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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OUSSAMA AL JAMAL, Defendant and Appellant.	B269707 (Los Angeles County Super. Ct. No. BA417280)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

The sole issue in this appeal is the amount of restitution (Pen. Code, § 1202.4[1]) owed by appellant Oussama Al Jamal to the Franchise Tax Board (FTB), following his negotiated pleas of no contest to failure to file a return (Rev. & Tax Code, § 19706; count 2), money laundering (§ 186.10, subd. (a); count 3), and identity theft (§ 530.5, subd. (a); count 34) with an admission the loss as to counts 2 and 3 exceeded $500,000 (§ 186.11, subd. (a)(2)).

The trial court ordered that appellant pay restitution to the FTB in the amount of $1,255,673, based on the court's calculation of unpaid state taxes on appellant's income from his unlicensed check-cashing business and money laundering activities using shell companies and sham bank accounts. Appellant contends the restitution award was inflated because the court considered as taxable income the full amount of checks that were deposited and processed through six sham bank accounts; he asserts he retained only a small percentage of each deposit as a check cashing fee and returned the remaining cash to a third party, and thus only the check cashing fees should be considered taxable income. Finding no abuse of discretion by the trial court in its calculation of the restitution award, we affirm.

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

FACTUAL AND PROCEDURAL SUMMARY

1. Preliminary Proceedings.

The facts of the offenses underlying counts 2, 3, and 34, to which appellant pled no contest, are not pertinent to this appeal.[2] On July 17, 2015, during the taking of the pleas to those counts, appellant agreed to pay restitution and provided a *Harvey*[3] waiver permitting restitution to include losses attributable to the remaining 77 counts, which were dismissed pursuant to the plea agreement. The parties agreed that, instead of stipulated restitution, a restitution hearing would be held. The court sentenced appellant to prison for a total of nine years four months, suspended execution of sentence, and placed him on formal probation for 10 years on the condition, inter alia, that he make restitution to the FTB in an amount to be determined at the restitution hearing.

2. Restitution Hearing.

a. Prosecution Evidence.

The prosecution submitted declarations and a table reflecting total restitution due, which were admitted into evidence without objection at the restitution hearing.

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[2] It is sufficient to note count 2 alleged appellant failed to file a return on or about April 15, 2010. Counts 3 and 34 alleged he committed money laundering and identity theft, respectively, between July 1, 2008, and July 31, 2008.

[3] (*People v. Harvey* (1979) 25 Cal.3d 754, 758.)

1. Gunson declaration.

Lisa Gunson, a special agent in the FTB's criminal investigation bureau, was assigned to investigate appellant's tax crimes. Based on Gunson's investigation, she determined that appellant underreported his income for tax years 2008 and 2009.

In 2008, appellant filed a false California Resident Income Tax Return (return) and, in 2009, he failed to file a return. The Los Angeles County District Attorney executed search warrants and Gunson reviewed evidence from appellant's home and several banks. From her review of the evidence, Gunson determined appellant was the sole authorized signer on six bank accounts and had sole control over those accounts and the monies deposited into them.

Three of the six accounts were with JP Morgan Chase Bank, and the name on each was appellant's name, doing business as a named company. The named companies were Los Angeles G.S. Distribution (GSD), Lord T. Whole Sale (Lord), and American Health Supplies (AHS), respectively. Three accounts were with Wells Fargo Bank and, again, the name on each was appellant's name, doing business as a named company. The named companies were GSD, AHS, and E.E. Adam & Johns Distribution (Johns). (We refer to GSD, Lord, AHS, and Johns as the "four businesses," and the six bank accounts associated with these businesses as the "six accounts.")

A seventh account was held with Wilshire State Bank under the account name VM Check Cashing (check cashing account). Appellant and Kinan Al Jamal were authorized signers on that account. Gunson explained that appellant used his check cashing business to facilitate the laundering of money through the six accounts, "converting the funds into cash [and] creating the ability for him to benefit from the cash in any way he chose." As to the six accounts, Gunson declared: "These accounts were opened utilizing name[s] of wholesale companies, distributors, and supply companies. This was done to give the appearance of legitimate business deposits. In the case of a legitimate business these deposits would be taxable. In this case the business was money laundering. The fact that [appellant] received the deposits makes them taxable. This is because [appellant] derived a benefit from the deposits. He received them, moved them through his controlled accounts, turned them into . . . cash, and made the money (cash) untraceable. The untraceability was the intent and benefit."

Gunson explained the method by which the FTB calculated appellant's tax liability associated with deposits to the six accounts and the check cashing account. "In proving income, the bank deposits method was used for taxable years 2008 and 2009. Each deposit was analyzed for taxable business gross receipts. Transfers and nontaxable income items were eliminated from the total deposits to arrive at taxable deposits." For the six accounts, the taxable income was calculated as "the totality of the deposits made less any transfers or nontaxable items."

By contrast, for the check cashing account, an extra step was taken that reduced the tax liability associated with deposits to that account. For that account, teller balance sheets, which were "essentially the daily books of the check cashing business," reflected check cashing fees charged by appellant. Gunson used this information to compute an average percentage representing the check cashing fees charged by appellant on the deposits to the check cashing account. Gunson instructed FTB auditor Linda Martinez to apply the rates of 1.7 percent and 1.55 percent for 2008 and 2009, respectively, to the total deposits in this account, and "[o]nly this percentage of the deposits was taxed for the check cashing business," as opposed to taxing the full deposit amounts.

2. Martinez declaration.

Linda Martinez, a forensic auditor in the FTB's criminal investigation bureau, computed appellant's tax liability. She analyzed the bank records of the six accounts as well as the check cashing account, including all outgoing checks and withdrawals. Applying the "bank deposits method" as to the six accounts, and then applying the percentage rate of check cashing fees to the deposits for the check cashing account, she determined that appellant had unreported taxable income of over $12.2 million, resulting in a $1.25 million tax liability for the tax years 2008 and 2009.

b. Defense Evidence -- Appellant's Testimony.

Appellant, who operated a check cashing business in Los Angeles, met customer Svyatoslav Sherman in 2008. Appellant cashed checks for Sherman through appellant's check cashing business, including checks made out to various individuals and businesses. In particular, Sherman gave appellant various

checks made out to the four fictitious businesses. Appellant created bank accounts for each of the four businesses and named the accounts GSD, Lord, AHS, and Johns to match the business names on the checks from Sherman. Appellant had checks printed for the accounts but the addresses on the checks were fake. None of the four businesses sold products, offered services, or had employees. The checks appellant deposited into the four businesses' accounts came solely from Sherman.

When Sherman gave appellant a check written to one of the four businesses, appellant would immediately give cash back to Sherman, subtracting a fee of 1.5 percent of the check amount. Appellant would deposit the check into the corresponding business's account. Subsequently he would transfer the funds from the business account to his check cashing account by writing small checks from the business account to VM Check Cashing. The small checks were "written in" "random names."

Appellant's counsel asked appellant why he had to deposit checks from Sherman into one of the six accounts rather than deposit them directly into the check cashing account. Appellant indicated he used to deposit them directly until Wilshire State Bank told him it would no longer accept large checks. To get around this problem, he opened up the separate accounts for the four businesses.

During cross-examination, appellant reiterated it was his idea to set up the "shell" companies in order to cash Sherman's checks. Appellant used random names of individuals to transfer checks "between these companies [he] created." The total amount of checks appellant cashed for Sherman in 2008 and 2009 could have been $12 million.

c. Prosecution Rebuttal.

1. Gunson Rebuttal Testimony.

In rebuttal, Gunson testified that "[m]ost of the deposits that were made to these [six] accounts were cashier's checks, which essentially is already cash." She testified, "The checks weren't cashed for Mr. Sherman, based on what the evidence tells me. The money was withdrawn through identity theft checks and run through [appellant's] check cashing business. However, the actual checks themselves were not cashed, because they were just cashier's checks deposited into the bank accounts." Nothing in appellant's testimony changed Gunson's opinion, as reflected in her declaration, regarding appellant's taxable income.

During cross-examination, Gunson testified a person could cash a cashier's check at a check cashing business, and the business would withhold its fee. However, she suggested it made no sense for a person to withdraw cash from the person's bank account, convert the cash into a cashier's check, then cash the cashier's check when the person had cash in the first place. She testified, "You're only doing that to obtain another benefit."[4] Gunson asked rhetorically why a person would do that, and the court commented, "Well, because we've already established we have a laundering operation going on." Gunson stated she thought that "that's the benefit being derived, and that's why it's taxable at the point of deposit."[5]

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[4] No evidence was introduced regarding the source of the funds initially converted into the cashier's checks.

[5] Gunson testified Sherman had been indicted in federal court but, as far as she knew, he had not been punished in a California court for involvement in money laundering activities with appellant.

2. Gunson Supplemental Declaration.

On January 8, 2016, the prosecutor filed a supplemental restitution brief with another declaration by Gunson. In addition to noting that appellant made large cash withdrawals from the six accounts that were untraceable, she declared that appellant paid bills and expenses from those six accounts, including making credit card payments. Further, Gunson reported that, contrary to appellant's testimony, miscellaneous deposits were made to the six accounts from sources *other* than checks made out to the four businesses, including other individuals and a $117,000 deposit from an escrow company to appellant. In addition, appellant transferred funds between these six accounts and others controlled by appellant.

Gunson declared, "The expense payments and miscellaneous deposits further demonstrate that [appellant] had control over the accounts and that the monies were not solely being 'cashed' for [Sherman], as [appellant] alleges. Additionally, [appellant] stated that he charged [Sherman] a 1.5% fee for check cashing. However, the withdrawals do not correlate to deposits less a 1.5% fee. I attempted to tie two samples from the 'Teller Sheets' used in my original report, and was unable to tie either to deposits in the bank." Gunson added, "The monies obtained and controlled by [appellant] were for illegal purposes. Additionally, the evidence doesn't support that the monies were for check cashing."

3. The Trial Court's Ruling.

In issuing its ruling on the restitution award, the court stated, "I have . . . two options: one, to fix restitution at the amount of income, as demonstrated by deposits into the bank accounts of the shell corporations, or as the defense would like[,] to fix restitution in the amount of 1.7 or 2 percent of that amount. In doing that, I have to rely on [appellant's] representation that was his gross income . . . . [I] am ordering restitution in the amount of $1,255,673." This was the amount of unpaid tax as calculated by the FTB using the "bank deposits method," with the full deposits to the six accounts treated as taxable income, but only the check cashing fees as to the check cashing account considered as taxable income.[6]

DISCUSSION

Appellant does not challenge the calculation of taxable income as to his check cashing account, but contends that the trial court erred in calculating his taxable income as to the six accounts based on the total deposits into those sham accounts. He characterizes the six accounts as "check cashing accounts" for checks from Sherman, and argues his testimony demonstrates that when Sherman would give him a check, he would immediately return the cash equivalent to Sherman, minus a 1.5 percent check cashing fee. He thus contends that the court should have calculated his taxable income as to the six accounts in the same manner applied to calculate income from the check cashing business. Appellant argues, "[Gunson's] surmise, circular logic, and speculation that these six accounts contained

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[6] The court also ordered that interest accrue at the rate of 10 percent per annum from the date of the order.

funds which were made intentionally untraceable because she was unable to trace them and that this characterization was a result of criminal conduct by appellant should not have been a substitute for the required amount of evidentiary proof." We reject appellant's claim of error.

Section 1202.4, subdivision (a)(3)(B), requires the court to order defendants to pay restitution to victims in accordance with subdivision (f). Subdivision (f), states, 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 by the victim or victims or any other showing to the court." The FTB, as a governmental subdivision or agency, can qualify for a restitution award when it has been defrauded by criminal activity, such as the underpayment of taxes. (§ 1202.4, subd. (k)(2); *People v. Sy* (2014) 223 Cal.App.4th 44, 62; *People v. Beck* (1993) 17 Cal.App.4th 209, 218-222.)

" '[T]he trial court is vested with broad discretion in setting the amount of restitution [and] it may " 'use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole.' ". . .' [Citation.]" (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 800.) All that is required is that the court's award have a "rational" basis (*id.* at p. 799), and the standard of proof at a restitution hearing is preponderance of the evidence. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469 (*Baker*).) "[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 . . . 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.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) "There is no requirement the restitution order 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." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

" 'The standard of review of a restitution order is abuse of discretion. "A victim's restitution right is to be broadly and liberally construed." [Citation.] " 'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.' " [Citations.]' [Citation.]" (*Baker*, *supra,* 126 Cal.App.4th at p. 467.) Moreover, although a restitution award may be challenged on the ground no substantial evidence supports the award, "[i]n reviewing the sufficiency of the evidence, the ' "power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings.' [Citations.] . . . 'If the circumstances reasonably justify the [trial court's] findings,' the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact." (*Id.* at pp. 468-469.)

The only issue in this case is whether there is substantial evidence supporting the trial court's calculation of appellant's total taxable income for the tax years 2008 and 2009. The FTB declarants indicated that appellant's unreported taxable income was computed by them using the "bank deposits method," a method commonly used in the prosecution of federal and state tax evasion, in which "the government totals all bank deposits, and, after the non-income deposits are excluded, [citation], and the amounts on deposit prior to the tax years in question have been deducted, [citation], the circumstantial inference properly permitted to arise is that all remaining deposits constitute taxable income." (*United States v. Helina* (9th Cir. 1977) 549 F.2d 713, 715-716, fn. 2; see CALCRIM No. 2843 [pattern instruction for determining that a defendant has unreported taxable income via "bank deposits method"].) When the "bank deposits method" is used, the question for the factfinder is whether the government's investigation has provided sufficient evidence to support an inference that the bank deposits are appropriately treated as taxable income. (Cf. *United States v. Stone* (9th Cir. 1985) 770 F.2d 842, 844-845.)

The prosecution presented evidence that appellant deposited millions of dollars in cashier's checks into the six accounts he opened and solely controlled for four sham businesses. He had checks, with fake addresses, printed for those accounts, and wrote small checks on the accounts to fictitious payees. Those checks to fictitious individuals were deposited into the check cashing account, rendering cash that was untraceable, with no legal obligations restricting appellant's use of that cash. The prosecution presented evidence that the six accounts were not used by appellant for check cashing; appellant's assertion

that he kept only 1.5 percent of each deposit did not line up with the bank records. Further, in addition to making large, untraceable cash withdrawals from these six accounts, appellant also paid bills and expenses from them. The prosecution thus provided sufficient evidence supporting an inference that the deposits in the six accounts were taxable income, and made a prima facie showing of the FTB's loss, i.e., the unpaid tax liability of approximately $1.25 million, based on appellant's income of approximately $12.2 million.

The prosecution having made the requisite showing, the burden shifted to appellant to demonstrate that the FTB's income-calculating method as to the six accounts was not appropriate and that his income was actually much less than what the FTB calculated. To prove that he did not retain the money laundered through the six accounts and instead kept only a small fraction as a check cashing fee, appellant offered only his self-serving testimony, and failed to introduce any documentary evidence or testimony from any other witnesses.

At one point during the restitution hearing, the court stated, "we've already established we have a laundering operation going on," and noted there was no way to determine what, if any, money was given back to Sherman. The court ultimately rejected appellant's argument that the restitution figure should be reduced, stating the court would "have to rely on [appellant's] representation" concerning his gross income in order to find a reduction to be warranted. The court thus made an implied finding that appellant lacked credibility and declined to give weight to appellant's assurances that he did not keep the bulk of the money that was processed through the six accounts. Given that appellant came to the restitution hearing having pled

no contest to money laundering and identity theft, i.e., crimes of moral turpitude (see *People v. Clark* (2011) 52 Cal.4th 856, 931-932 [theft-related crimes are probative of credibility]; *People v. Castro* (1985) 38 Cal.3d 301, 306, 313-316; *People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29), it is not surprising that the trial court did not accept appellant's unsupported assertions about his income. The court was also entitled to consider appellant's failure to call logical witnesses such as Sherman or employees at his check cashing business. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1304; *People v. Ford* (1988) 45 Cal.3d 431, 439-442.)[7]

Appellant has failed to show that the method employed by the court to calculate his taxable income was irrational or unsupported by substantial evidence. The court's award of restitution to the FTB in the amount of $1,255,673 was well within the sound discretion of the trial court.

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[7] It is also notable that, as part of his plea agreement, appellant admitted the loss as to the failure to file a return and money laundering counts exceeded $500,000, for purposes of section 186.11, subdivision (a)(2).

DISPOSITION

The judgment is affirmed.

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STONE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.