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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL VINCENT PETRONELLA, Defendant and Appellant.	G054524 (Super. Ct. No. 09CF1067) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Mark W. Fredrick and Cole M. Williams for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

This is the second opinion we have issued in this case. In the first, we affirmed appellant's convictions for insurance premium fraud but reversed the trial court's restitution award of $500,000 and remanded for a new restitution hearing. That hearing culminated with the trial court ordering appellant to pay restitution in the amount of $13.4 million, which is $18 million less than what the prosecution requested, but $12 million more than what appellant felt he owed. Appellant contends the court's restitution order is unsupported by substantial evidence and constitutes an abuse of discretion. We find the court's methodology eminently reasonable and cannot find any abuse of discretion.

FACTS

The underlying facts and procedural background are set forth in *People v. Petronella* (2013) 218 Cal.App.4th 945 (*Petronella I*), which we judicially notice. By way of summary, appellant Michael Petronella was convicted of 33 counts of insurance premium fraud for supplying false information to the State Compensation Insurance Fund (SCIF), which provided workers' compensation coverage for his various companies. (*Id.* at pp. 950-953.) The crux of the prosecution's case was that appellant knowingly underreported his payroll to SCIF in order to reduce the cost of his premiums. (*Id.* at pp. 950-953, 963.) The jury found the losses resulting from appellant's fraudulent conduct exceeded $500,000. (*Ibid.*) The trial court sentenced appellant to 10 years in prison and ordered him to pay SCIF $500,000 in restitution. (*Ibid.*)

On appeal, we rejected appellant's challenge to the validity of his convictions. (*Petronella I, supra,* 218 Cal.App.4th at pp. 953-964.) However, we found the trial court abused its discretion by relying on irrelevant factors and failing to consider all of the evidence in calculating restitution. (*Id.* at pp. 964-974.) We therefore remanded the matter for a new restitution hearing. (*Id.* at pp. 973-974.)

At the hearing, the parties agreed the proper measure of restitution was the amount appellant underpaid in premiums for the workers' compensation insurance SCIF

provided his companies from 2000 through 2008. The parties also agreed determining the amount appellant underpaid in premiums turned on three primary factors: 1) the amount of payroll he failed to report; 2) the type of work his employees did, as reflected in their classification rating; and 3) appellant's experience modification (ex-mod) rating, which is a measure of how his claims record compared to other like-sized companies in the same industry.

The first factor was fairly easy to calculate. All investigators had to do was compare the payroll information appellant filed for tax purposes with the payroll information he submitted to SCIF. The comparison revealed appellant underreported his payroll to SCIF by upwards of $29 million. That figure included the payroll for appellant's primary company, Petronella Roofing, as well as Western Cleanoff, Inc. (Western), a company appellant created to handle roofing removal and disposal.

The second factor – job classification – was more difficult to assess. The problem was that appellant did not keep detailed records of his employee's duties. So the parties had to go back and try to figure out what appellant's workers did during the period in question. Because that period extended back to 2000 – 16 years before the restitution hearing at issue here took place – the classification process was both exacting and inexact.

Calculating appellant's ex-mod rating, the third factor at issue, was also a challenging task due to the way appellant conducted his business. The injury claims appellant made to SCIF were readily verifiable for purposes of determining his claims record. But as explained more fully below, appellant did not always make a claim to SCIF when one of his workers got injured on the job. Thus, SCIF did not know the full extent of his claims record, which made it hard to determine his ex-mod rating.

Nevertheless, based on all the information it had available, SCIF estimated appellant underpaid his premiums by $31,212,930 between 2000 and 2008. Accordingly, that was the amount of restitution requested by the prosecution.

The chief witness for the prosecution was Randy Hogan, a risk manager for SCIF who oversees the company's workers' compensation program. Hogan testified that in 2000, appellant obtained a workers' compensation insurance policy from SCIF that covered both Petronella Roofing and Western. In 2003, appellant informed SCIF Western was dormant, and therefore Western was "endorsed off" the policy. However, Western continued to do business, appellant continued to submit claims for Western employees who were injured on the job, and SCIF ended up paying those claims.

In Hogan's opinion, SCIF was legally required to pay those claims because Western's employees worked for appellant, and he was the named insured on the policy. In other words, the fact Western's name was removed from the policy did not affect SCIF's legal obligation to provide workers' compensation coverage to Western's employees. In fact, to this day, SCIF is still obligated to service claims that were made by appellant's employees during the period in question. It has set aside half a million dollars in reserve for that purpose.

As for the classification of appellant's employees, Hogan testified he relied on a variety of sources, including information provided by appellant's former office staffers. Using business records and their own memory of events, those staff members were able to classify about half of appellant's employees. But they were unable to determine what the other half did. Because appellant was in the roofing business Hogan classified those workers as roofers, which is a high-risk occupation for purposes of calculating workers' compensation premiums. This classification was also dictated by insurance regulations that require SCIF to attribute the highest classification in the policy to any workers whose duties are not reported by the employer.

Hogan admitted he would like to have had more detailed information about appellant's employees in order to classify them more accurately. He also conceded the absence of full and complete information about appellant's claims record hampered SCIF's ability to come up with a more accurate ex-mod rating for his companies.

However, as more and more information became known to SCIF, appellant's ex-mod rating was adjusted accordingly. For example, based on information that was provided by appellant's attorney, SCIF made significant downward adjustments to appellant's ex-mods for the fiscal years 2007 and 2008.[1]

Still, appellant contended his ex-mod ratings and SCIF's restitution demand were inflated and failed to reflect the true amount he owed for his unpaid premiums. Based on his own assessment of the case, appellant opined he only owed $1,002,978, roughly $30 million less than what SCIF was seeking.

At the restitution hearing, appellant testified regarding the history of his companies and his role in them. He said Petronella Roofing was a construction company that contracted with large homeowners' associations for a wide variety of jobs, not just roofing. The company, which appellant described as one of the leading contractors in the nation, had over 100 employees and was involved in multi-million-dollar projects all over Southern California. As the founder of the company, appellant had the final say on all hiring decisions and was responsible for procuring workers' compensation insurance for its employees.

Appellant testified that when he acquired workers' compensation insurance for Petronella Roofing and Western through SCIF in 2000, SCIF required him to classify his workers as either roofers, sales personnel or clerical staff. Appellant felt those classifications did not accurately reflect the full range of his employee's job duties, and he was overpaying for his coverage. Therefore, he started underreporting his payroll to SCIF for both companies. He also limited the amount of claims he made to SCIF. If one of his employees sustained a minor injury on the job, he handled the claim himself

[1] A company's ex-mod rating is expressed as a percentage of its actual claims compared to its expected claims. An ex-mod above 100 percent signals a company has more claims than would be expected in its industry, resulting in higher worker's compensation premiums, and an ex-mod below 100 percent signals the opposite, resulting in lower premiums. For 2008, the ex-mod used to calculate appellant's premium was reduced from 335 percent to 61 percent, and for 2007, it was reduced from 275 percent to 55 percent.

through a health care plan he provided for his workers. But if an employee sustained a serious injury, he submitted the claim to SCIF. One of the claims he submitted, and that SCIF paid, was for a Western employee who was injured falling off a roof in 2006.

Appellant testified that in preparing for the restitution hearing and coming up with his restitution figure, he went back over his work records and retroactively classified all of his employees based on the type of work they did. Appellant was confident that if SCIF had utilized his classifications, his ex-mod rating and resulting premiums would have been much lower. However, on cross-examination, appellant admitted his classification analysis was based largely on memory. In thinking back to the period in question, he acknowledged he had as many as 30 different projects going on at the same time, each of which had its own crew and foreperson. He also conceded he was not really sure how many people he had working for him.

At the restitution hearing, appellant also presented two declarations from Dr. Arthur J. Levine, an expert on workers' compensation insurance premiums. In his first declaration, Dr. Levine opined that had appellant reported his proper payroll and classifications to SCIF during the period in question, his ex-mod ratings year over year would have been substantially lower; instead of averaging over 200 percent, they would have averaged around 68 percent. Based on those lower ratings, Dr. Levine estimated the amount of unpaid premiums appellant owed was two-thirds less than what SCIF was seeking.

