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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SERGEY VINALYEVIC SHCHIRSKIY et al., Defendants and Appellants.	C050796 (Super. Ct. No. 04F03507)

Defendants Sergey Vinalyevic Shchirskiy and Andrey Larshin appeal following judgment in a case involving various offenses, including assault with a firearm (Pen. Code, § 245; undesignated section references are to the Penal Code), robbery (§ 211), and extortion by threat (§§ 519,[1] 520,[2] 524[3]). Larshin claims

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[1] Section 519 provides: "Fear, such as will constitute extortion, may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, [¶] 3. To expose, or to impute to him or them any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him or them."

insufficiency of the evidence and sentencing error. Shchirskiy challenges a $1,500 restitution order. We shall reverse the $1,500 restitution order against Shchirskiy but shall otherwise affirm the judgments as to both defendants.

FACTUAL AND PROCEDURAL BACKGROUND

Although Larshin was convicted on numerous counts, his appellate contentions are limited, and we therefore need not recite the details of all counts.

Larshin was charged with 15 counts of robbery (§ 211), attempted extortion[4] (§ 524), criminal threats (§ 422), and assault with a semiautomatic firearm (§ 245, subd. (b)), as to various victims on various dates in 2003 and 2004, plus enhancements for personal use of a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). Count Eleven was dismissed by the court. The jury found Larshin not guilty on Count One (attempted extortion of Peter Konishchuk) and not guilty on

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[2] Section 520 states, "Every person who extorts any money or other property from another, under circumstances not amounting to robbery or carjacking, by means of force, or any threat, such as is mentioned in Section 519, shall be punished by imprisonment in the state prison for two, three or four years."

[3] Section 524 provides: "Every person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment."

[4] Section 524, fn. 3, *ante*, makes attempted extortion punishable in the same manner as if the defendant had actually obtained the money or property from the victim.

Count Nine (attempted robbery of Yaroslav Tseyk). The jury found Larshin guilty on the other 12 counts[5] and found true that Larshin personally used a firearm for Counts Three through Eight within the meaning of sections 12022.5, subdivision (a)(1), and 12022.53, subdivision (b).

Shchirskiy was charged with two counts (Counts One and Thirteen), for attempted extortion by threat. The jury acquitted Shchirskiy on Count Thirteen and found him guilty on Count One -- attempted extortion by threat against victim Peter Konishchuk.

The appellate contentions relate to Counts One, Two and Three.

Count One (Shchirskiy's Attempted Extortion)

Shchirskiy complains the trial court ordered him to pay restitution unrelated to the sole crime of which he was convicted -- Count One, attempted extortion of Konishchuk. The evidence adduced regarding Count One included the following:

One day in March 2004, Konishchuk was in his automotive body shop, making repairs to a customer's Mercedes Benz, when a

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[5] The jury found Larshin guilty of criminal threat against Peter Konishchuk on March 29, 2004 (Count Two); robbery, criminal threat, assault with a firearm, extortion, attempted extortion, and attempted robbery as against victim Yaroslav Tseyk on various dates in 2003 and 2004 (Counts Three through Eight, Ten and Twelve [Count Eleven was dismissed]); attempted extortion and dissuading a witness from testifying, as to victim Konstantin Brutskiy in April 2004 (Counts Thirteen and Fourteen); and criminal threat against Stephanie Johnson in August 2002 (Count Fifteen).

group of persons including defendants drove up in a Jeep and inquired about having Konishchuk repair a Jaguar assertedly owned by Shchirskiy. Three days later, Konishchuk arrived at work to find the entrance open and the Mercedes gone. He reported the theft to the police. He then received telephone calls from Shchirskiy, demanding $10,000 for the return of the Mercedes. Konishchuk said he would try to get the money. He reported the telephone calls to the police. Detective Prokopchuk had Konishchuk participate in several tape-recorded telephone calls on March 24 and 25, 2004 (played for the jury, with translation provided), in which Shchirskiy repeated his demands for money. Konishchuk said he had $8,000 and was trying to get the other $2,000 but wanted to see the car before turning over the money. Shchirskiy refused, became upset, and threatened to burn the car. Konishchuk eventually said he would not pay. He later learned that the police found the Mercedes "burned down" on March 23, 2004 (before the recorded phone conversations).

