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

STATE OF ARIZONA, Appellee, v. JAMES GERALD SCHLIENZ, Appellant.	)	1 CA-CR 09-0156 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR 0020080374

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Abigail Jensen, P.C. — Prescott
by Abigail Jensen
Attorneys for Appellant

W E I S B E R G, Judge

¶1 James Gerald Schlienz ("Defendant") appeals from the sentences imposed following his convictions for burglary in the

third degree and possession of burglary tools following a jury trial. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Defendant. *State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted for burglary in the third degree in violation of Arizona Revised Statutes ("A.R.S") section 13-1506(A)(1)(Supp. 2009) (entering or remaining unlawfully in a nonresidential structure with the intent to commit a theft or felony therein), a class 4 felony, and possession of burglary tools, to wit: a small mag light, in violation of A.R.S. § 13-1505(A)(1)(Supp. 2009), a class 6 felony. The State alleged two historical prior felony convictions. The following evidence was presented at trial.

¶3 On the night of March 9, 2008, a building under construction in Prescott was burglarized. T., the general contractor and E., the superintendent of construction, were the only ones who had access to the building. Numerous tools were removed from a locked room in the building, some belonging to T.'s construction company and some belonging to E.

¶4 T. and E. prepared a list of the stolen tools and the cost for each tool. They estimated that the total value of T.'s tools was $3,010 and the total value of E.'s tools was $2,300.

In addition, there was damage to the drywall, stucco, windows and paint caused by the burglary and E. estimated that the cost of repairs was $690.

¶5 Subsequent investigation revealed that S., who worked next to the building under construction, saw a man enter the construction site the night of March 9, 2008 and leave shortly thereafter. She later identified the man, both at the scene and in court, as Defendant. M., a co-worker of S., also observed a man at the construction site carrying something over his shoulder and saw him leave the premises. She too, later identified the man, both at the scene and in court, as Defendant.

¶6 R. lived in an apartment building behind the construction site. From his bedroom window, he saw a car in the parking lot of the site with its parking lights on. There was a female driver and a passenger in the car. He observed a man come from behind a pillar and make several trips loading items into the trunk of the car. After the driver closed the trunk, she and the passenger drove away and the other man left on foot. R. called 911. R. later made out-of-court and in-court identifications of Defendant as the man he saw loading the car.

¶7 Officer Mora was dispatched to the area and contacted Defendant. He saw a white powdery substance on his clothes and asked Defendant if he had been in the building under

construction. Defendant responded that he was just "walking through the building to cut through." After he was arrested and waived his *Miranda* rights, Defendant told the officer that he was in the construction area and saw three Hispanic males loading tile from the building to a car that was parked there. He asked them if they had a job because he needed work and one of the males told him to come back the next day and talk to the foreman. Defendant denied taking any items from the building.

¶8 In a search incident to the arrest, Officer Mora found a mini-flashlight on Defendant and seized it as a burglary tool. He also seized Defendant's boots. Officer Small, who investigated the scene, took photographs of bootprints he found in the room where the tools were stored. Although no scientific comparison was done to determine if the bootprints at the scene were made by Defendant's boots, the boots and photographs of the bootprints were admitted into evidence for use by the jury in its deliberations.

¶9 The jury found Defendant guilty as charged. After a hearing on the prior felony convictions, the trial court found that Defendant had two historical prior felony convictions. The court later vacated its finding on a Nevada felony conviction after the parties agreed that it might not be a felony if the offense had been committed in Arizona.

¶10 The court imposed presumptive, concurrent sentences of 4.5 years for burglary in the third degree and 1.75 years for possession of burglary tools and awarded Defendant 75 days of presentence incarceration credit. Based upon information in the presentence report, the court ordered Defendant to pay restitution to the victims in the total amount of $6,008. This sum included $3,018 to T. and $2,300 to E., respectively, for their stolen tools and $690 for repairs to damages to the building caused by the burglary. Defendant timely appealed.

¶11 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, -4033(A) (2001).

DISCUSSION

¶12 Defendant's sole issue on appeal is that the trial court abused its discretion in ordering Defendant to pay restitution for the cost of tools stolen from the construction site. He argues that because he was not charged with theft and because the burglary was complete when he entered the building with the intent to commit a theft, the loss of the tools was not a direct result of the criminal conduct for which he was charged. Defendant does not challenge the restitution order for damage to the building.

¶13 Defendant did not object below to the restitution order and therefore we review for fundamental error only. *State v. Henderson,* 210 Ariz. 561, 565, ¶ 8, 115 P.3d 601, 605 (2005).

To establish fundamental error, Defendant must first prove error. *Id. at* 568, ¶ 23, 115 P.3d at 608. There was no error in this case.

¶14 "The trial court has discretion to set the restitution amount according to the facts of the case in order to make the victim whole." *State v. Lindsley,* 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997). "On appeal, this Court will uphold the restitution award if it bears a reasonable relationship to the victim's loss." *Id.*

¶15 Under A.R.S. § 13-603(C)(Supp. 2009), 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." Under A.R.S. §13-804(B)(2001), "[i]n ordering restitution for economic loss . . . the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted." "Economic loss" means "any loss incurred by a *person* as a result of the commission of the offense [and] includes . . . losses which would not have been incurred but for the offense." A.R.S. § 13-105(14)(2001). (Emphasis added.) Further, under A.R.S. § 13-804(A), the court may allocate all or a portion of a fine as restitution payable by defendant to "any *person* who suffered an economic loss caused by the defendant's conduct." (Emphasis added.)

¶16 The criminal conduct must directly cause the economic loss and "damages [must] flow directly from the defendant's criminal conduct, without the intervention of additional causative factors." *State v. Wilkinson,* 202 Ariz. 27, 28, ¶ 7, 39 P.3d 1131, 1133 (2002); *State v. Morris,* 173 Ariz. 14, 18, 839 P.2d 434, 438 (App. 1992) ("restitution is proper when the victim's losses are a direct result of the defendant's conduct"). Thus, restitution can be ordered for an uncharged offense as long as the defendant is found guilty of another offense and the state proves by a preponderance of the evidence that the defendant's actions caused the victim's loss. *See Lindsley,* 191 Ariz. at 197, 953 P.2d at 1250 (although defendant not charged with theft, but convicted of forgery after taking victim's wallet and attempting to cash checks in it, trial court properly awarded restitution of $65 for damage to wallet because damage was the direct result of defendant's unlawful possession of it); *In re Stephanie B.*, 204 Ariz. 466, 470, ¶ 17, 65 P.3d 114, 118 (App. 2003) (upholding award of restitution for medical expenses where juvenile found not delinquent on a charged offense as long as juvenile found delinquent of another criminal offense that properly supports the award).

¶17 Here, Defendant's conduct in burglarizing the building where the tools were stored directly caused the economic losses to T. and E.; but for his criminal conduct, they would not have

incurred the losses. The fact that Defendant was not charged with theft does not change this result.

¶18 Defendant also contends that T. and E. were not "victims" of the offenses. He relies on Arizona cases in which restitution orders were vacated because someone other than the victim of the crimes sustained the loss. *State v. French,* 166 Ariz. 247, 249, 801 P.2d 482, 484 (App. 1990) (where defendant convicted of crimes committed in motel room causing damage to room, motel owner not entitled to restitution because owner not victim of crimes for which defendant convicted); *State v. Whitney,* 151 Ariz. 113, 114, 726 P.2d 210, 211 (App. 1985) (where defendant convicted of theft of vehicle causing damage to that and a second vehicle, driver of second vehicle not entitled to restitution because that driver not victim of the theft). In this case, however, both T. and E. were victims of the crimes for which Defendant was convicted.

¶19 The case of *State v. Guilliams,* 208 Ariz. 48, 52, ¶ 13, 90 P.3d 785, 789 (App. 2004), is instructive on this point. There, the defendant help an inmate to escape from a facility of the Arizona Department of Corrections ("ADOC"), pled guilty to attempted escape, and was ordered to pay restitution to ADOC for numerous costs associated with apprehending the inmate who had escaped. *Id.* at 50-51, ¶¶ 2-7, 90 P.3d at 787-88. The defendant argued on appeal that ADOC was not entitled to

restitution because escape is a victimless crime and ADOC was not a victim. *Id.* at 52, ¶ 11, 90 P.3d at 789. Division Two of this court disagreed. The court stated that although the term "victim" is not defined in A.R.S. § 13-603(C), our supreme court in *Wilkinson,* 202 Ariz. at 29, ¶ 7, 39 P.3d at 1133, interpreting that statute, "focused on the relationship between the criminal conduct and the claimed economic loss, noting that the test is whether the particular criminal conduct directly caused an economic loss." *Guilliams,* 208 Ariz. at 52, ¶ 13, 90 P.3d at 789. Observing that "[u]nder this analysis, the restitution statutes do not require that a specific victim be named in a statute, indictment, or verdict form," the court in *Guilliams* concluded that "a 'victimless crime' may still support an award of restitution so long as the criminal act directly results in economic damages to the person or entity receiving the award." *Id.* at ¶ 14. In determining whether ADOC was a victim of the crime, the court saw "no conceptual difference" between the crime of escape and the crime of burglary, which "did not include as an element that the crime be committed against a specific person." *Id.* at 53, ¶ 15, 90 P.3d at 790.

¶20 Similarly, although T. and E. were not victims under the statutes defining the offenses for which Defendant was convicted or as stated in the indictment, Defendant's criminal conduct directly caused their economic losses. They were

victims of Defendant's crimes under the restitution statutes and cases decided thereunder and the trial court properly awarded restitution to them.[1]

CONCLUSION

¶21 For the foregoing reasons, we affirm Defendant's sentences.

/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/_____
PHILIP HALL, Judge

/s/_____
JOHN C. GEMMILL, Judge

[1]As Defendant notes, there is an $8.00 discrepancy in the amount of T.'s losses based on the evidence presented at trial and the amount awarded to T. based upon the presentence report. Defendant does not argue, however, that this was fundamental error.