STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2063

In the Matter of the Welfare of: J. K. L. A., Child

Filed May 6, 2013
Affirmed
Huspeni, Judge[*]

Hennepin County District Court
File No. 27-JV-12-5785

David W. Merchant, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant J.K.L.A.)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for respondent county)

Considered and decided by Smith, Presiding Judge; Cleary, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

Appellant J.K.L.A. challenges the decision to certify him for adult prosecution, arguing that, for five of the six factors that must be considered, the district court erroneously found clear and convincing evidence favoring certification. We affirm.

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

FACTS

On the morning of June 26, 2012, officers responded to a report of multiple shots being fired at and into a home on Bryant Avenue North (the Bryant House), causing the death of a five-year-old boy. The boy was asleep on the couch in the living room of the home when he was shot in the upper back. Three other children were also sleeping on the couch with the victim when he was shot. Officers located ten bullet casings outside the home. Witnesses reported that two men ran from the scene and that one of the men went by the street name "Funny Mo."

The petition for certification indicated that the shooting was the culmination of a series of gang-related incidents commencing the previous evening, when several young people were gathered at a neighborhood convenience store. A witness stated that someone known as "Funny Mo" had pointed a gun at two teens. The two teens "knew people at the victim's house and spent a lot of time" at the Bryant House.

As officers canvassed the area for witnesses and weapons after the Bryant House shooting they were approached by residents of a home on Camden Avenue North (the Camden House), who stated that their home was shot at the previous night around midnight. The officers found approximately five bullet holes in the window glass at the Camden House. As they spoke with the residents of the Camden House, two men approached its residents from the direction of the Bryant House and accused them of shooting at the Bryant House. Other witnesses confirmed that there had been conflicts between people associated with the two houses.

The day after the shooting, officers interviewed fifteen-year-old appellant. He admitted the following: he was at the Camden House just before it was shot at; some bullets penetrated where he had been sitting; he was known as "Funny"; and (after first denying it) he had pulled a gun on people at the local convenience store the evening before the shooting. Appellant's co-defendant's mother confirmed to police that there had been ongoing problems and threats of violence since the death of her son, the co-defendant's brother, Juwan (known as "Skitz"), and that Juwan's friends called themselves "Skitz Squad." Police arrested appellant and his co-defendant the next day, and both denied any involvement in the Bryant House shooting.

Appellant was charged with first-degree murder by petition for non-presumptive certification. In advance of a certification hearing, a non-presumptive certification study was prepared by an investigative probation officer and a non-presumptive certification evaluation was prepared by a forensic psychologist. Both the probation officer and the forensic psychologist testified at the certification hearing.

The certification study indicated that at the time it was prepared, four cases were pending against appellant: the felony murder charge from this case, two counts of misdemeanor domestic assault from June 17, 2012, one misdemeanor charge of assault in the fifth degree from June 23, 2012, and one petty misdemeanor for a curfew violation from June 12, 2012; some resolution had been reached in 13 other incidents involving appellant between September 2009 and the time of the murder charge.[1]

[1] Those charges included three petty misdemeanor theft, two petty misdemeanor curfew violations, one petty misdemeanor traffic violation, two misdemeanor theft, two

As a consequence of resolving the charge of giving a false name to a police officer, appellant was given one year of supervised probation, was required to undergo anger management counseling, and—in lieu of community service—was given seven days of electronic home monitoring (EHM). The study indicated that while appellant was on EHM and probation, his attitude was poor and noncompliant, he missed several required anger-management classes, there were concerns that he was having people visit the house in violation of EHM rules, that he was using marijuana, that he was disobeying his mother's direction not to have people come over to the house, and that he was disrespectful to his parents. Despite several absences from anger-management classes, appellant was not discharged and was given another opportunity to succeed. The study indicated that appellant has been detained at the juvenile detention center several times, for the charges already discussed and other times, and had run from a program where he was held after being detained in response to a domestic-assault charge. Additionally, nine bench warrants have been issued for appellant for failing to appear in court.

