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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/13/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0019
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DREW VAN SCHAIK,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-151863-001

The Honorable Bruce R. Cohen, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Drew Van Schaik ("Appellant") appeals the trial court's order of restitution arising from his theft conviction. Appellant's counsel has filed a brief in accordance with *Smith*

v. Robbins, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Although this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, he has not done so. He has, however, raised one issue through counsel that we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),¹ 13-4031, and 13-4033(A). Finding no reversible error, we affirm Appellant's conviction and the court's order of restitution.

I. FACTS AND PROCEDURAL HISTORY²

¶3 At trial, the State presented evidence of an internal investigation at the Walmart store where Appellant worked as a

¹ We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

² We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. See *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

cashier. The evidence included testimony and documentation that Appellant's register had shortages amounting to at least \$3501, and Appellant's admission to a police officer that, over time, he had taken an undetermined amount of money from the register. In addition, the arresting officer testified that, at the time of Appellant's arrest at Walmart, Appellant had "exactly \$2000 in cash in both his wallet and his front pants pocket." A jury found Appellant guilty of theft of less than \$1000, a class one misdemeanor, in violation of A.R.S. § 13-1802. The trial court suspended sentencing, placed Appellant on probation, and scheduled a restitution hearing.

¶4 At the restitution hearing, the court considered the evidence presented at trial and the arguments of counsel, and after taking the matter under advisement, ordered that Appellant pay \$3501 in restitution. Appellant filed a timely notice of appeal from the court's restitution order.

II. ANALYSIS

A. Restitution Above Amount Reflected in Guilty Verdict

¶5 Appellant questions whether the court could properly order that he pay restitution in the amount of \$3501, given that the jury only convicted him of theft of less than \$1000. We find no error, much less fundamental error.

¶6 Arizona gives a victim the right to receive prompt restitution from a person convicted of the criminal conduct that

caused the victim's loss. Ariz. Const. art. 2, § 2.1(A)(8). If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime in the full amount of the economic loss as determined by the court. A.R.S. § 13-603(C). "A court has discretion to set the amount of restitution according to the facts . . . but some evidence must be presented that the amount bears a reasonable relationship to the victim's loss before restitution can be imposed." *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. 1991) (citations omitted). Restitution is not part of the adjudication of guilt, but part of sentencing; accordingly, the burden of proof is by preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, 469-70, ¶ 15, 65 P.3d 114, 117-18 (App. 2003).

¶7 At trial, the State submitted evidence that the victim (Walmart) suffered an economic loss of at least \$3501. Although the jury did not find the full amount proved beyond a reasonable doubt for the purpose of determining Appellant's guilt, *see id.*, the trial court could have reasonably relied on the evidence and determined that the lesser preponderance-of-the-evidence standard had been met for restitution purposes. *See State v. Fancher*, 169 Ariz. 266, 267-68, 818 P.2d 251, 252-53 (App. 1991) (holding that the "trial court has the authority to order restitution in full for damages caused by the criminal offense"

including restitution "in excess of amounts alleged in charging documents on which convictions were based"). Accordingly, we find no error, much less fundamental error, in the court's decision to order restitution in an amount greater than that reflected by Appellant's conviction.

B. Other Issues

¶8 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the court's order of restitution. Appellant was represented by counsel at all stages of the proceedings, was present at trial, and the court found that he waived the opportunity to appear at the restitution hearing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶9 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to

proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶10 Appellant's conviction and the trial court's restitution order are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
MICHAEL J. BROWN, Judge

_____/S/_____
MARGARET H. DOWNIE, Judge