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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



DIVISION ONE
FILED: 12/13/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0964
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
STEVE EDMOND ALLEN,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-031379-001 SE

The Honorable Paul J. McMurdie, Judge

RESTITUTION ORDER VACATED

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Attorneys for Appellant

P O R T L E Y, Judge

¶1 Steve E. Allen ("Allen") was found guilty of theft by conversion, a class three felony, and, as part of his probation, ordered to pay \$12,000 in restitution. Allen challenges the

restitution order. For the reasons that follow, we vacate the order.

FACTS AND PROCEDURAL BACKGROUND

¶2 The victims, B. and R.G., hired Allen to build a house on their property. They signed the contract and Allen signed on behalf of Builders Alliance and its subsidiary, Four Pillars Development and Construction ("Four Pillars"). Builders Alliance did not have a contractor's license at the time.

¶3 Allen received a \$2000 check at the time the contract was signed in July 2003, and two months later received \$10,000 for building permits and as a down payment on granite. The victims, however, never received the permits and their money was never returned. Instead, Allen testified that the money was used to rent equipment, purchase materials, pay himself, and pay to renew Builders Alliance's contractor's license.

¶4 The victims eventually terminated the contract and complained to the Registrar of Contractors ("ROC"). Subsequently, Allen was indicted, tried, and convicted of theft by conversion of property with a value of at least \$3000 but less than \$25,000. He was placed on probation for two years, and requested a restitution hearing.¹

¹ We affirmed Allen's conviction and sentence in *State v. Allen*, No. 1 CA-CR 10-0517, 2011 WL 1434669, at *1, ¶ 1 (Ariz. App. Apr. 14, 2011) (mem. decision).

¶15 At the hearing, the trial court learned that the ROC had already paid the victims for their loss. Alton Curtis ("Curtis"), the owner of Four Pillars, testified that the ROC had found him responsible and ordered him to pay it \$12,000. As a result, the court ordered Allen to pay Curtis \$12,000 restitution, and he has appealed.² We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-2101(B) (West 2011),³ 13-4031, and -4033(A) (West 2011).

DISCUSSION

¶16 Allen challenges the restitution order on three grounds: (1) there is insufficient evidence to support the order because Curtis's liability to the ROC may have arisen independently of Allen's conduct; (2) Curtis is not entitled to restitution because he is not an "entity" within the meaning of A.R.S. § 13-804(E) (West 2011); and (3) the court erred because it failed to adjust the restitution amount according to the value received by the victims.⁴

² The superior court granted Allen's request to file a delayed appeal from the restitution order. We allowed Allen to supplement the record with the record from his earlier appeal.

³ The Arizona Legislature recently renumbered A.R.S. § 12-2101. See 2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.) (effective July 20, 2011).

⁴ Because we find that reversal is mandated under the first argument, we do not reach the other arguments.

I. Standard of Review

¶7 The State argues that we may review the record for fundamental error only because Allen did not raise the first argument at the restitution hearing. We disagree. The trial court wrestled with whether it could order Allen to pay a third party who is not a victim. In fact, the court invited the parties to email any cases they might want the court to consider. Because the court had the opportunity to consider and rule on the issue, see *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 129, 927 P.2d 781, 789 (App. 1996), we will review the order for an abuse of discretion. *State v. Lewis*, 222 Ariz. 321, 323, ¶ 5, 214 P.3d 409, 411 (App. 2009) (citations omitted).

II. Restitution Order

¶8 Allen argues that there is insufficient evidence to support the restitution order because the court lacked evidence about the underlying ROC hearing and order.⁵ He contends that the court could not have concluded that Curtis's payment to the ROC was due to Allen's wrongdoing as opposed to Curtis's violations of the agency's regulations.

¶9 A defendant must pay restitution to a crime victim "in the full amount of the economic loss as determined by the

⁵ The court precluded the admission of any evidence about the ROC hearing at trial. The State did not attempt to admit the ROC order at sentencing or at the restitution hearing.

court.”⁶ A.R.S. § 13-603(C) (West 2011);⁷ see also Ariz. Const. art. 2 § 2.1(8) (guaranteeing a victim’s right “[t]o receive prompt restitution”). “Economic loss” means loss that results from the commission of a crime. A.R.S. § 13-105(16) (West 2011).

¶10 In *State v. Wilkinson*, our supreme court articulated a three-part test that governs which losses qualify for restitution: (1) “the loss must be economic”; (2) “the loss must be one that the victim would not have incurred but for the defendant’s criminal offense”; and (3) “the criminal conduct must directly cause the economic loss.” 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133 (2002). The third requirement reflects the statutory ban on consequential damages and reinforces the notion that a but-for relationship, without more, is insufficient to establish the direct causal connection that is needed to support a restitution order. A.R.S. § 13-105(16).

¶11 The State argues that the restitution order was proper because Curtis “ultimately compensated the [victims] for the loss directly caused by [Allen].” There is no evidence, however, why the ROC ordered Curtis to pay \$12,000. Because the

⁶ While our restitution statutes are designed to “restor[e] the victim to his economic status quo,” certain entities also may qualify for restitution. *In re William L.*, 211 Ariz. 236, 239, ¶ 11, 119 P.3d 1039, 1042 (App. 2005); see A.R.S. § 13-804(E).

⁷ Unless indicated otherwise, we cite to the current version of a statute if it has not undergone a material change since the criminal offense occurred.

trial court lacked evidence about the basis for Curtis's liability to the ROC, the restitution award to Curtis was an abuse of discretion.

CONCLUSION

¶12 Based on the above reasons, the restitution order is vacated.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

JON W. THOMPSON, Presiding Judge

/s/

JOHN C. GEMMILL, Judge