

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DONALD JAMES STUTLER,
Appellant.

No. 2 CA-CR 2016-0317
Filed August 23, 2017

Appeal from the Superior Court in Pima County
No. CR20140818001
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

STATE v. STUTLER
Opinion of the Court

OPINION

Presiding Judge Vásquez authored the opinion of the Court, in which Chief Judge Eckerstrom and Judge Howard¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Donald Stutler appeals from the restitution award resulting from his conviction of aggravated assault, domestic violence. He argues a portion of the award was improper because the victim’s lost earnings from her bakery business were consequential damages and were “caused by an intervening event.” He further contends the trial court’s award of the victim’s lost earnings was not supported by sufficient evidence. We affirm.

¶2 Stutler’s conviction stems from a 2014 incident in which he attacked the victim, the mother of his child, outside her home, covering her mouth and nose with his hand and squeezing her throat. After a jury found him guilty, the court sentenced him to a one-year prison term. We affirmed his conviction and sentence on appeal. *State v. Stutler*, No. 2 CA-CR 2015-0110 (Ariz. App. Feb. 4, 2016) (mem. decision).

¶3 While Stutler’s appeal from his conviction and sentence was pending, the state filed a motion for restitution, attaching the victim’s affidavit of loss requesting restitution for locks and a security system for her business, compensation for court appearances, and “lost wages and benefits.” Her affidavit stated her lost earnings were “\$900 average” for a week in January 2014. The court held an evidentiary hearing. The victim, who operated a bakery, testified that, after the assault, she and her son had moved to “a safe house” and, on the advice of a police officer, “remain[ed] away from the bakery” because she did not feel safe from Stutler, who had come to

¹The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

STATE v. STUTLER
Opinion of the Court

the bakery after the assault. She further testified that, as a result, she had been unable to deliver on several orders, including some wedding cakes and other baked goods. After the hearing, the court ordered that Stutler pay \$900 in restitution for lost earnings, \$85 for a locksmith and security system, and \$60 for court appearances. This appeal followed.²

¶4 We view the evidence in the light most favorable to sustaining the trial court's restitution order. *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 412 (App. 2009). And, we review that order for an abuse of discretion. *Id.* "A defendant who has been convicted of a crime shall be ordered '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.'" *Id.* ¶ 6, quoting A.R.S. § 13-603(C). A loss is recoverable if it constitutes economic loss the victim would not have incurred but for the criminal conduct, and the criminal conduct directly caused the loss. *Id.* ¶ 7. "'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). "Economic loss does not include . . . consequential damages." *Id.* The restitution award must bear "a reasonable relationship to the victim's loss." *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997).

¶5 Stutler argues the trial court erred in awarding restitution for the victim's lost earnings at the bakery, characterizing those earnings as "lost profits" and citing *State v. Pearce*, 156 Ariz. 287, 751 P.2d 603 (App. 1988), for the proposition that lost profits are consequential damages "not recoverable as restitution."³ In *Pearce*,

²The trial court permitted Stutler to file a delayed appeal pursuant to Rule 32.1(f), Ariz. R. Crim. P.

³Stutler did not argue below that the victim's losses were consequential damages, nor did he assert the officer's advice to the victim constituted an intervening cause. He therefore has forfeited these arguments on appeal absent fundamental, prejudicial error. *See In re J.U.*, 241 Ariz. 156, ¶ 8, 384 P.3d 839, 842 (App. 2016). Because the definition of economic loss excludes consequential damages,

STATE v. STUTLER
Opinion of the Court

the defendant pled guilty to stealing construction equipment he had leased from the victim, only some of which was recovered. *Id.* at 287-88, 751 P.2d at 603-04. The victim sought restitution for the amount owed under the equipment lease for the entire lease period. *Id.* at 288-89, 751 P.2d at 604-05. We held the trial court erred by ordering restitution in the amount the victim would have received had the defendant 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.2d 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 trial court. *Id.* at 290, 751 P.2d at 606.

¶6 *Pearce* has no application to the facts of this case. The restitution awarded the victim here is not profits from a contract that Stutler failed to perform, but for earnings for work she was unable to perform because of his conduct. Lost earnings are recoverable as restitution. § 13-105(16). And, as this court noted in *State v. Young*, even were we to characterize the victim’s loss as lost profits, “*Pearce* does not hold that ‘lost profits’ are necessarily ‘consequential damages’ that may never be recovered as economic loss” and, indeed, “language of that opinion may be limited to the peculiar circumstances of the case.” 173 Ariz. 287, 289, 842 P.2d 1300, 1302 (App. 1992).

¶7 Stutler further argues the lost earnings actually resulted from the police officer’s advice that the victim stay away from the bakery to avoid having contact with Stutler. Thus, he reasons, the loss “did not flow from the act for which Stutler was convicted.” But expenses incurred by a victim to protect herself from future attack can be awarded as restitution. *See State v. Brady*, 169 Ariz. 447, 448, 819 P.2d 1033, 1033 (App. 1991) (moving costs properly awarded as restitution in part “because [victim] feared that her assailant might

§ 13-105(16), however, the improper award of such damages is fundamental error. *J.U.*, 241 Ariz. 156, ¶ 9, 384 P.3d at 842 (“A restitution order that is not supported by statutory authority is fundamental, prejudicial error.”).

STATE v. STUTLER
Opinion of the Court

return and do her further harm”). Stutler has cited no authority, and we find none, suggesting that a victim loses the right to restitution merely because she has taken steps to protect herself at the advice of a law enforcement officer. Nor can we see any sensible reason to adopt such a rule – it would be absurd to deny restitution here when a victim who independently chose to take identical action would receive restitution.

¶8 Stutler also argues that insufficient evidence supported the trial court’s restitution award because the victim did not provide “documentary evidence” to support her claim of lost earnings. No such evidence was required. Viewed in the light most favorable to sustaining the court’s ruling, *Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d at 412, the victim’s testimony and her loss affidavit permitted the court to conclude she lost \$900 in earnings because she was unable to work. The court was entitled to evaluate her testimony and determine whether her claim of loss was credible. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998) (“We will defer to the trial court’s determination of witnesses’ credibility and the weight to give conflicting evidence.”).

¶9 We affirm the restitution award.