DIVISION ONE
FILED: 12/01/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0113
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
THOMAS DALE GRABINSKI,	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2001-006183

The Honorable Kenneth L. Fields, Judge (Retired)

AFFIRMED AS MODIFIED

Thomas Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

Thomas D. Grabinski — Grinnell, IA
Appellant *In Propria Persona*

S W A N N, Judge

¶1 Thomas Dale Grabinski ("Defendant") appeals from a restitution order following his fraud conviction. We conclude

that the order was based upon a proper procedural foundation, and that the method used to calculate the amount of restitution was lawful. We therefore affirm the court's restitution order, but modify it to correct an arithmetic error.

FACTS AND PROCEDURAL HISTORY

¶2 A jury found Defendant guilty of three counts of fraudulent schemes and artifices and one count of knowingly conducting an illegal enterprise. Those counts stemmed from his role in the operation and financial collapse of the Baptist Foundation of Arizona and related entities (collectively "BFA"). During post-trial proceedings, the trial court vacated the convictions on two of the three counts of fraudulent schemes and artifices because it found that the fraud counts were multiplicitous. It sentenced Defendant to an aggravated prison term of six years on the remaining conviction for fraudulent schemes and artifices. It sentenced him to a concurrent aggravated five-year term on the conviction for illegally conducting an enterprise. The trial court also ordered Defendant to pay $159 million in restitution to BFA's investors.

¶3 After Defendant appealed, we affirmed his convictions and sentences. But we vacated the restitution order and remanded for further proceedings because the trial court had not afforded Defendant a restitution hearing. *State v. Grabinski*, 1 CA-CR 06-0835, 2009 WL 1531020 (Ariz. App. June 2, 2009) (mem.

decision). Complying with this court's mandate, the trial court conducted a restitution hearing on December 1, 2010. After considering the evidence and the arguments presented, the trial court ordered Defendant to pay $173.6 million in restitution.

¶4 Defendant timely appeals. He advances three general lines of argument:

(1) that the trial court erred in ordering any restitution to BFA's investors;

(2) that the trial court erred in calculating the correct amount of restitution owed; and

(3) that the court unlawfully increased the restitution amount as a penalty for appealing.

We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(3).

STANDARD OF REVIEW

¶5 Generally, we review an order of restitution for abuse of discretion. *State v. Slover*, 220 Ariz. 239, 242, ¶ 4, 204 P.3d 1088, 1091 (App. 2009). If a particular issue raises a question of law, however, our review is de novo. *See State v. Guadagni*, 218 Ariz. 1, 5, ¶ 13, 178 P.3d 473, 477 (App. 2008). We review the evidence in the light most favorable to sustaining the trial court's order. *State v. Lewis*, 222 Ariz. 321, 324, ¶ 5, 214 P.3d 409, 412 (App. 2009).

DISCUSSION

I. THE TRIAL COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY RESTITUTION.

¶6 Under A.R.S. § 13-603(C), a person convicted of an offense must make restitution to the victims for the full amount of economic loss.[1] A victim of the offense is "any person who suffered an economic loss caused by the defendant's conduct." A.R.S. § 13–804(A). "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) (citation omitted). The state bears the burden of proving a restitution claim by a preponderance of the evidence. *Lewis*, 222 Ariz. at 324, ¶ 7, 214 P.3d at 412 (citation omitted). A restitution award will be upheld if it bears a reasonable relationship to the victim's loss. *In re Ryan A.*, 202 Ariz. 19, 24, ¶ 20, 39 P.3d 543, 548 (App. 2002).

¶7 At trial, the court heard testimony that when BFA sought bankruptcy protection in 1999 after the fraud was

[1] We apply the substantive law in effect when the offense was committed. *See* A.R.S. § 1-246; *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions after the date of an offense, we cite the statute's current version.

discovered, its investors had approximately $550 million invested in the organization. Using that figure as a starting point, the trial court calculated the restitution amount owed by Defendant. It applied off-sets and credits for amounts received from the sale of BFA assets. It also offset proceeds obtained by the bankruptcy trustee from settled claims against other parties who had a role in BFA's operation. Defendant does not dispute the sufficiency of the evidence or the factual findings regarding the total amount invested in BFA at the time of the bankruptcy; nor does he dispute the specific amounts of off-sets and credits used by the trial court in calculating restitution.[2]

A. Defendant's Intervening Cause Argument

¶8 Defendant contends that he should not be required to pay any restitution because the investors caused their own loss. They decided to liquidate BFA's assets. That decision, he claims, resulted in the assets being sold at less than full market value.

¶9 A victim is not entitled to receive restitution for consequential damages, but only for direct economic loss from the offense. *See* A.R.S. § 13-105(16) ("Economic loss does not include . . . consequential damages."). When a loss results

[2] Defendant includes a footnote in his opening brief that asserts that the total figure used by the trial court for off-sets and credits in calculating the original restitution award is debatable. He does not, however, advance any arguments on appeal regarding this "debatable" figure.

from the concurrence of some event other than the defendant's criminal conduct, the loss is indirect and consequential and does not qualify for restitution. *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133 (2002).

¶10 The manner in which BFA's assets were handled after the fraud's discovery does not transform the loss that the investors suffered into consequential damages. The evidence was undisputed that the victims invested $550 million in BFA. Defendant and his associates took those funds from the investors through fraud. Thus, the investors are entitled to restitution for that direct economic loss. *See id.* at 29, ¶ 9, 39 P.3d at 1133.

¶11 Defendant cites several cases in which victims' losses were not the proper object of restitution. Those cases, however, are inapposite. They involve losses that did not flow directly from the criminal conduct for which those defendants were convicted. *See, e.g., id.* at 29, ¶ 7, 39 P.3d at 1133 (holding that the cost of repairs for shoddy work was not a loss caused by the offense of contracting without a license); *State ex rel. McDougall v. Superior Court*, 186 Ariz. 218, 220, 920 P.2d 784, 786 (App. 1996) (holding that an injury suffered in an automobile accident was not a loss caused by the offense of leaving the scene).

¶12 Defendant's argument that the purported value of the BFA assets should be considered an off-set against the investors' loss is therefore based on a false equivalence. This is not a case in which the specific property taken from the victims has actually been returned to them. Here, the investors were defrauded of money. As Defendant acknowledges, the fraud's discovery "caused a run on the bank [BFA], and . . . BFA could not meet all the investors' demands because its money was tied up in real estate." The investors lost their money and were left as unsecured creditors in the ensuing bankruptcy. We are aware of no authority -- nor does Defendant cite any -- that would entitle him to an off-set for the investors' abstract creditor rights in the bankruptcy proceedings. The investors' right to restitution is reduced only when their rights as creditors result in an actual recovery of funds that reimburse them for their loss.

B. Defendant's Manner of Sale Argument

¶13 Defendant also raises as an issue the manner in which the BFA assets were liquidated in bankruptcy. Essentially, Defendant challenges the reasonableness of the actions taken to mitigate losses from the fraud.

¶14 Because restitution is intended to make the victim whole rather than to penalize the defendant, a defendant must be credited with any benefit the victim has received as a result of

the criminal conduct. *Town of Gilbert Prosecutor's Office v. Downie ex. rel. County of Maricopa*, 218 Ariz. 466, 469, ¶ 13, 189 P.3d 393, 396 (2008) (citation omitted).

¶15 Here, the trial court credited Defendant with the amounts the investors received from the liquidation sale of the BFA assets. No evidence was presented that the BFA assets were sold in a commercially unreasonable manner. As the trial court noted, Defendant's assertion that greater amounts could have been obtained was purely speculative. We therefore reject Defendant's argument that the trial court, by using the prices the bankruptcy trustee actually obtained for the properties, failed to credit him with the full value of the BFA assets. *See State v. Reynolds*, 171 Ariz. 678, 682-83, 832 P.2d 695, 699-700 (App. 1992) (finding that there was no showing that a closed auction was commercially unreasonable and therefore rejecting defendant's claim that restitution was improperly calculated because an insurer received less than full market value from the sale of recovered property at a closed auction).

C. Defendant's Notarized Claims Argument

¶16 Defendant has a final argument that the trial court erred in ordering restitution. He claims that the state failed to meet its burden of proving restitution in accordance with an order that required the investors to file notarized claims of the amounts still due. Defendant misreads the order.

