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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TRAVIS LEE HOSKINSON, Appellant.	2 CA-CR 2008-0408 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080699

Honorable John Leonardo, Judge
Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

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B R A M M E R, Judge.

¶1 Appellant Travis Hoskinson appeals his convictions for burglary in the third degree and misdemeanor theft by control, arguing the trial court erred in denying his motion to suppress evidence. Hoskinson also asserts there was insufficient evidence to support the amount of restitution the court awarded, and the court prematurely entered the criminal restitution orders. We affirm Hoskinson's convictions and the court's order reducing the indigent defense fee, attorney fees, and time payment fee to a criminal restitution order, but vacate the court's restitution award and remand the case for a restitution hearing.

Factual and Procedural Background

¶2 On appeal, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining Hoskinson's convictions and sentences. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On February 2, 2008, J. and K. discovered an unfamiliar lock on their self-storage unit, which housed, among other things, all of their music equipment, including a "high-end" guitar, base guitar, full drum set, keyboard, microphones, a public address system, equipment cables, equipment stands, and "over $1000 worth of recording software." Upon removing the unfamiliar lock, J. and K. found the unit's contents in disarray and some of their property was missing, including the guitars, amplifiers, and some tools. J. and K., non-smokers, also noted cigarette ashes and butts throughout the unit. They called police, and Detective Janice Carpenter, a Tucson Police Department burglary detective, responded.

¶3 Carpenter's investigation led her to Lisa James and James's boyfriend, Hoskinson. Carpenter discovered James also rented a storage unit she shared with Hoskinson in the same complex as J. and K.'s unit. She requested James's permission to search the unit and James consented. Unbeknownst to James, the unit contained property belonging to J. and K. Later, it was determined Hoskinson's deoxyribonucleic acid (DNA) matched that found on the cigarette butts discovered in J. and K's storage unit.

¶4 Hoskinson was indicted and convicted after a jury trial of burglary in the third degree and theft by control.[1] The trial court sentenced him to a mitigated, one-year prison term on the former charge and time served on the latter. The court awarded restitution to J. and K. in the amount of $10,220. Pursuant to A.R.S. § 13-805, the court reduced the indigent defense fee, attorney fees, and time payment fee, to a criminal restitution order, and ordered it be entered "upon the defendant's release from the custody of the Arizona Department of Corrections . . . ." It also reduced the amount of restitution to a separate criminal restitution order pursuant to § 13-805, but did not delay its entry until a later date. This appeal followed.

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[1]Initially, the state had charged Hoskinson with theft by control, a class three felony, for which the state is required to prove theft of property valued at $4,000 or more, but less than $25,000. A.R.S. § 13-1802(E). The state conceded at trial, however, that no testimony had been elicited to suggest the value of the victims' property exceeded $1,000. The court decided if the jury found Hoskinson guilty on the theft by control count, the resulting conviction would be a misdemeanor. Hoskinson was convicted of misdemeanor theft by control.

Discussion

Motion to Suppress Evidence

¶5 Hoskinson first contends the trial court erred in denying his motion to suppress the evidence obtained from the search of James's storage unit. He argues James had lacked authority to consent to the search, rendering the search violative of the Fourth Amendment. We review a trial court's denial of a motion to suppress evidence for an abuse of discretion. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). In doing so, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the trial court's ruling. *Id*. We defer to a trial court's factual findings, but review its ultimate legal conclusions de novo. *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004).

¶6 At the suppression hearing, Carpenter testified she discovered James had rented a storage unit and, upon request, obtained James's verbal and written permission to search the unit. James informed Carpenter that both she and Hoskinson stored property in the unit.[2] James also informed her that James paid the fees for the unit. When James was unable to find the keys to the unit, she called Hoskinson. After a brief conversation with James and Carpenter, during which Carpenter did not request Hoskinson's permission to

[2]Carpenter testified she had failed to note in her report that James stored her personal belongings in the unit, but James did in fact inform her of this fact.

search the unit, Hoskinson informed James that the keys were inside their shared residence. James retrieved the keys from her bedroom, and used them to unlock the unit.

¶7 James testified she had leased the storage unit in her name only and, although James permitted Hoskinson to store his things there, she had the unit's single set of keys. Hoskinson agreed to contribute to the rent, stored most of his possessions in the unit, and visited the unit more often than James. James testified she had given both verbal and written consent to Carpenter to search the unit. James only called Hoskinson when she could not find the keys because she thought he may have had them.

¶8 The Fourth Amendment to the United States Constitution prohibits unreasonable searches or seizures. Warrantless searches and seizures are per se unreasonable unless a recognized exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357 (1967). A search conducted pursuant to valid consent is one of the specifically established exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Here, the question is whether Hoskinson is bound by James's consent to search the unit.