The certification study also indicated that appellant's family and home life is troubled. There have been several allegations of abuse and maltreatment of appellant's mother and siblings. Appellant's father has had several contacts with Hennepin County Adult Court, as have at least two of appellant's siblings. Further, appellant's academic

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misdemeanor trespass, two misdemeanor disorderly conduct, and one charge of indeterminate severity for giving a false name to a police officer. Six of those charges were dismissed, one was continued without findings, two resulted in appellant being adjudicated a petty offender, and three resulted in appellant being adjudicated delinquent. Appellant was adjudicated delinquent on the charge of giving a false name to a police officer; the court dismissed a misdemeanor theft, a misdemeanor disorderly conduct, and two misdemeanor trespass charges.

record contains approximately fifty behavioral incidents at various schools since September 2008.[2]

During the certification study, appellant denied involvement in gangs or other illegal activity, denied carrying a weapon, denied using alcohol or drugs, denied having gang tattoos, and denied ever initiating a physical altercation. He stated that his best friends were his mother and God. He did acknowledge having some anger issues.[3] The certification study also noted several uncharged incidents, including suspicion of assault with a dangerous weapon on June 3, 2012, giving a false name to police on April 14, 2011, and trespass on April 17, 2011.

The certification evaluation, prepared by a forensic psychologist, was based largely on a lengthy interview with appellant, during which he was administered a number of tests and assessments. During the interview, appellant denied having any medical issues, mental health concerns, or substance abuse problems. Testing indicated that appellant was within a normal range of intelligence and had an educational level beyond what he had achieved in school, but had a "defensive response to testing," consistent with "extreme use of denial, poor insight, and lack of sophistication." The evaluation noted that appellant's profile "may show inappropriate, angry, unpredictable, or violent behaviors," and may experience "interpersonal sensitivity, argumentativeness,

[2] These include several instances of fighting and other physical altercations, gang related activity, "threaten[ing] to kill a school social worker," and dozens of incidents of disruptive and abusive behavior. The final behavioral incident at school occurred on February 9, 2012, after which point it appears that appellant stopped going to school.

[3] The certification study indicated that appellant "was attempting to portray himself in the most positive light which is understandable given his current situation."

suspiciousness, alienation, and distrust." The psychologist diagnosed appellant with "Conduct Disorder Unspecified Onset Severe."

On an assessment of appellant's propensity for violent behavior, the psychologist noted that appellant did not have a "[p]ositive attitude towards intervention and authority," "appears to be at [a] relatively high risk to reoffend violently," and presents several concerns that "are consistent with increased risk for reoffense," though "those difficulties" were moderated "to a relatively minor extent" by appellant's strengths. Ultimately, the psychologist's "clinical opinion" was that appellant "presents a relatively high risk for violent reoffense. Given his longstanding and complicated constellation of difficulties, his prognosis for benefitting from programming is guarded to poor."

At the certification hearing, the probation officer noted that post-incident reports indicated that appellant was involved in eight separate incidents while being held in custody on pending charges. The probation officer testified that, in her opinion, these incidents showed that appellant's "behavior hasn't really changed in a secure setting," as "[h]e is still displaying gang-related behaviors as well as threatening other peers." The probation officer stated that these incidents indicated that "he would have a difficult time with the rules of EJJ, based on the behavior that he is showing." In part, her concern with appellant being placed on EJJ is that the only potential facility for him was in Red Wing, which can keep appellant until he is 21, but which typically releases juveniles back into the community after nine months. She indicated that it would be possible to place appellant at the Mesabi Academy, though placement there is typically only for six months, and that she did not believe a non-secure facility would be appropriate for

appellant. She also noted that appellant would not qualify for some programs because of the seriousness of the offense with which he is charged.

On cross-examination, the probation officer conceded that appellant was never discharged from his probation or any programming. She acknowledged that appellant's record of delinquency is "not extensive" and agreed that appellant was never the subject of a warrant other than for a failure to appear, and that several of the warrants were actually issued at the same time, thus the number of incidents of failing to appear was lower than the total number of warrants. The probation officer agreed that there were many shifts at the detention center without any behavioral incidents involving appellant, and that none involving him were violent. She recognized the possibility that the court could extend the placement of appellant at the juvenile facilities, in contravention of the usual placement rules for those facilities, but restated her opinion that appellant would not be successful in treatment in the juvenile environment.

Appellant's attorney proffered that appellant had participated in a Boys and Girls Club, had helped coach basketball, and had played on several basketball teams, although the timeframe for these involvements was unclear. Appellant's attorney also cited the absence of several negative factors (such as substance abuse) and the presence of several positive factors (such as family relationships).

The psychologist testified that the frequency and consistency of appellant's problematic interactions at school indicate that "it would be difficult for him to be in a place where he forms a therapeutic bond with an authority figure who is going to give him direction about how to make changes in his life," and that, in her opinion, it is

"unlikely . . . that Red Wing could change [appellant's] behavior in a way that is adequate for public safety" because there are "constellations of difficulties that he has that he is not acknowledging." Similarly, the psychologist indicated that she believed that Mesabi Academy could benefit appellant and that he could get something out of the program, but that she did not think it would be sufficient to correct his behavior. On cross-examination, the psychologist acknowledged that it was possible that appellant's brain would further develop into his 20s, such that his behavior may change through maturation.

The clinical director of the Mesabi Academy testified at the certification hearing that appellant fit the profile of the juveniles placed at Mesabi Academy, and that the Mesabi program often worked with juveniles who were unsuccessful in other programming, dealt with individuals with gang affiliations before, dealt with children who had serious behavioral issues in other settings, and had "been relatively successful in working with" juveniles with similar issues. The director noted that appellant has at least average intelligence, appears to have demonstrated an ability to participate in some programs, and would be accepted in Mesabi Academy if the district court placed him there. But, in contrast to the typical short-term placement, the director "believe[d] that [appellant] needs to remain in the physically secure environment for three years and needs to remain with [the program] until adulthood." Programming would involve appellant taking responsibility for his actions, understanding the effects he has had on people, learning work and living skills, undergoing anger retraining and an anti-gang program, and working towards high school graduation. The director also noted that

appellant could be retained in a physically secure area until he showed that he would be compliant with the rules of the program.

An administrator from MCF-Red Wing also testified at the certification hearing, indicating that the facility is secure, generally accepts the most serious juvenile offenders, and that the programming includes skill enhancement, cognitive structuring, aggression-replacement training, anger-management training, social skill and moral reasoning development, substance-abuse programs, and a full-time high school program. The administrator also testified that it was very common for the program to accept juveniles with gang affiliations, with a history of noncompliance with or non-completion of other programming, that had committed serious crimes including the loss of life, and that have a poor prognosis for engagement in programming. The administrator indicated that appellant would qualify for admittance into the program, though he declined to offer an opinion on appellant's amenability to treatment. The administrator also testified that Red Wing would comply with a court's order that a juvenile be in a secure facility for a number of years.

Following the certification hearing and the submission of written closing arguments, the district court filed its certification order. The district court made commendably detailed and lengthy findings of fact that reflected testimony presented in support of the petition for certification, the certification study and evaluation, and the testimony of all witnesses. The district court concluded by finding that appellant

> has amassed his record of delinquency in a relatively short period of time, and that the conduct underlying his charges presents growing concerns for public safety. He has failed in

> numerous attempts at programming, displaying a consistent theme of disrespect and disruption. This court finds, by clear and convincing evidence, that each of the six factors weighs in favor of adult certification.

This appeal follows.

D E C I S I O N

"When a child, after reaching 14 years of age, is alleged to have committed an offense that would be a felony if committed by an adult, "the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations." Minn. Stat. § 260B.125, subd. 1 (2012). Because appellant was 15 years old at the time of the offense, the district court could order certification only if the state "demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety." Minn. Stat. § 260B.125, subd. 2(6)(ii) (2012); Minn. R. Juv. Delinq. P. 18.06, subd. 2.

"[C]lear and convincing evidence [is] . . . unequivocal and uncontradicted, and intrinsically probable and credible." *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994). "'Clear and convincing evidence' is evidence that is 'more than a preponderance of the evidence but less than proof beyond a reasonable doubt.'" *State v. Jones*, 753 N.W.2d 677, 696 (Minn. 2008) (quoting *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)).

In determining whether public safety is served, courts must consider

> (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
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> (6) the dispositional options available for the child.

Minn. Stat. § 260B.125, subd. 4 (2012). "In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision." *Id.*

"These factors, which address the nature of the offense and the circumstances of the child, are intended to assess whether a juvenile presents a risk to public safety and thus aim to predict whether a juvenile is likely to offend in the future." *In re Welfare of H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000). "Although some of the factors examine the juvenile's past behavior and programming failures, others must be read to allow consideration of the juvenile's current conduct." *Id.* "In the end, the factors must show that a risk to public safety exists because the juvenile's behaviors are likely to continue." *Id.* If the district court decides not to order certification, it may designate the proceeding as an EJJ prosecution. Minn. Stat. § 260B.125, subd. 8 (2012).

"A district court has considerable latitude in deciding whether to certify, and this court will not upset its decision unless its findings are clearly erroneous so as to

constitute an abuse of discretion." *In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Oct. 24, 2007).

Appellant argues that the district court erroneously analyzed five of the six public safety factors, and therefore erroneously reached its decision to certify him as an adult.[4]

First Factor

The first factor addresses "the seriousness of the alleged offense in terms of community protection," "the use of a firearm," "the impact on any victim," and whether "any aggravating factors" are present. Minn. Stat. § 260B.125, subd. 4(1).

The district court, in finding that this factor favored certification, stated that "[i]t is difficult to articulate a more profound threat to the public safety than that demonstrated by the actions of" appellant. Appellant does not dispute that this factor favors adult certification. Indeed, appellant recognizes that "[f]irst-degree premeditated intentional murder is the most serious charge a defendant can face and carries the most serious penalty a court can impose." Appellant argues, however, that this offense "lacks the intentional and premeditated quality of a targeted, planned killing" and is therefore less serious than a first-degree murder charge would otherwise be. Appellant also disputes

[4] Appellant also argues that there is a difference between the statement that "[f]or purposes of the certification hearing, the charges against the child are presumed to be true," *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008), and the statement that "[f]or purposes of certification, the juvenile is presumed guilty of the alleged offenses," *In re Welfare of U.S.*, 612 N.W.2d 192, 195 (Minn. App. 2000). The latter statement, appellant argues, "is a material misstatement of the law that offends basic tenets of fundamental fairness" because it "shifts the trial court's role from an objective fact-finder to a factor-finder strongly predisposed to ordering certification." We find no merit in appellant's argument on this point, and agree with respondent that both phrases, in the context of a probable cause analysis in a certification hearing, mean the same thing: there is credible evidence to believe that Appellant committed the charged offense.

whether some of the aggravating factors noted by the district court were presented in the charges.

Appellant's arguments regarding seriousness and aggravating factors are not persuasive. He shot at a house associated with a rival gang and its members, and in the process shot a sleeping five-year-old boy in the back, resulting in the child's death. Addressed "in terms of community protection," as required by Minn. Stat. § 260B.125, subd. 4(1), firing a gun at a house without regard for the safety of people in the house or in the community is undoubtedly among the actions that are most seriously detrimental to the community's protection. The propensity for injury or death is high, and the impact on a sense of well-being and safety in the community is obvious and severe. As noted by the district court, "[i]t is difficult to articulate a more profound threat to the public safety than that demonstrated" in this case. Indeed, three other children slept on the couch next to the victim when he was shot. *See also State v. Ferguson*, 808 N.W.2d 586, 592 (Minn. 2012) (holding that a defendant may have "increased culpability for committing an act of violence with the intent to harm more than one person").

In attempting to counter the aggravating factors identified by the district court, appellant argues that he was not aware of the victim's vulnerability or of the presence of children, and that the home was not the victim's zone of privacy because it was his grandmother's home. Appellant's arguments are without merit. An aggravating factor is present when "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability." Minn. Sent. Guidelines II.D.3.b.(1) (2013). The victim in this case was a

five-year-old child. And the sentencing guidelines do not require that the offender know or be aware of the presence of children. *Id.*, II.D.3.b.(13) (2013). Nor do the guidelines mandate that appellant be aware of a victim's expectation of privacy; only that such expectation is present. Minn. Sent. Guidelines II.D.3.b.(14) (2013). In any event, it strains credulity to argue that a five-year-old does not have some reasonable expectation of privacy in his grandmother's home.

Finally, in considering the first factor, the district court correctly noted that a gun was used. That use caused the most serious possible impact on the victim—death—and on the family that "must now live for the rest of their lives, with the trauma and grief of the murder of an innocent child killed while asleep in his grandmother's home."

As all the parties agree, the district court did not err in finding that the first factor favored certification. Appellant argues only mitigation. But this court "cannot emphasize too strongly that the district court must place greater weight on the severity of the alleged crime and the prior delinquency record of the juvenile in deciding whether to certify." *In re Welfare of P.C.T.*, 823 N.W.2d 676, 684 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Feb. 19, 2013). The district court gave this factor due weight in its certification decision, properly rejected mitigation, and did not err in determining that this factor favored certification.

Second Factor

The second factor requires consideration of the juvenile's culpability in the commission of the 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." Minn. Stat. § 260B.125, subd. 4(2). Mitigating factors include whether the victim was an aggressor, if the "offender played a minor or passive role in the crime," if the offender lacked the capacity for the crime because of involuntary physical or mental impairment, or "[o]ther substantial grounds exist which that tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.3.a.(1)-(3), (5) (2013). But when the juvenile is a "primary participant," culpability may weigh in favor of certification. *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 648 (Minn. App. 2000). The highest level of culpability occurs when a juvenile plans and executes the entire offense. *In re Welfare of D.T.H.*, 572 N.W.2d 742, 744 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998).

The district court found that this factor favored certification, because appellant's role in the offense "was not minor or passive." Moreover, the district court found that appellant was more culpable in this offense because of his involvement in the events leading up to the shooting; in effect, he "started the chain of events by pointing a gun at rivals the night before" the shooting. Appellant argues that this factor does not weigh in favor of certification because his actions in this case are less serious than they may otherwise be for first-degree murder, and his culpability is therefore lesser. Appellant's argument is not persuasive. His actions resulted in the death of another human being and his acts could have resulted in the death or injury of the three other children sleeping next to the victim.

While appellant acknowledges that the sentencing guidelines do not indicate that youth is a mitigating factor, he nonetheless argues that it should be considered here. We

find no merit in this argument. The supreme court has held that the statutorily mandated factors are an exclusive list and that no other factors may be considered. *N.J.S.*, 753 N.W.2d at 710 n.3. Appellant argues, however, that persuasive authority for considering his youth is found in the recent decision of the United States Supreme Court that mandatory life sentences without the possibility of release for juveniles are forbidden by the Eighth Amendment. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). But the Supreme Court did not foreclose such sentences altogether; it decided that only mandatory sentences were unconstitutional. *Id.* Moreover, the sole issue before this court is whether the district court correctly and adequately addressed the statutory certification factors. Unless and until appellant is sentenced, any discussion of the constitutionality of that sentence would be premature.

Appellant was a primary participant in the offense, and no mitigating factors from the Sentencing Guidelines that apply. The district court did not err in finding that this factor favors certification.

Third Factor

The third factor addresses a juvenile's "prior record of delinquency." Minn. Stat. § 260B.125, subd. 4(3). This factor, along with the first factor, must be given greater weight than the other factors. *Id.*, subd. 4. "'[P]rior record of delinquency' unambiguously refers to records of petitions to juvenile court and the adjudication of alleged violations of the law by minors." *N.J.S.*, 753 N.W.2d at 710. This factor does not include consideration of "school and institutional records," but the district court may consider pending charges when analyzing this factor. *Id.* at 709-10. This court looks for

a "prior history . . . [that] show[s] deeply ingrained, escalating criminal behavior that presents a threat to public safety." *H.S.H.*, 609 N.W.2d at 263. In other cases, this court has found this factor to favor certification when the juvenile has a "significant record" of prior delinquency. *U.S.*, 612 N.W.2d at 196. Even a recent escalation of delinquency is seen as favoring certification. *See D.T.H.*, 572 N.W.2d at 745.

The district court found that "this factor does not weigh as heavily in favor of certification as the first two," but that "the balance nonetheless tips toward certification." The district court had before it appellant's record of 13 petty misdemeanors and misdemeanors since September 2009. The district court further noted that the progression of offenses from petty misdemeanor theft and curfew violations to misdemeanor assault in the fifth degree and domestic assault, the latter of which occurred in the weeks prior to the murder, evidenced an "escalation of [appellant's] criminal conduct." Appellant argues that the district court erred by arriving at this finding "[o]nly by exaggerating the seriousness of appellant's juvenile record," that there are no felonies on his record, and that the record does not show deeply ingrained criminality or support the district court's characterization of appellant's criminal behavior as gang-related.

We agree that appellant's record of delinquency is not as significant as records present in other cases. *See U.S.*, 612 N.W.2d at 196. There are no felonies present, nor does he have an overwhelming and long-standing record of delinquency. But there is a record, one beginning in September 2009, when appellant was 12 years old. Between then and June 2012, when this offense occurred, appellant accrued 17 charges. Although several were dismissed or are unresolved, appellant was adjudicated a petty offender

twice, and adjudicated delinquent three times. Further, appellant's conduct has escalated from petty theft and curfew violations, to misdemeanor theft and disorderly conduct, to misdemeanor assault.

Appellant's record also involves dishonesty to police officers, violent behavior towards his family and others, and several instances of disrespect for property and authority figures. Appellant is correct that only one of these charges appears to have involved gang behavior—the charge of giving a false name to police indicates that he was approached by police because he was displaying gang signs. But that information, considered in connection with the present offense and its alleged gang connection, supports the district court's conclusion regarding that involvement. Finally, the pending fifth-degree assault charge indicates community awareness that appellant is known to carry a gun.

The determination of the district court that the third factor "tips toward certification" is supported by evidence that appellant has amassed numerous petty and misdemeanor charges in a relatively short period of time, and by evidence that the "conduct was escalating into increasing incidents of violence." The district court did not err in determining that this factor favored certification.

Fourth Factor

The fourth factor addresses "the child's programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4). This court has held that this factor favors EJJ designation when the child has not participated in any programs. *See D.T.H.*, 572 N.W.2d at 744; *In*

re Welfare of J.H., ___ N.W.2d ___, 2013 WL 777063, at *5-6 (Minn. App. Mar. 4, 2013).

Considerations under this factor may include "attendance at programming events, completion of the events, and demonstrated behavioral changes correlated with the programming," and "behavioral problems in school." *P.C.T.*, 823 N.W.2d at 683. The district court may also consider a "good-behavior contract with the school, tutoring after expulsion, and [directed] job search" as programming, and may consider "gang-related behavior" and other potential attitude concerns in assessing a juvenile's willingness to meaningfully participate. *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996). This court has noted involvement "in mediation, out-of-home placement, supervised probation, and compulsory attendance at a violence prevention group" as part of a juvenile's programming history. *S.D.S.*, 610 N.W.2d at 649. Further, the district court may consider the juvenile's "defiant and uncooperative behavior during his detention and civil commitment, as well as during pre-offense voluntary programming." *See N.J.S.*, 753 N.W.2d at 711.

The district court found that this factor favored certification, because appellant has failed to fulfill conditions of adjudication (including restitution and community service), has had numerous bench warrants issued for failing to appear, has displayed a defiance of authority even when he has completed ordered conditions, has been disruptive and destructive while at school, and has been "disrespectful & disruptive to staff" and "threatening" to other residents while detained for this offense. Appellant urges that he has had minimal programming, that the circumstances of his purported failure to satisfy

court-ordered programming indicate he was not culpable for that failure, that his behavior at school was not necessarily gang-related, and that the court failed to address the many uneventful days in detention among some negative incidents.

In response to the district court's determinations that appellant failed to pay restitution for his theft adjudications, failed to fulfill community service, and failed to show up for a diversion program intake appointment, appellant argues that he may not have been able to pay restitution because of his age, and that the bench warrants for failing to appear came about because his parents would not accompany him to hearings, as they were required to. We recognize that although appellant completed EHM, which was imposed after he was adjudicated delinquent for giving a false name to police, there is evidence that he may have violated the rules of that program by having friends on his porch and using marijuana. We also recognize that appellant was given a chance to stay in the anger management program despite being absent enough times to be removed from it. In summary, evidence of appellant's willingness to participate in programming, when it has been available, presents a mixed picture.

School behavior can be considered under the fourth factor, however. *P.C.T.*, 823 N.W.2d at 683. Appellant's school records contain roughly 50 incidents of behavioral issues, including many instances of insulting teachers, police, and staff, engaging in verbal confrontations, threatening teachers and staff, as well as several instances of physical violence, such as "punching" or "bullying" other students, "assault[ing]" other students, throwing food and objects, pushing staff, and fighting other students. Two incidents also involved gang-related behavior. These incidents ended when appellant

stopped going to school. Further, while detained during these proceedings, appellant has had eight incidents reported between June 29, 2012 and September 18, 2012, including threats of violence and disrespect towards other detainees and staff, verbal altercations, gang-related graffiti, and a threat to start a "lockdown" situation.

Evidence indicates that, when appellant has been presented with authority in a school or institutional setting, he has been reluctant to comply. He has struggled with court-ordered programming such as probation and home monitoring, and has failed to complete some community service and restitution requirements. He has engaged in "defiant and uncooperative behavior during his detention," *N.J.S.*, 753 N.W.2d at 711. He does not identify anything more than minimal compliance with two items of his required programming as favoring juvenile jurisdiction. The district court did not err in finding that this factor favors certification.

