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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **KATHLEEN BACH,** **Defendant and Appellant.**	**A125706** **(San Francisco County Super. Ct. No. 199462)**

Defendant Kathleen Bach (appellant) appeals from the judgment entered following a jury trial that resulted in her conviction on multiple counts, including embezzlement, grand theft, forgery, and money laundering. She contends the trial court erred in instructing the jury regarding an enhancement allegation, in denying probation, in failing to provide a jury trial to determine the amount of victim restitution, and in calculating the amount of restitution. She also contends she is entitled to additional presentence conduct credits. We agree she is entitled to additional credits, but otherwise reject her contentions on appeal.

PROCEDURAL BACKGROUND

In August 2006, a 25-count felony indictment was filed against appellant, charging her with four counts of embezzlement (Pen. Code, § 504)[1] (counts 1, 6, 11, & 16); eight counts of grand theft (§ 487, subd. (a)) (counts 2, 4, 7, 9, 12, 14, 17, & 19); eight counts

[1] All further undesignated section references are to the Penal Code.

of forgery (§ 470, subd. (a)) (counts 3, 5, 8, 10, 13, 15, 18, & 20); three counts of money laundering (§ 186.10, subd. (c)(1)(A)) (counts 21, 22, & 23); and two counts of willfully failing to file a tax return (Rev. & Tax Code, § 19706) (counts 24 & 25). The indictment also alleged an enhancement for takings in excess of $1.0 million (§ 12022.6, subd. (a)(3)), and an aggravated white-collar crime enhancement (§ 186.11, subd. (a)(2)).

At the close of trial, count 25 was dismissed for lack of evidence. The jury found appellant guilty of counts 4, 5, 9, 10, 14, 15, 16, 17, 19, 20, 21, 22, and 23, and found true the section 12022.6, subd. (a)(3) and section 186.11, subd. (a)(2) enhancement allegations. The jury found appellant not guilty of counts 1, 2, 3, 8, 13, 18, and 24; the trial court declared a mistrial on counts 6, 7, 11, and 12, on which the jury was unable to reach a verdict.

The trial court dismissed the section 12022.6 enhancement and sentenced appellant to nine years, eight months in prison. On appellant's motion, the trial court subsequently reduced the prison term to seven years, eight months. The trial court also ordered appellant to pay victim restitution to the Apple Family Trust in the amount of $1,043,247.15 and to Western Heating and Plumbing, Inc. (Western Plumbing) in the amount of $442,677.68.

FACTUAL BACKGROUND

Western Plumbing

Victor Bach, appellant's husband, and Paul Niess were the principal shareholders of Western Plumbing, a mechanical contractor company. In 2000, appellant became responsible for Western Plumbing's finances. From 2000 to 2003, appellant was responsible for accounts payable, accounts receivable, and the cash pay account. She was authorized to write checks, but not to sign them. Only Victor Bach, Paul Niess, and Lisa McLaughlin (project manager and appellant's daughter) had signing authority.

Victor Bach died on October 31, 2003, and appellant left Western Plumbing in November 2003. Starting that same month, McLaughlin began to discover irregularities in a number of checks, eventually discovering approximately 200 suspicious transactions. McLaughlin and other employees created a list of questionable checks, which they gave

to the police. For example, there were checks written with forged signatures and written to appellant's event planning business and to a jeweler friend of appellant. The checks totaled approximately $997,000. An investigator with the District Attorney's office, Raymond Tang, created a list of 217 questionable Western Plumbing checks. Tang's list of questionable Western Plumbing checks between 2000 and 2003 totaled $977,589.90.

Apple Family Trust

The Apple Family Trust was a family living trust that provided for the management of the assets of Seymour and Barbara Apple while they were alive and the termination of the trust upon their death, with distribution of the trust assets to their sons Kalman and Jennings. Around the year 2000, Seymour Apple suffered a stroke and moved into an assisted care facility. Victor Bach, a friend of Seymour Apple since childhood, was named cotrustee of the Apple Family Trust; appellant was named successor trustee in the event of Victor Bach's death. At that time, the value of the trust was approximately $800,000, not counting Seymour Apple's house in Santa Clara.