¶9 Valid consent to search may be given by someone other than the defendant who is challenging the search's legality, including "a third party [who] has the requisite authority." *State v. Flores*, 195 Ariz. 199, ¶ 11, 986 P.2d 232, 236 (1999), *citing Illinois v. Rodriguez*, 497 U.S. 177, 186-89 (1990) and *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). Consent to search may be given by a party possessing the requisite authority if there

is "'common authority over or other sufficient relationship to the premises or effects sought to be inspected,'" *Id*., *quoting Matlock*, 415 U.S. at 171, and "if it reasonably appear[s] that a third party had common authority over the premises, then the consent to the search [is] valid." *State v. Castaneda*, 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986). Merely having a possessory interest in property does not give rise to a reasonable belief; the possessor may validly consent to a search. *See Matlock*, 415 U.S. at 171 n.7. Rather, "[t]he authority which justifies the third-party consent [to a search rests on] mutual use of the property by persons generally having joint access or control for most purposes." *Id*.

¶10 We reject Hoskinson's argument that because James did not know where the keys to the storage unit were and called Hoskinson to find them, she had lacked authority to consent to the unit's search. Carpenter knew only James was named on the unit's lease, and James would have been responsible for any delinquent rent. *See State v. Lucero*, 143 Ariz. 108, 109-10, 692 P.2d 287, 288-89 (1984). Carpenter testified James had informed her that James stored property in the unit and paid the unit's rent. It therefore was reasonable for Carpenter to conclude James had common authority over the unit.

¶11 We also reject Hoskinson's argument that because Hoskinson used the unit more often than James, James lacked common authority over the unit. First, it is unclear from the record whether Carpenter was aware Hoskinson used the unit more often than

James.[3] Second, even if Carpenter were aware of this fact, it was still reasonable for Carpenter to conclude that James possessed joint access or control over the unit because James leased, paid for, and used the unit herself. The trial court did not abuse its discretion in denying Hoskinson's motion to suppress evidence because James possessed the requisite authority to consent to the search.[4]

Sufficiency of the Evidence to Support Restitution

¶12 Hoskinson contends the trial court erred in ordering restitution in the amount of $10,220. The state suggests Hoskinson waived his right to appeal the restitution award by failing to object to it at sentencing. Hoskinson argues he preserved the issue by requesting a restitution hearing and asserts the evidence presented was insufficient to support the amount awarded. The amount of restitution to be awarded generally is determined at sentencing, and "that is where the objection may be made, *or a restitution hearing*

[3]Carpenter's knowledge is relevant because we focus on the reasonableness of her belief that James possessed common control. *See Castaneda*, 150 Ariz. at 389, 724 P.2d at 8.

[4]Although not critical to our analysis, we note in passing that Hoskinson arguably impliedly consented to the search. As our supreme court has stated, "[a] consent to search may, of course, be evidenced by conduct as well as by words. However, the constitutional protection against unreasonable searches demands a waiver by unequivocal words or conduct expressing consent." *State v. Tucker*, 118 Ariz. 76, 78-79, 547 P.2d 1295, 1297-98 (1978). Here, Hoskinson facilitated the search by informing James of the location of the unit's keys. As Hoskinson concedes, he "had control of the storage room through his control of the keys," yet disclosed the location of the keys after impliedly knowing of Carpenter's intent to search the unit. At the suppression hearing, there was no specific testimony that Carpenter informed Hoskinson of her intent to search the unit, however, Carpenter testified that Hoskinson denied storing stolen property in the unit. Thus, as Hoskinson asserts and concedes, "[Carpenter] talked to him on the phone, and, since she testified that he told her nothing in the shed was stolen, she clearly conveyed to him what her purpose was."

requested." *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992) (emphasis added). Because Hoskinson requested a restitution hearing, he did not waive his right to challenge on appeal the amount of restitution awarded. He requests that we remand this matter to the trial court for a restitution hearing and argues restitution is limited to the monetary limit established by his conviction for misdemeanor theft by control ($1,000). *See* A.R.S. § 13-1802(E).[5]

¶13 The presentence report included the following:

> Victims [J. and K.] reported that approximately $17,000 worth of property was stolen from their storage unit, which included music equipment, firearms, computer equipment and jewelry. They were able to recover some of the items stolen. [J.] stated, "Some of these items can never be replaced. They were family gifts and heirlooms. Our life memories, goals and dreams have been invaded, stolen and disrespected." They are requesting $10,220 in restitution.

¶14 Hoskinson did not object to the presentence report, but did request a restitution hearing before the trial court ordered him to pay restitution. The court declined to hold a restitution hearing, instead determining that "the testimony did satisfactorily come out at trial of the amount of [J. and K's] loss," and ordering him to pay restitution in the amount requested. At trial, J. and K. had testified that most of their music equipment had been taken

[5]We refer to A.R.S. § 13-1802 as it read at the time Hoskinson committed the offenses. It has since been amended. 2009 Ariz. Sess. Laws, ch. 151, § 3; 2009 Ariz. Sess. Laws, ch. 144, § 4; 2009 Ariz. Sess. Laws, ch. 119, § 2 .

from their storage unit. Some of this property was recovered and returned to them by police. Little testimony was elicited as to the value of any of the stolen or returned property.

¶15 When a defendant is convicted of an offense, A.R.S. § 13-603(C) requires a trial court to impose restitution against the defendant "in the full amount of economic loss [suffered by the victim or the victim's immediate family if the victim has died] as determined by the court . . . ." "Economic loss" is defined as "any loss incurred by a person as a result of the commission of an offense," including lost interest and earnings, but excluding punitive or consequential damages and damages for pain and suffering. A.R.S. § 13-105(16). Because "loss" refers to the difference between what a victim had before and after an event, "Arizona courts credit victims with the value of returned property when considering restitution." *Town of Gilbert Prosecutor's Office v. Downie*, 218 Ariz. 466, ¶¶ 11-12, 189 P.3d 393, 396 (2008).

¶16 The amount of restitution awarded is within the discretion of the trial court, but "some evidence must be presented that the amount bears a reasonable relationship to the victim's loss before restitution can be imposed." *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. 1991). A court may rely on the presentence report in setting restitution if it satisfies this standard. *See State v. Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 660 (App. 2007). We review the amount of a restitution award for an abuse of discretion. *See State v. Streck*, 221 Ariz. 266, ¶ 9, 211 P.3d 1290, 1292 (App. 2009).

¶17 We reject the state's suggestion that J. and K.'s economic loss was the value of the property taken from their unit. J. & K.'s economic loss equals the value of the property taken from their storage unit less the value of the property returned to them, plus any other loss they incurred, but excludes punitive and consequential damages and damages for pain and suffering. *See* § 13-105(16). Although the trial court determined "the testimony did satisfactorily come out at trial of the amount of [J. and K.'s] loss," there was inadequate testimony, if any at all, identifying the value of the property J. and K. had lost. The amount of restitution the court awarded was simply the amount J. and K. requested. Notably, because the amount requested in the presentence report follows a summary of the pain and suffering J. and K. endured, we cannot be certain the amount requested did not include compensation for this improper element of damage. *See id*. The trial court abused its discretion because there was no evidence demonstrating a reasonable relationship between the loss and the amount awarded.

¶18 Hoskinson requests that we remand this case for a restitution hearing and argues restitution is limited to the monetary limit established by his conviction for misdemeanor theft by control ($1,000). § 13-1802(E). The Arizona Constitution confers upon the victim of a crime the right "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." Ariz. Const. art. II, § 2.1(A)(8). A trial court may only impose restitution "'on charges for which a defendant has been found guilty, to which he has admitted, or for which he has agreed to

pay.'" *State v. Lewis*, ___ Ariz. ___, ¶ 7, 214 P.3d 409 (App. 2009), *quoting State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993). The purpose of restitution is "to make the victim whole." *In re Ryan A.*, 202 Ariz. 19, ¶ 20, 39 P.3d 543, 548 (App. 2002).

¶19 The state has the burden of establishing a restitution claim by a preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 118 (App. 2003). Notably, "'[t]he determination of the amount of restitution is part of the sentencing function of the court and is bound by different rules than the adjudication of guilt.'" *Id.*, *quoting State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991) (emphasis removed). Accordingly, "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. Because the facts, and not the elements, underlying a conviction determine whether there are victims of a specific crime, "even a 'victimless' crime may support a restitution award when the criminal conduct directly caused the economic damage." *Lewis*, ___ Ariz. ___, ¶ 9, 214 P.3d 409.

¶20 We find *Fancher* instructive. There, the defendant waived his right to a jury trial in exchange for the state reducing the charge against him to a class two misdemeanor for criminal damage, for which the state is required to prove up to $250 in damages. 169 Ariz. at 266, 818 P.2d at 251. The defendant was convicted after a court trial and the court awarded $1,185.10 in restitution, the amount of the victim's loss. *Id.* The defendant argued on appeal the court could not order restitution in any amount greater than $250, the

upper limit for the charge. *Id.* Reasoning that the purpose and attendant burden of proof for restitution differs from that of conviction, Division One of this court affirmed the trial court's restitution order. *Id*. at 267-68, 818 P.2d at 252-53.

