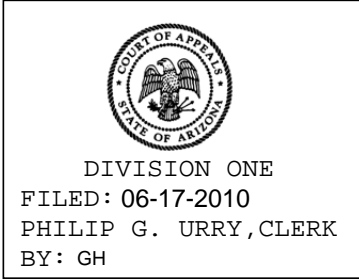


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
 See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
 Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
 STATE OF ARIZONA
 DIVISION ONE

IN RE PETER V.) No. 1 CA-JV-09-0228
)
) DEPARTMENT E
)
) **MEMORANDUM DECISION**
)
) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
)

Appeal from the Superior Court in Maricopa County

Cause No. JV550711

The Honorable James H. Keppel, Judge

RESITUTION AWARD AFFIRMED

Richard M. Romley, Acting Maricopa County Attorney Phoenix
 By Linda Van Brakel, Deputy County Attorney
 Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
 By Eleanor S. Terpstra, Deputy Public Defender
 Attorneys for Appellant

J O H N S E N, Judge

¶1 Peter V. appeals the superior court's ruling ordering him to pay \$80,000 in restitution. We affirm the order.

FACTUAL AND PROCEDURAL HISTORY

¶2 On January 6, 2009, Peter set several fires inside a Scottsdale warehouse. On March 17, 2009, the State filed a petition charging Peter with arson of an occupied structure, burglary in the third degree and criminal damage. The petition alleged the arson and burglary occurred on January 6, 2009 but provided March 6, 2009 as the date of the criminal damage. For each charge, the petition cited Scottsdale Police Department Report ("Department Report") 09-00551, which was created after the January 6 fire.

¶3 A month after the fire, the owner of the warehouse settled with his insurance company for the structural damage to the building. In support of his insurance claim, the owner submitted a statement setting out various estimated costs to clean the concrete floor and carpet and to "deodorize building - ozone treatment." These costs, combined with the cost of reglazing a window, totaled \$11,076.28. The insurance settlement was for \$14,984.33, less a \$5,000 deductible.

¶4 On May 19, 2009, Peter admitted to attempted arson of an occupied structure and agreed to pay restitution "arising out of Scottsdale Police Department report 2009-00551 not to exceed

\$80,000.00." In return the state dropped the other two charges against him.

¶15 At the restitution hearing, using photographs from Department Record 09-00551, the warehouse owner provided estimates of the value of a wide variety of personal property damaged or destroyed by the fire. Based on his testimony, the damage ranged from \$3,000 to \$12,000 for thousands of sanding belts that were destroyed, \$15,000 for damaged turquoise, \$6,000 to \$10,000 for damaged knives, and \$5,000 paid for cleaning the building. The owner also testified that an automatic knife sharpener, an electronic register and fire extinguishers were destroyed by the fire.

¶16 In addition, the court heard testimony from John Propst, a construction consultant. After Peter's counsel stipulated "to his qualifications that he can assess damage and estimates, contract estimates and things like that," Propst testified that repair of smoke damage to the building, repainting and "drywall and acoustical repairs" would total between \$80,000 and \$90,000.

¶17 Peter stipulated to paying the \$5,000 insurance deductible but argued the State presented insufficient evidence to support other damage arising from the fire. After considering written closing arguments, the court entered a judgment ordering Peter to pay \$80,000 in restitution to the

owner of the building. Peter timely appealed; we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 8-235(A) (2007).

DISCUSSION

A. Legal Principles.

¶8 The superior court has discretion to set a restitution amount according to the facts of the case as long as it bears a reasonable relationship to the victim's loss. *State v. Wilson*, 185 Ariz. 254, 260, 914 P.2d 1346, 1352 (App. 1996). This court reviews a restitution order for an abuse of discretion. *In re Andrew C.*, 215 Ariz. 366, 367, ¶ 6, 160 P.3d 687, 688 (App. 2007). Upon review, the court considers the facts in the light most favorable to upholding the decision. *Id.*

¶9 Restitution may be ordered for losses that are economic, would not have occurred but for the juvenile's delinquent conduct, and are not consequential, meaning the damages must be directly caused by the delinquent conduct. *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133 (2002); *Andrew C.*, 215 Ariz. at 368, ¶ 9, 160 P.3d at 689. Restitution must be proved by the preponderance of the evidence. *In re William L.*, 211 Ariz. 236, 238, ¶ 6, 119 P.3d 1039, 1041 (App. 2005). This means the evidence only needs to persuade the trier of fact that existence of the contested fact is more probable than not. *Id.* On review, "[w]e will not reweigh

evidence, but look only to determine if there is sufficient evidence to sustain the juvenile court's ruling." *In re Andrew A.*, 203 Ariz. 585, 587, ¶ 9, 58 P.3d 527, 529 (App. 2002).

B. The Evidence Supported the Restitution Order.

¶10 On appeal, Peter argues the superior court erred in adopting Propst's estimate of the cost of repairing structural damage to the warehouse because insufficient evidence linked that damage to the criminal conduct that was the subject of the adjudication. Propst testified that he based his opinion on a visit to the warehouse only a few days before the restitution hearing, some nine months after the fire. Peter argues the damage to which Propst testified was not caused by the fire Peter set but was caused by some unspecified event that occurred after the fire. In support, Peter cites evidence that windows in the warehouse were boarded up when Propst viewed the warehouse but were not boarded up immediately after the fire. He also points to testimony of a deputy fire marshal who visited the warehouse after the fire that only 20-30 percent of the warehouse experienced smoke damage, and the charging petition, which identified March 6, 2009 (two months after the fire) as the date of the criminal damage with which Peter was charged.

