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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1210**

In the Matter of the Welfare of:
M. J. M.,
Child.

**Filed November 30, 2010
Affirmed
Lansing, Judge**

Sibley County District Court
File No. 72-JV-10-39

Tina Hudak Appleby, Halberg Criminal Defense, Bloomington, Minnesota (for appellant M.J.M.)

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

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Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen,
Judge.

UNPUBLISHED OPINION

LANSING, Judge

The district court certified for adult proceedings a delinquency petition alleging that seventeen-year-old MJM committed the felony of first-degree, criminal sexual conduct, and MJM appeals the certification. Because the record does not demonstrate that MJM rebutted the presumptive certification by clear and convincing evidence, we affirm.

FACTS

The delinquency petition that the district court certified for adult criminal proceedings charges MJM with first-degree, criminal sexual conduct for sexually penetrating eleven-year-old EM. For purposes of certification, the following alleged facts are presumed to be true.

MJM was staying overnight at a fifteen-year-old friend's house on April 10, 2010. The other people at the house that night included EM, her twelve-year-old brother, her father, her father's girlfriend, and the girlfriend's son who had invited MJM to stay at the house. About 11:30 p.m. EM's father, his girlfriend, and EM's brother went to their downstairs bedrooms and went to sleep. EM went to her bedroom on the second floor. MJM and his friend also went to the second floor to the friend's bedroom where they began consuming alcohol.

Shortly before midnight MJM went into EM's room, telling her that he was looking for a cat that was in her room. After locating the cat he left EM's room. MJM returned to EM's room at least twice, telling her that he had been locked out of his

friend's room or that he was again looking for the cat. About 2:00 a.m., MJM went into EM's room and began touching her around her hips, but then left the room. About 3:00 a.m., when EM was asleep, MJM again entered her room. EM awakened and discovered MJM lying against her with his front side pressed up against her backside. MJM's pants were pulled down and EM's pants had also been pulled down to the middle of her thighs. EM felt MJM's hands touching the front and the back of her body near her vagina and her buttocks. MJM used his fingers to penetrate EM's anus and then penetrated it with his penis. EM remembered thinking "go away" over and over in her mind, and she may have said it out loud. MJM eventually left EM's room and did not return.

In the morning, EM told her family about MJM's conduct. Her father contacted her mother and they reported the assault to the Sibley County Sheriff's Department. The state charged MJM with first-degree, criminal sexual conduct in a juvenile petition and also filed a motion for adult certification.

At a contested certification hearing, the state presented a certification study and testimony from a corrections agent. The agent's ten-page report did not include a recommendation on whether MJM's prosecution should be certified but concluded that if MJM remained in the juvenile system, only the secure facility at Red Wing would adequately provide the necessary safety to the public. MJM presented a certification study and testimony from a psychologist. The psychologist recommended that MJM be retained in the juvenile system based on a conclusion that available treatment at the Red Wing Correctional Facility would be adequate.

The district court granted the state's motion to certify MJM's delinquency petition for adult proceedings. MJM appeals, arguing that he proved by clear and convincing evidence that retaining his case in the juvenile system would serve public safety.

D E C I S I O N

The district court has considerable latitude in determining whether to certify a juvenile for adult prosecution. *In re Welfare of J.L.B.*, 435 N.W.2d 595, 598 (Minn. App. 1989), *review denied* (Minn. Mar. 17, 1989). We will not reverse a certification determination unless the district court clearly errs in its findings or abuses its discretion in determining the issues. *In re Welfare of J.F.K.*, 316 N.W.2d 563, 564 (Minn. 1982). For purposes of certification hearings, the charges against the juvenile are accepted as true. *J.L.B.*, 435 N.W.2d at 598.

A presumption of certification to adult court applies if the child was sixteen or seventeen at the time of the offense and the offense would result in a presumptive prison sentence if committed by an adult. Minn. Stat. § 260B.125, subd. 3 (2008). Both factors are met in MJM's prosecution because MJM was seventeen years old at the time of the offense, and the charged offense carries a presumptive prison sentence under the sentencing guidelines. *See* Minn. Sent. Guidelines IV (2010) (indicating that first-degree, criminal sexual conduct carries presumptive prison sentence). Although these facts result in presumptive certification, a child may rebut the presumption by providing "clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety." Minn. Stat. § 260B.125, subd. 3 (2008).

