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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-915

Filed: 5 May 2020

Beaufort County, Nos. 16 CRS 51041, 51042

STATE OF NORTH CAROLINA

v.

ANITA CHAMAINE ZACHARY

Appeal by defendant from judgments entered 6 May 2019 by Judge Wayland J. Sermons, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sage A. Boyd, for the State.

Winifred H. Dillon for defendant.

ARROWOOD, Judge.

Anita Chamaine Zachary (“defendant”) appeals from judgments imposing restitution entered after her plea of guilty to two counts each of uttering a forged instrument and forgery. Defendant has filed a Petition for *Writ of Certiorari* with this Court because she lacks an appeal of right from an order of restitution entered

upon a plea of guilty. *See* N.C. Gen. Stat. § 15A-1444(e) (2019). In our discretion, we grant the *writ of certiorari*, finding merit in defendant's argument that the trial court erred in ordering restitution in amounts not supported by the evidence. Therefore, we vacate the trial court's order of restitution and remand for further proceedings consistent with this opinion.

I. Background

On 9 January 2017, defendant was indicted on two counts each of identity theft, forgery, uttering a forged instrument, and obtaining property by false pretenses. The charges were predicated upon her cashing of two fraudulent checks at stores in Beaufort County. The State's evidence established that defendant used false identification under the name "Tierra Poole" to cash fraudulent checks at Acre Station Meat Farm and Cratches Mini Mart, totaling \$299.90 and \$289.67 respectively.

Pursuant to an agreement with the State, defendant pleaded guilty to two counts each of uttering a forged instrument and forgery and the State dismissed the remaining charges. The trial court accepted defendant's plea and consolidated her sentences into two judgments with one count each of uttering a forged instrument and forgery. The court imposed an active sentence of 18-19 months in one judgment and a consecutive sentence of 10-21 months, suspended for 36 months' supervised probation, for the other.

At the sentencing hearing, the State submitted restitution worksheets requesting that defendant pay restitution of \$329.90 to Acre Station Meat Farm and \$324.67 to “J.S.Z., Inc.” of Jamesville, North Carolina. After confirming with the prosecutor that J.S.Z., Inc. and Cratches Mini Mart were one and the same, the court ordered restitution in accordance with the State’s recommendation. Defendant timely noted her appeal.

II. Discussion

As an initial matter, we note that defendant’s challenge to the trial court’s order of restitution is preserved despite her failure to object at trial. N.C. Gen. Stat. § 15A-1446(d)(18) (2019); *State v. Elkins*, 210 N.C. App. 110, 126, 707 S.E.2d 744, 756 (2011) (citations omitted). Where a defendant and the State have not entered into a “definite and certain” stipulation concerning restitution, a trial court’s order of restitution must be supported by competent evidence in the record. N.C. Gen. Stat. § 15A-1340.36(a) (2019); *Elkins*, 210 N.C. App. at 126-27, 707 S.E.2d at 756 (citations omitted). We review orders of restitution *de novo* in determining their evidentiary support. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation omitted). Unsworn statements of counsel for the State are insufficient to support an order of restitution, *Elkins*, 210 N.C. App. at 127, 707 S.E.2d at 756 (citation omitted), as are restitution worksheets unsupported by other evidence before the court. *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citations omitted).

In the instant case, no evidence was presented to support the precise amount of restitution ordered for each victim. The only evidence presented by the State indicated that defendant cashed fraudulent checks in the amounts of \$299.90 and \$289.67. The State provided no explanation for its requests for restitution amounts higher than the values of each check. Therefore, the trial court erred in its order of restitution because competent evidence did not support the amount of restitution ordered.

Defendant also argues that competent evidence does not support the trial court's award of restitution to J.S.Z., Inc. as a victim. We disagree. Defendant cites *Elkins* for the proposition that unsworn statements by a prosecutor do not amount to competent evidence to support an award of restitution. 210 N.C. App. at 127, 707 S.E.2d at 756 (citation omitted). However, in *Elkins* we applied this principle as to the *amount* of restitution ordered where no evidence of facts warranting any order of restitution was presented to the trial court. *Id.* Here, the prosecutor merely confirmed for the court that J.S.Z., Inc., was the entity that owned Cratches Mini Mart, thus qualifying it as a victim of defendant's offense. We do not believe this principle is applicable to this set of circumstances.

III. Conclusion

The trial court erred by ordering restitution in amounts higher than those supported by the evidence before it. We therefore vacate the court's order of

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restitution and remand for entry of a new order that imposes restitution in amounts commensurate with the evidence before it, namely, \$299.90 to Acre Station Meat Farm and \$289.67 to J.S.Z., Inc. of Jamesville.

VACATED AND REMANDED.

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).