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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2035**

In the Matter of the Welfare of: T. L. B.

**Filed June 10, 2008
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-JV-07-7388

Leonardo Castro, Hennepin County Public Defender, James A. Kamin, Assistant Public Defender, 317 Second Avenue South, Suite 200, Minneapolis, MN 55401 (for appellant)

Lori Swanson, Attorney General, Linda M. Freyer, Assistant Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.*

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges a district court decision certifying him for prosecution as an adult on an aggravated-robbery charge. Appellant argues that the six public-safety factors applied to determine if public safety weighs for or against certification weigh against certification in his case. We affirm.

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

FACTS

On June 14, 2007, appellant T.L.B., born October 16, 1989, and two others allegedly robbed R.M., a 62-year-old man who lived at a residential care facility. R.M.'s assailants punched him, kicked him while he was on the ground, and took items from his pockets. Appellant was arrested the same day as the incident, and on June 15, respondent State of Minnesota filed a petition, charging T.L.B., then age 17, with felony aggravated robbery in the first degree in violation of Minn. Stat. § 609.245, subd. 1 (2006) and Minn. Stat. § 609.05 (2006).

Appellant's challenge to adult certification is based on his version of the facts and his history of trauma, delinquency, and mental-health problems. Appellant maintains that his participation in the robbery was the result of coercion; that two others participated with him, D.P. (a minor) and Kenneth Johnson, age 20; that Johnson had threatened violence against appellant unless he obtained money; and that Johnson coached appellant in his actions during the robbery. Appellant reports that he had been "jumped" or assaulted by Johnson earlier in 2007.

Appellant has a history of traumatic experiences. He was sexually abused between the ages of three and eight, and has reported physical abuse by his parents. Appellant also has an extensive history of mental and behavioral problems, interventions, and delinquency offenses. Appellant's mental-health history includes diagnoses of bipolar disorder, oppositional defiant disorder, anxiety, dysthymia, ADHD and mood disorder, schizoaffective disorder–bipolar type, posttraumatic-stress disorder, and expressive and receptive language and learning disabilities. He has had auditory

hallucinations and has heard voices that tell him to do things. Appellant has an I.Q. of 64, in the “extremely low” range, and has received special-education services since kindergarten. He was recently found to be spelling at the first-grade level, reading at the second-grade level, and performing arithmetic at the fifth-grade level. A 2007 evaluation concluded that appellant meets the criteria for mild mental retardation.

Appellant has a long history of treatment and intervention. In 2002, he was placed on juvenile-court probation and received sex-offender treatment through Project Pathfinder in 2002 and 2003. In 2002, appellant also received services from the Wilder Child Guidance Clinic and was in the Arlington House shelter in 2003. In 2003, he was ordered into the Hennepin County juvenile-detention work program for 7-11 days. In 2004, he was ordered to complete community service and again placed on juvenile-court probation. Also in 2004, appellant was placed in the Willmar Residential Treatment Center and Elmore Academy, a residential program in Elmore, Minnesota. In August 2005, appellant was ordered to participate in family counseling, anger counseling, mentoring services, and was again placed on juvenile-court probation. In December 2006, the juvenile court placed appellant in the Bar-None stabilization program, where he remained until February 27, 2007. Appellant was on juvenile-court probation when he allegedly committed the offense precipitating his adult certification.

Appellant has also received treatment in the form of medication. In 2004, appellant was prescribed antipsychotic medication. His behavior stabilized, he began to do well in school, and he was expected to transition to a mainstream school setting, when he was hospitalized for kidney failure which he believed was caused by his prescribed

medication. Appellant's mother stopped the administration of the antipsychotic medication and appellant's behavior destabilized. Appellant has also been prescribed Adderall for ADHD, but the record is unclear whether this drug was effective for him. Appellant stopped taking this medication because he became ill and his mother did not refill the prescription.

Appellant's history of delinquency offenses began in 2000, when he was 11 years old and was charged with fifth-degree criminal sexual conduct, fifth-degree assault, and indecent conduct. In November 2003, he was charged with fourth-degree assault. In December 2003, he was charged with obstructing legal process and disorderly conduct. In November 2004, he was charged with disorderly conduct. In August 2005, he was charged with making terroristic threats and entered an admission to a charge of gross-misdemeanor harassment. In November 2006, appellant made threats against his mother, which resulted in a charge of felony terroristic threats to which appellant entered an admission.

