STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1545

In the Matter of the Welfare of:
L. L. S., Child.

Filed March 17, 2009
Affirmed
Larkin, Judge

Anoka County District Court
File Nos. 02-JV-08-1030; 02-JV-08-1031; 02-JV-08-1032

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Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, 2100 Third Avenue, Anoka, MN 55303-5025 (for respondent)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

LARKIN, Judge

On appeal from an order certifying charges of aiding and abetting first-degree aggravated robbery and third-degree assault for action under the laws and court procedures controlling adult criminal violations, 17-year-old appellant argues that the

district court (1) erred by considering evidence of uncharged conduct, (2) denied him the opportunity to present a meaningful defense by prohibiting him from calling a rebuttal witness at the certification hearing, and (3) abused its discretion by ordering certification. Because (1) the district court's erroneous consideration of uncharged-conduct evidence when analyzing the prior-record-of-delinquency factor did not prejudice appellant's substantial rights, (2) the district court did not abuse its discretion by refusing to allow appellant to call a rebuttal witness, and (3) the district court did not abuse its discretion by certifying the proceeding to adult court, we affirm the district court's certification order.

FACTS

This appeal involves review of a district court order certifying charges against appellant L.L.S. (d.o.b. August 2, 1991) for adult prosecution. The charges arise out of three separate aggravated robberies. The first occurred on March 22, 2008. Officers responded to a report of an assault and robbery and met W.C., who indicated that as she walked from a parking lot toward her apartment building, she was struck on the head, fell to the ground, and lost consciousness. Upon regaining consciousness, W.C. was shaky and could not get up. She had pain on the right side of her face, and a cut on her ear. She discovered that her purse had been taken, but she did not know who hit her or what she was hit with. Her purse was later recovered by a citizen who found it on the road at another location in Coon Rapids.

The day after the attack, W.C. gave notice to her landlord and later moved out of her apartment building. At the certification hearing, W.C. testified that in the week

following the attack she had trouble sleeping and four months later still experienced pain when trying to lie on her side. She also testified that she is still nervous when she returns to the area where the attack occurred.

The second offense occurred on May 7, 2008. Officers were dispatched to investigate a man who was screaming for help. Police discovered B.N., who reported that he was walking home when two men attacked him. One of the men tore his back pocket, causing his wallet to fall to the ground. The two men punched and kicked him, and he fell to the ground on top of his wallet. The two men continued to kick B.N. in an effort to get his wallet, but were unable to obtain it. The men left the scene in a minivan.

B.N. was transported to the hospital by ambulance. He was throwing up blood and very dizzy. His jaw and nose were fractured, and he had to undergo surgery on his face. His retina was torn, and he had foggy vision. He was hospitalized for four days, and doctors recommended a liquid diet. He missed two and one-half weeks of work because of the attack.

The third offense also occurred on May 7, 2008. Officers were dispatched to a nearby area on report of a robbery. Officers met C.L., who said he had been riding his bike when he was pushed off of it from behind. Two men then repeatedly hit him in the face and ribs, knocked off his glasses, and took his wallet. C.L. suffered a cracked rib, a concussion, and a possible dislocated elbow as a result of the assault. He was hospitalized for two days and missed three days of work due to his injuries. In the week following the attack, C.N. suffered from abnormal headaches. He testified that his elbow was still sore almost three months after the attack. He also testified that he was reluctant

to ride his bike anywhere after the assault and still does not go back to the area where the assault occurred.

In the course of their investigation, police discovered several recorded conversations in which appellant described in detail the attack on B.N. and bragged about sneaking up on a woman (W.C.) in a parking lot to steal her purse. The police executed a search warrant at appellant's home and arrested appellant after finding clothing stained with what appeared to be blood. In a post-*Miranda* statement, appellant indicated that he was present in the area where B.N. was assaulted.

One of appellant's acquaintances, J.M., was also taken into custody. J.M. admitted that he was in a minivan with appellant and Devonta Lewis on May 7, 2008. J.M. said that appellant had been driving when he suddenly stopped the van and motioned for the other two to be quiet. Appellant and Lewis exited the van, walked up behind B.N., and began hitting and kicking him. J.M. told police that he went home after the assault on B.N., but was later told by appellant that appellant and Lewis returned to the same area and "got another dude." J.M. testified at appellant's certification hearing that he was present when appellant attacked W.C. and saw appellant punch her and take her purse.

