IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-1036

Filed: 20 August 2019

Guilford County, No. 17 JB 37

IN THE MATTER OF: J.D.

Appeal by defendant from orders entered 13 November 2017 and 23 January 2018 by Judge Tabatha P. Holliday in Guilford County District Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ARROWOOD, Judge.

Defendant J.D. ("Jeremy[1]") appeals from an order finding him delinquent for the offenses of first-degree forcible sexual offense and second-degree sexual exploitation of a minor. For the following reasons, we reverse.

I. Background

[1] Pursuant to Rule 42 of the North Carolina Rules of Appellate Procedure, a pseudonym is used to protect the anonymity of each juvenile discussed in this case. N.C.R. App. P. 42 (2019).

This case arises from sexual misconduct by Jeremy towards a friend who was attending a sleepover at his house. The evidence tended to show as follows: On 18 November 2016, Jeremy hosted a sleepover for a friend, Zane. Two of Jeremy's cousins, Carl and Dan, also attended. All four boys were of middle-school age. During the night, Zane awoke to find his pants pulled down and Jeremy behind him. He believed someone was holding down his legs. Zane testified that he "felt [Jeremy's] privates on [his] butt" but that he did not feel them "go into [his] butt." Dan filmed much of the incident. In the video Jeremy can be heard saying "[Dan], do not record this." The video eventually ended up on Facebook.

A juvenile petition was filed against Jeremy based on the incident. A hearing on the matter was held in November 2017. Among the evidence presented were statements to the police from Dan and Carl, neither of whom testified at trial. Jeremy's motions to dismiss at the close of the State's evidence and at the close of all evidence were denied. Following the hearing, the trial court entered a written order adjudicating Jeremy delinquent based on the determination that Jeremy had committed first-degree forcible sexual offense for the assault and second-degree exploitation of a minor for his role in the recording of the assault.

The court, however, continued disposition until Jeremy could be assessed by the Children's Hope Alliance (CHA). The CHA report made numerous findings about

Jeremy, including that his risk factors for sexually harmful behaviors were in the low to low moderate range. The court counselor recommended a level 2 disposition

Before the disposition hearing began, Jeremy admitted to an attempted larceny of a bicycle. On 23 January 2018, after considering Jeremy's assessments and his admission to larceny, the trial court entered an order punishing Jeremy at level 3 and committing him to a Youth Detention Center (YDC) indefinitely. Jeremy appealed and requested his release pending disposition of the appeal. A hearing was held on 20 February 2018 on the question of his release. The trial court entered an order concluding Jeremy would remain in YDC.

II. Discussion

Defendant argues the trial court erred by: (1) denying his motion to dismiss the second-degree sexual exploitation of a minor charge, (2) denying his motion to dismiss the first-degree forcible sexual offense charge, (3) accepting his admission to attempted larceny when there was an insufficient factual basis, (4) violating the statutory mandate to protect his confrontation right, and (5) failing to include findings and conclusions that a level 3 disposition was appropriate in the disposition order and committing him to YDC pending the outcome of the appeal without finding compelling reasons for the confinement. We address each of these issues in turn.

1. Second-Degree Sexual Exploitation of a Minor

The trial court found defendant guilty of second-degree sexual exploitation of

a minor. We find that the trial court erred in denying the motion to dismiss because the evidence was insufficient to support this charge as a matter of law.

Whether the trial court erred in denying a motion to dismiss is reviewed *de novo*. *In re A.N.C.*, 225 N.C. App. 315, 324, 750 S.E.2d 835, 841 (2013). In order to prevail on a motion to dismiss in a juvenile matter, the State must offer "substantial evidence of each of the material elements of the offense alleged." *In re Eller,* 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992). Taking the evidence in the light most favorable to the State, as we are required to do, *In re A.W.*, 209 N.C. App 596, 599, 706 S.E.2d 305, 307 (2011), evidence must be "sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986) (citation omitted).

Second-degree sexual exploitation of a minor requires evidence that *the defendant knowingly "film[ed]" or "[d]istribut[ed] . . . material* that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17 (2017) (emphasis added). "[T]he common thread running through the conduct statutorily defined as second-degree sexual offense [is] that *the defendant [took] an active role in the production or distribution of child pornography* without directly facilitating the involvement of the child victim in the activities depicted in the material in question." *State v. Fletcher*, 370 N.C. 313, 321, 807 S.E.2d 528, 535 (2017) (emphasis added).

The State argues that the trial court properly concluded that Jeremy and Dan were acting in concert in regards to the filming of the incident and relies on *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979), which found that:

> [i]t is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 357, 255 S.E.2d at 395.

The State contends the evidence shows that the boys' common plan or purpose was to humiliate the victim. There is nothing in the record to support this. In fact, from the evidence, it is clear that Jeremy does not want to be filmed, as he explicitly tells Dan to stop recording. Although he was in the video, Jeremy was being filmed against his will. "Mere presence at the scene of a crime is not itself a crime, absent at least some sharing of criminal intent." *State v. Holloway*, __ N.C. App. __, __, 793 S.E.2d 766, 774 (2016) (citation omitted), *writ denied, discretionary review denied*, 369 N.C. 571, 798 S.E.2d 525 (2017). Furthermore, there was no evidence presented that Jeremy wished for this video to be made or that he was the one who distributed it.

Because there was no evidence that Jeremy took an active role in the production or distribution of the video, the trial court erred in denying Jeremy's

motion to dismiss the charge of second-degree sexual exploitation of a minor. Jeremy's adjudication for this charge should be vacated.

2. First-Degree Forcible Sexual Offense

In order to meet its burden to convict a defendant of first-degree sexual offense the State must show that defendant (1) "engage[d] in a sexual act with another person by force and against the will of the other person," and (2) the existence of at least one of three additional factors. *See* N.C. Gen. Stat. § 14-27.26 (2017). Because the evidence is not sufficient to show that Jeremy engaged in a "sexual act" with Zane, we need not reach the additional factors.

A "sexual act" is defined as "[c]unnilingus, fellatio, analingus, or anal intercourse[.]" In order to have a sexual act there must be "penetration, however slight by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2017). On the other hand, "sexual contact" is defined as the (i) "[t]ouching the sexual organ, anus, breast, groin, or buttocks of any person," (ii) "[a] person touching another person with their own sexual organ, anus, breast, groin, or buttocks . . ." N.C. Gen. Stat §14-27.20(5) (2017).

At trial, Zane denied that anal intercourse occurred. Zane testified that he only "felt [defendant's] privates on [his] butt" but, when asked if he felt defendant's privates go into his butt, however slightly, he responded "[n]ot that I know of." Furthermore, the prosecutor admitted at trial that, "there was not evidence of

penetration."

This Court has found that a totality of the evidence, including substantial evidence of penetration, along with the victim's ambiguous statement that penetration may have occurred, is sufficient for a finding that penetration did occur. *See State v. Sprouse*, 217 N.C. App. 230, 237, 719 S.E.2d 234, 240 (2011); *State v. Estes*, 99 N.C. App. 312, 316, 393 S.E.2d 158, 160 (1990). However, in the instant case, the victim's statement is not ambiguous. Zane specifically states in his testimony that penetration did not occur. Thus, the State has failed to prove penetration, the central element of this crime.

To support its contention that intercourse occurred, the State relies upon the video taken by Dan. This video shows no more than two boys engaged in "sexual contact" not a "sexual act." While it may have been sufficient to have shown that defendant engaged in sexual contact by force against the will of Zane, which is sexual battery in violation of N.C. Gen. Stat. §14-27.33 (2017), it does not show a sexual act necessary to prove forcible sexual assault.

Given Zane's testimony that no sexual penetration occurred, this case is similar to *State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987) where our Supreme Court reversed a sexual offense conviction, given the ambiguity of the victim's testimony as to whether anal intercourse had occurred. The dissent chooses to ignore Zane's denial of penetration and argues that, when taking the evidence in

the light most favorable to the State, the trial court did not err. The fatal flaw in the dissent's argument is that circumstantial evidence cannot be used to overcome a victim's direct testimony that no penetration occurred.

Because there was not substantial evidence for anal intercourse, even when looking at the evidence in the light most favorable to the State, the trial court erred in denying defendant's motion to dismiss the charge of first-degree sexual offense.

3. Attempted Larceny Admission

The trial court found that there was a sufficient factual basis to support defendant's admission to attempted larceny. We disagree.

The trial court must determine that there is a sufficient factual basis for a juvenile's admission of guilt before accepting the admission, and this factual basis may be based on statements presented by the attorneys. N.C. Gen. Stat. § 7B-2407(c) (2017); *In re C.L.*, 217 N.C. App. 109, 114, 719 S.E.2d 132, 135 (2011). This court has found that if the State fails to provide information in compliance with N.C. Gen. Stat. § 7B-2407(c) then the juvenile's admission of guilt must be vacated. *In re D.C.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008).

Attempted larceny requires proof that the defendant took affirmative steps, but did not succeed, to take another's property with no intent to return it. See *State v. Weaver*, 123 N.C. App. 276, 287 473 S.E.2d 362, 369 (1996) (setting forth the elements of attempted larceny).

The facts presented at trial do not support Jeremy's admission of guilt. The bicycle was stolen by two black males. Jeremy, a black male himself, was later found by officers biking down the road with two others who also matched the description. He was described by the prosecutor as "kind of off on his own" from the other two. When asked to stop by the officers, of the three, only Jeremy stopped. Jeremy told officers that he had not stolen the bicycle, that he knew who had, and admitted to having bolt cutters in his back pack.

There was not a showing of the requisite intent that defendant intended to steal, or assist others in stealing, the bicycle. Defendant's counsel argued that defendant loaned someone his book bag, who then placed bolt cutters inside it and left to "do their deed." The State presented no evidence, except to mention that "I believe the property was recovered." It is unclear where or from whom the bicycle was recovered.

Because the State failed to present sufficient evidence that defendant attempted to steal the bicycle, the trial court erred in accepting Jeremy's admission of attempted larceny. The adjudication for attempted larceny should be vacated.

4. Defendant's Right of Confrontation

In addition to the video of the incident and testimony from Jeremy and Zane, the State offered out-of-court statements from Dan and Carl, statements which tended to support the charges against Jeremy. These statements are part of the

circumstantial evidence which the dissent relies upon to try to overcome the victim's testimony that no penetration occurred. Jeremy argues that these statements were admitted in violation of his constitutional right to confront and cross-examine witnesses.[2] We agree and conclude that the error was prejudicial.

Errors affecting constitutional rights are presumed to be prejudicial and warrant a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Knight*, 245 N.C. App. 532, 548, 785 S.E.2d 324, 336 (2016) (citation omitted), *aff'd as modified*, 369 N.C. 640, 799 S.E.2d 603 (2017).

The State argues that the evidence was overwhelming where there was a videotape of the assault and testimony from the victim and defendant. However, the evidence presented at trial was not overwhelming. Zane denied that any penetration occurred and the video evidence was, at most, ambiguous. In order to attempt to overcome Zane's testimony, the State referenced Dan and Carl's statements numerous times in its closing argument (e.g., "all [Dan] know[s] about the video is

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[2] The State contends that this issue is not properly before us on appeal, as Jeremy failed to object to the entry of Dan and Carl's statements at trial. It is true that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation and emphasis removed).

However, Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing, and has been considered a "statutory mandate." *Matter of J.B.*, __ N.C. App. __, __, 820 S.E.2d 369, 371 (2018) (citations omitted). "The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). And, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Therefore, this issue is properly before this Court.

that they was doing it;" "[Dan] showed a clear understanding of what he was seeing. He says, sex. He's asked, do you know what sex is? And he explains it, basically male penetrate another person, basically"). Even though Dan and Carl both stated they thought Zane and Jeremy were having sex, they also both stated that Zane consented, that it was Zane's idea, and that he pulled his own pants down. It cannot be said that this additional evidence that penetration occurred was not prejudicial to defendant's defense. Therefore, the State has failed to prove this testimony was harmless beyond a reasonable doubt.

