

**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.

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**DEC 29 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellant,	)	2 CA-CR 2009-0043
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JENNIFER SUE JEN,	)	Rule 111, Rules of
	)	the Supreme Court
Appellee.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20082075

Honorable Hector E. Campoy, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Appellant

Law Office of Douglas W. Taylor  
By Douglas W. Taylor

Tucson  
Attorney for Appellee

E C K E R S T R O M, Presiding Judge.

¶1 Appellee Jennifer Jen pled guilty to one count of fraudulent use of a credit card. After the trial court suspended the imposition of sentence and placed Jen on probation for three years, it declined to order her to pay restitution to Zurich North America Insurance Company, the victim’s carrier. The State of Arizona appeals from that decision. For the following reasons, we affirm the court’s order declining to award restitution beyond what Jen independently had paid to the victim.

¶2 While working as the accountant for New Horizons Computer Learning Centers, Jen “forged checks to herself and made unauthorized credit card charges on company cards,” stealing a total of \$26,367. Based on those actions, a Pima County Grand Jury charged Jen with fraudulent scheme and artifice, and two counts each of forgery and fraudulent use of a credit card. She pled guilty to one count of fraudulent use of a credit card and was placed on probation for three years. New Horizons did not request any restitution, maintaining Jen had fully reimbursed it for the amounts she had stolen. However, Zurich asserted it was entitled to \$25,000 for the claim it had paid to New Horizons.

¶3 The trial court set a restitution hearing, which was held over the course of two days. The court found that “both New Horizons and [its owners] are not requesting any further restitution and the victims have been made whole.” The court noted it would rule on Zurich’s restitution claim upon receipt of Zurich’s restitution affidavit.

¶4 Zurich submitted an affidavit claiming it had suffered \$25,000 in economic loss by paying a claim to New Horizons. Although our record is not entirely clear, Zurich appears to have paid the claim to cover some of the other \$36,267.81 in losses New Horizons alleged

it had suffered as a result of the embezzlement. New Horizons contended those losses included the cost of a replacement computer, accounting software set-up, accountant assistance, issuing new checks, and a new stamp. The losses also included the owners' lost time, loss of sales, the operation's and new bookkeeper's time, bank fees, unpaid bills, tax penalties, and liens.

¶5 In its order denying restitution to Zurich, the trial court found virtually all of the additional \$36,267.81 was for noncompensable "consequential losses." Jen presented evidence she had actually stolen \$26,367 and had repaid New Horizons approximately \$35,875, or \$9,508 more than the amount she had stolen. The trial court found New Horizons, within its own exhibit, "acknowledge[d] receipt of \$43,706.48 from [Jen and amounts credited by its bank]." The court also found New Horizons had "received some additional monies from [its] insurance carrier, Zurich North America Insurance Company." Although the court concluded some of the claimed losses—those "related to time incurred as a result of the investigation or prosecution of this case"—could properly be characterized as economic losses, it found Jen had already paid an amount sufficient to cover those additional losses.

¶6 The state argues the trial court erred when it denied restitution to Zurich, contending the losses it claimed "were reasonably foreseeable and a direct result of [Jen]'s criminal conduct." We review a trial court's order denying restitution for an abuse of discretion. *See State v. Lewis*, 222 Ariz. 321, ¶ 5 & n.2, 214 P.3d 409, 411-12 & 412 n.2 (App. 2009).

¶7 Under article II, § 2.1(A)(8) of the Arizona Constitution, a crime victim has a right “[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” Section 13-603(C), A.R.S., likewise requires a person convicted of an offense “to make restitution to . . . the victim of the crime . . . in the full amount of the economic loss.” Section 13-105(16), A.R.S., defines economic loss as “any loss incurred by a person as a result of the commission of an offense.” Economic loss, however, does not include “consequential damages.” *Id.*

¶8 Our supreme court has held that a victim is entitled to restitution only for those economic losses that “flow directly from the defendant’s criminal conduct, without the intervention of additional causative factors.” *State v. Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d 1131, 1133 (2002); *see also State v. Guilliams*, 208 Ariz. 48, ¶ 18, 90 P.3d 785, 790-91 (App. 2004) (restitution claimant must show loss would not have occurred but for criminal act and also that causal link between conduct and loss neither factually nor temporally too attenuated); *State v. Lindsley*, 191 Ariz. 195, 198, 953 P.2d 1248, 1251 (App. 1997) (but-for causation not sufficient for restitution; loss must also “flow directly from . . . crime committed”); *State v. Morris*, 173 Ariz. 14, 17, 839 P.2d 434, 437 (App. 1992) (consequential damages “so remote as not to be actionable”), *quoting 25 C.J.S. Damages* § 2, at 617 (1966).

¶9 Here, the trial court did not abuse its discretion in finding most of New Horizons’ other losses were too attenuated from Jen’s criminal act to be compensable in restitution. It is the burden of the party asserting the claim to show the victim is entitled to

restitution. *See Lewis*, 222 Ariz. 321, ¶¶ 7, 11, 214 P.3d at 412, 413. Although New Horizons might not have installed a new accounting system and computer security, for example, but for Jen’s conduct, the state did not show a necessity for those items flowing directly from Jen’s act. *Cf. Williams*, 208 Ariz. 48, ¶¶ 22-23, 90 P.3d at 791-92 (analyzing restitution claim arising from prisoner’s escape, and noting difference “between extraordinary costs directly resulting from an escape and attenuated costs incurred in investigating an escape that has been successful”); *State v. Sexton*, 176 Ariz. 171, 173, 859 P.2d 794, 796 (App. 1993) (vacating, as consequential loss, portion of restitution order for losses that might occur under new homeowner’s insurance policy after old policy with greater coverage cancelled because of defendant’s actions); *State v. Pearce*, 156 Ariz. 287, 289, 751 P.2d 603, 605 (App. 1988) (“resulting breach of the lease and lost profits” from equipment theft considered consequential damages). And, the state failed to demonstrate that some of the losses claimed—namely, penalties and interest for failing to pay taxes and other bills—were caused by Jen’s criminal actions, rather than by her noncriminal failure to fulfill all the duties of her employment. *See Lindsley*, 191 Ariz. at 198, 953 P.2d at 1251 (criminal conduct must, at threshold, be “but for” cause of loss for loss to be recoverable).

¶10 The state relies heavily on *Morris*, in which this court approved the holding of a New Mexico case that ordered a defendant who had embezzled funds to pay the cost of an audit as restitution. 173 Ariz. at 18, 839 P.2d at 438. The New Mexico court in that case had found the cost of the audit was a “direct consequence of defendant’s criminal acts.” *Id.*, quoting *State v. Whitaker*, 797 P.2d 275, 284 (N.M. Ct. App. 1990). Similarly, here, the trial

court found the costs associated with investigating and prosecuting the case against Jen were economic losses within the meaning of § 13-105(16) and found Jen had already reimbursed New Horizons for that loss. But, on the record before us, the trial court reasonably could have concluded that the other costs flowed consequentially from the result of Jen's conduct—that she was no longer the accountant for New Horizons—rather than directly from the embezzlement itself.

¶11 We therefore find no abuse of discretion in the trial court's refusal to award restitution to Zurich, and we affirm its order.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR, Judge

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GARYE L. VÁSQUEZ, Judge