The state charged appellant with three counts of aiding and abetting first-degree aggravated robbery, and two counts of aiding and abetting third-degree assault, and moved to certify the proceeding for prosecution under the laws and court procedures controlling adult criminal violations. The district court ordered a certification study and a psychological evaluation.

Probation officer Lisa McHugo prepared the certification study. As part of the study, McHugo completed a Youth Level of Service Case Management Inventory. The inventory "is a standardized instrument for the use of professional workers in assessing risk, the need and responsivity of clients in [creating] a case plan." Overall, appellant scored a 25, which placed him in the high-risk range. After reviewing each of the public-safety factors, McHugo recommended certification.

A licensed psychologist, Dr. Patricia L. Crowns, conducted the psychological evaluation. As part of the evaluation, Dr. Crowns administered tests including the Shipley Institute of Living Scale, the Wechsler Intelligence Scale for Children, and the Comprehensive Test of Non-Verbal Intelligence (CTONI). Appellant scored within the borderline range of mental ability on the Shipley, within the average range of mental ability on the Wechsler, and within the low-average range on the CTONI. Dr. Crowns noted that appellant "appeared to be of about average mental ability." Dr. Crowns considered each of the public-safety factors and concluded that retaining the proceeding in juvenile court would serve public safety.

The district court held a certification hearing in July 2008. The court received the psychological evaluation and certification study into evidence. Appellant called two witnesses: Dr. Crowns and appellant's mother. The state called: J.M., victims C.L. and W.C., probation officer McHugo, and appellant's former assistant principal. Appellant offered, and the court received, three exhibits: two character letters, one from the leader of appellant's high-school-men's group and one from appellant's physical-education teacher; the third exhibit was a copy of Dr. Crowns's psychological evaluation.

Both Dr. Crowns and appellant's mother testified that appellant had an Individualized Education Program (IEP) for his attention deficit hyperactivity disorder (AD/HD) while he was in middle school, but that those services were discontinued at the end of seventh grade when it was determined that appellant no longer needed them. The state introduced evidence of appellant's middle-school records from 2003-2005. The exhibits were entered into evidence over appellant's objection that the documents were irrelevant because they were more than four years old. Most of the records involved minor disciplinary infractions, such as insubordination, horseplay, and running in the hallways. Appellant was written up 21 times for disciplinary infractions in eighth grade. Appellant's history at Central Middle School includes 12 days of suspension for insubordination, vandalism, and assault. No formal high school records were admitted into evidence, but McHugo's certification study listed some of appellant's school disciplinary issues, and testimony established that appellant had 26 disciplinary referrals in high school for being tardy, truant, insubordinate, and in violation of school policies. Appellant was also suspended for three days.

The state introduced two series of police reports by stipulation. McHugo testified that she put only a summary of appellant's prior police contacts in her report, but noted that appellant had 27 prior contacts with the Columbia Heights and Coon Rapids police departments and opined that these contacts established a pattern of "assaultive, threatening behavior." Specific incidents were detailed during questioning. On cross-examination, appellant pointed out that many of the contacts were incidents in which appellant was present but not directly involved.

After considering the testimony and exhibits received at the hearing and the arguments of counsel, the district court determined that appellant failed to overcome the presumption in favor of certification and referred the proceeding to adult court for prosecution. This appeal follows.

ANALYSIS

Certification of a delinquency proceeding for action under the laws and court procedures controlling adult criminal violations is presumed when a child is 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. Minn. Stat. § 260B.125, subd. 3(1)-(2) (2008); Minn. Sent. Guidelines III.D. The presumption applies in this case because appellant was 16 years old at the time of the offenses and the charged offenses of aiding and abetting aggravated robbery would result in a presumptive commitment to prison under the Sentencing Guidelines. Minn. Sent. Guidelines II.C. and IV.

To rebut the presumption of certification, the child must establish, through clear and convincing evidence, that retaining the proceeding in juvenile court would serve public safety. Minn. Stat. § 260B.125, subd. 3(1)-(2). If the district court finds that the child has not rebutted the presumption by clear and convincing evidence, the district court shall certify the proceeding. *Id.* If the district court does not order certification in a case in which the presumption applies, the district court must designate the proceeding an extended jurisdiction juvenile (EJJ) prosecution. Minn. Stat. § 260B.125, subd. 8. Under EJJ proceedings, the district court retains jurisdiction over the offender until the

offender's 21st birthday. Minn. Stat. § 260B.193, subd. 5(b)(2008). The district court imposes a juvenile disposition and a stayed-adult-prison sentence, which may be imposed if the offender fails to comply with the juvenile disposition. Minn. Stat. § 260B.130 (2008).