After the jury found Shchirskiy guilty of attempted extortion in Count One (victim Konishchuk), the trial court sentenced him to two years in prison and ordered him to pay $1,500 restitution for an amount extorted from the car owner (a crime for which Shchirskiy was not charged, as we discuss *post*).

Count Two (Larshin's Criminal Threat Against Konishchuk)

The day after the monitored phone calls, Larshin telephoned Konishchuk, said his (Larshin's) home had been raided by the police, and he (Larshin) would "make [Konishchuk] a hole in the

head" if Konishchuk did not get Larshin's name removed from the police's list of suspects for the theft of the Mercedes. Larshin also told Konishchuk to leave town or he would "have no life here anyway." Konishchuk became "a little bit scared" and believed defendant was serious and could carry out the threat.

Larshin testified he did not threaten Konishchuk. He merely called to ask Konishchuk to remove Larshin from the suspect list because he had nothing to do with the theft.

Counts Three through Six (Larshin's Offenses Against Yaroslav Tseyk)

Tseyk testified he was initially friendly with Larshin. Larshin once commented on the amount of cash carried by Tseyk (who worked as an airline baggage checker). While they were still friendly, Larshin showed Tseyk a loaded semiautomatic gun and said he carried it all the time. On other occasions thereafter, Tseyk saw Larshin with the gun in his waistband or putting the gun in the glove compartment.

Tseyk testified that one day in 2003 (he did not remember the date), Larshin called and asked Tseyk to meet him at an apartment complex near Norwood and Interstate 80. When Tseyk arrived, Larshin and several other persons, all armed with guns, approached Tseyk's car. Larshin asked for $1,000 for "protection." Tseyk said no. Larshin, with his gun in his hand, told Tseyk to pay the money or he would "end up in the American River flowing [*sic*] down the water." Larshin placed the point of his gun touching the side of Tseyk's head. Tseyk was afraid and agreed to pay the money. Larshin told him to

bring the money the next day. Tseyk agreed to do so. The next day, Larshin called Tseyk in the morning, and Tseyk brought him $1,000 in cash. When asked why he gave Larshin the money, Tseyk said, "So, he would leave me alone." Larshin's companions were not with him when he got the money.

This scenario of Larshin obtaining money by threatening Tseyk was repeated on later occasions, which were the subject of other counts not at issue in this appeal.

Larshin testified he met Tseyk at the apartment complex but had no gun, did not threaten Tseyk, and did not receive $1,000 from Tseyk. Larshin said Tseyk asked for help in buying a gun because another man (Oleg) threatened him with a knife. Larshin went to Oleg to intervene, but Oleg said Tseyk was lying, and Tseyk owed money for a ticket he got when he borrowed Oleg's car. Larshin drove back to the apartment complex, angry that Tseyk had tried to use him to get out of paying money he owed to Oleg. Larshin hit Tseyk and took $92 cash that was inside the wallet that fell out of Tseyk's pocket.

After the jury returned its verdicts, the trial court sentenced Larshin to a total of 29 years and four months -- the upper term of nine years on the Count Five assault with a firearm; one year on Count Seven extortion; one year on Count Eight extortion; three years on Count Fourteen dissuading a witness in violation of section 136.1; eight months each on Counts Two, Ten, Thirteen, and Fifteen extortion and criminal threats; 10 years for the section 12022.5, subdivision (a)(1), gun enhancement attached to the Count Five assault with a

firearm; and one year, four months for the gun enhancements attached to Counts Seven and Eight.