To determine whether public safety is served by certifying a presumptive offense, Minnesota law requires that courts consider (1) the seriousness of the alleged offense; (2) the child's culpability; (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 available dispositional options. Minn. Stat. § 260B.125, subd. 4 (2008). Courts are required to "give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors." *Id.*

A child who rebuts the presumption of certification is subject to an extended jurisdiction juvenile (EJJ) prosecution. Minn. Stat. § 260B.125, subd. 8 (2008). Under EJJ, the juvenile court retains jurisdiction until the child reaches age twenty-one. Minn. Stat. § 260B.193, subd. 5(b) (2008).

In its certification determination, the district court made findings on all six factors, giving greater weight to the seriousness of the offense and MJM's prior record. On review of the evidence presented under the six factors, we conclude that none of the district court's findings are clearly erroneous and that the certification determination does not constitute an abuse of discretion.

First, MJM does not dispute that the seriousness of the offense favors certification. We agree. First-degree, criminal sexual conduct is a serious offense, and the allegations supporting MJM's charge confirm the seriousness of the criminal conduct.

Second, the district court properly concluded that MJM's culpability supports certification because MJM was solely responsible for the offense. When the juvenile is the only participant in the offense, the culpability factor supports certification. *In re*

Welfare of S.J.T., 736 N.W.2d 341, 354 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007). Although the court must consider mitigating factors recognized by the sentencing guidelines when determining a juvenile's culpability, MJM does not allege any mitigating factors. *See* Minn. Stat. § 260B.125, subd. 4(2) (requiring consideration of mitigating factors).

Third, MJM has four prior offenses including curfew violations and consumption of alcohol as a minor, which are juvenile petty offenses. *See* Minn. Stat. § 260B.007, subd. 16 (2008) (defining juvenile petty offense). He also has a conviction for fifth-degree possession of controlled substances. Although the drug possession offense was a felony, the remaining offenses are relatively minor compared with the charged offense. The district court factored into its consideration of MJM's record that MJM was on probation at the time of this alleged offense. The district court did not abuse its discretion by concluding that MJM has a "moderate" record of prior delinquency determinations and this favors certification.

Fourth, the district court found that MJM's programming history was neutral and weighed neither for nor against certification. MJM did not have a long programming history and had just started chemical-dependency treatment. The court considered the treatment center's report that he was doing well in the program. The court, however, also considered that MJM was drinking alcohol in violation of his probation conditions, indicating that the programming was not successful and that MJM was not taking it seriously. The conflicting evidence on MJM's programming history supports the district court's finding that this factor is neutral in determining certification.

Fifth, the evidence also supports the district court's conclusion that the adequacy of punishment in the juvenile system favors certification. Considering MJM's age and the seriousness of the offense, the district court found that there are very limited options for MJM's placement in a juvenile program under EJJ. Although the court found that adequate treatment could be available at the Minnesota Correctional Facility at Red Wing if MJM was placed in a juvenile program, it found that the length of supervision and time served was inadequate to ensure public safety and that the degree of punishment was not commensurate with the seriousness of MJM's offense.

If MJM were placed at Red Wing, he would be released after only 40 months with no further supervision. If certified and convicted as an adult, MJM's presumptive sentence would be 144 months; he would serve 96 months before release with good time followed by ten years of supervision by the Minnesota Department of Corrections. Minn. Stat. §§ 609.342, subd. 2(b), (c), .3455, subd. 6 (2008). The court determined that 40 months of supervision did not sufficiently punish the serious offense and could not adequately ensure public safety. A district court's determination that there is insufficient time for supervision under the juvenile system is an acceptable consideration when deciding whether to certify a juvenile. *In re Welfare of K.A.P.*, 550 N.W.2d 9, 12 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). Thus, the court's findings were not clearly erroneous and its conclusion that this factor favors certification was not an abuse of discretion.

Sixth, the district court concluded that certification would better protect public safety. The district court found that the only facility that could adequately serve MJM as

a juvenile while protecting public safety was Red Wing, but that MJM would be subject to supervision for only 40 months. On these facts, the district court found that certification was the only disposition that offered sufficient supervision to protect public safety. The district court did not abuse its discretion by considering this factor in favor of certification.

For these reasons, we conclude that the district court did not abuse its discretion by determining that MJM failed to rebut the presumption of certification by clear and convincing evidence.

Affirmed.