When determining whether public safety is served, the district court must consider the following public-safety factors: (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 justice system; and (6) the dispositional options available for the child. Minn. Stat. § 260B.125, subd. 4(1)-(6). In weighing these factors, greater weight must be given to the seriousness of the alleged offense and the child's prior record of delinquency. *Id.*, subd. 4.

I. The district court did not commit reversible error by considering appellant's school records and history of police contacts when analyzing the public-safety factors.

Appellant argues that the district court committed plain error by considering uncharged conduct when analyzing the prior-record-of-delinquency public-safety factor. Under the plain-error standard, a party may obtain relief upon demonstration that: (1) there was error, (2) it was plain, and (3) the error affected the party's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1549 (1997)). "Usually clear or obvious error is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted). An error is "plain" if it is

clear or obvious at the time of appeal. *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006).

Appellant contends that this issue is controlled by *In re Welfare of N.J.S.*, 753 N.W.2d 704 (Minn. 2008).[1] In *N.J.S.*, a 15-year-old was charged with second-degree murder and certified to stand trial as an adult. *N.J.S.*, 753 N.W.2d at 705. In considering the prior-record-of-delinquency factor under Minn. Stat. § 260B.125, subd. 4, the district court noted that N.J.S. had no prior delinquency petitions or adjudications, but considered evidence of his behavioral incidents at school and determined that this factor weighed in favor of certification. *Id*. at 705-06. The supreme court held that "a juvenile court may not consider a juvenile's uncharged behavior reflected in school and institutional disciplinary records when evaluating the prior-record-of-delinquency factor for certification as an adult." *Id*. at 705. Only "records of petitions to juvenile court and the adjudication of alleged violations of the law" may be considered under this factor. *Id.* at 710. The supreme court concluded it was error to consider uncharged behavior, but determined that despite this error the other five factors weighed in favor of certification, and it was not an abuse of discretion for the district court to certify N.J.S. for adult prosecution. *Id*. at 710-11.

Here, the district court considered evidence of appellant's prior police contacts when analyzing the prior-record-of-delinquency factor. Under *N.J.S.*'s holding, the district court committed error that was plain when it considered uncharged conduct for

[1] The *N.J.S.* decision was decided on July 31, 2008, two days after the final certification hearing in this case.

this purpose. *See id.* at 710. But appellant is not entitled to relief unless the error affected his substantial rights. *Griller*, 583 N.W.2d at 740. Even though the district court erroneously considered uncharged conduct when evaluating the prior-record-of-delinquency factor, the district court ultimately found that this factor weighs in favor of EJJ designation. Thus, the error did not affect appellant's substantial rights, and appellant is not entitled to relief.

Despite the district court's finding that the prior-record-of-delinquency factor weighs against certification, appellant contends that he was nonetheless prejudiced by the district court's consideration of his school records and history of police contacts. Appellant argues that the evidence "may have colored the court's opinion on whether there were adequate programming options within the juvenile system or enough time remaining under EJJ to address [appellant's] issues." Appellant claims that the evidence regarding his behavior at school and history of police contacts was "inflammatory and irrelevant." Appellant's position seems to be that the evidence should not have been considered for any purpose. Appellant's position is not supported by law.

The *N.J.S.* holding is specifically limited to the prior-record-of-delinquency factor. 753 N.W.2d at 708 n.1 (stating that "[t]he concurrence wonders whether appellant's uncharged behavior could have been used when evaluating [other public-safety factors]. This issue was not presented to the courts below or to us and, therefore, we do not address it."). And when conducting a certification hearing, "[t]he court may receive any information, except privileged communication, that is relevant to the certification issue, including reliable hearsay and opinions." Minn. R. Juv. Delinq. P. 18.05, subd. 4(B).

Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Finally, "[e]videntiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

The district court considered evidence of appellant's school disciplinary records when analyzing the programming-history factor. The district court noted that appellant had an individualized education program at school and reasoned that school could be considered programming. The district court reviewed appellant's history of disciplinary infractions and suspensions in both middle and high school. The district court found that appellant has had a "rocky road" in school settings, but ultimately concluded that the programming-history factor weighs in favor of EJJ designation. The district court did not abuse its discretion by determining that evidence of appellant's past performance in school settings was relevant to its consideration of appellant's programming history. *See In re St. Louis County v. S.D.S.*, 610 N.W.2d 644, 646, 649-50 (Minn. App. 2000) (stating that the district court should have addressed unsuccessful efforts by the juvenile's high school principal, counselors and teachers to encourage him to attend school as evidence supporting juvenile's extensive programming history); *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996) (stating that evidence that the juvenile failed to participate in a good-behavior contract with his school, and in tutoring after his

expulsion, was appropriately considered by the district court when analyzing the programming-history factor).

