

Court of Appeals No. 11CA0020
Adams County District Court No. 10CR710
Honorable Chris Melonakis, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Toby Maximus Welliver,

Defendant-Appellant.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE LOEB
Bernard and Vogt*, JJ., concur

Announced March 15, 2012

John W. Suthers, Attorney General, Carmen Moraleda, Assistant Attorney
General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Joan E. Munteer, Deputy
State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2011.

¶1 This appeal primarily requires us to determine whether it is appropriate for a trial court to include a penalty imposed by the Colorado Employment Security Act (CESA) as restitution. We conclude that, under the circumstances here, such a penalty should not be included in the amount of restitution. We, therefore, affirm in part and reverse in part the restitution order appealed by defendant, Toby Maximus Welliver, and remand with directions.

I. Background

¶2 Between December 3, 2006, and April 9, 2007, defendant provided false information to the Colorado Department of Labor and Employment (CDLE) when he periodically represented that he was unemployed and earned no income. During that time period, defendant collected unemployment compensation benefits while he earned income from four different jobs. Following an audit and investigation of defendant's unemployment compensation claims, the CDLE determined that defendant had fraudulently received overpayments in the amount of \$7,830, and it turned the case over to the District Attorney's office for criminal prosecution.

¶3 Based on this conduct, defendant was charged with one count of felony theft, one count of computer crime, and one count of

forgery. He was not criminally charged under the provisions of the CESA. Thereafter, defendant pleaded guilty to an added count of attempted forgery of a government issued document (a class 6 felony) in exchange for dismissal of the other charges. After a hearing, the trial court sentenced defendant to seven years probation and ordered him to pay \$11,905 in restitution, including the CESA penalty. This appeal followed.

II. Actual Pecuniary Loss

¶4 Defendant contends that the restitution order violated his right to due process because the prosecution did not prove the amount of the alleged victim's actual pecuniary loss by a preponderance of the evidence. We disagree.

¶5 The record reflects that the court was provided with two attachments to the presentence report: (1) a chart showing the overpayments that were paid by the CDLE to defendant in the total amount of \$7830 and a fifty percent statutory penalty of \$3915; and (2) a report of the CDLE investigator showing the breakdown of the amounts requested in restitution, including (a) the amount of overpaid benefits of \$7830, (b) the fifty percent penalty of \$3915, and (c) an expert document examination fee of \$160.

¶6 Defendant does not argue that he was not provided with a copy of the presentence report or the attachments thereto. We note that a copy of the overpayment chart was also filed along with the affidavit and application for defendant's arrest warrant. Other than an objection to the penalty, as discussed below, defendant did not object to the amount of the CDLE's actual pecuniary loss as documented in the attachments to the presentence report, and, accordingly, the court was justified in relying on the report in determining the amount of restitution. *See People v. Miller*, 830 P.2d 1092, 1094 (Colo. App. 1991) (“[I]f the defendant fails to show that the information is inaccurate or untrue, the trial court is entitled to rely upon the [presentence] report or [victim impact] statement as submitted.”); *see also People v. Martinez*, 166 P.3d 223, 224 (Colo. App. 2007) (“A defendant waives his or her objections to the amount of restitution by failing to go forward with evidence when given the opportunity to do so.”).

III. Fifty Percent Penalty

¶7 Defendant contends that the trial court erred when it included a fifty percent statutory penalty as restitution. We agree.

¶8 We review the trial court’s restitution order for an abuse of discretion. See *People v. Reyes*, 166 P.3d 301, 302 (Colo. App. 2007); *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). “[A] trial court abuses its discretion when it misconstrues or misapplies the law.” *Reyes*, 166 P.3d at 302; see *Pagan*, 165 P.3d at 729.

¶9 However, we review de novo the interpretation of a statute. See *Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009). In interpreting statutes, we endeavor to do so “in strict accordance with the General Assembly’s purpose and intent in enacting them.” *In re 2000-2001 Dist. Grand Jury*, 97 P.3d 921, 924 (Colo. 2004); see also *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001). To determine that intent, we first look to the statute’s plain language and, when that language is clear, we must apply the statute as written. See *2000-2001 Dist. Grand Jury*, 97 P.3d at 924; *Martin*, 27 P.3d at 851.

¶10 To determine whether the fifty percent penalty at issue here should be included as restitution, we must interpret the restitution act, which should be “liberally construed to serve the General Assembly’s goals of rehabilitating offenders, deterring future criminality, and compensating victims.” *People v. Steinbeck*, 186 P.3d 54, 60 (Colo. App. 2007). Under the restitution act,

“[r]estitution” means *any pecuniary loss suffered by a victim* and includes but is not limited to all out-of-pocket expenses, interest, loss of use of money, anticipated future expenses, rewards paid by victims, money advanced by law enforcement agencies, money advanced by a governmental agency for a service animal, adjustment expenses, and other losses or injuries *proximately caused by an offender’s conduct* and that can be reasonably calculated and recompensed in money.

§ 18-1.3-602(3)(a), C.R.S. 2011 (emphasis added).

¶11 The loss must be a pecuniary loss, and it may be one specifically mentioned in the restitution statute or (as is the case here, since the penalty is not mentioned in the statute) some other loss or injury that is “proximately caused by an offender’s conduct and that can be reasonably calculated and recompensed in money.” *Reyes*, 166 P.3d at 303 (quoting *People v. Trujillo*, 75 P.3d 1133, 1140 (Colo. App. 2003)). In all events, the prosecution must prove that the alleged loss is one that is proximately caused by the defendant’s conduct.

