

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PATRICK DALE LOPEZ,
Petitioner.

No. 2 CA-CR 2016-0092
Filed October 25, 2016

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Graham County
No. CR201300168
The Honorable Monica L. Stauffer, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Petitioner

STATE v. LOPEZ
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

ECKERSTROM, Chief Judge:

¶1 Patrick Lopez seeks review of the trial court’s order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Lopez has not met his burden of demonstrating such abuse here.

¶2 Lopez pled guilty to attempted fraudulent scheme and artifice. The trial court suspended the imposition of sentence and placed Lopez on a three-year term of probation. His convictions were based on his having, over the course of nearly a year, stolen inventory from his employer and sold it to a former customer of his employer. During a two-day restitution hearing, the victim testified that Lopez’s actions had cost him \$33,852, consisting of \$31,091 in lost inventory and falsified invoices, and \$2,761 for time he and his employees had spent investigating the thefts. The court awarded the victim the full amount requested.

¶3 Lopez sought post-conviction relief, arguing the restitution award was improper because it was based on “double hearsay” and there was “insufficient proof of the victim’s actual losses.” He additionally asserted the prosecution fee imposed at sentencing was unlawful and that his counsel had been ineffective “[t]o the extent that [he] failed to fully develop the issues set forth in this petition, or to the extent that he might have been considered to have waived these issues.” The trial court granted relief on Lopez’s claim that the prosecution fee was improper but otherwise summarily denied relief; this petition for review followed.

STATE v. LOPEZ
Decision of the Court

¶4 On review, Lopez repeats his claim that the restitution award was improper because it was based on “double hearsay and speculation rather than an accurate calculation of the victim’s losses.” After conviction, a defendant shall be ordered “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* A.R.S. § 13-804(A); *State v. Madrid*, 207 Ariz. 296, ¶ 4, 85 P.3d 1054, 1056 (App. 2004). The state must establish restitution by a preponderance of the evidence. *State v. Leon*, No. 2 CA-CR 2015-0019, ¶ 7, 2016 WL 4525044 (Ariz. Ct. App. Aug. 29, 2016). We view the evidence relating to restitution in the light most favorable to sustaining the restitution order. *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 412 (App. 2009). The trial court has “substantial discretion according to the facts of the case” in determining the amount of restitution to be awarded. *Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d at 1056. “We will uphold a restitution award if it bears a reasonable relationship to the victim’s loss.” *Id.*

¶5 Lopez has not demonstrated that the trial court erred in relying on hearsay evidence in determining the victim’s economic loss. “Restitution is part of the sentencing process.” *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991). In his plea agreement, Lopez agreed the trial court “is not bound by the rules of evidence and may receive and rely on any reliable evidence, including hearsay,” in determining “any aspect” of his sentence. “So long as the procedure leading to a restitution award is such that defendant is given the opportunity to contest the information on which the restitution award is based, to present relevant evidence, and to be heard, due process is satisfied.” *Id.* And Arizona law allows the imposition of restitution based on uncorroborated victim statements. *See State v. Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 660 (2007).

¶6 Lopez also identifies what he claims are various defects in the victim’s calculation, specifically that the victim did not provide sufficient documentation to support his estimated losses and that his estimates were inconsistent with other evidence. But these assertions are no more than a request that we reweigh the evidence. We will not do so. *Id.* ¶ 14. And some of Lopez’s

STATE v. LOPEZ
Decision of the Court

argument is based on a misapprehension of the evidence – he asserts the business to which Lopez had sold the victim’s inventory was closed for fifteen weeks, and any revenue loss during those fifteen weeks should be excluded from the restitution award. But the victim made clear that he did not request restitution for any losses occurring during that fifteen-week period.

¶7 Lopez additionally repeats his claim that counsel was ineffective “to the extent” counsel did not fully develop or may have waived the issues Lopez now raises. “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016). Lopez has identified no deficiency in counsel’s performance; we therefore do not address the claim further.

¶8 We grant review but deny relief.