STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0367
A20-0368

In the Matter of the Welfare of: E. M. H., Child.

Filed August 17, 2020
Affirmed
Frisch, Judge

Washington County District Court
File Nos. 82-JV-19-636, 82-JV-19-637

Deborah Ellis, Susan Johnson, Ellis Law Office, St. Paul, Minnesota (for appellant)

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

Pete Orput, Washington County Attorney, Tricia A. Loehr, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Frisch, Judge.

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

FRISCH, Judge

In this consolidated appeal from orders certifying appellant for adult prosecution on first-degree criminal-sexual-conduct charges, appellant argues that (1) the district court erred by adopting the state's proposed findings of fact and conclusions of law nearly verbatim, and (2) the district court abused its discretion by certifying him for adult prosecution. We affirm.

FACTS

On August 19, 2019, the state filed two juvenile-delinquency petitions against E.M.H. In the first petition, the state charged E.M.H. with one count of criminal sexual conduct in the first degree pursuant to Minn. Stat. § 609.342, subd. 1(e)(i) (2018). In the second petition, the state charged E.M.H. with three counts of criminal sexual conduct in the first degree pursuant to Minn. Stat. § 609.342, subd. 1(e)(i), and one count of false imprisonment pursuant to Minn. Stat. § 609.255, subd. 2 (2018).

The first petition sets forth the following allegations. On September 7, 2018, when E.M.H. was 16, E.M.H. contacted the victim and asked if she would like to get some food. They agreed to go to a restaurant, but E.M.H. instead drove the victim to a nearby parking lot. E.M.H. tried to kiss the victim. The victim backed away and told E.M.H. that they were just friends. E.M.H. again tried to kiss the victim, and the victim moved away from E.M.H. E.M.H. grabbed the victim around her neck and tried to kiss her again. E.M.H. attempted to put his hands down the victim's pants. The victim said, "no, no," and told E.M.H. to leave her alone. E.M.H. moved to the back seat of his car and instructed the victim to do the same. The victim refused until E.M.H. "got directly behind her and put one hand around her throat, impairing her ability to breathe." The victim "couldn't talk and was gasping for air." E.M.H. again directed the victim to move to the back seat of the car, and the victim complied. E.M.H. grabbed the victim's leg and attempted to kiss her. The victim attempted to push E.M.H. away and told him no. E.M.H. then removed all of the victim's clothing, along with his pants and underwear. When the victim again said no, E.M.H. put his hands around the victim's throat with such force that "she believed he would

hurt her, so she just stopped moving and thinking because she was scared." E.M.H. then put his penis in the victim's vagina. E.M.H. drove the victim home. E.M.H. sometime thereafter sent the victim a message that he "felt bad and felt like he kind of forced her."

The second petition sets forth the following allegations. E.M.H. and a separate victim were acquainted from school and one prior date. E.M.H. had previously pressured the victim to have sex with him, and she said no. On November 2, 2018, when E.M.H. was 16, E.M.H. asked the victim to get together with him. The victim thought they were going to get ice cream, but E.M.H. instead drove to the parking lot of a city park. E.M.H. asked the victim to move an item into the backseat, then convinced the victim to stay in the backseat and talk. E.M.H. began touching the victim's thigh. The victim told E.M.H. to stop and stated that she needed to leave. E.M.H. again touched the victim and attempted to kiss her. The victim tried to exit the vehicle through the door, but the door would not open. The victim believed that E.M.H. had activated the child locks on his car. The victim tried to crawl into the front seat of the car. E.M.H. grabbed the victim and pulled her to the backseat. The victim then attempted to place an emergency call on her cell phone. E.M.H. took the phone and threw it to the front seat. E.M.H. touched the victim's leg near her vagina, and the victim told him to stop. The victim again tried to climb into the front seat, but E.M.H. grabbed her and pulled her into the backseat. E.M.H. pushed the victim down, reached inside the victim's leggings and digitally penetrated her vagina. The victim began to cry and tried to push E.M.H. away. E.M.H. held the victim down with sufficient force to bruise the victim's arm. E.M.H. attempted to remove the victim's underwear, but the victim held her underwear in place. E.M.H. then pinned the victim's right arm behind

her head, penetrated her vagina with his penis and said, "I'm sorry, you're too ugly right now. I have to cover your eyes," and if the victim would "quit crying, everything [would] be okay." E.M.H. then became angry when the victim's phone rang. The victim told E.M.H. that she needed to leave and would walk home. E.M.H. replied that he "would drive her home if she would suck his dick." The victim again attempted to climb into the front seat of the vehicle. E.M.H. grabbed the victim by her hair and pulled her into the backseat. E.M.H. forced his penis into the victim's mouth. The victim saw a light she believed originated from E.M.H.'s cell phone. The victim attempted to lift her head, but E.M.H. forcibly prevented her from doing so. E.M.H. thereafter repeatedly called the victim "ugly" and "disgusting" and drove her to a location near a friend's home. As E.M.H. drove away, E.M.H. "told her not to tell anyone or he would put the video out." The victim asked E.M.H. what he meant, and he played a few seconds of a video recording showing E.M.H. forcing the victim's mouth onto his penis.

In both cases, the state sought presumptive adult certification under Minn. Stat. § 260B.125, subd. 3 (2018). The district court found probable cause for the underlying offenses and scheduled a certification hearing. A probation agent conducted a certification study and recommended that E.M.H. be prosecuted as an extended jurisdiction juvenile (EJJ) rather than being certified for adult prosecution. On January 31, 2020, the district court held a certification hearing and received testimony from the probation agent, who testified that he had never recommended adult certification in any of his cases.

The district court asked the parties to submit proposed orders. On February 12, 2020, E.M.H. submitted his proposed order. On February 14, 2020, at 1:38 p.m., the state

submitted its proposed order. On February 14, 2020, at 4:19 p.m., the district court issued its order certifying E.M.H. as an adult. This appeal follows.

D E C I S I O N

I. The district court did not commit reversible error by adopting the state's proposed findings of fact and conclusions of law.

E.M.H. argues that the district court erred by adopting the state's proposed order, "virtually word for word with the exception of a single paragraph inserted by the court" and less than three hours after the state submitted its proposed order.

"Appellate courts disfavor the verbatim adoption of a party's proposed ruling by the district court but do not automatically reverse a district court for doing so." *Suleski v. Rupe*, 855 N.W.2d 330, 339 (Minn. App. 2014). We review a district court's verbatim adoption of one party's proposed findings by conducting "a careful and searching review of the record." *Dukes v. State*, 621 N.W.2d 246, 258 (Minn. 2001). Verbatim adoption alone does not provide sufficient grounds for reversal. *Id*. at 259.

Although very similar, the order signed by the district court is not a verbatim adoption of the state's proposed order. Of particular note, the district court added a full paragraph of findings regarding E.M.H.'s acceptance of responsibility and amenability to treatment based on its review of the certification study:

> The Court also notes that it is aware that while the Juvenile has been seeing a therapist related to sex offender treatment during the pendency of this matter—it is clear from the Certification Study that the Juvenile has denied delinquent/criminal involvement in each of the events in the therapy sessions and therefore an engaged or therapeutically successful outcome in a juvenile sex offender treatment program as a delinquency matter is a[t] best questionable.

Our review of the district court's order reflects additional, albeit relatively minor, differences as compared to the state's proposed order. The totality of these additions and changes reflect deliberate consideration and action by the district court.

Our careful and searching review of the record reveals that the order of the district court is well supported by the record and contains the required findings. In a presumptive certification order, the district court is only required to include findings of fact relating to E.M.H.'s date of birth, the date of the alleged offense, and why the court upheld the presumptive certification. Minn. R. Juv. Delinq. P. 18.07, subd. 2(a)(3). The order contains the required findings, including a detailed explanation of why the district court applied the presumption of adult certification. We find no error by the district court.[1]

II. The district court did not abuse its discretion by certifying E.M.H. as an adult.

E.M.H. argues that the district court abused its discretion by certifying him as an adult. We review an adult certification order for an abuse of discretion. *In re Welfare of J.H.*, 844 N.W.2d 28, 34 (Minn. 2014). We review legal questions de novo and findings of facts for clear error. *Id*. at 34-35. Certification to adult court is presumed if "(1) the child was 16 or 17 years old at the time of the offense; and (2) the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment

[1] We note that the district court's adoption of the majority of the state's proposed order and the short turnaround between the submission of that proposed order and the issuance of the district court's final order gave rise to E.M.H.'s question of confidence. Although we conclude that the district court did not err here, we emphasize that we discourage the wholesale adoption of a party's proposed order. "[T]he practice of the verbatim adoption of a party's proposed findings and conclusions is hardly commendable." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002).

to prison under the Sentencing Guidelines and applicable statutes." Minn. Stat. § 260B.125, subd. 3. In a presumptive certification proceeding where the district court has found probable cause that the juvenile committed the alleged offense, the juvenile has the burden of establishing, through clear and convincing evidence, that retaining the proceeding in juvenile court serves public safety. *Id*.

To determine whether public safety is served by certifying the matter, the court considers the following statutory factors:

> (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
>
> (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
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> (3) the child's prior record of delinquency;
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> (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
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> (5) the adequacy of the punishment or programming available in the juvenile justice system; and
>
> (6) the dispositional options available for the child.

Minn. Stat. § 260B.125, subd. 4 (2018); *see also* Minn. R. Juv. Delinq. P. 18.06, subd. 3 (setting forth the same factors). A district court must afford greater weight to the seriousness of the offense and the prior record of delinquency than the other statutory factors. Minn. Stat. § 260B.125, subd. 4; *In re Welfare of U.S.*, 612 N.W.2d 192, 195 (Minn. App. 2000). "For purposes of certification, the juvenile is presumed guilty of the alleged offenses." *U.S.*, 612 N.W.2d at 195. We will not reverse a finding regarding

whether public safety will be served by certification unless clearly erroneous. *J.H.*, 844 N.W.2d at 35.

As a threshold matter, adult certification was presumptive because E.M.H. was 16 at the time of the offenses and the offenses carry presumptive prison sentences if he were tried as an adult. E.M.H. does not dispute that certification was presumptive but instead argues that the district court abused its discretion in certifying him for adult prosecution against the recommendation of the certification study and clear and convincing evidence that retaining him in juvenile court under EJJ served public safety.

First, E.M.H. admits that the charged offenses are serious and that this factor weighs in favor of certification. E.M.H. argues that the district court clearly erred by finding that both charges included the potential aggravating factor of particular cruelty, but he offers no specific reason to dispute that the allegations referenced by the district court show the infliction of pain and cruelty beyond that normally associated with these offenses. Based on our review of the record, the district court correctly found that each of the petitions contained allegations potentially giving rise to the aggravating factor of particular cruelty. The first petition contains allegations that E.M.H. used child locks to prevent the victim from leaving and took the victim's phone to prevent her from seeking emergency assistance. The second petition contains allegations that E.M.H. called the victim "ugly" and "disgusting" and threatened the victim with release of video footage depicting the incident. We see no clear error by the district court in its assessment of the seriousness of the offenses.

E.M.H. next argues that the district court abused its discretion in concluding that his culpability weighed in favor of adult certification. We examine the alleged offenses in determining whether a juvenile is culpable. *J.H.*, 844 N.W.2d at 38. The district court found that E.M.H. was solely responsible for the allegations set forth in the petitions, which the district court must accept as true in an adult certification proceeding. *U.S.*, 612 N.W.2d at 195. The district court further noted the allegations that E.M.H. "sought out the victims, picked them up under false pretenses, and drove them to isolated areas away from help."[2] The district court further found that the allegations do not demonstrate that E.M.H. committed the acts under duress, acted in self-defense, or was a less culpable actor among many. And the certification study also concluded that this factor weighed in favor of adult certification. We see no abuse of discretion by the district court.

