IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
BILL ALLEN BENZ,
Defendant-Appellant.

Multnomah County Circuit Court
130833938; A157945

Jean Kerr Maurer, Judge.

Argued and submitted June 21, 2016.

Erin J. Snyder Severe argued the cause for appellant. With her on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jeff J. Payne, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Ortega, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

GARRETT, J.

Remanded for resentencing; otherwise affirmed.

GARRETT, J.

After pleading no contest, defendant was convicted of second-degree burglary, ORS 164.215; first-degree theft, ORS 164.055; second-degree theft, ORS 164.045; and second-degree criminal mischief, ORS 164.354. He appeals a supplemental judgment for restitution in the amount of $32,227.95, arguing that he was not convicted of, and never admitted, some of the crimes underlying that award. We conclude that the trial court plainly erred in awarding that amount of restitution and exercise our discretion to remand for resentencing.

We review for legal error the trial court's legal conclusions regarding a restitution award. *State v. Carson*, 238 Or App 188, 191, 243 P3d 73 (2010).

The facts are undisputed. Defendant and his stepson, Schneider, were arrested for a series of thefts throughout Portland. The indictment contained 51 counts; Schneider was charged in all of them, but defendant in only 30 of the counts, which alleged conduct from December 2012 through February 2013. Defendant pleaded no contest to his 30 counts, was found guilty, and was ordered to pay restitution.

Before the restitution hearing, the state provided defendant with the indictment and a 22-page presentence investigation (PSI) report. The PSI report contained information about the victims of defendant's charged crimes, as well as information about other alleged crimes, outside the scope of the indictment, for which neither defendant nor Schneider were prosecuted. The state also provided a spreadsheet of victims who sought restitution for defendant's and Schneider's thefts. The spreadsheet identified 42 victims and calculated a total of $32,227.94[1] in restitution requests. It listed each victim's claim individually, but did not link each claim with a corresponding count in the indictment, and contained no information about who, as between defendant or Schneider, caused which loss. Consequently,

[1] There is an unexplained one-cent discrepancy between the total amount requested by the state, $32,227.94, and the amount ordered by the court, $32,227.95.

the spreadsheet did not clearly connect any of defendant's charged crimes with any individual claim for restitution.

At the restitution hearing, the state employee who created the spreadsheet was unable to confirm that all of the claims in the spreadsheet arose from defendant's conduct. Defense counsel objected, in general terms, that the state had failed to prove a causal connection between defendant's crimes and the damages sought in restitution:

> "Well, Judge, I think the testimony is really unclear as to which counts and which defendant these losses are attributed to. And that's the State's burden.
>
> "Here they have to show economic damage. Find [defendant] through these specific persons and they haven't done so in this hearing. So I'd say at that point they haven't satisfied their burden as far as showing that cause—causation from [defendant's] conduct to the loss that is claimed here."

The trial court overruled the objection, reasoning:

> "*** I'm satisfied that using this standard that applies to these proceedings and—and in the context of the nature of the offense and the losses sustained by the victims that [$32,227.95] is an appropriate sum.
>
> "I would indicate just for the appellate record, which may follow this, that these are difficult cases. When there has been a criminal enterprise that is long standing in duration and involves multiple, multiple victims in the community, I think it is important that the District Attorney's Office provide the information that has been provided in this proceeding.
>
> "Which outlines carefully each of the named victims, the amount of the loss and I take also the statement by [the prosecutor] that he has sought no *** restitution for any of the property that [is] still being retained by the police."

The court then awarded $32,227.95 in restitution, comprising all 42 claims from the spreadsheet.

On appeal, defendant challenges the trial court's restitution award as to 11 of those 42 claims, arguing that they suffer from one of three defects: (1) they arose from crimes committed only by Schneider, in which defendant had no involvement; (2) they arose from criminal activity for

which *neither* defendant nor Schneider was ever charged; or (3) they arose from alleged crimes that occurred outside the time period alleged in the indictment.

The state does not contend on appeal that the trial court's restitution award is correct. Instead, the state argues that defendant's arguments are unpreserved because he failed to specifically identify below the 11 claims that he now challenges on appeal. The state argues that any error here is not plain, and that, if it is plain, we should decline to exercise our discretion to correct it because defendant possessed the indictment and PSI report before the restitution hearing and nevertheless failed to make a more specific objection below.

We need not address the issue of preservation because we conclude that, even if defendant failed to preserve the error, the error is plain. An error is plain if (1) it is one "of law," (2) it is "apparent," meaning it is obvious and not reasonably in dispute, and (3) it appears "on the face of the record," meaning that the court "need not go outside the record or choose between competing inferences to find it, and the facts that comprise the error are irrefutable." *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990).

All three criteria are met here. First, whether a trial court complied with the restitution requirements in ORS 137.106 is a question of law. *State v. Morgan*, 274 Or App 161, 164, 359 P3d 1242 (2015). Second, we have consistently held that a defendant "'cannot be required to pay restitution for pecuniary damages arising out of criminal activity for which he was not convicted or which he did not admit having committed.'" *State v. Dorsey*, 259 Or App 441, 445-46, 314 P3d 331 (2013) (quoting *State v. Seggerman*, 167 Or App 140, 145, 3 P3d 168 (2000)); *see also State v. Muhammad*, 265 Or App 412, 414, 335 P3d 1281 (2014) ("[U]nder our case law, it is error—plain error, in fact—for a trial court to impose restitution based on activities that occurred outside the period of time covered by the defendant's plea agreement.").

The third criterion—that the error appears "on the face of the record"—is also satisfied because, when one considers the indictment and PSI report together, it is obvious that the state was seeking restitution for criminal conduct

that defendant never admitted and of which he was not convicted. As one example, the spreadsheet indicates that victim R sought $3,194.56 for a loss which, according to the PSI report and indictment, only Schneider inflicted. As another example, victim W requested $2,700.00 for an alleged crime that, according to the PSI report, occurred in March 2013, one month later than the date range of defendant's conduct as alleged in the indictment.

Even where an error is plain, we must determine whether to exercise our discretion to correct it. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991). In so deciding, we consider:

> "the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way ***."

Id. at 382 n 6.

The gravity of the error here is substantial: Defendant was ordered to pay at least several thousand dollars in restitution for conduct that was never charged and that he did not admit. We also see no indication that defendant made a "strategic choice" to reserve his specific arguments for appeal. *See State v. Fults*, 343 Or 515, 523, 173 P3d 822 (2007) (identifying that possibility as weighing against the exercise of discretion to review for plain error); *see also Dorsey*, 259 Or App at 446-47 (exercising discretion, in part, because there was "no conceivable advantage" to be gained from the defendant's failure to object to restitution imposed for unconvicted conduct).

The state argues that we should decline to exercise *Ailes* discretion because defendant possessed the record necessary to articulate a more specific objection below. It does appear that defendant had the information necessary to formulate a more precise objection to the restitution award and simply failed to do that work for the trial court. However, we have consistently exercised discretion to correct plain errors in restitution awards, even where a defendant's objection below was vague or nonexistent. *See, e.g.*, *Dorsey*, 259 Or App

at 446-47 (exercising discretion to correct an unpreserved error where the trial court imposed restitution for thefts occurring outside the time period identified in the plea petition, and the defendant made only a vague objection below); *Morgan*, 274 Or App at 165-66 (exercising discretion to correct an unpreserved error where the record did not support a $3,000 restitution award); *see also, e.g.*, *State v. Martinez*, 250 Or App 342, 344, 280 P3d 399 (2012) (exercising discretion to correct unpreserved error in awarding $273 in restitution, in part because the "interests of justice militate against requiring a defendant to pay an obligation that is totally unsubstantiated by the record"); *State v. Harrington*, 229 Or App 473, 476, 477-78, 211 P3d 972, *rev den*, 347 Or 365 (2009) (exercising discretion to correct an unpreserved error where the state failed to prove the value of the victim's loss, and the defendant objected below "in only general terms"). In comparison with some of those cases, defendant's objection here at least provided the trial court with some notice of the error when he argued that the spreadsheet was "really unclear as to which counts and which defendant these losses are attributed to."

Additionally, the "policies behind the general rule requiring preservation" do not outweigh the other *Ailes* factors in this case. Principles of judicial efficiency weigh against our review "in nearly all cases where review of unpreserved issues are under consideration"; thus, that factor often offers little useful guidance. *State v. Reynolds*, 250 Or App 516, 525, 280 P3d 1046 (2012); *see also* *State v. Morris*, 217 Or App 271, 274, 174 P3d 1127 (2007), *rev den*, 344 Or 671 (2008) ("[I]f defendant had raised his present objection before the trial court, error might well have been avoided. But that is true in many 'plain error' cases—indeed, in virtually all such cases ***."). Moreover, remanding the case for only resentencing does not severely "undercut or offend notions of judicial efficiency." *State v. Medina*, 234 Or App 684, 688, 228 P3d 723 (2010) (citing *Alexander v. Johnson*, 164 Or App 235, 238, 990 P2d 929 (1999)) (internal quotation marks omitted); *Dorsey*, 259 Or App at 447.

Remanded for resentencing; otherwise affirmed.