

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1083**

In the Matter of the Welfare of: K. A. H., Child.

**Filed April 18, 2022
Affirmed
Bryan, Judge**

Hennepin County District Court
File No. 27-JV-20-3337

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant K.A.H.)

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent State of Minnesota)

Considered and decided by Bryan, Presiding Judge; Wheelock, Judge; and Smith, John, Judge.*

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal from the district court's order certifying him to stand trial as an adult, appellant requests remand for a new certification hearing, arguing that his attorney's conduct was so deficient that it entirely failed to subject the prosecution to adversarial

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

testing. Because appellant's attorney did not entirely fail to subject the state's case to adversarial testing, we affirm.

FACTS

On September 14, 2020, a surveillance camera captured video footage of two males firing multiple gunshots at a group of people. One victim died and another was injured. Respondent State of Minnesota charged appellant K.A.H. with one count of aiding and abetting second-degree intentional murder and one count of attempted second-degree intentional murder. On March 25, 2021, the state moved to certify the case for adult prosecution because K.A.H. was 17 years old at the time of the offense and because the charged offenses carried a presumptive executed prison sentence.

At hearings on May 21 and June 23, 2021, the district court admitted testimony from a clinical forensic psychologist and a probation officer, as well as documentary evidence, including the certification study, psychological evaluations, and the forensic psychologist's curriculum vitae. K.A.H.'s attorney did not offer any evidence or witnesses at the certification hearing, but briefly conducted cross-examination of the two witnesses. Although the parties did not make closing arguments at the certification hearing, each attorney submitted a post-hearing memorandum.

K.A.H.'s attorney incorporated statements from the psychological evaluation in the written submission and specifically discussed how K.A.H. had not been given opportunities in the past to address mental health, had not experienced stable education, and did not receive adequate services during his prior involvement in a diversion program:

[K.A.H.] has never done any therapy or counseling. He has never been psychiatrically hospitalized or taken any psychiatric medication. He has never been diagnosed with a learning disability however lacked a stable learning environment due to his mother removing him from schools she did not like, other schools he had attended closing down, and has a four-year gap of an unknown school placement in his school records. [K.A.H.] reported being placed in a Diversion program for his prior domestic charges where he was supposed to do six months of a program. When he attended the program, the man he met with didn't see the purpose of him being there stating "there were no issues." [K.A.H.] worked for one hour doing community service around the building. He then signed some papers and was considered finished with the program.

K.A.H.'s counsel also emphasized the recommendations for programming from the psychological evaluation. In this way, K.A.H.'s counsel used the documentary evidence and testimony to oppose the motion: "Based on all of the evidence presented by the State and the above arguments, the Defense respectfully requests the court not to certify him as an adult or in the alternative that this Court certified as Extended Juvenile Jurisdiction."

On July 29, 2021, the district court determined that all six statutory factors favored certification and granted the state's motion for certification. K.A.H. appeals.

DECISION

K.A.H. argues that a structural error occurred when his counsel entirely failed to subject the prosecution's motion for certification to meaningful adversarial testing.¹ We

¹ In his written brief to this court, K.A.H. does not raise a claim that counsel's representation fell below an objective standard of reasonableness and affected the outcome of the certification hearing pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). K.A.H. also does not argue that he need only satisfy the first *Strickland* prong to obtain relief. Instead, K.A.H. acknowledges that our structural error analysis is substantively different from the comparison required under the first *Strickland* prong. Given the argument as presented, we decline to determine what an objective standard of

are not persuaded and conclude that counsel did not entirely fail to contest the state's motion because counsel elicited testimony and submitted written arguments in opposition to the motion.

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. Counsel's conduct can constitute structural error: “if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *United States v. Cronin*, 466 U.S. 648, 659 (1984). Under this structural error analysis, the case “must involve a complete failure by counsel.” *State v. Dalbec*, 800 N.W.2d 624, 628 (Minn. 2011) (quotation omitted). The defendant has the burden to show structural error due to counsel's conduct. *Id.*

The Minnesota Supreme Court has previously concluded that failures of counsel to submit evidence, cross-examine witnesses, and make closing arguments did not amount to structural error. *Dereje v. State*, 837 N.W.2d 714, 719, 723 (Minn. 2013) (concluding that counsel's decision to stipulate to the admission of the complaint and police reports, and agreement not to present witnesses, present evidence, cross-examine witnesses, or provide closing argument did not result in structural error); *Dalbec*, 800 N.W.2d at 628 (concluding

reasonableness would entail in this context, whether K.A.H.'s counsel met this standard, and whether the outcome would have been different. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (noting that issues not briefed are not properly before an appellate court), *rev. denied* (Minn. Aug. 5, 1997); *see also McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (concluding that appellant's arguments were not properly raised because the appellant “fail[ed] to address [the issue] in the argument portion of his brief”).

that counsel's failure to submit a closing argument did not result in structural error); *State v. Cram*, 718 N.W.2d 898, 906-08 (Minn. 2006) (concluding that counsel's failure to submit evidence or argument regarding restitution did not result in structural error); *see also Cooper v. State*, 565 N.W.2d 27, 31 (Minn. App. 1997) (concluding that counsel's failure to have a sign language interpreter present during some of their communications did not constitute structural error), *rev. denied* (Minn. Aug. 5, 1997). Structural error requires an entire failure of counsel.

K.A.H.'s counsel did not entirely fail to contest the state's certification motion. We first observe that the nature of a certification hearing differs from a contested trial. Unlike at a trial, in a certification hearing, factual disputes regarding the commission of the offense are not directly pertinent to the application of the public safety factors set forth in Minnesota Statutes section 260B.125, subdivision 4 (2020). The parties at a certification hearing need not dispute evidence regarding the offense, the child's previous programming history, the child's prior record of delinquency, available programming, and dispositional options, among other subjects. We also acknowledge that the offense at issue was presumptively certifiable and the burden was on K.A.H. to rebut this presumption. Minn. Stat. § 260B.125, subd. 3 (2020). We consider the conduct of counsel in this context.

Here, counsel cross-examined the witnesses presented by the state regarding their recommendations. In addition, counsel submitted a written argument that K.A.H. should be given treatment and programming based on the psychological evaluation admitted into evidence, the direct testimony of the witnesses, and the statements made during cross-examination. K.A.H.'s attorney also incorporated statements from the psychological

evaluation to show that K.A.H. had not been given these opportunities in the past. Counsel's conduct in this case went beyond the limited efforts deemed satisfactory in *Dereje, Dalbec, Cram, and Cooper*. Therefore, we conclude that counsel did not entirely fail to contest the state's motion and that counsel's conduct in this case did not amount to structural error.

Affirmed.