

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANGELO JAMES MULLEN,
Appellant.

No. 2 CA-CR 2014-0452
Filed October 19, 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NOT FOR PUBLICATION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. CR20123677002
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

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

Peter B. Keller, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly¹ concurred.

H O W A R D, Judge:

¶1 Appellant Angelo Mullen appeals from the trial court’s restitution order entered after his conviction for third-degree burglary, criminal trespass, unlawful use of a means of transportation, and theft. Finding no error, we affirm.

¶2 In 2012, Mullen and two others broke into a home, stole various items, and left the homeowner’s vehicle with significant damage. Mullen told investigating officers that he and each of the others had driven the vehicle, but he claimed not to know how it had been damaged. The jury found Mullen guilty as outlined above, but not guilty of an additional charge of criminal damage to the vehicle. The trial court suspended the imposition of sentence and placed Mullen on concurrent, four-year terms of probation.

¶3 After a December 2014 restitution hearing, the trial court ordered Mullen to pay restitution for lost wages and various items of property, including for damage to and depreciation of the vehicle. Mullen objected to “any recovery at all for damage to the” vehicle because he had been acquitted on the criminal damage count.

¶4 On appeal, Mullen contends he could not be required to pay restitution because he was acquitted of criminal damage and “[t]here was no evidence that the damage occurred while [he] was

¹The Hon. Virginia C. Kelly, 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.

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driving.” He maintains there is no clear “causal nexus” between his unlawful use of the vehicle and the damage, and he attempts to distinguish this court’s decision in *State v. Lewis* on that basis. 222 Ariz. 321, 214 P.3d 409 (App. 2009). We review a court’s restitution order for an abuse of discretion, and we view the evidence relating to restitution in the light most favorable to sustaining the trial court’s order. *Id.* ¶ 5.

¶5 Upon conviction, a defendant 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”).

¶6 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).

¶7 This court has concluded in the juvenile context that a juvenile can be required to pay restitution for damage arising from an “uncharged offense,” so long as that damage directly resulted from the act for which the juvenile was found delinquent. *In re Maricopa Cty. Juv. Action No. JV-128676*, 177 Ariz. 352, 354, 868 P.2d 365, 367 (App. 1994). And, in *Lewis*, we explained that we will consider the facts rather than the elements of the crime in determining “whether there are victims of a specific crime.” 222 Ariz. 321, ¶ 9, 214 P.3d at 413, *quoting State v. Guadagni*, 218 Ariz. 1, ¶ 15, 178 P.3d 473, 478 (App. 2008); *see also In re Stephanie B.*, 204

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Ariz. 466, ¶¶ 5-6, 17, 65 P.3d 114, 115-16, 118 (App. 2003) (upholding restitution for victim's medical expenses when 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 only being charged with forgery of checks found in wallet). And the jury may have found that Mullen was not guilty on the criminal damage count not because he did not damage the vehicle, but based on mens rea or "as a compromise verdict." *Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d at 413. Thus, Mullen's acquittal on the criminal damage count does not relieve him of liability for restitution.

¶8 Furthermore, viewed in the light most favorable to upholding the restitution award, the evidence was sufficient to support the award. Mullen acknowledged that he and the others had driven the car. As we determined in *Lewis*, "a defendant may be held responsible for all of the damage or loss caused to a victim where criminal conduct was undertaken in concert with others." *Id.* ¶ 18, quoting *State v. Wells*, 861 P.2d 828, 829 (Kan. Ct. App. 1993); see also A.R.S. § 13-804(F). Here, as in *Lewis*, "the victim's loss 'was reasonably related'" to Mullen's criminal conduct, regardless of whether he personally caused all of the damage to the vehicle while at the wheel. *Id.* ¶ 19, quoting *State v. Adams*, 189 Ariz. 235, 239, 941 P.2d 908, 912 (App. 1997).

¶9 Mullen also contends for the first time on appeal that "ordering restitution for damage where a defendant has been acquitted of causing that damage" violates his right to due process. He did not raise this argument below, and therefore review is forfeited for all but fundamental error. See *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Mullen does not, however, argue that any such error is fundamental or that he was prejudiced by it. The argument is therefore waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008); see also *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

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¶10 Accordingly, the trial court's order of restitution is affirmed.