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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

DIANE LYNN HABENER, *Appellant*.

No. 1 CA-CR 12-0514

FILED 1-14-2014

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Appeal from the Superior Court in Maricopa County

No. CR2010-065403-001

The Honorable Janet E. Barton, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jana Zinman

*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Mark E. Dwyer

*Counsel for Appellant*

**MEMORANDUM DECISION**

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Patricia K. Norris joined.

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**J O N E S**, Judge:

¶1 Diane Lynn Habener (Appellant) appeals from the trial court's award of \$6,448.34 in restitution to the Maricopa County Sheriff's Office (MCSO). She argues that: (1) the State failed to present sufficient proof of a "causal link" between the criminal acts and the economic loss incurred; (2) the MCSO is not a victim under Arizona Revised Statutes (A.R.S.) section 13-603 (2013); (3) the trial court improperly shifted the burden of proof from the State to Appellant; and (4) insufficient evidence exists to support the trial court's award. For reasons set forth below, we affirm.

**PROCEDURAL HISTORY**

¶2 On October 1, 2010, the State charged Appellant with sixteen counts of cruelty to animals, each a Class 1 misdemeanor, after the MCSO's seizure of 114 dogs and cats from two properties where Appellant operated animal shelters. Following a bench trial, the trial court found Appellant guilty on nine of the sixteen counts and placed Appellant on probation for six years. This Court affirmed Appellant's convictions and the imposition of probation in *State v. Habener*, 1 CA-CR 11-0354 (Ariz. App. Sept. 11, 2012) (mem. decision).

¶3 On September 16 and December 2, 2011, the trial court held restitution hearings to consider the State's request for \$8,373.58<sup>1</sup> in restitution to the MCSO for costs incurred from the animals' seizure, as well as boarding and medical care provided by the Alta Vista Veterinary Hospital (Alta Vista). At the conclusion of the hearing, the trial court

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<sup>1</sup> The State, at the September 16 restitution hearing, initially requested \$9,273.58. At the December 2 restitution hearing, however, it was discovered that an incorrect charge of \$900 had been used in the calculation of the original request. The State then moved to subtract \$900 from the total amount of restitution sought.

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awarded the MCSO \$6,448.34 in restitution. On June 27, the trial court granted Appellant's request to file a delayed notice of appeal from the award of restitution, and this appeal followed. Having considered the issues Appellant raised on appeal, on September 24, 2013, a different panel of this Court, consisting of The Honorable Samuel A. Thumma, Presiding Judge, The Honorable Jon W. Thompson (authoring judge) and The Honorable Kent E. Cattani, issued a memorandum decision affirming the trial court's award of restitution. See *State v. Habener*, 1 CA-CR 12-0514 (Ariz. App. Sept. 24, 2013) (mem. decision).

¶4 On October 9, 2013, Appellant filed a motion for reconsideration in which she noted that Judge Cattani, who had been appointed to the Court of Appeals subsequent to the delayed appeal, had actually represented the State in this case in his previous capacity as an Assistant Attorney General. Appellant thereafter petitioned this Court to have her appeal "reheard in its entirety before a new panel of judges." On October 23, 2013, Judge Thumma, "out of an abundance of caution,"<sup>2</sup> vacated the memorandum decision issued on September 24, denied the motion for reconsideration as moot, and recused the members of the initial panel from any further consideration of this appeal. Thereafter, Appellant's appeal was reassigned to this panel for independent review and consideration.

¶5 We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2013), 13-4031 (2013). Although we are in no way bound by the previous panel's decision, after independently reviewing the record and the issues presented, we have concluded the panel's analysis in that decision was sound and adopt it as stated hereafter.

### DISCUSSION

¶6 During the restitution hearings, MCSO Sergeant Sherry Beckley testified about costs incurred from the animals' seizure, housing, and medical care, using invoices produced by Alta Vista Veterinary Hospital Alta Vista. Expenses accrued as a result of various medications,

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<sup>2</sup> The "representation" to which appellant alluded is based upon Judge Cattani's listing as the Chief Counsel for the Criminal Appellate/Capital Litigation Section of the Attorney General's Office on her *Anders* appeal. Judge Thumma, in his order, noted that the State of Arizona did not file a brief in appellant's *Anders* appeal.

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medical tests, vaccinations, veterinarian examinations, and other medical and health-related services provided to the animals. Sergeant Beckley testified that some treatments were recommended by veterinarians and some were part of MCSO's routine care for seized animals. She further testified that no treatment was unreasonable or needless.

¶7 The State requested \$8,373.58 in restitution. This amount represented MCSO's expenses for the nine animals related to Appellant's convictions. The trial court awarded restitution to MCSO in the amount of \$6,448.34, ruling that these expenses were "properly recoverable."

¶8 We review a trial court's restitution order for abuse of discretion. *State v. Slover*, 220 Ariz. 239, 242, ¶ 4, 204 P.3d 1088, 1091 (App. 2009). A trial court abuses its discretion when it misapplies the law or bases its decision on incorrect legal principles. *Id.* We view the facts in the light most favorable to affirming the trial court's findings, and we will not reweigh the evidence. *In re Andrew A.*, 203 Ariz. 585, 586-87, ¶¶ 5, 9, 58 P.3d 527, 528-29 (App. 2002).

I. The Causal Nexus Between Conduct and Loss

¶9 Appellant claims the trial court abused its discretion by ordering her to pay restitution for damages that were not directly caused by her conduct. She opposes paying for medical expenses she deems consequential or highly attenuated. Specifically, she contests the expenses for the animals' precautionary or routine treatments, rabies vaccinations, and treatments for valley fever and dog bite wounds.

¶10 Section 13-603(C) mandates restitution to the victim "in the full amount of the economic loss as determined by the court . . . ." Economic loss is defined as:

[A]ny loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

A.R.S. § 13-105(16) (2013). When determining restitution, the trial court "shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted." A.R.S. § 13-804(B) (2013). Furthermore, the restitution award must bear "a reasonable relationship

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to the victim's loss." *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997).

¶11 Both parties cite *State v. Madrid* for Arizona's rule governing what constitutes a recoverable loss for restitution. 207 Ariz. 296, 85 P.3d 1054 (App. 2004). A loss is recoverable through restitution if: (1) the loss is economic; (2) the loss is one that the victim would not have incurred but for the criminal conduct; and (3) the criminal conduct directly caused the economic loss. *Id.* at 298, ¶ 5, 85 P.3d at 1056. Direct causation is satisfied when the causal nexus between the conduct and the loss is not too attenuated factually or temporally. *State v. Williams*, 208 Ariz. 48, 53, ¶ 18, 90 P.3d 785, 790 (App. 2004) (quoting *United States v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997)). If the loss results from a causal event other than the defendant's conduct, then it is considered consequential and thus unrecoverable. *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133 (2002). Nonetheless, Arizona's mandatory restitution statute is quite broad and authorizes an award for a wide variety of expenses caused by a defendant's conduct. *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (App. 1992).

A. Routine and precautionary treatments

¶12 Appellant contends the routine and precautionary treatments provided by MCSO and Alta Vista - including veterinary checkups, tests, vaccinations, and medications - were not directly necessitated by her conduct. As part of MCSO's standard care procedures, all animals seized under cruelty claims are routinely examined by vets. Similarly, rabies vaccinations are given to every cat for health and safety purposes and to help make them more adoptable. In addition, Alta Vista recommended administering tests and medications for leptospirosis, a highly contagious illness communicable to humans. Although this was a precautionary measure, Sergeant Beckley explained that MCSO implemented this regimen for the protection of MCSO staff and inmates. Alta Vista further rendered treatments for valley fever.

¶13 The trial court found these expenses were reasonably recoverable and we agree. Some treatments were administered at the behest of veterinarians and some were given to protect MCSO from contagious pathogens. Therefore, the trial court did not abuse its discretion by including these costs in the restitution order.

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B. Dog bites

¶14 Appellant claims that expenses resulting from treatments to dogs for dog bite wounds that occurred while the animals were in MCSO's custody are too attenuated from her criminal conduct to satisfy *Madrid's* direct causation requirement. She asserts that MCSO's failure to properly tend to the dogs was an intervening cause.

¶15 Appellant provides no citation to the record or evidence supporting her allegation that MCSO failed to properly care for the animals. Conversely, Sergeant Beckley testified that MCSO separated the animals and took as many precautions as possible to ensure their health and safety.

¶16 The trial court found the expenses for dog bite treatments were reasonably recoverable and we agree. We find the causal nexus here to be sufficiently robust and, accordingly, find the trial court did not abuse its discretion by including these costs in the restitution order.