The district court also considered evidence regarding appellant's history of police contacts when analyzing the adequacy-of-available-juvenile-punishment-or-programming factor. The court found that appellant's history of police contacts indicates that appellant does not conform his behavior to reasonable community standards while in a home setting. The district court therefore concluded that appellant's placement in a non-secure juvenile program would not be consistent with public safety. Evidence regarding appellant's history of police contacts was relevant to the district court's assessment of the adequacy of non-secure juvenile programming options. The district court did not abuse its discretion by considering evidence of appellant's prior police contacts for this purpose. *See In re Welfare of D.M.*, 373 N.W.2d 845, 851 (Minn. App. 1985) (stating that a district court can consider police reports not only for the public safety issue but also "as they relate to a juvenile's amenability to treatment").

II. The district court did not abuse its discretion by prohibiting appellant from calling a rebuttal witness.

Appellant argues that he should have been allowed to call a rebuttal witness in order to show his amenability to juvenile programming. Rebuttal evidence generally "consists of that which explains, contradicts, or refutes the defendant's evidence." *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993) (citation omitted). The determination of what constitutes proper rebuttal evidence rests almost entirely in the discretion of the district court. *State v. Brown*, 500 N.W.2d 784, 788 (Minn. 1993). The district court did

not abuse its discretion by prohibiting appellant from calling his proposed rebuttal witness.

After probation officer McHugo testified, appellant proposed calling a rebuttal witness to establish how appellant was currently doing at the Anoka County Juvenile Center since McHugo had not received an update regarding appellant's progress in almost a month. The court determined that there was nothing to rebut because McHugo had testified that while she had not talked to anyone at the detention center in several weeks, the last time she had spoken to someone the report had been positive. Moreover, McHugo testified that she would typically receive an incident report if there were problems with appellant's behavior at the detention center. The court noted that since McHugo testified that she had received no incident reports and had no contacts from the detention center staff, the "reasonable inference to be drawn from the evidence is that in fact the juvenile was doing fine in the program up to and including today."

Appellant claims that the district court's ruling violated his due-process right to fundamental fairness, including a meaningful opportunity to present a defense. Appellant argues that his witness would have provided valuable evidence regarding appellant's amenability to treatment, which was relevant to the dispositional-options and available-programming factors. But appellant's offer of proof was merely that the proposed witness "would simply be providing information to the Court as to how [appellant] has been doing at the juvenile center." As reasoned by the district court, the proposed testimony was consistent with the state's evidence regarding appellant's behavior at the Anoka County Juvenile Center. The district court did not abuse its discretion by

concluding that the proposed testimony was not proper rebuttal evidence and by disallowing the evidence. *See Farmers Union Grain Terminal Ass'n v. Indus. Elec. Co.*, 365 N.W.2d 275, 277 (Minn. App. 1985) (what is proper rebuttal evidence rests wholly in the discretion of the court), *review denied* (Minn. June 14, 1985).

III. The district court did not abuse its discretion by certifying the proceeding to adult court.

District courts are given considerable latitude in determining whether certification of juvenile proceedings for adult prosecution is appropriate, and this court will not reverse a decision to certify unless the district court's findings are clearly erroneous so as to constitute an abuse of that discretion. *In re Welfare of S.J.G.*, 547 N.W.2d 456, 459 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). On appeal from a certification order, this court presumes that the factual allegations in the delinquency petition and the charges against the juvenile are true. *In re Welfare of U.S.*, 612 N.W.2d 192, 195 (Minn. App. 2000).

The district court considered each of the public-safety factors and determined that factors one, two, five, and six weigh in favor of certification and that factors three and four weigh in favor of EJJ designation. Appellant concedes that factors one and two weigh in favor of certification because the alleged offenses are undoubtedly serious and there is no question that he was a primary actor in the offenses. And appellant agrees that the district court properly weighed factors three and four in favor of EJJ designation. Appellant assigns error to the district court's determination that factors five and six weigh in favor of certification and argues that he presented clear and convincing evidence that

retaining the matter in juvenile court would serve public safety.

Factors five and six, the adequacy of punishment or programming available in the juvenile justice system and the dispositional options available for the child, are frequently considered together. *See, e.g.*, *In re Welfare of D.T.H.*, 572 N.W.2d 742, 744-45 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). The district court determined that these factors weigh in favor of certification. Appellant contends that the district court's finding that the juvenile system would not provide adequate punishment or programming was clearly erroneous and that the dispositional-options factor weighs in favor of EJJ designation.

Appellant argues that the district court inappropriately focused on the disparity in the amount of time appellant would be punished "per victim" if he were sentenced as an adult rather than as an EJJ offender. Appellant also argues that if he is certified and receives the presumptive sentence, he will reenter society as an untreated 27-year-old hardened by prison, instead of a treated 21-year-old who would be a far lesser threat. Appellant asserts that the Minnesota Correctional Facility-Red Wing and the Anoka County Juvenile Center are appropriate dispositional options and that appellant should be given one chance to succeed in the juvenile system.

Respondent counters that the district court was correct in determining that the available juvenile programming would not serve public safety given the serious nature of the charged offenses. Respondent contends that the district court correctly found that the available juvenile programming options would not provide a long enough period of incapacity. We have determined in the past that "[i]nsufficient time for rehabilitation

under the juvenile system is an appropriate consideration when determining whether to certify a juvenile." *In re Welfare of S.J.T.*, 736 N.W.2d 341, 354 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007).

Even though appellant has no delinquency history, or history of programming under the district court's supervision, he stands accused of three serious crimes. Appellant attacked three different victims within seven weeks. All three were struck from behind and knocked to the ground. One victim lost consciousness, and two others were hospitalized for their injuries. One underwent surgery, and two missed numerous days of work because of the attacks. Two victims still experienced discomfort from their injuries months later, and both are afraid to return to the areas where their attacks took place. Appellant's offenses indicate rapidly escalating criminal behavior without regard for impact or consequences. The charged offenses also indicate that appellant presents a significant threat to public safety.

In addition, appellant has a history of inappropriate behavior in school and in the community. Appellant's school performance and the observation of Dr. Crowns that appellant "lacks initiative to persevere through difficult tasks leading to a lower level of aspiration" support the district court's finding that appellant may have difficulty with future programming. Appellant's history of police contacts supports the district court's finding that appellant does not conform his behavior to reasonable community standards.

The district court noted that the long-term correctional programs proposed by appellant would provide a secure juvenile placement for 7 to 11 months. Appellant would then be on supervised probation in the community until his 21st birthday. The

district court further noted that if the proceeding is certified to adult court, appellant could receive three consecutive 58-month sentences for the aggravated-robbery offenses. Given the serious nature of the charged offenses, appellant's past inability to conform his behavior to reasonable community standards, and the likelihood that appellant would have difficulty with future programming, the district court did not clearly err by determining that the amount of time that appellant would spend in juvenile programming under an EJJ disposition is inadequate to protect the public safety.

While there are two secure dispositional options available within the juvenile system, the mere availability of juvenile programming does not necessarily favor maintaining juvenile jurisdiction. *S.D.S.*, 610 N.W.2d at 649. Furthermore, the certification statute emphasizes public safety rather than treatment options. *State v. Mitchell*, 577 N.W.2d 481, 489 (Minn. 1998). The district court's finding that public-safety factor six, the dispositional options available for the child, favors certification is supported by the evidence and is not clearly erroneous.

Finally, appellant argues that McHugo made her recommendation for certification without considering Dr. Crowns's psychological report and that McHugo therefore did not have adequate information on which to base her opinion regarding appellant's likelihood of success in programming. But review of the certification-hearing transcripts establishes that McHugo did talk to Dr. Crowns, as well as a liaison at the Anoka County Juvenile Detention Center where appellant was held during the certification proceeding. McHugo testified that when she spoke with Dr. Crowns on the phone, "she said that her recommendation was for EJJ. . . . because of the programming that [appellant] could

receive at the juvenile center." McHugo also testified that on July 8th, she inquired regarding available space at the juvenile center and "at that time my understanding is that [appellant] was doing fine . . . . [with] no violations."

Four of the six public-safety factors weigh in favor of certification, including the seriousness of the alleged offenses, which is statutorily prescribed to receive greater weight. Minn. Stat. § 260B.125, subd. 4. The district court did not abuse its discretion by finding that appellant failed to rebut the presumption in favor of certification.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals