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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

Defendant and Appellant.

(Super.Ct.No.

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,
Judge. Affirmed with directions.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., Susan
Elizabeth Miller, and Marilyn L. George, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant and appellant, _____, pled guilty to fraudulently making a material statement and representation for the purpose of obtaining compensation. (Ins. Code, § 187.14, subd. (a)(4); count 1.) The court granted defendant three years of summary probation and later imposed victim restitution in the amount of \$35,525.08. On appeal, defendant contends the court abused its discretion in awarding that amount of restitution. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY¹

A senior claims examiner who administered workers' compensation claims for the _____ testified defendant was a food services worker with the district. Defendant claimed she sustained an injury to the lower right side of her back on June 11, 2013, when she picked up a box of frozen burritos. Defendant received total workers' compensation benefits of \$4,450.43 between June 17 and November 12, 2013. An additional \$13,740.60 was also paid out for her medical expenses during that period. Defendant's treating physician, an orthopedic surgeon, submitted monthly reports on defendant's condition between August and November 2013; he opined during that time that defendant was totally temporarily disabled or partially disabled and able to return to work with modified duties.

A senior investigator for the Riverside County District Attorney's Office who was assigned to investigate workers' compensation fraud was assigned defendant's case in _____

¹ The parties derive their factual recitations from the preliminary hearing, as shall we.

March 2014. Defendant's physician told the investigator that after four visits, defendant reported that her pain level was increasing, i.e., she was not getting better. On October 18, 2013, defendant reported to her physician that she was unable to lift her arms, unable to sit for a protracted period of time, that her gait included a limp, and that she had difficulty getting up from a seated position.

On October 12, 18, and 20, 2013, an insurance investigator recorded three clandestine videos of defendant. In those videos, defendant spent an extended amount of time in a car driving, she went to a pumpkin patch event, she bent down and tied her shoes, she walked without a limp, she carried a package to her car, and she sat in a casino gambling. On November 12, 2013, the defendant's treating physician changed his opinion after viewing the videos. The physician said defendant was "milking it." On the same date, he issued a supplemental orthopedic report in which he wrote that defendant was not disabled and should return to work.

On January 26, 2016, the People charged defendant by felony information with making a fraudulent material statement and representation on or about November 11, 2013, for the purpose of obtaining compensation. (Ins. Code, § 1871.4, subd. (a)(1); count 1.) On October 4, 2016, defense counsel moved to reduce the charge to a misdemeanor pursuant to Penal Code section 17, subdivision (b). Over the People's objection, the court granted the motion. Defendant then entered a guilty plea to the court, the factual basis of which consisted of defendant's admission that she had "got some

money by faking an injury and getting some Workers' Comp money" on or about November 11, 2013.

On October 14, 2016, the People filed a request for restitution in an aggregate amount of \$45,747.23, itemized as follows: salary payments of \$9,902.69, medical expenses of \$15,116.60, clandestine investigation in the amount of \$7,651.60, photocopying in the amount of \$3,050.80, bill review expenses of \$1,312.14, defense fees of \$5,859.21, and deposition expenses of \$2,854.19. On October 18, 2016, the court granted defendant three years of summary probation.

On November 21, 2016, the court held the hearing on restitution. Defense counsel contested the entirety of the amounts for investigation. Defense counsel also maintained any restitution should be limited to those amounts expended after the date of the crime, November 11, 2013, as reflected in the complaint and the plea: "[T]he People cannot show that she didn't have a legitimate injury before the date that the doctor determined that she was, quote, milking it. So what I would be asking for is just the salary after that date, which would be \$4,035.22."

The court observed: "There is sufficient evidence to back up everything that the [district attorney] is requesting." The court ordered an aggregate amount of restitution of \$34,925.09 in the following amounts: \$9,902.69 for salary reimbursement, \$15,116.60 for medical expenses, \$7,051.61 for the clandestine investigatory expenses, and

\$2,854.19 for deposition expenses. The court denied restitution for photocopying, bill review, and defense fees.²

II. DISCUSSION

Defendant contends the court abused its discretion because it ordered restitution for amounts incurred prior to November 11, 2013. Defendant maintains there was insufficient evidence to show defendant had not incurred an actual injury with actual medical expenses that she simply exaggerated later. We disagree.

“Generally speaking, restitution awards are vested in the trial court’s discretion and will be disturbed on appeal only when the appellant has shown an abuse of discretion. [Citation.] “[E]ven though the trial court has broad discretion in making a restitution award, that discretion is not unlimited. While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.” [Citation.] “When there is a factual and rational basis

² We observe that the minute order reflects a total amount of \$35,525.08 in restitution awarded by the court; however, as we calculate the amounts awarded by the court, the total should be \$34,925.09. On our own motion, we shall order the clerk of the court to correct the amount awarded by the court by amending the minute order. (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324 [“To the extent a minute order diverges from the . . . proceedings it purports to memorialize, it is presumed to be the product of clerical error. [Citation.] . . . As with other clerical errors, discrepancies between [the minute order] and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal.”]); *People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3. [“‘When there is a discrepancy between the oral pronouncement . . . and the minute order . . . , the oral pronouncement controls.’ [Citation.] A reviewing court has the authority to correct clerical errors”].)

for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.” [Citation.]” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.)

Here, as the factual basis for defendant’s plea, defendant admitted that she received money by faking an injury and receiving workers’ compensation for that injury. This is reasonably susceptible to a determination by the court that defendant had never incurred any injury at all. Although defendant’s interpretation might also be supported by the evidence, we defer to the court’s exercise of its broad restitutionary discretion. Here, the court acted well within its discretion by implicitly determining that defendant had never suffered an injury; thus, its restitutionary award of all wages and medical expenses incurred as a result of defendant’s faked injury is supported by the record. This is regardless of the date reflected in the complaint and in defendant’s plea. Indeed, the clandestine videos showed that defendant had been capable of performing tasks as early as October 12, 2013, that she was reporting to her physician she could not do.

Defendant contends the decision in *People v. Amin* (2000) 85 Cal.App.4th 58, compels a different outcome. We disagree. In *Amin*, the defendant fell after slipping on a lemon peel at work. She submitted a workers’ compensation claim for the injuries she sustained. It was uncontested that the defendant had been injured; however, approximately six months after her injury, a doctor examining the defendant concluded she “was making complaints that were far in excess of what he would expect given the injuries she had sustained. He suspected ‘symptom magnification.’” A psychiatrist who

later evaluated the defendant agreed, finding “‘deliberate symptom exaggeration is a factor here’” (*Id.* at p. 60.)

An investigation by the insurer nearly a year and a half after the injury disclosed the defendant driving her children to school and walking in high heels. However, defendant later appeared severely injured and unable to walk without a walker when arriving and leaving the doctor’s office. (*People v. Amin, supra*, 85 Cal.App.4th at pp. 60-61.) The People charged the defendant with 12 counts pertaining to her insurance claims, but resolved the case through a negotiated plea to a single count of presenting a false or fraudulent statement in support of a claim for workers’ compensation. In return, the defendant received probation and agreed to pay restitution on all counts, including those dismissed. The court later ordered the defendant to pay restitution in the amount of \$29,983. (*Id.* at p. 61.)

On appeal, the defendant contended the trial court abused its discretion in ordering “restitution because she did, in fact, suffer a legitimate industrial injury.” The appellate court, in upholding the amount of restitution ordered by the lower court, noted the restitution amount was significantly less than the total amount the insurer had paid because the amount reflected expenditures made by the insurer beginning on the date of the videotape of the defendant’s malingering; thus, the court acted within its discretion in awarding that amount of restitution. (*People v. Amin, supra*, 85 Cal.App.4th at pp. 62-63.)

Amin is both distinguishable from the present case and not binding on this court. First, *Amin* is, at best, dicta for the proposition that restitution in a fraudulent workers' compensation case may only be awarded beginning on the date upon which the insurer provides evidence of fraud. The defendant in *Amin* did not challenge the specific amount of restitution, but the power of the court to order restitution in *any* amount. Thus, *Amin*'s reasoning was unnecessary to its holding. (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006 ["Mere observations by an appellate court are dicta and not precedent, unless a statement of law was 'necessary to the decision, and therefore binding precedent[.]'".])

Second, *Amin* reasoned that the amount of ordered restitution was proper because it was based on the amount paid after the video surveillance which reflected the defendant's malingering. Here, defendant contends restitution should be limited to an amount paid only after defendant's treating physician changed his opinion, not the date of the video recording of her malingering. Third, in *Amin* it was uncontested that the defendant had suffered an injury (*People v. Amin, supra*, 85 Cal.App.4th at pp. 60-61); the disputed issue was that she appeared to have "grossly exaggerated her injuries" (*id.* at p. 62). Here, there was no evidence that defendant suffered any injury. In fact, as discussed above, defendant acknowledged she received money for "faking an injury," not exaggerating one. Fourth and finally, to the extent that *Amin* could be deemed to hold that restitution in a fraudulent workers' compensation case may only be awarded in an amount beginning on the date upon which the insurer provides evidence of the fraud, we

simply disagree with that holding. (*People v. Valladares* (2009) 173 Cal.App.4th 1388, 1393 [appellate courts are not bound by the holdings of other appellate courts].)

III. DISPOSITION

The superior court is directed to correct the minute order dated November 21, 2016, to reflect that the court awarded a total amount of \$34,925.09 in restitution. In all other respects, the judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.