E.M.H. next argues that the district court abused its discretion by giving "undue weight" to his prior record of delinquency. A "prior record of delinquency" encompasses both adjudicated violations and records of petitions to juvenile court. *In re Welfare of N.J.S.*, 753 N.W.2d 704, 710 (Minn. 2008). The district court may consider pending petitions in consideration of the child's prior record of delinquency. *See In re Welfare of*

[2] Because E.M.H. knew both of his victims, E.M.H. argues that the district court clearly erred by stating that he sought out his victims under false pretenses. But both petitions contain allegations that, although E.M.H. was not a stranger to the victims, E.M.H. sought them out via messaging systems, convinced them to accompany him in his vehicle, then brought them to isolated locations that were different than where they believed they were going. These allegations support a finding that E.M.H. sought the victims out under false pretenses. Moreover, we note that first-degree criminal sexual conduct is in no way any less severe when an alleged perpetrator knows or is familiar with the victim.

K.A.P., 550 N.W.2d 9, 12 (Minn. App. 1996) (concluding that district court did not err by considering pending charges), *review denied* (Minn. Aug. 20, 1996).

The district court found that "a juvenile presumed to have committed two sexual assaults with force on two separate victims on two separate occasions presents a public safety risk." Although E.M.H. argues that the absence of any other criminal history shows that he does not present a risk to public safety, the district court acted well within its discretion in finding that the allegations in the two pending petitions demonstrated a public-safety risk.

E.M.H. next argues that the district court clearly erred by finding that he would not be successful in future treatment. "[A] child's programming history . . . broadly refers to programming history consisting of a specialized system of services, opportunities, or projects designed to meet a relevant behavioral or social need of the child." *J.H.*, 844 N.W.2d at 39. The district court noted that the certification study concluded that E.M.H. "has denied delinquent/criminal involvement in each of the events in therapy sessions and therefore an engaged or therapeutically successful outcome in a juvenile sex offender treatment program as a delinquency matter is at best questionable." Although E.M.H. argues that the district court "ignored all the positive evidence of E.M.H.'s successes and capabilities and drew its own negative conclusion," the district court acted within its discretion in finding that this factor weighed in favor of adult certification.

E.M.H. next argues that the district court abused its discretion in finding that EJJ programming was not appropriate to address the offenses, a finding contrary to the recommendation of the probation officer who prepared the certification study. We note

that the district court is not required to adopt the report or recommendation of a probation agent and is not obligated to specifically explain its reasons for rejecting the ultimate recommendation of a probation agent. Even so, here the district court independently reviewed and weighed the available EJJ placements and programming and concluded that they were not adequate to address the severity of the sex offenses set forth in the petitions. The district court specifically found that "public safety is not served by having a limited amount of time to work with and monitor an individual who for the purposes of this Order is presumed to have committed sexual assault with force on two separate victims." To that end, while the certification study included the results of an evaluation regarding the risk of general criminal re-offense, the evaluation did not include the results of a psychosexual evaluation or any other evaluation of E.M.H. regarding his risk to re-offend in a sex specific nature.[3] We see no abuse of discretion by the district court in its exercise of judgment regarding its assessment of programming or rejection of the recommendation of the probation agent.

E.M.H. argues that the district court abused its discretion in not considering the options available to him in EJJ. We disagree. The district court expressly set forth the significant difference between sentences for these offenses in adult court, including the potential for a 30-year probationary period, and EJJ, with a maximum probationary period of approximately three years given the age of E.M.H. The district court did not abuse its

[3] E.M.H. noted at oral argument that a psychosexual evaluation had been completed, but neither the evaluation itself nor a description of the results of the evaluation are included in the record.

discretion in concluding that no adequate punishment or rehabilitation is available to E.M.H. in EJJ and that public safety is best served by adult certification.

Finally, E.M.H. argues that the district court abused its discretion by not considering evidence of mitigating factors. The record shows that E.M.H. is a good student with no criminal history other than the instant petitions and that he benefits from the support of his family. Although the district court could have acknowledged the evidence of mitigating factors, it was not required to address each of the six statutory factors in its adult certification order. *See J.H.*, 844 N.W.2d at 37 (explaining findings of fact that are required in a presumptive certification case).

Accordingly, E.M.H. did not meet his burden of establishing, through clear and convincing evidence, that retaining the proceedings in the juvenile court serves public safety. Because we find no abuse of discretion by the district court in its order for adult certification and no clear error in the district court's finding that public safety will be best served by adult certification, we affirm the certification order in both cases.

Affirmed.