

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

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

ERIK PAUL LIZARRARAS,  
*Appellant.*

No. 2 CA-CR 2015-0015  
Filed February 2, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Pima County  
No. CR20123677001  
The Honorable Casey F. McGinley, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Jonathan Bass, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Nicole Farnum, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

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H O W A R D, Presiding Judge:

¶1 Erik Lizarraras appeals from the trial court's restitution order entered after his convictions for criminal trespass, as a lesser included offense of second-degree burglary; unlawful use of a means of transportation; and theft. Finding no error, we affirm.

¶2 In July 2012, Lizarraras and two other individuals entered the victims' home, stole several items, and significantly damaged the victims' vehicle. At trial, Lizarraras testified that although he and the other two individuals had taken turns driving the victims' car during the incident, he had left the victims' home before the car was damaged by one of the other individuals who had "hit a pothole . . . or something."<sup>1</sup> The jury found Lizarraras guilty as set forth above, but not guilty of criminal damage. The trial court suspended the imposition of sentence and placed Lizarraras on concurrent, three-year terms of probation.

¶3 After a December 2014 joint restitution hearing for Lizarraras and the surviving co-defendant, the trial court ordered the defendants to pay restitution for parking fees and mileage, lost wages, and various items of property, including damage to and depreciation of the vehicle.<sup>2</sup> At the restitution hearing, Lizarraras

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<sup>1</sup>That individual died before Lizarraras's trial.

<sup>2</sup>Lizarraras and the co-defendant were held jointly and severally liable for the restitution imposed, including \$16,669.77 related to the vehicle. Lizarraras does not challenge the accuracy of

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objected to the payment of restitution for the vehicle because he had been acquitted on the criminal damage count, which specifically related to the vehicle.

¶4 Lizarraras argues for the first time on appeal that he should not be required to pay restitution for damage to the vehicle because the damage was caused by another individual after Lizarraras had left the victims' home and was not the result of his conduct, thereby rendering it "'a non-recoverable[,] consequential damage'" under *State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). He also asserts, as he did at the restitution hearing below, that had the jury determined he caused the damage to the vehicle, it would not have acquitted him of the criminal damage charge. We review a court's restitution order for an abuse of discretion, and we view the evidence relating to restitution in the light most favorable to sustaining the trial court's order. *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 411-12 (App. 2009).

¶5 Upon conviction, a defendant is required 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); *see also* Ariz. Const art. II, § 2.1(A)(8). An "[e]conomic loss' [is] any loss incurred by a person as a result of the commission of an offense . . . [and] that would not have been incurred but for the offense." A.R.S. § 13-105(16); *see also* A.R.S. § 13-804(B) (court "shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted").

¶6 The state bears the burden of proving, by a preponderance of the evidence, that 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 loss. *Lewis*, 222 Ariz. 321, ¶ 7, 214 P.3d at 412, *quoting Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d at 1056. "The preponderance of the evidence standard requires that the fact-finder determine whether a fact

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this amount, but instead maintains he should not be held responsible for it.

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sought to be proved is more probable than not.” *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 25, 110 P.3d 1013, 1018 (2005).

¶7 Lizarraras contends he “is not jointly liable for the damage [to the vehicle] because he was no longer a participant in any criminal activity at the victims’ home or with their car when the damage occurred.” He did not raise this argument at the restitution hearing, and therefore review is forfeited for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 9, 115 P.3d 601, 607 (2005). Lizarraras has not argued or established fundamental error. The argument is therefore waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived if not argued); *see also State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶8 As to Lizarraras’s claim that his acquittal on the criminal damage count relieved him of liability for restitution, this court has concluded in the juvenile context that a juvenile can be required to pay restitution for damage arising from an “uncharged offense,” so long as that damage directly resulted from the act for which the juvenile was found delinquent. *In re Maricopa Cnty. Juv. Action No. JV-128676*, 177 Ariz. 352, 354, 868 P.2d 365, 357 (App. 1994). And, in *Lewis*, we explained that we will consider the facts rather than the elements of the crime in determining “whether there are victims of a specific crime.” 222 Ariz. 321, ¶ 9, 214 P.3d at 413, quoting *State v. Guadagni*, 218 Ariz. 1, ¶ 15, 178 P.3d 473, 478 (App. 2008); *see also In re Stephanie B.*, 204 Ariz. 466, ¶¶ 5-6, 17, 65 P.3d 114, 115-16, 118 (App. 2003) (upholding restitution for victim’s medical expenses when juvenile found delinquent for aggravated assault while victim impaired, but not delinquent of aggravated assault causing injury); *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997) (defendant required to pay for damage to wallet, despite only being charged with forgery of checks found in wallet). Here, the jury may have found Lizarraras not guilty on the criminal damage count “as a compromise verdict,” *Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d at 413, rather than a determination that the state failed to prove, beyond a reasonable doubt, that he had damaged the vehicle. *See State v. Parsons*, 171 Ariz. 15, 16, 827 P.2d 476, 477 (App. 1991)

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(whether jury's verdict result of carelessness or compromise immaterial, as "[j]uries may indulge in precisely such motives or vagaries"), quoting *State v. Estrada*, 27 Ariz. App. 38, 40, 550 P.2d 1080, 1082 (1976).

¶9 Moreover, Lizarraras admitted he and the others had driven the vehicle. And, as we determined in *Lewis*, "a defendant may be held responsible for all of the damage or loss caused to a victim where criminal conduct was undertaken in concert with others." *Id.* ¶ 18, quoting *State v. Wells*, 861 P.2d 828, 829 (Kan. Ct. App. 1993); see also A.R.S. § 13-804(F). For all of these reasons, we affirm the trial court's restitution order.