C. Prolonged Retention

¶17 Appellant repeatedly proclaims MCSO retained the animals for a prolonged period of time without attempting to adopt them out. She posits this was in aid of prosecution and resulted in increased medical expenses.

¶18 The record does not support Appellant's assertion. During the restitution hearings, Brandon Newton, an attorney from the civil division of the Maricopa County Attorney's Office, testified about an agreement between MCSO and Appellant concerning the forfeiture and adoption of Appellant's animals. Because of this agreement, MCSO could not legally adopt out some of the animals until Appellant was convicted. For the others, Sergeant Beckley testified MCSO did its best to secure adoptive families. We find Appellant's claim unsupported by the evidence.

II. MCSO is a "victim" under A.R.S. § 13-603(C)

¶19 Appellant contends that MCSO is not a "victim" within the meaning of Arizona's restitution statute. *See* A.R.S. § 13-603(C). Statutory interpretation is a question of law that we review *de novo*. *State v. Jensen*, 193 Ariz. 105, 107, ¶ 16, 970 P.2d 937, 939 (App. 1998). We first look to the statute's plain language as the most reliable indicator of its meaning.

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*Alliance TruTrus, L.L.C. v. Carlson Real Estate Co.*, 229 Ariz. 84, 86, ¶ 7, 270 P.3d 911, 913 (App. 2012).

¶20 Section 13-603(C) states that “[i]f 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 . . . .” While A.R.S. § 13-603(C) does not define “victim,” the definition of “person” within Arizona’s criminal statutes includes a “government” or “governmental authority.” See A.R.S. § 13-105(30). In Arizona, restitution is mandatory in a criminal case. See A.R.S. § 13-603(C).

¶21 Our Court has broadly interpreted “victim” to mean any entity, including a government agency, that legally stands in the victim’s shoes, and as a result, suffers the victim’s own economic loss. *State v. Prieto*, 172 Ariz. 298, 299, 836 P.2d 1008, 1009 (App. 1992) (holding Arizona Department of Economic Security is a victim entitled to restitution for providing psychological services to actual victim); see *Guilliams*, 208 Ariz. at 51-53, ¶¶ 9-15, 90 P.3d at 788-90 (recognizing Arizona Department of Corrections as a victim under restitution statute).

¶22 When MCSO executed the search warrant, the animals were suffering from malnourishment, dehydration, diseases, infections, valley fever, bug bites, and a variety of other ailments. MCSO assumed legal custody and responsibility for the animals’ care, housing, and treatment. As a direct result of Appellant’s conduct, MCSO was forced to provide for their well-being. Accordingly, we find the trial court did not abuse its discretion in determining that MCSO is a “victim” under the meaning of A.R.S. § 13-603(C).

III. Burden of Proof was not Improperly Shifted

¶23 Appellant next argues the restitution hearings were conducted in a manner that improperly shifted the burden of proof from the State to the defense. Appellant takes issue with the fact that her counsel preceded the State in questioning Sergeant Beckley and in giving the closing argument. She claims this shifted the burden of proof to the defense.

¶24 Arizona Rule of Criminal Procedure 19.1(a) directs the order of trial proceedings. Rule 19.1(a) also states that “[w]ith the permission of court, the parties may agree to any other method of proceeding,” and Appellant’s counsel on several occasions throughout the hearings expressly agreed to proceed in the order by which the trial was conducted.

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*See also* Ariz. R. Evid. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses . . .”). As such, the trial court appropriately exercised the discretion afforded to it to determine the order of trial proceedings with the parties’ approval, and we find no error.

IV. Sufficiency of the Evidence to Support the Restitution Award

¶25 Appellant argues the Alta Vista invoices were untrustworthy and insufficient to support the trial court’s order, the State failed to demonstrate any payments were made, and the State’s testimony did not support the restitution award. Appellant fails to elaborate on her factual claims or to cite any legal authority, as required by Arizona Rule of Civil Appellate Procedure 13(a)(6).

¶26 The trial court considered and concluded the State’s evidence – including Sergeant Beckley’s testimony and the Alta Vista invoices – was sufficient to establish restitution. We agree and find the trial court did not abuse its discretion.

**CONCLUSION**

¶27 For the foregoing reasons, we affirm the trial court’s award of restitution to MCSO in the amount of \$6,448.34.



Ruth A. Willingham · Clerk of the Court  
FILED: mjt