¶17 That order was not aimed at calculating the total amount of restitution owed by the defendants. It addressed the manner in which the Clerk of the Superior Court would distribute restitution funds after the BFA Liquidation Trust was dissolved. As for the notarized claims, the order merely directed the Clerk, after coordinating with the trustee, to devise a notice to victims who were receiving restitution funds. Those victims needed to file with the Clerk notarized claims for any funds still due so that the Clerk could "obtain and maintain a restitution/accounting ledger pursuant to its statutory duty under A.R.S. § 13-805."

II. THE TRIAL COURT'S ERROR IN CALCULATING RESTITUTION WAS NOT AN ABUSE OF DISCRETION.

¶18 Defendant raises several arguments regarding the trial court's calculation of restitution.

A. Defendant's Law of the Case Argument

¶19 First, he argues that the trial court erred in calculating the amount of restitution based on a finding that the investors' total loss from the fraud was $550 million. Defendant does not dispute that the evidence supports a finding that this amount was invested in BFA while the fraud was ongoing. Instead, he claims that this finding violates the law of the case doctrine because it is contrary to this court's

decision in his first appeal that the total loss from the fraud was $460 million.

¶20 In the law of the case doctrine, "the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested." *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). The doctrine's purpose is to promote the finality of decisions. *Davis v. Davis*, 195 Ariz. 158, 162, ¶ 13, 985 P.2d 643, 647 (App. 1999).

¶21 Defendant misapplies the doctrine to the facts of this case. In his first appeal, this court did not find that the investors suffered from the fraud a total loss of $460 million. *Grabinski*, 1 CA-CR 06-0835, at *1, ¶ 3. When we vacated the restitution order and remanded for a hearing to determine restitution, we expressly *declined* to address any of the arguments about calculating restitution. *Id.* at *14, ¶ 55. Because this court decided nothing with respect to calculating the restitution, the law of the case doctrine does not apply to the trial court's restitution ruling on remand. *See State v. Fulminante*, 193 Ariz. 485, 491, ¶ 13, 975 P.2d 75, 81 (1999).

B. Defendant's Multiplicitous Counts Argument

¶22 Defendant next argues that the trial court erred in ordering restitution on the two counts of fraudulent schemes and artifices that were dismissed post-trial.

¶23 The 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." *Lewis*, 222 Ariz. at 324, ¶ 7, 214 P.3d at 412 (quoting *State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993)).

¶24 In charging Defendant with respect to his fraudulent conduct, the state alleged three counts of fraudulent schemes and artifices. The three counts divided the investors' losses by particular misrepresentations made by Defendant and his associates. The trial court dismissed the convictions on two of the three counts because it found that the three counts were multiplicitous. An indictment is multiplicitous when it charges a single offense in multiple counts. *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985) (citation omitted). In other words, the trial court dismissed two of the three fraud counts, not because Defendant was not guilty of the charges in the three counts, but because together they constituted only one criminal offense. *See United States v. Platter*, 514 F.3d 782, 787 (8th Cir. 2008) (holding that when a defendant is convicted of

multiplicitous counts the remedy is to merge the counts into one).

¶25 When the state sought to reinstate the two dismissed convictions, we upheld the trial court's finding of multiplicity. We explained that although the three counts "include[d] differing amounts alleged to have been obtained by the fraudulent conduct," the allegations of the fraud counts "create[d] the clear potential of multiple convictions for the same offense based on the same act or course of conduct." *Grabinski*, 1 CA-CR 06-0835, at *16, ¶ 62. Therefore, "[b]ecause proof for conviction on each count [could] be established with exactly the same facts, the counts as alleged [were] multiplicitous." *Id.*

¶26 Although Count 1 alleged that the fraud involved a loss of $345 million rather than the $550 million found by the trial court, the maximum amount of restitution is not "frozen by the charging document." *State v. Fancher*, 169 Ariz. 266, 267, 818 P.2d 251, 252 (App. 1991). And so because Count 1 encompassed the allegations of the two dismissed counts, the trial court did not err in awarding restitution to the investors based on the conviction for Count 1. *See* A.R.S. § 13-804(B) ("In ordering restitution for economic loss . . . the court shall consider *all losses* caused by the criminal offense or

offenses for which the defendant has been convicted.") (emphasis added).

C. Defendant's Argument About the Increase in Restitution

¶27 Defendant also claims error in the $13.6 million increase in restitution on remand.

¶28 At sentencing, Defendant was order to pay $159 million in restitution. On remand, the trial court calculated the amount of restitution owed by Defendant as $173.6 million. The difference between those two amounts stems from the fact that the BFA Liquidation Trust had unsold assets appraised at $20 million when Defendant was sentenced. In calculating the original restitution amount, the trial court gave Defendant an off-set for the $20 million appraised value of the assets. By the time the issue of restitution was remanded, the assets had been sold. The proceeds of sale totaled only $6.4 million. Thus, the amount originally credited against the investors' total $550 million loss was reduced by $13.6 million.

¶29 Defendant contends that the increased restitution amount is improper because he is not responsible for that lower value received from the sale of the assets. He relies on *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985), but his reliance is misplaced.

¶30 In *Tyler*, the court held that the government was not entitled to restitution for the depreciation in the value of

stolen lumber between the time of its recovery and its sale. *Id.* at 1352-53. It explained that the loss in value was the result not of the defendant's theft, but of the government's failure to sell the lumber promptly. *Id.* at 1352.

¶31 In contrast to *Tyler* -- and as we discussed earlier -- there was no evidence that the BFA assets, including the few assets remaining after Defendant was sentenced, were disposed of in a commercially unreasonable manner. At the restitution hearing, the court heard evidence about the remaining unsold assets and the efforts made to sell them. The trial court reasonably found from this evidence that the victims were not responsible for either the length of time required to sell the assets or for the difference between the assets' initial appraised value and their actual sale price.

¶32 However, we do find a mathematical error in the trial court's calculations. The difference between the appraised value and the actual recovery was $13.4 million. This difference increases the total restitution owed from the $159 million ordered at sentencing to $172.6 million, not the $173.6 million ordered by the trial court. Accordingly, we modify the restitution order so that the amount owed by Defendant is $172.6 million. Ariz. R. Crim. P. 31.17(b).

III. THE INCREASE IN RESTITUTION DID NOT PENALIZE DEFENDANT FOR PURSUING AN APPEAL.

¶33 Finally, we reject Defendant's argument that the increase in restitution was a penalty for exercising his right to an appeal.

¶34 Due process prohibits the state from punishing a defendant for asserting his right to an appeal. *State v. Macumber*, 119 Ariz. 516, 522, 582 P.2d 162, 168 (1978). This principle is codified in Ariz. R. Crim. P. 26.14, which states the general rule that if a "judgment or sentence, or both, have been set aside on appeal, by collateral attack or on a post-trial motion, the court may not impose a sentence for the same offense, or a different offense based on the same conduct, which is more severe than the prior sentence."

¶35 As an initial matter, we note that it is questionable whether this rule applies to restitution because its primary purpose is not punishment but "reparation to the victim and rehabilitation of the offender." *Wilkinson*, 202 Ariz. at 30, ¶ 13, 39 P.3d at 1134. To the extent this rule does apply, the increased amount of restitution in this case falls squarely within Rule 26.14's third exception: a "more severe" sentence can be imposed if "other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge."

¶36 Crime victims have a constitutional right to receive restitution from the person convicted of the criminal conduct that caused their loss. Ariz. Const. art. 2, § 2.1(A)(8). Further, the trial court is required to order restitution for the full amount of economic loss determined by the court. A.R.S. § 13–603(C); *see also State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997) ("Restitution of full economic loss to a victim of crime is mandatory under our sentencing statutes.").

¶37 Here, the original restitution amount was determined without a hearing and before the full amount of the loss was actually realized. At the hearing after remand, the evidence established that the actual amount of the loss after off-sets and recoveries was greater than originally ordered. Under A.R.S. § 13–603(C), the trial court had an affirmative duty to order restitution for the full amount of the loss sustained by the victims. *State v. Zierden*, 171 Ariz. 44, 45, 828 P.2d 180, 181 (App. 1992). Under these circumstances, "there is no reasonable likelihood that the increase in the [restitution amount] is the product of actual vindictiveness by the sentencing judge." Ariz. R. Crim. P. 26.14.

CONCLUSION

¶38 The trial court did not err when it ordered Defendant to pay as restitution the difference between what the investors

lost from the fraud and what they received from the BFA bankruptcy. But because the court made a mathematical error in calculating that difference, we modify the order so that Defendant owes $172.6 million in restitution rather than $173.6 million.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge