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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHANY LOPEZ,

Defendant and Appellant.

D069140

(Super. Ct. No. SCD255319)

APPEAL from an order of the Superior Court of San Diego County, Joseph P. Brannigan, Judge. Affirmed.

Steven J. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Kristen Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted Chany Lopez of four counts of unlawfully making false and fraudulent statements to physicians and investigators in connection with workers' compensation claims (Ins. Code, § 1871.4, subd. (a)(1); counts 1-2, 4-5). The court granted a judgment of acquittal under Penal Code section 1118.1<sup>1</sup> as to count 3 because the People failed to present adequate foundational evidence of a false statement to another physician. The court granted Lopez probation for three years and imposed 180 days in local custody in a work furlough program. This court affirmed the judgment in the direct appeal. (*People v. Lopez* (May 12, 2016, D068570) [nonpub. opn.] )

In this appeal, Lopez challenges the court's order awarding York Risk Services (York) restitution in the amount of \$30,154.02 for expenses related to the workers' compensation claims. Lopez contends the court erred in ordering restitution for medical expenses not affected by his failure to disclose prior claims, for expenses associated with the denied claim, and for expenses incurred to obtain his medical records. We conclude the court did not abuse its discretion in ordering restitution as a condition of probation and we affirm the order.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code unless otherwise indicated.

## BACKGROUND

I<sup>2</sup>

"In 2009, defendant was an employee of the San Diego Unified School District (district). In late November 2009, while driving a district truck, defendant was sideswiped. Although defendant complained to coworkers that he was injured in the accident, he then declined any medical treatment and the matter was handled internally by the district.

### "A. *Count 1*

"In June 2011, defendant submitted a workers' compensation claim for pain in his neck and lower back arising from the November 2009 accident. Third party administrator [York] opened a file and sent defendant to Dr. Spencer Olsen, a physician in occupational medicine. Dr. Olsen treated defendant on June 10, 2011. In connection with that consultation, defendant filled out a 'health history questionnaire,' which Dr. Olsen noted sought information about 'past medical history, current conditions [and] past treatment.'

"Dr. Olsen testified that he also went over defendant's medical history with defendant and completed a separate medical history at the same time; that he asked defendant if he had suffered any 'previous occupational injuries or illnesses' and that defendant replied, 'no,' corresponding to the box then checked by Dr. Olsen; that he also

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<sup>2</sup> We granted Lopez's request for judicial notice of the record in his direct appeal. We quote the factual background statement from the unpublished opinion in that appeal, omitting the footnotes. (*People v. Lopez, supra*, D068570.)

asked if defendant had 'any preexisting conditions that complicate or prolong [defendant's] diagnosis or treatment' and that defendant again replied, 'no,' again corresponding to the box checked by Dr. Olsen; and that Dr. Olsen also wrote a 'zero with a slash through it' to confirm defendant had 'basically no[]' past medical history.

"Dr. Olsen opined that defendant's back and neck pain were caused by arthritis and not by the November 2009 car accident. Dr. Olsen reached this conclusion based on X-rays of defendant that, in Dr. Olsen's opinion, showed arthritis 'diffusely spread throughout [defendant's] spine.'

"B. *Count 2*

"After defendant's consultation with Dr. Olsen, York hired Enduro International PI Incorporated (Enduro) to investigate whether defendant's injury was work related. In connection with that investigation, typically an 'AOE/COE' interview is done. Private Investigator Kenneth Grimes, who at all times relevant worked for Enduro, testified 'AOE' means 'arising out of employment' and 'COE' means 'in the course of employment.'

"Grimes testified that he conducted an AOE/COE interview with defendant on July 7, 2011; that the interview took place at a district office; that typically these interviews were recorded but that defendant requested his interview not be recorded; and that during the interview, defendant's supervisor was present. Before the interview began, Grimes told defendant it was important to tell the truth.

"After defendant gave his statement, Grimes mailed defendant a copy of the report. Grimes instructed defendant to review the report to make sure it was accurate; to

initial each page of the report; and to sign the last page. Grimes, however, never received anything back, or heard, from defendant.

"Grimes testified that during the AOE/COE interview, he separately asked defendant if he had *ever* sustained a prior neck *or* back injury and that defendant responded 'no' to both questions. Grimes also asked defendant if he had *ever* made any prior liability claims. Defendant again responded 'no.' Grimes next asked defendant if he had filed a prior workers' compensation claim, and again defendant said 'no.' Grimes testified defendant then denied knowing anything about the workers' compensation system and denied he had been through the process of filing a claim before the November 2009 accident.

