

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

RICHARD ALLEN REED,

Appellant.

CR–20–0385–PR

Court of Appeals
No. 1 CA–CR 17–0620

Maricopa County Superior Court
No. CR2015–117844–001

THE STATE OF ARIZONA’S RESPONSE TO PETITION FOR REVIEW

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I. Issue(s) presented for review.

1. Did the court of appeals err in awarding the victim restitution for attorneys' fees she reasonably incurred?
2. Did the court of appeals err in refusing to act outside of its jurisdiction and address claims that were not properly before it?

II. Facts material to the issue presented.

Richard Allen Reed (“Reed”) was charged with one count of voyeurism after he “used a mirror to look under a closed bathroom door while his subordinate, C.C., was inside the bathroom urinating.” *State v. Reed*, No. 1 CA–CR 16–0269, 2017 WL 1325647, *1, ¶¶ 1–2 (Ariz. App. Apr. 11, 2017) (mem. decision) available at <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2017/1%20CA–CR%2016–0269.pdf> (“*Reed I*”).

C.C. retained the law firm Gust Rosenfeld to help her “determin[e] and enforc[e] her rights as a victim under Arizona law.” R.O.A. 119; Answering Brief, at Appendix A: Keller affidavit. Craig Keller represented C.C. and C.C. “agreed to compensate [the] law firm for services at [Keller’s] hourly rate” of \$395.00 per hour, and subsequently \$405.00 for services provided after January 1, 2016. Answering Brief, Appendix A, at 4–5.

Before sentencing, C.C. indicated her intent to request restitution. *See* R.O.A. 74. After Reed contested the requested restitution, R.O.A. 74, Exhibits C,

D, E, the State filed a motion requesting \$23,784.80 in restitution to C.C., which included \$17,909.50 in attorneys' fees. R.O.A. 74.

At the restitution hearing, Keller represented C.C. R.T. 7/21/17, at 2–3. Regarding restitution for attorneys' fees, Reed argued that there was no evidence C.C. agreed to pay Gust Rosenfeld, she had no need to hire counsel, and counsel spent unreasonable amounts of time on the services he performed. R.O.A. 93, at 3–4; R.T. 7/21/17, at 45–46. Keller explained that C.C. had never been before any court in a criminal or civil matter and was “totally unfamiliar with the court process” and retained Gust Rosenfeld “to help her navigate the process, which was very confusing to her, and to fill the gap between the State presenting its best case, victim's rights, doing what it has the budget, dedication and time to do, shepherding the matter along through the system.” R.T. 7/21/17, at 42. Keller stated that the fees reflected the amount C.C. was contracted to pay, and that the restitution requested was “fair and reasonable and [C.C.] incurred every penny of it, not because of choice, but because that's what was required for her wellbeing as a result of the felony of which [Reed] was convicted.” *Id.* at 50.

The trial court later issued an under advisement ruling ordering Reed to pay restitution in the amount of \$21,033.11, which included \$17,909.50 in attorneys' fees. R.O.A. 129. Reed appealed. R.O.A. 130.

In addition to the claims raised at the restitution hearing, Reed argued on appeal under fundamental error review that Keller’s fees were not recoverable as economic damages; Keller’s hourly rate was unreasonable; and the court erred by forcing Reed to pay for C.C.’s private prosecution of Reed. *See* Opening Brief, at 10–23.

After the briefing was complete, but before the resolution of the appeal, Reed died. *State v. Reed*, 246 Ariz. 138, 140, ¶ 1 (App. 2019) (“*Reed II*”). The court of appeals dismissed the appeal pursuant to A.R.S. § 13–106(A). *Reed II*, 246 Ariz. at 146, ¶ 31. Reed’s counsel petitioned for review to this Court, claiming that the statute was unconstitutional and challenging the legislature’s authority to enact such a statute.

This Court accepted review and concluded that the legislature lacked authority to require the dismissal of a pending appeal upon a convicted defendant’s death (under A.R.S. § 13–106(A)), but possessed authority to prohibit the abatement of that defendant’s conviction, sentence, and any restitution order or fines (under A.R.S. § 13–106(B)). *State v. Reed*, 248 Ariz. 72, 74, 78, ¶¶ 2, 19 (2020) (“*Reed III*”). This Court also held that a deceased defendant’s estate or other interested party may intervene in the appeal, and remanded the case to the court of appeals for a decision on the merits, noting, “the only issue on appeal is whether the restitution amount is correct.”

On remand, the court of appeals granted Reed’s surviving spouse’s motion to intervene. She filed a supplemental brief arguing that the superior court erred “by entering a restitution judgment against Mr. Reed for his separate crime, entering that judgment as a CRO, and then recording the CRO, automatically creating a lien against the community’s property.” Intervenor Brief, at 4. The Intervenor made no challenge to the amount of the restitution awarded.

The court of appeals affirmed the restitution award and found the attorneys’ fees were economic losses recoverable as restitution; the reasonableness of the award was supported by evidence presented at the restitution hearing; that Keller did not privately prosecute Reed; and the Intervenor did not show any basis to vacate the restitution award. [OP](#) (October 20, 2020).

III. This Court should deny review.

This Court should deny review of Reed’s claims. Well-established Arizona law controls the issues, and the appellate court followed it. Reed does not argue that any Arizona Supreme Court decision should be overruled or qualified, and he fails to cite any conflicting decisions in the Arizona Court of Appeals. *See* Ariz. R. Crim. P. 31.21(d)(1)(C). As discussed below, Reed attempts to re-litigate the claims raised on direct appeal—most of which were never presented to the superior court, lack supporting evidence, and were subject to fundamental error review. Reed’s parade of policy horrors disappear when litigants timely act to preserve

their rights. Accordingly, this case does not warrant this Court's discretionary review.

There is no evidence that Keller violated Reed's due process rights by acting as a private prosecutor. The court of appeals opinion does not invite abuse of the criminal process by attorneys soliciting victim clients and riding prosecutors' coattails because reimbursement is subject to judicial determination at a restitution hearing at which criminal defendants are motivated to challenge their reasonableness. Further, the court of appeals properly awarded attorney's fees to C.C. as the facts and evidence demonstrated a clear causal nexus between Reed's criminal conduct and the attorneys' fees incurred. Finally, the court of appeals properly concluded that it lacked jurisdiction to hear Intervenor's claims.

A. The victim's attorney did not act as a private prosecutor, but more importantly, the issue is not properly before this Court.

Reed argues that this Court should accept review because the victim's attorney was acting as a private prosecutor in violation of due process. PFR at 6–8. But this is contrary to the record. [OP at 6, ¶ 17](#) (stating the record does not support the argument “that the victim's attorney impermissibly served as ‘an adjunct prosecutor.’”).

Reed's claim that Keller acted as a private prosecutor was not raised before the trial court, although Reed was aware of Keller's involvement throughout the proceedings. R.O.A. 13 (Notice of Appearance); R.O.A. 37 (showing Keller's

appearance at pre-trial conference); Answering Brief, at Appendix B, at 22 (showing Keller’s appearance at trial). It is unfair for the State to respond to these claims when a record was never developed. However, a review of Keller’s Time and Expense Details reflects that Keller’s time was spent advocating for the victim, preparing restitution requests, staying informed of court proceedings and attending trial, and communicating with the prosecutor regarding restitution and trial. Answering Brief, at Appendix B. Nothing in Keller’s expense report reflects a violation of due process. *Id.* As the victim’s attorney, it is not unusual that Keller communicated with the prosecutor concerning trial.

Moreover, if Reed believed his conviction was improperly obtained by private prosecution, he should have raised such a claim on direct appeal from his conviction. PFR at 6–8. The claim is improperly raised here, as this appeal stems from the trial court’s restitution award, and a finding of a constitutional violation will not overturn Reed’s conviction.

B. The Opinion does not “invite abuse.”

Reed argues that unless this Court accepts review, “attorneys will stampede to charge \$400 an hour to practice criminal law as a lark[.]” PFR at 9. However, a criminal defendant has ample incentive to challenge potential abuses at the restitution hearing. The only reason Reed is attempting to raise his belated issues

now is because he *never contested the hourly rate* or presented the court with what he believed were reasonable rates at the restitution hearing. [OP at 8, ¶ 17](#).

He now faults the superior court for failing to *sua sponte* reduce the hourly rate and the appellate court for affirming the reasonableness of the hourly rate on a record that supports the awarded rate and lacks any evidence to the contrary.

The victim of a crime is entitled to retain counsel. [A.R.S. § 13–4437\(A\)](#); [E.H. v. Slayton in and for County of Coconino, 249 Ariz. 248, 255, ¶ 23 \(2020\)](#) (“A victim may hire an attorney to protect her rights.”). Whether the court will approve restitution requests for attorneys’ fees, however, is within the trial court’s discretion and subject to the evidence presented at a restitution hearing. *See State v. Dixon, 216 Ariz. 18, 21, ¶ 11 (App. 2007)* (trial court has “wide discretion in setting restitution based on the facts of each case”).

C. The court properly awarded restitution for direct losses.

A person convicted of a criminal offense is required to pay restitution to any victim “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(8)*. To be recoverable, an economic loss must “flow directly from the defendant’s criminal conduct, without the intervention of additional causative factors.” [State v. Wilkinson, 202 Ariz. 27, 29, ¶ 7 \(2002\)](#).

The court of appeals correctly found that the attorneys’ fees awarded here were incurred because of Reed’s crime, flowed directly from his conduct, and were recoverable as economic losses. [OP at 6, ¶ 12](#). Reed argues that the court of appeals erred, claiming the fees were not directly caused by Reed’s criminal conduct because there was “no need” for the victim to hire counsel. PFR at 10. But, the fact that the victim was involved in a contentious trial and found it necessary to retain counsel was the direct result of Reed’s conduct.

For example, Reed’s defense and trial strategy was to malign the victim’s character. *See* R.O.A. 16 [defense disclosure statement, listing witnesses who would testify to the victim’s “dishonesty,” “preoccupation with accusing [a witness] of sexual matters,” “her affair with a married male customer,” and “running up credit card debt prior to termination.”]. His defense to the charge of voyeurism was that he watched the victim urinate because he believed she was a drug user. R.T. 2/17/16, at 28–33 (opening statement). The State moved pretrial to preclude Reed from eliciting testimony regarding C.C.’s sexual activity—which did not appear to be relevant to Reed’s defense. R.O.A. 41 (“Between November 2015 and January 2016 during discussions with defense counsel, counsel made numerous arbitrary statements regarding Victim’s past sexual history and accused her of having a proclivity for sexual relationships with men.”). Reed continued to harass the victim after court proceedings began by contacting her over social

media, ignoring the release condition that he not contact the victim. R.T. 4/15/16, at 17. Reed and C.C. lived in a small town, where news of the trial and Reed's allegations about C.C. spread. *See* R.O.A. 73, at 8–9 (victim impact letters and C.C.'s statement that Reed "fabricated lies about [her] being a drug dealer, a thief and promiscuous" which circulated around town and ultimately caused C.C. to move).

After trial, the State attempted to negotiate a restitution settlement with Reed for therapy, travel expenses, and moving expenses. *See* R.O.A. 74, at Exhibits A, B. Reed objected, telling the prosecutor to get "actual bills" so he could "go over every bill with a fine tooth comb" and he wanted "every note from the counselor," "every check ever written regarding her claims," "all her employment records" and noted, "so far that is just the beginning." R.O.A. 74, at Exhibit C. In a follow-up email, Reed's counsel stated she would be "asking for every piece of [the victim's] life to support your request for restitution." *Id.* at Exhibit D.

Keller represented C.C. at the contested restitution hearing. R.T. 7/21/17, at 9 (Reed presented an affidavit from a witness who would "reference [] how manipulative [C.C.] was."); at 10 (defense counsel's statement, "it was a well-known fact that [C.C.] manipulated individuals[.]") During testimony at the restitution hearing, the court stopped proceedings to remind counsel that the

hearing should not be personal and to focus on the purpose of the hearing—restitution. R.T. 7/21/17, at 29.

Reed’s conduct directly caused C.C. to retain counsel to represent her interests. *See State v. Madrid*, 207 Ariz. 296, 300, ¶ 10 (App. 2004) (concluding that the necessity of the victim’s family attending the defendant’s trial “was entirely a direct consequence of his act of murder”). The legislature intended “economic loss,” as defined in A.R.S. § 13–105(16), to be construed “as broadly as the term permits.” *State v. Lapan*, 249 Ariz. 540, 550, ¶ 34 (App. 2020). A victim is entitled to restitution for all economic losses flowing from the defendant’s criminal conduct, including losses which result from a victim’s voluntary decision. *Id.* at 550, ¶ 33 (affirming lost wages and related travel expenses resulting from a victim’s voluntary decision to attend trial are recoverable as direct losses). Whether any restitution request, for attorneys’ fees or otherwise, is determined to be a recoverable economic loss, is dependent upon the facts and circumstances of each case.

A court has wide discretion in setting restitution, and it need only be proved by a preponderance of the evidence. *State v. Scroggins*, 168 Ariz. 8, 9 (App. 1991); *State v. Lewis*, 222 Ariz. 321, 324, ¶ 7 (App. 2009). Arizona courts have found “a wide variety of expenses,” such as a victim’s lost wages due to voluntary attendance at trial; the cost of psychological counseling; moving expenses; taxi

fares and car rental costs; and attorneys' fees incurred during probate proceedings, to have been directly caused by the defendant's criminal conduct and subject to restitution. See, e.g., *State v. Spears*, 184 Ariz. 277, 292 (1996) (upholding restitution award to murder victim's family for attorneys' fees incurred in probate proceedings); *State v. Lindsley*, 191 Ariz. 195, 198 (App. 1997) (holding lost wages due to voluntary attendance at trial were recoverable economic loss subject to restitution); *State v. Baltzell*, 175 Ariz. 437, 439 (App. 1992) (ordering reimbursement for attorneys' fees after noting that courts have defined economic loss for purposes of restitution "quite broad[ly]" and allowed restitution for a "wide variety of expenses caused by the conduct of persons convicted of crimes"); *State v. Morris*, 173 Ariz. 14, 18–19 (App. 1992) (holding that trial court properly awarded the victim restitution for expenditures such as taxi fares and car rental costs resulting from the defendant's damage to the victim's car); *State v. Brady*, 169 Ariz. 447, 448 (App. 1991) (affirming that "moving expenses incurred in an effort to restore the victim's equanimity" were recoverable expenses "directly attributable to the crime" in the same way as "the cost of psychological counseling for the victim of a violent crime").

Here, C.C. did not choose to be involved; instead, she was the victim of Reed's criminal conduct and faced an unfamiliar system where Reed attacked her character. She was forced to hire counsel as a direct consequence of Reed's

behavior. Consequently, there was a clear and sufficient nexus between Reed's criminal conduct and the \$17,909.50 attorneys' fees, and the trial court had an "affirmative duty" to require Reed to make full restitution for C.C.'s economic loss, which included the attorneys' fees incurred.