Fifth and Sixth Factors

These two factors may be considered together. *D.T.H.*, 572 N.W.2d at 745. The fifth factor requires consideration of "the adequacy of the punishment or programming available in the juvenile justice system," and the sixth factor addresses "the dispositional options available for the child." Minn. Stat. § 260B.125, subd. 4(5), (6). For both factors, when expert testimony is at issue, this court defers to the district court's credibility determinations. *S.D.S.*, 610 N.W.2d at 650; *K.M.*, 544 N.W.2d at 785.

The mere availability of juvenile programming does not necessarily favor maintaining juvenile jurisdiction. *S.D.S.*, 610 N.W.2d at 650. More important is whether the programming would be effective to protect the public safety, considering the

availability of programming and the sufficiency of the time for rehabilitation in the juvenile system. *See U.S.*, 612 N.W.2d at 197 ("Insufficient time for rehabilitation under the juvenile system is an appropriate consideration . . . ."); *D.T.H.*, 572 N.W.2d at 747. The district court may also consider whether "the severity and violence of the offenses, as well as [the juvenile's] emotional, behavioral, and chemical dependency difficulties, warrant a significant period of correctional detention." *U.S.*, 612 N.W.2d at 197. The district court must address "the actual nature and details of the rehabilitative programming that would be available in either the juvenile or the adult system" and focus on the benefits for public safety provided by the various programming options rather than the availability of rehabilitative programs for the juvenile. *P.C.T.*, 823 N.W.2d at 684.

The district court found that both factors five and six favored adult certification. As to the fifth factor, the district court noted that the disparity in potential consequences between EJJ and adult punishment was great, that "it would be difficult for [appellant] to be restored to law abiding behavior given the time offered by" EJJ, and that appellant's behavior indicated an "entrenchment in gang and criminal conduct" that would not be adequately dealt with in the juvenile system. As to the sixth factor, the district court noted that the security of some of the programming available to appellant was insufficient, that the length of time that appellant could be held in juvenile programs would be insufficient, and that the psychologist who prepared the certification study believed that treatment of appellant in a juvenile program would be unsuccessful.

The district court noted that appellant could face 30 years or more if he is certified as an adult, in contrast to the maximum length of EJJ at about five and a half years.

While EJJ status can continue only until age 21, a cautionary note should be sounded at this point. The observation of the district court, while correct, is incomplete. Full discharge of appellant from EJJ status at age 21 would be contingent upon his compliance with conditions placed upon him while in that status. Failure to comply could and likely would result in execution of the full adult sentence for first-degree murder.

With reference to the sixth factor, both the probation officer and the psychologist offered their opinion that appellant is unlikely to be amenable to, and successful in, treatment. The psychologist's opinion was particularly strong, indicating that, "[g]iven his longstanding and complicated constellation of difficulties, his prognosis for benefitting from programming is guarded to poor." Neither the director of the Mesabi Academy nor the administrator of Red Wing offered an opinion about whether appellant could benefit from their programming, though both indicated that they had accepted, and been successful with, individuals with similar histories. The psychologist testified that neither Mesabi Academy nor Red Wing would be sufficient to correct appellant's behavior in a way that is adequate for public safety. Notably, both the director of Mesabi Academy and the Red Wing facility administrator stated that appellant could and should be kept in a secured area for a number of years, and these appear to be the only two programs that would accept appellant, should juvenile jurisdiction be retained.

The district court's determination that both the fifth and sixth factors support certification is supported by the record. The evidence shows that appellant requires an extended period in a secure facility, that the possibility that appellant's behavior will be corrected by juvenile programming is minimal, and that there are limited programming

options available for appellant. Despite acceptance of appellant by Mesabi Academy and Red Wing, evidence that neither of these institutions could assure appellant's adequate treatment or public safety protection supports the decision of the district court to reject placement in either institution. The district court did not err in finding that this factor favored certification.

In summary, we note again that the "district court has considerable latitude in deciding whether to certify, and this court will not upset its decision unless its findings are clearly erroneous so as to constitute an abuse of discretion," *S.J.T.*, 736 N.W.2d at 346 (quotation omitted). We are not insensitive to the very difficult decision that must be made when determining whether a young person charged with the most serious offense in the criminal justice system may remain in the jurisdiction of juvenile court or should be certified to stand trial as an adult. It is a decision that should never be made lightly. We are convinced that it was not so made here, and we affirm the district court's decision to certify appellant for adult prosecution.

Affirmed.