

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502017AP00144AXXXMB
L.T. NO.: 502016MM012824AXXXMB

EDNA BURTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

_____/

Opinion filed: MAY 03 2019

Appeal from the County Court in and for Palm Beach County,
Judge Mark Eissey.

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PER CURIAM.

Appellant Edna Burton appeals her conviction for Criminal Mischief. Appellant raises two arguments on appeal: (1) the trial court erred in denying Appellant's motion for judgment of acquittal, and (2) the trial court abused its discretion in relying on hearsay evidence to determine the restitution amount. We find the trial court's denial of Appellant's motion for judgment of acquittal was proper and affirm Appellant's conviction for Criminal Mischief without further

comment. As for Appellant's second argument, we agree that the trial court improperly relied on hearsay evidence to determine the restitution amount. We therefore reverse the restitution award and remand this case for a new restitution hearing.

The restitution at issue in this case stems from damages Appellant caused to a speed bump on a private lane owned by Daniel Hiatt. At the restitution hearing, the State sought to introduce a written repair estimate Mr. Hiatt had received from Robert Weiss Concrete Designs. The State sought introduction of the written estimate under the business records exception to the rule against hearsay. But rather than have someone from Robert Weiss Concrete Designs testify, the State sought to introduce the estimate through Mr. Hiatt, who testified that he has utilized Robert Weiss Concrete Designs for numerous projects over a twenty-year period. Following Mr. Hiatt's testimony, the trial court admitted the written estimate under the business records exception, and further appears to have relied solely on that estimate in determining the restitution amount awarded. Appellant argues it was improper for the written estimate to be introduced through Mr. Hiatt, as he is neither a records custodian for, nor an employee of, Robert Weiss Concrete Designs. We agree.

Restitution must be proven by competent, substantial evidence, and hearsay evidence may not be used to determine a restitution award where there is a proper objection by the defense. *Conway v. State*, 115 So. 3d 1058, 1059 (Fla. 4th DCA 2013). However, a written repair estimate, even though hearsay, may be introduced to support a restitution award if it is properly admitted under the business records exception to the hearsay rule. § 90.803(6), Fla. Stat. (2017). To qualify evidence under the business records exception, the proponent of the evidence must establish:

- (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary

course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So.2d 952, 956 (Fla. 2008). Additionally, absent a stipulation among the parties or a certification that complies with the requirements of sections 90.803(6)(c) and 90.902(11), Florida Statutes, the records must be introduced through a witness qualified to testify to the predicate requirements, which includes either a records custodian or other “person who, by the very nature of that person’s job responsibilities and training, knows and understands the business records sought to be introduced.” *Lassonde v. State*, 112 So. 3d 660, 663 (Fla. 4th DCA 2013); *see also Cooper v. State*, 45 So. 3d 490, 492 (Fla. 4th DCA 2010) (“In order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony.” (quoting *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980))). While the testifying witness does not necessarily need to be the person who created the record, the proper person to introduce a business record will typically be an employee of the business. *See Lassonde*, 112 So. 3d at 662–63 (discussing cases).

Here, we find the trial court abused its discretion in allowing the written estimate to be introduced through Mr. Hiatt. Mr. Hiatt’s testimony might have established him to be a longtime customer of Robert Weiss Concrete Designs, but that does not qualify him to testify about that business’ recordkeeping practices. Specifically, Mr. Hiatt’s testimony did not establish him to be well enough acquainted with Robert Weiss Concrete Designs’ business practices as to enable him to provide the predicate testimony necessary to admit the written estimate under the business records exception. *Cooper*, 45 So. 3d at 492; *Lassonde*, 112 So. 3d at 662–63.

Accordingly, we AFFIRM Appellant’s conviction, but REVERSE the restitution award

and REMAND this case for a new restitution hearing.

KASTRENAKES, KELLEY, and COLBATH, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502017AP000144AXXXMB
L.T. NO.: 502016MM012824AXXXMB

EDNA MCDUGALL BURTON,
Appellant,

Opinion/Decision filed: MAY 03 2019

v.

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Mark Eissey

STATE OF FLORIDA,
Appellee.

Appealed: February 12, 2018

_____ /

DATE OF PANEL: FEBRUARY 26, 2019

PANEL JUDGES: KASTRENAKES, KELLEY, COLBATH

AFFIRMED/REVERSED/OTHER: AFFIRMED IN PART, REVERSED IN PART

DECISION BY: PER CURIAM

CONCURRING:)	DISSENTING:)	CONCURRING SPECIALLY:)
)	With/Without Opinion)	With/Without Opinion)
<u>JS</u>)))
<u>4/30/19</u>)))
DATE: _____ J.)	_____ J.)	_____ J.)
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<u>5/1/19</u>)))
DATE: _____ J.)	_____ J.)	_____ J.)