NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. CRYSTAL MARIE DIXON, Appellee.	)	Case No. 2D20-490

Opinion filed December 30, 2020.

Appeal from the Circuit Court for Pinellas County; Joseph Bulone, Judge.

Ashley Moody, Attorney General, Tallahassee, and Blain A. Goff, Assistant Attorney General, Tampa, for Appellant.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellee.

MORRIS, Judge.

The State appeals a restitution order imposed after entry of Crystal Marie Dixon's no contest plea to a charge of scheme to defraud. Because the trial court erred by refusing to conduct a restitution hearing when asked to do so by the State and,

thereafter, by imposing a lesser amount of restitution than what the State requested, we reverse.

I. BACKGROUND

Ms. Dixon's charge arose after her employer discovered financial discrepancies in sales receipts and determined that Ms. Dixon had been accepting cash payments but failing to register the sales into the computer system between January and April of 2019. Ms. Dixon was ultimately arrested. During a pretrial hearing, Ms. Dixon indicated she wanted to resolve the case and enter a plea in exchange for forty-eight months of probation and payment of $3000 in restitution. The State declined to stipulate to the restitution amount, asserting that the employer suffered a loss of $20,848.14 and would not be willing to accept $3000 in restitution. Ultimately, the pretrial hearing was reset to allow both sides to depose the victim's loss prevention officer.

At the next pretrial hearing, both sides notified the court that they were unable to reach a plea agreement and that the amount of restitution was still in dispute. The State told the trial court that the loss prevention officer had reviewed two weeks of surveillance footage and determined that Ms. Dixon took $1,839.56 over that period of time. The loss prevention officer then reviewed business records and inferred that based on the rate of loss that occurred in the two-week period for which he reviewed surveillance footage, Ms. Dixon took over twenty thousand dollars over the entire four-month period as alleged in the information. The loss prevention officer had not reviewed footage for the entire four-month period, but the State noted that he was willing to do so if needed for a restitution hearing.

Defense counsel asked the trial court to set a restitution hearing, but the trial court, sua sponte, offered to allow Ms. Dixon to enter a no contest plea if she agreed to serve 180 days in jail and pay $1,839.56 in restitution. In doing so, the trial court stated, "That's all they can prove." Thereafter, Ms. Dixon withdrew her plea and entered a no contest plea. The State objected, noting that the victim "has indicated that they can prove . . . the amount that they've requested." The State then requested a restitution hearing if the court was unwilling to order the requested restitution. The trial court merely replied, "All right. Factual Basis." The hearing then proceeded with the acceptance of the plea and imposition of sentence, including the $1,839.56 in restitution. At the conclusion of the hearing, the trial court told Ms. Dixon that she had a right to a hearing on all the fees and costs and the amount of restitution, though it failed to acknowledge that both the State and defense counsel had previously asked for such a hearing.

II. ANALYSIS

We review a restitution award for abuse of discretion. The award must be supported by competent, substantial evidence, and the State must prove the amount by the greater weight of the evidence. See Danzey v. State, 186 So. 3d 1064, 1065 (Fla. 2d DCA 2016); State v. Shields, 31 So. 3d 281, 282 (Fla. 2d DCA 2010).

"Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." § 775.089(7), Fla. Stat. (2019). "[D]ue process requires a formal hearing on the amount of restitution," and where a defendant objects to the amount of restitution and requests a hearing, a trial court's failure to hold such a hearing requires a reversal of the restitution order. Lewis

v. State, 288 So. 3d 1232, 1235 (Fla. 2d DCA 2020) (quoting Barone v. State, 222 So. 3d 1235, 1236 (Fla. 5th DCA 2017)); see also Molter v. State, 892 So. 2d 1115, 1117 (Fla. 2d DCA 2004) ("Once [the defendant] objected to the amount of restitution, the trial court was required to hear evidence on the matter." (first citing § 775.089(7), Fla. Stat. (2002), and then citing Smith v. State, 801 So. 2d 1043, 1045 (Fla. 5th DCA 2001))); Strickland v. State, 746 So. 2d 1189, 1190 (Fla. 2d DCA 1999) ("When a defendant objects to restitution and requests proof by the State of the restitution amount, he is entitled to separate hearing." (quoting Noonan v. State, 709 So. 2d 635 (Fla. 2d DCA 1998))); Gardipee v. State, 620 So. 2d 255, 256 (Fla. 2d DCA 1993) (reversing order imposing restitution where appellant objected to amount of restitution and trial court initially stated it would permit a restitution hearing but failed to do so); Barone, 222 So. 3d at 1236 ("A trial court should not enter a restitution order without a hearing absent an agreement by the defendant."); Smith v. State, 801 So. 2d 1043, 1045 (Fla. 5th DCA 2001) ("The trial court should have conducted an evidentiary hearing once the defendant objected to the restitution amount."). That principle also applies in the context of a State objection and request for a formal restitution hearing. Nothing in the statute limits the right to a restitution hearing to an objecting defendant, and due process requires that both parties have the right to prove the necessity for the type or amount of restitution. Indeed, restitution cannot be based on speculation, but must instead be proven by competent, substantial evidence. Morrill v. State, 268 So. 3d 160, 162 (Fla. 4th DCA 2019).

But here, by refusing to conduct a restitution hearing despite both defense counsel and the State requesting one, the trial court foreclosed the State's opportunity

to prove the amount of restitution by competent, substantial evidence. The fact that the prosecutor informed the trial court that the loss prevention officer had arrived at the $1,839.56 amount after reviewing two weeks of surveillance footage is not dispositive. The prosecutor's comments are not evidence. See Lewis, 288 So. 3d at 1235. More importantly, the prosecutor informed the trial court that for purposes of a restitution hearing, the loss prevention officer was willing to review all four months of surveillance footage in order to definitively establish how much money had been taken between January and April of 2019. Thus, the trial court erred by failing to hold the requested restitution hearing. Cf. State v. Castro, 965 So. 2d 216, 219 (Fla. 3d DCA 2007) (holding that order denying restitution which contained a finding that the victim's loss was not established, reasonable, credible, and was likely inflated was not supported by the evidence where the trial court refused to hold a restitution hearing and thus no evidence was ever presented despite State's objection and request for a hearing).

Accordingly, we reverse and remand for further proceedings.

NORTHCUTT and STARGEL, JJ., Concur.