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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-116

Filed: 2 October 2018

Buncombe County, No. 15 CRS 85127

STATE OF NORTH CAROLINA

v.

DOUGLAS MATHEW DREHER, Defendant.

Appeal by defendant from judgment and order entered 11 July 2017 by Judge Todd Pomeroy in Buncombe County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Joseph L. Hyde, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

ZACHARY, Judge.

Defendant Douglas Matthew Dreher appeals from a judgment entered upon his conviction for unauthorized use of a motor vehicle. On appeal, Defendant argues that the trial court erred in its order for restitution. For the following reasons, we reverse the trial court's order.

Background

On 8 May 2015, Ronnie Davis, an officer with the Buncombe County DWI Task Force, stopped Defendant for driving "at a high rate of speed." Defendant had been driving alone in a 1987 Ford truck. Officer Davis "detected an odor of alcoholic beverage [on Defendant's] breath" and arrested him for driving while impaired. After the truck had been towed, Officer Davis learned that it belonged to Melissa Weiss. On 3 April 2017, Defendant was indicted for driving while impaired and speeding. He was later indicted for unauthorized use of a motor vehicle. Weiss also brought a civil suit against Defendant.

The charges against Defendant came on for trial at the 10 July 2017 criminal session of Buncombe County Superior Court, the Honorable W. Todd Pomeroy presiding. The State dismissed the speeding charge and Defendant pleaded guilty to driving while impaired. Defendant waived his right to a jury trial, and a bench trial was held on the remaining charge of unauthorized use of a motor vehicle.

The evidence introduced at trial tended to show the following: In March of 2015, Weiss took her diesel truck for repairs to Defendant, a mechanic. Defendant told Weiss the truck had "a blown head gasket, and it was going to cost $4,000" to repair. He also told Weiss "he needed $2,000 in cash up front." Over the next two months, Defendant made several excuses for why the truck was not ready. Weiss requested that Defendant return her truck after being told that repair costs had risen to $6,000, but Defendant refused. Weiss paid Defendant another $2,000, but she

"ended up getting back" the "second and third installments" she had paid to Defendant. In total, Weiss had given Defendant $2,000 by this point.

The morning after his arrest, Defendant sent Weiss a text message that her truck had been impounded. When Weiss went to retrieve her truck, she noticed "the gas tanks were gone and there was like a old rusty RV tank ratchet-strapped up there." In addition, the hood of the truck was missing, and "it had 5,000 more miles in the two months he had it." Defendant refused to return the gas tanks or hood, but Weiss paid $50 to an older gentlemen who worked for Defendant to retrieve her missing parts.

Weiss testified that after the return of her truck, expenses continued to mount. Weiss spent $375 to have her truck towed three times due to the missing parts, as well as $1,350 at "Xpertech Mechanic" having her fuel system repaired—another issue Defendant told Weiss he would fix. It cost Weiss $125 to re-register her vehicle after the incident, and she spent $250 on insurance. In addition to these expenses, Weiss testified:

> I needed to rent a U-Haul for $500 [for a work trip]. And then eventually I had to buy another work vehicle. So I spent $4,000 on a used van to replace my work truck. The truck was $4,000 originally. And right after I bought it I had bought brand-new tires for it, which I think were about $600.

On cross-examination, Weiss admitted she was estimating these expenses. Counsel for Defendant referenced an affidavit Weiss signed on 5 May 2017 claiming

she only suffered $1,040 in direct damages,[1] but Weiss clarified that amount did not account for future expenditures such as having to purchase a replacement for her vehicle. At the close of evidence, the trial court found beyond a reasonable doubt that Defendant was guilty of unauthorized use of a motor vehicle.

Regarding the amount of restitution owed, the State requested

> [the] bare minimum, the $2,000, . . . that she is yet to receive. And also I believe the total was $4,500 that the state is requesting that were direct damages -- for the tows when she picked it up from impound, and then taking it to other places, as well as the mechanic fees to have all the other items re-installed back onto the car of $1,350.

A restitution hearing was then held so that Defendant could testify on his own behalf. Defendant stated that he had lost his civil case, and been ordered to pay Weiss approximately $4,500. Defendant also recounted the expenditures he incurred in repairing Weiss's truck. He asserted that $1,040 was the proper amount of restitution "because that's the only thing [Weiss] could come up with."

Defendant received a forty-five day sentence, which was suspended for eighteen months, and was placed on probation. The trial court ordered Defendant to pay a total of $3,725 in restitution to Weiss. Specifically, Defendant was ordered to pay Weiss $2,000 "for the initial payment of funds; $375 for the three towing fees;

[1] The affidavit was used in Weiss's civil suit against Defendant.

[and] $1,350 for the mechanical inspection." Defendant gave notice of appeal in open court.

Standard of Review

"[W]e review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (quotation marks omitted). "A trial court's award of restitution must be supported by competent evidence in the record." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997). Even absent an objection at trial, this Court may review whether "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." N.C. Gen. Stat. § 15A-1446(d)(18) (2017).

Discussion

Defendant argues that the trial court erred by failing to use the formula set forth by the General Assembly to determine the appropriate award of restitution for crimes involving property damages. We agree.[2]

When restitution is imposed as a condition of probation, "the [trial] court shall take into consideration the factors set out in [N.C. Gen. Stat. §] 15A-1340.35 and [N.C. Gen. Stat. §] 15A-1340.36." N.C. Gen. Stat. § 15A-1343(d) (2017); *see generally*

[2] Defendant also contends that the trial court erred by ordering him to pay $3,725 in restitution because the trial court ordered restitution that was not the direct or proximate cause of the criminal offense. Because the case must be remanded for the trial court to use the statutory formula for determining restitution, we need not address this argument.

State v. Canady, 153 N.C. App. 455, 460-61, 570 S.E.2d 262, 266 (2002) (providing examples of when restitution is appropriate under N.C. Gen. Stat. § 15A-1343(d)). Pursuant to N.C. Gen. Stat. § 15A-1340.35, the trial court shall consider the following in cases where the offense results "in the damage, loss, or destruction of property of a victim of the offense":

> a. Return of the property to the owner of the property or someone designated by the owner; or
> b. If return of the property under subdivision (2)a of this subsection is impossible, impracticable, or inadequate:
> > 1. The value of the property on the date of the damage, loss, or destruction; or
> > 2. The value of the property on the date of sentencing, less the value of any part of the property that is returned.

N.C. Gen. Stat. § 15A-1340.35(a)(2) (2017).

In the present case, the restitution ordered by the trial court indicates that the trial court did not consider the value of Weiss's truck—the property at issue. The only testimony offered regarding the value of the truck was the purchase price of the truck when Weiss bought it in November 2014 for $4,000. Moreover, the trial court specifically stated that it was ordering restitution of "$2,000 to the victim in this case for the initial payment of funds; $375 for towing fees; [and] $1,350 for mechanical inspection." Absent from the trial court's order is any mention of the value of Weiss's truck on 8 May 2015, and the value of the truck after 8 May 2015.

This Court has not required trial courts to adhere to rigorous fact finding when determining restitution amounts. *See*, *e.g.*, *State v. Freeman*, 164 N.C. App. 673, 596 S.E.2d 319 (2004) (holding the trial court did not err by averaging two values to determine the cost of some illegally cut timber, both of which were supported by evidence—the property owner's testimony and the value set forth in the forestry report); *State v. Burkhead*, 85 N.C. App. 535, 536, 355 S.E.2d 175, 176 (1987) ("The trial court is not required to make specific findings of fact in support of its recommendation of work release[;] [h]owever, . . . restitution to the aggrieved party as a condition of obtaining work release must be supported by the evidence." (citation omitted)). However, we have required trial courts to adhere to statutory requirements in ascertaining the amount of restitution.

Here, the trial court was not presented with any testimony as to either the value of the truck on the date of the unauthorized use, or the truck's value afterward. Without determining the truck's value on 8 May 2015, there was no means by which the trial court could competently establish the proper amount of restitution. Thus, the trial court erred by failing to consider the value of the truck "on the date of the damage, loss, or destruction" as well as after the unauthorized use.

On remand, in order to make Weiss whole, the value of the truck after Defendant's unauthorized use must be subtracted from the value of the truck prior to the unauthorized use. The extent of Defendant's unauthorized use includes the

thousands of miles driven by Defendant while the truck was in his possession, together with Weiss's damages resulting from the truck's impoundment after the events of 8 May 2015, including towing expenses. Weiss's testimony concerning the value of the truck before and after Defendant's unauthorized use may be considered in making this determination, and her testimony may be challenged on cross-examination.

Conclusion

For the reasons stated, we "remand for the trial court to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution." *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 849-50 (2011).

REVERSED AND REMANDED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).