STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1109,

In the Matter of the Welfare of: M. L. B., Child

Filed June 30, 2009
Reversed and remanded
Collins, Judge[*]

Olmsted County District Court
File No. 55-JV-07-6899
Winona County District Court
File Nos. 85-JV-08-91, 85-JV-07-558

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Appellant challenges his adjudication of delinquency for aiding and abetting criminal damage to property, asserting that (1) the district court erred by admitting a

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

car-repair estimate as the primary evidence of the reduced-value element of the offense when no one from the repair shop testified at trial and (2) because appellant's counsel inaccurately advised him on aiding-and-abetting law, he is entitled to specific performance of the plea agreement that he had been offered. Because the repair estimate was the primary evidence used to prove an essential element of the charged offense, its admission without the testimony of the person who prepared it constitutes reversible error. Therefore, we reverse and remand for a new trial.

FACTS

One late evening in March, 2007, appellant M.L.B. and his friends vandalized an unattended car that they discovered in a ditch in rural Olmsted County. The next day, the owner returned to the scene and had the damaged car towed to a local repair shop. The ensuing investigation implicated M.L.B., and he was charged by delinquency petition with aiding and abetting first-degree criminal damage to property—value reduced over $500 (a felony if committed by an adult), and two petty-misdemeanor-level offenses. Although no one from the repair shop testified at the trial, the car's owner was permitted to testify to the amount of the repair estimate, and over a defense hearsay objection, the written repair estimate of approximately $3,000 was admitted into evidence. The only other evidence related to value reduction was the owner's testimony that she thought that the car was purchased for more than $1,000 the year before it was vandalized and that it was later sold for only $150. M.L.B. was found guilty, adjudicated delinquent for criminal damage to property, and placed on supervised probation. This appeal followed.

D E C I S I O N

M.L.B. asserts that the district court abused its discretion by admitting the repair estimate as substantive evidence without testimony supporting its admissibility under the business-records hearsay exception. "Evidentiary rulings are committed to the [district] court's discretion and will not be reversed absent a clear abuse of discretion." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). Under this standard, "[r]eversal is warranted only when the error substantially influences the [fact-finder]'s decision." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997).

Respondent State of Minnesota does not dispute that the estimate is hearsay but argues that the evidence was admissible under the business-records exception. This rule excepts from the hearsay rule records kept in the course of regularly conducted business activity, provided that a qualified witness testifies that it is the regular practice of the business to create that record. Minn. R. Evid. 803(6); *see also Nat'l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 62 (Minn. 1983) (stating that business-records exception requires foundational testimony by qualified witness). However, the lack of foundational testimony does not always establish that evidence was improperly admitted under the business-records exception to the hearsay rule. "A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court . . . or the parties may stipulate [that] the records were filed and prepared in the regular course of business." *Nat'l Tea Co.*, 339 N.W.2d at 61 (quotation omitted); *see also Theissen-Nonnemacher, Inc. v. Dutt*, 393 N.W.2d 397,

400 (Minn. App. 1986) ("Bills and summary listings may be acceptable evidence even without the inclusion of underlying support.").

But here, the repair estimate was admitted to prove an essential element of the charged offense—the reduced value of the property measured by the cost to repair. *See* Minn. Stat. § 609.595, subd. 1 (2006) (describing, as an element of first-degree criminal damage to property, the amount by which the damage reduces the value of the property). Independent of the repair estimate, the only evidence offered as proof of the reduced value of the property was the car owner's imprecise testimony that the car was purchased for more than $1,000 the year before it was vandalized and was later sold for only $150. And although the state argues that the car owner's statement is sufficient of itself to satisfy the reduced-value element, given the number of factors that diminish the value of a car over the course of a year or more, as well as the owner's uncertainty as to the actual purchase price, evidence derived from the repair estimate was the sole definitive proof establishing the reduced-value element of the offense. As such, it "was both crucial to the prosecution and devastating to the defendant." *United States v. McClintock*, 748 F.2d 1278, 1292 (9th Cir. 1984). We find persuasive the Ninth Circuit's reasoning in *McClintock*, that when a record is crucial to establishing the element of a criminal offense and the means used in creating the record involved subjective decisions, the defendant's confrontation of the preparer of the record may be valuable to his defense, and, therefore, the state's failure to produce the preparer of the record or to demonstrate the preparer's unavailability is an error of "constitutional magnitude." *Id.* Accordingly, we conclude that the failure of the state to produce the person who prepared the estimate constitutes "a

violation of [the defendant's] constitutional right to confront his accusers." *Id.*; *cf. Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004) (holding that all testimonial out-of-court statements are inadmissible when accused is not afforded prior opportunity to cross-examine declarant).

The Minnesota Supreme Court reached a similar conclusion in *State v. Matousek*, 287 Minn. 344, 350, 178 N.W.2d 604, 608 (1970). There, the supreme court conditioned the admissibility of business records on the purpose for which the records were offered and determined that records offered to prove an essential element of a crime "must be proved *through persons having personal knowledge* of the element or connection and such persons must be available for cross-examination." 287 Minn. at 350, 178 N.W.2d at 608 (emphasis added). In *Matousek*, because warranty-repair orders admitted into evidence did not connect the defendant directly with the crime or prove an element of the crime, the supreme court affirmed the admission of the repair orders even though they were not introduced through a witness who could verify that the engine number on the repair orders matched the number on the engine in the stolen car. *Id.* at 350, 178 N.W.2d at 609. However, had the repair orders been offered to prove an essential element of the crime or directly connect the defendant to the crime, the *Matousek* court reasoned, the defendant would have been "denied his right to confront the witnesses against him" unless a person with personal knowledge of the element or connection were called to testify. *Id.* at 350, 178 N.W.2d at 608.

We note that in *In re Welfare of L.Z.*, the Minnesota Supreme Court, in dicta, opined that the reasoning in *Matousek* was itself dicta and no longer reflected the law in

other jurisdictions. 396 N.W.2d 214, 221 n.5 (1986). But the *Matousek* court's reasoning is consistent with that of the Ninth Circuit in *McClintock.* Moreover, the issue in *L.Z.* was whether school-attendance records were admissible to prove habitual truancy when accompanied by the testimony of the school-attendance clerk, who recorded excused and unexcused absences, in lieu of the testimony of the school principal, who made decisions to reject facially valid excuses. *Id.* at 220-22. The *L.Z.* court concluded that the attendance clerk's testimony provided an adequate foundation for the admission of the attendance records to prove the number of absences, the excuses offered, and the number of unexcused absences. *Id.* at 220-21. But the *L.Z.* court also ruled that the records could not be admitted to prove whether an excuse was valid without the opportunity for the defendant to confront the person who judged the excuses invalid. *Id.* at 221.

Our decision is consistent with *Matousek*, *L.Z.*, and *McClintock*. Here, the repair estimate prepared by someone at the car-repair shop was the sole evidence offered to prove the reduced-value element of first-degree criminal damage to property, and there was no opportunity for M.L.B. to confront the preparer about the repair estimate. Because the reduced value of the property is an essential element of first-degree criminal damage to property, Minn. Stat. § 609.595, subd. 1, M.L.B.'s constitutional right to confront his accusers was violated by the admission of this evidence. We, therefore, reverse the adjudication and remand for a new trial. Because the admission of the car-repair estimate was erroneous for this reason, we need not analyze whether the estimate falls within the business-records exception to the hearsay rule. Also, because the record

is not sufficiently developed to permit meaningful review of M.L.B.'s ineffective-assistance-of-counsel claim, we decline to address it.

Reversed and remanded.