Dr. Levine filed a supplemental declaration after meeting with appellant and hearing his take on how SCIF allegedly mishandled his policy and miscalculated his unpaid premiums. Dr. Levine did not accept all of appellant's claims in that regard. However, he felt that if some of them were true, it could significantly reduce the amount of premiums appellant owed. "It is even conceivable," Dr. Levine wrote, "that a trier of fact would deem SCIF's claims handling and/or other underwriting and auditing conduct

to warrant a complete defense to SCIF's additional premium claim – or perhaps even damages due to [appellant]."

After taking the matter under submission, the trial court issued a written restitution order. It rejected the ex-mod ratings offered by SCIF and appellant as unreliable and adopted the ex-mod ratings and analysis provided by Dr. Levine. Consequently, as Dr. Levine recommended, the court reduced SCIF's restitution request by two-thirds, from $31,212,930 to $10,404,310. It then deducted $2,014,379 to reflect the premiums appellant had already paid, leaving a balance of $8,389,931. Including interest, that figure grew to $13,423,889, which is the total amount the court ordered appellant to pay SCIF in restitution.

DISCUSSION

Even though the trial court adopted the analysis offered by his own expert, appellant contends the court's restitution order is irrational and lacking evidentiary support. We cannot agree.

"In a criminal case an award of restitution is committed to the sound discretion of the trial court. No abuse of that discretion occurs as long as the determination of economic loss is reasonable, producing a nonarbitrary result." (*People v. Giordano* (2007) 42 Cal.4th 644, 665.) While the court must employ a calculation method that is rationally designed to make the victim whole, "'[t]here 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. [Citation.]' [Citation.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26–27.)

Appellant claims there is no rational basis for the trial court's restitution order because Hogan, the prosecution's primary witness, misclassified his workers and was unable to vouch for the ex-mod ratings SCIF used to calculate his unpaid premiums. In appellant's view, this rendered SCIF's analysis fundamentally unreliable. However,

the trial court did not rely on that analysis in determining the amount of restitution owed. Instead, it relied on the analysis provided by appellant's own expert, Dr. Levine.

Appellant would have us believe SCIF's classification and ex-mod ratings were still important in terms of assessing the reliability of the court's restitution order because they formed the starting point for Dr. Levine's analysis. In that respect, appellant seems to be arguing that Dr. Levin's analysis was unreliable because it was based on information supplied by SCIF. But it is obvious Dr. Levine did not blindly rely on SCIF's data in forming his opinions; rather, he came up with his own ex-mod rating for each of the years appellant underreported his payroll. That is why his estimation of restitution owed by appellant for unpaid premiums was two-thirds less than what SCIF was seeking. We do not believe the reliability of that estimation was tainted by virtue of any problems associated with Hogan's testimony or SCIF's ex-mod analysis.

Appellant further contends that since the trial court reduced SCIF's restitution request by two-thirds based on the analysis Dr. Levine provided in his first declaration, it should have reduced the request even further based on Dr. Levine's supplemental declaration. In his supplemental declaration, Dr. Levine did contemplate a further reduction might be warranted. However, he stated that possibility was contingent on the trial court making certain factual determinations in favor of appellant. Those factual determinations were primarily related to appellant's claim that SCIF was contributorily negligent in terms of handling his policy and investigating his alleged misconduct. By refusing to reduce the restitution award beyond two-thirds of that requested by SCIF, the trial court impliedly rejected appellant's claims in that regard, and we are not at liberty to second-guess that decision. While appellant notes that even prosecution witness Hogan agreed with certain aspects of his testimony, such as the classification rating he retroactively assigned his workers, the trial court was not required to adopt appellant's version of events or his ultimate opinion about the amount of restitution he owed. (See *Bookout v. State of California ex rel. Dept. of Transportation*

(2010) 186 Cal.App.4th 1478, 1487 ["the trier of fact is not required to believe the testimony of any witness, even if uncontradicted"].)

