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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHRISTOPHER SHANE GILES, Appellant.	)	2 CA-CR 2011-0108 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101027001

Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; REMANDED WITH DIRECTIONS IN PART

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Christopher Giles was convicted of aggravated assault, a lesser included offense of aggravated assault of a peace officer, theft of means of transportation, and third-degree burglary. The trial court sentenced Giles to concurrent, somewhat aggravated and presumptive prison terms, the longest of which is fifteen years. On appeal, Giles argues the court erred by (1) ordering him to pay restitution for the victim's personal belongings and the damage to her vehicle; (2) finding he had historical prior felony convictions by a preponderance of the evidence rather than by clear and convincing evidence; and, (3) improperly imposing a time payment fee. Giles also asks that we remand to correct an error in the sentencing minute entry order. For the reasons set forth below, we affirm in part, and remand with directions.

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In March 2010, Tucson Police Officer Kasey Ball discovered a vehicle (the Honda) the victim, R., had reported stolen the night before. Although he did not see any signs of forced entry, Ball noted that "the vehicle could be started by just placing a screwdriver into the ignition in place of a key." Parked in an unmarked police car behind the Honda in an apartment parking lot, Ball began working on paperwork related to the vehicle and waited for the tow truck to arrive. Giles then walked toward Ball's truck, disappeared, looked around, and then "walked directly across the parking lot towards the stolen vehicle," which he entered through the driver's door. Ball drove his truck twenty to thirty feet toward the Honda and "[b]umped it" with his unmarked truck in order to get Giles's attention because he "could not afford to let [the Honda] get away."

¶3 Ball was wearing jeans, a T-shirt, and a lanyard with police identification on it, and his truck had "equipment antennas all over it [and r]ed and blue lights[and] a siren." Ball approached the driver's window of the Honda, repeatedly identified himself as a police officer to Giles, and commanded Giles at gunpoint to exit from the vehicle. Giles then "[r]evved the engine, mashed the gas," "lurched forward up over the curb . . . put [the car] into reverse and . . . slammed backwards" into Ball's truck, causing a "[h]uge c[r]ash." Giles then drove straight toward Ball, "narrowly" missing him and causing him to "jump[] backwards." Giles eventually fled on foot leaving the Honda on a nearby basketball court. A resident of the apartment complex where the incident had occurred testified that, although he did not initially hear Ball identify himself as a police officer, he did, in fact, hear him do so before Giles drove the Honda over the curb.

¶4 The state charged Giles with aggravated assault of a peace officer, theft of means of transportation, non-residential burglary, residential burglary, and criminal damage. The state also alleged Giles had committed the offenses while he was on release and that he had two prior convictions.

¶5 Giles argues the trial court erred by ordering him to pay restitution to R. and her insurance company. He argues, as he did below, that he should not have to pay restitution because he was not charged with criminal damage to R.'s vehicle or with theft of any of the items inside that vehicle; he was not responsible for the damages to the Honda, which resulted from Ball's conduct; and, there was no evidence linking him to the original theft of the Honda. Instead, Giles reasons he is linked only to the use of the

vehicle the day after it was stolen, and after R.'s personal belongings had been removed from the vehicle.

¶6 The trial court addressed restitution at the sentencing hearing. Although Giles initially told the court he should be responsible to pay R. for the cost of a rental car because "she was deprived of her vehicle," he later withdrew that statement, and instead asserted R. would not have suffered lost wages and her vehicle would not have been damaged but for the "way [Ball] handled this investigation." The state argued restitution was appropriate "because [Giles] was found guilty of the auto theft and [R.] suffered losses as a result of that." The court ultimately found "restitution is appropriate and reasonable and the losses claimed reasonably flowed from the criminal conduct" of which Giles had been convicted. The court ordered Giles to pay R. $4,841.01, including $3,591.01for personal belongings missing from her vehicle, a $500 insurance deductible, and $750 for lost wages. The court also ordered him to pay $5,056.04 to R.'s insurance company for damages to her vehicle.

¶7 Section 13-603(C), A.R.S., provides "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." The state has the burden of establishing a restitution claim by a preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 118 (App. 2003). The amount of restitution awarded is within the discretion of the trial court, "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). To be

recoverable as restitution, "(1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss." *State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). A trial court may only impose restitution "'on charges for which a defendant has been found guilty, to which he has admitted, or for which he has agreed to pay.'" *State v. Lewis*, 222 Ariz. 321, ¶ 7, 214 P.3d 409, 412 (App. 2009), *quoting State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993).

¶8 We first address Giles's argument regarding damages to the stolen vehicle. Giles does not dispute that the losses were economic, nor does he dispute the amount of the losses. Rather, he maintains "[t]he damage to [R.'s] car was not a direct result of the offenses but the result of fleeing from [Ball] who rear-ended the car and ran up and pointed a gun at . . . Giles [who] was escaping a car[]jacking not a police officer who was attempting to apprehend a stolen car." But "the facts underlying a conviction" not the elements of a crime, "determine whether there are victims of a specific crime." *State v. Gaudagni*, 218 Ariz. 1, ¶ 15, 178 P.3d 473, 478 (App. 2008). Accordingly, although Giles was not convicted of criminal damage to R.'s vehicle, he may still be liable for restitution as long as his criminal conduct, theft of a means of transportation, directly caused the losses. *See id.* ¶ 18.

