IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR ST LUCIE COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 17-AP-5
Lower Tribunal No. 16-MM-1356

MARK HERMESDORF,

Appellant,
v.

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

STATE OF FLORIDA,

Appellee.
_____/
Decision filed July 24, 2018.

Appeal from the County Court for St. Lucie County; Philip Yacucci, Jr., Judge.

Carri Leininger, Williams, Leininger & Cosby P.A., North Palm Beach, for appellant.

Bruce Colton, State Attorney, and Jonathon Alford, Assistant State Attorney, Fort Pierce, for appellee.

PER CURIAM.

On November 15, 2016, an Indian River County Sheriff's Office deputy served a St. Lucie County bench warrant on the Appellant, who was in the Indian River County jail on other charges, for failing to appear in court on a charge of contracting without a license. A month later, the Appellant pled no contest to contracting without a license. The trial court adjudicated him guilty and sentenced him to four months in the county jail with credit for time served, plus court costs. On January 25, 2017, the trial court held a separate evidentiary hearing on restitution, and the next day, it rendered an order awarding $21,500.00 in restitution to the victim.

Issue 1—Whether the Restitution Award is Supported by Competent Substantial Evidence

The Appellant argues that the trial court erred in awarding the restitution because it is not supported by competent substantial evidence. Specifically, he argues that the State improperly

used hearsay evidence to prove the amount of damages. A trial court's restitution order is reviewed for an abuse of discretion, and the amount must be supported by competent substantial evidence. *Prinz v. State*, 149 So. 3d 65, 68 (Fla. 4th DCA 2014). The State has the burden of proving the amount of restitution, and it must be proved by a preponderance of the evidence. *Bennett v. State*, 944 So. 2d 524, 525 (Fla. 4th DCA 2006).

Hearsay evidence may not be used to determine the amount of restitution when the defendant makes a proper objection. *T.J.N. v. State*, 977 So. 2d 770, 773 (Fla. 2d DCA 2008). When testimony about estimates for repairs is submitted as evidence to prove the truth of the matter asserted, it is hearsay unless it is made by the declarant while testifying at the hearing. *Id*.; *see also* §90.801(1)(c), Fla. Stat. (2016). The declarant of the estimate is the person who created it. *Id*. In *Allen v. State*, the victim described damage to her car and provided the written estimate to get it fixed. 162 So. 3d 1055 (Fla. 2d DCA 2015). However, the person who wrote the estimate did not testify, and the proper foundation was not laid to admit the estimate under the business records hearsay exception because the State did not call a witness who could testify that "production of estimates is a regularly conducted business activity." *Id*. at 1057 (quoting *Butler v. State*, 970 So. 2d 919, 920-21 (Fla. 1st DCA 2007) (the State did not lay the proper foundation for the business records exception to get the written estimate admitted when it did not call a witness to authenticate it, and the State did not meet the requirements of certification when the defendant made a proper hearsay objection)); *see also* §90.803(6)(a), Fla. Stat, (2016). The State did not establish the foundation for the business record exception through certification or declaration either. *Id*.; *see also* §90.803(6)(c). Therefore, the Second District held that since the defendant made a proper objection to the hearsay evidence, the case had to be reversed and remanded for a new restitution hearing. *Id*. The Fifth District has also held that repair estimates are hearsay and cannot support an award of restitution if the defendant properly objects. *A.J.A. v. State*, 215 So. 3d 639 (Fla. 5th DCA 2017).

In the instant case, the State argues that *Gonzalez v. State* applies, which involved the victim testifying at the restitution hearing about the value of stolen jewelry based on her personal knowledge, information from her husband, who also testified, and comparable values that she obtained from the internet and Kay Jewelers. 40 So. 3d 86, 87 (Fla. 4th DCA 2010). On appeal, the defendant argued that the trial court relied on speculative hearsay. *Id*. at 88. However, the Fourth District found that victim's testimony was neither speculative nor hearsay. *Id*. It stated that

the victim's testimony on the value of stolen items can be sufficient when supported by proper documentation. *Id*. at 89.

Here, the facts of the case are much more analogous to the *Allen, Butler, T.J.N.*, and *A.J.A.* line of cases from the First, Second, and Fifth Districts; the *Gonzalez* case is distinguishable. The estimates objected to at the hearing were quotes to show the cost to complete the remodel job, which is equivalent to an auto body shop estimate to repair damage on a car, like in *Allen, T.J.N., and A.J.A.*, or an estimate to replace a damaged exterior door, like in *Butler*. *Gonzalez*, on the other hand, involved what appears to be printouts from the internet, specifically Kay Jeweler's website, in an effort to value jewelry, coins, and other merchandise that the defendant stole from the victim. 40 So. 3d at 87. These cases create two distinct categories: one involves estimates for professional services to be rendered to repair damage, and the other involves valuing tangible merchandise. Estimates prepared by contractors to finish a remodel project are an offer of professional services to repair damage, which makes the instant case much more similar to *Allen, Butler, T.J.N.*, and *A.J.A.* Consequently, the trial court should not have relied on the State's argument that *Gonzalez* applied and that allowing the victim to testify about the estimates because she was there while the contractor drafted them was enough to properly admit the estimates into evidence over a valid hearsay objection from the Appellant.

The State asked the trial court for a restitution award of $23,000.00. Without the two estimates, evidence left in the record is the victim's testimony, a detailed bid proposal between the Appellant and the victim, checks that the victim paid the Appellant, and an invoice from Jetson's appliances. The bid proposal shows that the victim paid $27,145.00, but the checks total $25,295.00. Both were admitted into evidence without objection from the Appellant. The trial court specifically stated that it did not include the Jetson's appliances in its calculation for the restitution award, even though the invoice was admitted into evidence without objection. In fact, it gave the Appellant the "benefit of the doubt" on the Jetson's appliances, which resulted in a $1,500.00 credit. The State's request of $23,000.000 minus the $1,500.00 Jetson's appliance credit is how the trial court arrived at the final number of $21,500.00 of restitution; however, it is not supported by bid proposal of $27,145.00 or the checks of $25,295.00. The victim's testimony is the only evidence left, and it does not clarify the discrepancy in the numbers. *See Williams v. State*, 850 So. 2d 627, 628 (Fla. 2d DCA 2003) (The State can carry its burden of proof in a restitution hearing "by presenting testimony of a witness with knowledge of the amount of damage and

repairs, or by presenting uncontested documentary evidence." (quoting *C.S. v. State,* 617 So.2d 863, 864 (Fla. 1st DCA 1993))). When there is no competent substantial evidence to support the amount of restitution awarded, the case must be reversed and remanded for a new restitution hearing. *Bianchini v. State*, 77 So. 3d 247, 248 (Fla. 4th DCA 2012) (in prosecution for contracting without a license, there was no competent substantial evidence to support the restitution award when the only evidence was based on hearsay that was properly objected to by the defendant). Therefore, this case must be reversed and remanded for a new restitution hearing.

The Fourth District has acknowledged that it is "practically impossible for the victim to establish the restitution amount without relying on hearsay evidence" in certain cases, and it recommended that the Legislature revisit §775.089(7) to allow trial courts greater discretion in setting restitution amounts. *Phillips v. State*, 141 So. 3d 702, 706 (Fla. 4th DCA 2014). The Fifth District has joined in this recommendation. *Schenk v. State*, 150 So. 3d 275, 276 (Fla. 5th DCA 2014). However, the Legislature has not yet taken action.

Issue 2—Whether the Trial Court Erred in Refusing to Hear Evidence of the Arbitration Award

Next, the Appellant argues that the trial court erred in failing to consider evidence of the arbitration award between the Appellant and the victim. The interpretation of a statute is a purely legal matter and is subject to de novo review. *Kirby v. State*, 863 So. 2d 238, 241 (Fla. 2003). §775.089(8), Fla. Stat., (2016) states:

> The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding. **An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.**

(Emphasis added). The statute recognizes that the restitution obligation is primary, but the victim shall not receive a double recovery. *Kirby v. State*, 863 So. 2d 238, 243 (Fla. 2003). Also, the statute assumes that the criminal restitution will precede the civil recovery, but the sequence is not predetermined. *Id*.; (citing *Weinstein v. State*, 745 So.2d 1085, 1086 (Fla. 4th DCA 1999)). The amount of a settlement is a relevant factor for a trial court to consider in setting the amount of restitution in order to prevent a double recovery to the victim. *Id*. at 244; (citing *Weinstein*, 745 So.2d at 1086).

In the instant case, the Appellant immediately brought up an arbitration hearing at the beginning of the restitution hearing and notified the trial court that the Appellant and victim had already been to arbitration in December 2015:

> …this issue has already been decided by an arbitrator through Thumbtack and reconciled. This has already been arbitrated. **There is a binding legal document enforced that both parties agreed to in this matter. I have that document for you, Your Honor, if you'd like to take a look at this…**

(Emphasis added). The State countered by citing the Kirby case for the proposition that a "civil judgment does not collaterally stop this court, the criminal court from seeking damages as to restitution", and the trial court agreed with the State without considering the Appellant's arbitration document. Later in the hearing during a relevance objection, the trial court asked about the amount paid during arbitration, but then it did not allow the Appellant to answer:

> The Court: Sustained, other than if there was anything paid as a result of that arbitration. I will be happy to hear that and consider that, but not the arbitration issue itself. **Was there anything paid?**
>
> State: Not to my knowledge.
>
> **Appellant: I'm not—**
>
> **The Court: Okay. Okay. I just wasn't sure. Thank you.**
>
> The Appellant: Your Honor, we would be requesting that I be allowed to ask her because it's—it's relevant because it goes to the same issue that—that we're arguing here, Your Honor.
>
> The Court: I'm going to overrule—excuse me, I'm not going to allow that. I—I've already ruled on that arbitration issue. **Again, if there's money that was paid as a result of that arbitration then I will definitely take that into consideration, but both sides are telling me no money was paid as a result of that so I don't need to go into the arbitration issue…**

It seems that the trial court knew it should have considered the amount awarded in arbitration, but, for some reason, it did not allow the Appellant to speak clearly on the issue. It then stated three more times that it would not consider anything from arbitration, which was error, especially when the record is not clear on whether a monetary award was awarded to the victim, which would have required setoff under §775.089(8). The trial court's refusal to consider the Appellant's arbitration document that he tried to present at the beginning of the restitution hearing and make clear for the record whether the arbitrator awarded an amount to the victim that needed to be setoff under §775.089(8) was reversible error.

Reversed and remanded for a new restitution hearing.

BRONIS, MCNICHOLAS, JJ., and ROBERTS, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.