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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-778

Filed: 21 July 2020

Sampson County, No. 17 CRS 50472

STATE OF NORTH CAROLINA

v.

FAWN ANN COLYN

Appeal by defendant from order and judgment entered 11 September 2018 by Judge Robert F. Floyd, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 10 June 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. Gibbs, for the State.*

*Charlotte Gail Blake for defendant-appellant.*

ZACHARY, Judge.

Defendant Fawn Ann Colyn appeals from a judgment entered upon a jury's verdict finding her guilty of obtaining property by false pretenses, and the trial court's order awarding restitution. On appeal, Defendant argues that the trial court erred by ordering restitution in the amount of \$1,250. Upon review, we affirm.

**Background**

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On 23 October 2017, a Sampson County grand jury returned a true bill of indictment formally charging Defendant with obtaining property by false pretenses. The State's evidence tended to show that in 2014 or 2015, Michael Hicks bought a white 2000 Mitsubishi Galant for \$1,250, and that he drove it regularly. Thereafter, Hicks replaced the motor of the vehicle at a cost of approximately \$400. When the vehicle needed a new transmission in June of 2016, Hicks had it towed to Defendant's home so that her boyfriend could replace the transmission. On 6 December 2016, Defendant held herself out to have the lawful right to sell and dispose of the motor vehicle, and sold it to a salvage yard for \$134.10. The car was crushed and recycled. Hicks did not discover that his vehicle had been sold until January of 2017, at which time law enforcement personnel began an investigation into the matter.

On 11 September 2018, Defendant's case came on for trial by jury in Sampson County Superior Court, the Honorable Robert F. Floyd, Jr., presiding. The jury found Defendant guilty of obtaining property by false pretenses. The trial court imposed a sentence of 6-17 months in the custody of the North Carolina Division of Adult Correction, suspended upon successful completion of 36 months of supervised probation. The trial court further ordered, *inter alia*, that Defendant pay \$1,250 in restitution to Hicks as a condition of her probation. Defendant filed timely notice of appeal.

**Discussion**

*I. Jurisdiction*

“While [D]efendant did not specifically object to the trial court’s entry of an award of restitution, this issue is deemed preserved for appellate review[.]” *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004); accord *State v. Hunt*, 250 N.C. App. 238, 253, 792 S.E.2d 552, 563 (2016).

*II. Order of Restitution*

Defendant first argues that the trial court erred by ordering her to pay \$1,250 in restitution because that amount was not supported by competent evidence. We disagree.

The trial court is authorized to order restitution “for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” N.C. Gen. Stat. § 15A-1340.34(c) (2019). “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, *disc. review improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997).

Our Supreme Court has explained that such evidence must be “adduced at trial or at sentencing.” *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). On appeal, whether the amount of restitution imposed by the trial court is supported by competent evidence adduced at trial or sentencing is reviewed de novo. *Hunt*, 250 N.C. App. at 253, 792 S.E.2d at 563.

Notably, “the quantum of evidence needed to support the [restitution] award *is not high*.” *State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704 (2018) (emphasis added). “[W]hen there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal.” *Id.*; *see also State v. Tate*, 187 N.C. App. 593, 597, 653 S.E.2d 892, 895 (2007) (“Because of the nuanced nature of the decision to impose restitution it makes little sense for an appellate court, significantly more removed from the case than the trial court, to scrutinize the decision closely.” (citation omitted)).

Where, as in the instant case, 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). “In determining the amount of restitution” in cases where the offense results “in the damage, loss, or destruction of property of a victim,” and where it is “impossible, impracticable, or inadequate” to return said property, the trial court must consider: (1) “[t]he value of the property on the date of the damage, loss, or destruction; or” (2) “[t]he value of the property on the date of sentencing, less the value of any part of the property that is returned.” *Id.* § 15A-1340.35(a). The State bears the burden of establishing the value of the loss sustained by the victim as a result of the charged offense. *Tate*, 187 N.C. App. at 596, 653 S.E.2d at 895.

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In the instant case, Defendant contends that, at the time that she sold Hicks's car for \$134.10, the vehicle was not drivable, and thus, Hicks's statement "that he thought the car was still worth \$1,250 . . . was wishful thinking at best." Hence, Defendant asserts that the restitution award was not supported by competent evidence. This argument lacks merit.

Here, the trial court ordered restitution in the amount of \$1,250. At trial, Hicks testified that he paid \$1,250 for the car one or two years prior to the events in question, and that he had since spent \$400 "put[ting] another motor in" the vehicle. Hicks also noted that the car was worth \$1,250 at the time he left it for repair by Defendant's boyfriend—that is, had Hicks sold the car at that time, he would have asked \$1,250 for it. This testimony supports the trial court's restitution award in that amount.