¶11 The superior court is in the best position to determine the credibility of the witnesses and analyze the exhibits and other evidence for the purposes of restitution;

therefore, we defer to its factual determinations. *In re Richard B.*, 216 Ariz. 127, 130, ¶ 12, 163 P.3d 1077, 1080 (App. 2007). The superior court has the discretion to draw inferences from the evidence; we will not disturb its conclusions if they are reasonably supported by the evidence. *See Andrew A.*, 203 Ariz. at 587, ¶ 10, 58 P.3d at 529.

¶12 Peter does not explain on appeal what other event caused damage to the warehouse after the January 6 fire, and points to no evidence in the record identifying any such event. His contention that another event must have occurred is mere speculation unsupported by the record. The fact that windows were not boarded up shortly after the fire but were boarded up nine months later does not require the conclusion that another event damaged the warehouse in the interim. Moreover, the court had the discretion to discount the fire marshal's testimony in favor of Propst's opinion that painting and other "containment" of smoke damage to the warehouse would cost \$45,000 to repair.¹ The discrepancy relating to the date of the conduct underlying the criminal damage charge does not prove Peter's contention that acts by someone else caused the damage Propst testified he observed.

¹ Indeed, given the size of the warehouse, Peter offered no evidence showing that Propst's \$45,000 painting estimate was inconsistent with the amount of smoke damage to which the fire marshal testified.

¶13 Moreover, the superior court heard testimony by the owner of the warehouse of considerable damage done to the contents of the building, on which it relied in entering its restitution award. A court may consider a victim's testimony concerning reasonable damages for injury to or loss of property. A.R.S. § 8-344(B) (2007). Although, as Peter argues, the warehouse owner had no documentation (i.e. receipts, records, etc.) other than notes he made on photographs of the damage, Peter does not dispute that the owner was competent to testify to the value of the personal property lost or destroyed in the fire. In *State v. Dixon*, 216 Ariz. 18, 21, ¶¶ 12-13, 162 P.3d 657, 660 (App. 2007), the court affirmed a restitution award based on an itemized list with assigned values in the presentence report and a statement by the victim's mother adopting the values. Even though the value of the items in that case was uncorroborated by other evidence, the court emphasized the fact that the evidence was uncontested and "substantiated" by the victim's statement. *Id.*

¶14 As in *Dixon*, the warehouse owner in this case assigned values to the damaged items photographed after the fire. He then explained, albeit briefly, how he arrived at the value of the damaged items. Further, Peter offered no evidence controverting the estimated values the owner provided for the damaged belts, knives and turquoise and the clean-up and

repainting required by the fire. See *Wilson*, 185 Ariz. at 260, 914 P.2d at 1352 (restitution amount held reasonable in light of the fact that there was no evidence that "directly controverted [the victim's] testimony").

¶15 For the first time in his reply brief, Peter argues that Propst's estimate of damages should not be believed because it exceeds the insurance settlement the warehouse owner accepted. As Peter notes, however, the owner testified that he discovered further damage to the warehouse after he accepted the settlement.

¶16 Finally, Peter argues the court abused its discretion by requiring him to pay restitution for damage arising out of the two charges that were dismissed pursuant to the plea agreement. He argues he did not agree to pay restitution for conduct underlying the two dismissed charges. In support of this argument, Peter contends the structural damage to which Propst testified must have been caused by conduct underlying the dismissed criminal damage charge, which the petition stated occurred on March 6, 2009, not on January 6, 2009, the date of the fire.

¶17 Peter waived this argument by failing to raise it in the superior court. See *State v. White*, 194 Ariz. 344, 354, ¶ 44, 982 P.2d 819, 829 (1999) ("Our adversarial system properly and necessarily precludes injection of new issues on appeal").

Even if we were to consider the argument, however, we would reject it.

¶18 Neither party offers an explanation for the discrepancy in the dates listed in the charging petition. We infer the March 6 entry was an error because the record contains no other reference to any criminal conduct alleged to have been committed by Peter other than conduct relating to the fire set on January 6. In any event, Peter's argument ignores that he agreed in the plea agreement to pay up to \$80,000 in restitution "arising out" of Department Report 09-00551. As noted, the petition filed against Peter made plain that each of the three charges, including the criminal damage charge, was based on conduct outlined in Department Report 09-00551.

¶19 "Plea agreements are contractual in nature and subject to contract interpretation." *Coy v. Fields*, 200 Ariz. 442, 445, ¶ 9, 27 P.3d 799, 802 (App. 2001). By agreeing to be subject to restitution for any economic loss arising from Department Record 09-00551, Peter agreed to accept liability for any damage arising from acts recounted in that report. Notwithstanding that the criminal damage charge was dismissed pursuant to the plea agreement, conduct underlying that charge was set out in Department Record 09-00551, for which Peter agreed to pay restitution.

CONCLUSION

¶20 Viewing the facts in the light most favorable to upholding the restitution award, sufficient evidence in the record supports that award. Accordingly, because we cannot conclude the superior court abused its discretion, we affirm the court's order.

/S/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/S/
PHILIP HALL, Judge

/S/
PATRICIA K. NORRIS, Judge