Sentences on the remaining counts (Counts Three, Four, Six and Twelve) were stayed under section 654.

DISCUSSION

I. Larshin's Appeal

A. Substantial Evidence - Count Two

Larshin contends the evidence was insufficient to prove he committed the offense of criminal threat (§ 422) against Peter Konishchuk, as charged in Count Two, because there was no substantial evidence of "sustained fear." We disagree.

In reviewing a challenge to sufficiency of the evidence, we examine the record in the light most favorable to the judgment to see if it contains reasonable, solid evidence (contradicted or uncontradicted) from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Castro* (2006) 138 Cal.App.4th 137, 140.)

Section 422 provides in part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an

immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

The jury was instructed, in accordance with *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156, that "sustained fear" meant "a period of time that extends beyond what is momentary, fleeting, or transitory."

Larshin contends there is no substantial evidence that he caused Konishchuk "sustained fear" when he (Larshin) telephoned Konishchuk and said that he would "put a hole" in Konishchuk's head and that Konishchuk would have to leave the city or would have no life unless he removed Larshin's name from the list of suspects for the theft of the car.

Larshin acknowledges Konishchuk testified he believed Larshin's words constituted a threat and believed Larshin could carry out the threat. Larshin nevertheless argues Konishchuk did not have "sustained fear," as required by section 422, because he testified he was only "a little bit scared," and there was no evidence that he took measures to ensure his safety, that he complied with Larshin's request to tell the police to take Larshin off the suspect list, or that he had any knowledge of any prior violence by Larshin.

We disagree with Larshin's contention. First, the witness did not testify he was "only" a little bit scared, as asserted by Larshin on appeal. "Only" is Larshin's word, not the

witness's word. The absence of evidence that Konishchuk was aware of prior violence or took measures to ensure his safety does not undermine a finding of sustained fear.

The "sustained fear" element of section 422 has an objective and a subjective component. (*In re Ricky T*. (2001) 87 Cal.App.4th 1132, 1140.) There must be proof that the threat has a gravity of purpose and an immediate prospect of execution of the threat such as to cause the victim reasonably to be in sustained fear. (*In re Ernesto H*. (2004) 125 Cal.App.4th 298, 312.) Larshin's threats pass this test.

The subjective component of sustained fear under section 422 may be reasonably inferred from the circumstances. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.)

Konishchuk testified at trial that, three days after Larshin, Shchirskiy and another man visited his shop to discuss repairs to a Jaguar, his (Konishchuk's) shop was burglarized and a Mercedes automobile was taken, along with other items. Shchirskiy contacted Konishchuk and said the Mercedes would be returned for $10,000, and if Konishchuk did not pay, he "would see a disaster." Konishchuk testified he then received a telephone call from Larshin, who "told me to remove his name from the police lists [of suspects]. And he said that unless I did that, he would make me a hole in my head, and he also told me to get out of the city or else you will have no life here anyway." Larshin used foul and profane language, which Konishchuk declined to repeat in court. Konishchuk testified, "people may have all kinds of things in their heads. I got a

little bit scared." Konishchuk also testified, "This wasn't a joke. This was serious."

On cross-examination, Konishchuk testified as follows:

"Q. [Larshin's counsel] Did Mr. Larshin tell you in essence that you caused the police to come out to his house and messed up his house?

"A. I do not understand the question.

"Q. Was Mr. Larshin blaming you for the police going to his house?

"A. Yes. He was saying that I had turned him in.

"Q. And his request of you was to call them back and tell them that you were wrong, right?

"A. Yes. Or either remove his name from the lists.

"Q. And then he used a little bit of heavy language along that [*sic*] same request?

"A. Whatever I had said earlier, that was what he said.

"Q. Okay. Is there anything unusual about a couple of Russian men talking kind of rough with each other?

"A. It depends on what kind of surroundings you are.

"Q. You didn't really believe he was going to put a hole in your head, did you?