¶9 "Viewed in the light most favorable to upholding the restitution award," *Lewis*, 222 Ariz. 321, ¶ 15, 214 P.3d at 326, the record contains sufficient evidence to support the award for damages to R.'s vehicle. The presentence report contained the details of R.'s damages. *See State v. Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 660-61

(App. 2007) (court may rely on presentence report in setting restitution). R.'s vehicle sustained damage while Giles was committing theft of means of transportation, the offense of which he was found guilty. The direct connection between that offense and the ensuing damages cannot be disputed, despite Giles's criticism of the way Ball handled the matter or Giles's claim—implicitly rejected by the jury—that he was the victim of a carjacking at the time. *See In re Maricopa Cnty. Juv. Action No. JV-132905*, 186 Ariz. 607, 608-09, 925 P.2d 748, 749-50 (App. 1996) (juvenile who admitted theft of car and agreed to pay restitution, but denied causing damages to vehicle held responsible for restitution to pay for those damages).

¶10 Moreover, the court may order restitution "to any person who suffered an economic loss caused by the defendant's conduct." A.R.S. § 13-804(A). Based on the record before us, R. is such a person. *See State v. Proctor*, 196 Ariz. 557, ¶ 32, 2 P.3d 647, 655-56 (App. 1998) ("§13-804(A) appears to contemplate a wider group of persons to whom a defendant may be ordered to pay restitution than § 13-603(C)"). We thus find the court properly awarded restitution for the damages to R.'s vehicle.

¶11 Asserting he had nothing to do with the initial theft of the Honda, Giles next argues he is not responsible for the loss of R.'s personal property that appears to have been removed from the vehicle before he was found driving it. We "will uphold the restitution award if it bears a reasonable relationship to the victim's loss." *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997).

¶12 Section 13-2305(1), A.R.S., states: "[p]roof of possession of property recently stolen . . . may give rise to an inference that the person in possession of the

property was aware of the risk that it had been stolen or in some way participated in its theft." Giles was convicted of theft of means of transportation under A.R.S. § 13-1814(A)(5), which provides that "[a] person commits theft of means of transportation if, without lawful authority, the person knowingly . . . [c]ontrols another person's means of transportation knowing or having reason to know that the property is stolen." Subsection B of § 13-1814 further provides that "[t]he inferences set forth in § 13-2305 apply to any prosecution under subsection A, paragraph 5 of this section."

¶13 This case is similar to *In re Andrew A.*, 203 Ariz. 585, ¶ 9, 58 P.3d 527, 529 (App. 2002), where we affirmed the restitution order of a juvenile who had admitted responsibility for theft of means of transportation but denied having stolen the vehicle or the victim's personal property from the vehicle. Although Andrew agreed to pay restitution, *see Andrew A.*, 203 Ariz. 585, ¶ 9, 58 P.3d at 529, while Giles did not, our reasoning in that case nonetheless applies here. In *Andrew A.*, we noted that "there need not be direct evidence that [the] juvenile stole the personal property where circumstances support an inference that he did so." *Id.* ¶ 10. Based on the facts in that case, we reasoned the trial court could have found incredible Andrew's denial of having stolen the victim's personal property and having caused physical damage to the vehicle. *See id.* Instead, we relied on § 13-2305, to conclude that "the trial court could have reasonably inferred that [the] juvenile participated in the vehicle's theft because he was found in possession of it." *Andrew A.*, 203 Ariz. 585, ¶ 10, 58 P.3d at 529.

¶14 Viewed in the light most favorable to sustaining the restitution award, *Lewis*, 222 Ariz. 321, ¶ 15, 214 P.3d at 414, the facts here show that the Honda's ignition

had been tampered with; the day after the car was stolen, Giles initially took an evasive route to reach the Honda, and then entered the stolen vehicle and started it, apparently without the use of a key; and, Giles engaged in extensive efforts to escape after Ball identified himself as a police officer. This evidence permitted the trial court to infer, as it appears to have done, that Giles participated in the initial theft of the Honda. Based on the record and the statutory inference permitted under § 13-2305, the court did not abuse its discretion by holding Giles responsible for the loss of R.'s personal property.

¶15 Giles next argues the trial court found he had historical prior felony convictions for sentence enhancement purposes under a preponderance of the evidence standard rather than clear and convincing evidence, and that he thus should be resentenced without using the prior convictions. He also asserts the state did not sufficiently establish the prior convictions. At the prior convictions trial, Giles's attorney argued prior convictions must be proven beyond a reasonable doubt; the state responded, and the court agreed, that the correct standard is preponderance of the evidence, after which Giles's attorney then stated, "I stand corrected."