Reed claims that the attorneys' fees were not reasonable and were not given fair value. PFR at 11. Reed points to no contrary evidence in the record to support his contention—nor can he, as he failed to make this claim in the trial court. [OP at 8, ¶ 17](#). Nevertheless, the record contains substantial evidence that the fees charged by Gust Rosenfeld were reasonable and Reed's reliance on a document, PFR, at Appendix B, at Appendix C, which includes a contract and fee schedule for attorney services performed on behalf of indigent defendants by the Office of Public Defense Services, does not undermine the sufficiency of the evidence presented below.

Moreover, Keller's affidavit was sufficient to establish the reasonableness of the fees and time expended on each service by a preponderance of the evidence. PFR, at Appendix E, at Exhibit G. The evidence presented to the superior court, by an attorney who had "personal knowledge of the legal services performed"; who was "familiar with the current rates charged by law firms engaged in general litigation practice for attorneys of [Keller's] experience, education and skill"; and who affirmed the charged services were "related to representing [C.C.] as the

victim in this case,” avowed the “sums [were] in the range of fees customarily charged in the geographic area where the services were performed,” and the time expended was “reasonable and appropriate,” were sufficient to carry the State’s burden of proof by a preponderance of the evidence. *Id.*; *Leteve*, 237 Ariz. at 407–408 (“Because counsel’s affidavits supported the restitution order, the State met its burden of proving the amount by a preponderance of the evidence.”).

Finally, Reed argues that the C.C. did not prove her loss was realized. PFR at 12. But the record contained an affidavit stating the victim agreed to pay the attorneys’ fees, and permitted the court to conclude the victim had contracted with Gust Rosenfeld to provide legal services. OP at 8, ¶ 19. This evidence was sufficient to support the burden of proof.

D. The court of appeals correctly held that it lacked authority to review Intervenor’s claims regarding whether the restitution order was properly recorded.

Reed claims that the court of appeals erred by refusing to address Intervenor’s claims regarding an alleged lien on claimed community property, but does not address the court of appeals’ conclusion that her requests exceeded the court’s authority. PFR at 13–15.

The claims raised by the Intervenor were not properly before the court of appeals as they did not originate from a lower court proceeding attempting to enforce a lien against certain property. The appellate court could only address

arguments contesting the validity of the underlying restitution order in Reed’s appeal because that is the order from which Reed filed the notice of appeal. R.O.A. 130; [Ariz. R. Crim. P. 31.2\(c\)\(1\)](#) (notice of appeal must identify order that is being appealed). Accordingly, the appellate court did not have jurisdiction to address Intervenor’s claims regarding enforcement of an alleged lien against “community property,” which has not been before a lower court. *See* [A.R.S. § 12–120.21\(A\)\(1\)](#) (this Court has “[a]ppellate jurisdiction in all actions and proceedings *originating in* or permitted by law to be appealed from the superior court[.]”).

There is no evidence in this record that the restitution order was recorded, that a lien was created on either a vehicle or home owned by Intervenor, or that the vehicle or home at issue are “community property.” Nonetheless, Intervenor asks the Court to make factual determinations (in the absence of a record) which it simply cannot do. *See* [State v. Schackart, 190 Ariz. 238, 247 \(1997\)](#) (It is well-established that an appellate court cannot consider “materials that are outside the record on appeal” because it “does not act as a fact-finder.”); *see also* [State v. Fassler, 108 Ariz. 586, 596 \(1972\)](#) (disregarding extraneous factual assertions “not found in the record,” and noting, “[m]atters in criminal cases must be reviewed and decided solely on the record made in the trial court”) (citation omitted).

Accordingly, the court of appeals properly found that Intervenor's requests exceeded the court's authority.

IV. Conclusion.

Victims have a right to retain counsel. The court of appeals correctly found that the attorney's fees here were recoverable as restitution because they were directly caused by Reed's conduct. The trial court observed the proceedings and was in the best position to determine whether a nexus existed between Reed's criminal conduct and the attorneys' fees incurred. For all the foregoing reasons, the State respectfully requests this Court deny review.

RESPECTFULLY SUBMITTED this 14th day of December, 2020.

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