As part of the adult certification proceeding, the district court ordered a psychological evaluation and certification report. The psychological evaluation was completed by Katheryn Cranbrook, Psy.D., who diagnosed appellant with mood disorder, conduct disorder, ADHD, learning disability, borderline intellectual functioning, and hearing loss.¹ Dr. Cranbrook reported that appellant has a number of factors correlated with increased risk of future aggressive and/or violent behavior without intervention. In evaluating the public-safety factors, Dr. Cranbrook concluded that the charged offense

¹ Dr. Cranbrook also listed, "Rule Out: Schizoaffective Disorder," in her diagnoses.

was “clearly serious,” that appellant was fully culpable for his role in the offense, that he had engaged in illegal and antisocial behaviors despite interventions, and that he would be best served by long-term residential intervention. Dr. Cranbrook supported an extended jurisdiction juvenile (EJJ) designation.

Hennepin County Probation Officer Susan Bach completed the certification report. Ms. Bach evaluated the public-safety factors and concluded that the crime was serious and that appellant was fully culpable. She noted that appellant has an extensive history of delinquency and has had significant involvement with programming. Ms. Bach reported that if appellant is convicted as an adult, he could serve 48 months in prison and if designated an EJJ, the juvenile court would have jurisdiction for 38 months. Ms. Bach testified that she does not believe that there would be sufficient time to treat appellant within the juvenile system, if designated an EJJ, and recommended that appellant be certified to adult court for prosecution. In her testimony, Ms. Bach emphasized the vulnerability of the victim. The district court questioned Ms. Bach about police descriptions of the victim as vulnerable and appellant’s description of the victim as “elderly.”

Initially, Ms. Bach’s certification report was admitted into evidence without her testimony. Later, appellant’s counsel objected, stating that respondent had agreed to call Ms. Bach as a witness. After both respondent and appellant rested, the district court called Ms. Bach as the court’s witness and advised both parties that they would be allowed to cross-examine Ms. Bach under Minn. R. Evid. 614. Appellant made no objection in connection with the district court calling Ms. Bach as a witness and did not

object to respondent asking her leading questions until after numerous questions had been asked.² The court overruled appellant's objection. After the completion of Ms. Bach's testimony, appellant moved the district court for a mistrial and for recusal of the judge, arguing that the court had assumed a partisan role by calling Ms. Bach as a witness. Appellant also argued that the court had unfairly put him in the position of questioning the witness before respondent and had unfairly allowed respondent to ask leading questions of the witness. Before closing arguments, the district court denied appellant's motions.

On the record, the district court granted respondent's motion for adult certification and later filed a written order. The certification order was stayed pending this appeal.

D E C I S I O N

I.

A district court has wide latitude when certifying a juvenile for adult prosecution, and its findings will be affirmed unless 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), *review denied* (Minn. Oct. 24, 2007).

“Certification is presumed for an offense committed by a juvenile if the child was 16 or 17 years old at the time of the offense and the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes.” *Id.* (citing Minn. Stat.

² The transcript reflects eight pages of Ms. Bach's testimony pursuant to respondent's questioning before an objection was made.

§ 260B.125, subd. 3 (2004)); Minn. R. Juv. Delinq. P. 18.06, subd. 1(A)-(C). The parties do not dispute that certification was presumed in this case.

When the presumption of certification is established, “the juvenile may rebut the presumption of certification by ‘clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety.’” *S.J.T.*, 736 N.W.2d at 346 (quoting Minn. Stat. § 260B.124, subd. 3); Minn. R. Juv. Delinq. P. 18.06. If the presumption is rebutted, then proceedings are retained in juvenile court as EJJ proceedings; if the presumption is not rebutted the case must be certified. Minn. Stat. § 260B.125, subd. 3(2) (2006); *S.J.T.*, 736 N.W.2d at 346.

To decide whether public safety would be served by retaining proceedings in the juvenile system, courts weigh six public-safety factors: (1) the seriousness of the offense; (2) the culpability of the child; (3) the child’s prior record of delinquency; (4) the child’s programming history; (5) the adequacy of punishment or programming available in the juvenile system; and (6) the dispositional options available for the child. Minn. Stat. § 260B.125, subd. 4 (2006); *S.J.T.*, 736 N.W.2d at 347. The seriousness of the offense and the child’s prior record of delinquency are given the greatest weight. Minn. Stat. § 260B.125, subd. 4; Minn. R. Juv. Delinq. P. 18.06, subd. 3; *S.J.T.*, 736 N.W.2d at 347.

In this case, the district court considered the six factors, placing the greatest weight on seriousness and the child’s prior record, concluded that appellant had not rebutted the presumption in favor of certification, and certified the case for adult prosecution. Appellant claims the district court abused its discretion by relying on erroneous findings that the following factors supported certification: (1) seriousness;

(2) culpability; (3) record of delinquency; (4) programming history; and (5) adequacy of punishment or programming in the juvenile system.

Seriousness

The district court found that the offense was “serious in terms of public safety.” Appellant argues that the district court’s finding that the seriousness of the offense weighs in favor of certification is flawed in three ways: (1) the district court failed to compare appellant’s conduct to that typically involved in the commission of aggravated robbery; (2) the district court erroneously found the aggravating factors of victim vulnerability and a crime committed by three or more participants; and (3) the district court’s conclusion of seriousness is not supported by victim impact and use of a weapon.

Appellant provides no authority for his argument that the district court erred by failing to compare appellant’s conduct in this case to conduct typically found in the commission of an aggravated robbery. Appellant cites only one case involving the prosecution of an adult, *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984), which provides that a comparison is required in applying the sentencing guidelines. But the statute applicable here states that the district court is to consider “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.” Minn. Stat. § 260B.125, subd. 4(1). The statute does not require a comparison like that in *Cox* in all parts of the seriousness analysis.

In its analysis of the seriousness of the offense, the district court must consider “the existence of any aggravating factors recognized by the Sentencing Guidelines.” *Id.*

The district court found two aggravating factors: victim vulnerability and a crime committed by a group. *See* Minn. Sent. Guidelines II.D.2.b.(1), (10) (stating aggravating factors of victim vulnerability due to age, infirmity, or reduced physical or mental capacity and of a crime committed by a group of three or more who actively participated). Appellant argues that neither aggravating factor was present. He argues that under the guidelines, in order for vulnerability to be present, an offender must know or have reason to know of a victim's vulnerability. Appellant argues that the district court's findings that the victim was 62 years old and lived in a care facility are insufficient to establish vulnerability because appellant did not know that the victim resided in a care facility. But appellant also described the victim as "elderly." Under the guidelines, vulnerability can be due to "age, infirmity, or reduced physical or mental capacity." *Id.* at (1). An elderly victim is vulnerable due to age. *See State v. Van Gorden*, 326 N.W.2d 633, 634 (Minn. 1982) (stating that 66-year-old victim was particularly vulnerable due to her age); *State v. Kimmons*, 502 N.W.2d 391, 397 (Minn. App. 1993), (stating that district court did not abuse its discretion in finding that 63-year-old victim was vulnerable due to age, and stating that "[e]lderly victims have been found to be particularly vulnerable"), *review denied* (Minn. Aug. 16, 1993). Because appellant knew his victim was elderly, he also knew he was vulnerable. Thus, the district court did not abuse its discretion when it found this aggravating factor.

Appellant also argues that the crime was not committed by a group of three or more, but rather by two people with a third watching. But the petition alleges that three people participated in the offense. For purposes of certification, factual allegations in the

petition must be taken as true. *In re Welfare of D.W.*, 731 N.W.2d 828, 834 (Minn. App. 2007). Taking the allegations as true, the district court did not abuse its discretion when it found that the crime was committed by a group of three or more people and properly found that the corresponding aggravating factor was present.

Finally, appellant argues that the considerations of victim impact and use of a weapon do not support the district court's conclusion. *See* Minn. Stat. § 260B.125, subd. 4(1) (stating that use of a firearm and the impact on any victim are part of the seriousness of the offense). But appellant concedes that the impact to the victim was serious and significant. Appellant argues that it was not more serious or significant than that in other cases, but comparison is not required. Further, the fact that appellant did not use a weapon in the commission of the offense does not undermine the district court's other considerations that support its finding of seriousness of the offense. Accordingly, the district court did not abuse its discretion when it decided that the factor of seriousness weighed in favor of certification.

Culpability

The district court found that appellant was an active perpetrator who punched and kicked the victim and took items from the victim's pockets while the victim was on the ground. The district court was not persuaded that appellant had been coerced into committing the crime and found that appellant's mental condition did not mitigate his participation. The district court also noted that on the basis of its own observation of appellant in the courtroom, appellant did not lack substantial capacity. Finally, the

district court concluded that even if appellant's mental condition was a mitigating factor, overall, the factor of culpability still weighs slightly in favor of certification.

Appellant argues that the district court confused legal responsibility with the child's culpability and improperly relied on its own observations instead of expert opinion. This argument misunderstands the relevance of the child's impairment. Under Minn. Stat. § 260B.125, subd. 4(2), the court must consider mitigating factors under the guidelines when considering culpability. Under Minn. Sent. Guidelines II.D.2.a.(3), it is a mitigating factor that the offender lacked substantial capacity for judgment when the offense was committed. Mitigating impairment under the sentencing guidelines should be extreme in order to support a departure. *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992). The district court discussed the child's impairment not to assess legal responsibility, but to determine whether his mental condition constituted the extreme level of impairment that would mitigate his culpability. The district court also did not rely solely on its own observations, but considered the facts of the offense, appellant's history, and expert testimony in reaching its conclusion. Under these circumstances, the district court did not abuse its discretion in making its finding of culpability.

Appellant also argues that the district court's analysis should have been comparative and more nuanced. Appellant offers no authority for this argument nor does he explain what sort of nuanced analysis is required. The statute provides that the district court must consider "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" in considering culpability. Minn. Stat. § 260B.125, subd. 4(2). The district

court's consideration of appellant's mental condition reveals that the court engaged in the analysis required by the statute. The district court did not abuse its discretion in concluding that this factor weighed in favor of certification.

Record of Delinquency

The district court found that appellant's record of delinquency supports certification, noting the testimony of social worker Katie Vouk, Dr. Cranbrook, and Ms. Bach. Each of these witnesses opined that appellant's criminal behavior had escalated over time. The district court also noted appellant's poor behavioral record in school and in the juvenile detention center. The district court concluded that this factor weighed slightly in favor of adult certification.

Appellant argues that the district court exaggerated appellant's record, stating that the underlying conduct of the offenses charged show that his behavior has not escalated. The district court properly relied on appellant's history of behavioral problems and delinquency charges. Appellant's crimes have progressed in severity level from misdemeanor to gross misdemeanor to felony to more serious felony. Given appellant's history of increasingly severe offenses, the district court's conclusion that this factor weighs in favor of certification was not an abuse of discretion.

Programming History

The district court found that appellant has been "the subject of many intervention attempts, including having an Individualized Education Plan, mentoring, psychotherapy, hospitalization, residential evaluation, a residential consequence program, probation supervision three times, sex offender treatment/therapy and day treatment." The district

court noted that appellant had mixed success in interventions, and had done better in a treatment setting than in a correctional setting, but had struggled in both. Recognizing that appellant had not been in a long-term residential treatment program, the district court noted that appellant's parents had removed him from two residential programs before treatment was completed. Further, the district court noted that appellant has failed to follow recommendations after release from treatment. The district court found that this factor weighed slightly in favor of certification.

Appellant argues that he has never had the opportunity to go to a long-term residential treatment program and that his needs require this type of program. But the district court properly considered that appellant had received many interventions without success. The district court did not abuse its discretion in its finding that appellant's programming history weighed slightly in favor of certification.

Adequacy of Options in Juvenile System

Addressing adequacy of options in the juvenile system, the district court discussed the time available to treat appellant as an EJJ, noted appellant's lack of success with treatment programs and follow-up recommendations, and noted that everything except long-term residential treatment had been tried and had failed. The district court concluded that given the pattern of interventions over time, if designated an EJJ, not enough time remained to return appellant to law-abiding behavior in the juvenile-court system. Thus, the district found that this factor weighed slightly in favor of certification.

Appellant argues that this conclusion was incorrect because long-term residential treatment is available and adequate and adult corrections would not protect public safety

because the cause of appellant's behavior would not be treated. Appellant also argues that there would have been sufficient time for treatment because the treatment options were of shorter duration than the court's remaining jurisdiction.

The district court did not abuse its discretion in concluding that this option weighed in favor of certification. Appellant's long history of failing to return to law-abiding behavior after programming in the juvenile-court system supports the court's conclusion that further treatment in the juvenile system may not be adequate. Further, "[i]nsufficient time for rehabilitation under the juvenile system is an appropriate consideration when determining whether to certify a juvenile." *S.J.T.*, 736 N.W.2d at 354. Although long-term-treatment options in the juvenile system might be completed within the district court's remaining period of jurisdiction of appellant, if designated an EJJ, the district court did not abuse its discretion in concluding that there was insufficient time to address a failure in treatment or failure to comply with recommendations after treatment in light of appellant's history. The district court did not abuse its discretion in determining that this factor weighs in favor of certification.

In sum, the district court did not abuse its discretion with regard to any of its findings that the public-safety factors weigh in favor of certification. And, the district court did not abuse its discretion when it certified appellant for prosecution as an adult.

II.

Appellant finally argues that the district court acted as an advocate by calling Ms. Bach as the court's witness; that it was unfair to allow respondent to use leading questions instead of requiring respondent first to conduct a direct examination; and that

this procedure bolstered the weight of the certification report and contributed to the district court's erroneous certification decision. Because we conclude that the district court's certification decision was not erroneous, we decline to address appellant's argument that Ms. Bach's testimony contributed to an erroneous decision.

Affirmed.