In December 2003, it became apparent that substantial assets were missing from the Apple Family Trust. In January 2004, appellant told Kalman Apple that "she took money out of the Apple Trust for her own personal use, and that she was sorry, but she didn't offer any explanation." That same month, a private professional fiduciary, Joanne Stine, was appointed trustee of the Apple Family Trust. In April 2004, appellant stated to Stine in an e-mail, "I know that I owe the Apple family money, and I would like to start to make restitution to them. . . . No excuse, but please realize I am not a bad person. Just a person with a spending problem that I am trying to take care of."[2]

The attorney for the Apple Family Trust trustee testified that between 2000 and 2004 more than $1.0 million was unlawfully removed from the trust. Between 2000 and 2002, Seymour Apple and Victor Bach were cotrustees; after December 2002, Victor Bach was the sole trustee. Checks written from the trust's checking account showed two

[2] Appellant made other admissions to other persons. It is unnecessary to detail them here.

different forms of Victor Bach's signature. It appeared that checks paying valid trust expenses bore one signature, whereas checks for invalid expenses bore a different signature. The illegitimate payees included appellant, Victor Bach, Western Plumbing, appellant's event planning business, appellant's credit cards, and various jewelers.

Tang created a list of 229 questionable Apple Family Trust checks; there were also numerous questionable trust account ATM withdrawals. The total of the questionable checks and cash withdrawals between 2000 and early 2004 was $843,524.09. In addition, there were six checks totaling $111,000 from another Apple Family Trust account to appellant's event planning business.

DISCUSSION

I. *The Instruction on the Section 186.11 Enhancement Was Not Erroneous*

With regard to the aggravated white collar crime enhancement, section 186.11, subdivision (a)(2), the trial court instructed the jury with the following language of CALCRIM No. 3221: "If you find the defendant guilty of the crimes charged in [counts 1 through 23], you must then decide whether the People have proved the additional allegation that the defendant engaged in a pattern of related felony conduct that involved the taking of more [than $500,000]. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant committed two or more related felonies, specifically theft, embezzlement, or forgery; [¶] 2. Fraud or embezzlement was a material element of at least two related felonies committed by the defendant; [¶] 3. The related felonies involved a pattern of related felony conduct; [¶] AND [¶] 4. The pattern of related felony conduct involved the taking of more than [$500,000]."

Appellant contends the trial court's instruction led the jury "to believe that if they found one check a theft for [any one] count, they could then consider the list of total losses per year that the People provided them to find the allegations true." The contention is without merit.

We review appellant's claim of instructional error de novo. (*People v. Riley* (2010) 185 Cal.App.4th 754, 767 (*Riley*).) "A trial court must instruct the jury 'on the law applicable to each particular case.' [Citation.] '[E]ven in the absence of a request,

the trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)[3] In determining whether the trial court committed instructional error, " ' " 'we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" [Citation.]' " (*Riley*, at p. 767.) " ' "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." [Citation.]' " (*Ibid.*)

There is no reasonable likelihood the jury misconstrued or misapplied the trial court's instruction. (*Campos, supra*, 156 Cal.App.4th at p. 1237.) The language in the instruction given tracks the language in the statute; "[g]enerally, the language of a statute defining a crime or defense may serve as the instruction." (*People v. Frederick* (2006) 142 Cal.App.4th 400, 419, citing *People v. Rodriguez* (2002) 28 Cal.4th 543, 546.) Contrary to appellant's argument, nothing in the instruction suggested the jury could consider the total list of losses if it found one check to be a theft. Instead, the instruction specified the jury was required to find that the "pattern of related *felony conduct* involved the taking of more than [$500,000]." (Italics added.) Thus, the instruction made clear that appellant's *crimes* had to result in the taking in excess of $500,000, not merely that she committed a theft, regardless of whether the theft caused the loss exceeding $500,000.[4]

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[3] To the extent appellant suggests the court's instruction, while correct in law, was " ' "too general or incomplete," ' " that contention has been forfeited due to appellant's failure to request " ' "appropriate clarifying or amplifying language." ' " (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 (*Campos*).)

[4] The arguments to the jury reflected this understanding of the instruction. (See *People v. Cain* (1995) 10 Cal.4th 1, 37 [closing arguments "buttressed" conclusion that there was no reasonable likelihood instruction misled jury].) The prosecutor's argument focused on the language of the instruction and emphasized that the jury was required to find the "taking involved more than $500,000." Defense counsel emphasized that the prosecution had "to prove that each alleged amount is accurate. You can't just add checks together that you do not believe beyond a reasonable doubt are thefts."

Appellant's claim of instructional error is without merit.[5]

II. *The Trial Court Did Not Abuse Its Discretion in Denying Probation*

Appellant contends the trial court abused its discretion in denying her request for probation.

In its sentencing memorandum, the prosecution argued for imposition of the middle term of thirteen years, four months. In her sentencing memorandum, appellant argued she was eligible for probation because each count was a "wobbler." (See *People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 355.) She argued that the court should impose three years' probation because, among other things, she was 58 years old, in poor health, and had no prior record. The probation report recommended that appellant be sentenced to prison for the lower term. In detailing appellant's crimes, the report noted appellant had abused a position of trust, caused a trust to be "plundered" and a business to be "crippled," displayed "a high degree of sophistication," and committed her offenses over a period of three years. Regarding probation, the report concluded, "a grant of probation is not equitable when placed against the damage the defendant did to the many victims in this matter." Several witnesses who were impacted by appellant's crimes spoke at the sentencing hearing, requesting that the maximum punishment be imposed. Following arguments from counsel, the trial court denied probation and sentenced appellant to a prison term of nine years, eight months, later reduced to seven years, eight months.

"[A] grant of probation is not a matter of right but an act of clemency." (*People v. Covington* (2000) 82 Cal.App.4th 1263, 1267.) " 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a

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[5] Because the trial court dismissed the section 12022.6 enhancement, we do not consider appellant's contention that the trial court's instruction regarding that enhancement was erroneous. We note, however, that there is no reason to think the language of the instruction would have caused the jury to misapply the law with respect to section 186.11, subdivision (a)(2).

trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)[6]

The trial court had ample reasons to deny probation in this case, as indicated in the probation report and the prosecution's arguments to the court. Appellant has not demonstrated that the court abused its discretion.

III. *Appellant Was Not Entitled to a Jury Trial on the Amount of Victim Restitution*

Appellant contends the trial court's award of restitution to Western Plumbing violated her Sixth Amendment right to a jury trial, reasoning that the restitution order constituted additional punishment that could not be imposed without jury findings beyond a reasonable doubt under the rationale of *Cunningham v. California* (2007) 549 U.S. 270 and its progeny.

The argument presented by appellant was rejected in *People v. Millard* (2009) 175 Cal.App.4th 7 (*Millard*). There, the court rejected the premise that victim restitution constitutes increased punishment, because "the primary purpose of a victim restitution hearing is to allow the People to prosecute an expedited hearing before a trial court to provide a victim with a civil remedy for economic losses suffered, and not to punish the defendant for his or her crime. To the extent a victim restitution order has the secondary purposes of rehabilitation of a defendant and/or deterrence of the defendant and others from committing future crimes, those purposes do not constitute increased punishment of the defendant." (*Id.* at pp. 35-36.) Accordingly, the trial court's determination of the amount due in restitution "does not involve a defendant's Sixth Amendment right to a jury or proof beyond a reasonable doubt." (*Id.* at p. 36.) The court in *People v.*

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6 To the extent appellant contends the trial court failed to provide adequate reasons for its decision, that claim has been forfeited due to appellant's failure to object on that ground below. (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1084.)

Chappelone (2010) 183 Cal.App.4th 1159 (*Chappelone*) followed *Millard* and also cited a number of federal cases reaching the same conclusion. (*Chappelone*, at pp. 1184.)[7]

We agree with the decisions in *Millard* and *Chappelone*, and reject appellant's Sixth Amendment claim.

IV. *The Trial Court's Restitution Determination Was Not an Abuse of Discretion*

Section 1202.4 provides 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." (§ 1202.4, subd. (a)(1).) Section 1202.4, subdivision (f) states that, subject to certain exceptions not applicable here, "[I]n 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 court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." Restitution "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct. . . ." (§ 1202.4, subd. (f)(3).)

A defendant is entitled to a restitution hearing to "dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).) "At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] 'Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.' " (*Millard, supra,* 175 Cal.App.4th at p. 26; see also

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[7] The cases appellant cites for the proposition that restitution constitutes punishment are not directly on point because, unlike *Millard* and *Chappelone*, they do not address the issue in the context of a Sixth Amendment claim. (See *People v. Hanson* (2000) 23 Cal.4th 355, 362; *People v. Walker* (1991) 54 Cal.3d 1013, 1024-1026; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1221-1224; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1273.)

Chappelone, supra, 183 Cal.App.4th at p. 1172.) "A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall." (*Chappelone*, at p. 1172.) We uphold the trial court's determination of the amount of restitution unless appellant has demonstrated that the court abused its discretion. (*Id.* at p. 1173.)

Appellant contends the trial court improperly awarded a windfall to Western Plumbing because the $442,677.68 award should have been reduced by $120,000 to reflect payments totaling that amount from the Apple Family Trust to Western Plumbing. At the restitution hearing the prosecutor indicated he was limiting his restitution request to Western Plumbing's losses in 2003, which was the year of the two Western Plumbing counts regarding which the jury returned a guilty verdict (counts 16 and 17). Western Plumbing employee McLaughlin testified as to why checks totaling $442,677.68 were illegitimate. Defense counsel introduced four checks from the Apple Family Trust to Western Plumbing dated between August and September 2003 and totaling $120,000. Defense counsel argued that sum represented money "that was received back to Western [Plumbing] and that money [appellant] has already been ordered to pay to [the] Apple [Family Trust]." He continued, "for the Court to order [appellant] to pay the full amount . . . you're actually making her pay an extra $120,000," because "in 2003 Western [Plumbing] is not out that money." The trial court declined to decrease the award to Western Plumbing by that amount, reasoning that appellant had not met her burden of proof because it was speculative that those funds reimbursed the losses that McLaughlin described. The court stated, "There's a lot of losses of Western Plumbing that aren't the subject of this restitution hearing."

There is no dispute that the prosecution made a prima facie showing of Western Plumbing's loss, which shifted the burden to appellant to "disprove the amount of losses claimed by the victim." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) The trial court did not abuse its discretion in declining to reduce the restitution award to reflect the $120,000 received by Western Plumbing from the Apple Family Trust. Although the payment could have been intended to partially compensate Western

Plumbing for its 2003 losses due to illegitimate checks, the payment also could have been intended to reimburse Western Plumbing for previous or unrelated losses.[8] Absent any evidence from appellant linking the $120,000 payment to Western Plumbing's 2003 losses from the illegitimate checks identified by McLaughlin, we cannot conclude the trial court abused its discretion in declining to reduce the restitution award to Western Plumbing.

V. *This Court Must Remand for Recalculation of Presentence Custody Credit*

In October 2009, the Legislature passed Senate Bill No. 18 (2009-2010 3d Ex.Sess.) (Senate Bill No. 18), which amended section 4019, effective January 25, 2010, to increase the rate at which a specified class of prisoners could earn conduct credits. (Former § 4019, subds. (b)(1), (c)(1) as amended by Stats.2009, ch. 28, § 50.)[9] Eligible prisoners are those who were neither required to register as sex offenders, nor were committed for serious felonies (§ 1192.7), nor had been convicted of serious or violent felonies (§ 667.5). (Former § 4019, subds. (b)(2), (c)(2).) Appellant contends she is entitled to additional presentence conduct credits under former section 4019, even though

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[8] Contrary to appellant's suggestion, the fact that appellant was not found criminally liable for Western Plumbing's losses before 2003 does not mean that the court could not consider the existence of uncompensated losses in deciding whether to decrease the restitution award. The existence of other losses showed that the Apple Family Trust payment was not necessarily connected to the 2003 illegitimate checks. The court's conclusion that appellant failed to present evidence to justify decreasing the award by the amount of the Apple Family Trust's payments does not mean the court provided a restitution award for the past losses.

[9] As used herein, "former section 4019" refers to section 4019 as amended by Senate Bill No. 18 (Stats. 2009, 3d Ex.Sess., ch. 28X, § 50, eff. Jan. 25, 2010.) Effective September 28, 2010, section 4019 was further amended to restore the previous rate of accrual of conduct credits. (Stats. 2010, Ch. 426, § 2 (Sen. Bill No. 76), eff. Sept. 28, 2010; see § 4019, subd. (f) ["if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody"].) That most recent amendment is not at issue here because it is inapplicable to appellant. (§ 4019, subd. (g) ["The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act"].)

she was sentenced before the January 25, 2010 effective date of the legislation. We agree.[10]

A defendant sentenced to state prison following a criminal conviction is entitled to credit against the sentence imposed for all days spent in custody prior to sentencing. (§ 2900.5, subd. (a).) In addition, the defendant may be entitled to conduct credits pursuant to section 4019. Prior to January 25, 2010, subdivisions (b) and (c) of section 4019 provided that "for each six-day period in which a prisoner is confined in or committed to" a local facility, one day is deducted from the period of confinement for performing assigned labor and one day is deducted from the period of confinement for satisfactorily complying with the rules and regulations of the facility. (Stats. 1982, ch. 1234, § 7, p. 4553.) Prior to January 25, 2010, section 4019, subdivision (f) provided that "if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Stats. 1982, ch. 1234, § 7, p. 4554.)

Senate Bill No. 18 amended section 4019 to provide for the accrual of presentence credits at a greater rate. (Former § 4019, subd. (b)(2); see also *id*., subd. (c)(2).) Subdivisions (b)(1) and (c)(1) of former section 4019 provide that one day of work credit and one day of conduct credit may be deducted for each four-day period of confinement or commitment. According to subdivision (f) of former section 4019, "if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody . . . ."

Appellant contends she is entitled to the benefit of any statutory amendment that reduces punishment or increases credits unless the legislation contains a savings clause making it applicable prospectively only. She argues Senate Bill No. 18 contained no such savings clause. In *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the California Supreme Court stated, "When the Legislature amends a statute so as to lessen the

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10 This issue is presently before the California Supreme Court in *People v. Brown*, 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.

punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.)

In our view, the present matter is governed by *Estrada*. The effect of the Senate Bill No. 18 amendment to section 4019 was to reduce the overall time of imprisonment, and, thus, the punishment, for those less serious offenders who have demonstrated good behavior while in custody. Even without the presumption of retroactivity, a legislative intent that former section 4019 be applied retroactively might reasonably be inferred from section 59 of Senate Bill No. 18. It read: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009, 3d Ex.Sess., ch. 28X, § 59.) Arguably, if the Legislature did not intend retroactive application, it would not have been concerned with "delays in determining the amount of *additional time credits* to be granted against inmate sentences resulting from changes in law pursuant to this act." (*Ibid.*, italics added.)

We conclude defendant is entitled to the additional conduct credits provided by former section 4019. Under former section 4019, based on her 27 days in custody,[11] she is entitled to a total of 53 days of presentence custody credits, rather than the 39 days she received.

DISPOSITION

The present matter is remanded to the trial court with instructions to amend the abstract of judgment to reflect 27 actual days in custody, 26 days of conduct credits under former section 4019, and total credits of 53 days. A certified copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

[11] The abstract of judgment incorrectly states that appellant served only 17 actual days in custody, rather than 27 days. We will order that the abstract of judgment be corrected.