STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1823

In the Matter of the Welfare of:

A. A. D., Jr., Child.

Filed August 24, 2020
Reversed and remanded
Jesson, Judge

Hennepin County District Court
File No. 27-JV-18-5372

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant A.A.D. Jr.)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant County Attorney, Minneapolis, Minnesota (for respondent county)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Hooten, Judge.

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

JESSON, Judge

After pleading guilty to tampering with a motor vehicle, the district court ordered appellant A.A.D. Jr., a juvenile, to pay restitution. But the district court held the contested restitution hearing without A.A.D. present. Because we conclude that the district court

erroneously determined that A.A.D. waived his right to be present, we reverse and remand for a new restitution hearing.

FACTS

In December 2018, police arrested appellant A.A.D. Jr.—who was 14 at the time—for riding in a stolen car.[1] The next day, A.A.D. pleaded guilty to tampering with a motor vehicle. During his plea, A.A.D. acknowledged that he was a passenger in the stolen car and that the owner did not give him permission to be in the car.

At sentencing, with A.A.D.'s mother present, the district court adjudicated A.A.D. delinquent and ordered him to complete three days with a work crew. Additionally, the district court explained to A.A.D. and his mother that he may be responsible for paying some amount of restitution. After a restitution study, the court ordered A.A.D. to pay $1,328 in restitution. That amount reflected the value of the stolen car and a few items inside it.

In a written motion, A.A.D. objected to the restitution amount. In doing so, he argued that he was not involved in the theft of the vehicle and his actions did not directly cause the victim's loss. A.A.D. also explained that he was unable to pay restitution because he was an eighth-grade student and his family did not have the financial means to pay. Finally, according to A.A.D., the victim failed to mitigate his damages because he failed to retrieve his car from the impound lot.

[1] Three other juveniles were also charged with a criminal offense.

The district court held a contested restitution hearing. But on the day of the hearing, neither A.A.D. nor a parent or guardian was present. When the court questioned counsel about A.A.D.'s absence, his attorney informed the court that she was unsure if A.A.D.'s mother told him about the hearing. Counsel explained that A.A.D. did not have a home phone number, and she only had contact information for A.A.D.'s mother and grandmother. According to A.A.D.'s attorney, "neither one of them indicated that they had let him know that there was a hearing today." And because the restitution hearing was not scheduled while in court, A.A.D. never signed a hearing notice with the date and time of the hearing. In contrast, the state argued that by failing to appear, A.A.D. waived his right to a continuance and asked the court to award the full restitution amount.[2]

Additionally, the state presented testimony from the victim, the owner of the stolen car. He estimated the car was worth between $1,300 and $1,500. The victim testified that after he reported the car stolen, he never received any information from the police about where his car was. Despite assurances from the police that they would "get back to" him, police never called the victim back. According to the victim, he first learned of his car's location when he received a letter from an impound lot informing him that he would need to pay just over $1,700 in fees to retrieve his car. The victim understood this to mean—apparently correctly—that he would have to pay more than $1,700 to retrieve his stolen car valued around $1,300. By the time the victim decided to pay the fees to recover his car,

[2] The district court expressed some concern that A.A.D. needed to be present for the hearing. But because the victim had taken time off work to attend the hearing, the district court allowed it to proceed while it was "investigating" the issue of A.A.D.'s absence.

the impound lot had sold it. Accordingly, the victim requested $1,328 in restitution to account for his stolen—and later sold—car and a few items inside it.[3]

In a subsequent order, the district court found that A.A.D. waived his right to be present at the restitution hearing by failing to appear without providing a valid excuse. Because A.A.D. did not appear at the hearing, the court concluded that "the issue of ability to pay is waived." After concluding that A.A.D.'s conduct directly caused the victim's loss and rejecting the argument that the victim contributed to his own losses by failing to retrieve the stolen car from the impound lot, the district court ordered A.A.D. to pay $1,328 in restitution.[4] A.A.D. appeals.

D E C I S I O N

In general, district courts have wide discretion to order restitution, and we only reverse a restitution order if the district court abused that discretion. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). When assessing a restitution order, we review factual findings for clear error. *Id.* But we consider de novo the legal question of the district court's authority to order restitution. *Id.*

A.A.D. maintains that the district court violated his constitutional right to be present at the restitution hearing by conducting the hearing in his absence. Further, according to

[3] Because A.A.D. was not present at the hearing, the district court did not hear any testimony regarding his ability to pay restitution. Additionally, at the end of the hearing, the district court asked the parties to submit written arguments about the effect of A.A.D.'s absence from the hearing.

[4] A.A.D. was jointly and severally responsible for paying the restitution award with the three other juveniles.

A.A.D., the district court erroneously concluded that he waived his right to attend the hearing.

A juvenile has the right to be present at all hearings. Minn. R. Juv. Delinq. P. 2.03, subd. 1. Additionally, a criminal defendant has a constitutional right to be present at a restitution hearing to challenge the evidence presented against him. *State v. Rodriguez*, 889 N.W.2d 332, 336 (Minn. App. 2017) (observing that "[a] contested restitution hearing constitutes a trial-like confrontation because the district court must weigh and balance evidence in deciding whether and what amount a defendant must pay restitution to a victim").

But the right to be present can be waived. *Id.* If a juvenile "voluntarily and without justification is absent after the hearing has commenced or . . . disrupts the proceeding," he or she "is deemed to waive the right to be present." Minn. R. Juv. Delinq. P. 2.03, subd. 1. And in criminal proceedings, "[a] defendant may expressly waive the right to be present or the district court may imply waiver from the defendant's conduct, such as his absence from a hearing without explanation." *Rodriguez*, 889 N.W.2d at 336. In general, "voluntary absence without compelling justification" is "a waiver of the right to be present." *State v. Cassidy*, 567 N.W.2d 707, 709 (Minn. 1997) (quotation omitted). A defendant bears the "heavy" burden to show that his absence was involuntary. *Id.* at 710; *see also State v. Finnegan*, 784 N.W.2d 243, 247-48 (Minn. 2010). But when deciding if a constitutional right—like the right to be present—"has been waived, courts must indulge every reasonable presumption against the loss of constitutional rights." *Cassidy*, 567 N.W.2d at 709 (quotation omitted).

Here, the district court concluded that A.A.D. waived his right to be present at the restitution hearing. In doing so, the district court observed that A.A.D.'s counsel requested the hearing and filed an affidavit signed by A.A.D. Further, the district court found that "[e]ven though a hearing notice was not signed, his mother and *presumably* [A.A.D.] were fully aware of the hearing and chose not to appear." (Emphasis added.) After determining that "there was no indication . . . that there was a legitimate reason for his absence," like illness or a lack of transportation, the district court concluded that A.A.D. just decided "not to come to [c]ourt."

We disagree. Nothing in the record demonstrates that A.A.D. knew about the restitution hearing and chose not to attend. A.A.D.'s attorney informed the district court that she never communicated directly with A.A.D. about the hearing. And although A.A.D.'s mother and grandmother had the information about the hearing, according to his attorney, neither of them indicated that they provided the hearing information to A.A.D. Compounding the lack of direct communication with A.A.D. is the fact that the hearing was not scheduled during court. As a result, there is no signed hearing notice in the record demonstrating that A.A.D. knew about the restitution hearing.

Seemingly recognizing that nothing in the record establishes that A.A.D. knew about the hearing, the district court found that A.A.D. "presumably" was "fully aware of the hearing and chose not to appear." But a *presumption* that A.A.D. knew about the hearing, without more, is insufficient to support the conclusion that he waived his constitutional right to be present. *See Rodriguez*, 889 N.W.2d at 337 (stating that waiver of the right to be present cannot be presumed "from a record that does not clearly articulate

that his absence was a product of his voluntary choice"). Because the record does not demonstrate that A.A.D. knew about the restitution hearing and voluntarily chose not to attend, we conclude that the district court erroneously determined that A.A.D. waived his right to be present. *See id.* at 338 (concluding that when the record was unclear whether an incarcerated defendant "had received notice of the hearing or was actually aware of its date and time" and did not indicate that the defendant personally consulted with his attorney, the defendant did not voluntarily waive his right to be present at a restitution hearing).

Still, the state argues that A.A.D. knew that he may have to pay restitution as part of his sentence and that his counsel requested the restitution hearing. Further, the state contends that the record establishes that A.A.D.'s mother knew about the hearing and had promised to bring A.A.D. until shortly before the hearing.[5] But neither of these arguments establish that A.A.D. had notice of the restitution hearing. Although the record supports

[5] To the extent that we interpret the state's argument as suggesting that A.A.D.'s mother's conduct could waive A.A.D.'s right to be present at the hearing, we observe that the parties do not provide any caselaw dictating whether a parent can or cannot waive a juvenile's right to be present. But we note that, in general, a juvenile—not the parent—must validly waive certain rights. *See* Minn. R. Juv. Delinq. P. 8.04, subd. 1 (discussing the rights a juvenile must waive before pleading guilty to an offense). Additionally, this court has stated that "a defendant must personally decide to waive his right to be present," and such a decision "is not a decision that is left up to his attorney." *Rodriguez*, 889 N.W.2d at 337. In the absence of any information in the record demonstrating A.A.D.'s knowledge of the hearing, we cannot conclude that A.A.D.'s mother's conduct warrants the conclusion that A.A.D. waived his right to be present.

the conclusion that A.A.D.'s *mother* voluntarily chose not to attend the hearing, the same cannot be said about A.A.D.[6]

Having concluded that the district court erroneously decided that A.A.D. waived his right to be present, we must determine whether that error was harmless. *See id.* (stating that "a new restitution hearing is warranted only if the district court's error was not harmless"). When a district court's decision to order a defendant to pay restitution was "surely unattributable to the error," the error was harmless beyond a reasonable doubt. *Id.* To analyze whether a district court's error in proceeding without a defendant present was harmless, we consider the strength of the evidence in the record and "what the defendant would have contributed to his defense if he had been present." *Id.*; *see also State v. Breaux*, 620 N.W.2d 326, 332-33 (Minn. App. 2001). The state bears the burden of establishing that the district court's error was harmless beyond a reasonable doubt. *Rodriguez*, 889 N.W.2d at 338.

Here, the state maintains that any error was harmless because A.A.D.'s counsel cross-examined the victim at the restitution hearing and gave a closing argument. The state acknowledges, however, that the district court concluded that A.A.D. waived any argument regarding his ability to pay restitution by failing to appear at the hearing. And when determining whether to award restitution and for what amount, the district court "*shall*

[6] The state also argues that the victim of the crime had a right to receive restitution and that "[t]he rights of the victim should not be held hostage to the capricious whims of a juvenile or family member who simply [does not] feel like coming to court." But again, the record here does not demonstrate that A.A.D. did not attend the hearing because he did not "feel like coming to court."

consider . . . (1) the amount of economic loss sustained by the victim as a result of the offense; and (2) the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1(a) (2018) (emphasis added). Here, it is not evident that the district court would have ordered restitution exactly as it did had it considered A.A.D.'s ability to pay. Accordingly, we cannot say that the erroneous decision that A.A.D. waived his right to be present was harmless beyond a reasonable doubt. For this reason, we reverse the restitution order and remand for a new restitution hearing. *See id.* at 339 (remanding for further proceedings consistent with the opinion).[7]

Reversed and remanded.

[7] Because we remand for a new restitution hearing, we do not address A.A.D.'s other arguments related to the restitution award. But we observe that before ordering restitution, the district court must consider "(1) the amount of economic loss sustained by the victim as a result of the offense; and (2) the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1(a). And the supreme court has clearly articulated that "a district court may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant's crime." *State v. Boettcher*, 931 N.W.2d 376, 381 (Minn. 2019).