*"C. Count 4*

"On November 29, 2011, defendant consulted with an orthopedist, Dr. John Lane, concerning neck and back pain. In response to Dr. Lane's question whether he had any previous work injuries including to his lower back, defendant replied 'no.' Defendant also denied having any previous non-work-related injuries. After his examination, Dr. Lane's diagnostic impressions of defendant were a cervical strain in the neck region and a mild to moderate multi-level stenosis of the lumbar spine.

"Dr. Lane saw defendant on March 20, 2012, when Dr. Lane prepared a permanent and stationary report dated that same day. Dr. Lane testified that when a person sustains a work injury, under California's workers' compensation system such a report is necessary to provide for permanent work restrictions, if any, and for 'impairment for which people get compensated for the injury'; 'to outline the need for future medical care'; and to

address 'apportionment.' Dr. Lane gave defendant a 0 percent 'whole person impairment' for his cervical spine and 11 percent for his lumbar spine. Dr. Lane noted a 'whole person impairment' refers to a percentage rating of a person's disability that is used in California's workers' compensation system to determine benefits.

"Dr. Lane next completed an apportionment of defendant's workers' compensation injury with respect to the lumbar spine injury. Dr. Lane noted that defendant did have some "degenerative changes" in the lumbar spine and that, 'in the *absence of any prior injury*, it was [his] opinion that 10 percent of his impairment would be due to some of the underlying degenerative changes with 90 percent being due to work aggravation.' (Italics added.)

"During a background search of defendant that included subpoenaed records, York found defendant had in fact submitted the following workers' compensation claims when employed by the City of San Diego (City): 1) May/June 1991 for left shoulder, left arm *and* upper back; 2) March 1993 for low back and both legs; and 3) January 1996 for low back. Defendant's prior medical history was important because it affected the apportionment calculation of benefits. That is, if a person had no prior injury, then there would be no apportionment and that person would receive the entire sum based on his or her permanent disability.

"York asked Dr. Lane to review this additional information and provide, if necessary, a supplemental report including on the issue of apportionment. Dr. Lane testified that he spent more than 22 *hours* reviewing the additional records provided by York.

"Dr. Lane in his December 15, 2013 supplemental report revised his opinions on defendant's whole person impairment and apportionment based on his review of the additional information provided by York. Dr. Lane determined in his supplemental report that defendant had a 13 percent whole person impairment and that 61.5 percent of his award was due to his prior injury and 38.5 percent was due to his subsequent injury. Defendant's benefits were reduced accordingly.

"D. *Count 5*

"In late April 2012, defendant called Daveena Harris, a York employee and senior claim's examiner, regarding the status of his 2011 workers' compensation claim. Harris testified that at the outset, defendant told Harris she did not have permission to record the call. During the call, defendant complained he was not being treated fairly by York.

Harris testified she specifically asked defendant during that phone call if he had *ever* sustained a work-related injury and if he had *ever* submitted a workers' compensation claim from any employer. According to Harris, defendant responded 'no' to both questions."

II

In a separate restitution proceeding, the People presented evidence of costs related to two workers' compensation claims. The first claim was denied after a physician

examined Lopez in October 2011 and determined his injuries were not caused by the automobile accident in 2009.<sup>3</sup> The expenses related to this claim totaled \$1,173.59.

The second claim was generated after the physician concluded Lopez's complaints must be work related since they were not related to the auto accident and Lopez denied prior injuries. The expenses related to this second claim totaled \$28,990.98. This figure included expenses for treating physicians and other medical services as well as utilization review services. York sought restitution for these expenses because treatment may not have commenced based upon a presumption Lopez's claim was related to his work if Lopez had not misrepresented he had no prior back injuries or disability awards regarding the same body parts. York sought, among other things, restitution for legal and investigation fees related to gathering prior medical and litigation information involving Lopez's prior undisclosed workers' compensation claims.

Lopez's counsel did not dispute the amount of expenses claimed by the People. However, counsel argued Lopez was convicted of misrepresenting the existence of prior work-related injuries and the award of restitution must be the result of criminal conduct. Lopez's counsel also argued if he had reported prior injuries, there is no evidence the need for treatment or the need to obtain prior medical records would have been obviated. Counsel also argued the legal fees incurred were not based on illegal conduct, but a

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<sup>3</sup> This is the visit related to count 3, for which the court entered a judgment of acquittal because there was inadequate foundation to establish Lopez made a false statement on this date denying prior injuries.



refusal to sign a waiver form. After considering the arguments of both parties, the court ordered restitution to York in the amount requested by the People.