"A. I did not believe?

"Q. That's the question[.]

"A. This is not a smart question.

"Q. What's the answer?

"A. He could have done easy whatever he said.

"Q. I appreciate that, but the question to you sir, is, Did you within yourself believe[] that if you didn't call off the police, he is [*sic*] going to run over to your shop and put a hole in your head?

"A. Yes, I believed he could have done whatever.

"Q. Well, I think any one of us could have done it, but what I'm asking you is, Did you think he was going to do it?

"A. This was a threat. He did not point his gun to my head, but this was a threat."

We disagree with Larshin's assertion that the witness (who was testifying with the assistance of an interpreter) was evasive.

On appeal, Larshin argues the evidence did not reflect that Konishchuk's reaction was anything other than transitory or momentary. Larshin argues there was no evidence that the witness undertook any measures to ensure his safety, nor did he seek to remove Larshin's name from the list of suspects. Larshin argues this case is different from *Ortiz, supra*, 101 Cal.App.4th 410, where sustained fear was inferred from circumstantial evidence, because in *Ortiz* the threat was made during a carjacking and kidnapping of the victim, and as the *Ortiz* court said, anyone would be scared in such circumstances. Larshin also argues this case is distinguishable from another case where the victim was aware of prior criminal conduct by the defendant. (*People v. Garrett* (1994) 30 Cal.App.4th 962, 967.)

Larshin's argument is without merit. After defendants visited his business premises, Konishchuk suffered a burglary

which included the theft of a customer's car, following which Konishchuk received telephone calls from Shchirskiy extorting money for the return of the car. Konishchuk's belief that defendants took the car is reflected in the evidence that he borrowed thousands of dollars from relatives in an attempt to meet the extortion demand. This context provides circumstantial evidence from which to infer that the fear Konishchuk expressed as a reaction to Larshin's threatening phone call was "sustained fear" within the meaning of section 422.

We conclude substantial evidence supports the conviction of Larshin on Count Two for criminal threat in violation of section 422.

B. Count Three - Robbery

Under the heading that the evidence was insufficient to sustain his conviction for robbery of his former friend, Yaroslav Tseyk, as charged in Count Three, Larshin argues, "Since Tseyk did not give [defendant] any cash at the time of the threatened encounter, but rather gave him cash the following day, a completed robbery was not committed." Larshin also argues the jury returned "mutually exclusive" verdicts of guilt on both robbery (Count Three) and extortion (Count Six) arising from the same act. We shall conclude Larshin fails to show grounds for reversal.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.)

To the extent Larshin suggests he was convicted for robbery based only on what happened the first day (when Larshin expressly threatened Tseyk), Larshin fails to show the jury convicted him for robbery based only on what happened the first day. The jury was instructed that robbery required that there be a taking possession of the victim's property by Larshin.

To the extent that Larshin suggests all elements of robbery must occur on the same day, his opening brief cites no authority on this point. He merely asserts there was no evidence that he threatened the victim on the second day, when Larshin took possession of the cash. Larshin argues the victim's testimony demonstrated only that, after the victim agreed on day one to bring Larshin the money, the victim met Larshin at the same location on day two and gave him $1,000. Larshin says there is no evidence that, at the time of the cash exchange, Larshin threatened the victim with a gun or words.

However, robbery need not be confined to a single time and place. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.) In his reply brief, Larshin miscites *Carrasco* for the proposition that robbery requires that the taking of property be contemporaneous with or within minutes of the show of threat or force.

However, *Carrasco* does not help Larshin. Although there was an express threat at the time of, or a few minutes before, the taking of property as to two of the three robbery convictions affirmed in *Carrasco*, there was not a

contemporaneous threat as to the first incident. Thus, the *Carrasco* opinion begins:

"Defendant Luis Carrasco asked his friend to give him money. The friend refused. At various times during the next four hours defendant threatened to kill his friend and fired gunshots near the front of the store where his friend worked. Two hours after the shots were fired, defendant came to the store and demanded money from his friend *but did not show a gun*. [Italics added.] His friend gave him money.

"We conclude that under these circumstances defendant committed a robbery. We also conclude that firing the gun after the first threat was made and two hours before defendant received the money supports the allegation of personally discharging a firearm during the commission of a robbery. [Citation.]" (*Carrasco, supra*, 137 Cal.App.4th at p. 1053.)

In upholding the firearm enhancement, *Carrasco* said: "'"Robbery . . . is not confined to a fixed *locus*, but is frequently spread over a considerable distance and varying periods of time."' [Citations.] 'The crime is not divisible into a series of separate acts. Defendant's guilt is not to be weighed at each step of the robbery as it unfolds. The events constituting the crime of robbery, although they may . . . take some time to complete, are linked by a single-mindedness of purpose.' [Citation.] In other words, the crime of robbery begins with the commission of any of the defined elements and is completed when all of the remaining elements have been committed. It is a continuing offense that concludes not just

when all the elements have been satisfied but when the robber reaches a place of relative safety. [Citation.]" (*Carrasco, supra*, 137 Cal.App.4th at p. 1059.)

Thus, the absence of evidence of an express threat by Larshin at the time the victim turned over the money does not constitute grounds for reversal.

The record in this case supports an inference that the victim was operating under fear of Larshin's threat when he gave Larshin the money. Larshin held a gun to the victim's head and threatened to kill him unless the victim gave him money. Out of fear, the victim agreed to bring the money the following day. Although the victim did not testify he was still afraid when he turned over the money, the evidence supports this inference.[6] Thus, since Larshin and the victim had been friends, Larshin knew how to find the victim if the victim did not show up. Moreover, the victim testified he knew Larshin carried the gun at all times, because Larshin previously told him so, and on other occasions the victim saw Larshin put the gun in the car's glove compartment or carry it in his waistband.

Substantial evidence supports the robbery conviction.

As to Larshin's contention that his robbery conviction must be reversed because it conflicts with his extortion conviction

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[6] The People say Tseyk's fear is supported by his testimony that he delayed going to the police out of fear of Larshin. However, the cited testimony was that the victim delayed going to the police for a year after a subsequent incident involving Larshin. This does not show fear on the day at issue in this appeal.

(§ 520, fn. 2, *ante*), Larshin fails to show grounds for reversal. He cryptically states he is not raising a claim of inconsistent verdicts, but rather mutually exclusive verdicts, because a jury cannot find conflicting mental states of the victim (consensual for extortion, nonconsensual for robbery) in a single act of theft.

We note there is no issue of multiple punishment for the same act in this case, because the trial court designated Larshin's assault on Tseyk with a firearm (Count Five) as the principal offense and stayed sentence on both the extortion and the robbery convictions pursuant to section 654.

We reject Larshin's argument that robbery and extortion require necessarily conflicting mental states of victims. *People v. Torres* (1995) 33 Cal.App.4th 37, said, "'The crime of extortion is related to and sometimes difficult to distinguish from the crime of robbery.' [Citation.] Both crimes have their roots in the common law crime of larceny. [Fn. omitted.] Both crimes share the element of an acquisition by means of force or fear. One distinction between robbery and extortion frequently noted by courts and commentators is that in robbery property is taken from another by force or fear 'against his will' while in extortion property is taken from another by force or fear 'with his consent.' [Fn. omitted.] The two crimes, however, have other distinctions [robbery requires a taking from the victim's person or immediate presence with intent to permanently deprive him of the property] . . . Extortion does, however, require the specific intent of inducing the victim to consent to part with

his or her property. [Citation.]" (*Id*. at p. 50.) In a footnote, *Torres* said, "The paradox of a taking which is both consensual *and* the result of force or fear has been the subject of numerous court decisions and commentaries. [Citations.]" (*Torres, supra*, 33 Cal.App.4th at p. 50, fn. 6.)

However, robbery can be committed strictly by frightening a victim into surrendering property. (*Carrasco, supra*, 137 Cal.App.4th at p. 1057.) Indeed, section 519, fn. 1, *ante*, says, "Fear, such as will constitute extortion, may be induced by a threat . . . [t]o do an unlawful injury to the person or property of the individual threatened . . . ."

We conclude Larshin fails to show grounds for reversal of the robbery conviction in Count Three.

C. Sentence

The trial court imposed the upper term on Count Five (assault with a firearm) and the upper term on the attached section 12022.5 enhancement because (1) the crimes involved great violence and threat of great bodily harm or acts disclosing a high degree of cruelty, viciousness or callousness; (2) the victims were particularly vulnerable because English was their second language, they were new to this country and had a general distrust of law enforcement; (3) Larshin induced others to participate in the crimes and threatened witnesses; (4) the crimes involved planning and some degree of sophistication; (5) Larshin's prior performance on probation was unsatisfactory; and (6) there were no circumstances in mitigation.

Larshin contends the imposition of the upper term sentence violated *Blakely v. Washington* (2004) 542 U.S. 296, and the federal constitutional rights to a jury trial (6th Amendment) and due process (14th Amendment). He argues we should consider this contention despite his failure to raise it in the trial court. He acknowledges his claim of sentencing error fails under *People v. Black* (2005) 35 Cal.4th 1238 (which was published before Larshin's sentencing hearing) but says he makes the argument here in order to preserve it for federal court review. Since the Attorney General does not urge forfeiture, we shall not consider the contention forfeited.

Applying the 6th Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 303-306 [159 L.Ed.2d 403, 413-414] (*Blakely*).)

The United States Supreme Court later emphasized: "If the [sentencing scheme] could be read as merely advisory provisions

that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. [Citations.] . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (*United States v. Booker* (2005) 543 U.S. 220, 233 [160 L.Ed.2d 621, 643] (*Booker*).)

Citing *Apprendi* and *Blakely*, Larshin contends the upper term for Count Five (assault with a firearm) and the upper term of 10 years for the attached firearm enhancement must be reversed because the trial court relied on facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving Larshin of the constitutional right to a jury trial on facts legally essential to the sentence.

However, for reasons set forth in its recent opinion, the California Supreme Court has held "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law" does "not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*." (*Black, supra*, 35 Cal.4th 1238, 1254.)

We must follow the holding in *Black, supra,* 35 Cal.4th 1238, which is binding on us. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject Larshin's claim of sentencing error.

II. Shchirskiy's Appeal

Shchirskiy raises only one issue on appeal. He contends the trial court improperly ordered him to pay $1,500 restitution to the Mercedes's owner who, according to the probation report, gave Larshin and Shchirskiy $1,500 for return of the car, unaware the police had already found the car burned. Shchirskiy argues the restitution order was unauthorized because he was convicted only of extortion against the garage owner Konishchuk, who did not suffer the $1,500 economic loss. We agree and shall reverse the restitution order.

Shchirskiy was originally charged with extortion of the Mercedes owner (Peter Svityashchuk), but that charge was dismissed and was omitted from the amended information.

The probation report said that the Mercedes's owner gave Larshin and Shchirskiy $1,500 for return of the car, unaware that the police had already found the car burned. The probation report also said the garage owner sustained no apparent losses, other than a possible loss at the point of entry to his business.

At sentencing, Shchirskiy's attorney argued Shchirskiy was convicted only for his unsuccessful attempt to extort money from the garage owner Konishchuk, and this conviction was not transactionally related to the $1,500 paid by the Mercedes owner. The deputy district attorney was unfamiliar with the case and expressed no opinion. Defense counsel represented to the court that the $1,500 was paid from the car owner (Svityaschuk) to Larshin, and though no evidence was adduced at

trial, pretrial matters indicated the car owner called Shchirskiy for help in getting the car back. Shchirskiy put the car owner together with Larshin, who collected the $1,500 from the car owner. The charge for extorting the $1,500 was dismissed because of the absence of the car owner.

The trial court said: "Well, I'm going to go ahead and order the restitution. Mr. S[h]chirskiy has a right to a hearing before a Judge to resolve it if that's an issue. It's my recollection that $1500 [*sic*] was paid out, and that that is appropriate for a restitution order. But, obviously, if my memory is incorrect, Mr. Shchirskiy can have another Judge take a look at it and make a decision."[7]

The judgment ordered Shchirskiy to pay $1,500 to unnamed "victim(s)."

A restitution order resting upon a demonstrable error of law constitutes an abuse of the trial court's discretion. (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49.)

California Constitution, article I, section 28, subdivision (b), states 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 restitution from the persons convicted of the crimes for losses they suffer.

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[7] Though not clear, the trial court perhaps was referring to section 1202.4, subdivision (f)(1), which gives the defendant the right to a hearing to dispute the amount of restitution.

[¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section . . . .”

Section 1202.4 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.

“[¶] . . . [¶]

“(f) . . . [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.”

In a *nonprobation* context, “restitution must be for economic damages resulting from the crime of which [the defendant] was convicted, not merely those ‘reasonably related’ to the crime.” (*People v. Rubics* (2006) 136 Cal.App.4th 452, 460 [noting different rule for probation cases]; see also, *People v. Percelle* (2005) 126 Cal.App.4th 164, 180 [in nonprobation context, a restitution order is not authorized where the defendant’s only relationship to the victim’s loss is by way of a crime of which the defendant was acquitted].)

Thus, in the nonprobation context of this case, the trial court was not authorized to order Shchirskiy to pay restitution to a victim of a crime for which Shchirskiy was not charged or convicted (i.e., the car owner who paid $1,500). Nor was the court authorized to order Shchirskiy to pay $1,500 to Konishchuk (the victim of the attempted extortion of which Shchirskiy *was* convicted), because Konishchuk did not suffer that $1,500 economic loss (nor did Konishchuk suffer *any* economic loss from the *attempted* extortion of which Shchirskiy was convicted). Section 1202.4, subdivision (a), authorizes restitution to "a victim of crime who incurs any economic loss," and subdivision (k) says "victim" includes any person who has sustained economic loss as a result of a crime and is a relative or household member of the victim. There is no evidence or argument that Konishchuk paid or was entitled to the $1,500.

The People argue that, according to *Percelle, supra*, 126 Cal.App.4th 164, the defendant must be *acquitted* of the crime in order not to be liable for restitution. However, *Percelle* did not impose any such restriction on all cases but merely made the reference to acquittal because the defendant in that case had been acquitted. *Percelle* rejected the Attorney General's argument that restitution was authorized because section 1202.4, subdivision (f), required the court to order restitution to a victim who has suffered economic loss as a result of the defendant's "conduct." (*Percelle, supra*, 126 Cal.App.4th at p. 180.) *Percelle* said the subdivision merely described how to calculate the amount of restitution, and the statute in total

made clear that the victim should receive restitution from a defendant *convicted of that crime*. (*Ibid*.)

Accordingly, we need not address the People's argument that Shchirskiy was "well-connected" with "losses associated with the Mercedes," including the car owner's loss of the $1,500, because of his involvement, e.g., he was a known associate of Larshin, was apparently involved in the theft of the car, and demanded money from garage owner Konishchuk.

We conclude the restitution order of $1,500 against Shchirskiy must be reversed.

DISPOSITION

The judgment as to Andrey Larshin is affirmed. As to Sergey Vinalyevic Shchirskiy, the abstract of judgment is modified to delete the victim restitution order of $1,500. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The Shchirskiy judgment is otherwise affirmed.

SIMS, Acting P.J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.