5. Sentencing Errors

Although we find that the judgment must be reversed because of the errors set forth above, and therefore the disposition vacated, we feel it is also important to address the errors made by the trial court during the sentencing phase of the case.

i. Level 3 Disposition

While the State argues that the trial court sufficiently found each of the five statutorily required factors from N.C. Gen. Stat. § 7B-2501(c) to support a level 3 disposition, we find that there are not adequate written reasons in the Disposition and Commitment Order to support its findings.

Under Section 7B-2501, the trial court is required to make findings of fact as to a number of enumerated factors regarding the best interests of the delinquent child and the protection of the public, as follows:

> (1) The seriousness of the offense;
> (2) The need to hold the juvenile accountable;
> (3) The importance of protecting the public safety;
> (4) The degree of culpability indicated by the circumstances of the particular case; and
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2017). "[A] trial court must consider each of the factors in Section 7B-2501(c) when entering a dispositional order." *Matter of I.W.P.*, __ N.C. App. __, __, 815 S.E.2d 696, 704 (2018). Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*. *See In re G.C.*, 230 N.C. App. 511, 516, 750 S.E.2d 548, 551 (2013) (citations omitted).

CHA found that Jeremy's risk factors for sexually harmful behaviors are in the low to low moderate range. Jeremy's evaluation from the court counselor indicated that he "is a low/moderate risk for reoffending." The counselor recommended a level 2 disposition. The recommended terms of level 2 include, but are not limited to: cooperating with the TASK program and group therapy, having a curfew, not participating in sleepovers, having electronic devices monitored, not being used as a babysitter, maintaining passing grades at school, and not having contact with the victim. These suggested terms would have effectively satisfied the requirements of N.C. Gen. Stat. § 7B-2501(c).

The trial court found that the "[j]uvenile requires personal accountability for his actions [and] . . . requires more structure." It is unclear how the trial court

reaches this conclusion as to why defendant must be committed at the YDC as his own home can provide him accountability and structure. The report from CHA indicated that defendant had a stable home life. The report further notes that defendant's family relationships are "noted to be 'close' and supportive" and that there was no reported history of Department of Social Services (DSS) visits or experiences with physical or sexual abuse.

The trial court also found that defendant's "level of regulation in the short term is low." CHA had Jeremy complete the Adolescent Self-Regulatory Inventory (ASRI), which indicated he had "some level" of self-regulation, "some level" of short-term self-regulation and a "moderate level" of long-term self-regulation. The lowest score for short-term self-regulation is 13, the middle score is 39, and 65 is the highest score. Jeremy scored a 36, which is much closer to the middle score than the lowest score. The trial court did not indicate why any potential issues with Jeremy's self-regulation could only be corrected by sending defendant to YDC instead of the recommended counseling sessions.

The trial court further found that "[j]uveniles [sic] YDC commitment and treatment will protect the public and provide juvenile the opportunity to mature regarding opportunistic and impulsive behavior." However, the order also noted that if there is not sex-specific individual or group therapy available at the YDC then he will complete it during his post-release supervision period. Having access to this

therapy is essential towards the goal of N.C. Gen. Stat. § 7B-2501(c) to protect the public *and* meet the needs and best interests of defendant. It would be more appropriate to ensure that defendant received this counseling now, as opposed to when he is released from YDC.

This Court has stated it:

> cannot overemphasize the importance of the intake counselor's evaluation in cases involving juveniles alleged to be delinquent or undisciplined. The role of an intake counselor is to ensure that the needs and limitations of the juveniles and the concern for the protection of public safety have been objectively balanced before a juvenile petition is filed initiating court action.

In re Register, 84 N.C. App. 336, 346, 352 S.E.2d 889, 894-95 (1987).

Furthermore, while the State attempts to reconcile the order's findings with the requirements of N.C. Gen. Stat. § 7B-2501(c), the trial court should have adequately explained its own reasoning.

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, when taking into account the evaluations by the court counselor and CHA, the trial court failed to effectively explain its decision to ignore their evaluations and instead commit defendant to YDC, and it fails to further explain how its findings satisfied all of the factors required by N.C. Gen. Stat. § 7B-2501(c).

ii. Confinement Pending the Outcome of this Appeal[3]

The State contends that the trial court did not err because it stated compelling reasons for its denial. However, the trial court did not state its own reasons for its denial and instead referenced reasons given by defense counsel and the State.

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. *For compelling reasons which must be stated in writing*, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (emphasis added).

The Appellate Entries form filed on 22 February 2018 did not list anything under "[c]ompelling reasons release is denied." The court then issued a separate

[3] The State contends that this issue is both not properly before us and also moot upon resolution of Jeremy's appeal. It is true that Jeremy has not appealed the order denying his release pending appeal, but our Court has oft reviewed this issue without a separate appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006); *In re Bass*, 77 N.C. App. 110, 116-17, 334 S.E.2d 779, 782-83 (1985). In the same respect, though his appeal will no longer be pending upon issuance of this opinion, our Court has repeatedly chosen to address this issue despite similar circumstances. *See In re J.J., Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating an insufficient order despite "the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot") (quoting *In re Lineberry,* 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002); *In re J.L.B.M.,* 176 N.C. App. at 628, 627 S.E.2d at 249 (citation omitted)). In the interest of judicial economy, we reach the merits of this claim in the present appeal.

order with Findings of Fact and Conclusions of Law about the matter on 19 March 2018. In pertinent part, the Findings of Fact are:

> 2. That the defense Attorney, Marcus Jackson, contends that the juvenile may be served by being home and under house arrest along with other conditions pending appeal.
>
> 3. That the State has raised issues of lack of structure in the home and continued delinquent behavior after being charged with a B1 felony. That the juvenile has been provided treatment as a result of the adjudication and the Youth Development Center program.

