

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

VINCENT PAUL SIMONE,  
*Petitioner.*

No. 2 CA-CR 2017-0134-PR  
Filed August 7, 2017

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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NOT FOR PUBLICATION  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.*

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Petition for Review from the Superior Court in Pima County  
No. CR20090168001  
The Honorable D. Douglas Metcalf, Judge

**REVIEW GRANTED; RELIEF GRANTED**

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COUNSEL

Law Office of Stephanie J. Meade, Tucson  
By Stephanie J. Meade  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard<sup>1</sup> concurred.

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ECKERSTROM, Chief Judge:

¶1 Vincent Simone seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. For the reasons that follow, we grant review and relief.

¶2 In 2009, Simone pled guilty to aggravated assault with a deadly weapon, endangerment, and driving under the influence of an intoxicant (DUI). The plea agreement stated:

The state acknowledges that [Simone] has paid civil damages amounting to less than the economic harm the Victims have suffered. However, [Simone] agrees to pay any remaining restitution to all of the victims . . . . [He] further waives any and all rights to have the amount of the restitution [h]e owes determined by an evidentiary (restitution) hearing. The victims' restitution claim form shall be accepted as conclusive proof of the victims' economic loss.

The trial court imposed concurrent prison terms for aggravated assault and endangerment, the longer of which was two years. For

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<sup>1</sup>The 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.

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Simone's conviction of DUI, the court suspended the imposition of sentence and placed him on a five-year term of probation.

¶3 In 2012, Simone's probation was revoked after he pled guilty to new charges of criminal damage and DUI. The state requested a restitution hearing on behalf of one of the victims in the 2009 case, stating that, although the victim had filed an affidavit of no restitution, she "does not remember that she filed this affidavit," and the state would "gather her medical bills and other documentation." Simone filed a motion objecting to restitution, arguing the victim's affidavit was binding and that she had delayed too long in seeking restitution. He additionally argued that his plea was rendered involuntary, contending he was unaware of the amount of restitution he would be required to pay because he believed the victim would not seek restitution. He also claimed he was entitled to "an evidentiary hearing to determine the amount of restitution he actually owes." The trial court denied his motion and instructed the parties "to settle the final restitution numbers prior to sentencing."

¶4 At sentencing,<sup>2</sup> Simone's counsel informed the trial court that she was "not comfortable stipulating to" an amount of restitution due to inconsistencies between the victim's affidavit and supporting documents, and requested "a full restitution hearing." The state did not object and, after hearing the victim's testimony, the court awarded \$22,180.38 in restitution—\$3,600 less than the victim had requested.<sup>3</sup>

¶5 Simone then sought post-conviction relief arguing his trial counsel had been ineffective because she did not inquire at the restitution hearing about any payments the victim had received from his insurance company as a result of the settlement of her civil claim against him. He asserted the victim had received \$15,000 from

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<sup>2</sup>The trial court imposed a sentence of time served for DUI.

<sup>3</sup>The reduction appears to have been based on a discrepancy in the victim's claimed hourly wage and the wage as shown on other documents.

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his insurance company and he was entitled to have the restitution award reduced by that amount.

¶6 The trial court held an evidentiary hearing. At the beginning of the hearing, Simone clarified the victim had received only \$9,500 from the settlement after attorney fees and costs were paid. Trial counsel testified at the hearing, acknowledging she had sent an e-mail to the prosecutor before the restitution hearing inquiring about insurance payments to the victim, but did not “follow[] through” and obtain “insurance paperwork . . . to present at the restitution hearing.” She also stated that, had she “gotten any documentation about insurance payments,” she would have presented them. The court denied relief, reasoning Simone had not shown prejudice because there was “no evidence that the insurance settlement was limited to the Victim’s economic losses” and, thus, “the insurance payment may not have reduced the net amount of the Victim’s economic losses even if it was raised during the restitution hearing.” This petition for review followed.

¶7 On review, Simone asserts the trial court erred by concluding he was not entitled to offset the amount of restitution he was to pay by the \$9,500 insurance settlement the victim had received and, thus, that he had not been prejudiced by counsel’s conduct. He argues that, based on the demand letter the victim’s attorney had sent his insurance company, the settlement was only for economic loss.

¶8 To prevail on his claim of ineffective assistance of counsel, Simone was required to show that counsel’s conduct fell below prevailing professional norms and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate prejudice, Simone must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016), quoting *Hinton v. Alabama*, \_\_\_ U.S. \_\_\_, \_\_\_, 134 S. Ct. 1081, 1089 (2014). “[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.*, quoting *Hinton*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 1089. “A

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reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Hinton*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 1089, quoting *Strickland*, 466 U.S. at 694.

¶9 A trial court is required “to order payment of restitution by the offender to the victim of a crime.” *State v. Iniguez*, 169 Ariz. 533, 535, 821 P.2d 194, 196 (App. 1991); A.R.S. § 13-603(C). Such restitution is limited, however, to economic loss, § 13-603(C), that is “any loss incurred by a person as a result of the commission of an offense” including “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, however, “does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.” *Id.*

¶10 Simone is correct that a defendant is entitled to offset payments to the victim made pursuant to a related civil proceeding, to the extent those payments compensate the victim for economic loss. See *Iniguez*, 169 Ariz. at 537-38, 821 P.2d at 198-99. But Simone is incorrect that the evidence requires the conclusion that the entire \$9,500 paid to the victim was for economic loss.

¶11 As Simone points out, the demand letter lists medical expenses for the victim of \$42,255.60 but does not include a detailed accounting of any other claimed losses except for damage to the victims’ vehicle, which was paid separately. The letter does identify other economic losses, such as lost wages, and noneconomic losses for pain and suffering. Although the letter does not provide specific dollar amounts for those losses, we cannot agree with Simone that fact requires the conclusion that the settlement was entirely for economic loss. The letter recognizes that the policy limits, which the letter to Simone from the claims department established was \$15,000 for each of the two victims, were well below what was required to compensate the victim for all losses, and asks for settlement “for the limits of [Simone’s] policy.” It was therefore unnecessary for the demand letter to provide a dollar amount for each of the victim’s losses. Other evidence in the record similarly does not suggest the settlement provided compensation for only economic loss. A letter from Simone’s insurance company and documentation from the

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victim’s attorney show that the victim received a “gross settlement amount” of \$15,000 and that the victim received \$9,500 after deduction of legal fees and expenses. Neither document shows the specific losses—whether for wages, medical bills, or pain and suffering—associated with those amounts.

¶12 Although the evidence does not mandate the conclusion that Simone is entitled to an offset for the entire amount of the settlement, the trial court nonetheless erred by denying relief based on a lack of prejudice. The court concluded Simone had not shown prejudice because even if counsel had presented evidence of the settlement, that still “may not have reduced the net amount of the Victim’s economic losses.” This reasoning, however, does not reflect the correct legal standard. *See State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 112 (App. 2010) (“When a trial court predicates its decision on an incorrect legal standard, . . . it commits an error of law and thereby abuses its discretion.”). To show prejudice, Simone was not required to show that a different result was certain, only that there was a reasonable probability of a different result—that is, “a probability sufficient to undermine confidence in the outcome.” *Hinton*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 1089, *quoting Strickland*, 466 U.S. at 694; *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64.

¶13 Although the demand letter does not require the conclusion that all the settlement was for economic loss, it strongly suggests that at least some of that amount was intended to compensate the victim for her economic loss. Thus, had trial counsel presented evidence about the settlement at the restitution hearing, it is reasonably likely the sentencing court would have reduced the restitution award. Accordingly, the trial court erred by concluding Simone had not shown prejudice resulting from counsel’s conduct.

¶14 Because the trial court concluded Simone had not shown prejudice, it did not address whether trial counsel fell below prevailing professional standards by failing to raise the settlement at the restitution hearing. And we decline to address this question for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”).

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¶15 For the reasons stated, we grant review and relief. The case is remanded to the trial court to determine whether counsel fell below prevailing professional standards and, if so, to hold a restitution hearing.