¶16 Because Giles essentially failed to object below to the standard of proof the court applied, he forfeited the right to obtain appellate relief on this issue absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Asserting that fundamental error occurred, Giles argues we cannot find on appeal that "the trial court would have found sufficient evidence of the prior convictions or the fact that [he] committed the offenses while on parole if it had applied the correct standard." Fundamental error is that which "goes to the foundation of [a defendant's]

case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* ¶ 24. And "[t]o prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. "[P]rior convictions for sentence enhancement purposes must be established by clear and convincing evidence." *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). And in *Henderson*, our supreme court found fundamental error where a trial court used a standard of review below the constitutionally required standard to find facts used to enhance a defendant's sentence. 210 Ariz. 561, ¶ 25, 115 P.3d at 608.

¶17 Here, because the trial court found "[p]reponderance [of the evidence] is the standard," we must conclude that fundamental error occurred. Giles, however, has failed to establish resulting prejudice. "The proper procedure for establishing a prior conviction is for the state to submit a certified copy of the conviction and establish that the defendant is the person to whom the document refers." *Cons*, 208 Ariz. 409, ¶ 16, 94 P.3d at 615. The state introduced, without objection, a "pen pack" from the Arizona Department of Corrections and certified copies of two of Giles's prior convictions. Giles does not appear to dispute that courts have found prison "pen packs" sufficient documentary evidence of an inmate's conviction record. *See State v. Robles*, 213 Ariz. 268, ¶¶ 3, 15-17, 141 P.3d 748, 750, 753 (App. 2006); *see also State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990). Nor does he dispute that such records are

public records and not, therefore, hearsay. *See* Ariz. R. Evid. 803(8)[1] (public records are exceptions to hearsay rule and are admissible); *State v. Gillies*, 142 Ariz. 564, 572, 691 P.2d 655, 663 (1984) (prison documents public records for admissibility purposes). He does argue, however, that the state did not compare his fingerprints with those contained in the "pen pack." Fingerprints, however, are not the only means of identifying the defendant as the person previously convicted of a felony, and courts may consider other kinds of evidence. *See Robles*, 213 Ariz. 268, ¶ 16, 141 P.3d at 753.

¶18 In this case, Giles's probation officer identified him in court, stated Giles was the same individual pictured in the "pen pack" in evidence before the court, and confirmed he was supervising Giles pursuant to two prior felony convictions when the instant offenses occurred. The trial court noted that, although it had "some concerns about some of the testimony of [the probation officer] and its accuracy, [it did not] have concerns about the operative matters which he did testify to." The court added that while "many of the concerns that [defense counsel had] about [the probation officer's] testimony credibility . . . concern matters that are not directly related to the issues presently before the Court." The court then concluded the state had proved Giles "was in fact on parole at the time of the instant offenses, and that he has previously been convicted of two felonies."

¶19 Although Giles asserts on appeal, as he did below, that the probation officer was not a credible witness and that the state failed to prove the prior convictions, he does

[1]We cite the version of the evidentiary rules in effect during Giles's February 2011 trial. None have undergone substantive changes. *See* Ariz. R. Evid. prefatory cmt. to 2012 amendment.

not challenge the authenticity of the exhibits, and therefore, "evidence conclusively proving his prior convictions is . . . in the record." *State v. Morales*, 215 Ariz. 59, ¶ 13, 157 P.3d 479, 482 (2007). Accordingly, any error related either to the standard of proof or the probation officer's credibility was harmless based on the officer's unequivocal acknowledgment that he recognized Giles as a former client combined with the certified documents before the court. *See Robles*, 213 Ariz. 268, ¶¶ 15-17, 141 P.3d at 753. We therefore conclude Giles has not shown that a reasonable judge applying the correct standard of proof "could have reached a different result." *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. We thus find no reversible error. In light of our ruling, we do not address Giles's claim that double jeopardy bars a new trial on the prior convictions.

¶20 Giles next points out a discrepancy between the trial court's oral pronouncement at sentencing and the sentencing minute entry order on count two, theft of means of transportation. At sentencing, the court imposed a "somewhat aggravated" thirteen-year prison term on count two, while the sentencing minute entry order reflects a "slightly aggravated" fifteen-year term for the same count. When an express conflict exists between the oral pronouncement of sentencing and a minute entry, the oral pronouncement generally controls. *See State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999). The state agrees that the conflict exists and should be corrected. In our discretion, we remand and direct the court to correct the sentencing minute entry order on count two, theft of means of transportation, to reflect the somewhat aggravated, thirteen-year sentence the court imposed at sentencing.

¶21 Finally, although Giles argued in his opening brief that the trial court erroneously had imposed a time-payment fee, he conceded in his reply brief that the fee was imposed properly. We thus do not address this issue on appeal.

¶22 For the reasons stated above, we affirm Giles's convictions, remand for correction of his sentence as directed in this decision, and otherwise affirm his sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge