DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PATRICK DERRICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-62

March 25, 2022

Appeal from the County Court for Pasco County; Anne Wansboro, Judge.

Christopher George DeLaughter of Law Office of Darlene Calzon Barror, Tampa, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Chelsea N. Simms, Assistant Attorney General, Tampa, and Allison C. Heim, Assistant Attorney General, Tampa (substituted as counsel of record), for Appellee.

ATKINSON, Judge.

Patrick Derrick appeals his conviction and sentence for one count of criminal mischief with damage to property of $200.00 or

less. He argues the trial court abused its discretion overruling his best evidence rule objections to testimony about the contents of a surveillance video that was not admitted into evidence at trial. We agree and reverse his conviction and sentence and remand for a new trial. We write also to briefly address a restitution issue should it arise again on remand. We affirm the trial court's ruling on Derrick's constitutional challenge without further discussion.

On July 15, 2020, Derrick's neighbor discovered a large scratch on the newly replaced trunk of his car. The neighbor obtained a surveillance video from the apartment office to discover how his car had gotten scratched. This video was not admitted at trial. Instead, over Derrick's objections, the neighbor and a police officer who had viewed the video testified that it showed Derrick approach the neighbor's car with a vape pen in his right hand and touch the trunk of the car with his left hand. They testified that the video did not show what Derrick had been doing with his right hand while he was touching the trunk with his left hand. They testified that the video showed Derrick leave the area and return about ten minutes later to touch the trunk again with his left hand.

The State also presented two letters from Derrick to his neighbor in which he apologized for scratching the car, claimed the scratch was unintentional, and offered to pay for the damage. The police officer who interviewed Derrick also testified that Derrick had confessed to scratching the car with his vape pen because he was angry with the neighbor.

Section 90.952, Florida Statutes (2020), provides: "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." This rule, commonly known as the best evidence rule, "is predicated on the principle that if the original evidence is available, that evidence should be presented to ensure accurate transmittal of the critical facts contained within it." *Lamb v. State*, 246 So. 3d 400, 410 (Fla. 4th DCA 2018) (quoting *T.D.W. v. State*, 137 So. 3d 574, 576 (Fla. 4th DCA 2014)). "A witness's in-court description of actions depicted in a video recording is 'content-based testimony that violates the best evidence rule' when offered to prove the crime without introduction of the video in evidence." *J.J. v. State*, 170 So. 3d 861, 862 (Fla. 3d DCA 2015) (quoting *T.D.W.*, 137 So. 3d at 576).

Derrick argues the neighbor's and police officer's testimonies violated the best evidence rule because they recounted the contents of the surveillance video, the video was not admitted into evidence, and the evidence was offered to prove that Derrick had committed criminal mischief by scratching the neighbor's car with his vape pen. The State responds that the trial court did not abuse its discretion because the testimony was not offered to prove the crime since the witnesses testified that the video did not show Derrick scratching the car with his vape pen, only that he had been near the trunk with a vape pen in his right hand. The State argues that the witnesses' testimony about the video only provided them with the identity of the person to investigate—not evidence that he had committed the crime.

Even presuming for the sake of discussion that the witnesses' testimony about the content of the video was not offered to prove that Derrick actually scratched the neighbor's car with his vape pen, the testimony was offered to prove contents of the video for the purpose of establishing Derrick's guilt—that *Derrick* was the person who committed the crime. The video was offered to prove Derrick's identity as the only person who had been near the car at the

relevant time and, thus, the only person with the opportunity to scratch the car. Therefore, the trial court abused its discretion by overruling Derrick's best evidence rule objections. *See T.D.W.*, 137 So. 3d at 576.

This error was not harmless. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) ("The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."). During closing arguments, the State repeatedly referred to the witnesses' testimony describing the contents of the surveillance video. For example, the State argued that the testimony demonstrated the willfulness of Derrick's actions because he left the scene and returned to touch the car again. The State also argued that the testimony was consistent with Derrick's confession and the letters, supporting a conclusion that Derrick had willfully scratched the car. Therefore, the State has not proven beyond a reasonable doubt that the testimony did not contribute to the verdict. *See Allen v. State*, 192 So. 3d 554, 558 (Fla. 4th DCA 2016) ("Further, the fact

that the state emphasized this erroneously admitted evidence in its closing argument also may have tainted the validity of the jury's verdict." (citing *Donaldson v. State*, 722 So. 2d 177, 185 (Fla. 1998))); *cf. T.D.W.*, 137 So. 3d at 577–78.

Although reversal is required on best evidence rule grounds, we also address restitution issues raised by the parties. Immediately after trial, the trial court ordered Derrick to pay $200.00 restitution. The trial court explained that although the neighbor testified that the estimate that he received to repair the trunk of his car was more than $600.00, the trial court would not hold a restitution hearing or award restitution at $600.00 because the jury had determined that the amount of damage was $200.00 or less.

This court has held that "due process requires a formal hearing on the amount of restitution." *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)). This court has also held that "a trial court is not bound by the monetary thresholds of an adjudicated offense when it decides restitution" and may award restitution in an amount greater than the maximum dollar amount

associated with the offense for which the defendant was convicted. *Eylward v. State*, 289 So. 3d 989, 991–92 (Fla. 2d DCA 2020); *see also J.O.S. v. State*, 689 So. 2d 1061, 1064–65 (Fla. 1997). If, after a new trial, Derrick is convicted of criminal mischief, the trial court must hold a formal restitution hearing to determine the amount of restitution owed, regardless of the maximum dollar amount associated with the offense. *See Lewis*, 288 So. 3d at 1235; *Eylward*, 289 So. 3d at 991–92.

Affirmed in part; reversed in part; remanded.

CASANUEVA and SILBERMAN, JJ., Concur.

Opinion subject to revision prior to official publication.