NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. LONNIE LOREN KOCONTES, Defendant and Appellant.	G060333 (Super. Ct. No. 13ZF0163) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed. Motion to augment granted.

Maha Jamal Kasim for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Christopher P. Beesley and Britton B. Lacy, Deputy Attorneys General, for Plaintiff and Respondent.

Appdx A

Lonnie Loren Kocontes appeals from a postjudgment order awarding restitution in the amount of $930,958. Kocontes raises numerous contentions, none of which have merit. We affirm the postjudgment order.

STATEMENT OF FACTS

A complete recitation of the facts can be found in our prior opinion, *People v. Kocontes* (2022) 86 Cal.App.5th 787.[1] Suffice it to say, in May 2006, Kocontes and Micki Kanesaki, his ex-wife, were on a cruise ship heading to Naples, Italy. (*Id.* at p. 800.) One evening, they ate, went to a show, and returned to their cabin. (*Ibid.*) About 6:00 a.m. the next morning, Kocontes reported Kanesaki missing, and she was nowhere to be found. (*Ibid.*) About 36 hours later, another ship recovered Kanesaki's body. (*Ibid.*) Three medical examiners concluded she did not drown, and two concluded she was strangled. (*Id.* at pp. 800, 805, 816.) A jury convicted Kocontes of first degree murder for financial gain. (*Id.* at p. 817.) The trial court sentenced Kocontes to prison for life without the possibility of parole. (*Ibid.*) We affirmed. (*Id.* at p. 799.)

PROCEDURAL HISTORY

The prosecution filed a motion for restitution. Although the prosecution initially sought $1,781,789, it later revised the amount to $930,958. In its brief, the prosecution explained its expert and the defense expert opined that the estimated values of the couple's joint accounts and assets at the time of Kanesaki's death were as follows: TD Ameritrade (investment account): $474,996; Vanguard (investment account): $581,120;

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[1] We grant the parties' request to take judicial notice of the record in case No. G059475. (Evid. Code, §§ 452, subd. (d), 459.) We grant Kocontes's motion to augment the record on appeal. (Cal. Rules of Court, rule 8.340(c).)

Citibank (checking account): $5,158; Citibank (savings account): $3,973; and 17 Maybeck Lane, Ladera Ranch (real property): $636,416. Additionally, the experts agreed that Kanesaki had $80,127 in a separate Vanguard account at the time of her death. The prosecution explained that at the time of Kocontes and Kanesaki's divorce in 2002, they filed a "Marital Termination Agreement" that specified the division of assets. The prosecution, relying on the agreement, argued Kanesaki owned 100 percent of her separate Vanguard account; Kanesaki was entitled to half of the couple's joint TD Ameritrade, Vanguard, and Citibank accounts at the time of her death; and Kanesaki was entitled to 50 percent of the proceeds of the sale of the Maybeck Lane house.

In his restitution brief, Kocontes contended a restitution hearing was unnecessary because he and Kanesaki's estate reached a settlement agreement. For background, in 2008, the United States of America seized $1,026,781.61 from a bank account belonging to Kocontes. Kocontes and his then wife sought return of the funds. In federal district court, Magistrate Judge Marc Goldman granted Kocontes and wife's motion for summary judgment dismissing the action with prejudice. He asserted collateral estoppel prohibited relitigation of the issue,[2] disputed the prosecution's expert's conclusions, and claimed Kanesaki's brother, Toshitaka Kanesaki, was not the proper beneficiary. The prosecution filed a reply.

The trial judge, who had decided numerous pretrial issues and presided over Kocontes's trial, conducted the restitution hearing. Because of

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[2] We grant Kocontes's request to take judicial notice of the record in case No. G050582. (Evid. Code, §§ 452, subd. (d), 459.)

the judge's familiarity with the proceedings, and in the interest of judicial economy, the parties agreed the prosecution's case-in-chief would be the trial testimony of the prosecution's expert, Scott Weitzman. The parties also agreed that rather than adhere strictly to the typical question and answer format, Kocontes could engage in a narrative and the defense could present its case through him "read[ing] information into the record" when he testified.

