IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JENNIFER MICHELLE SNOUFFER,
Appellant.

No. 2 CA-CR 2014-0344
Filed October 13, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20110130001
The Honorable Terry L. Chandler, Judge

VACATED IN PART; AFFIRMED IN PART

COUNSEL

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Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Brammer[1] concurred.

H O W A R D, Judge:

¶1 Following a jury trial in absentia, Jennifer Snouffer was convicted of class four felony theft by control and/or by controlling stolen property and trafficking in stolen property. On appeal, she argues the trial court erred by ordering restitution to the victim, E.R., for certain unrecovered items and for amounts E.R. paid to Snouffer's employer. Because we conclude the court abused its discretion in finding that Snouffer directly caused the loss of the unrecovered items, and because the wages paid by E.R. were not economic losses caused by Snouffer's criminal conduct, we vacate the portion of the restitution order relating to E.R., but otherwise affirm.

Factual and Procedural Background

¶2 We view the evidence relating to restitution in the light most favorable to sustaining the trial court's order. *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 412 (App. 2009). In September 2010, E.R. hired Christian Companions to provide twenty-four-hour, in-home, non-medical care for her husband. Snouffer worked as a caregiver for Christian Companions and occasionally worked at E.R.'s home. After Snouffer left on the morning of December 3, E.R. noticed some of her jewelry was missing. A Pima County Sheriff detective discovered that Snouffer had pawned one piece of E.R.'s jewelry on November 7 and another twelve pieces on November 28,

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[1]The Hon. J. William Brammer, Jr., 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.

and detectives later found several additional pieces of E.R.'s jewelry in Snouffer's home.

¶3 At the grand jury hearing, the detective testified that E.R. initially had said the value of all the stolen items was "roughly under $10,000" and the value of the recovered jewelry specifically was between $3,000 and $4,000. The grand jury then indicted Snouffer for theft by control and/or controlling stolen property with a value between $3,000 and $4,000, a class four felony, A.R.S. § 13-1802(G), and first-degree trafficking in stolen property, A.R.S. § 13-2307(B).

¶4 After the grand jury hearing, but before trial, E.R. claimed additional pieces of jewelry were missing that she had not previously remembered and that the unrecovered jewelry was valued at $40,600. The state chose not to re-indict Snouffer based on E.R.'s revised valuation and the case proceeded to trial on the class four felony charge of theft by control and/or controlling stolen property. The parties agreed to limit the evidence at trial to the recovered jewelry. The parties additionally agreed the trafficking charge would be limited to the jewelry pawned on November 28, and the trial court amended the indictment accordingly. A jury subsequently found Snouffer guilty of both counts. The court suspended the imposition of sentence and placed Snouffer on concurrent terms of probation, the longest of which is five years.

¶5 E.R. then filed a restitution affidavit requesting $40,600 for the unrecovered jewelry, which included approximately eleven additional pieces of jewelry and four sterling silver dinner knives, $500 for the insurance deductible she had paid for her claim on all of the stolen items, and $2,146.42 for wages she had paid to Christian Companions for Snouffer's services. Following a restitution hearing, the trial court ordered Snouffer to pay E.R. restitution in the amount of $43,246.42 for "unrecovered jewelry and other items stolen, [E.R.'s] insurance deductible and wages she paid to [Snouffer]." The court additionally ordered Snouffer to pay restitution to the pawn shops and E.R.'s insurance company. We have jurisdiction over Snouffer's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1). *See State v. Fancher,* 169 Ariz. 266, 266 n.1, 818 P.2d

251, 251 n.1 (App. 1991); *see also* Ariz. R. Crim. P. 31.3(b) and 32.1(f) (permitting trial court to grant delayed appeal).

Presence Error

¶6 Our review of the record revealed that Snouffer was not present at the restitution hearing or when the trial court issued its restitution order. Snouffer did not raise a presence issue below or on appeal. However, because a presence error can be structural error, *State v. Forte*, 222 Ariz. 389, ¶ 15, 214 P.3d 1030, 1035 (App. 2009), and reversal is mandated if we find such error, *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 236 (2009), we must determine whether such error occurred here.

¶7 A defendant's physical presence is required at sentencing, which includes the imposition of restitution. Ariz. R. Crim. P. 26.9; *see also State v. Lewus,* 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992). The trial court therefore erred in imposing restitution without Snouffer's presence. *See Lewus*, 170 Ariz. at 414, 825 P.2d at 473. Because Snouffer did not object below, she is entitled to relief only if "the error was fundamental and prejudicial, or . . . structural and therefore prejudicial per se." *Forte*, 222 Ariz. 389, ¶ 14, 214 P.3d at 1035.

¶8 A presence error can amount to structural error when it "so undermine[s] the integrity of the trial process that [it] will necessarily fall within that category of cases requiring automatic reversal." *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 16, 953 P.2d 536, 540 (1998), *quoting Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995) (second alteration in *Garcia-Contreras*). This court therefore must evaluate "'the character of the proceeding from which the defendant was excluded . . . to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding.'" *Id.*, *quoting Hegler*, 50 F.3d at 1477.

¶9 The purpose of the rule requiring a defendant to be present at sentencing is to ensure "essential warnings and information regarding appeal . . . [are] given after sentence is pronounced." Ariz. R. Crim. P. 26.9 cmt.; *see State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983). It also allows the defendant to

"exercise [her] right to allocution," and provides "a chance for the judge to personally question and observe the defendant." *Fettis*, 136 Ariz. at 59, 664 P.2d at 209.

¶10 Snouffer was present at the first sentencing hearing at which the trial court ordered she be placed on probation, ordered the fines and fees she was required to pay, and ordered restitution to the pawn shops and insurance company. Because the state was not prepared with an exact amount of the restitution owed to E.R., the court scheduled a restitution hearing on the matter. Snouffer's counsel waived her presence at the restitution hearing. The court then set the amount of restitution in a subsequent ruling.

¶11 Because Snouffer was present at the initial sentencing hearing, the trial court was able to provide her the "essential warnings and information regarding appeal." She also was given the opportunity to speak, which she declined, and the court was able to personally observe her demeanor. And she actually appealed the restitution order. The purposes of requiring a defendant's presence at sentencing therefore were met in this case. *See Forte*, 222 Ariz. 389, ¶ 21, 214 P.3d at 1036 ("'minimal requirements' for sentencing" met when "trial court has observed, questioned, listened to the defendant and his attorney, and advised the defendant of his appellate and post-conviction rights"), *quoting Fettis*, 136 Ariz. at 59, 664 P.2d at 209.

¶12 Snouffer also waived her right to be present at the restitution hearing. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992) ("the right to be heard as to the amount of restitution may be waived"). And, in her absence, Snouffer's attorney actively participated in the process and was able to "contest the information on which the [restitution] award w[as] based." *See Lewus*, 170 Ariz. at 414, 825 P.2d at 473. The trial court's error in ordering restitution to E.R. in Snouffer's absence thus did not "so insult[] the basic framework of a criminal sentencing such that the proceeding could no longer serve its core function" and was not structural. *See Forte*, 222 Ariz. 389, ¶¶ 16, 20-21, 214 P.3d at 1035-36.

¶13 Furthermore, because, as discussed above, Snouffer was not prejudiced by her absence at the hearing, the error is not

fundamental and prejudicial. *Id.* ¶ 14; *see also State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (appellate court will not ignore fundamental error "when we find it"). Thus, although the trial court erred in imposing restitution in Snouffer's absence, because the error does not mandate reversal, we address Snouffer's arguments on appeal.

Restitution

¶14 Snouffer first argues the trial court abused its discretion in ordering her to pay restitution for the unrecovered jewelry because class four theft is limited to a $3,000 to $4,000 range—"the value of the recovered jewelry"—and thus she never was charged with or convicted of the theft or trafficking of the unrecovered items. *See* A.R.S. § 13-1802(G). We review a court's restitution order for an abuse of discretion. *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 411 (App. 2009). "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *State v. Jackson*, 208 Ariz. 56, ¶ 12, 90 P.3d 793, 796 (App. 2004).

¶15 Following a defendant's conviction, she is required 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." A.R.S. § 13-603(C); *see also* Ariz. Const. art. II, § 2.1(A)(8). An "'[e]conomic loss' [is] any loss incurred by a person as a result of the commission of an offense . . . [and] that would not have been incurred but for the offense." A.R.S. § 13-105(16); *see also* A.R.S. § 13–804(B) (court "shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted").

¶16 The state bears the burden of proving, by a preponderance of the evidence, that the 1) loss is economic, 2) the loss is "one that the victim would not have incurred but for the criminal conduct," and 3) the criminal conduct directly caused the loss. *Lewis*, 222 Ariz. 321, ¶ 7, 214 P.3d at 413, *quoting State v. Madrid,* 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). "The preponderance of the evidence standard requires that the fact-finder determine whether a fact sought to be proved is more probable than

not." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 25, 110 P.3d 1013, 1018 (2005).

¶17 In *Fancher*, the defendant was convicted of criminal damage, a class two misdemeanor, which encompasses a maximum of $250 in damage. 169 Ariz. at 266, 818 P.2d at 251. The trial court awarded $1,185.10 in restitution to the victim. *Id.* On appeal, we stated that restitution was part of sentencing and thus a separate process from the trial, with the purpose of making the victim whole rather than punishing the defendant. *Id*. at 268, 818 P.2d at 253; *see also In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 117-18 (App. 2004) ("Restitution is not part of the adjudication of guilt; it is part of sentencing function."). We affirmed the restitution order in excess of the class two misdemeanor amount, noting that "restitution orders in excess of amounts alleged in charging documents on which convictions were based have been affirmed." *Fancher*, 169 Ariz. at 268, 818 P.2d at 253.

¶18 Additionally, in the juvenile delinquency context, we concluded that, even though the damage arose from an act that could constitute an "uncharged offense," if that damage directly resulted from the juvenile's act for which he was found delinquent, the juvenile could be required to pay restitution. *In re Maricopa Cty. Juv. Action No. JV-128676*, 177 Ariz. 352, 354, 868 P.2d 365, 367 (App. 1994). Furthermore, appellate courts have affirmed restitution awards for damages not connected to the elements of the offense in any way. *See Lewis*, 222 Ariz. 321, ¶ 9, 214 P.3d at 413 (defendant required to pay restitution to shooting victim even though acquitted of aggravated assault against victim, and convicted only of drive-by shooting, which does not require person be targeted); *see also Stephanie B.*, 204 Ariz. 466, ¶¶ 5-6, 17, 65 P.3d at 115-16, 118 (upholding restitution for victim's medical expenses where juvenile found delinquent for aggravated assault while victim impaired but not delinquent of aggravated assault causing injury); *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997) (defendant required to pay for damage to wallet, despite being charged only with forgery of checks found in wallet).

¶19 The foregoing cases establish that the amount of restitution is not limited to the value range of the specific crime of

which the defendant was convicted or the evidence produced at trial. *See also* A.R.S. § 13-804(I) (trial court may consider all evidence or information produced before sentencing). Whether the state could have charged Snouffer with a higher class of felony or with additional crimes is not a relevant inquiry. We conclude the trial court did not err by awarding restitution above the $4,000 limit of a class four theft. *See* A.R.S. § 13-1802(G).

¶20 Snouffer further argues the trial court erred in finding that sufficient evidence supported the restitution order concerning the unrecovered jewelry. As stated above, we review the order for an abuse of discretion. *Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d at 411.

¶21 In *State v. Young*, on which the trial court relied in this case, Young pled guilty to theft from the store where he worked as a manager and was ordered to pay restitution for the store's total losses incurred during the time he was a store manager. 173 Ariz. 287, 288, 842 P.2d 1300, 1301 (App. 1992). Young argued that because "all stores incur losses," the court should not have attributed the store's total loss over the relevant time frame to him. *Id.* Evidence showed that Young had admitted to "'dipping into the till'" to his regional store manager and Young's own records of the thefts substantiated that his criminal actions "might well have" accounted for the store's total losses during that time. *Id.* at 289, 842 P.2d at 1302. And all of the store's other employees during that time submitted written statements confirming Young's "fraudulent behavior." *Id.* Consequently, "there was clear evidence that the defendant stole substantial amounts," and "no evidence that any other employee was stealing from the store," thus making restitution for the store's total losses appropriate. *Id.* at 288-89, 842 P.2d at 1301-02.

¶22 In this case, E.R. told detectives she regularly checked the cabinet drawers where she kept her jewelry and she had first noticed it was missing after Snouffer's shift ended on December 3. The detective, based on that information, checked only the names of Snouffer, the caregiver who arrived just after Snouffer, and possibly one other caregiver against a pawn shop database. That investigation showed that Snouffer had pawned some items on November 7 and 28, which E.R. later identified as some of her

missing jewelry. A search warrant then was executed on Snouffer's home, and detectives discovered several additional pieces of jewelry belonging to E.R. The evidence also showed that, in addition to Snouffer, eighteen other caregivers from Christian Companions had worked in E.R.'s home between September and late December 2010.

¶23 In her restitution affidavit, E.R. identified approximately eleven pieces of jewelry, and four sterling silver dinner knives, totaling in value of $40,600 that were still missing. At the restitution hearing, E.R. testified she had noticed all those items were missing and told the police about them on December 3. E.R. valued one of the pieces of jewelry, an "antique diamond ring," at $25,000 based on "family feeling" and her memory of what a jeweler had once told her about the ring. E.R. valued the next item, a "perfect" diamond solitaire on a 14 karat gold chain, at $8,500 after "look[ing] at some jewelry stores for prices of things."

¶24 E.R. also described an "antique family stick pin" made of 18 karat gold, which she believed it was worth $1,500 "[b]ecause it had . . . opal in the center and little [seed] pearls around it." She additionally testified that she "guessed" each of the dinner knives were valued at $200 each. As for the remainder of the items on the affidavit, E.R. "assumed" their value and did not have receipts or any documentation appraising the items at a specific value.

¶25 In its ruling on E.R.'s restitution, the trial court correctly noted that, as in *Young*, no evidence had been presented that any other Christian Companions employee stole the unrecovered items. *See* 173 Ariz. at 288, 842 P.2d at 1301. But more importantly, unlike the situation in *Young*, the record here contains no evidence showing that Snouffer likely took the unrecovered jewelry. *Id.* at 289, 842 P.2d at 1302.

¶26 Eighteen other caregivers worked in E.R.'s home during the relevant time frame, and the detective only checked the names of two or three against the pawn shop database and did not further investigate any other employees in regards to the unrecovered jewelry. And, unlike Young who had kept records concerning his theft which substantiated it could have accounted for the entire missing amount, 173 Ariz. at 289, 842 P.2d at 1302, no such records

exist here. Additionally, despite E.R.'s claim that she regularly checked her jewelry, most of the jewelry Snouffer was convicted of stealing was pawned nearly a week before E.R. discovered it was missing and a wedding band was pawned nearly a month before E.R.'s discovery. And although more jewelry was recovered at Snouffer's home, the remainder of the items E.R. identified as missing never were found.

¶27 Restitution is mandatory for all losses caused by Snouffer, and E.R. should be made whole. A.R.S. § 13-603(C); *see Fancher*, 169 Ariz. at 268, 818 P.2d at 253. But even viewing the facts "in the light most favorable to upholding the restitution award," *Lewis*, 222 Ariz. 321, ¶ 15, 269 P.3d at 414, given the time frame over which a large number of caregivers were in E.R.'s home, the small number that were investigated in regards to the missing items, and the fact that many of E.R.'s items had been missing long before E.R. noticed their disappearance, the evidence on the record before us simply does not establish that it was "more probable than not" that Snouffer also stole the unrecovered items. *Kent K.*, 210 Ariz. 279, ¶ 25, 110 P.3d at 1018; *see also Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250. The state therefore failed to show by a preponderance of the evidence that Snouffer took the unrecovered items. *Lewis*, 222 Ariz. 321, ¶ 7, 214 P.3d at 412. The trial court thus abused its discretion in ordering Snouffer to pay restitution for the unrecovered items.[2] *Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d at 411; *Jackson*, 208 Ariz. 56, ¶ 12, 90 P.3d at 796.

¶28 Snouffer further argues the trial court erred in ordering restitution of $500 for the insurance deductible E.R. paid to her insurance carrier for her claim on the stolen items. Because, as discussed above, the state did not show, by a preponderance of the

[2]Because we conclude that Snouffer is not required to pay restitution for the unrecovered jewelry and knives, we do not address Snouffer's argument that the trial court erred by relying solely on E.R.'s opinion of the value of those items and that the amount of restitution for the unrecovered jewelry should have been reduced by $2,500—the amount E.R. received from her insurance company for her claim on those items.

evidence, that Snouffer took the unrecovered items, it logically follows that Snouffer is similarly not required to pay restitution for E.R.'s insurance deductible for her claim on those items.[3]

¶29 Snouffer also contends the trial court erred in ordering restitution for the wages E.R. paid Christian Companions for Snouffer's caregiver services. The state agrees. No evidence was presented that Snouffer failed to provide the caregiver services for which E.R. paid, and the wages were not economic losses which E.R. would not have incurred but for Snouffer's criminal actions. A.R.S. §§ 13-105(16), 13-603(C), 13-804(B). Consequently, the court erred in ordering restitution for the wages paid by E.R. to Christian Companions for Snouffer's services, and we vacate that portion of the restitution order.

Disposition

¶30 For the foregoing reasons, we vacate the portion of the trial court's restitution order relating to E.R., but otherwise affirm Snouffer's convictions and sentences.

[3] The state, in its answering brief, conceded that ordering restitution for both the value of the unrecovered jewelry and the insurance deductible E.R. paid, while failing to deduct the amount E.R.'s insurance company paid her on the claim, effectively would "double compensate" E.R. and thus was improper.