This Court has repeatedly stated that a restitution award must be based on evidence, such as testimony, and not on the prosecutor's or trial court's guess as to the amount of damages. *See State v. McNeil*, 209 N.C. App. 654, 667-68, 707 S.E.2d 674, 684 (2011) (determining that the trial court erred in awarding restitution where there was *no evidence* of the cost of the broken door or who paid for it, "merely testimony and visual evidence that [the victim's] door was 'busted in' " (citation omitted)); *see also State v. Daye*, 78 N.C. App. 753, 757, 338 S.E.2d 557, 561 (concluding that the prosecutor's guess as to the amount of the funeral bill was

insufficient to support the restitution award of \$5,000, in that “there must be something more than a guess or conjecture as to an appropriate amount of restitution”), *aff’d per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986); *Clifton*, 125 N.C. App. at 479-80, 481 S.E.2d at 398-99 (determining that there was no evidence presented as to the cost of the victim’s funeral, and that the trial court’s *guess* as to the cost was insufficient to support a \$3,000 restitution award).

Thus, contrary to Defendant’s assertions on appeal, the \$1,250 restitution award was supported by competent evidence—Hicks’s sworn testimony regarding the vehicle’s value on the date of loss—and was not the result of “a guess or conjecture.” Accordingly, we conclude that there was competent evidence to support the restitution award.

### *III. Ability to Pay Restitution*

Defendant also contends that the trial court erred in failing to consider her ability to pay \$1,250 in restitution. We disagree.

“Whether the trial court properly considered a defendant’s ability to pay when awarding restitution is reviewed by this Court for abuse of discretion.” *Hillard*, 258 N.C. App. at 98, 811 S.E.2d at 705. In contrast to the amount of restitution owed, which the State bears the burden of proving, the defendant shoulders the burden of demonstrating an inability to pay restitution. *See Tate*, 187 N.C. App. at 596-97, 653 S.E.2d at 895; *State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004)

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(“Because [the defendant] failed to present evidence showing that she would not be able to make the required restitution payments, we find no error.”).

N.C. Gen. Stat. § 15A-1340.36(a) requires that the trial court consider the defendant’s resources in setting the amount of restitution. Among the resources a trial court is to consider are “*all real and personal property owned by the defendant and the income derived from the property, the defendant’s ability to earn, the defendant’s obligation to support dependents, and any other matters that pertain to the defendant’s ability to make restitution[.]*” N.C. Gen. Stat. § 15A-1340.36(a) (emphasis added).

At sentencing in the present case, the State requested that Defendant be ordered to pay restitution of \$1,250 to Hicks for the loss of his vehicle. Defense counsel noted that Defendant was on disability. At trial, however, Defendant testified that she owned substantial assets, in particular, a home with a garage, which she was selling because she intended to move to Iowa.

Defense counsel also asked the trial court to allow Defendant 36 months, rather than 24 months, in which to make restitution, stating that 36 months “should be sufficient for her to be able to pay the restitution” award of \$1,250. Divided into equal payments over 36 months, Defendant would be obligated to pay approximately \$34.73 per month in restitution. The trial court acceded to Defendant’s request.

On appeal, Defendant argues that the trial court erred by making no further inquiry upon learning that Defendant was on disability, and by failing to consider her ability to pay. We disagree.

First, it is Defendant's burden to establish an inability to make restitution, which she did not do. To the contrary, Defendant represented that she had the ability to pay the restitution award if allowed 36 months in which to do so. In that Defendant "failed to present evidence showing that she would not be able to make the required restitution payments, we find no error." *Riley*, 167 N.C. App. at 349, 605 S.E.2d at 215.

In addition, it is evident from the trial transcript that the trial court considered Defendant's ability to pay restitution. In announcing the award, the trial court stated:

The [trial] [c]ourt finds she [is] indigent, on disability, and I'll remit supervision fees. I'll reduce the court costs to a civil judgment. The restitution and attorney fees, however, will be paid as a condition of probation. She will be placed on probation for a period of 36 months. The first monies received shall be applied to the restitution. She shall be subject to the regular terms and conditions of probation.

The trial court properly considered Defendant's ability to pay, assented to Defendant's request for 36 months in which to do so, and rendered its judgment accordingly.

Therefore, having failed to carry her burden, Defendant's argument on appeal must fail; in addition, we are satisfied that the trial court considered Defendant's



ability to pay in accordance with N.C. Gen. Stat. § 15A-1340.36(a), and did not abuse its discretion in ordering Defendant to pay \$1,250 in restitution.

**Conclusion**

The trial court neither erred nor abused its discretion in imposing a \$1,250 restitution award. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges BERGER and BROOK concur.

Report per Rule 30(e).