

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-884

Filed 2 April 2024

Yancey County, No. 22-JB-51

IN THE MATTER OF: E.M.

Appeal by juvenile from disposition order entered 28 March 2023 by Judge Rebecca Eggers-Gryder in Yancey County District Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for the juvenile-appellant.

THOMPSON, Judge.

In this case, fourteen-year-old E.M.,¹ was adjudicated delinquent for willfully and feloniously disturbing, vandalizing, or desecrating human remains; felonious breaking and entering; felonious larceny pursuant to felonious breaking and entering; and two counts of injury to real property. Pursuant to a plea agreement, E.M. pled guilty to felonious breaking and entering; the State dismissed the

¹ We use initials to protect the identity of the juvenile in this case.

remaining petitions. E.M. now appeals from a disposition order requiring, *inter alia*, the payment of restitution. After careful review, we vacate and remand for entry of an order consistent with this opinion.

I. Factual Background and Procedural History

On 2 December 2022, the State filed juvenile petitions to have E.M. adjudicated delinquent pursuant to N.C. Gen. Stat. § 7B-1501(7) for willfully and feloniously disturbing, vandalizing, or desecrating human remains; felonious breaking and entering; felonious larceny pursuant to felonious breaking and entering, injury to personal property; and injury to real property. On several occasions between 29 July 2022 and 29 September 2022, E.M. and several other juveniles broke into the victim's home. According to the petitions, E.M. allegedly damaged furniture, paintings, clothing, books, doors and walls, and broke windows. In addition to the destruction of real and personal property, E.M. allegedly disturbed, vandalized, or desecrated human remains found in the victim's home by opening bottles of human remains and pouring the remains into a creek.

The matter came on for hearing before Judge Rebecca Eggers-Gryder at the 28 March 2023 Session of Yancey County District Court. Pursuant to a plea agreement between the State and E.M., E.M. admitted to felonious breaking and entering in exchange for dismissal of the remaining petitions. Following E.M.'s admission, the district court held a disposition hearing. On 28 March 2023, the trial court

adjudicated E.M. delinquent, and entered a Juvenile Level 2 Disposition Order (disposition order) against E.M. that same day.

In relevant part, the disposition order required E.M. to pay restitution for the victim's benefit, serve 65 hours of community service, serve supervised probation until 24 March 2024, abstain from associating with the other juveniles involved with the destruction of the victim's property, and abstain from entering onto the property of the victim.

On the disposition order and the Supplemental Order for Conditions of Probation entered by the district court on 28 March 2023, box 23 and box 14, respectively, are checked; both of these entries require the payment of restitution by E.M. However, there are no specifications as to the amount of restitution E.M. was to pay.

From these orders, E.M. entered timely written notice of appeal on 6 April 2023.

II. Analysis

A. Standard of review

The word "shall" indicates a statutory mandate and failure of the district court to comply with that mandate constitutes error. *In re E.M.*, 263 N.C. App. 476, 478, 823 S.E.2d 674, 676 (2019) (citation omitted). "When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed de novo." *Id.* at 479, 823 S.E.2d at 676 (citations and

emphasis omitted). Under de novo review, this Court considers the matter anew and substitutes its judgment for that of the lower court. *Id.*

a. Restitution: Best interest of the juvenile

On appeal, E.M. argues that the district court “erred by ordering [E.M.] to pay restitution because it failed to specify the amount of restitution, failed to determine whether restitution was in [E.M.]’s best interest, and failed to determine whether [E.M.] had the means to pay restitution.” We agree.

“[C]riminal sentences are designed to impose a punishment commensurate with the injury the offense has caused . . . and to provide a general deterrent to criminal behavior” *In re D.L.H.*, 364 N.C. 214, 217, 694 S.E.2d 753, 755 (2010) (citation and internal quotation marks omitted). However, “dispositions in juvenile actions have a greater focus on accountability and responsibility and aim to provide the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.” *Id.* at 217–18, 694 S.E.2d at 755 (citation and internal quotation marks omitted).