## DISCUSSION

Lopez contends the court erred in ordering restitution for expenses "beyond compensating the victim [York] for the crime [Lopez] was charged with and for which he was convicted." We disagree.

### I

"The California Constitution gives crime victims a right to restitution and, consequently, requires a court to order a convicted wrongdoer to pay restitution in every case in which a crime victim suffers a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(B).)" (*People v. Sy* (2014) 223 Cal.App.4th 44, 62 (*Sy*).

A number of statutes implement this constitutional right to restitution. Section 1202.4, subdivision (a)(1), provides, "[i]t is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution from a defendant convicted of that crime." Generally, "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 ... 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." (§ 1202.4, subd. (f).) "Courts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction." (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049 (*Woods*), citing *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247 (*Lai*).

In cases where probation is granted, section 1203.1, subdivision (a)(3), provides the court "shall provide for restitution in proper cases." Restitution ordered under this section is not limited to losses arising out of the conduct for which the defendant was convicted. (*Woods, supra*, 161 Cal.App.4th. at p. 1050.) " 'California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction.' [Citation.] ... 'Under certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting in a conviction (*People v. Miller* [(1967)] 256 Cal.App.2d [348,] 355-356), by conduct underlying dismissed and uncharged counts (*People v. Goulart* (1990) 224 Cal.App.3d 71, 79), and by conduct resulting in an acquittal (*People v. Lent* [(1975)] 15 Cal.3d [481,] 483). 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. Anderson* (2010) 50 Cal.4th 19, 27, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)<sup>4</sup>

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<sup>4</sup> Additionally, when someone is convicted of making a false or fraudulent material representation for the purpose of obtaining workers' compensation, Insurance Code section 1871.4, subdivision (b), provides "[r]estitution shall be ordered, including restitution for any medical evaluation or treatment services obtained or provided. The court shall determine the amount of restitution and the person or persons to whom the restitution shall be paid. A person convicted under this section may be charged the costs of investigation at the discretion of the court." Given our conclusion the restitution award was a proper exercise of the court's discretion under section 1203.1, we need not determine the applicability this statute.

" ' "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.] ' "Where 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.] However, a restitution order "resting upon a ' "demonstrable error of law" ' constitutes an abuse of the court's discretion. [Citation.]" [Citation.] ... [¶] ' "[T]he court's discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole.' " ' " (Sy, *supra*, 223 Cal.App.4th at p. 63.)

## II

In this case, the court granted Lopez probation. Restitution was ordered to York as a condition of probation. Therefore, the court had broad discretion to order restitution under section 1203.1 and the limitation of section 1202.4 does not apply.

At the restitution hearing, the People made a prima facie showing of York's losses by a preponderance of the evidence. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1153 [preponderance of the evidence is the standard of proof at a restitution hearing].) The People presented documentary and testimonial evidence of the expenses incurred in relation to both workers' compensation claims, which York contended were based on false reports. (Sy, *supra*, 223 Cal.App.4th at p. 63 [a prima facie case may be made by " 'a victim's testimony on, or other claim or statement of, the amount of his or her economic loss' "].) The People presented evidence Lopez's failure to disclose his prior injuries misled all of the physicians. Harris, the claims examiner assigned to these

claims, testified York may not have incurred the expenses if Lopez had disclosed his prior injuries and if he had signed a waiver authorizing York to obtain his medical information without resorting to litigation to subpoena the records. The claim may have been denied altogether if a physician had adequate information at the beginning of the case.

Once that showing was made, the burden shifted to Lopez " 'to demonstrate that the amount of the loss is other than that claimed by the victim.' " (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) Lopez did not meet his burden.

The court heard Lopez's arguments that the restitution award should be limited to expenses caused by the crime for which he was convicted. The court also heard and considered Lopez's arguments he should not be ordered to pay restitution for medical records for declining to sign an authorization form. Although, Lopez was not required to sign an authorization form, York was entitled to restitution for expenses it incurred to obtain court authorization for those records to prove or disprove the contested claim. (Lab. Code, § 4620, subd. (a).) After the court considered the law and the facts presented both at trial and at the restitution hearing, the court exercised its discretion to order full restitution to York in the amount requested by the People. On this record, we conclude there was a rational and factual basis for the award and the court did not abuse its discretion in ordering restitution as a condition of probation.

In light of our conclusion that the trial court did not err in ordering restitution pursuant to section 1203.1, we need not consider whether we may affirm the trial court's

restitution order on the ground Lopez was precluded from retaining workers' compensation benefits pursuant to Insurance Code section 1871.5.

DISPOSITION

The restitution order is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

PRAGER, J.\*

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