per month she was saving by not renting her previous residence “to rent a home or office with high-speed internet access.” In short, he posits that “the real reason [S.B.] was ‘unable’ to work” in the aftermath of his stalking and arson “was because she did not want to.” We reject these contentions.⁵

S.B. testified under oath that she was unable to work from late December 2014 until the fire, “because I was being stalked nonstop.” Then, after her house burned down, she was unable to work at least through May 2015 because the borrowed R.V. in

⁵ We also reject defendant’s suggestion, made in reply, that the trial court could not properly consider the effect of psychological trauma on S.B.’s ability to work, which she provided to the court in a victim impact statement during defendant’s sentencing. There is no indication the trial court relied on that, but we would not find any such reliance improper. Our Supreme Court squarely has held that section 1202.4, subdivision (f) “does not distinguish between economic losses caused by physical injuries and those caused by psychological trauma.” (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

which she was living lacked the reliable high-speed internet access she needed to communicate with lenders, run comps, and prepare appraisal reports. This testimony, which the trial court credited, was sufficient to make the prima facie case that defendant's conduct was a substantial factor behind her loss of income. (See *People v. Scott* (1978) 21 Cal.3d 284, 296 ["The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable."].) Indeed, S.B. attributed her loss of income entirely to defendant's actions. The burden then shifted to defendant to disprove S.B.'s losses and theory of causation. He did not introduce any evidence to support his current claim that S.B. could have worked at alternative locations or found and moved into a new home or office. Defendant likewise did not probe S.B.'s testimony about conditions in the real estate market—which the trial court also credited—nor did he introduce evidence tending to refute her claims that "there was a lot more work" in the early months of 2015.

There is no evidence in the record supporting defendant's claim that S.B. simply "did not want to" work after the fire. To the contrary, she testified that she visited her mother's house to review the job offers she continued to receive. Her testimony regarding market conditions also indicates that she remained connected to the industry, an unusual trait of someone unwilling to work. The trial court did not abuse its discretion in awarding S.B. restitution for lost income.

It also did not abuse its discretion in calculating the amount of restitution S.B. was due for her lost income. Defendant claims that the court erred by using S.B.'s "potential

gross income rather than her potential net profit.” In his view, “her net lost profit during this six-month period was less than \$6,000,” or at most “less than \$9000.”⁶ He acknowledges that the only case he cites in connection with this argument, *People v. Thygesen* (1999) 69 Cal.App.4th 988, 994 (*Thygesen*), held that “the term ‘profit,’ in the case of a commercial loss, is reasonably interpreted as meaning ‘gross profit.’” Nevertheless, defendant contends, *Thygesen* is factually distinguishable and S.B.’s “actual loss was necessarily her lost net profit.” While we agree that *Thygesen* is factually distinguishable, we see no basis for distinguishing its legal holding.

In *Thygesen*, the defendant absconded with a cement mixer he rented from the victim, an equipment rental business. (*Thygesen, supra*, 69 Cal.App.4th at pp. 990-991.) The manager of the business testified that the replacement cost of the mixer was \$3,331, and that the business lost out on 13 months of rental income of \$294, or \$3,822, due to the defendant’s theft of the mixer. The trial court gave the manager the choice between accepting the replacement cost of the mixer or the lost rental income; he chose the larger rental income loss. (*Id.* at p. 991.) The defendant argued that the store should not receive the full amount it charged customers to rent the mixer, but only “the net profit the victim would have realized for the rental of the mixer.”

⁶ Defendant apparently derives these figures by using the net (\$11,873) and gross (\$54,125) income reported in S.B.’s 2013 tax return. The \$6,000 estimate represents approximately six months’ worth of S.B.’s net income, as reported in the 2013 tax return. The \$9,000 estimate apparently represents the ratio of S.B.’s net to gross income in 2013 (roughly 0.22) multiplied by the \$35,000 gross income the trial court found she forwent by declining appraisal jobs between December 2014 and May 2015.

(*Id.* at p. 994.) The appellate court rejected this argument as “counter to the legislative intent to make a victim whole for every economic loss.” (*Ibid.*) It explained, “The price set on the rental of all of [the store’s] equipment necessarily provides for overhead, depreciation, and profit. Overhead is an ongoing factor in any business. The loss of use of a rental item would possibly have a negative impact on [the store’s] overall financial condition and ability to meet its monthly overhead.” (*Ibid.*) The court accordingly held that “the term ‘profit,’ in the case of a commercial loss, is reasonably interpreted as meaning ‘gross profit.’” (*Ibid.*)

Here, rather than an equipment rental business, we have a contract worker whose “product” is real estate appraisals. Yet the analysis of a commercial loss is the same: S.B. is providing her services as her business, the going rate for appraisals is her income, and her business expenses are equivalent to the overhead costs faced by a corporation. Just as the business in *Thygesen* was entitled to be compensated for the entire “negative impact” the defendant’s conduct had on its “ability to meet its monthly overhead,” S.B. was entitled to be compensated for the entire amount of money she would have earned had she been able to work in the wake of defendant’s crimes.

We find further parallels in cases awarding lost wages to individuals who are not self-employed. Defendant has not pointed to, nor has our research uncovered, any case restricting a traditionally employed victim’s restitution award to his or her take-home pay rather than the gross wages he or she would have earned absent the crime. Similarly, in civil cases, injured parties may recover gross earnings rather than the earnings they net after taxes. (See, e.g., *Rodriguez v. McDonnell Douglas Corp.*

(1978) 87 Cal.App.3d 626, 665-668, disapproved on another ground by *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499.) The court's order requiring defendant to compensate S.B. for the gross amount she would have earned had she been able to work was a rational one, not an abuse of its discretion.

DISPOSITION

The restitution order is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.