

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-0136

ALANA SAVELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Prohibition—Original Jurisdiction.

August 13, 2019

WOLF, J.

Petitioner challenges the trial court's denial of her motion to dismiss an information charging her with two counts of aggravated battery with a firearm. She argues that the trial court incorrectly applied the Best Evidence Rule at the hearing on petitioner's motion to dismiss by excluding testimony about an unrecoverable video tape depicting the altercation that led to her charges. While it appears the trial court failed to determine whether the evidence was admissible pursuant to section 90.954(1), Florida Statutes, we nonetheless deny the petition because petitioner failed to proffer the excluded testimony.

Petitioner was charged after an altercation occurred at her residence during which she discharged a firearm and injured two people. At the hearing on her motion to dismiss, petitioner

attempted to have several witnesses testify about the contents of a video from her home security system that she claimed was unrecoverable. Petitioner alleges that this testimony would have provided evidence that the male victim attempted to forcibly reenter her residence at the time of the altercation, providing her with justification to discharge her firearm. The trial court sustained the State's objection to this testimony on the grounds that its admission would violate the Best Evidence Rule.

The Best Evidence Rule requires the offering party to present "an original writing, recording, or photograph . . . in order to prove the contents of the writing, recording, or photograph." § 90.952, Fla. Stat. However, an exception to the rule exists: "[t]he original of a writing, recording, or photograph is not required . . . and other evidence of its contents is admissible when . . . [a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith." § 90.954(1), Fla. Stat.; *Yero v. State*, 138 So. 3d 1179, 1184 (Fla. 3d DCA 2014) (holding, in part, that testimony about the contents of a video that is unrecoverable is admissible under an exception to the Best Evidence Rule provided there was no bad faith on the part of the offering party). Here, it is not clear the trial court conducted a bad faith analysis.

However, Best Evidence Rule violations are subject to harmless error analysis. *T.D.W. v. State*, 137 So. 3d 574, 577 (Fla. 4th DCA 2014). Here, petitioner did not proffer or attempt to proffer the excluded testimony. Only a small portion of what might have been said was presented to the court. We cannot consider the admissibility of excluded testimony which is not present in the record. *See Jacobs v. Wainwright*, 450 So. 2d 200, 201 (Fla. 1984). Accordingly, we cannot deem that any potential error was harmful.

The petition is DENIED.

B.L. THOMAS and ROBERTS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Rudolph C. "Rusty" Shepard, Jr. and Jean Marie Downing of Shepard Law, Panama City, for Petitioner.

Ashley Moody, Attorney General, and Steven E. Woods, Assistant Attorney General, Tallahassee, for Respondent.