¶12 “‘Proximate cause’ means a cause that in ‘natural and probable sequence produced the claimed injury’ and ‘without which the claimed injury would not have been sustained.’” *People v.*

Lassek, 122 P.3d 1029, 1035 (Colo. App. 2005) (quoting *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002)); *see also* *Steinbeck*, 186 P.3d at 60. “Loss” means “the act or fact of losing: failure to keep possession: deprivation” and “the harm or privation resulting from losing or being separated from something or someone.” *Webster’s Third New International Dictionary* 1338 (2002).

¶13 The CESA provides procedures for the collection of benefit overpayments, penalties, and interest. *See* § 8-79-102, C.R.S. 2011. The penalties imposed by the CESA include a fifty percent penalty on any overpayment of unemployment compensation benefits made by the CDLE to any person who collected the overpaid unemployment compensation based on a false representation or willful failure to disclose a material fact. *See* § 8-81-101(4)(a)(II), C.R.S. 2011 (“If any person receives any such overpayment because of his or her false representation or willful failure to disclose a material fact . . . the person shall be required to pay the total amount of the overpayment . . . plus a penalty of fifty percent of such overpayment, which shall be paid into the unemployment revenue fund.”).

¶14 Here, the trial court concluded that the fifty percent penalty should be included in the restitution order, finding that “[t]hese are damages intended to compensate for administrative inconvenience and for the willful violation of the statute in the event the individual . . . does not comply with the requirements of law.” The court further found that the penalty was compensatory in nature because its purpose was “to ensure that there is full compensation of the [CDLE] for the resources that are expended in the improper payment of the benefits.”

¶15 We agree that the purpose of the penalty is to enforce compliance with the CESA. *See* § 8-77-106(1), (2), C.R.S. 2011 (creating an unemployment revenue fund for the purpose of enforcing compliance with the CESA). However, the penalty authorized in section 8-81-101(4)(a)(II) is to be paid into the unemployment revenue fund, which is a general fund used for such enforcement purposes, and the amount thereof cannot be specifically attributed to defendant’s conduct. Thus, there is no evidence in the record here that the amount of the penalty (\$3915) correlates in any way to the cost that the CDLE incurred to investigate and enforce the provisions of the CESA against

defendant. Without such a correlation, there is no loss suffered by the CDLE that can be “reasonably calculated” under the restitution act. See § 18-1.3-602(3)(a). Accordingly, we conclude that the fifty percent penalty is not properly included as restitution because it is not a “pecuniary loss that was suffered by” the CDLE as a “natural and probable sequence produced” by defendant’s conduct. See *Lassek*, 122 P.3d at 1035. We, thus, further conclude that the trial court abused its discretion when it included the penalty as restitution.

¶16 We note that the prosecution could have introduced, but did not introduce, evidence of the actual investigative costs incurred by the CDLE in this case, so that such costs — regardless of whether they were more or less than the amount of the penalty — could be added to the restitution award. See *People v. Witt*, 15 P.3d 1109, 1111 (Colo. App. 2000) (value of Department of Social Services employee time devoted to an investigation necessitated by a defendant’s conduct properly added to restitution award); *People v. Phillips*, 732 P.2d 1226, 1230 (Colo. App. 1986) (trial court properly included in the restitution figure an amount to reimburse an insurer-victim for the expenses and investigation costs it incurred

in processing the case); *see also* § 8-81-101(4)(a)(III), C.R.S. 2011 (investigative costs awarded in a criminal action are paid into the unemployment revenue fund). However, as discussed above, the prosecution here did not request restitution for the actual costs of CDLE’s investigation, but simply chose to request the full fifty percent penalty, without any correlation between the amount of that penalty and the enforcement costs actually incurred by the CDLE.

¶17 We also note that, notwithstanding our holding here, the CDLE has other procedural mechanisms for recovering the full amount of the penalty in a case of unemployment fraud. First, the CDLE may bring a civil or administrative action to recover the overpayment, and if successful, imposition of the penalty authorized under section 8-81-101(4)(a)(II) is mandatory as part of the CDLE’s statutory remedy. *See Woollems v. Indus. Claim Appeals Office*, 43 P.3d 725, 726 (Colo. App. 2001). However, although the CDLE may assess and recover the penalty in a civil or administrative proceeding, “restitution is a criminal penalty and may not be used as a substitute for a civil action for damages.” *People v. Brigner*, 978 P.2d 163, 165 (Colo. App. 1999).

¶18 Second, a person who commits unemployment benefits fraud may be criminally prosecuted directly under section 8-81-101(1)(a), C.R.S. 2011 (declaring such conduct to be a misdemeanor). If a defendant is convicted under that statutory section, the court would again be statutorily mandated to impose the penalty, not as restitution, but as a criminal penalty as part of the defendant's punishment in the case. *See* § 8-81-101(4)(a)(II); *see also* *People v. Chesnick*, 709 P.2d 66, 67 (Colo. App. 1985) (alleged fraudulent receipt of unemployment compensation benefits may be prosecuted either under the general felony theft statute or under section 8-81-101(1)(a)).

¶19 Because we conclude that the trial court abused its discretion when it included the fifty percent penalty in its restitution order, we need not consider defendant's additional arguments in his briefs on appeal.

¶20 The restitution order is reversed as to the CESA penalty, and the case is remanded for the trial court to amend the order by deleting the amount of the fifty percent penalty (\$3915) from the restitution award. The order is affirmed in all other respects.

JUDGE BERNARD and JUDGE VOGT concur.