DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. GEORGE M. REED, JR., Appellant.	)	No. 1 CA-CR 11-0552 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR20060332

The Honorable Michael J. Burke, Judge

SENTENCE AFFIRMED; INCARCERATION CREDIT MODIFIED

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J O H N S E N, Judge

¶1 George M. Reed, Jr. was convicted of one count of armed robbery and two counts of conspiracy to commit armed robbery. On appeal, this court vacated one of his conspiracy convictions, affirmed the other two convictions and remanded for resentencing on the remaining conspiracy conviction. The superior court then resentenced Reed to 10.5 years' incarceration on the conspiracy conviction, to be served consecutively to another 10.5-year term imposed for the robbery conviction. While the prior appeal was pending, the superior court also imposed restitution.

¶2 Reed's current appeal was timely filed after the resentencing in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Reed's counsel searched the record on appeal and found no arguable question of law that is not frivolous. *See Smith v. Robbins,* 528 U.S. 259 (2000); *Anders,* 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Reed filed a supplemental brief arguing the superior court erred by imposing consecutive sentences and by ordering restitution for an armed robbery of which he was acquitted. This court ordered additional briefing pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), on the latter issue. After reviewing the entire record, we affirm Reed's sentence and the order of restitution but modify his presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY

¶3 The State charged Reed with two counts of conspiracy and two counts of armed robbery in connection with robberies of an Ehrenberg truck stop on July 14 and September 15, 2005. The jury acquitted Reed of the July robbery but found him guilty of both conspiracy charges and the September robbery. The superior court originally sentenced Reed to aggravated concurrent terms of 21 years' incarceration for the conspiracy convictions and a presumptive consecutive 10.5-year term for the robbery conviction. On appeal this court vacated Reed's conviction on one of the conspiracy charges because the jury "effectively found Reed guilty twice for participating in one conspiracy to commit two armed robberies," in violation of the Fifth Amendment's Double Jeopardy Clause. *State v. Reed*, 1 CA-CR 09-0532, 1 CA-CR 09-0637, 2010 WL 4970014, at *5, ¶ 25 (Ariz. App. Oct. 14, 2010) (mem. decision). We also remanded for resentencing on the remaining conspiracy charge because we concluded the superior court erred by using the jury's finding that Reed conspired to commit two robberies as an aggravating circumstance pursuant to Arizona Revised Statutes ("A.R.S.") section 13-701(D)(24) (West 2012).[1]

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

¶4 As noted, on remand the superior court sentenced Reed to a presumptive 10.5-year term on the conspiracy conviction, to be served consecutively to the prior 10.5-year sentence for the armed robbery conviction. We have jurisdiction of Reed's appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033 (West 2012).

DISCUSSION

A. Issues Raised in Reed's Supplemental Brief.

1. Imposition of consecutive sentences.

¶5 Reed argues the superior court erred in sentencing him to consecutive rather than concurrent terms of imprisonment.

¶6 Consecutive sentences do not violate the Double Jeopardy Clause of the United States Constitution as long as "each [conviction] requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *State v. Anderson*, 210 Ariz. 327, 357, ¶ 139, 111 P.3d 369, 399 (2005). Reed's armed robbery conviction required proof of a robbery committed while armed.[2] The conspiracy conviction, in contrast, required proof of an agreement to commit armed robbery but did not require the robbery to be performed.[3] Because each offense required proof of

[2] *See* A.R.S. § 13-1904(A) (West 2012).

[3] *See* A.R.S. § 13-1003(A) (West 2012).

a different element, imposition of consecutive sentences does not violate constitutional double jeopardy protections.

¶7 Arizona law likewise prohibits double punishment for conduct constituting a single act. "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116 (West 2012). Section 13-116 allows consecutive sentences for convictions arising from a single set of circumstances only if the convictions constitute separate acts. To determine whether Reed's conspiracy and robbery constitute separate acts, we apply the "identical elements" test:

> [W]e identify the ultimate crime, discard the evidence that fulfills the elements of that crime, and then determine whether the remaining facts satisfy the elements of the other crimes. If they do, then consecutive sentences are permissible unless, given the entire transaction, it was not possible to commit the ultimate crime without also committing the other offense. Finally, if such a factual impossibility exists, we must ascertain whether [the defendant's] conduct in committing the secondary crime subjected the victim "to a different or additional risk of harm than that inherent in the ultimate offense."

State v. Roseberry, 210 Ariz. 360, 370, ¶ 58, 111 P.3d 402, 412 (2005) (citing *State v. Gordon*, 161 Ariz. 308, 312-15, 778 P.2d 1204, 1208-11 (1989)).

¶8 In applying those criteria, we note first that the "ultimate crime," the September robbery, was proven by a truck stop employee's testimony that the truck stop was robbed by a man with a gun and testimony by Reed's co-conspirator that Reed committed the robbery. *Reed*, 1 CA-CR 09-0532, 1 CA-CR 09-0637, 2010 WL 4970014, at *5, ¶ 23. The jury heard other evidence sufficient to support the conspiracy conviction, including testimony by Reed's co-conspirator about planning the September robbery with Reed in light of her knowledge that he had committed the July robbery and "wanted to do it a second time." *See id.* at *4, ¶¶ 17-20.

¶9 Second, it was not impossible for Reed to commit one offense without committing the other. Reed could have conspired to commit armed robbery without committing the substantive offense and inversely could have committed the armed robbery without agreeing with another to do so.

¶10 Finally, conspiracy involves risks not created by the substantive armed robbery offense. The conspiracy exposed society (as a victim) to "concerted criminal activity that endangers society differently than individual acts do," while the armed robbery caused monetary loss to the truck stop (as a victim). *Roseberry*, 210 Ariz. at 371, ¶ 62, 111 P.3d at 413.

2. Restitution for the July robbery.

a. Legal principles.

¶11 Reed also argues the superior court erred by ordering him to pay restitution for the July robbery because the jury acquitted him of that robbery and the evidence does not support the jury's conclusion that he conspired to commit that robbery.

¶12 We review the superior court's restitution order for an abuse of discretion. *State v. Lewis*, 222 Ariz. 321, 323, ¶ 5, 214 P.3d 409, 411 (App. 2009). We view the evidence bearing on restitution claims in the light most favorable to sustaining the superior court's order. *Id.*

¶13 Arizona requires a convicted defendant to pay restitution to the victim for the full amount of economic loss caused by the crime. Ariz. Const. art. 2, § 2.1(A)(8); A.R.S. §§ 13-603(C), -804(A), (B) (West 2012). "A [superior] court may impose restitution only on charges for which a defendant had been found guilty, to which he has admitted, or for which he has agreed to pay." *State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993). A victim's loss is recoverable in restitution if (1) the loss is economic, (2) the victim would not have incurred the loss but for the defendant's criminal conduct and (3) the criminal conduct directly causes the economic loss. *State v. Madrid*, 207 Ariz. 296, 298, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). The State has the burden of

proving a restitution claim by a preponderance of the evidence. *Lewis*, 222 Ariz. at 324, ¶ 7, 214 P.3d at 412.

b. Reed's July armed robbery acquittal does not preclude restitution.

¶14 Reed argues his acquittal on the July robbery charge necessarily means he did not cause the loss the truck stop incurred in that robbery. Acquittal of the substantive offense, however, does not preclude restitution. "Rather than the elements of the crime, the facts underlying the conviction determine whether there are victims of a specific crime." *Id.* at 325, ¶ 9, 214 P.3d at 413 (quotation omitted). Thus, even though a defendant may be acquitted of the underlying offense, he may still be liable for restitution as long as his criminal conduct directly caused the victim's injuries. *Id.*

¶15 In *Lewis*, the defendant was convicted of drive-by shooting but acquitted of aggravated assault with a deadly weapon in an incident in which a woman was left injured. *Id.* at 323, ¶¶ 2-3, 214 P.3d at 411. The court of appeals rejected the defendant's argument that he could not be liable for restitution because the jury acquitted him of the aggravated assault. *Id.* at ¶ 1. The court reasoned that "although [defendant] was acquitted of aggravated assault, he may still be liable for restitution as long as his criminal conduct – the drive-by

shooting – directly caused [the victim's] injuries." *Id.* at 325, ¶ 9, 214 P.3d at 413.

¶16 In imposing restitution in this case, the superior court similarly concluded that notwithstanding Reed's acquittal in the July robbery, he was convicted of conspiracy to commit that robbery, and that conspiracy "set the wheels in motion . . . result[ing] in the loss on that first robbery." The court correctly concluded, therefore, that the acquittal on the robbery charge did not preclude restitution for that robbery.

c. The record contains sufficient evidence supporting the jury's finding that Reed conspired to commit the July armed robbery.

¶17 Reed next argues the restitution award is improper because the evidence did not support the guilty verdict on the charge of conspiracy to commit the July robbery. As he argues, none of the evidence "involved any specific plan where Reed or anyone else . . . would use a gun or other weapon during the [July] robbery."

¶18 We review questions of sufficiency of evidence *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d

484, 486 (1987). The existence and aims of a conspiracy may be proven by both direct and circumstantial evidence. *See West*, 226 Ariz. at 562, ¶ 16, 250 P.3d at 1191 ("Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction.").

¶19 Reed argues there was no evidence at trial that he and his co-conspirator specifically agreed to use a firearm or any other weapon during the July robbery. In evaluating the restitution order, however, "we must view the evidence not as a series of isolated components but in its totality, giving such consideration to any logically apparent inter-relationships as may be due." *State v. Olivas*, 119 Ariz. 22, 23, 579 P.2d 60, 61 (App. 1978).

¶20 Although there was no testimony that Reed and his co-conspirator explicitly agreed to use a firearm, the totality of evidence supports the jury's finding beyond a reasonable doubt that Reed conspired to commit the July armed robbery. Not only did Reed and his co-conspirator discuss "how it could be done," how much money could be taken and how the money was counted and accounted for prior to the July robbery, but the day after the July robbery Reed effectively confessed to committing the crime and confided in his co-conspirator that he planned to do "it" again. Additionally, given the robbery occurred while the truck stop was open for business, the jury reasonably could have

inferred Reed and his co-conspirator planned to use a deadly weapon to accomplish the crime. *See United States v. Echeverri*, 982 F.2d 675, 679 (1st Cir. 1993) ("criminal juries are not expected to ignore what is perfectly obvious").

¶21 *United States v. DeMasi*, 40 F.3d 1306, 1314 (1st Cir. 1994), illustrates our point. The defendant in that case appealed his conviction of attempted armed robbery of an armored truck, claiming there was no evidence to support a finding he knew his co-defendants would be using firearms during the robbery. *Id.* at 1316. The court upheld the conviction, holding that "a rational jury could conclude that [the defendant] understood the scope of what a robbery of an armored truck with two armed guards would entail." *Id.* In this case, the aggregate evidence likewise sufficiently supports the jury's finding that Reed conspired to commit the July armed robbery.

d. The superior court's restitution order is appropriate because Reed's conspiracy directly caused the robbery to occur.

¶22 Reed contends, however, that even assuming the evidence was sufficient to support the conspiracy conviction, the conspiracy did not "directly cause" the robbery to occur because an intervening event, the act of the individual who perpetrated the robbery, broke the chain of causation.

¶23 *Lewis* again illustrates why Reed's argument fails. The defendant in that case asserted the State did not prove he

directly caused the victim's gunshot wounds because his brother, who was firing a gun at the same time, could have caused the victim's injuries. 222 Ariz. at 325, ¶ 12, 214 P.3d at 413. The court rejected this argument, explaining,

> In determining whether the state carried its burden of establishing its restitution claim by a preponderance of the evidence, the trial court was not constrained by [the defendant's] acquittal on the aggravated assault charge, on which the state has the burden of proving his guilt beyond a reasonable doubt.

Id. at 326, ¶ 14, 214 P.3d at 414.

¶24 Viewed in the light most favorable to upholding the restitution award, the record contains sufficient evidence to support the superior court's conclusion that the conspiracy to commit the July robbery caused the loss the truck stop sustained in that robbery. Not only was there evidence that Reed admitted he committed the July armed robbery, his co-conspirator testified that he promised beforehand to divide the spoils of that robbery with her. She also testified she was with Reed when he used cash from that robbery to buy new vehicles for himself. Thus, based on the evidence and reasonable inferences therefrom, the superior court reasonably could find Reed's "criminal conduct . . . directly cause[d] the [victim's] economic loss." *Madrid,* 207 Ariz. at 298, ¶ 5, 85 P.3d at 1056.

B. Fundamental Error Review.

¶25 Reed was represented by counsel at all stages of the resentencing proceeding. While he did not appear in person at his resentencing hearing, he voluntarily appeared by telephone from prison.

¶26 A defendant is entitled to presentence incarceration credit for all time spent in custody pursuant to an offense. A.R.S. § 13-712(B) (West 2012). A failure to award the correct amount of presentence incarceration credit constitutes fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). The superior court awarded Reed 2,134 days' presentence incarceration credit. According to the record, Reed was taken into custody on September 15, 2005, in Blythe, California. He was transferred into Arizona custody on September 20, 2005, and remained in custody until the day of his resentencing, August 1, 2011.

¶27 While a defendant receives no credit for time spent incarcerated in another state on charges unrelated to Arizona charges, a defendant is awarded presentence incarceration credit for time "spent in the custody of another state pursuant to an arrest for an Arizona offense." *State v. Mahler*, 128 Ariz. 429, 430, 626 P.2d 593, 594 (1981). Because Reed was held in California custody solely on his Arizona charges between September 15 and 20, he should be awarded presentence

incarceration credit from September 15, 2005, to August 1, 2011, which is 2,146 days. We modify the judgment accordingly.

CONCLUSION

¶28 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm the convictions and the sentences imposed, except that we modify the judgment to provide for 2,146 days' presentence incarceration credit.

¶29 After the filing of this decision, defense counsel's obligations pertaining to Reed's representation in this appeal have ended. Defense counsel need do no more than inform Reed of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Reed has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Reed has 30 days from the date of this decision to file a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge