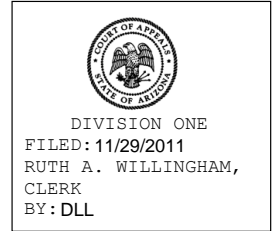


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 10-0617
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JAIME DEJESUS VAZQUEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-152507-001 DT

The Honorable Steven P. Lynch, Judge Pro Tempore

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
by Cory Engle, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Jaime DeJesus Vazquez appeals from an order imposing \$11,038.38 in restitution following his conviction for resisting arrest, on the ground that the trial court erred in finding that

he had caused the economic loss at issue, and in conducting the restitution hearing in his absence. For the reasons that follow, we find no error and affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶12 The evidence at trial was as follows. Police conducted a traffic stop on a vehicle in which Vazquez was a passenger. Police arrested the driver and directed Vazquez to exit the vehicle. When Vazquez became belligerent, interfering with the investigation and refusing to follow orders, police approached Vazquez to arrest him. Vazquez resisted attempts to handcuff him, spinning his arms, locking his wrists, bending at the waist, and moving back and forth. During the struggle, one of the officers dislocated his thumb, requiring surgery and three weeks off work. Vazquez admitted at trial that he locked his arms together, crouched down, and leaned forward, but he denied swinging his arms, and he denied resisting arrest.

¶13 The judge entered judgment of acquittal on the charge of disorderly conduct. The jury acquitted Vazquez of aggravated assault of the officer, but convicted him of resisting arrest, a class six undesignated felony. The judge suspended sentence and placed Vazquez on probation for three years.

¹ We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

¶14 A month after the sentencing, the State requested a restitution hearing. At the start of the restitution hearing, Vazquez's attorney said, "Brian Finsterwalder on behalf of Mr. Vazquez who is present - who is not present. His presence was waived for this hearing and he's out of the country." The hearing proceeded, and the officer injured during the arrest testified that he dislocated his thumb during the struggle to handcuff Vazquez, that he underwent surgery and physical therapy for the injury, and that he missed three weeks of work as a result. A representative of the officer's insurance carrier testified that the insurer and the city paid \$11,038.38 for the officer's medical treatment and lost wages. After hearing argument, the judge ordered restitution in the amount of \$11,038.38. Vazquez filed a timely appeal.

DISCUSSION

Sufficiency of the Evidence

¶15 Vazquez asks us to vacate the restitution order on grounds that it was not supported by sufficient evidence, because the injury was not caused by Vazquez, but rather by the "combination of the excessive force and/or unlawful detention initiated by Officer B[] and the reaction of Vazquez to the officer." We review a trial court's restitution order for abuse of discretion, viewing the evidence in the light most favorable

to sustaining the order. *State v. Lewis*, 222 Ariz. 321, 323-24, ¶ 5, 214 P.3d 409, 411-12 (App. 2009).

¶6 Restitution is required under Arizona Revised Statutes (A.R.S.) section 13-603(C) (2010) "in the full amount of the economic loss" sustained by the victim. "Economic loss" means "any loss incurred by a person as a result of the commission of an offense," including "losses that would not have been incurred but for the offense," but excluding consequential damages. A.R.S. § 13-105(16) (Supp. 2011). "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." *Lewis*, 222 Ariz. at 324, ¶ 7, 214 P.3d at 412 (citation omitted). Thus, "[i]f the loss results from the concurrence of some causal event other than the defendant's criminal conduct, the loss is indirect and consequential and cannot qualify for restitution under Arizona's statutes." *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133 (2002) (holding that victims of unlicensed contractor were entitled to refund of monies paid, but were not entitled to cost of repairing faulty construction). The State has the burden to prove a restitution claim by a preponderance of the evidence. *Lewis*, 222 Ariz. at 324, ¶ 7, 214 P.3d at 412. A restitution order "may be supported by . . .

any evidence previously heard by the judge during the proceedings." A.R.S. § 13-804(I) (2010). We will sustain a restitution award "if it bears a reasonable relationship to the loss sustained." *State v. Dixon*, 216 Ariz. 18, 21, ¶ 11, 162 P.3d 657, 660 (App. 2007).

¶7 Viewed in the light most favorable to upholding the restitution award, the evidence was sufficient to support the award in this case. At the start of the restitution hearing, the judge informed counsel that because he had presided over the trial, he was familiar with the facts presented at trial, and wanted the parties to focus on the restitution claim. The officer who suffered the dislocated thumb testified that he sustained the injury while attempting to handcuff Vazquez and place his hands behind his back. "During the struggle to do that, the Defendant used his weight against my right hand on his forearm. Trying to maintain that grip and with him using his force, my thumb dislocated and wasn't able to withstand the force," the officer testified. He stated that because he suffered the injuries on duty, the city's worker's compensation carrier paid his medical expenses and lost wages. A representative of the carrier testified that the carrier, along with the city, paid \$11,038.38 for the officer's medical treatment and lost wages for this injury. On this record, the judge did not abuse his discretion in finding that Vazquez

caused the officer's thumb to dislocate, and was therefore responsible for the costs of medical treatment and lost wages.

