IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/30/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 09-0925
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
KENNETH NEIL ACEVES, JR.,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-164551-001 SE

The Honorable Connie Contes, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Kenneth Neil Aceves, Jr., appeals his convictions for theft and two counts of third degree burglary. Appellant raises

four issues. Appellant argues the trial court erred when it failed to withdraw exhibits related to two counts that were dismissed at the close of the State's case; there was insufficient evidence to support his conviction for third degree burglary as charged in count 4; he was denied his right to confrontation; and the trial court erred when it awarded restitution in excess of $25,000 for the theft offense. For the reasons that follow, we affirm Appellant's convictions and the award of restitution.

I. Factual and Procedural History

¶2 "We 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) (citation omitted). Further, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not, however, weigh the evidence; that is the function of the jury. *See id*.

¶3 Police suspected Appellant committed a number of vehicle burglaries in the area where Appellant lived. During their investigation, police placed a global positioning system (GPS) tracking device on Appellant's vehicle and tracked it over the course of several days. The tracking device recorded and transmitted information every four seconds regarding the date

and time the vehicle was driven, the vehicle's route, when and where the vehicle stopped and the duration of each stop. The information was then plotted on maps. Based on this information, police determined Appellant's vehicle was at the site of each charged offense when each offense was believed to have been committed. Police eventually arrested Appellant and searched his vehicle and residence. Those searches revealed burglary tools and numerous items of stolen property, including driver's licenses and various other identification cards for a number of different people. The stolen property also included a drag racer taken from a nearby business.

¶4 A jury found Appellant guilty of theft and two counts of third degree burglary. Except as noted below, Appellant does not contest the sufficiency of the evidence to support his convictions. Appellant was sentenced to presumptive, concurrent terms of 6.5 years' imprisonment for theft and 4.5 years' imprisonment for each count of burglary. Appellant was also ordered to pay over $30,000 in restitution and fines. Appellant now appeals. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A) (2003), 13-4031 (2010) and -4033 (2010).

II. The Failure to Withdraw Exhibits for Dismissed Counts

¶5 As the first issue on appeal, Appellant argues the trial court erred when it failed to withdraw exhibits admitted to prove two counts that were ultimately dismissed on the State's motion. Appellant argues that once those counts were dismissed, the exhibits became nothing more than inadmissible character evidence. Appellant goes so far as to argue that because the counts were dismissed, the exhibits should never have been admitted at all. Appellant concedes that because he failed to object to the admission of this evidence and failed to request that the exhibits be withdrawn once the counts were dismissed, we review only for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (the failure to raise an issue at trial waives all but fundamental error).

A. Background

¶6 Appellant was originally charged with six counts - theft, theft of means of transportation, and four counts of third degree burglary. The State pursued convictions on all six counts during its case in chief. Count 3 charged Appellant with third degree burglary and identified "A.E." as the victim.[1] In support of count 3, the State introduced A.E.'s social security

[1] We use initials to protect the identity of the victims.

card and two of her driver's licenses, all of which police found in Appellant's vehicle. The State also introduced a map which displayed the GPS tracking information for Appellant's vehicle at A.E.'s residence and in her neighborhood, as well as a color satellite photograph which depicted the same area as the GPS map. These items were admitted without objection.

¶7 Count 6 charged Appellant with third degree burglary and identified "J.L." and "C.L." as the victims. In support of count 6, the State introduced C.L.'s health insurance card and J.L.'s driver's license, voter identification card, hunting license and Costco card, all of which police found in Appellant's vehicle. The State also introduced the GPS tracking map and overhead satellite image which depicted J.L. and C.L.'s residence and the surrounding area. These items were also admitted without objection.

¶8 As the trial progressed, the State informed the court it was having difficulty obtaining the presence of A.E., J.L., and C.L. for trial. At the close of the State's case the next day, the State moved to dismiss counts 3 and 6 because it could not obtain the presence of these victims.[2] The trial court granted the motion to dismiss. Appellant did not request that

[2] The court also granted the State's motion to dismiss count 1 "for consolidation purposes" because both count 1 (theft) and count 2 (theft of means of transportation) addressed the theft of the drag racer.

the exhibits for counts 3 and 6 be withdrawn from the jury's consideration.

B. Discussion

¶9 "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his 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." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even once fundamental error has been established, a defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26.

¶10 We find no fundamental error. First, there is no question the evidence was relevant and admissible to prove Appellant committed counts 3 and 6, both of which were pending until the State moved to dismiss them at the close of its case. Until those two counts were dismissed, there would have been no legitimate reason to exclude the evidence.

¶11 Further, we find no fundamental error in the failure to withdraw exhibits that would have been admissible even in the absence of counts 3 and 6. Appellant's vehicle contained driver’s licenses, identification cards, and other property which belonged to people other than the victims identified in the six charged offenses. When the State explained it would not seek to admit any of that evidence unless it became necessary to

do so on rebuttal, the court noted it believed the evidence could be admissible pursuant to Arizona Rule of Evidence 404(b) "for other purposes," but ruled no further because the State had agreed not to admit the evidence at that time. The trial court was correct. Our supreme court has held that when a defendant charged with burglary is found in possession of property taken in a separate uncharged burglary committed near the charged offense, evidence from the uncharged burglary can be admissible pursuant to Rule 404(b) to prove intent, motive and/or identity. *State v. Fierro*, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990). Therefore, evidence that Appellant possessed property taken in the A.E., J.L., and C.L. burglaries was admissible to prove intent, motive and/or identity in the remaining counts, regardless of whether the counts involving A.E., J.L., and C.L. were ultimately dismissed. Because the evidence was admissible for other purposes, the circumstance that the court did not withdraw those exhibits sua sponte once counts 3 and 6 were dismissed did not constitute fundamental error. Further, the exhibits were properly received into evidence at the time they were admitted during the State's case in chief. Finally, as noted above, the exhibits would have been admissible under Rule 404(b). Therefore, we perceive no error, let alone fundamental error.

III. Sufficiency of the Evidence to Support Count 4

¶12 Appellant argues there was insufficient evidence to support his conviction for third degree burglary as charged in count 4 because the victim identified in the indictment, "K.G.," did not testify.[3] Appellant does not contest the sufficiency of the evidence to support any of the statutory elements of the offense.

¶13 "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) (citation omitted). "To set aside a jury verdict for insufficient evidence, it must clearly appear that under no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶14 While K.G. did not testify, a person identified by the State as K.G.'s brother, “S.G.” did testify. S.G. testified items were taken from the "family car" on the date of the incident and at the location identified in count 4 when someone slashed open the convertible top. The items taken included S.G.'s wallet, social security card, two driver's licenses,

[3] Count 4 of the indictment alleged in relevant part that Appellant "entered or remained unlawfully in or on a non-residential structure of [K.G.]" located at a specific address.

money and a credit card. S.G. further testified that no one had permission to slash the top, enter the car, or remove the items. Finally, S.G. testified his brother, whom he did not name, reported the incident to police. In closing argument, Appellant's counsel referred to the burglarized vehicle as "[K. and S.G.'s] car[.]"

¶15 The evidence introduced at trial was sufficient to support the conviction for count 4, even if K.G. did not testify at trial. Appellant argues a victim must testify "as a condition precedent to prove a charge against a defendant[,]" but cites no authority for this proposition and we are aware of none. All that was required for a conviction for third degree burglary as charged in count 4 was that the jury found beyond a reasonable doubt that Appellant entered or remained unlawfully in or on a nonresidential structure with the intent to commit any theft or any felony therein. *See* A.R.S. § 13-1506(A)(1) (2008). The identity of the victim is not an element of the offense. Regardless of who was named in the indictment as the victim for count 4, the evidence was more than sufficient to permit the jury to find that Appellant unlawfully entered the vehicle identified in count 4 at the location identified in count 4 with the intent to commit a theft or felony therein. Nothing more was required.

¶16 Further, an indictment is automatically amended to conform to the evidence introduced at trial so long as there is no change in the nature of the underlying offense or actual prejudice to the defendant. Ariz. R. Crim. P. 13.5(b); *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996). Even though there was no discussion of amendment below, amendment here would not have changed the nature of the underlying offense or prejudiced Appellant in any way. Therefore, even if the identity of K.G. as the victim of count 4 was an element of the offense, the indictment was automatically amended to identify S.G. as the victim. *See State v. Castoe*, 114 Ariz. 47, 51-52, 559 P.2d 167, 171-72 (App. 1976) (where indictment identified husbands as victims of theft, indictment deemed automatically amended pursuant to Arizona Rule of Criminal Procedure 13.5(b) to identify wives as victims where evidence showed property actually belonged to wives).

¶17 The evidence was sufficient to support Appellant's conviction for third degree burglary as alleged in count 4.

IV. The Right to Confrontation

¶18 Within his argument on the above issue, Appellant also argues he was denied his right to confront K.G. when he failed to testify. While appellant failed to raise this issue below, we find no error, fundamental or otherwise. The Confrontation Clause applies only to "[t]estimonial statements of witnesses

absent from trial" offered to prove the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). “Nontestimonial” statements are exempt from the requirements of the Confrontation Clause. *Id.* at 68. Even though K.G. may have been absent from trail, no statements from him, testimonial or otherwise, were introduced into evidence. Therefore, Appellant’s claim that he was denied the right to confront a witness who provided testimonial evidence used against him lacks merit.

V. Restitution

¶19 As the final issue on appeal, Appellant argues the trial court erred when it awarded over $25,000 in restitution to the victim of count 2 for damage done to the stolen drag racer. A trial court has "substantial discretion" in determining the amount of restitution to be awarded. *State v. Madrid*, 207 Ariz. 296, 298, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). "We will uphold a restitution award if it bears a reasonable relationship to the victim’s loss." *Id*.

¶20 The victim testified it would cost approximately $33,000 to restore the drag racer to the condition it was in before it was taken by Appellant. The victim also provided a detailed written estimate that totaled $32,386.90 in repairs. As part of its verdict for count 2, however, the jury found the fair market value of the drag racer was $4,000 or more but less

than $25,000. This rendered the theft a class 3 felony. *See* A.R.S. § 13-1802(E) (2008).

¶21 Despite the jury's finding, the trial court awarded the victim of count 2 restitution in the amount of $32,386.90. Of this amount, the court ordered Appellant to pay $25,000 in "restitution" plus $7,386.90 as an "additional fine" payable directly to the victim. On appeal, Appellant argues the trial court could not award restitution in excess of $25,000 for count 2 because the court was limited by the jury's determination that the fair market value of the drag racer was less than $25,000.

¶22 When a defendant is convicted of an offense, the trial court must order the defendant to pay restitution in the full amount of the economic loss suffered by the victim. A.R.S. § 13-603(C) (2008). As was done here, the court may also order that all or any portion of any fine imposed on the defendant be allocated as restitution and be paid directly to the victim. A.R.S. § 13-804(A) (2008). In making its determination of the amount to award, the court must consider all the economic losses of the victim. A.R.S. § 13-804(B). Restitution of the full economic loss is mandatory even if not requested by the victim. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992). "'Economic loss' means any loss incurred by a person as a result of the commission of an offense." A.R.S. § 13-105(14) (2008). Further, the amount of restitution to be awarded may be

based on any information submitted to the court before sentencing or any evidence previously heard by the court. A.R.S. § 13-804(I). In this regard, "the owner of property is competent to give an opinion of its value." *State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988).

¶23 We find no abuse of discretion. First, restitution is not limited by the jury's determination of fair market value. *State v. Fancher*, 169 Ariz. 266, 267-68, 818 P.2d 251, 252-53 (App. 1991). Restitution is not an element of the offense but is determined by the trial court to make the victim whole. *Id.* at 268, 818 P.2d at 253. Further, restitution may be based on any information submitted to the court up until sentencing and need only be proven by a preponderance of the evidence. *Id.*; *In re Stephanie B.*, 204 Ariz. 466, 470, ¶ 15, 65 P.3d 114, 118 (App. 2003); A.R.S. § 13-804(I).

¶24 Second, the fair market value of property is not always an appropriate measure of the amount of restitution that should be awarded. *In re Andrew C.*, 215 Ariz. 366, 368, ¶ 11, 160 P.3d 687, 689 (App. 2007); *State v. Ellis*, 172 Ariz. 549, 551, 838 P.2d 1310, 1312 (App. 1992). "[F]air market value should not be used as the measure for the 'full amount of the economic loss' suffered by a crime victim if the result is that the victim is made less than whole." *In re William L.*, 211 Ariz. 236, 240, ¶ 15, 119 P.3d 1039, 1043 (App. 2005). Here,

the trial court could reasonably determine that the jury's determination of fair market value was insufficient to make the victim of count 2 whole.

¶25 The trial court did not abuse its discretion when it awarded restitution in excess of $25,000 for count 2.

VI. Correction of the Sentencing Minute Entry

¶26 Appellant's sentences were enhanced with one historical prior felony conviction for attempted sale or transportation of marijuana committed in 2001. Appellant correctly notes in his opening brief that the trial court incorrectly identified this prior felony conviction as a class 2 felony. Regardless of what is reflected in the sentencing minute entry for that prior conviction, *attempted* sale or transportation of marijuana committed in 2001 was not a class 2 felony, regardless of the amount of marijuana at issue. *See* A.R.S. § 13-3405(A)(4) and (B)(11) (2001) (sale or transportation of marijuana as completed offense); A.R.S. § 13-1001(C) (2001) (felony classification of attempted offenses). Therefore, we correct the sentencing minute entry to reflect that Appellant's historical prior conviction for attempted sale or transportation of marijuana committed in 2001 was a class 3 felony.

VII. Conclusion

¶27 Because we find no error, we affirm Appellant's convictions and the award of restitution. We correct the sentencing minute entry to reflect that his prior felony conviction for attempted sale or transportation of marijuana was for a class 3 felony rather than a class 2 felony.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICK IRVINE, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge