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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. FRANK DiMARCO, Defendant and Appellant.	B237500 (Los Angeles County Super. Ct. No. SA073190)

APPEAL from a judgment (order granting probation) of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Frank DiMarco appeals from the judgment (order granting probation) entered following his no contest plea to grand theft of personal property. (Pen. Code, § 487, subd. (a).) The court suspended imposition of sentence and placed him on probation for two years. We affirm the judgment.

FACTUAL SUMMARY

The record reflects the information alleged as count 1 that on or between February 1, 2008, and June 30, 2009, appellant committed the felony of grand theft of personal property, "unlawfully tak[ing] money and personal property of a value exceeding Four Hundred Dollars . . . , to wit, cash, the property of Deborah Singer." (Some capitalization omitted.)

On February 17, 2011, appellant pled no contest to that charge with an indicated sentence that, inter alia, at the time the court sentenced appellant, the court would reduce the offense to a misdemeanor, place appellant on probation, and conduct a restitution hearing.

Appellant waived his constitutional rights, pled no contest to count 1, and his counsel joined in the waivers, concurred in the plea, and stipulated to a factual basis for the plea based on the police reports. After the court accepted the plea, the People moved pursuant to Penal Code section 17, subdivision (b) that the court reduce the offense to a misdemeanor and the court granted the motion. The court suspended imposition of sentence and placed appellant on probation for two years on the condition, inter alia, that appellant make restitution to the victim in an amount to be determined at a hearing. Appellant indicated he understood and accepted the probation conditions.

At the September 2, 2011, restitution hearing, Singer, appellant's former spouse, testified that from February 2008 through June 2009, $49,888.05 was electronically withdrawn from her Bank of America (Bank) account. Except for a March 2008 withdrawal of $1,038.02 by her, appellant made the above withdrawals and they were unauthorized.

During cross-examination at the hearing, the prosecutor asked whether Singer had testified at the preliminary hearing that she had been reimbursed a certain amount, leaving the amount removed from her account at about $12,000. The prosecutor posed a relevance objection which the court overruled. The prosecutor asked if she could be heard but the court replied no.

Singer subsequently testified that, at the preliminary hearing, she had testified she had been reimbursed about $30,000 and was out of pocket about $12,000. She testified at the restitution hearing that Bank initially fully reimbursed her but later deducted amounts from her account based on individual transactions following an investigation.

During cross-examination of Singer at the restitution hearing, appellant asked Singer if Bank had reimbursed Singer for the amount, $49,888.05, reflected in People's exhibit No. 3, a spreadsheet later admitted into evidence.[1] She replied Bank reimbursed her for every transaction having appellant's name attached to it. Appellant asked whether it appeared from the spreadsheet that the amount was $49,888.05. Singer indicated the spreadsheet reflected the total number of transactions, she submitted each individual transaction to Bank, and Bank credited that amount to her. Appellant asked whether the amount was $49,888.05, and she replied, "If that's the exact number of transactions I did and it is the same as this, then yes."

Subsequently, the court commented that case law indicated the amount of restitution that a defendant owed a victim could not be reduced by reimbursements an insured victim had received from the victim's insurer or from the insurer of a third party. The prosecutor indicated that that had been the basis of her relevance objection that the court had overruled before the line of questioning had begun.

The following then occurred: "The Court: Right. So to me, the fact that Bank of America has credited her money and then taken away money and all of that is irrelevant to this proceeding. [¶] [Defense Counsel]: It goes beyond that. This is different . . .

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[1] Singer earlier had testified People's exhibit No. 3 was an accurate compilation of amounts taken from Singer's account and credited to appellant's Capital One account.

because the money that was reimbursed was money that was taken back from Mr. DiMarco. So it's not -- [¶] The Court: I find this area of questioning irrelevant."

Appellant later testified as follows. It was not true that money was unlawfully taken from Singer's account. Except for the March 2008, transaction of $1,032.02, he was responsible for the remaining transactions listed in People's exhibit No. 3. The transactions were done to offset spousal support that Singer owed to appellant, and appellant and Singer had discussed this. The agreement between Singer and appellant was that he could withdraw money from the account in lieu of spousal support payments. Singer had arranged for the money to go from the Bank account to appellant's Capital One account.

Appellant later testified a writ of execution dated June 2009 and filed in appellant's divorce case with Singer sought garnishment of Singer's wages for failure to pay spousal support. The prosecutor asked whether appellant filed the writ because he was claiming as of June 2009 that he had not received spousal support. Appellant replied no and claimed the writ pertained to other spousal support due him. During the divorce case, appellant periodically filed declarations of income under penalty of perjury. His June 2008 and March 2009 declarations did not list spousal support income. His June 2008, March 2009, and September 2009 declarations did not indicate he was receiving spousal support in the form of money taken from Singer's account. Appellant claimed his attorney prepared the declarations and appellant signed them without reviewing them. (Appellant never testified he reimbursed Singer in whole or in part for any loss resulting from his commission of the present offense or that he reimbursed her in whole or in part for the $49,888.05 or for $48,850.03 ($49, 888.05 less $1,038.02).)

After the presentation of evidence, the court indicated its tentative order concerning the restitution amount was as follows. The court stated, "Prior to hearing a couple of pieces of critical information in the cross-examination of Mr. DiMarco, I had some question as to whether or not the victim had shown sufficient evidence to meet the burden of proof.

"However, after hearing that after Mr. DiMarco received all of this money from him withdrawing it from this trust account and putting it into his credit card account, he afterwards filed a writ of execution seeking to garnish the victim's wages for failing to pay spousal support, and adding to that the fact that he did not report any spousal support income he allegedly received from her trust account in these subsequent income and expense declarations, it's clear to me that the criminal case was appropriate and that, in my mind, the burden of proof has been way met [*sic*] with respect to the amount of -- that this money was, in fact, unlawfully taken by Mr. DiMarco from the victim's trust account.

"So what I did was subtract from $49,888.05 the erroneously included $1,038.02. And I've come up with $48,850.03 that the court intends to award as restitution."

After the court asked for comments from the parties, the following occurred: "[Defense Counsel]: I raised my objection earlier indicating that she had been -- Ms. Singer had been reimbursed substantially through Mr. DiMarco. This is not a case that involves insurance coverage of Ms. Singer. The reimbursements came from Mr. DiMarco, to Capital One, to Bank of America, to Ms. Singer. [¶] And I think as far as the case law is concerned, I think that would qualify as a legitimate reimbursement." The prosecutor commented, "We don't have any proof of that." The court later stated, ". . . I am going to award [$]48,850.03 in restitution for the loss -- theft to Ms. Singer."

ISSUE

Appellant contends "the sentencing court erred in denying appellant the opportunity to present evidence that Ms. Singer suffered no monetary loss because the bank credited her account for the amount withdrawn by appellant."

DISCUSSION

Appellant contends as previously indicated. We reject the contention. Appellant notes Singer testified at the preliminary hearing that "the bank had credited her account for $30,000 of the withdrawals she claimed were unauthorized" and Singer testified at the restitution hearing "that the bank had credited the full amount of the withdrawals, or

$49,888.05." Appellant argues "the sentencing court erred in restricting this evidence and in not considering the evidence that the bank had credited her account as an offset against the claimed amount." He argues the trial court "did not use a reasonable method to calculate the loss because it ignored the evidence that Ms. Singer had no loss because the bank credited her account."

Appellant also argues Bank, not Singer, is the victim of the "forgery" in this case and that this court cannot modify the judgment to name Bank as the direct victim "because the issue as to what amounts were credited and what amounts Bank of America showed in litigation to have been wrongfully credited was not factually settled at the hearing, and no demand was made by Bank of America[] through the probation department to be paid. (Pen. Code, § 1260)"

Appellant further argues Singer testified at the preliminary hearing that she was currently in litigation with Bank regarding its credits to her account for the withdrawals, no evidence was presented at the restitution hearing concerning the outcome of this litigation, and it reasonably can be concluded "that litigation will have included the disputed facts as present in the restitution hearing – whether appellant was authorized by Ms. Singer to withdraw the money in lieu of spousal support."

However, there is no dispute appellant pled no contest to grand theft of personal property from Singer. The issue is how much, if anything, he owed by way of restitution for his admitted theft.

Penal Code 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, inter alia, 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."

The requirement that the amount of loss be determined by the court means that the court must decide the amount of the loss on grounds which will withstand review for abuse of discretion. The 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. (*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.)

There is no dispute appellant withdrew $48,850.03 from Singer's account. The premise of appellant's argument that Singer suffered no loss because Bank *reimbursed* her effectively presupposes appellant withdrew the amount.

Similarly, whatever may or may not have occurred in any alleged collateral litigation, there is no dispute that the trial court in this case found at the restitution hearing that appellant unlawfully took $48,850.03 from Singer's account, and that this was Singer's loss. Nor is there any dispute there was a rational basis for the restitution award, and that the trial court used a rational method to fix the amount of restitution, except to the extent appellant argues (1) the trial court excluded evidence that Bank credited Singer's account for the withdrawals and (2) Singer failed to suffer loss to the extent of that credit. In particular, and nothwithstanding appellant's argument at the restitution hearing, appellant argues here that Singer's loss was negated because, and to the extent, *Bank* reimbursed her for the amount appellant withdrew (not because *appellant* reimbursed her for any such amount). In sum, appellant is arguing the restitution award should be negated or reduced because Singer received reimbursement from a collateral source, i.e., Bank.

The collateral source rule applies to restitution in criminal cases. The restitution awarded to Singer, the victim, may not be reduced by any reimbursement from Bank, a collateral source. (Cf. *People v. Hamilton* (2003) 114 Cal.App.4th 932, 935, 940-941, 944 (*Hamilton*).) As the court stated in *Hamilton*, "Although [the decedent victim's successor] may end up with more money than she expended, the result can be justified.

The restitution order serves deterrent and punitive goals. In tort law, if an injured party receives compensation for injuries from a source independent of the tortfeasor, the amount of such compensation is not offset against the damage obligation of the tortfeasor (the collateral source doctrine). [Citation.] Although '[t]he doctrine has been severely criticized by commentators . . . it is firmly established as the California rule.' [Citation.] There is no reason why that same principle of tort law should not apply to restitution for crime victims." (*Id.* at p. 943.)

In *People v. Hume* (2011) 196 Cal.App.4th 990 (*Hume*), the court stated, "In determining restitution pursuant to section 1202.4, the amount ordered 'shall not be affected by the indemnification or subrogation rights of any third party.' (§ 1202.4, subd. (f)(2).) Further, to the extent possible, the restitution order shall be for the full amount of the victim's economic loss. (*Id.*, subd. (f)(3).) As our Supreme Court explained in connection with a prior version of the relevant statutory provisions which remain substantively unchanged under section 1202.4, 'the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make full restitution for all losses his crime had caused, and that such reparation should go entirely to the individual or entity the offender had directly wronged, regardless of that victim's reimbursement from other sources. . . . (*People v. Birkett* (1999) 21 Cal.4th 226, 246 . . . italics omitted; [citation].)" (*Id.* at p. 996.)

To the extent appellant argues Bank, and not Singer, was the victim in this case, we reject the argument. "The particular crime of which an offender is convicted . . . indicates who is the direct victim." (*People v. Saint-Amans* (2005) 131 Cal.App.4th 1076, 1087.) Appellant pled no contest to grand theft of personal property "to wit, . . . the property of Deborah Singer."

To the extent appellant refers to preliminary hearing testimony that was not introduced into evidence at the restitution hearing, including any such testimony referring to collateral litigation, and alludes to what might have occurred during said litigation on the issue of whether appellant was authorized to make the withdrawals, that testimony

was not before the trial court in this case. In any event, the trial court in this case concluded appellant unlawfully took money from Singer's account.

An appellate court applies an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning relevance. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) The trial court did not abuse its discretion by excluding evidence that Bank reimbursed Singer either in whole or in part, nor did the trial court abuse its discretion by awarding restitution to Singer in the amount of $48,850.03.

None of the cases cited by appellant compels a contrary conclusion. This includes *People v. Bartell* (2009) 170 Cal.App.4th 1258 (*Bartell*). In *Bartell*, the defendant entered a plea bargain pursuant to which the court could award restitution to victims in matters still under investigation and as to which criminal charges had not been filed. (*Id.* at p. 1260.) In one such case, a woman's checkbook had been stolen, forged checks had cleared, and the forgeries were linked to the defendant. (*Ibid*.) *Bartell* concluded the trial court properly awarded restitution to the bank as the victim, because the probation report had reflected the bank had covered the forged checks. *Bartell* also concluded the woman suffered no loss because the bank paid the money as a result of the forgeries, could not debit the woman's account once the bank learned the checks had been forged, and, therefore, the bank had to absorb the loss. (*Id.* at p. 1262.)

Unlike the case in *Bartell*, in the present case, appellant pled no contest to a charge of grand theft that named Singer (Bank's customer) as the person from whom property was taken. That charge effectively named Singer as the victim. The present case did not involve, as *Bartell* did, forged checks with a delay between the time the bank paid the checks and the time the bank might have tried to debit the customer's account once the bank learned the checks were forged. The present case involves, as *Bartell* did not, a defendant who, by his withdrawals, took money directly from a customer's account, causing debits to the account, followed by bank reimbursements.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.