Under N.C. Gen. Stat. § 7B-2512(a), a dispositional order

shall be in writing and *shall* contain appropriate findings of fact and conclusions of law. The court *shall* state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition

N.C. Gen. Stat. § 7B-2512(a) (2023) (emphases added). Moreover, in the disposition order, “[t]he trial court is required to make findings demonstrating that it considered the [N.C. Gen. Stat.] § 7B-2501(c) factors . . . in a juvenile delinquency matter.” *In re J.J.*, 216 N.C. App. 366, 375, 717 S.E.2d 59, 65 (2011). Once a juvenile has been adjudicated delinquent, the court with jurisdictional authority over the juvenile “may use the following alternatives in accordance with the dispositional structure set forth in [N.C. Gen. Stat.] § 7B-2508” N.C. Gen. Stat. § 7B-2506. Of these alternatives, restitution is included. *Id.* § 7B-2506(4), (22). Finally, “[a]n order of restitution must be supported by the record, which demonstrates that the condition is fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile” *In re D.A.Q.*, 214 N.C. App. 535, 537, 715 S.E.2d 509, 511 (2011) (citation omitted).

Based on our careful review of the record, we cannot distinguish this case from *In re Schrimpsheer*, in which this Court held that “although the record indicates that others participated in the break-in, the trial court made no findings from which [the Court] can determine whether the participants acted jointly in [] causing harm.” *Schrimpsheer*, 143 N.C. App. 461, 465–66, 546 S.E.2d 407, 411 (2001). Moreover, the district court “failed to make any . . . findings as to how much damage [wa]s attributable to the juvenile.” *Id.* at 466, 546 S.E.2d at 411. Without such findings, it is “impossible to determine whether the conditions are fair and reasonable, and in the best interest of the juvenile.” *Id.*

In the present case, the juvenile court counselor (JCC) testified that E.M. and four other juveniles were involved in the breaking and entering and destruction of property. The JCC further testified that based on her understanding of the police report, the five juveniles were in or about the property at different times and that different individuals were in or about the property on different days. When asked about the cost of the damages to the property, the JCC testified that the victim provided an estimate she received from a building supply company, including costs of materials, labor, and overhead, that totaled \$20,949.00.

Analogous to *Schrimpsheer*, in this case, multiple individuals were involved in the breaking and entering of the victim's property, and there were different individuals in or about the property on different days. However, in the disposition order, the district court failed to make any findings as to how much damage was attributable specifically to E.M. Instead, the district court's only finding regarding restitution was that E.M. was to pay restitution to the victim's benefit within twelve months, and that there was joint and several liability. Here, the district court did not state with particularity, orally or in writing on the disposition order, the terms of restitution (i.e., the amount E.M. was to pay) or any findings showing that the court considered whether restitution was "fair and reasonable, and in the best interest of the juvenile." *Id.*

Thus, based on well-settled case precedent by this Court, we cannot determine whether the conditions of restitution are in the best interest of E.M., and therefore

we remand this disposition order with instructions for the district court to make appropriate findings of fact.

B. Restitution: Ability to pay

Pursuant to N.C. Gen. Stat. § 7B-2506(4) and (22), if the juvenile establishes to the court that she does not have, and could not reasonably acquire, the means to make restitution, then the court “shall not require the juvenile to make restitution.” *Id.* at 464, 546 S.E.2d at 410.

Because the district court failed to make *any* findings regarding restitution, it would be inappropriate for this Court to determine E.M.’s ability to pay restitution. Based on the evidence of record, there is testimony that would allow the district court to determine whether E.M. satisfied her burden pursuant to N.C. Gen. Stat. § 7B-2506(4) and (22). Therefore, on remand, the district court should make appropriate findings of fact regarding restitution, and subsequently determine whether E.M. has the ability to pay restitution.

C. Disposition order level

E.M. argues, and the State concedes, that the district court erred “by entering a Level 2 disposition because it failed to make any supporting findings of fact, incorrectly stated that it had considered a predisposition report and a risks and needs assessment when it had not done so, and incorrectly concluded that a Level 2 disposition was mandated when it had the authority to issue a Level 1 disposition instead.” We agree.