"The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations and internal quotation marks omitted) (finding that "stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports" are not "specific ultimate facts").

In the instant case, there were no compelling reasons stated on the Appellate Entries form. There were supporting reasons among the Findings of Facts on the subsequent order, but they were phrased as contentions of defense counsel and the State. The trial court did not list independent compelling reasons on either the Appellate Entries form or the order, thus violating the provisions of N.C. Gen. Stat. § 7B-2605, and, as such, the trial court erred by committing defendant to YDC pending the outcome of this appeal. In this case, where we have reversed the

determination of delinquency, it is especially disturbing that the trial court ignored the requirements of the statute thus causing the juvenile to be held in detention for a period of 17 months when his convictions were improper.

III. Conclusion

For all the foregoing reasons, we reverse this case and remand this matter to the district court.

REVERSED AND REMANDED.

Judge BRYANT concurs

Judge DILLON dissents by separate opinion.

No. COA18-1036 – *In re J.D.*

DILLON, Judge, dissenting.

This appeal is from an order by the trial court adjudicating Jeremy delinquent based on the trial court's finding that Jeremy committed first-degree forcible sexual offense and second-degree sexual exploitation of a minor.

The evidence before the trial court was conflicting. To be sure, there was strong evidence suggesting that Jeremy did not commit these offenses. However, in a juvenile delinquency proceeding, it is the trial court judge – and not the judges on our Court – who resolves any conflicts in the evidence. I conclude that the evidence was sufficient to support the trial court's findings and its ultimate order. My vote, therefore, is to affirm the order of the trial court.

I. Summary of Evidence

A delinquency petition was filed against Jeremy, based on a sexual encounter he had with another boy, Zane, during a sleepover. Two of Jeremy's cousins, Carl and Dan, also attended the sleepover. Dan recorded a portion of the sexual encounter on a cellphone, a recording which was subsequently uploaded to the internet.

Based on the evidence presented during the adjudication phase, the trial court essentially found that Jeremy penetrated Zane's anal opening with his penis, at least slightly; with some degree of force and against Zane's will; while being aided and

abetted by Carl and/or Dan; and that he participated in the recording and/or distribution of the video.

Most of the arguments on appeal concern whether there was sufficient evidence that Jeremy committed the offenses. A summary of the evidence is as follows:

A. The Video

The State offered Dan's cellphone recording into evidence. The video lasts less than a minute. For the entire recording, Jeremy and Zane are seen with their pants down; Zane is slumped over a piece of furniture; Jeremy is behind Zane; the front of Jeremy's pelvic area (including his penis) is pressed against Zane's buttocks; and Jeremy is engaged in a constant thrusting motion into Zane's buttocks.

In the video, Jeremy is seen turning his face towards Dan's cellphone and stating, "[Dan], don't record this." Dan responds in a joking voice that he is not recording, to which Jeremy states, "Yeah, right," in a sarcastic tone suggesting that he knows that Dan is recording. In any event, it appears that the cellphone was being held up by Dan where Jeremy could see it.

Jeremy then turns his head back towards the back of Zane's head. He continues his thrusting motion and begins to pull at the back of Zane's head and hair. Zane, whose eyes are open the entire time and who has otherwise been rather quiet and passive while Jeremy is thrusting, begins to show and express discomfort.

At the end of the video, Jeremy turns his face back towards Dan and the cellphone and gives a "thumbs up" gesture, as he continues his thrusting motion. The video then ends.

B. Zane's Testimony

Zane testified at the hearing as follows:

He was asleep. He awoke to discover himself on his knees slumped over a piece of furniture, his pants were down, and Jeremy was thrusting into his bare buttocks. He felt someone else holding down the bottom of his legs, restraining his movements. He could feel Jeremy's penis in his buttocks but did not believe that Jeremy's penis penetrated his anal opening. Once he fully realized what was happening to him, he struggled and was able to push Jeremy off of him. Shortly thereafter, he, Jeremy, and the other boys went to sleep. He reported the incident sometime later after the video had been uploaded to the internet.

C. Jeremy's Pre-trial Statement

Jeremy gave a statement during the investigation of the matter. He stated that the entire encounter was consensual. He described the encounter as "intercourse." He stated that he had a partial erection and that he could feel his penis pressing against Zane's anal opening as he was thrusting, but did not believe that his penis actually penetrated Zane's anus.

D. Dan and Carl's Pre-trial Statements

Dan and Carl were each interviewed by investigators prior to the hearing. Their recorded interviews were offered into evidence by the State without objection.

Both testified that Zane had consented to the sexual encounter, that it was Zane's idea, and that Zane pulled his own pants down. Both stated that they were uncomfortable about what was happening. Dan stated he began recording the encounter because he thought Jeremy and Zane were just joking around. Carl stated that he stood off in the corner because he felt uncomfortable. Both stated that they thought Jeremy and Zane were having "sex." Dan stated that he understood that "sex" included "penetration." However, neither witness stated that he was actually able to see exactly where Jeremy's penis was in relation to Zane's anal opening.

Both described that they all went to sleep after the encounter.

II. Analysis

Jeremy makes a number of arguments on appeal contesting the trial court's order. I address each in turn.

A. Sufficiency of the Evidence

Jeremy argues, and the majority agrees, that there was insufficient evidence that he engaged in the criminal conduct alleged in the petition.

In determining whether there was sufficient evidence, our Court must view the evidence "*in the light most favorable to the State*." *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992) (emphasis added). There was certainly conflicting evidence.

But viewing the evidence in the light most favorable to the State, I conclude that there was sufficient evidence from which the trial court judge could find that Jeremy committed these offenses, as explained below.