¶21 Hoskinson was convicted of burglary in the third degree, for which the state is not required to prove any specific amount of loss. A.R.S. § 13-1506. He was also convicted of misdemeanor theft by control, for which the state is required to prove an amount of loss up to $1,000. § 13-1802(E). The elements of these crimes, however, do not constrain the amount of restitution that may be awarded. Thus, we reject Hoskinson's request to limit the amount of restitution on remand to $1,000. Rather, we remand this matter to the trial court for a restitution hearing, so that the court can determine the amount of J. and K.'s economic loss, based on the facts of the case, and award restitution accordingly. A.R.S. § 13-804(G) ("If the court does not have sufficient evidence to support a finding of the amount of restitution or the manner in which the restitution should be paid, it may conduct a hearing upon the issue according to procedures established by rule of court.").

Criminal Restitution Orders

¶22 Hoskinson also contends the trial court erred in entering criminal restitution orders (CROs) at the time of sentencing pursuant to § 13-805, which provides that the trial court "*shall* retain jurisdiction of the case" and shall enter CROs "[a]t the time the defendant completes the defendant's period of probation [or] sentence." (Emphasis added.) Because this issue was not raised at trial, we review only for fundamental error. *State v. Henderson*,

210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Imposition of an illegal sentence, however, constitutes fundamental error. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007). "'[T]he failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal.'" *Id.*, *quoting State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995).

¶23 Hoskinson asserts, and the state concedes, our recent decision in *State v. Lewandowski*, 220 Ariz. 531, 207 P.3d 784 (App. 2009), compels us to vacate the court's CROs entered pursuant to § 13-805. There, we held § 13-805 applies only at the expiration of the defendant's sentence or probation. *Id.* ¶ 15. We reasoned the imposition of a CRO before the defendant's probation or sentence has expired constitutes an illegal sentence because the premature accrual of interest obligates the defendant to pay more than § 13-805 requires. *Id.* We held the premature entry of a CRO was not harmless error. *Id.* Despite the state's concession, we affirm the court's first CRO, and need not address the second.

¶24 The court entered two CROs. The first CRO addressed the indigent defense fee, attorney fees and time payment fee. It reads as follows:

> IT IS ORDERED that the following unpaid financial assessments listed below are reduced to a Criminal Restitution Order, pursuant to A.R.S. § 13-805, upon the defendant's release from the custody of the Arizona Department of Corrections as follows:
>
> 1. An Indigent Defense Fee in the amount of $25.00
> 2. Attorney's fees in the amount of $400.00
> 3. A time payment fee in the amount of $20.00

¶25 Notably, this CRO provides for the imposition of the indigent defense fee, attorney fees, and time payment fee, "upon the defendant's release from the custody of the Arizona Department of Corrections . . . ." It appears this language comports with § 13-805 and *Lewandowski*. We therefore affirm this CRO, but note that should Hoskinson pay these fees or any part thereof before the expiration of his sentence, the CRO will be inaccurate when effective. Because this possible issue has been neither raised nor briefed, we do not address it. We do not issue advisory opinions on matters not ripe for decision. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548, 694 P.2d 835, 836 (App. 1985).

¶26 The court's second CRO addressed the restitution due J. and K. It reads as follows: "IT IS FURTHER ORDERED that Restitution to [J. and K.] in the amount of $10,220.00, be reduced to a Criminal Restitution Order, pursuant to A.R.S. 13-805. The defendant is jointly and severally liable for the restitution with his co-defendants."

¶27 Unlike the first CRO, this CRO does not specify that it becomes effective only "upon the defendant's release from . . . custody . . . ." Rather, this CRO appears to be immediately effective, ordering restitution before the expiration of the defendant's sentence in violation of *Lewandowski*. In addition to violating *Lewandowski*, we note again that, if Hoskinson were to pay restitution, even in part, before the expiration of his sentence, this CRO would also be inaccurate when effective. Indeed, A.R.S. §§ 31-261(D) and 31-230(C) provide for the automatic payment of restitution from a prisoner's trust fund, retention

account, or spendable account. However, because we vacate the restitution award because it was inadequately supported, we do not address the legality of this CRO.

Disposition

¶28 For the foregoing reasons, we affirm Hoskinson's convictions and the sentences imposed, as well as the trial court's criminal restitution order including the indigent defense fee, attorney fees, and time payment fee. However, we vacate the court's restitution award, and remand the case for a restitution hearing.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge