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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0513**

In the Matter of the Welfare of: M. K. T., Child.

**Filed September 9, 2013
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-JV-12-11212

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Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's designation of his prosecution as an extended jurisdiction juvenile (EJJ) prosecution, arguing that the court clearly erred by finding that the EJJ designation serves public safety. We affirm.

FACTS

Respondent State of Minnesota charged appellant M.K.T. with one count of aiding and abetting first-degree aggravated robbery under Minn. Stat. §§ 609.245, subd. 1, .05 (2012), a felony, on or around December 8, 2012. As of December 18, 2012, M.K.T. was 16 years old. The state moved the district court to designate M.K.T.'s prosecution as EJJ. The district court conducted a hearing on the state's EJJ motion and admitted into evidence a DVD video recording of the offense; a probation officer's EJJ report and addendum, recommending that M.K.T.'s prosecution be designated EJJ; and a psychological evaluation of M.K.T. The court also heard argument of counsel. The district court designated the prosecution EJJ.

This appeal follows.

DECISION

M.K.T. challenges the EJJ designation of the prosecution against him. "The EJJ designation was conceived to provide a more graduated juvenile justice system based on age and offense with a new transitional component between the juvenile and adult systems." *State v. Garcia*, 683 N.W.2d 294, 300 (Minn. 2004) (quotation omitted). An EJJ designation "extends jurisdiction over a young person to age twenty-one and permits the court to impose both a juvenile disposition and a criminal sentence." *State v. J.E.S.*, 763 N.W.2d 64, 67 (Minn. App. 2009) (quotation omitted).

The district court must grant a prosecutor's request for EJJ prosecution "[i]f the prosecutor shows by clear and convincing evidence that [doing so] serves public safety." Minn. Stat. § 260B.130, subd. 2 (2012). An appellate court "review[s] under a clearly

erroneous standard the juvenile court's finding that the prosecutor proved by clear and convincing evidence that public safety would be served by designating [the juvenile] prosecution EJJ." *In re Welfare of D.M.D.*, 607 N.W.2d 432, 437 (Minn. 2000).

Public-Safety Factors

"In determining whether public safety is served, the court shall consider the factors specified in section 260B.125, subdivision 4," Minn. Stat. § 260B.130, subd. 2:

- (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;
- (3) the child's prior record of delinquency;
- (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
- (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 (2012). "[T]he 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.* All six factors "aim to predict whether a juvenile is likely to offend in the future." *In re Welfare of R.D.M.*, 825 N.W.2d 394, 399 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Apr. 16, 2013).

The district court found that all six factors favor EJJ designation.

Seriousness of Alleged Offense and M.K.T.'s Culpability

The district court found that the seriousness of the alleged offense and M.K.T.'s culpability favored EJJ designation of the prosecution. As to the seriousness of the alleged offense, the court found that the video revealed that M.K.T.'s attack of the victim was "violent and unprovoked" and that M.K.T. repeatedly punched and kicked the victim in the face, fracturing the victim's nose. As to M.K.T.'s culpability, the court found that M.K.T. was "highly culpable." Without provocation, M.K.T. was the first of three co-assailants to approach the victim, and M.K.T. repeatedly punched and kicked the victim, "who never fought back." The court found the fact that one of M.K.T.'s co-assailants, not M.K.T., stole the victim's wallet to be immaterial and found "most troubling" M.K.T.'s posting of a video of the attack on his social-media Internet page, noting that M.K.T.'s conduct "reflect[ed] braggadocio rather than remorse." The video and victim-impact statements support the district court's findings.

M.K.T. argues that his offense was inadequately serious because it involved no weapon, the victim was able to run home, the state charged M.K.T. only with *aiding and abetting* the offense, and M.K.T. did not take the victim's wallet. Although his factual statements are supported by the record, his argument is unpersuasive. In considering the seriousness of the offense, a court must consider "the existence of any aggravating factors recognized by the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 4(1). Under the guidelines, an aggravating factor is "[t]he offender committ[ing] the crime as part of a group of three or more offenders who all actively participated in the crime." Minn. Sent.

Guidelines 2.D.3.b(10) (2012). This aggravating factor applies because M.K.T. committed the attack with two other participants.

Moreover, in considering the seriousness factor, a court must consider “the impact on any victim.” Minn. Stat. § 260B.125, subd. 4(1). The victim-impact statements reveal that until a few days before making his victim-impact statement, the victim suffered from frequent nosebleeds, and he expected to have neck problems “possibly to the end of [his] life.” The victim’s mother stated that the day of the attack was “the most terrifying day of [her] life,” that the victim returned from the attack unable to speak and covered in blood, and that she has nightmares about the attack. She also stated that they both fear that it will happen again every time he leaves home and that he asks almost every day how soon they can move. The victim’s godmother stated that she no longer feels safe because the attack happened close to her home. As to the victim’s post-attack appearance, the victim’s girlfriend stated that she had “never seen something so horrible.”

M.K.T. argues that he “lacked control” at the time of the alleged offense because he was a juvenile and had attention-deficit hyperactivity disorder (ADHD). But he fails to explain why youth and ADHD mitigated his participation in a brutal, unprovoked attack. The video reveals M.K.T. encouraging his co-assailants’ attack, stomping on the victim while he lay helpless on the ground, leaping on the victim, punching him in the face, and kicking and punching him as he stood to run away. M.K.T. argues that the district court failed to consider that M.K.T. “was the subject of a child protection proceeding” and held against M.K.T. his “history of being neglected.” But, at a pretrial hearing, although the court asked if anyone disagreed, no one disagreed when the court stated that “it does not

appear that [M.K.T.]’s present problems are driven by issues at home.” And M.K.T.’s allegation that the court’s culpability finding “exhibited only that the court felt it could impose its own personal feelings about its own outrage over the offense rather than evaluating whether this case was a proper case for EJJ” is simply unfounded by anything in the record.

We conclude that the district court did not clearly err by finding that the seriousness of the offense and M.K.T.’s culpability favored designating the prosecution EJJ.

M.K.T.’s Delinquency Record and Programming History

That a juvenile’s violence is escalating supports a finding that his delinquency record and programming history favor EJJ designation. *See R.D.M.*, 825 N.W.2d at 400–01 (stating that R.D.M.’s prior adjudications, considered with pending charges, “clearly show escalating criminal behavior that presents a threat to public safety”); *In re Welfare of P.C.T.*, 823 N.W.2d 676, 683 (Minn. App. 2012) (concluding that programming history favored EJJ designation when P.C.T. “escalated the severity and violence of his behavior”), *review denied* (Minn. Feb. 19, 2013); *see also In re Welfare of D.T.H.*, 572 N.W.2d 742, 745 (Minn. App. 1997) (concluding that delinquency record favored adult certification when D.T.H.’s “criminal conduct has escalated greatly in the past year”), *review denied* (Minn. Feb. 19, 1998). And “[n]oncompliance and failures at numerous types of juvenile treatment and dispositional programs are considerations relevant to the [programming] factor, and so is good performance following such programming.” *P.C.T.*, 823 N.W.2d at 682 (quotation omitted).

The district court found that M.K.T.'s delinquency record and programming history favored EJJ designation. M.K.T.'s delinquency record supports the court's finding that M.K.T.'s violence was escalating, despite past times in which he was found delinquent of disorderly conduct and completed probation terms, and that M.K.T. "clearly has failed to apply what he learned . . . and is not rehabilitated." And, as noted by the court, M.K.T.'s programming history "reflect[ed] poorly on his ability to positively respond to programming"; no placement appeared to consistently report positive behavior and program engagement.

Based on information contained in the EJJ report, M.K.T. was adjudicated delinquent three times. In April 2011, the district court adjudicated M.K.T. delinquent for committing disorderly conduct and ordered him to complete supervised probation until June 30, 2012; "3 days STS"; and "the Gun Program," because the state initially charged M.K.T. with gross-misdemeanor carrying a BB gun in public. In November 2011, the district court adjudicated M.K.T. delinquent for committing disorderly conduct and ordered him to continue probation; complete 36 community-service hours; participate in counseling and mentorship; and "cooperate with CHIPS order." During that offense, M.K.T. fought with a student and a teacher's face was unintentionally hit. In December 2011, the district court adjudicated M.K.T. delinquent for committing disorderly conduct and ordered M.K.T. to obtain counseling, provide apology letters, and complete probation. M.K.T. committed that offense in his home and, as a result, his stepfather was no longer willing to care for him because he feared for the safety of the other children in the home. For that reason, and because M.K.T. had been physically abused in his home,

in February 2012, M.K.T. was placed in St. Joseph's Shelter, where he remained until March 2012.

Within two weeks of arriving at St. Joseph's Shelter, the state charged M.K.T. with disorderly conduct. According to the police report, M.K.T. lost control when staff told him that he could not shower after bed-time hours. M.K.T. yelled and swore at St. Joseph's staff, "tried to instigate other residents to come out of their rooms," and had to be restrained. The state dismissed the disorderly conduct charge, and the district court placed M.K.T. at Bar None Residential Treatment in March 2012. M.K.T. remained at Bar None until May 2012, when the court ordered his discharge to the Braza Group Home. Bar None's discharge summary states that, while at Bar None, M.K.T. once attempted to punch a counselor, necessitating a physical hold, and that M.K.T. became angry and verbally abusive when Bar None staff did not approve his requests.

M.K.T.'s compliance with the rules at the Braza Group home was tenuous at best. In August 2012, he ran from Braza after a court hearing; on another occasion, he left early in the evening and did not return until 1:00 a.m. the next morning. In September, he again left overnight. On October 11, M.K.T. stomped his feet and used profanity in court when he was told that he could not return home. Also in October, after M.K.T. was granted a weekend pass from Braza and was picked up by his mother on Friday, Minneapolis police officers detained him at 12:30 a.m. on Saturday and returned him to Braza. The officers found M.K.T. in the area of Lyndale and Lowry Avenue, where he was acting erratically and screaming that his godbrother had been stabbed, even though the police observed the wound to be "a pin prick of a stab wound." M.K.T. was very

angry, yelling and directing profanity at the officers. Because M.K.T.'s behavior at Braza upon his return was erratic and out of control, Braza staff requested that the officers take M.K.T. to the juvenile detention center. Instead, the officers took M.K.T. to The Bridge for Youth from which M.K.T. claimed that his godmother picked him up later on Saturday morning. After M.K.T. returned to Braza on Sunday evening, Metro Transit Police arrested him because he had attempted to fight with an individual on a bus. In November 2012, Braza discharged M.K.T. to his mother's care on a 60-day trial basis. While in his mother's care, M.K.T. committed the offense in this case, aiding and abetting of aggravated robbery.

We conclude that the district court did not clearly err by finding that M.K.T.'s delinquency record and programming history favored designating the prosecution EJJ.

Punishment-and-Programming Adequacy and Available Disposition Options

"These two factors are frequently considered together." *R.D.M.*, 825 N.W.2d at 401 n.3. Here, the district court found that they favored EJJ designation because M.K.T. failed to respond to past juvenile-justice-system programming and his violence was escalating. The court found that M.K.T. "needs more intensive supervision and programming for the purposes of both rehabilitation and punishment." The findings are not clearly erroneous in light of the record evidence, including M.K.T.'s psychological evaluation that describes M.K.T.'s "risk of violence as moderately high."

M.K.T.'s Remaining Arguments

M.K.T. argues that the district court erred by not comparing his case to other cases that warranted EJJ designation. He also argues:

A proper analysis . . . should examine a juvenile's overall circumstances to determine if the juvenile can be rehabilitated. A juvenile should not be an EJJ unless the juvenile has been proved to be qualitatively more dangerous and less able to participate in juvenile programming than other juveniles who remain under delinquency jurisdiction.

But the public-safety factors “are not a rigid, mathematical equation,” and “[j]uvenile courts should have the discretion to weigh the factors in the context they are presented, and then decide whether EJJ designation is warranted according to the clear and convincing standard set forth in the EJJ statute.” *D.M.D.*, 607 N.W.2d at 438.

M.K.T. urges that, because juveniles are less culpable than adults, the state need not prosecute him as an adult. But the EJJ designation of the prosecution does not result in M.K.T.'s prosecution as an adult; instead, the EJJ designation results in a prosecution under a “transitional component between the juvenile and adult systems.” *Garcia*, 683 N.W.2d at 300 (quotation omitted). None of M.K.T.'s arguments is persuasive.

Affirmed.