1. First-Degree Forcible Sexual Offense

To prove first-degree forcible sexual offense, the State must prove (a) that the defendant "engage[d] in a sexual act with another person," (b) "by force and against the will of the other person," and (c) that there existed at least one of three certain aggravating factors. N.C. Gen. Stat. § 14-27.26 (2015).

a. Evidence of a Sexual Act

The petition in this case alleges that Jeremy committed "anal intercourse[]", which is a "sexual act" defined in Section 14-27.20(4) of our General Statutes. N.C. Gen. Stat. § 14-27.20(4) (2015) (defining "[s]exual act" as including "anal intercourse").

Jeremy argues, and the majority agrees, that there was insufficient evidence that Jeremy's penis actually penetrated Zane's anal opening. Indeed, "[a]nal intercourse requires *penetration* of the anal opening of the victim by the [defendant's] penis[.]" *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986) (emphasis added). However, the State need not prove that total penetration occurred;

penetration can be very slight to satisfy this element. *Id.*; N.C. Gen. Stat. § 14-27.36 (2015) ("Penetration, however slight, is . . . anal intercourse.")[4].

There was certainly some evidence that penetration did not occur. For instance, Zane himself testified that he did not believe that Jeremy penetrated him. However, Zane also stated that he was not fully awake during much of the assault.

In any event, there was other evidence from which a fact-finder could find that slight penetration did occur, namely the cellphone video itself and Jeremy's own statement.

Regarding the cellphone video, it admittedly does not offer *direct* evidence of penetration, as the exact position of Jeremy's penis is obscured by his pelvis pressed against Zane's buttocks. The video, though, does constitute sufficient *circumstantial* evidence of penetration. Specifically, it shows the position and proximity of Jeremy to Zane and his constant thrusting motion towards Zane's anus. Our Supreme Court has held that penetration can be proven by *circumstantial* evidence alone. *See, e.g., State v. Robinson*, 310 N.C. 530, 534, 313 S.E.2d 571, 574 (1984) (holding that penetration in a rape prosecution can be proven either by direct testimony "or by circumstantial evidence"); *State v. Santiago*, 148 N.C. App. 62, 70, 557 S.E.2d 601, 607 (2001) (holding that "circumstantial evidence may be utilized" to prove penetration). Indeed, it is axiomatic in jurisdictions across our country that

[4] This section was previously codified at N.C. Gen. Stat. § 14-27.10. Recodified as cited effective 1 December 2015, after the events of this case transpired.

"[e]vidence of the condition, position, and proximity of the parties as testified to by eyewitnesses may afford sufficient [circumstantial] evidence of penetration" even where a view of the genitals is obscured. 81 C.J.S. Sodomy § 11, note 42 (1977).[5] Accordingly, the video itself was sufficient for the trial court to make a finding that penetration occurred.[6]

Jeremy's own statement, itself, is evidence of penetration: he admitted that he had a semi-erect penis; that his penis was pressing against Zane's anus; that he was thrusting; and he described the encounter as "intercourse." A fact-finder could infer

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[5] *See Taylor v. State*, 374 P.2d 786, 788-89 (Okla. Crim. App. 1962) (sustaining verdict based on circumstantial evidence of eyewitness, recognizing that "it has been held in several jurisdictions that the condition, position and proximity of defendants, as testified to by eyewitnesses, afford sufficient evidence of penetration . . . since it is very seldom that penetration can be observed in cases involving sex offenses"), *citing Commonwealth v. Bowes*, 74 A.2d 795 (Pa. Super. Ct. 1950), *and State v. Crayton*, 116 N.W. 597 (Iowa 1908). *See also Holmes v. State*, 20 So.3d 681, 683 (Miss. Ct. App. 2008) (holding that testimony of eyewitness who found the defendant in a compromising position with a minor, though not seeing the actual position of the defendant's genitals, was sufficient to prove penetration, stating "[w]hile penetration must be proved beyond a reasonable doubt, it need not be proved in any particular form of words, and circumstantial evidence may suffice"); *State v. Golden*, 430 A.2d 433, 435-37 (R.I. 1981) (concluding that testimony of police officer that the defendant was naked on top of victim was sufficient to prove penetration); *Marshall v. State*, 223 S.W.3d 74, 78 (Ark. Ct. App. 2006); *Knowlton v. State*, 382 N.E.2d 1004, 1008-09 (Ind. Ct. App. 1978) (holding that eyewitness testimony that the defendant had assumed a position appropriate for a sexual act with another, that the defendant was close enough to the other person to be touching, that the defendant's pants were unzipped, and that his penis was erect was sufficient circumstantial evidence to prove penetration); *Ryan v. Commonwealth*, 247 S.E.2d 698, 702 (Va. 1978) (holding that "evidence of condition, position, and proximity of the parties . . . may afford sufficient evidence of penetration"); *State v. Pratt*, 116 A.2d 924, 925 (Me. 1955) (holding that "the fact of penetration may be proved by circumstantial evidence as by the position of the parties and the like").

[6] Our Supreme Court did hold that the circumstantial evidence in *Robinson* was *not* sufficient to establish penetration. However, in that case, no witness actually saw the defendant and the victim in a sexual position, but rather they were discovered unclothed after the assault. Accordingly, the Court ruled that this circumstantial evidence was sufficient to establish something "disgusting and degrading" was occurring, but not sufficient to establish that actual penetration of the victim's vagina by the defendant's penis had occurred. *Robinson*, 310 N.C. at 534, 313 S.E.2d at 574.

from this statement that at least the tip of Jeremy's penis slightly penetrated Zane's anal opening, though his entire penis may not have penetrated.