In challenging the court's restitution award, appellant also objects to the fact the trial court considered the amount of payroll he underreported for Western after Western was endorsed off his policy in 2003. However, even after 2003, appellant continued to submit claims to SCIF on behalf of Western workers who were injured on the job, and SCIF serviced those claims. As Hogan explained in his testimony, SCIF was legally obligated to provide coverage for *all* of appellant's workers because appellant was the named insured under the policy. The removal of Western's name from the policy in 2003 had no bearing on that obligation.

Even so, appellant argues it was improper for the court to consider the underreporting of Western's payroll in determining restitution because he was not convicted of any wrongdoing with respect to Western. (See *People v. Percelle* (2005) 126 Cal.App.4th 164, 180 [a defendant who is denied probation generally cannot be ordered to pay restitution for charges of which he was acquitted].) Once again, appellant is mistaken. The record shows he was charged with 36 counts of insurance premium fraud for underreporting his payroll to SCIF. The jury did acquit him on three of those charges – counts 35, 36 and 37 – but those charges related to Petronella Corporation, which was a legally distinct company from Petronella Roofing and Western. Unlike those three charges, the remaining 33 counts were based on appellant's underreporting of payroll for Petronella Roofing and Western. Because the jury found appellant guilty on all of those counts, it was proper for the trial court to include Western in its restitution analysis.

Appellant also asserts the trial court failed to employ a reasonable methodology in ascertaining the amount of restitution he owed SCIF. In appellant's view, the court essentially just split the difference between the parties' restitution

requests and neglected its responsibility to provide a more detailed analysis of the factors bearing on the premium owed, such as classification and ex-mod ratings.

However, it is clear the trial court did not simply pick a number midway between the parties' restitution figures. Rather, it adopted the analysis provided by Dr. Levine, who calculated a precise ex-mod rating for each of the years in which appellant underreported his payroll. While Dr. Levine stated he did not have all of the information necessary to determine the exact amount of premiums appellant owed, his opinions provided a sufficient basis for the trial court's restitution order. (See *People v. Giordano, supra,* 42 Cal.4th at p. 666 [the trial court's restitution award need not be calculated with "methodological []precision"].)

Lastly, appellant alleges the trial court's restitution order constitutes a windfall to SCIF that far exceeds the amount of actual damages it suffered as a result of his fraudulent conduct. The argument is grounded in Hogan's testimony regarding SCIF's expected loss ratio on its policies. Hogan said that on most of the policies it issues, SCIF's loss ratio is about 70 percent, meaning it pays out about .70 cents in claims for every dollar in premiums it takes in. However, according to appellant, SCIF's loss ratio on his particular polices would only have been about eight percent if the trial court had ordered restitution in the amount sought by SCIF.[2] Appellant sees that as an unfairly low loss ratio, but his analysis is misleading because the court did not actually award SCIF anything like the full amount of restitution it requested. And beyond that, the parties agreed the correct measure for restitution in this case was the amount of appellant's unpaid premiums, not the percentage of profit SCIF derived from appellant's policies.[3]

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[2] SCIF requested roughly $30 million in restitution yet it only paid out about $2.4 million in claims on appellant's policies.

[3] Dr. Levine was fully aware of this. In his supplemental declaration, he rejected appellant's windfall argument as a misguided attempt to peg restitution to the value SCIF received from appellant's policies, as opposed to the amount of premiums appellant owed on those policies.

The fact of the matter is appellant carried out one of the largest insurance premium scams in the history of California's workers' compensation system. To the extent the scope and nature of his misconduct precludes an exact determination of SCIF's losses, the equities favor SCIF as far as calculating the amount of restitution it is due. (See *People v. Prosser* (2007) 157 Cal.App.4th 682, 691; *People v. Baker* (2005) 126 Cal.App.4th 463, 469.) In light of all the relevant considerations, we are satisfied there is a factual and rational basis for the trial court's restitution order. No abuse of discretion or other ground for reversal has been shown.

DISPOSITION

The trial court's restitution order is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.