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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1282

Filed: 6 August 2019

Hoke County, Nos. 16CRS 51260, 16CRS 51270, 16CRS 51287-88

STATE OF NORTH CAROLINA

v.

KANISHA RACHELLE MCBRIDE, Defendant.

Appeal by Defendant from judgment entered 12 March 2018 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.

Edward Eldred, for the Defendant-Appellant.

BROOK, Judge.

I. Background

On 27 July 2016, Kanisha McBride (“Defendant”) first took cameras, range finders, beach towels, and homeware products from Wal-Mart without paying and, in a second incident the same day at the same store, took meat and foam plates without paying. The Loss Prevention department for Wal-Mart recognized Defendant from previous encounters. Defendant had been previously convicted for stealing from this

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Wal-Mart on several occasions and from other Wal-Marts in surrounding counties. A grand jury indicted her on two counts of first-degree trespass, one count of habitual larceny, and two counts of habitual larceny. Defendant pleaded guilty to all five counts, and the trial court accepted Defendant's plea.

Following the plea colloquy, the prosecutor stated "there's also \$3,267.93 in restitution." A Restitution Worksheet was then handed to the judge with the amount of \$3,267.93 to be paid to Wal-Mart. No other testimony, evidence, or explanation was given to supplement the restitution calculation put forth by the State. Judge Brown incorporated the Restitution Worksheet in the judgment by reference.

On 16 March 2018, at the conclusion of the trial, Defendant timely entered written notice of appeal. Defendant's notice of appeal referenced the criminal charges and criminal judgment, but not the civil restitution issue.

Judge Tanya Wallace filed amended judgments on 25 March 2019. She placed the values from the Restitution Worksheet into the actual judgment documents.

Defendant responded to the amended judgments by petitioning this Court for certiorari to "review the judgments entered by Judge Tanya Wallace." We grant Defendant's petition and the writ shall issue for the reasons that follow. We also vacate the restitution judgments.

II. Appellate Jurisdiction

A. Defective Notice of Appeal of Restitution Issue

As stated previously, the notice of appeal only references the criminal charges and criminal judgment rendered by the trial court. It does not acknowledge that the appeal is for the restitution judgment entered without evidentiary support. However, given that the court reaches the merits of this case via the petition for writ of certiorari, we need not go into a further analysis of the defective notice of appeal here.¹

B. Writ of Certiorari

Writs of certiorari are considered to be “extraordinary remedial writ[s]” and can serve as substitutes for an appeal. *State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1964) (citation omitted). Rule 21 of the North Carolina Rules of Appellate Procedure governs writs of certiorari. It specifies what a petition must include: namely, “a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion[.]” N.C. R. App. P. 21(c). Our Rules of Appellate Procedure further permit the issuance of a writ of certiorari in this Court’s discretion “when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a)(1). Given the writ’s sufficiency and the fact that Defendant’s failure to timely appeal the restitution judgment resulted from

¹ Generally, where the notice of appeal does not set forth the specific issue the party wishes to appeal, it is considered improper and the court may dismiss the appeal on such grounds. *See* N.C. R. App. P. 3 (explaining the filing instructions, time restrictions, content requirements, and methods of service for civil appeals).

her trial attorney's action, we exercise our discretion and grant the petition in accordance with the analysis below.

First, Defendant's writ complies with the requirements of Rule 21(c). Defendant gives the facts of the trial court proceeding in great detail within the petition. These facts lay out the question presented by the petition: the prosecution gave no evidence to support the restitution amount stated in court or in the Restitution Worksheet. Defendant argues this supports the issuance of the writ. Defendant also attached copies of the amended judgments certified by a notary public to the petition for writ of certiorari. Therefore, Defendant has fully satisfied the requirements of Rule 21(c).

Second, it is within the Court's discretion to issue the writ of certiorari in the current controversy pursuant to Rule 21(a)(1). *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) (granting petition for certiorari where there was no evidence that respondent contributed to the error and the consequences of the adjudication order were serious). Defense counsel's notice of appeal focuses mistakenly on the criminal charges as opposed to whether the judgment's requirement that Defendant pay restitution was sufficiently supported.

Thus, the petition for certiorari is legally sufficient, the writ is within our discretion to issue, and, as discussed below, puts forward a meritorious issue. Accordingly, we grant the petition, and issue the writ.

III. Merits

Turning to the merits, Defendant argues that the judgment's requirement that restitution be paid was not sufficiently supported by the evidence before the trial court. We agree. Accordingly, we vacate the judgment's requirement that restitution be paid and remand the case to the trial court for further proceedings consistent with this opinion.

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citation omitted). Conclusory evidence and unsupported statements are inadequate. *See State v. Swann*, 197 N.C. App. 221, 225, 676 S.E.2d 654, 657-58 (2009) (holding in the absence of evidence to support the restitution worksheet, the restitution issue is remanded); *State v. Calvino*, 179 N.C. App. 219, 223, 632, S.E.2d 839, 843 (2006) (noting insufficient evidence to support the restitution calculation is enough to vacate the trial court's holding). Thus, "a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citation omitted). Relatedly, a "prosecutor's unsworn statement" regarding the amount of restitution owed "is insufficient to support" a restitution judgment. *Wilson*, 340 N.C. at 727, 459 S.E.2d at 196.

Here, the judgment's requirement that restitution be paid is not adequately supported by evidence because the State submitted only a conclusory, unsworn statement. The prosecution stated a restitution amount, handed the trial judge the Restitution Worksheet reflecting that amount, and later that total was included in the amended judgments.² In short, the unsworn testimony of the prosecutor alone served as the basis for the challenged judgments. The State concedes that this case is thus indistinguishable from *Wilson*, and, as such, "that the restitution award must be vacated" on account of insufficient evidence. We agree.

IV. Conclusion

For the foregoing reasons, we grant the petition for certiorari, issue the writ, and vacate the restitution judgments entered by the trial court because they were not supported by evidence.

VACATED AND REMANDED

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).

² When the record on appeal has been filed, an amendment or correction may only be made by the trial court judge with permission of the appellate court. *See* N.C. R. App. P. 9(b)(5) ("On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content."). Here, the trial court did not seek permission to make the amendment to the judgments. This error is not prejudicial here, however, as both the State and Defendant indicate that the amended judgments do not affect their arguments. Accordingly, our consideration of this case focuses on these amended judgments.