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IN THE
COURT OF APPEALS OF INDIANA

I.M.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1101-JV-41
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle P. Gaughan, Judge Pro Tem
The Honorable Geoffrey A. Gaither, Magistrate
Cause No. 49D09-1012-JD-3365

August 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

I.M. appeals the restitution order issued by the trial court. I.M. raises one issue which we revise and restate as whether the juvenile court abused its discretion in ordering I.M. to pay restitution. We reverse and remand.

The relevant facts follow. Sometime prior to November 16, 2009, sixteen-year-old I.M. and a friend saw keys in the ignition of a truck. I.M. did not have the owner's permission to take or borrow the truck and did not know the owner. I.M. had the truck for "[p]robably a couple weeks." Transcript at 11. On November 16, 2009, I.M. drove the truck from Indianapolis to Hamilton County to bring a friend "up to get some money to put gas in the truck." Id. at 9. I.M. did not have a valid Indiana driver's license.

On January 19, 2010, the State filed a delinquency petition in the Hamilton Circuit Court alleging that I.M. had committed the following, which, if committed by an adult, would be: Count I, receiving and retaining stolen property, a class D felony; Count II, criminal mischief, a class A misdemeanor; Count III, resisting law enforcement, a class D felony; and Count IV, operating a motor vehicle without ever receiving a license, a class C misdemeanor.

On October 4, 2010, the court held a fact-finding and dispositional hearing, and I.M. admitted to Count I, receiving stolen property, and Count IV, operating a motor vehicle without ever receiving a license. I.M. indicated that the "truck was in the same condition for the entire time and no damage was done to the truck." Id. at 12. The court entered adjudications for delinquency for Counts I and IV and dismissed Counts II and III. The court then transferred disposition to Marion County, I.M.'s county of residence.

On January 7, 2011, the Juvenile Division of the Marion Superior Court continued the dispositional hearing. The prosecutor argued that "there is some substantiating documentation for restitution" and stated:

> I got a call this morning from the victim, Mr. Jason Lee and uh he said that he still hasn't received anything and he is claiming as a substantiated [sic] within the documentation that you should have uh three seventy-five for a truck storage fee and tow fee and then one thousand nine hundred and seventy-six dollars and six cents for car damage and he informed me that he had liability only insurance so none of that was covered and of course I would just ask that that restitution be implemented as a part of his probation . . . .

Id. at 23. The prosecutor mentioned some receipts, which were not admitted into evidence, and stated that the total amount was $2,351.06.

I.M.'s mother testified that she was not employed and was supporting five children with the help of her father and government assistance. I.M. testified that he is a member of a rap group and that he earns about eighty dollars per show. The court placed I.M. on informal probation and ordered restitution in the amount of $2,351.06. I.M.'s counsel then stated: "As far as restitution I would just like an opportunity to talk to the listed victim regarding these receipts before restitution is ordered." Id. at 28. The court informed I.M.'s counsel that it was going to leave its order "as it is." Id. The court's dispositional order states that a special condition of informal probation was to pay restitution in the amount of $2,351.06 and that probation would end on May 13, 2011. The court did not impose additional court fees "as the family was found to be indigent." Appellant's Appendix at 7.

The issue is whether the juvenile court abused its discretion in ordering I.M. to pay restitution. I.M. argues that the evidence does not support the restitution order because there is no evidence that the truck owner incurred damages as a result of the criminal acts to which I.M. pled guilty. I.M. also appears to argue that the court abused its discretion in ordering I.M. "to pay the amount of $2351.06 in a lump sum payment," ordered the amount to be paid "without fixing a manner of payment," and because "[t]here is no evidence I.M. is able to make the restitution payment as a lump sum as a condition of his probation." Appellant's Brief at 5-6. I.M. requests that we vacate the restitution order.

The State concedes that "remand is proper for the purpose of setting a new restitution hearing as the juvenile court's restitution order is not supported by the evidence." Appellee's Brief at 3. The State observes that the receipts were not admitted into evidence, the record does not show that the juvenile court actually viewed the receipts prior to ordering restitution, and there is no evidence establishing the validity of the receipts as being a result of I.M.'s offenses. The State also acknowledges that "the juvenile court's inquiry was not adequate to determine whether I.M. had the ability to pay restitution, and the juvenile court did not fix a manner of paying restitution." Id. at 4.

A juvenile court may order the child "to pay restitution if the victim provides reasonable evidence of the victim's loss, which the child may challenge at the dispositional hearing." Ind. Code § 31-37-19-5 (Supp. 2008). The restitution order is within the court's discretion, and this court will reverse only upon a showing of an abuse of discretion. M.L. v. State, 838 N.E.2d 525, 528 (Ind. Ct. App. 2005), reh'g denied,

trans. denied. An abuse of discretion occurs when the juvenile court's determination is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id.

The adult restitution statute, Ind. Code § 35-50-5-3, requires that a restitution order for property damages be based on actual loss incurred by the claimant. See Shane v. State, 769 N.E.2d 1195, 1201 (Ind. Ct. App. 2002). The adult statute is instructive when the juvenile statute is silent. M.L., 838 N.E.2d at 528-529. Evidence supporting a restitution order is sufficient "if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." T.C. v. State, 839 N.E.2d 1222, 1227 (Ind. Ct. App. 2005) (quoting State v. Kinneman, 155 Wash.2d 272, 119 P.3d 350, 357 (Wash. 2005)), reh'g denied.

Here, the prosecutor mentioned receipts but these documents were not admitted into evidence, and the record does not reveal that the juvenile court examined the receipts. Further, the record does not reveal evidence that the damage to the truck was the result of I.M.'s actions. Based upon the record, we conclude that the court abused its discretion. See J.H. v. State (filed Jun 3, 2011), Ind. App. No. 49A02-1005-JV-560, slip op. at 5 (holding the "'estimates' were mere speculation or conjecture and that the juvenile court's order is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom").

To the extent that I.M. argues that there is no evidence that I.M. was able to make the restitution payment and the State acknowledged that the juvenile court's inquiry in this regard was inadequate, we observe that equal protection and fundamental fairness concerns require that a juvenile court inquire into a juvenile's ability to pay before the court can order restitution as a condition of probation. M.L., 838 N.E.2d at 529. While the juvenile court has "the discretion to set the amount of restitution, it [is] constrained by principles of equal protection and fundamental fairness to set an amount within [the juvenile's] ability to pay [when] restitution [is] made a condition of probation." Id. at 530. "This is so because, as a general rule, 'when restitution is ordered as a condition of probation, the trial court must inquire into the defendant's ability to pay in order to prevent indigent [juveniles] from being imprisoned because of their inability to pay.'" J.H., slip op. at 6.

Here, the juvenile court conducted an inquiry as to the ability to pay of I.M.'s mother. However, it is the juvenile's ability which is relevant. See T.C., 839 N.E.2d at 1224-1225. I.M. testified that he is a member of a rap group and that he earns about eighty dollars per show, but the record does not reveal how often the group performs or whether I.M. has other sources of income or assets. We cannot say that the court engaged in an inquiry sufficient to ascertain whether I.M. would be able to pay restitution. See J.H., slip op. at 7 (holding that the court could not say that the juvenile court engaged in an inquiry sufficient to ascertain whether J.H. would be able to pay restitution). Accordingly, we reverse the juvenile court's order of restitution and remand

for a new restitution hearing. See id. at 7 (reversing the juvenile court's restitution award and remanding for a new restitution hearing).

For the foregoing reasons, we reverse and remand for a new restitution hearing.

Reversed and remanded.

BAKER, J., and KIRSCH, J., concur.