¶18 We find no merit in Vazquez's argument that he was deprived by his absence at the restitution hearing from presenting evidence supporting his argument that an unlawful arrest and use of excessive force intervened to cause the officer's injuries. Vazquez's attorney represented him at the hearing, cross-examined the witnesses, and argued that the jury's acquittal of him on the charge of aggravated assault demonstrated that he did not cause the officer's dislocated thumb. Vazquez's attorney made an argument at the hearing similar to the one that Vazquez makes on appeal: that the officer caused his own injury by "trying to grab the guy." The judge implicitly disagreed, instead finding that the evidence supported the restitution claim.

¶19 Vazquez also misplaces his reliance on *State v. Pearce*, 156 Ariz. 287, 751 P.2d 603 (App. 1988), for the proposition that the officer's contributory fault made his recovery of loss more appropriate for a civil lawsuit. In *Pearce*, the court held only that lost profits could not be recovered as restitution from a defendant who had been convicted of theft by conversion of leased equipment. 156 Ariz. at 289, 751 P.2d at 605. This holding, and the rationale supporting it, has no applicability here, because the evidence shows that

Vazquez's conduct was the direct cause of the officer's injury. The restitution award in this case bore a reasonable relationship to the loss sustained, and accordingly, we will affirm it.

Absence at Hearing

¶10 Vazquez also argues that the judge erred in conducting the restitution hearing in his absence, without his knowing, intelligent, and voluntary waiver of his right to be present. We find no merit in this argument. We ordinarily review a trial court's determination whether a defendant's absence at a hearing is voluntary for an abuse of discretion. *State v. Reed*, 196 Ariz. 37, 38, ¶ 2, 992 P.2d 1132, 1133 (App. 1999). Because Vazquez presents this argument for the first time on appeal, however, we review for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Vazquez thus bears the burden of proving error, that the error was fundamental, and that he was prejudiced thereby. *Id.*; cf. *State v. Sainz*, 186 Ariz. 470, 473-75, 924 P.2d 474, 477-79 (App. 1996) (holding that defendant's involuntary absence during trial was harmless error).

¶11 A defendant has a right to be present at his restitution hearing. See *State v. Lewus*, 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992) (holding that defendant's right to be present at sentencing includes right to be present at

restitution hearing) (citing Ariz. R. Crim. P. 26.9 (defendant "shall be present at sentencing")). A defendant, however, "may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it," Ariz. R. Crim. P. 9.1, or by personally giving his consent. See *State v. Goldsmith*, 112 Ariz. 399, 400, 542 P.2d 1098, 1099 (1975); see also *State v. Guytan*, 192 Ariz. 514, 520, ¶ 17, 968 P.2d 587, 593 (App. 1998) ("It is not good practice for defense counsel to waive . . . the presence of the defendant without consultation with the defendant . . ."). A defendant's personal waiver is required only for relatively few constitutional rights, such as the right to counsel, the right to jury trial, and the right to a twelve-person jury. *State v. Swoopes*, 216 Ariz. 390, 399, 402, ¶¶ 28, 39, 166 P.3d 945, 954, 957 (App. 2007).

¶12 Vazquez does not argue that he did not give his consent to counsel to waive his presence at the hearing; he argues only that his counsel "incorrectly indicat[ed] that at some prior point in the case a record had been made that Appellant voluntarily gave up his right to be present." He thus does not dispute that he voluntarily absented himself from the hearing by being "out of the country." He argues only that the record does not sufficiently reflect his voluntary absence. We agree with Vazquez that there is no evidence in the record that he made a personal in-court waiver of his right to be present at

the restitution hearing. However, the most plausible basis for his counsel's knowledge that Vazquez was "out of the country" and waived his right to be present at the hearing, is that Vazquez and his counsel communicated, Vazquez's counsel informed Vazquez of the hearing, and Vazquez informed his counsel that he would not attend the hearing. Indeed, Vazquez does not assert that he lacked notice of the hearing, only that the record failed to show he received notice.

¶13 Moreover, even if the trial court erred in accepting Vazquez's counsel's waiver of his presence, Vazquez fails to meet his burden on fundamental error review to show that he was prejudiced thereby. See *State v. Dann*, 205 Ariz. 557, 575, ¶ 73, 74 P.3d 234, 249 (2003) (defendant failed to show how his absence from hearings prejudiced him). At the restitution hearing, Vazquez's counsel made a similar argument to the one he makes on appeal: that the officer's own actions caused his injury, and Vazquez was not responsible. The judge found no merit in this argument and Vazquez does not suggest how his presence at the hearing would have altered the trial court's findings. Because Vazquez has failed to persuade us that, had he been present, the result could have been any different, we decline to find fundamental, reversible error on this basis.

CONCLUSION

¶14 For the foregoing reasons, we affirm the restitution order.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
PATRICIA A. OROZCO, Judge