

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ANTHONY VERNI, JR.,

Defendant and Appellant.

C065429

(Super. Ct. No.
NCR77091)

APPEAL from a judgment of the Superior Court of Tehama County, Dennis E. Murray, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of parts I and III.

The California Constitution establishes a right of restitution for crime victims. (Cal. Const., art. I, § 28, subd. (b)(13).) "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." (*Id.* at subd. (b)(13)(B).) Despite this "unequivocal" language (*id.* at subd. (b)(13)(A)), defendant contends that he cannot be expected to pay an apartment owner for fire damage caused when defendant poured gasoline on Michelle B. in the apartment bedroom and lit her on fire. Defendant argues that because he pleaded guilty to aggravated mayhem (i.e., intentionally causing disability or disfigurement to another human being) in exchange for dismissal of an arson charge, Michelle B. was the "immediate object" of his crime and the apartment owner cannot be considered a direct victim entitled to crime victim restitution.

The right to crime victim restitution is not so narrow. By pouring gasoline on Michelle B. in an apartment bedroom and igniting the fuel, defendant set Michelle B. and the apartment on fire in a single course of criminal conduct. Although structural damage is not an element of aggravated mayhem, the apartment damage was substantially certain to occur and was a direct and immediate result of defendant's aggravated mayhem. That is enough to establish the apartment owner as an immediate

object of defendant's crime and a direct victim entitled to restitution. We will affirm the judgment.¹

BACKGROUND

Defendant Joseph Verni, Jr., argued with Michelle B. about her ex-boyfriend. Later that day defendant called Michelle B. twice and they continued to argue.

Shortly after midnight on July 6, 2009, defendant entered Michelle B.'s bedroom while she was sleeping. He woke her up yelling, "You need to tell me the truth!" He had a soda bottle containing gasoline. Defendant poured the gasoline on Michelle B.'s arms and torso and lit her on fire with a lighter.

Michelle B. attempted to extinguish the fire with blankets while defendant watched. The flames increased and began to go over Michelle B.'s face, limiting her vision. The apartment fire-suppression sprinklers eventually activated, extinguishing the fire. Officers arrived and found Michelle B. suffering from severe burns to the upper portion of her body. Fire damage to the apartment totaled \$32,246.07.

Pursuant to a plea agreement, defendant pleaded guilty to aggravated mayhem (Pen. Code, § 205)² in exchange for dismissal

¹ The recent amendments to Penal Code sections 2933 and 4019 do not apply to defendant because he was convicted of a violent and serious felony. (Pen. Code, §§ 667.5, subd. (c)(2), 1192.7, subd. (c)(2), 4019, former subds. (b)(2) & (c)(2) [as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50], 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

² Undesignated statutory references are to the Penal Code.

of the remaining charges for attempted premeditated murder (§§ 664, 187, subd. (a)), torture (§ 206), and arson causing great bodily injury (§ 451, subd. (a)). Defendant did not make a *Harvey* waiver, which would have allowed the trial court to consider dismissed charges in issuing restitution orders. (*People v. Harvey* (1979) 25 Cal.3d 754, 758.)

The trial court sentenced defendant to life with the possibility of parole and ordered defendant to pay victim restitution of \$32,246 to Hidden Property Management (HPM).³ (§ 1202.4, subd. (f).)

DISCUSSION

I*

As a preliminary procedural matter, the People argue that defendant forfeited his challenge to the restitution order because he did not object to the order at sentencing. Defendant responds that his challenge falls within the “unauthorized sentence” exception to the general forfeiture rule. Defendant

³ There is some indication in the record that the correct name of the company providing property management services for the apartment is “Hyder Property Management.” Nonetheless, in this opinion we use the name referenced by the trial court in its oral pronouncement of sentence. Defendant does not assert this discrepancy as a basis for challenge on appeal. In addition, defendant does not differentiate between property manager HPM and the apartment owner, Kimball Crossing Apartments. Defendant refers to HPM and “its apartment.” Both HPM and the apartment owner appear to be business entities, and defendant does not contend that it was error for the trial court to direct payment of restitution to HPM rather than to the apartment owner. Accordingly, like defendant, we treat HPM as standing in the shoes of the apartment owner for purposes of our analysis.

is correct. (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1094-1095 (*Slattery*)). We will address his contention to the extent it asserts a claim that the trial court's restitution order resulted in an unauthorized sentence.

II

The California Constitution declares that a crime victim has a right of restitution. (Cal. Const., art. I, § 28, subs. (a), (b) (13).) "(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. [¶] (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." (Cal. Const., art. I, § 28, subs. (b) (13) (A), (B).)

The Legislature adopted legislation implementing the right of restitution. (*People v. Crow* (1993) 6 Cal.4th 952, 956 (*Crow*)). Section 1202.4, subdivision (a) (1) provides: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." In addition, with certain exceptions not applicable here, section 1202.4, subdivision (f) provides 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. . . .”

Of course, crimes can be committed against business and governmental entities too, and those entities can be crime victims. (See, e.g., *Crow*, *supra*, 6 Cal.4th at p. 957.) But a business or governmental entity is entitled to crime victim restitution only if it is a “direct victim” of a crime. (§ 1202.4, subd. (k)(2); *People v. Martinez* (2005) 36 Cal.4th 384, 393 (*Martinez*).)

In this case, defendant contends the apartment owner was not a “direct victim” of the crime for which defendant was convicted, because the elements of aggravated mayhem do not involve property damage.⁴ Hence, defendant contends that Michelle B. was the “immediate object” of his aggravated mayhem and the only crime victim entitled to restitution in this case.

Defendant is applying the phrase “immediate object” incorrectly. To understand why, we review how the phrase has been used in prior California Supreme Court decisions.

⁴ Section 205 provides: “A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole.” (See also CALCRIM 800.)

In *Crow, supra*, 6 Cal.4th 952, the California Supreme Court affirmed a judgment in which defendant was convicted of aiding and abetting welfare fraud and ordered to pay restitution to Lake County pursuant to former Government Code section 13967, subdivision (c). (*Crow, supra*, 6 Cal.4th at pp. 956, 963.) The Supreme Court concluded that the defrauded government agency was a "victim" of defendant's crime. (*Ibid.*) As part of its analysis, the Supreme Court noted that Black's Law Dictionary defined "'victim'" as a "'person who is the object of a crime'" (*Crow, supra*, 6 Cal.4th at p. 957.)

The Supreme Court quoted the Black's Law Dictionary definition of "victim" again in a probation case,⁵ *People v. Birkett* (1999) 21 Cal.4th 226, 232 (*Birkett*). In that case, however, the Supreme Court added that the 1994 language of another statute, section 1203.04, created the "inescapable inference" that entitlement to restitution arose only in favor of "'actual' or 'direct' victims -- i.e., the real and immediate objects of the probationer's offenses -- and their close family survivors." (*Birkett, supra*, 21 Cal.4th at p. 233.)⁶ The

⁵ Unlike this case, where defendant was sentenced to prison, probation cases involve different considerations. (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459-460 (*Rubics*)).

⁶ The Supreme Court also noted in *Birkett* that the Oxford English Dictionary defined "'[d]irect'" as "'straightforward, uninterrupted, [or] immediate' in time, order or succession, or 'proceeding [in logic] from antecedent to consequent, from cause to effect, etc., uninterrupted,' or generally '[e]ffected or existing without intermediation or intervening agency; immediate.'" (*Birkett, supra*, 21 Cal.4th at pp. 232-233, fn. 6,

Supreme Court concluded that a third-party insurer was not a direct victim entitled to restitution in that case because the insurer was not an "immediate victim" of the crime, but instead incurred its loss indirectly pursuant to the terms of its insurance contract. (*Birkett, supra*, 21 Cal.4th at pp. 245-247.)

The "immediate object" language was referenced again by the Supreme Court in *Martinez, supra*, 36 Cal.4th at p. 393. In that case, defendant was convicted of attempting to manufacture methamphetamine and was ordered to pay restitution to the state agency that cleaned up his drug laboratory. (*Id.* at p. 386.) The Supreme Court held that defendant's crime was not "committed against" the agency and the agency was not the "immediate object" of his crime, therefore the agency was not a direct victim. (*Id.* at pp. 393-394.)

Nothing in the foregoing decisions indicates that the "immediate object of a crime" is determined solely by reference to the elements of the crime. Instead, those prior decisions indicate that an entity is the immediate object of a crime if it incurs economic loss as a direct and immediate result of the

citing 4 Oxford English Dict. (2d ed. 1989) p. 702, 4th, 6th definitions.) The Supreme Court added that in the legal context, "'direct'" was defined in Black's Law Dictionary as "[i]mmediate; proximate; by the shortest course; without circuitry; operating by an immediate connection or relation, instead of operating through a medium; the opposite of indirect.'" (*Birkett, supra*, 21 Cal.4th at pp. 232-233, fn. 6, citing Black's Law Dict. (6th ed. 1990) p. 459, italics omitted.)

criminal conduct for which defendant is convicted. This meaning is consistent with the express language of the controlling constitutional and statutory provisions. (Cal. Const., art. I, § 28, subd. (b)(13)(A), (B); § 1202.4, subs. (a)(1), (f).)

Our interpretation is also consistent with the law regarding criminal intent and the consequences of criminal conduct. In *People v. Booker* (2011) 51 Cal.4th 141, the California Supreme Court held that when the defendant in that case started a fire in an apartment with knowledge that an infant was present, a trier of fact could reasonably find that defendant was substantially certain that the infant would be killed. (*Id.* at p. 178; see also *People v. Huggins* (2006) 38 Cal.4th 175, 211; *People v. Fabris* (1995) 31 Cal.App.4th 685, 698, disapproved of on other grounds in *People v. Atkins* (2001) 25 Cal.4th 76, 84.) Similarly, in this case defendant poured gasoline on Michelle B. and ignited the fuel in circumstances where it was substantially certain that the apartment would burn. Under such circumstances, the burning of the apartment was an "immediate object" of his crime.

In *Rubics, supra*, 136 Cal.App.4th 452, the defendant pleaded guilty to felony hit and run and admitted an allegation that the accident resulted in death. (*Id.* at p. 454.) Although the Court of Appeal considered the elements of the convicted offense in affirming a restitution order for family funeral expenses (*id.* at pp. 457-459), the Court of Appeal ultimately held: "Because Rubics was involved in an accident that caused Casey's death, it was proper for the court to order him to pay

Casey's funeral expenses because the 'victim has suffered economic loss as a result of the defendant's conduct' (Pen. Code, § 1202.4, subd. (f).)" (*Id.* at p. 461.)

If we were to adopt defendant's position, a crime victim's entitlement to restitution would be dictated and potentially limited by the discretionary decisions of the charging authority. Such an interpretation would be contrary to a crime victim's broad right to restitution. (Cal. Const., art. I, § 28, subs. (b)(13)(A), (B).)

Defendant relies on cases where restitution awards were held to be improper, but the circumstances in those cases are very different. The economic loss in this case did not arise indirectly from a contractual obligation to reimburse a victim (*Birkett, supra*, 21 Cal.4th at pp. 245-246), an investigation of the crime (*People v. Torres* (1997) 59 Cal.App.4th 1, 1-5; *People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077), subsequent cleanup of the crime scene (*Martinez, supra*, 36 Cal.4th at pp. 393-394), or the subsequent care for a victim (*Slattery, supra*, 167 Cal.App.4th 1091, 1096-1097). Moreover, the loss in this case did not arise from conduct occurring outside the time period of the crime for which defendant was convicted (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049-1050 [restitution improperly imposed on accessory after the fact because his participation in crime occurred after the loss was sustained]; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247, 1249 [no restitution for loss attributable to fraudulently obtained welfare aid occurring before the charged period]), or from separate criminal conduct

for which defendant was acquitted (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179-180 [where defendant was convicted for theft of first car but acquitted for unrelated theft of second car, restitution order for loss arising from second theft was improper]).

In this case, defendant started a fire in a single course of criminal conduct that directly and immediately burned Michelle B. and the apartment. The apartment owner incurred an economic loss as a direct result of defendant's aggravated mayhem. Under these circumstances, the apartment owner was an immediate object of defendant's crime and was a direct victim of his crime.

The trial court did not err in ordering defendant to pay restitution for the apartment damage.

III*

Defendant further argues that the trial court erred in ordering restitution for the apartment damage because the arson charge was dismissed without a *Harvey* waiver. (*People v. Harvey, supra*, 25 Cal.3d 754.)

Nothing in the record indicates that the trial court ordered restitution based on the dismissed arson charge, and as we have explained in part II of this opinion, it was appropriate for the trial court to order restitution based on the aggravated mayhem charge because the apartment owner was a direct victim of that crime.

In any event, defendant's claim of *Harvey* error is forfeited because he did not object to the restitution order in

the trial court. Although an appellate claim is not forfeited based on a failure to object where the claim concerns an unauthorized sentence that could not lawfully be imposed under any circumstances (*People v. Scott* (1994) 9 Cal.4th 331, 354), an allegation of *Harvey* error is not within this category. (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1685, fn. 8 [*Harvey* error forfeited when no objection lodged in trial court].) Furthermore, defendant's *Harvey* contention is forfeited because it is not presented under a separate argument heading and is raised in a perfunctory fashion. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.)

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

BLEASE, Acting P. J.

HULL, J.