The trial court weighed what it saw in the video and Jeremy's statements against the evidence suggesting that penetration did not occur, and the trial court found that at least slight penetration did occur. I see no error here. It is not our role to reweigh the evidence and make a different finding.[7]

b. Evidence of Force and Lack of Consent

There was evidence that Zane had not given his consent to Jeremy's actions and that Jeremy used some degree of force. Specifically, Zane testified at the hearing that the video did not depict the entire assault and that he was asleep when the assault started. He testified that he fully awoke to Jeremy pulling on his hair while thrusting his bare pelvis into Zane's bare buttocks. Zane testified that he felt someone holding his legs down as the assault was occurring. Zane testified that he pushed Jeremy off of him soon after the recording stopped. There is nothing in the video itself which suggests *conclusively* that Zane was, in fact, participating willingly.

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[7] This case is different from cases like *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), where it was held that evidence of penetration was insufficient where the victim denied or was ambiguous as to whether penetration actually occurred. Specifically, in *Hicks*, there was *no* other evidence, direct or circumstantial, which *supported* a finding of penetration which could be weighed by the finder of fact against the victim's exculpatory statement. *Id.* at 90, 352 S.E.2d at 427. *Hicks* and similar cases do *not* stand for the proposition that a victim's denial of actual penetration is conclusive if there is other evidence which supports a finding of penetration. Indeed, there are many reasons why a victim might not want to admit that he was actually penetrated. Of course, where the victim has denied actual penetration and where there is no evidence to the contrary, it is inappropriate for the fact-finder to speculate. But where there *is* evidence of penetration, the fact-finder, the trial court in the present case, is free to disbelieve the victim.

And there is some evidence in the video that he was being subdued by Jeremy, as Jeremy is seen pulling on Zane's hair.

Admittedly, there was strong evidence that Zane was a willing participant. For instance, Jeremy, Carl, and Dan all stated during the investigation that the incident was Zane's idea and that Zane and Jeremy each pulled their own pants down.

But, again, factual discrepancies were for the trial court, and not our Court, to resolve. Therefore, I conclude that there was sufficient evidence to support that Jeremy acted with force and against Zane's will. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("Contradictions and discrepancies are for the [factfinder] to resolve and do not warrant dismissal.").

c. Evidence that Jeremy was Aided and Abetted

The petition alleges that Jeremy committed the sexual act while "aided and abetted by one or more other persons[,]" which is an aggravating factor enumerated in Section 14-27.26(a)(3). N.C. Gen. Stat. § 14-27.26(a)(3) (2015). The trial court so found; and for the following reasons, I conclude that there was sufficient evidence to support this finding.

Aiding and abetting has been described by our Supreme Court as follows:

> A person aids when being present at the time and place he does some act to render aid to the actual perpetrator of the crime, though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.

State v. Holland, 234 N.C. 354, 358, 67 S.E.2d 272, 274-75 (1951). An individual's *mere presence* during the commission of a crime, though, does not typically constitute aiding and abetting. *State v. Hoffman*, 199 N.C. 328, 333, 154 S.E. 314, 316 (1930). However, "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

When viewed in the light most favorable to the State, the evidence supports an inference that Jeremy was aided and abetted by his cousin Dan. Specifically, the video depicts them in conversation which could be inferred as joking about the recording being made. Further, towards the end of the video, Jeremy gives Dan a "thumbs up" signal. A fact-finder could certainly infer from their tone and actions that Dan and Jeremy were joking with each other during the assault and that Dan was not simply a passive bystander, but rather a source of encouragement.

Further, there was some evidence, though admittedly weak, from which one could infer that Carl aided Jeremy's assault. Specifically, Zane testified that he felt his legs being held down by someone that he believed was not Jeremy during Jeremy's assault, testimony which would support a finding that Carl was holding Zane down while Jeremy was engaged in the sexual assault.

2. Sexual Exploitation of a Minor

Sexual exploitation of a minor requires evidence that Jeremy "record[ed]" or "distribut[ed] . . . material that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17 (2017).

It is undisputed that Jeremy did not *personally* record the incident, and there is no direct evidence that Jeremy participated in the publishing of the recording. But again, the evidence *in the light most favorable to the State* supports an inference that Jeremy *acted in concert* with Dan to record the incident.

Under the acting in concert doctrine, an individual need not personally commit any portion of an alleged crime as long as he is (1) "present at the scene of the crime[,]" and (2) "acts [] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner,* 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Our Supreme Court has held that a common plan or purpose may "be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *State v. Westbrook,* 279 N.C. 18, 42, 181 S.E.2d 572, 586 (1971). "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders,* 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975).

Here, Jeremy was indisputably present. Though Jeremy is heard telling Dan not to video the incident, a fact-finder could certainly infer from Jeremy's tone and

the position of the cellphone that Jeremy knew that he was being recorded and was in approval of the recording. Jeremy's "thumbs up" gesture at the end of the recording can reasonably imply knowledge and approval and that he was working with Dan to get a recording of the assault. Certainly other inferences could be made from the evidence, but the resolution of conflicting inferences is for the trial court to sort out.

B. Right of Confrontation

The State offered into evidence the recordings of interviews of Carl and Dan, Jeremy's cousins, by investigators. Jeremy did not object. Indeed, much of their testimony benefited Jeremy as they described the entire encounter as consensual. However, Jeremy argues that portions of their statements were harmful to him and that admission of these statements was in violation of his constitutional right to confront and cross-examine witnesses against him. Specifically, Jeremy contends that Carl and Dan provided some testimonial evidence that actual penetration by Jeremy's penis of Zane's anal opening occurred.

The State contends that this issue is not properly before us on appeal, as Jeremy failed to object to the entry of Dan and Carl's statements at trial.

It is true that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *Braswell*, 312 N.C. at 558, 324 S.E.2d at 246 (emphasis removed).

However, Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing and has been considered a "statutory mandate." *Matter of J.B.*, ___ N.C. App. ___, ___, 820 S.E.2d 369, 371 (2018); N.C. Gen. Stat. § 7B-2405 (2015). "The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). And, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Therefore, this issue is properly before this Court.

Section 15A-1443 provides that when a preserved issue is based on a statute, it is the defendant's burden on appeal to show that there is a reasonable possibility that, but for the error, a different result would have occurred. N.C. Gen. Stat. § 15A-1443(a) (2015). However, where the preserved issue is based on a constitutional right, the burden is on the State to show that the error was not harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

Of course, some errors may be based on both a constitutional right and a statutory right. And it could be argued that the error Jeremy complains of is technically statutory in nature, and, therefore, Jeremy is only entitled to "reasonable

possibility" review. That is, Jeremy has waived his constitutional argument by not objecting; and, therefore, it is only Jeremy's statutory right under Section 7B-2405 that is preserved for appellate review.

But our jurisprudence compels us to review violations of the statutory right under Section 7B-2405 with "harmless beyond a reasonable doubt" review, which is otherwise reserved only for *preserved* constitutional errors. *See In re J.B.*, ___ N.C. App. ___, ___, 820 S.E.2d 369, 371 (2018) (holding that "failure to follow the statutory mandate when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt").

But even based on the "harmless beyond a reasonable doubt" standard, I conclude that the inclusion of Dan and Carl's statements which suggested that penetration occurred does not justify a new hearing. Indeed, neither boy described in any detail that they saw Jeremy's penis actually penetrate Zane's anus. Dan stated that he thought Jeremy and Zane were just joking around. Carl stated that he stood away from the action in the corner. Rather, I am convinced that the trial court made its finding regarding penetration based on the video itself, which provided no better view than the view Dan and Carl had, and based on Jeremy's own admission that he could feel his penis press against Zane's anal opening while he was thrusting, something that Carl and Dan could not see from their vantage points.

C. Attempted Larceny Admission

DILLON, J., dissenting.

Sometime after the adjudication but before the disposition hearing, Jeremy allegedly stole a bicycle. At the disposition hearing, Jeremy admitted to attempting the theft, as he was caught with bolt cutters next to a bicycle. The trial court used Jeremy's admission to the attempted larceny to support its ultimate disposition.

Jeremy argues, and the majority agrees, that there was an insufficient factual basis to support the admission, and therefore the trial court should not have accepted Jeremy's admission. I disagree.

To be sure, the trial court must determine that there is a sufficient factual basis for a juvenile's admission of guilt before accepting the admission, though this factual basis may be based on statements presented by the attorneys. N.C. Gen. Stat. § 7B-2407(c) (2017); *In re C.L.*, 217 N.C. App. 109, 114, 719 S.E.2d 132, 135 (2011).

Attempted larceny requires proof that the defendant took affirmative steps, but did not succeed, to take another's property with no intent to return it. *See State v. Weaver*, 123 N.C. App. 276, 287, 473 S.E.2d 362, 369 (1996) (reciting elements of attempted larceny).

In this matter, the trial court heard a recitation of facts from the State regarding Jeremy's attempted theft of the bicycle before accepting Jeremy's admission of guilt. The recitation showed that two young males stole a bicycle using bolt cutters. Jeremy was later found by police in the company of two young males

matching the description of the thieves. Jeremy admitted to knowing about the theft *and was found to be in possession of the bolt cutters which were used to facilitate the larceny*. The stolen bicycle was ultimately recovered.

I conclude that this recitation is sufficient to show that Jeremy directly participated, or at least acted in concert, in the commission of the attempted theft of the bicycle. Indeed, Jeremy's attorney and his parents each stated that Jeremy was present when the bicycle was stolen and was found in actual possession of the bolt cutters. *See State v. Agnew,* 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) ("The [] sources listed in [N.C. Gen. Stat. § 15A-1022(c)] are not exclusive, and therefore the trial judge may consider any information properly brought to his attention."); *In re Mecklenburg Cty.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008) (acknowledging the parallels between N.C. Gen. Stat. §§ 7B-2407 and 15A-1022).

D. Level 3 Order

Jeremy next makes essentially three arguments with respect to his Level 3 disposition. I address each in turn.

1. Sufficiency of the Findings

First, Jeremy contends that the trial court failed to make required findings of fact as to each of the factors listed in Section 7B-2501 of our General Statutes. Whether the trial court properly complied with its statutory duty to make findings is

a question of law to be reviewed *de novo*. *See In re G.C.*, 230 N.C. App. 511, 516-17, 750 S.E.2d 548, 551 (2013).

Under Section 7B-2501, the trial court is required to make findings of fact as to a number of enumerated factors regarding the best interests of the delinquent child and the protection of the public, as follows:

> (1) The seriousness of the offense;
> (2) The need to hold the juvenile accountable;
> (3) The importance of protecting the public safety;
> (4) The degree of culpability indicated by the circumstances of the particular case; and
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501 (2017). Further, "[t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512 (2017). The trial court need not expressly track each of the factors enumerated in Section 7B-2501; rather, it need only enter "appropriate" findings. *Matter of D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 516 (2017).

Here, the trial court checked form boxes indicating that the juvenile's delinquency history level was "low," and that it considered a number of reports and assessments submitted by the parties. It then added the following findings of fact in a space labeled "Other Findings:"

> Juvenile was adjudicated on a B1 felony.
> Juvenile's level of regulation in the short term is low.
> Juvenile continued to engage in delinquent behavior despite this pending charge (see admission to attempted

> larceny, date of offense 4/7/17).
> Juvenile requires personal accountability for his actions.
> Juvenile requires more structure.
> Juveniles [sic] [Youth Detention Center] commitment and treatment will protect the public and provide juvenile the opportunity to mature regarding opportunistic and impulsive behavior.

Jeremy cites a number of cases to show that the brevity of the trial court's findings reflects a lack of appropriate consideration for each of the required factors. *See Matter of I.W.P.*, ___ N.C. App. ___, ___, 815 S.E.2d 696, 704 (2018) (remanding for further findings where the trial court considered only three of the five factors in Section 7B-2501); *In re V.M.*, 211 N.C. App. 389, 392, 712 S.E.2d 213, 216 (2011) (reversing and remanding where the trial court's order contained insufficient findings of fact). But these cases are distinguishable from the case before us. For instance, in *In re V.M.*, the trial court checked boxes indicating receipt of the parties' documents and stated that "[t]he juvenile has been adjudicated for a violent or serious offense and Level [3] is authorized by G.S. 7B-2508," but left the "Other Findings" space blank and made no additional findings of fact at all. *In re V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215. Similarly, in *Matter of I.W.P.*, the trial court made some findings of fact but failed to make findings as to the seriousness of the juvenile's offense and his or her culpability. *Matter of I.W.P.*, ___ N.C. App. at ___, 815 S.E.2d at 704.

Here, though, not only did the trial court make multiple, additional findings of fact, but each of the five factors in Section 7B-2501 are reflected in the findings. The

seriousness of the juvenile's offense is listed as commission of a B1 felony. The findings show a high need to hold the juvenile accountable, as he continues to engage in delinquent behavior and requires accountability and structure. The findings show that Jeremy's disposition will protect the public while he matures, develops personal accountability, and is prevented from continual delinquent behaviors. Jeremy's culpability is described as adjudication of a violent offense for which he exhibits concerns with personal accountability. Lastly, the order shows that the trial court considered risks and needs assessments submitted by the parties and ultimately determined that commitment with the Youth Detention Center ("YDC") would provide Jeremy an opportunity for treatment and positive growth and provide protection for the public. I conclude that the trial court's findings were "appropriate" under Section 7B-2501.

2. Sufficiency of the Evidence to Support Those Findings

Jeremy contends that the evidence did not support the trial court's findings. I conclude that the evidence supported the trial court's findings.

Jeremy scored below the median score on an Adolescent Self-regulatory Inventory assessment, showing that "his levels of self-regulation are less developed in the short-term." Further, Jeremy elected to engage in further delinquent behavior following the sexual assault. Though reports suggested that Jeremy had adequate supervision at home, there was evidence that Jeremy's mother was unaware that the

assault had occurred within her home until two weeks after the event, that Jeremy was allowed to spend time with others who engaged in criminal activity, and that his mother referred to the assault as simply "kids being kids." Psychological testing showed signs of immaturity, and Jeremy's assessments concluded that his "risk factors suggest that his referring offense behaviors were opportunistic and impulsive." The assessments also reflected that Jeremy only partially expressed remorse and/or guilt for his actions. The evidence shows that removing Jeremy from his current circumstances and committing him to the YDC would allow an opportunity to grow and mature away from a potentially negative environment.

3. Sufficiency of Conclusions to Support Level 3 Disposition

Jeremy contends that he "could have received a Level 2 disposition" and that a Level 2 disposition would have been "most appropriate in this case."

"The decision to impose a statutorily permissible disposition is vested in the discretion of the juvenile court and will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason." *In re K.L.D.*, 210 N.C. App. 747, 749, 709 S.E.2d 409, 411 (2011); *see* N.C. Gen. Stat. § 7B-2506 (2017).

Here, the trial court adjudicated Jeremy delinquent for commission of a Class B1 felony, and the trial court found that his delinquency history level was "low." Class B1 felonies are considered "violent" offenses, and juveniles who commit violent offenses with a "low" delinquency history may receive either a Level 2 or 3 disposition.

N.C. Gen. Stat. §§ 7B-2508(a), (f) (2017). Therefore, it was within the trial court's discretion to enter a Level 3 disposition in this case. "The existence of [evidence of Jeremy's good behavior], although it might have supported a decision by the trial court to impose a Level 2 disposition, does not support a conclusion that the trial court's decision to impose a Level 3 disposition was unreasonable." *Matter of D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 516 (2017).

E. Confinement Pending Appeal

Upon entering his appeal, Jeremy also filed a motion requesting release from the YDC while his appeal was pending. The trial court entered an order denying this motion. Jeremy contends that the trial court failed to state compelling reasons for its denial, in violation of Section 7B-2605. I disagree.[8]

Section 7B-2605 of our General Statutes states that a juvenile must be released pending appeal, unless the trial court states written, compelling reasons otherwise:

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may

[8] The State contends that this issue is both not properly before us and also moot upon resolution of Jeremy's appeal. It is true that Jeremy has not appealed the order denying his release pending appeal, but our Court has oft reviewed this issue without a separate appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006); *In re Bass*, 77 N.C. App. 110, 117, 334 S.E.2d 779, 783 (1985). In the same respect, though his appeal will no longer be pending upon issuance of this opinion, our Court has repeatedly chosen to address this issue despite similar circumstances. *See In re J.J., Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating an insufficient order despite "the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot"); *In re J.L.B.M.,* 176 N.C. App. at 628, 627 S.E.2d at 249; *In re Lineberry,* 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002)). In the interest of judicial economy, we reach the merits of this claim in the present appeal.

> enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (2017). While compelling reasons are required, the court need not be verbose. For instance, this Court has upheld denial of release pending appeal where the trial court simply listed that the defendant committed "first degree sex offenses with a child." *In re J.J.D.L.*, 189 N.C. App. 777, 781, 659 S.E.2d 757, 760-61 (2008). Most commonly, orders denying release are vacated where the trial court simply checks a box on a form in lieu of making any written findings at all. *See In re J.J., Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66.

Here, the trial court's order acknowledged in writing that Jeremy had a "lack of structure in the home" and "continued delinquent behavior after being charged with a B1 felony." Jeremy entered an admission of guilt in regard to his subsequent delinquent behavior following his adjudication for sexual offenses. Further, the order decrees that Jeremy "shall remain in [YDC custody] pending appeal for . . . protection of the public." I conclude that the trial court's order sufficiently noted compelling reasons for Jeremy's continued confinement pending his appeal.

III. Conclusion

My vote is to affirm the order of the trial court. While I may have made different findings, there was evidence to support the findings that the trial court made. Accordingly, I dissent.

DILLON, J., dissenting.