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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/02/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0396  
) 1 CA-CR 11-0497  
Appellee, ) (Consolidated)  
)  
v. ) DEPARTMENT B  
)  
IRA JOE ANDERSON, )  
) **MEMORANDUM DECISION**  
Appellant. ) (Not for Publication -  
) Rule 111, Rules of the  
) Arizona Supreme Court)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005422-001

The Honorable Karen L. O'Connor, Judge

**AFFIRMED AS MODIFIED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
And Adriana M. Zick, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Terry J. Adams, Deputy Public Defender  
Attorneys for Appellant

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**K E S S L E R**, Judge

¶1 Ira Joe Anderson ("Anderson") filed this appeal in  
accordance with *Anders v. California*, 386 U.S. 738 (1967), and

*State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following his convictions of conspiracy to commit first degree murder, a class 1 felony, and conspiracy to commit kidnapping, a class 2 felony.

¶2 Finding no arguable issues to raise, Appellant's counsel requested that this Court search the record for fundamental error. Appellant was given the opportunity to, but did not submit a *pro per* supplemental brief. For the reasons that follow, we affirm Appellant's conviction but modify his sentence to reflect an increase to his presentence incarceration credit and modify the restitution order to reflect a decrease to the award.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶3 Anderson was charged with seven counts of sexual conduct with a minor, one count of conspiracy to commit kidnapping, and one count of conspiracy to commit first degree murder. These charges arose out of allegations made by Anderson's stepdaughter ("K.S.") to police in September 2009. K.S. alleged that Anderson had been sexually abusing her since she was approximately twelve years old. After K.S. had reported the abuse to police, Anderson made a series of phone calls throughout a five-day period to a friend who later became a confidential informant. During these phone calls, Anderson conspired to kidnap and kill K.S., her sister ("C.S."), and her mother ("Mother"). These phone calls were recorded by police,

and in October 2009, Anderson was arrested.

¶4 At trial, K.S. testified that Anderson's first sexual contact with her occurred during a stretching routine when she was twelve years old. K.S. testified that from age thirteen to age seventeen, Anderson had sexual intercourse with her at least three to four times per week. When K.S. was approximately sixteen years old, she began traveling with Anderson to perform at fairs and other events outside of Arizona. When K.S. was approximately seventeen, she moved with Anderson to Las Vegas, Nevada to take a job at an online radio station in hopes of advancing her music career. While in Las Vegas, K.S. shared a one bedroom apartment with Anderson. K.S. testified that Anderson continued to have sexual intercourse with her frequently while they lived together in Las Vegas, but because she was becoming more independent, she was able to refuse him on some occasions.

¶5 K.S. testified that at some point after moving to Las Vegas, Anderson became angry when K.S. refused his advances, and an argument ensued. K.S. testified that she attempted to leave the apartment through the front door, but Anderson blocked the door and pushed her down. She testified that she took her cell phone, went out the patio door, and escaped to the roof of the building where she called her mother and told her about the sexual abuse that had been occurring for the previous four

years. The next day, Mother arrived in Las Vegas, and she and K.S. reported the sexual abuse to a Las Vegas police officer. The Las Vegas police contacted Scottsdale police, and on approximately September 8, 2009, Scottsdale police took over the investigation.

¶6 Soon after K.S. and Mother had reported the abuse to police, Anderson contacted a friend ("Fully") to ask him for help in kidnapping and killing K.S. and her family. Fully contacted K.S. and Mother to warn them, and they arranged to record the next phone call between Fully and Anderson. On September 30, 2009, Fully called Anderson while K.S. was also on the line recording the conversation. During that conversation, Anderson again asked Fully to kill K.S. and her family. Mother contacted the police to give them the recording of that phone call, and police asked Fully to assist in the investigation as a confidential informant.

¶7 As part of the investigation, Fully agreed to record a series of phone calls to Anderson, which were transcribed and entered into evidence at trial. During the first recorded phone call on September 30, 2009, Anderson told Fully to "take [K.S.] out in the desert and . . . bury her . . . so they never find her." Anderson initially agreed to pay Fully \$1,000 to kill K.S. During a phone call on October 1, 2009, Anderson changed his plan from murder to kidnapping, and offered to pay Fully

\$2,000. On October 2, 2009, Anderson changed his plan again and asked Fully to kill K.S. and her family. Despite the changes in the plan, Fully testified that there was always discussion of murder. After the last phone call, Fully believed based on their conversations that "the possibility of murdering [K.S.] was still on the table." Fully confirmed during his testimony that at no time did Anderson suggest going to the police or involving anyone else to stop his plan.

¶8 Anderson was found guilty of the conspiracy charges, but the jury could not come to agreement as to the remaining seven sexual conduct charges and the court declared a mistrial as to those counts. Anderson was sentenced to life imprisonment with the possibility of parole after 25 years for conspiracy to commit first degree murder and a five year sentence for conspiracy to commit kidnapping to be served consecutively. After a restitution hearing, Anderson was also ordered to pay restitution to the victim's family in the amount of \$2,105.98.

#### **STANDARD OF REVIEW**

¶9 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have

received a fair trial.” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20.

## **DISCUSSION**

¶10 After careful review of the record, we find no grounds for reversal of Anderson’s convictions. The record reflects Anderson had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Appellant was present and represented at all critical stages of trial, was given the opportunity to speak at sentencing, and the sentences imposed were within the range for Appellant’s offenses.

### **I. SUFFICIENCY OF THE EVIDENCE**

¶11 In reviewing the sufficiency of evidence at trial, “[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant.” *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117,

1118-19 (1976)).

**A. Conspiracy to Commit First Degree Murder**

¶12 There is sufficient evidence in the record to support the jury's conviction of Anderson for the crime of conspiracy to commit first degree murder. A person commits conspiracy if:

[W]ith the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and . . . an overt act shall not be required if the object of the conspiracy was to commit any felony upon the person of another . . . .

Ariz. Rev. Stat. ("A.R.S.") § 13-1003(A) (2010).<sup>1</sup> The State need not prove the conspirators actually committed the offense; one may be convicted as a conspirator on proof that he intended the act and agreed to promote or facilitate the act. *Evanchyk v. Stewart*, 202 Ariz. 476, 480, ¶ 15, 47 P.3d 1114, 1118 (2002). It is a defense to conspiracy that the defendant voluntarily renounced his criminal intent by making "a reasonable effort to prevent the conduct or result which is the object of the" conspiracy. A.R.S. § 13-1005(A) (2010). An effort to prevent the conduct or result is not considered reasonable unless it is "substantial." A.R.S. § 13-1005(D).

¶13 A person commits first degree murder if "[i]ntending or knowing that the person's conduct will cause death, the

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<sup>1</sup> We cite the current versions of the applicable statutes when no revisions material to this decision have since occurred.

person causes the death of another person . . . with premeditation . . . .” A.R.S. § 13-1105(A)(1) (2010). Any agreement with another to kill a third person constitutes the premeditation element of first degree murder. *Evanchyk*, 202 Ariz. at 479, ¶ 10, 47 P.3d at 1117.

**¶14** The recorded phone calls between Anderson and Fully reveal Anderson’s intention to have K.S. killed. During the first call, Anderson stated, “You need to take her out in the desert and do it out there and bury her . . . so they never find her. Then they can’t call it a murder if they never find ‘em.” During that same call, he offered to pay \$1,000 to each of the men Fully offered to hire to help him kill K.S. On October 2, 2009, Anderson confirmed that the plan was to murder K.S. and her family and bury their bodies. Fully’s testimony confirmed Anderson’s plan was to kill K.S.

**¶15** As discussed above, there is some evidence in the record that Anderson renounced his plan to kill K.S. and intended only to kidnap her and her family. However, it is clear from the transcript of the October 2, 2009 phone call at 12:00 p.m. that Anderson had changed his plan back to murder: “[I]f it was my way, I would kill all three of them and bury them. So they’ll never be found. . . . But . . . I don’t want them to say I’m changing plans again.” He then confirms with Fully that the plan has changed to murder: “[T]hey got to bury



they ass though, so they'll never be found. . . . [B]ut they don't find them, they can't question nobody. . . . Like we said the first time, . . . at a desert, like way deep." During a later phone call that same day, Anderson confirmed, "[W]e ain't changing no plans. It stands just like we said." At no point during the last four phone calls that followed did Anderson change the plan back to kidnapping only. Thus, there is sufficient evidence for a jury to find that Anderson had conspired to commit first degree murder.

#### **B. Conspiracy to Commit Kidnapping**

¶16 There is evidence in the record to support the jury's conviction of Anderson for the crime of conspiracy to commit kidnapping. "A person commits kidnapping by knowingly restraining another person with the intent to: 1) Hold the victim for ransom, as a shield or hostage; or . . . 3) Inflict death, physical injury or a sexual offense on the victim . . . ." A.R.S. § 13-1304(A) (2010). Both Fully's testimony and the transcript of the recorded calls establish Anderson planned to kidnap K.S. and C.S. with the intent to obtain money from Mother and with the intent to murder. The transcripts reveal that initially, Anderson intended to kidnap K.S. and C.S. for the purpose of extorting Mother for money, and ultimately that he intended to kidnap K.S., C.S. and Mother for the purpose of killing them. Thus, there is sufficient evidence in the record

to support Anderson's conviction of conspiracy to commit kidnapping.

## **II. PRESENTENCE INCARCERATION CREDIT**

¶17 Presentence incarceration credit is given for time spent in custody beginning on the day of booking, *State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993), and ending on the day before sentencing, *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). Anderson received 597 days of presentence incarceration credit. Anderson was in custody from his arrest on October 4, 2009 until his sentencing on May 25, 2011. The record indicates Anderson was in custody 598 days, excluding the date he was sentenced. While Anderson's total time incarcerated prior to sentencing was 598 days, he only received a credit of 597 days. We, therefore, modify the sentence to reflect this correction.

## **III. RESTITUTION ORDER**

¶18 A restitution hearing was held in June 2011, and Mother requested Anderson pay \$4,665.67 for the losses she, K.S., and C.S. suffered. Mother specifically requested \$2,005.64 for K.S.'s losses, which included the following expenses: 1) physicians' exams, 2) psychological counseling, and 3) cost of traveling to and from counseling sessions and doctors' appointments. Mother requested additional amounts related to losses she and C.S. suffered including the cost of

\$100.34 to change the locks to her home. The court ordered Anderson pay restitution in the amount of \$2,105.98, which included the \$2,005.64 requested for all of K.S.'s losses and \$100.34 requested for the cost of changing the locks.

¶19 A trial court "may impose restitution only 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, 324, ¶ 7, 214 P.3d 409, 412 (App. 2009) (quoting *State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993)). "A loss is recoverable as restitution if it meets three requirements: (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, 298, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). Because Anderson was not found guilty of the sexual abuse crimes, did not admit to committing sexual abuse, and did not agree to pay the restitution, he is only responsible for the economic loss K.S. suffered as a direct result of the conspiracy crimes.

¶20 During the restitution hearing, Mother testified that the counseling K.S. received was intended to treat both the trauma caused by the sexual abuse and the trauma caused by the conspiracy against her. However, two of the sessions and the related travel expenses for which Mother was reimbursed occurred

on September 22, 2009 and September 29, 2009, before the first recorded conversation documenting the conspiracy. There is no evidence in the record that K.S. knew of the conspiracy against her when she received counseling on those two days. Furthermore, Mother was reimbursed for two doctors appointments and related travel expenses that, based on Mother's testimony, related only to the sexual abuse charges. The parties were ordered to file briefs pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988) to address the issue of whether Mother is entitled to reimbursement for those costs.

¶21 The State argues that Mother is entitled to restitution related to the sexual abuse charges because, using a preponderance of the evidence standard, sufficient evidence established Anderson committed sexual abuse and was, therefore, responsible for the losses caused by those acts. The State incorrectly cites *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997) to argue that a court may impose restitution related to an offense on which the jury was hung. In *Lindsley*, although the defendant was not charged with theft of the wallet, the court imposed restitution for the damage to the wallet because the defendant admitted under oath to stealing it. *Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250. Arizona law is clear that a defendant can be ordered to pay restitution for crimes to which he admits. *Garcia*, 176 Ariz. at 236, 860 P.2d

at 503. Contrary to the State's argument, in *Lindsley*, the court did not hold a defendant can be ordered to pay restitution for a crime to which he did not admit and of which he was not convicted after adjudication. In fact, the court specifically found the defendant not responsible for restitution related to missing jewelry because the defendant "neither admitted theft of the jewelry nor was convicted of that offense, and did not agree to pay restitution for this loss." *Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250.

¶22 The State also cites *In re Stephanie B.*, 204 Ariz. 466, 470, ¶15, 65 P.3d 114, 118 (App. 2003) to argue the burden of proof applicable to a restitution claim is proof by a preponderance of the evidence, and using that standard, evidence established Anderson committed the sexual abuse. In *Stephanie B.*, the court used the preponderance of the evidence standard to find that the criminal conduct for which the defendant was already convicted directly caused the victim's losses. *Id.* at ¶ 16. The court did not use a preponderance of the evidence standard to find that the defendant committed acts for which she was not convicted. The court held that to be held responsible for restitution, a defendant must be found guilty of some criminal conduct which causes the victim economic loss:

[D]ue to the differing burdens of proof, a restitution award is not barred because the juvenile has been found not delinquent on a charged offense *so long as*

the juvenile is found delinquent of another criminal offense that properly supports the award. Stephanie's acquittal on the [first assault] charge was accordingly not a bar in light of the [second assault charge] adjudication.

*Id.* at ¶ 17; see also *Lewis*, 222 Ariz. at 325, ¶ 11, 214 P.3d at 413 (“[T]he government must prove that a particular loss would not have occurred but for the *conduct underlying the offense of conviction*, and that the causal nexus between the conduct and the loss is not too attenuated . . . .” (citation and internal punctuation omitted) (emphasis added)).

¶23 In the case before us, Anderson was not found guilty of any criminal conduct that caused K.S. to seek medical examinations, which Mother testified were only related to the alleged sexual abuse. Furthermore, Anderson was not found guilty of any criminal conduct that would have caused K.S. to seek counseling prior to her learning about the conspiracy against her. There is no evidence K.S. knew about the conspiracy prior to the September 22, 2009 and the September 29, 2009 counseling sessions, and as such, the State has not met its burden to show those sessions were directly related to the criminal conduct for which Anderson was convicted.

¶24 Finally, the State argues that the conspiracy conviction alone supports the restitution order because the sexual abuse was the underlying criminal conduct of the conspiracy crime. The State cites its own theory that Anderson

conspired to kill K.S. to ensure she would not reveal the sexual abuse. However, Anderson testified that his goal was not to silence K.S., but to force her to confess that she lied about the sexual abuse. Given the jury's failure to convict Anderson on the sexual assault charges, it cannot be inferred that the jury believed the sexual abuse was the motive for the conspiracy. Thus, losses caused by the alleged sexual abuse cannot support a restitution claim.

¶25 Requiring a defendant to make payments not authorized by law constitutes an illegal sentence. See *State v. Lewandowski*, 220 Ariz. 531, 535, ¶ 11, 207 P.3d 784, 788 (App. 2009). An illegal sentence constitutes fundamental error. *State v. Zinsmeyer*, 222 Ariz. 612, 623, ¶ 26, 218 P.3d 1069, 1080 (App. 2009). Accordingly, we affirm in part and vacate in part the restitution order consistent with this decision.

#### **CONCLUSION**

¶26 For the foregoing reasons, we affirm Anderson's conviction but modify his sentence to grant him 598 days of presentence incarceration credit. We affirm Anderson's restitution order in the amount of \$1,606.95 for expenses related to K.S.'s counseling treatment beginning November 3, 2009 and for the expense of replacing the locks. We vacate the order of restitution in the amount of \$499.03 for expenses related to K.S.'s physician's exams on September 15, 2009 and

October 22, 2009 and K.S.'s counseling sessions on September 22, 2009 and September 29, 2009.<sup>2</sup> Upon the filing of this decision, defense counsel shall inform Anderson of the status of his appeal and his future appellate options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Upon the Court's own motion, Appellant shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/S/  
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DONN KESSLER, Judge

CONCURRING:

/S/  
\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

/S/  
\_\_\_\_\_  
LAWRENCE F. WINTHROP, Judge

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<sup>2</sup> This amount includes the following expenses: \$85.36 for the September 15, 2009 physician's exam, \$125.38 for the October 22, 2009 physician's exam, \$6.35 for travel costs to and from those doctor's appointments, \$150.00 for the September 22, 2009 counseling session, \$115.00 for the September 29, 2009 counseling session, and \$16.94 for travel costs to and from those two counseling sessions.