Kocontes testified that in 2000, he and Kanesaki bought the Maybeck Lane house with Toshitaka and his wife. However, using his "separate money," he then bought out Kanesaki's brother's interest in the house and thus he owned the additional share "free and clear from" Kanesaki. He said that when he and Kanesaki divorced in 2002, they "reached two agreements"—one was their written Marital Termination Agreement and the other was "an oral agreement" to continue "to live together and share expenses" at the Maybeck Lane house. He explained that pursuant to their oral agreement, Kanesaki was supposed to deposit her disability payments into their Citibank joint checking account. He said though that he recently learned she did not do so for 30 months, from 2001 to 2006, which amounted to $82,362.60. He also stated that Kanesaki had violated their Marital Termination Agreement by failing to keep her own health insurance, which meant that joint funds in the amount of $18,000 were used to pay her health insurance and he was entitled to an offset.

As to the house on Maybeck Lane, Kocontes stated that he continued to pay the mortgage and paid it off in 2003 using his and his father's money; Kanesaki did not contribute. He admitted that he signed a declaration stating he would accept half the equity in the house because he wanted closure.

Kocontes testified Kanesaki wrote checks to herself from the joint Citibank checking account without his knowledge in the amount of $197,430. He also stated that the $335,000 that funded the joint Vanguard account was excess proceeds from the sale of various stocks he owned with his father and not Kanesaki. Thus, he claimed credit for the entirety of their joint Vanguard account valued at $581,120. He admitted filing joint taxes with Kanesaki even though they were divorced, but said Kanesaki told him that the IRS would recognize the equivalent of a common law marriage so he did not think it was improper. Kocontes explained that his separate property funded the joint Ameritrade account with Kanesaki, but they did not have a written agreement stating that it was his separate property.

Finally, Kocontes stated that he paid $22,723.93 to probate Kanesaki's will and to be able to sell the Maybeck Lane house, and he also paid $15,000 as part of a settlement agreement with Kanesaki's family regarding her probate. He concluded that if the trial court awarded offsets for all these items, Kanesaki's estate was not entitled to any restitution.

On cross-examination, Kocontes described his "oral agreement" with Kanesaki: she would contribute her disability income to their joint Citibank account, he would contribute his work income, and they "would continue to pool [their] monies" to share the expenses of maintaining the Maybeck Lane house and other joint expenses. Kocontes stated that he did not "scrutinize the bank statements and check register" because he "was working seven days a week." With respect to their Marital Termination Agreement, Kocontes stated that they took care to identify separate property versus joint property, except for the house. He acknowledged that, in lieu of spousal support, the agreement was Kanesaki would receive all of the parties' jointly held securities and savings accounts. As to the Maybeck Lane house,

Kocontes admitted that he submitted a signed declaration with the court that stated he and Kanesaki "'jointly paid off the mortgage on the residence'" and the two of them owned it free of any debt. As for the probate costs he paid, Kocontes agreed that "they wouldn't have to be paid if [Kanesaki] hadn't died," but added that he had "no personal knowledge she was murdered."

In rebuttal, the prosecution called Scott Weitzman, its expert who testified at Kocontes's trial. During the trial, Weitzman testified that the accounts that were designated as joint tenancy with right of survivorship were to be split 50/50 between Kocontes and Kanesaki concerning valuation of the assets. He opined that the value of Kanesaki's assets at the time of her death was approximately $930,000. Weitzman said the defense expert at trial faulted his analysis because he failed to do a tracing methodology to determine an accurate valuation of Kanesaki's assets. Consequently, before the restitution hearing, Weitzman employed a tracing methodology to again review and analyze the available records to determine the value of Kanesaki's share of the couple's assets at the time of her death. Based on his tracing analysis, Weitzman opined that the value of Kanesaki's assets was approximately $930,000, i.e., the same amount that he had attributed to Kanesaki using the first analysis he conducted during Kocontes's trial. Weitzman also noted that investment and security accounts rise in value based on deposits as well as appreciation, and that trading activity has the potential to raise the value of an investment account.

