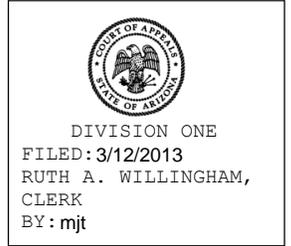


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0105
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
ALAN PHILLIP DZIWULSKI,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-170388-002

The Honorable Randall H. Warner, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Legal Advocate Phoenix
By Colin F. Stearns, Deputy Legal Advocate
Attorneys for Appellant

J O H N S E N, Judge

¶1 Alan Phillip Dziwulski appeals his conviction of one
count of theft of means of transportation and the resulting

sentence. The sole issue on appeal is whether the superior court committed fundamental error in ordering Dziwulski to pay \$5,969.88 in restitution. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶12 On May 29, 2009, Dziwulski rented a 2009 model car from a car dealership.¹ In the rental agreement, Dziwulski agreed to return the car the next day and pay a per diem rate of \$37.08, including taxes. After Dziwulski failed to return the car, the dealership reported it stolen. When police recovered the car on November 5, 2009, it was drivable but had been damaged.

¶13 The State charged Dziwulski with one count of theft of means of transportation, a Class 3 felony, committed on or between May 30 and October 4, 2009. The jury found him guilty as charged. The court found Dziwulski had two historical prior convictions and sentenced him to a mitigated prison term of 10 years. After a hearing, it also ordered Dziwulski to pay \$5,969.88 in restitution based on "the reasonable rental value of the vehicle during the time" he had the car.²

¹ We view the evidence in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Dziwulski. See *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

² The court calculated the amount by multiplying the vehicle's daily rental rate of \$37.08, as provided in the rental agreement, by 161, the number of days from May 29 to and

¶14 Dziwulski timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013), 13-4031 (West 2013) and -4033(A)(3) (West 2013).³

DISCUSSION

¶15 Dziwulski argues the court effectively awarded the dealership "lost profits," which he contends are consequential and not a direct result of his criminal conduct.

¶16 As Dziwulski correctly concedes, we review for fundamental error because he did not challenge the restitution order in superior court. See *State v. Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996). To obtain relief, Dziwulski therefore must show that error occurred, the error was fundamental and he was prejudiced thereby. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶17 In Arizona, restitution is mandatory, and its purpose is to make the victim whole. Ariz. Const. art. 2, § 2.1(A)(8); *State v. Zaputil*, 220 Ariz. 425, 428, ¶¶ 10-11, 207 P.3d 678, 681 (App. 2008). "If a person is convicted of an offense, the

including November 5, 2009. When recovered by the police, the car's back window was missing and the hood, a front fender and a side mirror were damaged. The superior court received no evidence of the cost to repair the car, and repair costs were not discussed at the hearing.

³ Absent material revisions after the date of an alleged offense, we cite a statute's current version.

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” A.R.S. § 13-603(C) (West 2013). “‘Economic loss’ means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense.” A.R.S. § 13-105(16) (West 2013). “Economic loss does not include . . . consequential damages.” *Id.* The amount of restitution to award is within the discretion of the superior 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).

¶18 Dziwulski cites *State v. Pearce*, 156 Ariz. 287, 751 P.3d 603 (App. 1988), in which the defendant pled guilty to stealing construction equipment he had leased from the victim. *Id.* at 287, 751 P.3d at 603. By the time the victim recovered the equipment, the defendant had damaged it. The victim claimed as restitution the amount owed under the equipment lease for the entire lease period less the proceeds from selling the two recovered items. *Id.* at 288-89, 751 P.3d at 604-05. We held the superior court erred by ordering restitution in the amount the victim would have received if the defendant had fully

performed on the lease agreement because the award amounted to "lost profits [that] are consequential damages resulting from [defendant's] conversion." *Id.* at 289, 751 P.3d at 605. We remanded "for a determination of the economic loss actually suffered by [the victim] as a result of the theft" excluding the "contract damages" originally awarded by the superior court. *Id.* at 290, 751 P.3d at 606.⁴

¶19 Here, despite Dziwulski's argument to the contrary, the \$5,969.88 ordered in restitution was not "lost profits" in the sense that it represented the proceeds of a contract breached by Dziwulski. Rather, the restitution ordered by the court properly reflected the value of the dealership's loss of the use of the car during the relevant time. Thus, the restitution award is not based on lost profits as a result of Dziwulski's contract breach (which *Pearce* found impermissible) but, rather, on the victim's loss of use of the car to be rented to others. Accordingly, *Pearce's* rationale for not including "lost profits" in a restitution order does not apply in this case. The restitution order was reasonably related to the economic loss Dziwulski's criminal conduct directly caused the

⁴ It is not clear from the opinion whether the victim recovered the equipment before or after the lease term expired. Nor does the opinion specify whether the total amount of restitution ordered by the court included, in addition to the victim's expectation contract damages, the amount of damages the victim suffered as a result of the diminished sales price that resulted from the defendant's damage to the equipment.

dealership. Accordingly, we discern no error, let alone fundamental error.

¶10 Dziwulski also argues the amount of restitution is excessive because the per diem rate of \$37.08 the court used to calculate the award included taxes and the indictment did not allege he retained the car for 161 days.

¶11 The court did not err by including tax in the per diem rental rate. Dziwulski's argument presumes that the dealership's receipt of restitution payments will not result in a tax liability to it, but nothing in the record supports this presumption, and we therefore cannot rely upon it to find error. See *State v. Diaz*, 223 Ariz. 358, 361, ¶ 13, 224 P.3d 174, 177 (2010) ("We will not reverse a conviction based on speculation or unsupported inference.").

¶12 Dziwulski also provides no authority, nor are we aware of any, supporting the proposition that restitution must be limited to the loss a victim experienced during the date the indictment alleged the crime was committed. Arizona law is not so restrictive; the court must order restitution that reflects the total economic loss a victim suffers as a result of a defendant's criminal conduct. A.R.S. § 13-603(C); see, e.g., *State v. Morris*, 173 Ariz. 14, 18-19, 839 P.2d 434, 438-39 (App. 1992) (defendant's criminal damage to victim's vehicle directly led to costs incurred by victim for rental cars, taxi fares and

related phone calls such that those costs were properly included in restitution order). Here, the court did not abuse its discretion by calculating the economic loss to the dealership over the time it was deprived of the car as a result of Dziwulski's conduct.

CONCLUSION

¶13 We affirm Dziwulski's conviction and sentence and the court's restitution order.

_____/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge