IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-539

Filed: 6 December 2016

Lincoln County, No. 13 CRS 53150

STATE OF NORTH CAROLINA

v.

SUSAN ANNETTE ALLEN, Defendant.

Appeal by Defendant from judgment entered 29 October 2015 by Judge Gregory R. Hayes in Lincoln County Superior Court. Heard in the Court of Appeals 17 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. Townsend, for the State.

Ryan McKaig for Defendant-Appellant.

INMAN, Judge.

Susan Annette Allen ("Defendant") appeals from judgment entered upon her conviction for felony larceny. On appeal, Defendant contends that the trial court erred in: (1) admitting text messages without a proper foundation, and (2) ordering Defendant to pay restitution in the amount of $18,750. After careful review, we find no error.

The evidence at trial establishes the following factual background. On 19 September 2013, Edward Tomasini ("Mr. Tomasini") discovered that a large amount of cash had been stolen from a locked strongbox in his home. Mr. Tomasini kept the strongbox in his attic hidden under some insulation. Defendant's conviction arises from this theft.

Defendant was engaged to Mr. Tomasini's son, Richard ("Richard"). The two had been in a relationship for approximately four years and lived together. While Defendant and Richard were together, they would regularly visit Richard's parents. Richard and Defendant would also take care of his parents' house and dog when his parents were out of town. Mr. Tomasini's wife at times left a letter to Richard explaining that the strongbox contained important paperwork and cash, in the event of an emergency such that Richard needed to access the box's contents. Mr. Tomasini testified he had been adding to the money in the strongbox for a number of years and kept it for emergencies. He also kept a record of the amount added and corresponding dates. He testified that prior to the theft, the strongbox contained $19,400 in cash. The last time Mr. Tomasini had opened the strongbox was October 2011. He verified that the cash was still in the box at that time.

On 17 September 2013, Richard informed his father that he and Defendant had been having problems and had broken up. Two days later, Richard called his father and told him to check the strongbox. After noticing that things in his own

house were missing, Richard became concerned that his parents might also be missing some items. Mr. Tomasini immediately retrieved the strongbox from the attic, opened it, and discovered all of the cash was missing. Mr. Tomasini suspected that Defendant had opened one of his wife's letters, read it, and taken the money from the strongbox. Mr. Tomasini testified that no one, other than his wife and son, had access to his house or knew of the strongbox and its contents.

After discovering that the cash from the strongbox was missing, Mr. Tomasini called Defendant's mother and advised her of the suspected theft. He then reported the theft to the Lincoln County Sheriff's Department. Detective Mark Stamey from the Sheriff's Department investigated the case. He checked the strongbox for fingerprints, but was not able to lift any.

Richard, meanwhile, had been exchanging text messages with Defendant. Defendant sent Richard a text message on the night of 19 September 2013 informing him that her father had left a voicemail message for Richard's mother. She asked Richard to have one of his parents return the call. During the course of the text messages, Richard accused her of taking the money from his parents, asked if she had told her parents about the theft, and demanded that she stop lying. Defendant responded that she had told her parents and that they knew everything. Richard also asked Defendant how she would repay "the eighteen to nineteen thousand dollars [she] took with no job." Defendant responded, stating "I'm sorry. I'm so sorry. I will

make this right if it takes me 100 years. . . ." Defendant told Richard that she was scared, had lost her job, and wanted to make it appear as if she was contributing to the couple's expenses. The two exchanged 21 text messages in total, over the span of approximately one and a half hours. Richard later forwarded the text messages to Det. Stamey, who printed them. Neither Richard nor Det. Stamey altered the text messages.

During his investigation, Det. Stamey located Defendant at a shelter and met with her. During the conversation, Defendant admitted to Det. Stamey that she had stolen $12,000 in cash from the Tomasini residence in either April or May of 2012. She told Det. Stamey that she had used the money to buy things for Richard and contribute to their income.

Defendant was charged by bills of indictment with felony larceny and possession of stolen goods. A jury found Defendant guilty of both charges, but the trial court arrested judgment on the possession of stolen goods charge. The trial court sentenced Defendant to a suspended term of 6 to 17 months and placed her on 60 months of supervised probation. The trial court also ordered Defendant to serve a split sentence of 20 days and to pay restitution in the amount of $18,750.00. Defendant failed to give timely notice of appeal, and this Court allowed Defendant's petition for writ of certiorari to review the judgment.

I.

Defendant first challenges the trial court's admission of the text messages purportedly sent to Richard by Defendant, contending that the State failed to properly authenticate them. Evidence Rule 901 provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen Stat. § 8C-1, Rule 901(a) (2015). Rule 901 also provides a nonexclusive, illustrative list of "examples of authentication or identification conforming with the requirements of this rule," including the following, in pertinent part:

> (1) Testimony of Witness with Knowledge.-Testimony that a matter is what it is claimed to be.
>
> . . . .
>
> (4) Distinctive Characteristics and the Like.-Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

N.C. Gen. Stat. § 8c-1, Rule 901(b)(1), (4).

In the instant case, the State relied on Richard's testimony regarding the text messages to authenticate them. Defendant argues that Richard's testimony was insufficient because: (1) his identification was unreliable, given the couple's history; (2) Defendant's name was not listed in the messages or heading; and (3)

authentication of text messages generally requires testimony from a neutral third-party witness. For the reasons that follow, we disagree.

First, we reject Defendant's argument that Richard's testimony was insufficient. Richard was undoubtedly a knowledgeable witness. He was in a relationship with Defendant for several years, lived with her, and was engaged to her. Defendant's claim that Richard's testimony was unreliable given his relationship with Defendant was not a matter of admissibility. Rather, it was a matter of credibility for the jury to decide. *State v. Orr*, 260 N.C. 177, 179, 132 S.E.2d 334, 336 (1963) ("The credibility of witnesses and the proper weight to be given their testimony must be decided by the jury—not by the court.").

Second, Richard's testimony demonstrated that the text messages in question were in fact from Defendant. Richard testified that the five pages of text messages introduced at trial originated from his iPhone. He testified that he received the messages on 19 September 2013, that he was communicating with Defendant via her cell phone number, that it was the only phone number he used to communicate with Defendant in the entire time he knew her, and that he never communicated with another individual on that phone number. Richard also testified that he forwarded the text messages to Det. Stamey, and that neither he nor the detective altered them in any way. Furthermore, the text messages contained "distinctive characteristics" that demonstrated they were from Defendant. For instance, in one of the messages,

Defendant claimed that she used the money in question to buy Richard the "green egg," which is the term Defendant used for a barbeque she bought Richard. She also provided her father's cell phone number and asked for one of Richard's parents to return her father's call. Therefore, we conclude that Richard's testimony is sufficient to lay a proper foundation for the text messages.

Finally, we address Defendant's contention that testimony for a third-party witness—such as a cellular phone company employee—is necessary to authenticate text messages. In support of this contention, Defendant relies on *State v. Taylor*, 178 N.C. App. 395, 632 S.E.2d 218 (2006), in which transcripts of text messages sent to and from a murder victim's cell phone number were admitted into evidence and authenticated by an employee of a cell phone company. The defendant argued that the messages were not properly authenticated because the State made no showing of who actually typed and sent the text messages. We rejected the defendant's argument, concluding that the text messages contained sufficient circumstantial evidence that tended to show the victim was the person who sent and received them. *Id.* at 414, 632 S.E.2d at 230-31. Nowhere in *Taylor* did we hold that text messages must be authenticated by a third-party witness. *Id.* Indeed, there was no way for the victim in *Taylor* to authenticate the messages because he was deceased. We therefore reject Defendant's argument that third party testimony was necessary. Based on the foregoing reasons, we conclude that the trial court did not err in

determining that the State laid a proper foundation for admission of the text messages.

Defendant also appears to suggest that the trial court erred in admitting the text messages because the State failed to establish that the text messages met the business record exception to the hearsay rule. *See* N.C. Gen Stat. § 8C-1, Rule 802, 803(6) (2015). This argument, however, is not preserved for appeal. At trial, Defendant only argued that the text messages lacked a proper foundation—he never claimed that they constituted inadmissible hearsay. Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Additionally, while Defendant appears to generically reference the plain error standard of review, he does not specifically argue that the trial court committed plain error by admitting the text messages. Therefore, we decline to address the business record issue raised by Defendant under plain error review.

II.

Next, Defendant argues that the trial court erred by entering a restitution award in the amount of $18,750. She contends that the amount of restitution is not supported by the evidence.

"The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing." *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010). To justify an order of restitution, "there must be something more than a guess or conjecture as to an appropriate amount of restitution." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997) (internal citation and quotation marks omitted). This Court has held that "[a] restitution worksheet, unsupported by testimony, documentation, or stipulation, is insufficient to support an order of restitution." *State v. Blount*, 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011) (internal citation and quotation marks omitted).

At sentencing, the State requested restitution in the amount of $19,500, which is the amount that appears on the restitution worksheet. The State indicated that this amount was based on the testimony of Mr. Tomasini. The trial court instead ordered Defendant to pay restitution in the amount of $18,750, which is the amount appearing on the indictment.

Defendant argues that because Mr. Tomasini testified he maintained cash between the amounts of $18,750 and $19,400, the award was based solely on conjecture. We disagree with Defendant's assertion. Mr. Tomasini testified in great detail as to his process for maintaining the cash in the strongbox, including keeping a record of the amounts he added. Mr. Tomasini was further able to pinpoint the last

time that he opened the strongbox—it was around the time of his mother's death in October 2011. At that time, Mr. Tomasini confirmed that the cash was in place.

Even though the trial court opted for a lesser amount, Mr. Tomasini's testimony was nonetheless sufficient to establish the amount of restitution. We have previously held that "[w]hen, as here, there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005) (internal citation and quotation marks omitted). Therefore, we hold that the trial court did not err in its restitution award.

NO ERROR.

Judges STROUD and TYSON concur.

Report per Rule 30(e).