After counsel argued, the trial court adopted its tentative ruling as its final ruling. Citing to *People v. Petronella* (2013) 218 Cal.App.4th 945, 969, and referencing exhibit C of the prosecution's restitution brief, which had also been a trial exhibit, the court found "by a preponderance of the evidence, that the amounts that are set forth in the two columns, 'Total value'

and '[Kocontes's] inheritance,' ha[d] been established through the testimony both during the trial and during th[e] restitution hearing." The court explained that account Nos. "2 through 6 were joint accounts and that [a]ccount [No.] 1 was the property of the victim in this case and inherited by [Kocontes]." The court concluded that Kocontes "did receive the amount of [$]930,958." The court declined to offset the $15,000 settlement because it "had to deal with a probate matter that had to do with an account, a piece of property, that is not set forth in [e]xhibit C."

As to Kocontes's claims, the trial court stated that based on having heard and reread his trial testimony, and considering his restitution hearing testimony, it concluded he was truthful about some things and not others. The court said, "There is no question in the [c]ourt's mind that [Kocontes] was aware of every penny and every dime that was going into those accounts and that were leaving those accounts, and for this testimony that he was unaware of basically a million dollars being fraudulently taken by the victim is an unreasonable interpretation of the evidence, and the [c]ourt rejects that testimony . . . . The [c]ourt then will not offset the restitution that is in the amount of $930,958. [¶] The [c]ourt will instruct the [prosecution] to prepare that restitution order in that amount to the name of [Toshitaka] as the representative of the estate of . . . Kanesaki." The court opined that "the evidence before [it] is that the representative/executor, the person that's responsible for the estate, is [Toshitaka]."

DISCUSSION

I.

ISSUE PRECLUSION

Kocontes argues the federal action has preclusive effect and bars restitution. We disagree.

"In general, whether a prior finding will be given conclusive effect in a later proceeding is governed by the doctrine of issue preclusion, also known as collateral estoppel. [Citations.] This common law doctrine is 'grounded on the premise that "once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed."' [Citation.] The doctrine "'has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.'" [Citation.] It applies in criminal as well as civil proceedings. [Citations.]" (*People v. Strong* (2022) 13 Cal.5th 698, 715–716.) Generally, several threshold requirements must be satisfied for issue preclusion to bar relitigation of issues previously decided. (*Id.* at p. 716.) One of those issues is that "'the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.]" (*Ibid.*) Our review is de novo. (*Samara v. Matar* (2017) 8 Cal.App.5th 796, 803.)

Here, the State of California was not a party to the federal action and was not in privity with the federal prosecutors. The state would be bound by the summary judgment order only if the state/county prosecutors had *participated actively* in the federal action.

People v. Meredith (1992) 11 Cal.App.4th 1548 (*Meredith*), is instructive. In that case, federal prosecutors charged the defendant with possession of cocaine base. (*Id.* at p. 1552.) After the federal court ruled that the evidence against the defendant had been obtained in violation of the Fourth Amendment, federal prosecutors dismissed the case. (*Ibid.*) State prosecutors then charged the defendant with possession of the identical cocaine base. (*Ibid.*) In rejecting defendant's collateral estoppel argument, the *Meredith* court held that the state prosecutors were not collaterally estopped

by the federal court's Fourth Amendment ruling because they were not in privity with the federal prosecutors. (*Id.* at pp. 1553, 1555–1560.) It noted: "The United States and the several states have legitimate and parallel interests in prosecuting persons for crime. But they are *separate sovereigns* under our federal system, and their interests are not necessarily identical. [Citation.]" (*Id.* at p. 1559.)