Under N.C. Gen. Stat. § 7B-2501(c), the court “shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile.” N.C. Gen. Stat. § 7B-2501(c). The court determines which dispositional level is appropriate based on the juvenile’s delinquency history and the level of offense. N.C. Gen. Stat. § 7B-2508(f). Finally, “within the guidelines set forth in [N.C. Gen. Stat. § 7B-2508],” the court

shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon: (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) (emphasis added).

Our Court has recently held that “[a]lthough the information regarding the statutory factors may be included in the reports given to the court by the juvenile court counselor and may have been considered by the trial court, the trial court is vested with the responsibility of making oral and written findings showing *its* consideration of the five factors contained in N.C. Gen. Stat. § 7B-2501(c).” *In re N.M.*, ___ N.C. App. ___, 892 S.E.2d 643, 646 (2023) (emphasis added).

Here, the district court indicated on the disposition order that E.M.’s juvenile delinquency history level was “low.” The State charged E.M. with a Class H felony, which is considered a “serious” offense for purposes of a dispositional order.

Therefore, according to the chart set forth in N.C. Gen. Stat. § 7B-2508(f), the permissible dispositional levels available to the district court were *either* Level 1 or Level 2. *See, e.g.*, N.C. Gen. Stat. § 7B-2508(f). However, the district court marked the box on Line 1 indicating that it was “required to order a Level 2 disposition.”

This is an incorrect conclusion as a matter of law, and the appropriate box for the district court to have marked was on Line 2, which states, “The Court is required to order either a Level 1 disposition or a Level 2 disposition, and is entering a Level 2 disposition.” Therefore, the district court erred by concluding as a matter of law that it was “required to order a Level 2 disposition.” Consequently, we vacate and remand the disposition order with instructions for the district court to make findings of fact indicating its considerations when entering the court’s dispositional level in the disposition order.

D. Consideration of predisposition report and risk and needs assessment

Finally, E.M. argues that the district court abused its discretion when it asserted that it had received, considered, and incorporated by reference the contents of a predisposition report, risk assessment, and needs assessment for E.M. when executing the disposition order, despite having never received such reports. We agree.

a. Standard of review

“It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

“A [district] court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *Id.* “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Id.*

b. Discussion

“Dispositional findings must be based upon properly admitted and clear[,] cogent[,] and convincing evidence.” *In re A.J.L.H.*, 289 N.C. App. 644, 650, 890 S.E.2d 921, 925 (2023). Furthermore, in entering a disposition order, the district court *shall* select a disposition based on five factors, one factor being “the rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.” N.C. Gen. Stat. § 7B-2501(c)(5). “[W]hen a reviewing court finds an abuse of that discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion.” *A.J.L.H.*, 289 N.C. App. at 649, 890 S.E.2d at 924. “The reviewing court should not substitute its own discretion for that of the trial court.” *Id.*

Upon our thorough review of the record on appeal, there is no indication that a predisposition report, risk assessment, or needs assessment was ever conducted regarding E.M. These findings were not supported by clear, cogent, and convincing evidence, and cannot be used to support the disposition order. Consequently, the district court abused its discretion by asserting that it received and considered a predisposition report, a risk assessment, and a needs assessment and that the court

had incorporated those three documents by reference into the disposition order, when those three documents simply did not exist.

III. Conclusion

For the foregoing reasons, we hold that the district court failed to make the requisite written findings of fact to show that it considered the factors set forth in N.C. Gen. Stat. § 7B-2501(c), failed to make the requisite oral and written findings of fact regarding restitution, and failed to make a determination as to E.M.'s ability to pay restitution. Additionally, we hold that the district court abused its discretion when it improperly asserted that it had received and considered a predisposition report, risk assessment, and needs assessment when executing E.M.'s disposition order because such reports are absent from the record. As such, we vacate the disposition order and remand for a new disposition hearing and entry of an order that includes the requisite findings of fact.

VACATED AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).