Here, as in *Meredith*, the federal action has no preclusive effect because "the People of the State of California were not a party to the federal proceeding and were not in privity with the United States, the party against whom the federal ruling was made." (*Meredith, supra*, 11 Cal.App.4th at p. 1558.) In other words, the Deputy District Attorney did not participate in the federal action, and the Assistant United States Attorney did not participate in the criminal proceedings in state court.

Kocontes asserts that the necessary element of privity is established because Orange County law enforcement and the FBI conducted a joint investigation and therefor had a mutual interest. But this purported mutual interest and level of cooperation between federal and state authorities in investigating him does not establish privity. (*Meredith, supra*, 11 Cal.App.4th at p. 1559, fn. 7 ["cooperation between state and federal police agencies does not, without more, establish there was cooperation between the separate sovereigns' prosecutorial authorities"].) And cooperation through the sharing of discovery does not establish privity. (*Bartkus v. Illinois* (1959) 359 U.S. 121, 123 [conventional practice of federal and state cooperation does not support claim that state prosecution was "merely a tool" of the federal authorities].)

Kocontes also contends privity may be based on "adequate[] represent[ation]" of the nonparty (California) by the United States or *proxy*

status of the nonparty. Adequate representation may be established through evidence that the party to the original case "understood" it was "acting in a representative capacity," or that "the original court took care to protect the interests of the nonparty." (*Taylor v. Sturgell* (2008) 553 U.S. 880, 900.) On this record, Kocontes has not established either that the United States understood it was representing California's interests, or that the federal court took care to protect California's interests. Notably, with respect to the proxy issue, the Supreme Court cautioned that "courts should be cautious about finding preclusion on this basis," and suggested that "preclusion is appropriate only if the [party's] conduct of the suit is subject to the control of the [nonparty] who is bound by the prior adjudication." (*Id.* at p. 906) We are not convinced by Kocontes's claims in his reply brief that issue preclusion applies here pursuant to an expansive approach. (*Citizens for Open etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070.) Although state and federal authorities may have cooperated in their respective cases against Kocontes, their complementary efforts were constitutional rather than collusive. (*United States v. Lucas* (2016) 841 F.3d 796, 803–804.) Because Kocontes failed to establish that California was ""the same as, or in privity with"" the United States, his claim of preclusion fails. (*People v. Curiel* (2023) 15 Cal.5th 433, 452 [noting that party asserting collateral estoppel bears burden of establishing its requirements].) Thus, the federal action did not have preclusive effect and did not bar restitution.

II.

PROBATE CODE

Kocontes concedes he is not entitled to Kanesaki's property because, under applicable probate law, he is deemed to have "predeceased" her as to her property. (Prob. Code, §§ 250, 251.) He asserts though that the

trial court's restitution order violates the Probate Code because he was "entitled to trace his portions of the jointly-titled property and retain them as his property." Not so.

Probate Code section 5301 provides that "[a]n account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each, unless there is clear and convincing evidence of a different intent." (Prob. Code, § 5301, subd. (a); *id.*, subd. (b) ["If a party makes an excess withdrawal from an account, the other parties to the account shall have an ownership interest in the excess withdrawal in proportion to the net contributions of each to the amount on deposit in the account immediately following the excess withdrawal, unless there is clear and convincing evidence of a contrary agreement between the parties"].) Here, their Marital Termination Agreement, the documents filed in court pertaining to the Maybeck Lane house, and the couple's joint tax filings constitute such "clear and convincing evidence of a different intent." (Prob. Code, § 5301, subd. (a).)

Kocontes and Kanesaki's Marital Termination Agreement, which they signed and filed when they divorced, specified his "separate assets and liabilities," as well as "his share of the community property," which included "[o]ne-half the equity and debt associated with" the Maybeck Lane house. The agreement also provided that Kanesaki's "share of the community property" included "[o]ne-half the equity and debt associated with" the Maybeck Lane house, and "in lieu of spousal support, all of the parties' jointly held securities and savings accounts . . . ." Additionally, Kocontes signed and filed court documents stating that he and Kanesaki jointly paid off the mortgage on the Maybeck Lane house, jointly owned the house free of debt, and equally divided the equity—Kanesaki's share of the proceeds from the sale of the

house was 50 percent. Significantly, he made no claim beyond a 50 percent ownership of the Maybeck Lane house during probate proceedings. This evidence refutes Kocontes's attempt to reapportion Kanesaki's share of the Maybeck Lane house at the restitution hearing.

With respect to their joint accounts, Kocontes testified at the restitution hearing that his separate property funded the two of them, but he admitted that Kanesaki independently managed these accounts and he never had any type of written agreement stating the money was his separate property. Kocontes also acknowledged that he and Kanesaki not only lived together after they divorced, but they also continued to file joint tax returns, further evincing that their joint property was akin to community property. In any event, Weitzman, the prosecution's expert, reviewed the available documents and accounts, used a tracing methodology, and opined that Kanesaki's share of the couple's assets at the time of her death was approximately $930,000.

Kocontes asserts that "[r]estitution cases in the context of criminal cases are consistent with the approach of the probate courts." Regardless, he ignores all of the countervailing clear and convincing evidence in the record detailed above. The trial court properly relied on Weitzman's testimony to determine Kanesaki's share of the couple's assets and rejected Kocontes's self-serving representations in awarding Toshitaka restitution. Kocontes has not demonstrated the court erred.

III.

SUFFICIENCY OF THE EVIDENCE

Kocontes contends insufficient evidence supports the trial court's restitution award. Again, we disagree.

"On appeal, 'we review the trial court's restitution order for abuse of discretion. [Citations.] The abuse of discretion standard is "deferential," but it "is not empty." [Citation.] "[I]t asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the . . . victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered.' [Citation.] 'The order must be affirmed if there is a factual and rational basis for the amount. [Citation.]' [Citation.]" (*People v. Petronella, supra,* 218 Cal.App.4th at p. 969.)

Here, sufficient evidence supports the trial court's order that Kocontes pay $930,958 in restitution. Weitzman, the prosecution's expert, calculated Kocontes's inheritance at trial, and reached the same result again at the restitution hearing after employing a tracing methodology. At the restitution hearing, Weitzman testified that he reviewed and analyzed "21 accounts that were factored in during this time period from sometime in [19]98 until 2006," and he "looked at the money going in and the money going out and any transfers between accounts." Significantly, "it turned out that . . . Kanesaki and [Kocontes] each put in about the same amount of money into the accounts," and he therefore opined that, setting aside the account that was in Kanesaki's name only, "it's about a 50/50 split, which is what [he] had in the chart that [he] testified [to] at trial." Weitzman's testimony

corroborated by exhibit C constituted substantial evidence in support of the court's restitution award.

Kocontes asserts the trial court relied on an erroneous methodology and ignored his exhibits. When there is a factual and rational basis for the restitution amount, we cannot find an abuse of discretion. (*People v. Baker* (2005) 126 Cal.App.4th 463, 467.) The record demonstrates the trial court was intimately familiar with the evidence and Kocontes's arguments. Here, as we explain above, there was evidence to support the restitution award, and thus his reliance on *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995, is misplaced because in that case there was a "total lack of evidence." Kocontes's claim amounts to nothing more than a disagreement with the trial court.

In a related claim, Kocontes contends the trial court erred by not awarding him any offsets based on his expenditures and Kanesaki's diverting funds. Again, we disagree.

The starting point for our analysis is that the trial court's restitution award was supported by substantial evidence. That could end the discussion, but we address a few of Kocontes's claims out of an abundance of caution.

First, the trial court properly determined Kocontes's $415,000 payment to settle the probate dispute was not related to any of the accounts discussed at the restitution hearing. Second, Kocontes should not benefit from his criminal conduct and thus his claim he should be reimbursed for probate costs is unpersuasive. Finally, as the court noted, the evidence at trial and at the restitution hearing supports the court's conclusion that Kocontes knew exactly where every penny in his accounts was going. His claim that Kanesaki was the sole wrongdoer misses the mark. The court did

not abuse its discretion by refusing to award any offsets as it was well within its ample discretion based on the prosecution's evidence. (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1138.) Because there is a factual and rational basis for the amount of restitution the trial court ordered, we cannot substitute our judgment for the trial court's and must affirm the restitution order. (*People v. Prosser* (2007) 157 Cal.App.4th 682, 686–687.)

IV.

PAYEE

Relying on *People v. Runyan* (2012) 54 Cal.4th 849, 859 (*Runyan*), Kocontes contends any restitution award should have been made payable to Kanesaki's estate and not Toshitaka. Not so.

In *Runyan, supra,* 54 Cal.4th at page 859, our Supreme Court concluded "that when a crime victim has died," restitution owed to that deceased crime victim "is properly payable to the decedent's estate." The court stated though that "[w]hen the actual victim of a crime has died, the estate, acting in the decedent's stead, steps into the decedent's shoes to collect restitution owed *to the decedent*, but which the decedent cannot personally receive because of his or her death." (*Id.* at p. 857.) The court explained, "Thus, a decedent's estate—or, more precisely, its executor or administrator as the decedent's personal representative—is a proper recipient, on the decedent's behalf, of restitution owed *to the decedent*, as an actual and immediate crime victim, for economic losses the decedent incurred as a result of the defendant's offenses against the decedent." (*Ibid.*) The court added that "[o]ther provisions of law make clear that a debt owed to a decedent is properly payable to the decedent's personal representative." (*Ibid.*)

The *Runyan* court noted that section 1202.4 "contains no indication that the personal representative lacks authority to collect a restitutionary debt the defendant owes to a deceased crime victim for the decedent's personal economic loss incurred as a result of the crime." (*Runyan, supra*, 54 Cal.4th at p. 858.) The court emphasized that "even if section 1202.4 left doubt about whether a deceased crime victim's personal representative may receive restitution owed to the victim, recent constitutional amendments conclusively resolve[d] the issue." (*Ibid.*) Specifically, it said the voters' adoption of "Marsy's Law" resulted in amendments that "make clear that a crime 'victim' is entitled, among other things, '[t]o restitution' (Cal. Const., art. I, § 28, subd. (b)(13)); define a 'victim,' for all purposes of article I, section 28, to include 'a lawful representative of a crime victim who is deceased' (*id.*, subd. (e)); and provide that 'a lawful representative of the victim' may enforce the victim's rights (*id.*, subd. (c)(1))." (*Runyan, supra*, 54 Cal.4th at pp. 858–859 & fn. 3.)

Here, Toshitaka was Kanesaki's representative for purposes of Marsy's Law. Although Kocontes may have technically remained the executor of Kanesaki's estate at the time of the restitution hearing, that was only because Kanesaki's will listed him as sole beneficiary and her will was probated before he was convicted of murdering her. The court was aware of Toshitaka's trial testimony regarding his efforts to be the administrator and personal representative of her estate and appropriately determined that "the person that's responsible for the estate, is [Toshitaka]." Thus, the court properly specified Toshitaka as the representative of Kanesaki's estate for purposes of restitution. (*Runyan, supra*, 54 Cal.4th at pp. 857–859.) Kocontes's request that we rely on other evidence, such as that he was the executor, fails. (*Id.* at p. 859.)

DISPOSITION

The postjudgment order is affirmed.

O'LEARY, P. J.

WE CONCUR:

SANCHEZ, J.

MOTOIKE, J.

Court of Appeal, Fourth Appellate District, Division Three - No. G060333

S287657

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

LONNIE LOREN KOCONTES, Defendant and Appellant.

The petition for review is denied.

GUERRERO

Chief Justice

Appdx B.